III. THE U.S. EXPERIENCE

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The selection of a New Yorker to speak on the topic of "The Outer Limits of Interest Arbitration" is quite logical because I recognize that many persons consider New York as far out as one can get in public-sector labor relations. It will be my task to describe some of the pioneering features of the New York City Collective Bargaining Law to illustrate some of the limits of interest arbitration. Before doing so, I want to express my appreciation to the Program Committee for affording me the privilege of sharing this platform with our distinguished Canadian and Australian colleagues because those countries have been in the forefront of the development of interest arbitration and had binding arbitration long before its use became widespread in the United States.

I also want to take a few moments to set forth a national basis for these remarks. I recognize that there are important and innovative private-sector examples of interest arbitration, such as the Experimental Negotiating Agreement in the steel industry and certain transportation contracts. This paper will be concerned with the public sector, however. The rapid growth of public-sector unions in the 1960s was followed in the 1970s by the passage of binding interest arbitration laws in order to resolve disputes over new contract terms. With the strike almost universally forbidden as a means of impasse resolution, an alternate method was needed to resolve public-sector disputes and to stimulate the bargaining process.

As Samuel Johnson once declared, there is nothing as likely to focus a man's attention as the certainty that he is to be hanged in the morning. Similarly, the decision to strike or to take a strike is a powerful stimulus to the bargaining process. Experience is demonstrating that the decision to submit an issue to arbitration also stimulates decision-making and collective bargaining by government employers and their employees' representatives.

The enactment of laws banning strikes and providing for interest arbitration as an alternative means of dispute settlement cannot provide an absolute guarantee against strikes in a free

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society. However, the record to date of the near absence of strikes where interest arbitration laws have been enacted requires a closer look, particularly by those who believe it is not possible to have collective bargaining without the right to strike. I say the near absence of strikes because the record has not been perfect. Last month a two-day strike of firefighters and police superior officers occurred in the city of Yonkers, New York.[1] To my knowledge, this was the first serious strike since the passage of New York State's interest arbitration law some seven years ago.[2] Happily, the matter was resolved with an agreement to go to interest arbitration.

Twenty-two jurisdictions have passed statutes providing for some form of binding interest arbitration to resolve disputes over new contract terms.[3] For the most part, such statutes apply to police and firefighters or to other public safety employees, such as prison guards, or to employees of mental hospitals. However, in some states, for example, Connecticut, Iowa, and Wisconsin, and in the City of New York, the statutes apply to most employees of local government and, in Iowa, also to employees of the state.[4]

Arbitration statutes provide a variety of procedures. Some of these are:

- Conventional arbitration of all unsettled claims.
- Selection of the last offer of the employer or of the union on an issue-by-issue basis.
- Selection of the last offer of the employer or of the union, or the fact-finder's report as a single package.
- Selection of the last offer of the employer or of the union, or the fact-finder's report on an issue-by-issue basis.
- Separating the dispute into economic and noneconomic issues and employing one of the selection procedures outlined above.[5]

Some interest arbitration statutes provide for arm's length

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[1]909 *Government Employee Relations Report* 34 (April 20, 1981).

[2]Ch. 724, §3, [1974] N.Y. Laws 1883 and Ch. 725, §3, [1974] N.Y. Laws 1887 (codified at N.Y. Civ. Serv. Law §209(4) (McKinney Supp. 1977)).

[3]The 22 jurisdictions which currently have interest arbitration statutes are Alaska, Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, New York City, and the City of Eugene, Ore.

[4]Conn. Gen. Stat. Ann. §7-472-473 (1979); Iowa Code Ann. §20.22 (1978); Wisc. Stat. Ann. §111.77 (Supp. 1979); N.Y. Admin. Code, Ch. 54, §1173-7.0(c) (2) (1980).

[5]For an analysis of interest arbitration procedures used in the various jurisdictions, *see* Public Employment Relations Services Information Bulletin, Vol. 1, No. 1 (February-March 1978).

judicial proceedings, while others are designed to encourage direct negotiations and settlement by the parties, aided by mediation-arbitration (med-arb) procedures. Final-offer procedures are growing in popularity because they give the parties a much greater role in the arbitration process. Experience is showing that final offer in particular encourages bargained settlements.

