

APPENDIX B

SIGNIFICANT DEVELOPMENTS IN PUBLIC
EMPLOYMENT DISPUTES SETTLEMENT
DURING 1980*

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This report covers significant developments for 1980—including statutory, judicial, and related activity—in public-employment disputes settlement at federal, state, and local levels. It begins, in Section I, with a state-by-state summary of legislation enacted during the year. Section II includes a summary of the year's experience of the Federal Labor Relations Authority and the Federal Service Impasses Panel as well as some key court cases involving the Postal Service. Section III deals with public-sector dispute resolution in Canada, and the report concludes with Section IV, covering judicial and related developments.

As has been the trend in recent years, relatively few states enacted labor legislation affecting the public sector. Most new laws covered arbitration and impasse resolution procedures. New interest arbitration provisions were adopted in three states and the District of Columbia.

In a continuation of the "Proposition 13" movement to place taxing limits on government, voters in Massachusetts approved a referendum limiting property taxes to 2.5 percent of full market value, limiting tax increases to 2.5 percent, reducing excise taxes on automobiles, and permitting renters to deduct half

*Report of the Committee on Public Employment Disputes Settlement. Members of the committee are John B. Abernathy, Reginald H. Alleyne, Arvid Anderson, Leon B. Applewhaite, Armon Barsamian, David R. Bloodsworth, Frederick H. Bullen, Irwin J. Dean, Jr., John F. Drotning, Jonathan Dworkin, Milton T. Edelman, Philip Feldblum, Jerome G. Greene, Irving Halevy, Allan J. Harrison, John E. Higgins, Morris A. Horowitz, Robert G. Howlett, Myron L. Joseph, Irvine L. H. Kerrison, Edward B. Krinsky, Leonard E. Lindquist, Nathan Lipson, Walter A. Maggiolo, Samuel S. Perry, William B. Post, Thomas N. Rinaldo, Josef P. Sirefman, Henry L. Sisk, Herman Torosian, Fred Witney, Helen M. Witt, Sidney A. Wolff, and Paul Prasow, chairperson.

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their rent from their state income tax. These provisions in themselves are bound to have a profound effect on public-sector labor relations through layoffs and reductions in service.

The year 1980 also saw voters in six states—Arizona, Oregon, Nevada, South Dakota, Utah, and Michigan—turn down proposals to reduce taxes. However, by most predictions the eighties are likely to be difficult for labor-management relations. Against a backdrop of proposed federal budget and tax cuts and continuing double-digit inflation, there will be increasing confrontations over how the smaller pie is to be divided.

I. State Labor Legislation Enacted in 1980¹

The year was a light one for state labor legislation, with some legislatures not meeting at all or only for brief sessions.² Twelve states enacted new legislation or amended existing labor relations laws affecting public employees; most of this legislation was concerned with arbitration and impasse resolution procedures.

Minnesota adopted a law granting state, local, and teaching employees the right to strike on 60 days' notice in the absence of an agreement or an arbitration award. The right to strike is not extended to "essential employees"—police, firefighters, correctional institution guards, and nurses providing direct care. Hawaii expanded the definition of "strike" to include sympathy strikes by public employees in support of other striking employees.

Two states—California and New Jersey—enacted laws that permitted organizational security agreements that would require employees to join an organization that was the employees' exclusive representative or pay that organization a service fee. The New Jersey law also established procedures for the rebate of pro rata share expenditures to nonmember employees.

Nine states modified existing bargaining laws affecting teacher labor relations. Instead of making major revisions to narrow the provisions of such laws, most state legislatures concentrated on ways to enforce statutory strike penalties without

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²Legislatures in Arkansas, Montana, Nevada, North Dakota, and Texas did not meet, while Missouri, New Hampshire, New Mexico, and Utah had abbreviated sessions that enacted no significant labor legislation.

interfering with dispute settlement machinery. The Kansas bargaining law, for example, was revised to provide for mediation and fact-finding of issues at impasse and to allow fact-finders to recommend settlement terms independently rather than limiting them to the "last best offer." The number of items on which teacher associations may negotiate with local school boards also was expanded to include supplemental contracts.

Compulsory retirement based solely upon age, a subject that has received considerable legislative attention at both the federal and state levels in recent years, received less attention during 1980. The mandatory retirement age was raised to 70 for public employees in Mississippi and for state employees and teachers in Virginia. Arizona and Tennessee enacted laws banning age-based employment discrimination against persons ages 40 to 70, and Kentucky raised the retirement-age upper limit from 65 to 70.

In legislation that affected private-sector industrial relations primarily, Michigan, Ohio, and Wisconsin prohibited the awarding of state contracts to persons or firms found to be in violation of the National Labor Relations Act. Connecticut passed a similar law in 1979. In addition, the use of strike breakers was "barred" in Wisconsin; in Oklahoma, prison inmates on work-release programs are not to report for work if a strike occurs and may not be used to replace strikers.

No new states ratified the proposed Equal Rights Amendment to the U.S. Constitution during 1980. In order that it be adopted, three additional states must approve it by June 30, 1982.

Arizona

The legislature enacted a law extending the terms of office of Employment Relations Board members until July 1, 1982.

California

The number of members of the Public Employment Relations Board (PERB) was increased from three to five. The new law also specifies that a board member is not precluded from participating in any case pending before the Board, and it transfers the responsibility for appointing the PERB executive director from the chairperson to the Board. Another amendment em-

powers the governor to appoint, upon the Board's recommendation, a general counsel to the PERB, to serve at its pleasure. An amendment to the law on public school employer-employee relations directs the Board to respond within 10 days to any inquiry from a party who has petitioned for extraordinary relief. In its response the Board must explain why it had not sought court enforcement of its final decision or order. The Board must seek such enforcement upon request and must file in a court the records of the Board proceeding and evidence disclosing a party's failure to comply with the Board's decision and order.

A new statute permits union security agreements between classified employees in public schools and their employers. As a condition of employment, these employees are required either to join the organization that is the exclusive representative of the employees or to pay that organization a service fee. Governing boards of school districts are authorized to check off union dues from salaries of classified employees. Employees who are not union members may pay service fees directly to the exclusive representative union in lieu of the salary deductions. The law states that public school employees who are members of a religious body that objects to supporting employee organizations are not required to join, maintain membership in, or financially support any such organization as a condition of employment. An employee, however, may be required to pay amounts equal to the agency fee to a nonreligious, nonlabor organization's charitable fund exempt under federal income tax regulations. The new law also permits employee organizations to charge a public school employee for the costs incurred in the resolution of any grievance arising from representation where the resolution of that grievance is requested by the employee.

The public school Employer-Employee Relations Act was amended to permit parties at impasse after mediation to agree mutually upon a person who is to serve as chairperson of a fact-finding panel. Previously, the PERB selected the chairperson and bore his or her costs. Under the new law, fees and expenses for the chairperson's services are borne equally by the parties.

Another statute authorizes the board of directors of fire protection districts in counties where the district board is composed of the county board of supervisors to call a referendum on whether or not district boards may provide for a system of bind-

ing arbitration for the resolution of impasses in employee-employer relations.

Connecticut

Claims that an issue is not a proper subject for arbitration cannot be reviewed by an arbitration panel unless the party making a claim gives at least 10 days' written notice to the opposing party and to the arbitration panel chairperson. A claim may be heard, however, if there is reasonable cause as to why a notice was not given.

A new law provides that employment contracts of a teacher who has served continuously for four years may be terminated at any time if that position is filled by another teacher and if no other position exists to which he or she may be appointed. If qualified, this teacher shall be appointed to a position held by a teacher who has not completed three years of continuous employment. Determination of employment contract termination is made in accordance with a layoff procedure agreed upon by the local or regional board of education or, in the absence of an agreement, with the written policy of a local or regional board of education. The law, however, does not prohibit a local or regional board of education from entering into an agreement with an exclusive employee representative on matters involving teacher recall. The law also specifies that a board of education, prior to contract termination, is required to give an affected teacher a written notice of termination.

The Connecticut labor relations law was amended to prohibit employers, employees, their agents, and their representatives from recording a conversation or discussion pertaining to employment contract negotiations between the parties to those negotiations by means of any instrument, device, or equipment without the consent of both parties.

District of Columbia

New provisions covering most aspects of the management-labor relationship of the District of Columbia and its employees were incorporated into the D.C. Government Merit Personnel Act by a new law that went into effect on April 4, 1980. Under this law, the Board of Labor Relations is replaced by the Public Employee Relations Board (PERB), authorized to resolve unit-

determination and representation issues, to certify and decertify bargaining representatives, to conduct elections, to determine and decide unfair labor practice allegations and order remedies, to determine and decide scope-of-bargaining disputes, and to resolve bargaining impasses through fact-finding, mediation, and binding arbitration. The law empowers the PERB to retain its own legal counsel and to order remedies of back pay, and it provides for judicial review and enforcement of PERB decisions. The new law includes compensation in the list of bargainable items and extends organization and negotiation rights to public school supervisors.

Florida

Several changes were made in the public employee collective bargaining law. Local commissions established pursuant to local-option collective bargaining provisions now include a representative of employers and a representative of employees or employee organizations. Any other appointees, including alternates, are to be persons who, in their previous vocation, employment, or affiliation, are not or have not been classified as representatives of employers, employees, or employee organizations. The chairperson and members of local commissions are appointed for four-year staggered terms and may not be employed by, or hold any commission with, any state governmental unit or any employee organization while serving on the commission.

Another amendment reversed procedures for impasse resolution. A special master now is required to transmit the recommended decision to the Public Employee Relations Commission (PERC) and to the representative of each party by registered mail within 15 days after the close of a hearing on a dispute. The recommendations are to be discussed by both parties. Each recommendation shall be deemed approved by both parties unless specifically rejected by either party by a written notice filed with the PERC within 20 calendar days after recommendations have been received. The notice must include a statement of the reason for each rejection.

Hawaii

An amendment to Hawaii's collective bargaining law focused on strikes. "Strike" was redefined to include sympathy strikes by

public employees in support of other groups of striking public employees. The amended law also prohibits “essential employees” from striking. Under the law, an “essential employee” is one who is designated by a public employer to fill an “essential position.” An “essential position” is defined as one designated by the Public Employment Relations Board (PERB) as necessary to avoid an imminent or present danger to public health or safety. The law also empowers public employers to petition the PERB for an investigation of a strike or threat of a strike. Upon a finding that a strike constitutes a present danger to public health or safety, the PERB now is directed to designate which employees are “essential,” to establish requirements to eliminate the danger, and to require the essential employees to contact their public employers for work assignments. The new law grants the affected public employer the power to petition a state circuit court for relief where the violations of the strike prohibitions are confirmed by the PERB, but it prohibits jury trial for these violations.

Kansas

Several changes were made in the law governing collective bargaining for the professional employees of Kansas schools. The list of negotiable items was expanded to include supplemental contracts covering extracurricular activities, employee grievances, extended and sabbatical leaves, probationary periods, evaluation procedures, dues checkoff, use of school facilities for association meetings, use of a school mail service, and reasonable leaves for organizing activities.