Most interest arbitration statutes provide detailed procedures governing the scope and conduct of the arbitration, as well as comprehensive criteria to guide the arbitrators. Most arbitration statutes also provide for limited judicial review and, where that has not been done, the courts have implied that such review is authorized.

Legal Challenges

Interest arbitration statutes have been challenged on the ground that arbitration involves an illegal delegation of legislative authority to a nonelected, nonaccountable arbitrator. Other challenges charge that some arbitration statutes lack adequate guiding criteria for the arbitrator or conflict with other statutes. Civil Service and Cap Laws—the latter are laws which limit the taxing or budgetary authority of local governments—are examples of state laws with which arbitration statutes may conflict.

In other litigation, the issues of separation of powers, due process, equal protection of the laws, home rule, and the power to tax have been considered.[6] Most state courts have held that interest arbitration does not constitute an illegal delegation of legislative authority provided there are in the statute carefully defined limits and criteria to guide the arbitration process and provisions for due process and judicial review.[7]

While legal challenges will continue, it seems safe to conclude at this point that the biggest hurdle for interest arbitration is not in the constitutional challenges still pending before some of the

[6]For a comprehensive and thoroughly documented discussion of legal challenges to interest arbitration statutes, see Charles J. Morris, *Interest Arbitration: Panacea's Art or Pandora's Box?*, paper presented at a conference sponsored by the Continuing Legal Education Society of British Columbia, at Vancouver, B.C. (April 18, 1980), available from the author: Professor of Law, Southern Methodist University School of Law, Dallas, Tex. 75275.

[7]*See, e.g., City of Richfield* v. *Local 1215, Int'l Ass'n of Fire Fighters,* 276 N.W.2d 42 (Minn. 1979); *Town of Arlington* v. *Board of Concil. and Arbit.,* 370 Mass. 769, 352 N.E.2d 914 (1976); *City of Amsterdam* v. *Helsby,* 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975).

state courts. The real test will be whether interest arbitration procedures work to the satisfaction of public employers and employees and reflect appropriate concern for the public interest. If they do, then the process will survive. If arbitration, in practice, fails to provide a reasonable alternative to the strike, then the process will not survive. But that will be a political rather than a legal decision.

The New York City Experience

The extensive experience of Iowa, Michigan, New Jersey, New York State, Pennsylvania, and Wisconsin with interest arbitration could serve to illustrate the limits of binding arbitration. However, this paper will focus on the New York City experience.

New York City has had binding interest arbitration for nearly a decade.[8] The law applies to about 200,000 city employees who are represented by some 50 different unions, but it does not apply to the city's teachers and transit workers. The latter are covered instead by the New York State Taylor Law, and under that law the interest disputes of only police and firefighters must be submitted to final and binding arbitration. The Taylor Law permits local governments to enact local public employment relations "provisions and procedures" provided they are "substantially equivalent" to the Taylor Law.[9] In the exercise of this local option, New York City enacted the Collective Bargaining Law (NYCCBL), which provides procedures for the resolution of bargaining impasses, including mediation and the issuance of a final and binding report by an impasse panel.[10] The law is administered by the tripartite Board of Collective Bargaining, a body composed of three neutral members, two labor members and two city members.[11] The two city members serve at the pleasure of the mayor and the two labor members are chosen by the Municipal Labor Committee (MLC), a voluntary association of city unions. The three neutral members are chosen by the unanimous vote of the city and labor members for staggered three-year terms.[12] The city and the MLC equally share the cost of the fees paid to two of the neutral members as well as the

[8]N.Y.C. Local Law No. 2, [1972] N.Y. Local Laws 158–160.
[9]N.Y. Civ. Serv. Law §212 (McKinney 1973).
[10]New York, N.Y. Admin. Code, Ch. 54, §1173-1.0 to §1173-13.0 (1976 & Supp. 1980–81).
[11]New York, N.Y. Charter, Ch. 54, §1171 (1977).
[12]*Id.*

salary of the third, who is the chairman of the Board and full-time director of the Office of Collective Bargaining.[13]

As originally enacted in 1967, the NYCCBL contained provisions for fact-finding which were advisory only.[14] Nonetheless, the City of New York maintained a policy of voluntary compliance with impasse panel recommendations. In 1969, the Taylor Law was amended to require the mayor of the City of New York to submit a plan dealing with the need for a specified final step in the impasse procedures.[15]

In order to develop proposed finality procedures for submission to the state legislature, a series of meetings was conducted among representatives of the City of New York, the Municipal Labor Committee, and the Office of Collective Bargaining. The reluctance of the MLC and of the mayor's office to conform New York City procedures to the Taylor Law as it then stood, by requiring legislative action in bargaining impasses, was strongly concurred in by the city council leadership. The city legislators did not wish to play the part of referee in labor disputes between the mayor and the public employee unions. The council was also reluctant to become involved in disputes between unions where, for example, it would have to determine which union should get the most: police, fire, or sanitation. So long as the unions were denied the right to strike, they preferred a finality method where the ultimate decision would be made by third-party neutrals. Therefore, a system of finality with a form of compulsory interest arbitration was agreed upon and enacted by the New York City Council in 1972.[16]

An impasse in negotiations is deemed to exist when the Board of Collective Bargaining, upon the director's recommendation, "determines that collective bargaining negotiations . . . have been exhausted, and that the conditions are appropriate for the creation of an impasse panel. . . ."[17] Once the impasse determination is made, a panel is chosen by submitting to the parties a list of seven persons drawn from the roster of neutrals maintained by the Office of Collective Bargaining.[18] The parties indi-

[13]*Id.*, §§1170–1171.
[14]*See* N.Y.C., Local Law No. 53, 1 [1967] N.Y. Local Laws 449–450.
[15]Ch. 24, §11, [1969] N.Y. Local Laws 79–80.
[16]N.Y.C. Local Law No. 2, 1 [1972] N.Y. Local Laws 158–160 (codified at New York, N.Y. Admin. Code, Ch. 54, §1173-5.0(a)(8), §1173-7.0(c)(3)(e), §1173-7.0(c)(4), and §1173-7.0(f) (1976)).
[17]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(c)(2) (1976).
[18]*Id.*, §1173-7.0(c)(1)–(2).

cate their preferences in numerical order and the director appoints those persons who are the most mutually acceptable choices.[19] Impasse panels usually consist of one person, but three persons may serve by agreement of the parties or at the determination of the director absent such agreement.[20] Inclusion on the roster of neutrals maintained by the Board of Collective Bargaining is by unanimous vote of the labor and city members of the Board.[21] The fees and expenses of mediation and impasse panels are shared by the public employer and public employee organization which are parties to the dispute,[22] as is the cost of the mandatory stenographic record made in impasse panel hearings.[23]

The NYCCBL grants impasse panels the power to mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary to resolve the impasse. If an impasse panel is unable to achieve voluntary agreement of the parties, settling an impasse within a reasonable period of time as determined by the director, it is required, within such period of time as the director prescribes, to render a written report containing findings of fact, conclusions, and recommendations for terms of settlement.[24]

Experience has shown that even if the parties do not reach formal agreement through the panel's mediatory efforts, and a report with recommendations is issued, very often the report reflects the parties' advice to the panel as to certain informal agreements existing between them.[25]

The NYCCBL specifies the following criteria which an impasse panel is to consider in making its recommendations for the terms of settlement:

> "(1) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in

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[19]*Id.*, §1173-7.0(c)(2).

[20]*Id.*, §1173-7.0(e).

[21]The NYCCBL requires only a majority vote, including one city and one labor member (§1173-7.0(c)(1)). However, in practice, inclusion on the roster has been based on unanimous approval.

[22]New York City Office of Collective Bargaining, Revised Consolidated Rules §9.3 (1972).

[23]*Id.*, §5.10.

[24]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(c)(3)(a) (1976).