The law, as revised, now includes impasse resolution procedures providing for mediation and fact-finding. The revisions eliminated the provision which had required fact-finders to choose between the “last best offer” made by a school board or by an employee organization and to recommend adoption of one offer or the other. The law now allows fact-finders to make independent recommendations on each of the issues at impasse. Another change in the law shortened the period for negotiating a new contract to two months, and the deadline for serving notice to negotiate new items or to amend an existing contract was changed from September 1 to February 1 of each year. The law now provides that if agreement on a new contract is not reached by June 1, an impasse is automatically declared and the

machinery to resolve differences goes into effect without the need for a court to declare that an impasse exists. The responsibility for the determination and declaration of an impasse was transferred from the district courts to the secretary of human resources, as was the authority to rule on alleged commissions of prohibited practices by either party.

Kentucky

Terms of office for members of the Labor-Management Advisory Council were changed under a new law. Two labor and two management members now are to be appointed for terms of one to four years. Appointments are to be made by the governor 30 days after the expiration of the term of any member.

Louisiana

A concurrent resolution requested that the joint legislature committee study of public-sector employer-employee relations, begun in 1979, be extended. The committee is to study related issues, including collective bargaining and strikes, and report its findings and proposals to the legislature 30 days prior to the beginning of the 1981 regular session.

Massachusetts

Elected officers of the Professional Firefighters of Massachusetts, if on duty, are to be given leave by the municipal employer for regularly scheduled work hours spent on union business. The chairperson of the Board of Conciliation and Arbitration may now appoint a nonmember to act as a temporary neutral member of the board, or to act as the single arbitrator with full powers of the board in the arbitration of a grievance arising under a public or private collective bargaining agreement.

Michigan

A new statute permits compulsory arbitration of labor disputes involving state police troopers and sergeants and provides procedures for the selection of arbitration panel members, hearings, and the enforcement and review of arbitration panel orders.

Minnesota

The name of the Department of Personnel was changed to the Department of Employee Relations. The new department is organized into the Division of Personnel and the Division of Labor Relations, the latter being responsible for negotiating and administering state employee collective bargaining agreements.

Under provisions of the law amended in 1973, public employees could strike only if their employer either refused to submit a bargaining impasse to arbitration or refused to implement an arbitrator's award; in teacher disputes, only school boards could decide whether arbitration could be used. The new law expands the right to strike for all state, local, and teaching employees except for those designated as "essential"—police, firefighters, nurses providing direct patient care, and institution guards.

The right to strike is granted 60 days (including 30 days after contract expiration) after mediation if either party rejects arbitration or, if arbitration is not requested, after an additional 45 days so long as a further 10 days' notice is given and the contract has expired.

New Jersey

An amendment to the New Jersey Employer-Employee Relations Act permits public employers and their employees to negotiate agency shop agreements requiring nonmembers to pay the representative union a fee for services rendered in lieu of membership dues. Under the amended law, the agency shop fee cannot exceed 85 percent of regular membership dues, fees, and assessments paid by union members. Public employees who pay representation fees may demand and receive a return of any part of the fee paid that represented pro rata shares of expenditures by the union for partisan political or ideological activities or for causes only incidentally related to terms and conditions of employment, or that were applied toward costs of benefits available only to union members. Pro rata share refunds do not apply to lobbying costs incurred in promoting policy goals in collective negotiations and contract administration or in securing advantages in employees' wages, hours of work, and conditions of employment in addition to those secured through collective negotiations with the public employer. Negotiated agreements

on payroll deduction of representation fees may be made only if membership in the majority representative organization is available equally to all employees in the unit.

The new law also established a three-member board comprised of a public employer representative, a public employee organization representative, and an impartial public member who serves as chairperson in hearing and deciding issues on pro rata share challenges. Representation fees are to be paid to the majority representative organization during the term of the negotiated collective agreement affecting nonmember employees.

Under the amendment, public employers or public employee organizations may not discriminate between nonmembers who pay representation fees and members who pay regular membership dues.

New York

Although there was no significant public-sector labor legislation enacted in New York State, 13 amendments to the New York City Collective Bargaining Law were passed by the New York City Council and signed by the Mayor in 1980. These include a provision adding agency-shop deductions to the list of matters constituting mandatory subjects of bargaining, a provision defining more precisely the period of negotiation during which the parties are prohibited from taking any unilateral actions which would disturb the status quo or otherwise disrupt the bargaining process, and a provision to clarify the nature and effect of an impasse panel report which is accepted by the parties or rejected by either or both parties but not timely appealed. The latter amendment also redefines the scope of review by the Board of Collective Bargaining of impasse panel reports to provide explicitly for consideration of the conformity of such reports with applicable laws and regulations.

Rhode Island

Casual and seasonal state employees are excluded from coverage under the law giving state employees the right to organize and bargain collectively. Another revision of the Rhode Island Labor Relations Act requires that notice of a motion to vacate, modify, or correct an arbitration award be served upon an adverse party or his attorney within one month, rather than three

months, after the award is filed or delivered and before the award is confirmed.

South Carolina

The South Carolina legislature approved a law directing the Commission on Higher Education to establish grievance procedures for employees and faculty members of state-funded post-secondary educational institutions. Procedures must provide a hearing process for an aggrieved employee which allows him or her the right to representation by counsel. Grievance procedures must also include the right to appeal decisions to the institution's governing board or a committee designated by the board. Issues subject to the grievance procedure include discrimination in compensation, promotion, and work assignment. Dismissal of tenured or other permanent employees and dismissal prior to the end of an employment contract shall be only for cause and are to be considered by the grievance procedure.

Vermont

Revised rules governing grievances, promotions, transfers, internal affairs, and disciplinary procedures are to be established by the Commissioner of Public Safety under legislature-established guidelines. A State Police Advisory Commission was established to review the rules and to act as an adviser to the Commissioner.

Virgin Islands

A Public Employee Labor Relations Law was enacted, granting public employees the right to form and join unions and to bargain collectively. The law defines unfair labor practices and provides for binding arbitration and a limited right to strike. An Office of Collective Bargaining was created in the Office of the Governor, with responsibility to represent the executive branch and negotiate on its behalf.

Wisconsin

Public- and private-sector employees have the right to inspect and make corrections in their personnel files and medical records at least twice a year, or as provided in a collective bargain-

ing agreement. An employee may also authorize a union representative to inspect the records when a grievance is pending. Certain records are excluded, such as letters of reference, records relating to a criminal investigation, management planning records, and portions of test documents.

II. Federal-Sector Developments

New Legislation

A significant major development in the federal labor-management relations sector for 1980 was the passage of the Foreign Service Act of 1980 (Public Law 96-445). Chapter 10 of this act supersedes Executive Order 11636 which had governed labor-management relations in most of the Foreign Service since 1971. The act now governs the labor-management relations for approximately 14,500 Foreign Service employees at the Department of State, the International Communications Agency, the U.S. International Development Cooperation Agency, the Department of Agriculture, and the Department of Commerce.

The new Foreign Service Labor Relations Board was established to administer the provisions of Chapter 10 of the act. The chairman of the Federal Labor Relations Authority also serves as chairman of the Board pursuant to the act. Similarly, the general counsel of the Authority also serves as general counsel of the Board.

The Board's functions include supervising or conducting representation elections; resolving unfair labor practice complaints; resolving issues related to the obligation to bargain in good faith; resolving certain disputes concerning the effect, interpretation, or a claim of breach of a collective bargaining agreement; and taking other actions necessary to administer the act effectively.

Another significant development in the federal labor-management relations sector was the passage of the General Accounting Office Personnel Act of 1980 (Public Law 96-191) which resulted in the establishment of the General Accounting Office Personnel Appeals Board. This board was created by Congress to give the Government Accounting Office (GAO) full control over its internal personnel and labor relations systems.

The GAO, a legislative branch agency, serves as Congress's "watchdog" to see that executive agencies are spending appro-

priated funds in the manner intended by Congress. The GAO personnel legislation removes GAO from the jurisdiction of the Merit Systems Protection Board, the Office of Personnel Management, and other agencies which regulate personnel and labor relations matters in the executive branch.

The Comptroller General of the United States has appointed the five members of the board. Matters to be considered and decided by the board include adverse action appeals, prohibited personnel practices, Hatch Act questions, determinations of bargaining units, oversight of representation elections, unfair labor practice charges, and equal employment opportunity matters. The general counsel of the board will investigate allegations of prohibited personnel practices and political activities and all matters under the jurisdiction of the board, if so requested. The act further provides for judicial review of board decisions.

As part of the Panama Canal Act of 1979, Title VII of the Civil Service Reform Act was made applicable to employees of the Panama Canal Commission. Therefore, there still remains American jurisdiction over foreign nationals working and residing outside of the United States.

*Federal Labor Relations Authority*³

The Federal Labor Relations Authority is concerned with four major substantive areas: representation and certification of bargaining units, determination of scope of bargaining questions, unfair labor practice determinations, and review of arbitration awards.

During 1980, 5,570 cases were filed in the regional offices of the Authority. Of these, 4,955 were unfair labor practice charges and 615 were representation petitions. Approximately 700 cases were filed or appealed to the Authority for final disposition during 1980. Of particular interest, new filings of exceptions to arbitrators' awards climbed to 102 cases from fiscal 1979's 44 cases. The Office of Administrative Law Judges received 1,093 cases in 1980, more than four and one-half times the 238 cases reaching the office in fiscal year 1979.

³For a more complete discussion of the functions of the Federal Labor Relations Authority and the Federal Service Impasses Panel, see the 1978 and 1979 reports of the Committee on Public Employment Disputes Settlement, Walter J. Gershenfeld, Chairperson.

The rest of this discussion will focus on the Authority's role in reviewing arbitration awards. In the federal sector, the use of arbitration has expanded greatly and will continue to do so in the future. Section 7121 of the statute provides that every collective bargaining agreement must have a grievance procedure which terminates in final and binding arbitration. Under certain conditions the Authority can review exceptions to arbitrators' awards. This review is restricted and does not call for a retrial on the merits.

In reviewing exceptions to an arbitrator's award, the Authority considers two basic statutory guidelines. The first of these is that the award is not contrary to laws, rules, or regulations. When considering laws, rules, and regulations, the Authority will seek interpretation of the rules and regulations from the issuing agency where appropriate.

The agency's interpretation, however, is not uniformly utilized. In one case an employee who was denied a promotion filed a grievance claiming a violation of the collective bargaining agreement. The arbitrator held that a violation had occurred and awarded a promotion retroactively with back pay. In considering the agency's exceptions, the Authority interpreted the rules and regulations without referral to the agency and sustained the award by ruling that it was not contrary to the Federal Personnel Manual and the Back Pay Act.⁴

On the other hand, in another decision the Authority requested an advisory opinion from the Office of Personnel Management concerning its interpretation of the Federal Personnel Manual provisions regarding an arbitrator's award.⁵ The Authority determines what action to take on a case-by-case basis.

The second area for Authority consideration of arbitration exceptions is Section 7122(a)(2) which states that the Authority, upon review, may find an award deficient on grounds similar to those applied by federal courts in private-sector labor-management relations. By interpretation and case law, this would involve situations where an arbitrator exceeds his or her authority, or issues an award that does not draw its essence from the collective bargaining agreement, or is based on a nonfact. In several decisions the Authority has applied this doctrine. For example, in the decision of *Overseas Education Association and Office*

⁴*Veterans Administration Hospital and AFGE Local 2201*, 4 FLRA 57 (1980).