[25]*See* Anderson, *The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger,* 1973 Wis. L.Rev. 986, 1101. *See also* Doherty, *On Factfinding: A One-Eyed Man Lost Among the Eagles,* 5 Pub. Personnel Mgt. 363, 366 (1976); Grodin, *Political Aspects of Public Sector Interest Arbitration,* 1 Indus. Rel. L.J. 1, 14 (1976).

the impasse proceedings with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;
(2) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime, and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
(3) changes in the average consumer prices for goods and services, commonly known as the cost of living;
(4) the interest and welfare of the public;
(5) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits and other working conditions in collective bargaining or in impasse proceedings."[26]

Additionally, since 1978, when the state legislature amended the Financial Emergency Act of 1975 (FEA), impasse panels in New York City have been required to accord substantial weight to the City's financial ability to pay when considering demands for increases in wages or fringe benefits.[27] Financial ability to pay is defined by the Act as "the financial ability of the city . . . to pay the cost of any increase in wages or fringe benefits without requiring an increase in the level of city taxes existing at the time of the commencement of [the impasse proceeding]."[28] Even before the enactment of the above-described legislation, the Office of Collective Bargaining had consistently interpreted the statutory criterion "interest and welfare of the public" to include consideration of the employer's financial ability to pay.[29]

The NYCCBL does not specify a time within which the impasse panel must submit its report and recommendations; this decision is left to the director. The statute does provide that the report shall be made public within seven days of its submission to the parties, but this time may be extended up to 30 days upon consent of the parties and with the approval of the director.[30] The latter provision has the purpose of allowing the parties to

[26]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(c)(3)(b) (1976).
[27]Ch. 201 [1978] N.Y. Laws, §23.3(a).
[28]*Id.*, §23.3(h).
[29]For example, in *Community Action for Legal Servs. Inc.* v. *Legal Servs. Staff Ass'n,* Case No. I-110-74, slip op. at 4–5 (Nov. 13, 1974), the single-member impasse panel noted that: ". . . I am bound by the requirements of the City Labor Law [section 1173-7.0(c)(3)(b)] which requires that I take into account the interest and welfare of the public. This has come to mean the ability of the City to pay and the extent to which the services rendered may have to be curtailed if funds are unavailable."
[30]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(c)(3)(d) (1976).

conclude a negotiated agreement prior to publication. If a contract is negotiated during this time, the report will not be released except upon consent of the parties. If a contract is not being negotiated during this period, the parties must, within ten days of receipt of the panel's recommendation, notify each other and the director of their acceptance or rejection.[31] If no notification is received, the recommendations are deemed accepted. Accepted recommendations become binding on both parties unless implementation of any provision thereof requires the enactment of a law.[32] In such a case, the provision does not become binding until the appropriate legislative body enacts such a law. This limitation was enacted to deal with both the political and constitutional questions of delegation of legislative authority. For example, if sufficient funds are not in the budget, the panel report cannot be implemented until the funds are made available.

A party who rejects, in whole or in part, the panel's recommendations can appeal to the Board of Collective Bargaining for review.[33] A notice of appeal must be filed with the Board and served on the other party within ten days of the rejection.[34] The Board may also review a panel's recommendations on its own initiative.[35] While appeals are normally decided upon the pleadings, the parties may present oral argument and/or submit briefs to the Board.[36] Review is based on the record and evidence before the impasse panel[37] and is guided by the statutory criteria set forth above, including a requirement, pursuant to the 1978 FEA amendments, that before proceeding to other issues the Board must make a threshold determination as to whether a recommendation for an increase in wages or fringe benefits is within the City's financial ability to pay.[38] If the determination is negative, the matter is immediately remanded to the panel for further consideration. If the threshold determination is in the affirmative, the Board may proceed to review the panel's recommendation with respect to other issues.

The Board has adopted a standard of review for impasse

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[31] *Id.*, §1173-7.0(c)(3)(e).
[32] *Id.*
[33] *Id.*, §1173-7.0(c)(4)(a).
[34] *Id.*
[35] *Id.*
[36] *Id.*, §1173-7.0(c)(4)(b).
[37] *Id.*
[38] Ch. 201 [1978] N.Y. Laws, §23.3(b).

panel determinations comparable to the test applied by the courts in reviewing administrative agency decisions under Article 78 of the New York Civil Practice Law and Rules.[39] This entails examining the record to determine whether the parties were given a fair hearing and whether there is substantial support for the result reached by the panel. The Board will not ordinarily substitute its judgment for that of the impasse panel.