⁵*U.S. Department of Commerce, National Bureau of Standards, Washington, D.C. and AFGE Local 2186*, 3 FLRA 98 (1980).

of *Dependent Schools, Dept. of Defense*,⁶ the Authority overturned the arbitrator's award as not drawing its essence from the collective bargaining agreement.

In another case the arbitrator stated that since Section 7106(a), the management rights provision, pertained to the assignment of work, it was under the substantive jurisdiction of management and was not a procedural situation subject to grievance. The Authority remanded the case, stating that the merits are reachable but the clause could impact on the remedies available.⁷

The statutory provisions appear to bar direct appellate court review of the Authority determinations in arbitration cases except where the basis of the dispute involved could have been an unfair labor practice. The one decision which was taken to the appellate courts dealt with a situation in which the agency had disciplined an employee who was also a union activist. The arbitrator sustained the discipline for five incidents of misconduct under the "just cause" language of the bargaining agreement, even though the agency's action taken against the grievant was, in part, because of union activity.⁸ Since the genesis of this case is an unfair labor practice, judicial review is authorized under Section 7123(a)(1).

Federal Service Impasses Panel

Cases

Requests Received and Cases Closed. At the start of the fiscal year, 44 cases were pending before the Federal Service Impasses Panel. It received 123 requests for assistance during the year, a rate of filing essentially unchanged from the previous reporting period. The number of filings represents a very small proportion (15 percent) of the approximately 800 sets of negotiations which take place in the federal sector each year.

A record 132 cases were closed during the year. Most of these disputes occurred at the end of the contract, but a few arose during the term of the agreement as the result of reopener provisions of employer-proposed changes in working conditions.

⁶4 FLRA 17 (1980).

⁷*The Marine Corps Logistics Support Base, Pacific, Barstow, Calif. and AFGE Local 1482*, 3 FLRA 61 (1980).

⁸*Federal Correctional Institution and AFGE Local 1286*, 3 FLRA 111 (1980).

The Panel declined to assert jurisdiction in 27 percent of closed cases. In most instances the parties had failed to devote sufficient time and effort to negotiations and were directed to resume bargaining with mediation assistance, as necessary. In other cases jurisdiction was not asserted mainly because an agency had raised a question concerning its obligation to bargain with respect to union proposals. Such questions may be referred to the Authority for resolution.

Twenty-five percent of the requests for assistance were withdrawn. In most instances, the parties either reached agreement after assistance was sought or agreed to resume negotiations. In some cases—often at the urging of the Panel's staff—the agency and labor organization arranged for assistance from higher level persons within their organizations or from an FMCS representative.

Twelve percent of the closed cases were settled by the parties, often with the assistance of a fact-finder, prior to the issuance of formal recommendations or a decision. This represents a slight decline from the previous year. The percentage of settlements based upon post-fact-finding recommendations, however, was essentially unchanged (4 percent).

The number of *Decisions and Orders* issued by the Panel represents 27 percent of the cases closed during the year. Although this figure is small, whether considered in isolation or in the context of the potential number of impasses in the federal sector, it is a sizable increase over fiscal year 1979 when the figure was only 13 percent. This may be explained by the rising number and complexity of issues in cases brought to the Panel and the interest of the parties and the Panel in quick resolution of some disputes. In addition, budgetary constraints on the Panel often precluded the use of fact-finding hearings and associated opportunities for informal settlements, necessitating decisions based solely on written submissions from the parties. There was a related increase in the use of final-offer selection procedures, either on an issue-by-issue or package basis.

For the first time in its history, the Panel ordered the parties in one dispute to use an outside arbitrator for a final and binding decision. A similar procedure was recommended in two other cases. The parties in two impasses adopted such a procedure after their request for the Panel's approval was granted.

Examples of Different Procedures Utilized. The Panel continued to use a wide variety of dispute-resolution techniques. Consistent with its broad statutory mandate, it based the selection on such

factors as sound collective bargaining principles, the complexity of the dispute, the preferences of the parties, and its budget. An underlying consideration, however, was the Panel's determination to remain flexible and unpredictable in the implementation of these procedures. The panel directed that a fact-finding hearing be conducted in 21 disputes, to be followed by whatever action the Panel deemed appropriate. The same kind of uncertainty was present in 15 cases where written submissions were received. In another 15 cases written submissions were to be followed by a final-offer selection procedure. Some examples of a few of these procedures follow:

Decline to assert jurisdiction: The Panel may decline to assert jurisdiction if the parties have not exhausted voluntary efforts to reach agreement or for other good cause such as the existence of a threshold question concerning a party's obligation to bargain over a proposal. In *Naval Air Engineer Center*, Panel Release No. 155, the employer filed a request for assistance, listing nine issues at impasse. The Panel's investigation revealed that two issues were pending before the Authority as negotiability appeals and that the parties had resumed bargaining after the filing of the request. The Panel declined to assert jurisdiction.

Panel recommendations following fact-finding: In *Federal Energy Regulatory Commission*, Panel Release No. 135, the parties were deadlocked over the employer's proposal to exclude EEO complaints from the grievance and arbitration procedures. After a fact-finding hearing and receipt of the fact-finder's report, the Panel issued a *Report and Recommendation* in which it concluded in the circumstances of this case that employees should have the option of choosing either the negotiated grievance procedure or the statutory system for the resolution of EEO complaints. Additionally, the Panel found that further negotiations were necessary for the parties to reach agreement on a procedure encompassing adequate time for the investigation and informal resolution of EEO complaints prior to the institution of formal procedures. Both parties accepted the recommendation.

Decision and Order based upon written submissions: In *Federal Trade Commission*, Panel Release No. 152, the union, which represented approximately 30 persons in the employer's Boston regional office, filed a request for assistance on 14 issues, including the status of nonveteran attorneys. This request was consolidated with a second union request to resolve an impasse concerning the impact and implementation of performance standards. After receipt of the parties' written submissions, the

Panel ordered the employer to grant both veteran and nonveteran attorneys access to the grievance and arbitration procedures on the same basis as other members of the bargaining unit. Since the parties agreed that this was the key issue, they were directed to resume bargaining on the other issues and notify the Panel of the results within 30 days. The parties subsequently notified the Panel that an agreement had been consummated.

Final-offer selection based upon written submissions: The union, representing some 70,000 employees, requested the Panel to break a deadlock over the composition of the ranking panel for the Management/Technical Intern Program in *Air Force Logistics Command*, Panel Release No. 151. The union proposed to designate one nonvoting observer to participate in panel discussions and file written comments, whereas the employer proposed that only management officials of GS-14 or equivalent grade be panel participants. Using a final-offer selection procedure, the Panel ordered the parties to adopt the union's proposal.

Approval of arbitration: Negotiating a new contract for approximately 6,500 employees, the parties in *Department of Labor*, Panel Release No. 150, were unable to reach agreement on 23 issues, including performance evaluation, disciplinary action, and adverse action. They jointly requested the Panel to authorize use of outside arbitration to resolve the dispute. The Panel's inquiry revealed that the parties had exhausted voluntary efforts for settlement and had otherwise met the conditions established by the Panel for the authorization of this procedure. Accordingly, the request was granted. Thereafter, the Panel was advised that the dispute had been resolved voluntarily through mediation assistance provided by the arbitrator at the parties' request.

Issues

Approximately one-half of the cases received by the Panel during the year contained only a single issue. The others typically involved less than five disputed items, although one impasse had more than 30 issues. The dominant issue was hours of work and overtime, which includes the subjects of flex-time and compressed workweek. Promotions and denials, and official time for union representation followed in frequency. The latter category includes official time requested by unions for the

preparation for negotiations as well as the actual negotiations and administration of an agreement. The grievance and arbitration issues often centered on the scope of the procedure.

Compliance With Panel Decisions

The statute provides in Section 7116(a)(6) and (b)(6) that it is an unfair labor practice for either party to “fail or refuse to cooperate in impasse procedures and impasse decisions.” In a number of cases involving the wearing of the military uniform, however, National Guard activities have sought direct review of Panel decisions in other forums.

In *Nevada National Guard v. United States*,⁹ the U.S. Court of Appeals for the Ninth Circuit dismissed the employer’s petition for review of an order of the Panel for lack of jurisdiction. The court stated that if judicial review were sought pursuant to Executive Order 11491, as amended, the court lacked original jurisdiction. Alternatively, if judicial review were sought under the statute, the court found that the Panel’s decision was not a final order of the Authority reviewable under 5 U.S.C. 7123.

The California National Guard¹⁰ and the New York National Guard¹¹ petitioned the Authority to review directly and overturn Panel decisions involving the wearing of the military uniform. In each instance the Authority denied the petition, noting that the legislative history of the statute states that final action of the Panel is not subject to appeal. The Authority further concluded that Congress intended to establish the unfair labor practice procedure as the exclusive means of obtaining such review by the Authority.

Unfair labor practice complaints involving these and five other National Guard components, based in part on an alleged refusal to comply with *Decisions and Orders* of the Panel, were pending before the Authority on September 30, 1980.

Postal Service

In 1980 four federal court decisions dealt with the United States Postal Service (USPS) and the proper role of grievance arbitration under various circumstances.

The U.S. Court of Appeals for the Fifth Circuit held that a

⁹No. 79-7235 (9th Cir., Dec. 14, 1980).

¹⁰2 FLRA 21 and 2 FLRA 22.

¹¹2 FLRA 20.

postal employee is bound by an arbitrator's decision upholding her dismissal.¹² The court was "not unsympathetic" to a former employee's complaint that she received "disparate if not inequitable" treatment as a result of her use of the negotiated grievance procedure instead of the civil service appeal as the forum in which to contest her removal from the U.S. Postal Service. However, the fact that the employee herself consented to arbitration means that she accepted the final and binding nature of the arbitrator's award. This is so even though another employee tried for the same reason as the plaintiff was reinstated after appealing his removal through the civil service procedure as authorized by the Veterans Preference Act and the collective bargaining agreement.

In a second case, the U.S. Court of Appeals for the Fourth Circuit held that a lower court improperly enjoined the Columbia, South Carolina, post office from making certain shift changes until a union grievance could be arbitrated.¹³ The court said that since the collective bargaining agreement provides for mandatory grievance-arbitration procedures, the federal courts should not intrude at the behest of either management or labor into disputes over arbitral issues unless intrusion by injunction is necessary to protect the arbitral process itself. In this case, since employees did not lose their jobs as a result of the management action, no irreparable injury resulted and the arbitrator could easily restore the status quo ante by his award.

On the other hand, the U.S. District Court for New Jersey held that a discharged postal employee need not exhaust his remedies under the collective bargaining agreement before filing suit alleging that the U.S. Postal Service breached that agreement.¹⁴ According to the court, exhaustion is not required where the suit alleges that employer behavior effectively repudiated the grievance procedures contained in the contract.

In this case an employee was fired after having been charged with a criminal offense. The president of his local union told the employee that he (the president) would get an agreement from management to hold the grievance procedure in abeyance until the criminal case was resolved. Two years later the charges were

¹²*Smith v. Daws, Postmaster*, USCA 5, No. 79-1581, 859 GERR 7 (1980).

¹³*Columbia Local, American Postal Workers Union, AFL-CIO v. Bolger*, USCA 4, No. 79-1123, 863 GERR 8 (1980).

¹⁴*Riley v. Letter Carriers Local 380, et al.*, USDC NJ, Civil Action No. 78-1414, 867 GERR 9 (1980).

dropped, but when the former employee sought, through the union, to reinstate the grievance, USPS said it was untimely. He then sued the union for breach of the duty of fair representation and USPS for breach of the collective bargaining agreement.

The judge dismissed the suit against the union, but refused to do so for the Postal Service. Judge Debevoise reasoned that the special arrangement to hold the grievance in abeyance pending the outcome of the criminal matter amounted to a modification of the contract's grievance procedure, and he said that relief for alleged breaches of that modified procedure could be sought in court.

The Postal Service requested reconsideration based on the requirement stated by the Supreme Court in *Vaca v. Sipes*¹⁵ that a plaintiff prove a violation of the union's duty of fair representation as a threshold matter before suing the employer for breach of a collective bargaining agreement. The court held, however, that *Vaca* does specifically provide, as in the present case, that the individual employee may resort to the courts before the grievance procedures have been fully exhausted when the conduct of the employer amounts to a repudiation of those contractual procedures.

Finally, in a decision currently under appeal to the U.S. Court of Appeals for the Ninth Circuit, a federal court in California ruled that once an arbitrator has made a threshold determination that an employee has participated in a strike against the federal government, no mitigation of the discharge penalty is possible.¹⁶ The decision reasons that because it is unlawful for a person who has participated in a strike against the government to hold a federal job, an award of reinstatement would be unenforceable because it would compel the performance of an illegal act.

The arbitrator had ruled that the grievant did participate in a strike; however, the arbitrator had reinstated him with back pay based on mitigating circumstances. In setting aside the arbitration award, the federal court dealt a blow to efforts to win amnesty for several hundred strikers who took part in an abortive postal strike in 1978. Moreover, if the decision stands, it presumably would affect all federal agencies, not just the Postal Service.

¹⁵386 U.S. 171, 64 LRRM 2369 (1967).

¹⁶*American Postal Workers Union, AFL-CIO v. U.S. Postal Service, San Francisco Bulk Mail Center, Richmond, Calif.*, USDC Cal. No. C-80-0748-WWS, 872 GERR 5 (1980).

III. Dispute Resolution in Canada

Collective bargaining for federal and provincial public employees in Canada, like the United States, is a relatively recent development. Each of the provinces has adopted its own legislation to grant and regulate collective efforts by public employees. In 1967 the federal government enacted legislation establishing formal collective bargaining procedures, including binding arbitration to resolve disputes. This analysis will report, briefly, on relatively recent developments in the province of Ontario¹⁷ and on legislation covering federal public employees.

Ontario

In 1975 Bill 100 was passed covering the negotiation of collective agreements between school boards and teachers. The act is administered by the Education Relations Commission consisting of five members, one of whom is designated as the chairperson and another as the vice-chairperson. Members of the Commission are experienced labor relations specialists. The Commission's authority resembles that of similar agencies in the United States administering collective bargaining statutes.

Section 29 of the act provides that the parties may refer matters in dispute to a binding voluntary interest arbitration board or to a single arbitrator. The parties themselves may name the arbitrator or request the Commission to appoint one. The parties may each select a person to a board of arbitration.

As an alternative, the parties may elect to submit unresolved negotiation matters to a "selector." Again, the parties may agree to the name of the selector or, if they are unable to agree, the Commission will appoint one. In essence, the parties submit their final offers to the selector who then makes a selection in writing of all of one of the party's final offers. Under certain circumstances teachers may legally strike.

The future of public-sector grievance arbitration in Ontario is somewhat in doubt, clouded by recent legislation in the private sector. Bill 25 was introduced in Ontario as an amendment to the Labour Relations Act. The bill provides that either party may request referral of a grievance to a single arbitrator not chosen by the parties, but rather appointed by the Minister of

¹⁷Legislation in other provinces is similar to that of Ontario.

Labour. The bill did not apply to collective agreements in effect on the date the bill came into force. Since several multiyear agreements are in existence, the full effect of the bill is not yet known. Although the bill applies only to the private sector, it is reasonable to believe that it may have a spillover effect into the public sector.

Other public employees in Ontario are likewise statutorily regulated. Employees of general hospitals are prohibited from striking; yet in early 1981 employees struck even though an arbitration process existed. Firefighters have the right to strike, but have traditionally refrained from doing so. Police are forbidden from striking, instead using interest arbitration to resolve their disputes.

Federal Sector

The Public Service Staff Relations Act of 1967 provided for collective bargaining for Canadian federal civil servants. One unique feature of the legislation is the choice of procedures for impasses. When first introduced, the legislation banned strikes and provided for binding arbitration. While the bill was being acted on, postal workers engaged in an illegal strike. Partly as a result of that strike, the legislation, as finally enacted, provides for an election of procedures. Prior to the start of bargaining, the union specifies whether, if agreement is not reached, the matters in dispute will be referred to arbitration or there will be a work stoppage. The choice cannot be altered during that bargaining round. It should be stressed that the choice is made by the union and is binding on the employer. The legislation provides that before either arbitration or a work stoppage, specified conciliation steps must be followed. The law also provides that certain employees designated as essential by the Public Service Staff Relations Board must continue working. Evidence indicates that the vast majority of bargaining units have chosen the arbitration route of impasse resolution. The legislation provides for a permanent arbitration tribunal which consists of a chairperson, an alternate chairperson, and three employer and three union partisan members. When arbitration is appropriate, a tribunal is formed consisting of the chairperson (or an alternate) and one union and one employer representative. The arbitration award is binding.

IV. Judicial and Related Developments

Constitutionality of Collective Bargaining Laws and Practices

California's Statute. A key case challenging the constitutionality of a collective bargaining statute came in California. Since the advent of collective bargaining in public employment, civil service and collective bargaining systems seem to have been on a collision course. Both systems now permeate all levels of government employment in California, including the state civil service where a constitutionally created State Personnel Board (SPB) administered the civil service system and a legislatively created Public Employment Relations Board (PERB) administers public employment relations acts.

In California abstract questions concerning the purported incompatibility of civil service and collective bargaining systems became a concrete case in *Pacific Legal Foundation v. Brown*.¹⁸ On March 25, 1980, the California Court of Appeal held that the State Employer-Employee Relations Act (SEERA) conflicted with certain civil service provisions in the California constitution. Having found such a conflict between the two systems, the court resolved the matter in favor of the civil service system and declared SEERA unconstitutional.¹⁹

On May 22, 1980, the California Supreme Court agreed to review the Court of Appeal decision, and on March 12, 1981, the 4-2 decision, written by Justice Matthew Tobriner, was handed down.²⁰ It held that SEERA is constitutional and that the language in the statute does not conflict on its face with the constitutional powers of the State Personnel Board.

The ruling went further than some had anticipated. It was generally assumed that the court would find no inherent conflict between a collective bargaining system and a merit system, or between setting wages and the SPB's authority to classify jobs. However, the court surprised some by also determining that there is no facial conflict between PERB's jurisdiction over un-

¹⁸103 Cal.App.3d 801, 103 LRRM 3131 (1980).

¹⁹These introductory remarks have been drawn from a perceptive article written by UCLA Law Professor Reginald Alleyne in which he challenged the appellate court's findings and anticipated the basic reasoning used by the California Supreme Court in ultimately upholding the constitutionality of SEERA. Alleyne, *A Comment on the Constitutionality of SEERA*, 46 Cal. Pub. Emp. Rels. 2 (September 1980).

²⁰*Pacific Legal Foundation v. Brown, et al.*, *supra* note 18; *California State Employees Assn., et al., Interveners*, Sup. Ct. No. S.F. 24168, March 12, 1981.

fair practices involving state employees and the SPB's exclusive constitutional jurisdiction to review disciplinary actions involving state employees.

Leaving the door open for further constitutional litigation, the court made it clear that the case did not involve any specific action under SEERA which conflicted with the constitutional authority of the SPB. Rather, the question brought to the court was whether the act *on its face* inevitably poses such a total and fatal conflict with the constitution that it must be struck down. Although such an inevitable, fatal conflict was not found, as the act is implemented, disputes could arise over specific application of the statute—such as whether the terms of a collective bargaining agreement conflicted with the SPB's constitutional powers or whether a PERB action in an unfair practice case in fact encroaches on SPB's disciplinary jurisdiction. In such instances, the court stated that the conflicts may be resolved by litigation, by administrative accommodation, or by legislative action.²¹

Fair-Share Agreements. In recent years the issue of the proper amount of dues collectible under a fair-share provision has been the subject of much litigation. In February 1981 the Wisconsin Employment Relations Commission issued a decision of national importance on this subject.²² Wisconsin's Municipal Employment Relations Act defines a "fair share agreement" as an agreement under which all employees are required to "pay their proportionate share of the cost of the collective bargaining process and contract administration. . . ."

Plaintiffs argued that the term "collective bargaining process" includes only those functions of the local union (as opposed to affiliated state and international unions and other affiliates) relating to the negotiation of collective bargaining agreements, to the contract administration, and to the resolution of grievances arising under such agreements.

The Commission rejected the narrow interpretation of the plaintiffs. In adopting a broad interpretation, the Commission stated:

"We deem that a union, which is the collective bargaining representative of employees in a collective bargaining unit, is pursuing its

²¹For a more complete discussion from which these remarks are drawn, see Bogue, *Supreme Court Upholds SEERA*, 48 Cal. Publ. Emp. Rels. Supp. 16 (March 1981).

²²*Browne, et al.*, No. 18408 (February 1981).

representative interest by expending sums of money, either directly or by payments to others, for activities other than those found to be impermissible herein, relating to improving the wages, hours, and working conditions of the employees in the bargaining unit involved, as well as the wages, hours, and working conditions of other employees represented by said unions and its affiliates, and that therefore such expenditures are properly included in the amount of fair share payments by unit employees who are not members of said union."

Accordingly, a wide range of activities were found chargeable to fair-share payers, including lobbying for legislation or regulations affecting wages, hours, and working conditions of employees generally; per capita payments to affiliated organizations; advertising; union newspapers; litigation; payments for printed materials and technical personnel; conventions and meetings, depending on their purpose; and most impasse procedures. Not chargeable, however, are costs incurred in support of an illegal strike; support and contributions to political organizations and candidates for public office, to charitable organizations, to ideological causes, and for international affairs; and training in voter registration, get-out-the-vote, and campaign techniques.

Dues Checkoff. In Virginia an issue has arisen of the legality of dues checkoff absent a collective bargaining agreement or power to create one. Virginia does not have a statute authorizing collective bargaining for public employees. However, prior to 1977 some school boards and teacher organizations had reduced their agreement to writing. In that year the state supreme court declared public-employee collective bargaining illegal absent enabling legislation.²³ The decision expressly denied Virginia's public employees any implied power to bargain and rescinded contracts previously honored. Since 1977, proponents have tried unsuccessfully to secure express statutory authority for collective bargaining by public employers and employee organizations.

In 1980 it became apparent that seven Virginia cities and more than 100 school boards have permitted dues checkoff for members of employee organizations. A number of city managers or county councils, however, disclaimed knowledge of the checkoff.