The Board may, by majority vote, affirm or modify the recommendations of the impasse panel, in whole or in part, or, if it finds that the rights of a party have been prejudiced, it may set aside the recommendations.[40] If the Board fails to issue a final determination within the time periods prescribed in the statute, the recommendations of the impasse panel are considered to have been adopted by the Board.[41] A final determination of the Board is binding upon the parties and constitutes an award within the meaning of Article 75 of the Civil Practice Law and Rules governing arbitration in New York State.[42] The binding effect of a Board determination, like the decision of an impasse panel, is qualified by the proviso that it is subject to legislative action when its implementation requires the enactment or amendment of a law.[43]

Board decisions may be appealed to the state courts although there have been only two such appeals to date, both unsuccessful.[44] A threshold determination by the Board that an impasse panel's recommendations concerning increases in wages or fringe benefits are or are not within the City's financial ability to pay is subject to appeal in a special proceeding in the appellate division, New York State's intermediate appellate court.[45] Such a proceeding is given preference over all other cases except those relating to the election law. The standard of review differs from the standard applied to other aspects of Board decisions. It is a de novo review of the entire record solely for the purpose of determining whether an award of an increase in wages or fringe benefits was within the City's financial ability to pay.[46] All

[39]N.Y. Civ. Prac. Laws §7803 (McKinney 1981).
[40]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(c)(4)(c) (1976).
[41]*Id.*, §1173-7.0(c)(4)(d).
[42]*Id.*, §1173-7.0(c)(4)(f).
[43]*Id.*, §1173-7.0(c)(4)(e).
[44]*Higgins* v. *Anderson, et al.*, 97 LRRM 2481 (N.Y. Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1, 1977); *City of New York* v. *Patrolmen's Benevolent Ass'n,* unpublished opinion (N.Y. Sup. Ct., N.Y. Cty., Sept. 30, 1977—J. Kirschenbaum).
[45]Ch. 201 [1978] N.Y. Laws, §23.3(e).
[46]*Id.*, §23.3(f).

questions other than the questions relating to the threshold determination may be reviewed in the same proceeding, however, under Article 75 standards, even though the issues would otherwise have been subject to review in the New York Supreme Court.[47] This procedure has not been utilized to date and is scheduled to sunset out on December 31, 1982,[48] which will be after the next round of City negotiations.

When New York City's final and binding impasse procedures were first introduced, critics claimed that the procedures would encourage the use of third parties in fashioning contract settlements to the detriment of concerted efforts at the bargaining table. The experience to date does not support this contention, however. In the nine years since the adoption of finality in impasse procedures, only 8.6 percent or 51 of 592 reported contract settlements used the process. Of these 51 impasse cases, the panel's recommendations were accepted by the parties in 39; twelve cases were appealed to the Board for final determination. In ten cases, the report and recommendations of the impasse panel were affirmed, while the Board acted in two cases to reduce the award in order to conform the recommendations to the City's fiscal plan.[49]

Unique Features

There are several features in the New York City law which I believe are unique, or at least distinctive. First of all there is a nonjudicial appellate procedure for the review of impasse panel recommendations by the Board of Collective Bargaining. While numerous statutes, including that of New York State, provide for judicial review, only New York City provides for appellate review of interest arbitration awards, prior to judicial review. Arbitrators are familiar with certain nonjudicial appellate procedures for grievance arbitration awards, for example, in the steel and coal industries and under the Federal Labor Relations Authority.[50] The two-step appellate procedure was included in New York City's statute to guard against irrational awards and against disparate awards for employees of the same employer.

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[47] *Id.*

[48] *Id.*, §23.3(i).

[49] 1980 Annual Report prepared by the Office of Collective Bargaining, at 15.

[50] Some surveys have shown that as many as one in six federal sector awards are appealed to the Federal Authority. 908 GERR 9 (April 13, 1981).