²³*Commonwealth of Virginia v. County Board of Arlington County*, Va. S. Ct., 232 S.E.2d 30, 94 LRRM 2291 (1977).

In May 1980, the Richmond city council adopted an ordinance authorizing payroll deduction of dues for police, firefighter, and teacher employee organizations which are not recognized as bargaining units. A suit filed in July 1980 in the Richmond circuit court will determine the legality of authorizing dues checkoff. Trial is scheduled for May 1981.

Significant Developments in Interest Arbitration During 1980

Court Decisions. On June 6, 1980, the Supreme Court of Michigan handed down the year's most significant interest arbitration decision when it upheld the constitutionality of the state's last-offer item-by-item interest arbitration statute for municipal police and firefighters.²⁴ Two issues that frequently arise in interest arbitration were treated in considerable detail: (1) whether the act was an unconstitutional delegation of legislative and political responsibility to politically unaccountable arbitrators, and (2) whether the arbitration panel's award was supported by the evidence.

In deciding the second issue, the court tackled the extremely important matter of the weight to be given to each of the eight factors which the law requires the arbitration panel to consider. The decision had been anxiously awaited since an arbitration panel issued its award on December 20, 1978, and since an evenly divided Michigan Supreme Court upheld the constitutionality of the law in 1975.²⁵

On the accountability issue, the majority held that 1976 amendments changing the method of appointing the neutral chairperson of the arbitration panel removed any doubts regarding the panel's accountability that existed after the *Dearborn* decision. Chairpersons are now appointed by the Michigan Employment Relations Commission (MERC) from its permanent arbitration panel. The court reasoned that persons whose names appear on that panel will be concerned with the long-term impact of their decisions because they must be residents of Michigan and because they remain on the panel until removed by MERC. They serve in many disputes, so are not "hit and run arbitrators," a phrase used to describe the temporary nature of the arbitrator's role. As residents of the state, the arbitrators

²⁴*City of Detroit v. Detroit Police Officers Assn.*, 294 N.W.2d 68, 105 LRRM 3083, 868 GERR 16 (1980).

²⁵*Dearborn Firefighters v. City of Dearborn*, 231 N.W.2d 226, 90 LRRM 2002 (1975).

cannot escape to another jurisdiction, thus avoiding the impact of their decision. By serving an indeterminate term, the arbitrators acquire a degree of tenure. Furthermore, as appointees of MERC the arbitrators acquire a kind of political accountability they would not have if appointed by the partisan members of the arbitration panel.

The court may be stretching a bit to find arbitrators politically accountable, but the judges acknowledged that the statute struck a balance between political accountability and independence. Greater political accountability was not desirable, the court noted, because it would erode the independence of the arbitrator. A concurring justice pointed out that a politically accountable legislature had enacted the statute so arbitrators need not be as politically accountable as legislators. The majority believed that the "tension" between independence and political accountability was balanced by the act's standards to guide the arbitration panel, by the public atmosphere in which the act operates, and by the act's provision for judicial review.

Judicial review can rest on one of three bases: that the panel exceeded its jurisdiction, that its order was not supported by the evidence, or that the order was procured by unlawful means such as fraud. Only the second—weight of the evidence—had any applicability to this case. It constitutes the second major issue considered by the court.

The statute instructs the panel to be guided by eight factors, all of which are familiar to those who have worked in the field of interest arbitration. They include the lawful authority of the employing public jurisdiction, stipulations of the parties, financial ability of the employing unit along with the interest and welfare of the public, comparisons of wages and other conditions of employment with public and private employers, changes in consumer prices, overall compensation of the affected employees, and a general "catch-all" provision which covers all other factors not specifically listed but that are normally used in arbitration.

The panel must consider all eight factors, but is not told how to weight them. The court held that the legislature mandated the arbitration panel to weight the factors and that such was a constitutional delegation of authority. The panel may not ignore any factor, but is to decide which factors are of greater and which are of lesser importance.

By upholding the panel's authority to weight these factors, the

court recognized that the economic, social, and political climate is instrumental in determining which factors are most important in any given case. Listing the factors may be necessary before courts will uphold the constitutionality of interest arbitration statutes, but the weight to be given each factor must be determined on a case-by-case basis before a decision can be reached.

Other 1980 court decisions upheld interest arbitration statutes; none was struck down. The Connecticut Supreme Court in a unanimous ruling overturned a 1978 decision of the Hartford superior court and upheld the constitutionality of the state's Municipal Employee Relations Act, which includes compulsory, binding, final-offer arbitration.²⁶ The lower court had ruled that the statute clothes arbitrators with too much authority. Not so, said the supreme court. Towns are "creatures of the state," so the state legislature may require them to submit disputes to binding arbitration. An unusual provision of the Connecticut statute requires that the appropriating authority provide the money necessary to implement an arbitration award although a party is permitted to file a motion to vacate the award.

The Pennsylvania Supreme Court ordered the Franklin County Prison Board to abide by an arbitration award dealing with salaries of prison guards.²⁷ The prison board refused to implement the award on the grounds that it required legislative enactment and, thus, under the statute the award was advisory only. The court held that the state legislature, not the county prison board, was the legislative body. The prison board was an administrative agency which received money from the legislature. The task of the prison board was to allocate that money. The award was advisory to the legislature, but binding on the prison board.

Another Pennsylvania decision dealt with the authority of arbitration panels to rule on particular issues. The Commonwealth Court of Pennsylvania upheld the authority of an arbitration panel to fix a five-day, 40-hour workweek for police under the statute governing collective bargaining for police and firefighters.²⁸ Hours of work is a proper subject for bargaining and, thus, is a proper subject for arbitral ruling, said the court.

²⁶*Town of Berlin v. Frank Santaguida, et al.*, 870 GERR 11 (1980).

²⁷*Franklin County Prison Board v. Pennsylvania Labor Relations Board*, 417 A.2d 1138, 103 LRRM 2461 (1980).

²⁸*Arbitration between the Borough of Ambridge and the Police Department, Pa. Cmwlth.*, 417 A.2d 29 (1980).

By contrast, the Massachusetts Appeals Court declared invalid that portion of an arbitration award which dealt with the authority of a chief of police to assign officers to shifts.²⁹ The Massachusetts statute limits the authority of arbitration panels in police matters by excluding certain managerial functions, among them the right to assign work. Assignment of shifts is a proper subject for bargaining, the court said, but the statute excludes that subject from arbitration.

In a noteworthy opinion, a New York supreme court held that certain amendments to the Taylor Law in 1977 were meant to provide for more stringent judicial review of public-interest arbitration awards.³⁰ Thus, judicial review of compulsory interest arbitration awards, while still concerned with consideration of whether the award, on the whole, is reasonably founded on the record, is now additionally focused by the statutory amendments on the reasonableness and rationality of *specific* findings which the arbitrators are required to make with respect to each and every statutory criterion placed in issue by the parties. The court vacated the arbitration award in this case on the ground that the panel majority had failed to specify the basis for most, if not all, of its findings, as required by the 1977 statutory amendments.

The Massachusetts Joint Labor-Management Committee for Municipal Police and Fire. In Massachusetts, the Joint Labor-Management Committee (JLMC) for police and fire was created effective January 1, 1978, in response to dissatisfaction—especially on the part of municipal governments—with last-best-offer arbitration. The committee, composed of six representatives from local government, three from the firefighters, three from police labor organizations, and an impartial chairperson and vice-chairperson, has oversight responsibility for all collective bargaining negotiations involving municipal police and firefighters.

The basic principle of the JLMC is to assist the parties to reach an agreement themselves, rather than to have an outsider make the decision through last-best-offer arbitration, which may leave the parties with an award that frequently results in unsatisfactory labor relations.

The JLMC has a wide range of options in the processing of a dispute brought to it by either party. Generally, the first step

²⁹*City of Taunton v. Taunton Branch of Mass. Police Assn.*, Mass. App. Ct. Adv. Sh. 1359 (1980).

³⁰*Buffalo Police Benevolent Assn. v. City of Buffalo*, 13 PERB 7539 (N.Y. 1980).

is to assign a staff mediator, who gathers the facts, identifies and seeks to narrow the issues, and engages in mediation. Subsequent steps would involve mediation efforts by senior staff members and then by labor and management representatives of the committee. If these steps do not resolve the dispute, a tripartite subcommittee of the JLMC may be assigned to meet with the parties for further mediation, which may include a formal mediation proposal. A formal fact-finding step may be used, with the chairperson, vice-chairperson, or an outsider as fact-finder. In those cases where informal procedures do not resolve the dispute, the committee may certify the issues in dispute and refer the matter to a form of final and binding arbitration before the chairperson, vice-chairperson, or an outside arbitrator. In a significant number of cases the parties reach settlement through the informal processes of the JLMC, but then request that the agreement be announced as a formal arbitration award to meet the political needs of either or both parties.

Prior to the establishment of the JLMC, there were 97 last-best-offer awards; since the establishment of the committee there have been only seven. The overall average time for all cases under the old procedures was 6.7 months, compared to an overall average of 3.6 months under the JLMC. Through fiscal 1980, the JLMC resolved about 68 percent of its cases through informal settlements; for fiscal 1980 alone, the disputes resolved by informal settlements rose to 80 percent.

The evidence is clear and convincing that during the past three years the procedures of the JLMC have enhanced the role of collective bargaining in the settlement of all disputes between communities and their public-safety unions, and by speeding up the settlement process the committee has eliminated considerable friction between the parties and substantially reduced the costs of the process to the parties.

The improved climate for responsible collective bargaining was subjected to a new set of uncertainties when, on November 4, 1980, the voters of Massachusetts approved a referendum item, Proposition 2½, an offspring of California's tax-cutting measure, Proposition 13. Although the JLMC rarely used the step of final arbitration, the threat of its use was always present. Now, however, one of the provisions of Proposition 2½ appears to have eliminated the final and binding aspects of arbitration awards upon the appropriate legislative body. The legality of the total proposition has been questioned and is now in the courts.

Also in the courts is the question of the authority of the JLMC. The number of cases coming to the committee has declined rather substantially since November 1980, with the parties apparently waiting the outcome of court cases as well as the potential drive to amend or drastically revise Proposition 2½.

Med-Arb in Wisconsin. The year 1980 was Wisconsin's third year of experience under its med-arb law which provides for final-offer arbitration by package for interest disputes involving municipal employees (except fire and law-enforcement personnel who are covered by a separate interest arbitration law). To date, the Wisconsin Employment Relations Commission has processed and closed 794 med-arb cases. Of the 794 closed cases, 175 have required an award. The remaining cases were resolved after a med-arb petition had been filed, but prior to an arbitrated award. Of the 175 awards, the union's offer was selected in 69 cases and the employer's in 58 cases; 48 awards were issued pursuant to a consent award.

The med-arb law was enacted with a sunset provision and, accordingly, is programmed to expire October 31, 1981. All indications at this time are that the law will be reenacted.

Significant Developments in Grievance Arbitration

Court Decisions

Grievance arbitration received considerable attention in two states, New York and Pennsylvania. As in the past, many court cases in 1980 dealt with the issue of arbitrability, while other decisions dealt with the individual's right to take a case to arbitration and the standards under which a court should review an arbitrator's award.