Another distinctive feature of the NYCCBL is the use of the word "impasse" rather than the word "arbitration." The word was adopted in part for semantic reasons because of the antipathy of public employee unions toward the concept of binding arbitration. The term impasse is also used because the impasse panels are empowered to mediate as well as arbitrate and because their recommendations are not final and binding if they are rejected and appealed to the tripartite Board of Collective Bargaining within ten days. This procedure imports a degree of flexibility in the arbitration process which is directed at accommodation rather than adjudication in interest disputes.

The New York City law is also unique in its inclusion of a specific statutory provision to resolve disputes over the scope of bargaining[51] and, thus, the scope of the impasse proceeding. Only mandatory subjects or jointly agreed upon permissive subjects may be considered by the panel. In most other jurisdictions such disputes are resolved through the improper or unfair labor practice route which, I believe, casts in an unnecessarily pejorative light good-faith disputes as to whether certain subjects are proper for interest arbitration.

The NYCCBL also contains a status quo provision which precludes public employees from engaging in a strike and prevents the employer from making any unilateral change in working conditions until a collective bargaining agreement is concluded or until a specified period of time after an impasse panel is appointed or after its report is submitted, whichever is sooner, and including any period during which an appeal to the Board of Collective Bargaining of an impasse panel's recommendations is pending.[52] The terms and conditions contained in the expired contract remain in effect during this time. The status quo provision has the salutary effect of protecting the bargaining process and preserving the relationship between the parties during impasse proceedings.

The Board of Collective Bargaining also has the power to consolidate impasse proceedings[53] and, while this procedure has not yet been exercised to force an unwilling party to arbitration, the threat of such action has eliminated certain lock-step

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[51]New York, N.Y. Admin. Code, Ch. 54, §1173-5.0(a)(2) (1976); New York City Office of Collective Bargaining, Revised Consolidated Rules §7.3 (1972).

[52]New York, N.Y. Admin. Code, Ch. 54, §1173-7.0(d) (1976) as amended by Int. No. 856-A, Council of the City of New York, §10 (1980).

[53]N.Y.C. Office of Collective Bargaining, Revised Consolidated Rules §13.12 (1972).

parity demands by city unions. I refer to those disputes where one union, usually a member of the uniformed forces, will seek to insure that its wage or salary level will always be higher than that of another group; the perennial problem of police-firefighter parity is an example. It is generally recognized that such a demand in New York City bargaining would lead to Board exercise of its power of consolidation, thus making all parties affected by the demand parties to the impasse proceeding.

The New York City Collective Bargaining Law proviso that any portion of an arbitration award which requires the enactment of a law cannot go into effect until the law is enacted appears to have been sufficient to prevent any impermissible invasion of legislative authority. Most states' interest arbitration laws require legislative approval of all awards. However, New York's Taylor Law specifically states that such approval is not required.[54] I believe that New York City's limitation is sound, both politically and constitutionally.

Another limit on arbitration in the New York City law is the provision for judicial review. As mentioned above, there have been only two challenges to the Board's review of impasse panel awards in the nearly ten-year history of the finality procedures, both of which were unsuccessful.[55]

Lessons to Be Learned

What are the lessons to be learned from New York City's near-decade of experience with interest arbitration? The first lesson is that the process works. One of the major tests of a public-sector bargaining law providing for arbitration in a jurisdiction which outlaws the strike is whether strikes have occurred. Since the enactment of the New York City law, there have been only three strikes over new contract terms and nearly 600 individual contracts were negotiated during this period. There was a five-and-a-half hour firefighter strike in 1973 which was settled by arbitration, a ten-day strike of off-track betting clerks in 1979, and a one-week strike of interns and residents in 1981 which is now being submitted to binding arbitration.

Another measure of whether the law works has been the degree of utilization of arbitration and the related question of

[54]N.Y. Civ. Serv. Law §209(4)(c)(vi) (McKinney Supp. 1980–81).
[55]*See* note 44 *supra.*

whether arbitration has had a chilling effect on collective bargaining. Contrary to predictions, there has been a very low utilization rate; only 8.6 percent of all contract disputes have required the use of impasse procedures. And more than half of that number represent awards which were the confirmation, in whole or in part, of the bargaining process of the parties. There has clearly been no chilling of the bargaining process.