New York. The New York Court of Appeals rendered three decisions in 1980 which are further sequels to cases reported on last year which limited the doctrine enunciated in *Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association*.³¹ The decisions indicated a retreat from the restrictive view of public-sector arbitration announced in *Liverpool*.

In *Hannelore Lehnhoff v. Shepherd Nathan, et al.*,³² the court of

³¹42 N.Y.2d 509, 399 N.Y.S.2d 189 (1977).

³²48 N.Y.2d 990, 425 N.Y.S.2d 544 (1980).

appeals found that the parties' collective bargaining agreement, which permitted the employer to suspend petitioner from her position in a state psychiatric center without pay if he determined that there was probable cause to believe that her "continued presence on the job represents a potential danger to persons or property and would severely interfere with operations," contemplated that the issue of whether there had in fact been a probable-cause determination by the employer was to be submitted to arbitration. The court reversed a decision by the appellate division,³³ which held that the arbitration clause did not even come into play until the suspending authority had made a finding of probable cause. Thus, the court of appeals held, judicial resolution of the merits of the dispute over the propriety of petitioner's suspension was foreclosed.

In another case,³⁴ the court of appeals found the grievance of a probationary school teacher arbitrable within the meaning of the contract between the parties. Where the school district agreed to submit to arbitration all grievances involving "an alleged misinterpretation or misapplication of an express provision of [the] Agreement," it begs the question, said the court, to contend that the grievance is not arbitrable because it involves a dispute not unambiguously encompassed by an express substantive provision of the contract. The court distinguished *Liverpool* as requiring that arbitration be stayed only in cases where the parties' arbitration agreement did not unambiguously extend to the particular dispute. Here, however, the parties' agreement to arbitrate the dispute was clear and unequivocal. The ambiguity surrounded the coverage of the applicable substantive provision of the contract which is a matter of contract interpretation for an arbitrator.

In *Board of Education of Middle Island Central School Dist. No. 12 v. Middle Island Teachers Association*,³⁵ the court of appeals held that a probationary teacher who was denied tenure for alleged professional incompetence in the performance of his nonclassroom duties had a right to arbitrate alleged breaches of contract evaluation procedures specifically referable to classroom performance. The court reversed a decision of the appellate divi-

³³63 A.D.2d 694, 405 N.Y.S.2d 108 (2d Dept. 1978).

³⁴*Board of Education of Lakeland Central School District of Shrub Oak v. Joseph Barni*, 49 N.Y.2d 311, 425 N.Y.S.2d 544, 103 LRRM 2903 (1980).

³⁵50 N.Y.2d 426, 429 N.Y.S.2d 564 (1980).

sion³⁶ which had stayed arbitration on the ground that the school board had denied tenure for reasons unrelated to the teacher's classroom performance. Citing *Liverpool*, the court of appeals found that the subject matter of the dispute was encompassed by the broad arbitration clause in the parties' collective bargaining agreement. Since the school board is bound by an agreement which requires teacher evaluation procedures, failure to follow these procedures may form the basis for a grievance which may be submitted to arbitration. Even though the board had the right to deny tenure to a probationary teacher without an explanation, "the procedural aspect of the contract is discrete from the denial of tenure and should be so treated," said the court.

In a fourth New York case dealing with judicial review of arbitration awards,³⁷ the court of appeals held that it was an error for the appellate division to vacate an award merely because it believed the arbitrator had misconstrued the apparent, or even the obvious, meaning of the agreement. The court stated that "Parties who agree to refer contract disputes to arbitration must recognize that 'arbitrators may do justice' and the award may well reflect the spirit rather than the letter of the Agreement."

Pennsylvania. In Pennsylvania a continuing issue in the interpretation of Act 195 is the identification of those cases that are covered by the mandatory arbitration provision of the statute. In one case,³⁸ the commonwealth court upheld the common pleas decision that ruled that the school board lawfully refused to submit to arbitration a grievance alleging that teachers were denied professional advantage without "just cause" as a result of the board's decision to eliminate certain courses that they taught. There was no allegation that the teachers were suspended or reduced in rank, and the court concluded that the agreement's "just cause" provision did not provide for arbitration of disputes arising from the management decision to eliminate courses.

However, the commonwealth court ruled in another case³⁹ that the elimination of two academic positions was arbitrable

³⁶68 A.D.2d 926, 414 N.Y.S.2d 373 (2d Dept. 1979).

³⁷*Amalgamated Transit Union Local 1179 v. Green Bus Lines*, 50 N.Y.2d 1007, 431 N.Y.S.2d 680, 409 N.E.2d 1354 (1980).

³⁸*Greater Johnstown Area Vocational-Technical School*, 11 PPER 11061 (1980).

³⁹*Greater Johnstown Area Vocational-Technical School*, 11 PPER 11044 (1980).

under the grievance/arbitration provisions in the collective bargaining agreement. In reversing a court of common pleas decision, the court found that the dispute did not involve the exercise of an inherent managerial function that would be unarbitrable under the act, but that the elimination of two positions presented an issue that deprived union members of work and, therefore, had an immediate and direct impact on their legitimate interests.

The commonwealth court rejected the argument that PERA gives a public employee the right to take a grievance to arbitration. In 1978 the court found that only the union and the employer, as parties to the collective bargaining agreement, could appeal an arbitrator's award. In the more recent case, the commonwealth and the union had entered into a memorandum of agreement under which individual employees could file grievances but could not appeal them to arbitration.⁴⁰ The court affirmed a PLRB finding that a state agency did not violate its duty to bargain in good faith by refusing to arbitrate a grievance when the union, but not the individual grievant, withdrew its request for arbitration. The court noted that the memorandum of agreement, which set forth the procedure for arbitration, referred to "the parties," and the court could not say that the PLRB's refusal to issue a complaint was a manifest and flagrant abuse of its discretion.

Although the court affirmed the principle that an individual employee does not have the right to take a grievance to arbitration, it ruled that the PLRB did not have the exclusive jurisdiction over allegations that fair representation was not being provided.⁴¹ It held that the common pleas court had jurisdiction to decide whether a public employer discharged an employee without just cause, whether the union arbitrarily and in bad faith refused to demand arbitration on the employee's behalf, and whether the employer and union conspired and agreed to the discharge. The union had processed the grievance through the grievance procedure, but did not appeal it to arbitration. The commonwealth court rejected the argument that the grievant had not exhausted available remedies under the union's constitution and bylaws, noting that such remedies could not result in the employee's reinstatement with back pay. It also rejected the

⁴⁰*Pennsylvania Dept. of Transportation*, 11 PPER 1103 (1980).

⁴¹*SEPTA*, 11 PPER 1161 (1980).

argument that the grievance procedure was the exclusive procedure for appealing the alleged wrongful discharge. The court concluded that the alleged conspiracy made the case subject to a principle established in 1960 that a member may sue the union for breach of the duty of fair representation and may join the employer as a co-defendant for participating in the union's breach of its obligation. It found that the PLRB did not have exclusive jurisdiction over the complaint because the breach of the duty of fair representation in grievance proceedings was not among the unfair labor practices described in Section 1201 of PERA.

Grievance Arbitration and the Regulation of Public-Employee Life Style: The Image Offense

Since at least 1949, when our current Chief Executive, in a somewhat less influential capacity, championed the right of a small-town school mistress to enjoy off-duty hours at the beach in a form-flattering swimsuit,⁴² the fascination and the anxiety of the public-at-large over the lifestyle of public employees has been constant. In response to public anxiety, public employers have sought to regulate the lifestyle of their workers into patterns acceptable to the conservative core of the community. It may be stated as a general rule, applicable to public and private sector alike, that an employer may regulate lifestyle to a degree, that an employee must comport with whatever standards of personal grooming and conduct his employer may choose to promulgate, provided, however, that some demonstrable nexus exists between the standards imposed and the legitimate managerial concerns of the employer.⁴³

It is sometimes stated in private-sector disputes that one is constitutionally secured from too severe demands made by an employer regarding comportment.⁴⁴ It is sometimes further stated that the approach to be taken in determining the legitimacy of the employer's demands is to balance the employer's needs against the employee's individual freedoms.⁴⁵ It would

⁴²*The Girl from Jones Beach*: Ronald Reagan, Virginia Mayo; Warner Brothers Studios, 1949.

⁴³See generally, *Changing Lifestyles and the Problems of Authority in the Plant*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1972), 235 *et seq.*

⁴⁴*Economy Super Mart*, 54 LA 816, 819 (Elson 1970).

⁴⁵*Pepsi Cola General Bottlers, Inc.*, 55 LA 663 (Volz 1970).

seem that attributing a constitutional dimension to a private-sector dispute over employee lifestyle overstates the case. What is actually being examined in such cases is the enforceability of a code of grooming and conduct under the "just cause" provision of the collective bargaining agreement. In such cases, the issue is not whether the Constitution prohibits implementation of the code, but, simply, whether aspects of the code are so tenuously related to the legitimate managerial concerns of the employer that their violation could not provide just cause for discipline. We are not, or should not, in such cases be scouting for constitutionally protected activity; we should simply be determining whether the employer has an interest in proscribing the activity. There is little justification for conducting a constitutionally based inquiry in a private-sector extracurricular misconduct case.

By contrast, there are, minimally, three constitutional issues which inhere in most extracurricular misconduct cases involving public-sector workers. The issues arise, of course, from the presence of "state action," a factor lacking in the private sector. The issues are: (1) whether the safeguards of procedural due process have been observed in ordering discipline;⁴⁶ (2) whether a fundamental right to privacy has been violated;⁴⁷ and (3) whether an irrational classification has been imposed in violation of the equal protection clause.⁴⁸ It is not uncommon to encounter a spectrum of constitutional concerns in a single off-duty misconduct case. The focus of this discussion will not be on the full spectrum of claims available, but only on the right to privacy and to equal protection in relation to the regulation of one's lifestyle by one's employer.

In considering the situation of public employees, the courts have come to acknowledge such workers as a special category of individuals, a category with a less potent claim against state infringement upon lifestyle than the public-at-large.⁴⁹ The acknowledgement was made explicit most recently in *Fabio v. Philadelphia Civil Service Commission*.⁵⁰ In *Fabio*, the Pennsylvania Supreme Court allowed the discharge of a police officer who had

⁴⁶See, e.g., *Skelly v. State Personnel Board*, 124 Cal.Rptr. 14, 539 P.2d 774 (1975).

⁴⁷*Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D.Pa. 1979); *Warren v. State Personnel Board*, 156 Cal. Rptr. 351, 94 Cal.App.3d 94 (1979).

⁴⁸*Hollenbaugh v. Carnegie Free Library*, 436 F.Supp. 1328, *aff'd* 578 F.2d 1374, *cert. den.* 439 U.S. 1052, 99 S.Ct. 734 (1977).

⁴⁹*Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440 (1976).

⁵⁰414 A.2d 82 (1980).

procured a fellow officer as a sexual partner for his wife, procured that fellow officer's girlfriend as a sexual partner for himself, and, subsequently, becoming dissatisfied, had instigated an affair with his wife's teenage sister. The stated basis for discharge was "conduct unbecoming an officer."

Officer Fabio alleged an impermissible infringement upon his penumbral First Amendment right to privacy. The plurality opinion, while conceding, perhaps erroneously,⁵¹ that constitutionally protected activity was involved, rejected Fabio's claim. The court reasoned:

"In Pennsylvania, individuals have the right to engage in extramarital sexual activities free from governmental interference. . . . However, in this case, we are concerned with the government's regulation of the conduct of its employees. This distinction is of considerable importance since a state has wider latitude and different interests in regulating the activities of its employees than in the behavioral pattern of the citizenry at large."⁵²

Moreover, *Fabio* carried on the precept that the more visible a public employee is to the constituency, the more vulnerable that employee may be to employer attempts to curtail his or her lifestyle. Tribunals have upheld the dismissal of adulterous librarians in a small community,⁵³ of a public prosecutor who frequented a brothel,⁵⁴ and of an allegedly voyeuristic school-teacher⁵⁵—all without regard to the employee's efficiency on the job and with decided emphasis upon the public's impression of the employer.

Such cases involve "image offenses," extracurricular incidents which evidence a personality, demeanor, or attitude which is incompatible with the "image" of the public employer as a trustworthy repository of public esteem and traditional values and which, on that basis, is unacceptable to the employer. Employers have insisted that discipline be sustained for off-duty, off-premises conduct which tends to cloud the public's perception of the particular governmental entity, whether or not such conduct adversely affects the employee's actual ability to perform his or her tasks competently. In Pennsylvania it has been stated that no ascertainable link between an image-damaging

⁵¹*Ibid.*, Roberts, J., concurring; *Hollenbaugh*, *supra* note 48, at 1333-1334.

⁵²*Fabio*, *supra* note 50, at 89.

⁵³*Hollenbaugh*, *supra* note 48.

⁵⁴*Moore v. Strickling*, 46 W.Va. 515, 33 S.E. 274 (1899).

⁵⁵*Raymond v. Western Wayne School District*, Teacher Tenure Appeal No. 38-78 (Pa. 1980).

offense and a public employee's ability to perform on the job need be established to support disciplinary action.⁵⁶ There might be severe employment consequences of essentially private behavior ranging from transsexuality⁵⁷ to mildly aberrant Saturday-night pranks⁵⁸ as tribunals become receptive to a public agency's claims that its preferred image cannot endure the continued employment of a worker straying from the straight and narrow during off-hours.⁵⁹

The relation of constitutionally oriented litigation over public-employee lifestyle to public-sector arbitration seems obvious. If the courts are prepared to acknowledge the special vulnerability of public employees to regulation of lifestyle and an interest by public employers in their own image that is so compelling that it overrides individual constitutional privileges, then it seems a public employer's authority to promulgate and enforce far-reaching rules of conduct under the management rights and just cause provisions of a collective bargaining agreement should be acknowledged in arbitration proceedings.

There is little problem with acknowledging the right to proscribe outside activity which threatens some tangible, immediate impact upon a public agency's operations.⁶⁰ The concept of an image offense, however, embraces conduct with no readily discernible effect upon operations. In *Lone Star Gas Co.*,⁶¹ for instance, any real damage to the employer utility company seemed highly speculative, yet the arbitrator upheld the grievant's discharge, notwithstanding a satisfactory work record, because the grievant's arrest and conviction for incest contrasted with the "good public image" of the employer. *Lone Star* parallels remarkably the rationale expressed in court considerations of image-damaging conduct. The concern is not only for the smooth

⁵⁶*Id.*, citing *Penn. Delco School District v. Urso*, 33 Pa. Cmwlth. 501, 382 A.2d 162 (1978).

⁵⁷*Warren*, *supra* note 47; *DeTore v. Local 245, Jersey City Public Employees*, 3 Pa. L.J. 9.

⁵⁸In an unpublished Pennsylvania arbitration case, the commonwealth sought to discharge a psychiatric aide on the premise that, *inter alia*, he had, while off duty, "mooned" police officers.

⁵⁹It is not a universally occurring phenomenon that public employees are found to be properly disciplined for extracurricular behavior which damages the staid image of an employer but has no effect upon operations. The requirement of an appreciable effect of off-duty conduct on on-duty performance, apparently abandoned to a substantial degree by some courts and tribunals considering image offenses, remains in force in others. See, e.g., *Nightingale v. State Personnel Board*, 102 Cal.Rptr. 758, 7 Cal.3d 507 (1972); *Shuman*, *supra* note 47.

⁶⁰See, e.g., *Baltimore Transit Line*, 47 LA 62 (Duff 1966), wherein community outrage at the grievant's open participation in the Ku Klux Klan was so extreme that violence, strikes, and boycotts against the public employer were imminent.

⁶¹56 LA 1221, 1223 (Johannes 1971).

running of day-to-day operations, but also for the preservation, for whatever intrinsic value it may have, of an unsullied reputation within the community. The concept of an image offense asks that an arbitrator accept reputation per se, not merely reputation as it affects morale or productivity, as a legitimate managerial interest of a public employer—an interest which may be protected by disciplining employees for off-duty, off-premises conduct which does not conform with a “good public image.”

The special circumstance which permits a public, but not a private, employer to encroach so extensively upon the outside activity of its workers is that the public employer, as an extension of government, acts, by definition, as a spokesman and representative of the public-at-large. A school board cannot, for instance, retain an intemperate, licentious, or morally unrestrained school administrator without granting, or appearing to grant, imprimatur to his lifestyle on behalf of the community. A public employer is charged not only with the obligation of ensuring quality service but also with the obligation of accurately reflecting community morals; it is within the legitimate interest of a public employer to avoid giving the appearance of tacit approval to communally disapproved lifestyles.⁶²

Perhaps the most compelling aspect of an image-offense dispute is the compassion that it invites for the grievant/plaintiff. Although Officer Fabio may have obviously overstepped the bounds of propriety in establishing his adulterous menage and a California Highway Patrol officer may have obviously risked disciplinary action when he succumbed to the solicitation of homosexual prostitutes,⁶³ there are other employees whose conduct less obviously offends community standards, who are caught in a swirl of altering lifestyles, and who, understandably, have no firm grasp of approved behavior. It is ironic that students may assert a stronger equal-protection right to lifestyle than do “role model” public employees.⁶⁴ The behavior of public employees is strictly policed in order to foster an approved public image, but in an environment where private citizens freely indulge their preferences and do so with constitutional

⁶²Hollenbaugh, *supra* note 48; Warren, *supra* note 47.

⁶³Warren, *supra* note 47.

⁶⁴Stull v. School Board of Western Beaver Junior High School, 459 F.2d 339 (1972); Hollenbaugh, *supra* note 48.

sanction, who can cite with clarity what is approved and what is expected from public employees?

Once one accepts the concept of an image offense, the more difficult question is whether the public employer is seeking to preserve an outmoded image. The public employer may have a legitimate managerial interest in presenting a good public image and protecting its reputation per se, but the image and reputation must be that expected by the community, not that which is more puritanical or reminiscent of more restrained times.

Spielberg-Collyer in the States

We start with a brief review of the *Spielberg-Collyer* doctrine as developed in the private sector and then show how it is being applied by the states in the public sector.

The National Labor Relations Board decision in *Spielberg Manufacturing Co.*⁶⁵ involved a complaint of an unfair labor practice by an employer who had failed to reinstate strikers following alleged picket-line misconduct. The issue had been arbitrated, the arbitrator holding that the employer was not obligated to reinstate the employees. The NLRB held that, while it is not bound as a matter of law by an arbitrator's award, it will defer to an arbitrator's award if specified conditions have been met.

In *Dubo Manufacturing Corp.*,⁶⁶ the NLRB withheld action on a complaint because a U.S. district court, after the issuance of the complaint, had issued an order directing arbitration.

In 1971, in *Collyer Insulated Wire Co.*,⁶⁷ the NLRB, in a 3-2 decision, extended the deferral doctrine to include deferral to contract arbitration prior to hearing an unfair labor practice case on the merits. The NLRB retained jurisdiction to determine whether the standards enunciated in its opinion were met by the arbitrator.

In *Collyer*, the respondent was charged with violation of Sections 8(a)(1) and (5) of the National Labor Relations Act. In the other cases, the Board included Sections 8(a)(3) and 8(a)(4) in its deferral doctrine.

Three cases decided by the NLRB in 1977 generally limited

⁶⁵112 NLRB 1080, 36 LRRM 1152 (1955).

⁶⁶142 NLRB 431, 53 LRRM 1070 (1963).

⁶⁷192 NLRB 837, 77 LRRM 1931 (1971).

the scope of deferral to issues involving the rights and obligations of the parties under a collective bargaining agreement as distinguished from cases involving the rights of an individual employee.⁶⁸

Later, in a *Spielberg* case, the NLRB deferred to arbitration where an 8(a)(3) violation, as well as an 8(a)(5) violation, had been charged⁶⁹ and where an employer was charged with violating Section 8(a)(1).⁷⁰

The Board has deferred in *Collyer* cases where (1) the unfair labor practice dispute is cognizable under the parties' collective bargaining agreement and the issue was presented to and considered by the arbitral tribunal; (2) the arbitral proceedings were fair and regular; (3) all parties to the arbitral proceedings agreed to be bound thereby; and (4) the decision of the arbitral tribunal was not repugnant to the purposes and policies of the NLRA.⁷¹

Changes in the NLRB's approach are due in large part to changes in Board membership.

Several state agencies which have jurisdiction in the public sector have applied the *Spielberg* and *Collyer* doctrines with some variations. The discussion that follows is a report of various state agencies. The committee has summarized briefly the results of our inquiry and an examination of state agency decisions.⁷² We start with a state supreme court decision of considerable significance.

Michigan. In 1980, the Michigan Supreme Court, in a 4-3 decision, held that the Michigan Employment Relations Commission (MERC) does not have the power to defer unfair labor practice charges until an arbitration proceeding under the par-

⁶⁸*Filmation Associates, Inc.*, 227 NLRB 237, 94 LRRM 1470 (1977); *Roy Robinson, Inc.*, d/b/a *Roy Robinson Chevrolet*, 228 NLRB 828, 94 LRRM 1474 (1977); *General American Transportation Corp.*, 228 NLRB 808, 94 LRRM 1483 (1977).

⁶⁹*Kansas City Star Co.*, 236 NLRB 119, 98 LRRM 1320 (1978).

⁷⁰*United States Postal Service*, 241 NLRB 192, 101 LRRM 1074 (1979).

⁷¹A report on *State Labor Board Deferral to Arbitration* is included in the Selected Proceedings of the 25th Conference of the Association of Labor Relations Agencies (July 22-27, 1979), Madison, Wisconsin, published by Labor Relations Press. The paper was presented by Joan G. Dolan, member of the Massachusetts Labor Relations Commission, following the receipt of questionnaires sent to the states which are ALRA members. Commissioner Dolan's paper is well worth reading by persons interested in *Spielberg/Collyer* as applied by the states.

⁷²It is regrettable that space limitations necessitated deleting much of Mr. Howlett's excellent contribution. Thus, in the interest of brevity, not all cases have been cited and several states for which he provided a more detailed discussion have been relegated to a summary at the end of this report.

ties' collective bargaining agreement has been completed.⁷³ The case ended the "Collyer" policy adopted by MERC one year before the NLRB did so.⁷⁴

The MERC deferred in *City of Flint* and later cases under the following conditions: (1) there is a stable bargaining relationship between the parties; (2) the respondent is willing to exhaust the grievance procedure, which culminates in binding arbitration; and (3) the underlying dispute centers on the interpretation or application of the contract.