It is also important to add that interest arbitration awards have not been used primarily to determine the basic wage pattern of the city and its major unions. For the most part, wage patterns have been established by collective bargaining. Of course, wage disputes can go to interest arbitration and some awards concern attempts to increase the basic wage pattern of the city. Others involve special conditions of employment, such as whether or not one-man supervisory patrols should be implemented in the Police Department,[56] or what the proper rate of compensation should be for two-man sanitation crews assigned to do the work previously performed by three-man crews.[57] A "salary review panel" has been established to resolve disputes over salaries required to attract and retain employees in skilled occupations and professions such as nurses, engineers, and computer operators.[58]

The effectiveness of the process may also be gauged by comparison of arbitration awards with negotiated settlements. As mentioned, there were only two cases during the nearly ten-year period where the awards were found to be inconsistent with negotiated settlements. In the appellate process, these awards were reduced by the unanimous decisions of the tripartite Board of Collective Bargaining to conform the awards to the city's basic wage patterns. It is also significant that less than one-fourth of all impasse panel awards have been appealed to the Board of Collective Bargaining and that no awards have been successfully appealed to the courts.

Is the experience in New York City transferable? I believe it is, and I respectfully suggest that the appellate procedures should be considered by other jurisdictions. A variant of this concept exists in Massachusetts where the law provides for the

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[56] *Sergeants' Benevolent Ass'n and Lieutenants' Benevolent Ass'n* v. *City of New York,* Case No. I-145-79 (October 3, 1980).

[57] *City of New York* v. *Uniformed Sanitationmen's Ass'n Local 831,* Case No. I-157-80 (January 15, 1980).

[58] *See, e.g., New York State Nurses Ass'n* v. *City of New York (Health and Hosps. Corp.),* Case No. I-154-80 (October 24, 1980).

submission of interest disputes to a Joint Labor-Management Committee (JLMC).[59] While the enactment of Proposition 2½ has curtailed the power of the JLMC to issue awards which are binding on municipal legislative bodies, the record of the JLMC shows that a statewide tripartite labor-management committee to determine local conditions of employment for police and firefighters by arbitration works well.[60]

I also suggest that the New York City procedures for resolving scope of bargaining issues and the requirement that impasse panel awards cannot become final and binding if they require the enactment of a law until such a law is enacted are worthy of consideration by other jurisdictions which are constantly worried about the scope of an arbitrator's authority and the enforceability of the award.

Most of this paper has focused on procedures, but equally if not more important is the role of the arbitrator. In New York City only persons unanimously approved by the tripartite Board of Collective Bargaining serve as members of impasse panels. This prescreening process has contributed to the mediation efforts of the impasse panels and to the acceptance of the awards. We have been fortunate in obtaining the services of highly qualified persons to serve as arbitrators to deal with the complex questions in municipal labor disputes. But if New York City and the other 21 jurisdictions with interest arbitration are to maintain good records, then it will be necessary for the best arbitrators to continue to be willing to do the "heavy lifting" that is required in interest arbitration cases. I am quite aware that interest arbitration can be hard and financially hazardous work, but I have confidence that the members of this Academy will accept their share of the responsibility in order that interest arbitration may continue to be a viable alternative to the strike for resolution of public-sector collective bargaining disputes.

Lastly and more importantly, the New York City impasse procedures have worked because the parties have wanted them to work. The New York City law was jointly drafted by the parties and they have a stake in its success. Procedures, no matter how well designed, are not of much use without a commitment to use them properly when they are needed. There has been a commitment by city administrations and the major labor

[59]Ch. 1078 §4 [1973] Mass. Acts, as amended by Ch. 154 [1979] Mass. Acts.

[60]*Commonwealth of Massachusetts Joint Labor-Management Committee for Police and Fire,* a report by Professor John T. Dunlop, reported in 884 GERR 46 (October 20, 1980).

unions since the beginning to make the collective bargaining process work. Consistent with such a commitment, labor and management in New York have used the impasse procedures in a limited number of instances and for the purpose of supplementing the collective bargaining process, rather than as a substitute for collective bargaining. In sum, the parties in New York are persuaded that interest arbitration is the better way to resolve disputes over new contract terms.