Ten years after *City of Flint*, the Michigan Supreme Court held that the Public Employment Relations Act (PERA) does not authorize MERC to defer to arbitration in a *Collyer* situation. The four-member majority distinguished the NLRA and the PERA on the ground that:

1. The Michigan legislature did not intend that MERC would have authority to defer to private arbitration, because the PERA requires that MERC comply with the State Administrative Procedures Act; there is no such requirement in a proceeding before an arbitrator.

2. The Michigan PERA does not include a policy statement of preferences for the private resolution of contractual labor disputes through private arbitration.⁷⁵

3. The PERA and related state statutes manifest "a clear legislative intent that, once a party to a public sector employment collective bargaining relationship invokes MERC's jurisdiction under PERA, that party's complaint should be resolved by MERC in accordance with the statutory processes."⁷⁶

4. The PERA prohibits public employee strikes, in contrast to the private sector where a union is normally willing to give up the legal right to strike in exchange for an employer's agreement to acceptable methods of grievance resolution.⁷⁷

California. California has adopted *Spielberg* and *Collyer* under

⁷³*Detroit Fire Fighters Assn. v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 105 LRRM 3386 (1980).

⁷⁴*City of Flint*, 1970 MERC Lab. Op. 367.

⁷⁵The majority opinion noted that the Michigan Labor Mediation Act, applicable to the private sector, does, like the NLRA, include as one purpose "the . . . arbitration of labor disputes."

⁷⁶*Detroit Fire Fighters*, *supra* note 73, at 685.

⁷⁷The majority opinion does not address itself to *Spielberg*, although the language appears to be broad enough to cover it. However, the dissenting opinion of Mr. Justice Williams states that the court does not entertain "the statutory or constitutional efficacy of post-arbitration award, or *Spielberg*-type deferral." *Id.*, at 686.

the statutes applicable to public-school employees and state employees.

The State Employer-Employee Relations Act provides that the California Public Employment Relations Board (PERB) shall not issue a complaint on a charge of an unfair labor practice "against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it . . . covers the matter at issue, has been exhausted, either by settlement or binding arbitration." If appeal to the contract grievance procedure would be futile, exhaustion is not necessary. The PERB has power to review the settlement or arbitration award to determine whether it is repugnant to the purposes of the act. If it finds so, a complaint shall be issued.⁷⁸

The Higher Education Employer-Employee Relations Act does not contain comparable language, but provides that the PERB shall not issue a complaint on any charge based on alleged violation of an agreement that would not also constitute an unfair labor practice under the act.⁷⁹

The PERB has held an arbitrator's award deficient and repugnant to the public school statute.⁸⁰ A hearing officer held that an employer seeking deferral must waive all procedural defenses.⁸¹

Massachusetts. Massachusetts has adopted *Spielberg* and *Collyer*. The Massachusetts Labor Relations Commission (MLRC) first deferred to arbitration in a *Collyer* situation in *Cohasset School Committee and Cohasset Teachers' Association*.⁸²

A union filed both an unfair labor practice charge and sought arbitration on the transfer of employees from one division to another. The arbitrator's award was issued before the completion of the MLRC hearing. The MLRC dismissed the unfair labor practice complaint, "[s]ince we find no violation of procedural safeguards and do not find the award to be repugnant to the purposes of the Law or the policies of the Commission, we decline to reconsider the matters herein and therefore adopt the arbitrator's award."⁸³

The MLRC deferred where the issue was whether an administrative assistant position in the city's police department was

⁷⁸Sections 3514.5, 3541.5, California Statutes.

⁷⁹Section 3563.2

⁸⁰*Drycreek Joint Elementary School District*, 2 NPER 05-11141 (1980).

⁸¹*Oakland Unified School District*, 2 NPER 05-11143 (1980).

⁸²MUP 419 (1973).

⁸³*City of Boston and Boston Police Patrolmen's Assn., Inc.*, 5 MLC 1155 (1978).

includable in a unit comprised of all nonprofessional employees of the city. The MLRC held that the arbitrator would, in all probability, resolve the status of the disputed position, so that the current litigation before the MLRC would serve no public service.⁸⁴ Patently, this case could have been decided as a unit clarification issue, if the MLRC had such a policy.

In a *Spielberg* case, the MLRC refused to decide an issue of transfer of work from one classification to another.⁸⁵ An MLRC hearing officer held that the MLRC will not defer where (1) neither party filed for arbitration, (2) arbitration proceedings would not resolve all issues, and (3) the issue is not a bona fide contract dispute.⁸⁶

Commissioner Joan G. Dolan of the Massachusetts Labor Relations Commission advises that the commissioners are “debating the issue of whether or not we should defer (a)(1) or (a)(3) cases,” and that a decision on an (a)(1) case will be issued soon. The MLRC has “been firm in deferring (a)(5) cases.”

New York. New York State has adopted *Spielberg* and *Collyer*. The New York Public Employment Relations Board (PERB) adopted *Spielberg* in *New York City Transit Authority*.⁸⁷ *Collyer* was also adopted in 1971.⁸⁸

In 1978 the Taylor Law was amended to provide:

“[T]he Board 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.”

Thus, where a charge alleges a unilateral change by an employer and the employer claims a contractual basis for its action, the board dismisses the charge on jurisdictional grounds instead of deferring.⁸⁹

Wisconsin. Wisconsin has adopted *Spielberg* (and *Dubo*), but not *Collyer*.

The Wisconsin Employment Relations statutes, applicable to both the public and private sectors, provide that the violation of a collective bargaining agreement is an unfair labor practice.

⁸⁴*Boston Police Department*, 2 NPER 22-11132 (1980).

⁸⁵*Winchester School Committee and Winchester School Secretaries Assn.*, 5 MLC 1047 (1979).

⁸⁶*Burlington School Committee*, 2 NPER 22-11046 (1980).

⁸⁷4 PERB 3031 (1971).

⁸⁸*Board of Education of the City of Buffalo*, 4 PERB 3090 (1971).

⁸⁹*City of Oneida*, 1 NPER 33-14615 (1979).

The Wisconsin Employment Relations Commission (WERC) enforces the provisions of a collective bargaining agreement which provides that grievances may be submitted to arbitration. In such cases, the WERC refuses to assert its jurisdiction. It does not consider this to be a "deferral" to arbitration, but gives effect to the collective bargaining contract; that is, contracts are enforceable through arbitration and not through court or administrative proceedings.

The first such WERC action involved the private-sector statute.⁹⁰ In language that sounds like *Collyer*, the WERC directed the employer to cease and desist from refusing to submit a dispute to arbitration and to comply with the arbitration provisions of the collective bargaining contract. However, action was based on the commission's power to require compliance with a contract, not on the principle of deferral.

Thus, the WERC has not adopted the *Collyer* policy of requiring a charging party to arbitrate, except in the context of breach of a collective bargaining contract. Query: Is this not what all agencies that apply *Collyer* do? WERC members are reluctant to adopt *Collyer* because:

"1. The Commission does not investigate or prosecute unfair labor practices, thus making the *Collyer* procedure difficult to administer and of limited administrative economy;

"2. The Commission has generally pursued a policy of allowing charging parties to assert statutory rights notwithstanding the mere existence of possible parallel contractual rights."⁹¹

The fact that it does not investigate or prosecute unfair labor practices did not deter the Michigan Employment Relations Commission from applying the *Collyer* doctrine.

It should be noted that the WERC provides arbitration by staff members for employers and unions who request it. The WERC holds:

"There are sound labor law principles to support [its] deferral policies . . . which are designed to discourage a charging party from proceeding simultaneously in two forums and thus 'taking two bites from the apple' and to insure that agreements to arbitrate contract interpretation questions are enforced."⁹²

⁹⁰*Int'l Union of Operating Engineers Local No. 311 v. Milwaukee Lodge No. 46 of the Benevolent and Protective Order of Elks of the United States of America*, Case III, No. 10889, Ce-1096, Decision No. 7753 (1966).

⁹¹Letter dated June 30, 1980 from WERC general counsel in reply to inquiry from MERC chairman, dated June 18, 1980.

⁹²*Milwaukee District Council 48 AFSCME v. Milwaukee Board of School Directors*, Decision No. 10663-A, Case XXXVI, No. 15096 MP-100 (1972).

Because of the foregoing, “[t]he possibility of parallel proceedings in two separate forums on the same facts is particularly repugnant to the statutory purpose . . . of the Municipal Employment Relations Act providing peaceful settlement through the processes of collective bargaining agreements.”⁹³

*Milwaukee Board of School Directors*⁹⁴ is a *Dubo* case. The WERC withheld action pending arbitration. The arbitrator found that the action of a principal (the individual charged) constituted coercion and discrimination within the meaning of the provisions of the contract, that the grievance had been resolved to the satisfaction of both parties, and that “clean hands” did not exist on either side of the case. He issued an award dismissing the grievance. The union urged before the WERC that the arbitrator had erred in his award by taking equity considerations into account. The WERC noted that it does not apply a “clean hands” doctrine, but found that further proceedings “would be redundant.” The WERC noted that the arbitrator made it clear from his opinion that the principal’s conduct was improper, and his discussion provides guidelines for future conduct.

Other States. Based on information from those states which responded to the committee’s inquiry or those for which state agency cases were found, the following summarizes the positions in the states not discussed above:

These states have adopted both the *Collyer* and *Spielberg* doctrines either under statutory, judicial, or administrative auspices: Connecticut, Florida, Maine, New Jersey, Oregon, and Pennsylvania. The New York City Office of Collective Bargaining and the New York Port Authority also have adopted both doctrines.

The following states have adopted *Collyer*, all or in part, but have not adopted or, in some instances, have not been confronted with *Spielberg*: Delaware, Hawaii, Indiana, Vermont, and Washington.

Nebraska has adopted neither *Spielberg* nor *Collyer*.

Acknowledgements

The Chairperson deeply appreciates the scholarly contributions of the following committee members: Reginald Alleyne, on the constitutionality of SEERA; Arvid Anderson, on develop-

⁹³*Id.*

⁹⁴*Id.*

ments in New York City and State; Leon B. Applewhaite, on the Federal Labor Relations Authority and new federal legislation; Frederick H. Bullen, on developments in the U.S.; Irwin J. Dean, Jr., assisted by Richard Dissen, on arbitration and employee lifestyle; Milton Edelman, assisted by Elaine Edelman, on interest arbitration; Philip Feldblum, on developments in New York State; Morris A. Horowitz, on police and firefighters in Massachusetts; Robert G. Howlett, on *Spielberg/Collyer* in the States; Myron Joseph, on developments in Pennsylvania and West Virginia; Thomas N. Rinaldo, assisted by Donald P. Goodman, on dispute resolution in Canada; Josef P. Sirefman, on the Federal Service Impasses Panel; Henry L. Sisk, on developments in Texas; Howard W. Solomon, on the Federal Services Impasses Panel; Herman Torosian, on developments in Wisconsin; Helen M. Witt, on developments in Delaware, Maryland, and Virginia.

The Chairperson also wishes to thank Barbra L. Davis, Research Assistant, Institute of Industrial Relations, UCLA, for her assistance in the preparation of this report.

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