APPENDIX C

REPORT OF COMMITTEE ON PUBLIC EMPLOYMENT DISPUTES SETTLEMENT*

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This Committee has not reported to the Academy for several years. As a consequence, this report will cover developments in various states from as early as 1980 and as recent as the winter and early spring of 1985. The report is not all-encompassing but is intended to highlight major developments of different kinds in a number of states over the last several years.

Statutory Developments

Ohio passed its first public employee bargaining statute in the summer of 1984. A Director and a State Employment Relations Board (SERB) were appointed by August 1984. The SERB initially contracted out mediation responsibilities to the Federal Mediation and Conciliation Service because of a substantial accumulation of pending cases. This backlog was also handled by appointing 417 individuals as ad hoc mediators, 109 as fact-finders, and 23 as "conciliation appointments" which is apparently the terminology applied in Ohio to those appointed as interest arbitrators. Mediators and fact-finders may reside anywhere; interest arbitrators are required to be Ohio residents. In the first eight months under the statute SERB reports that 483 collective bargaining settlements were achieved, about 300 of these by procedures developed by the parties themselves, 51 in mediation, 35 after mediation and fact-finding, and 11 after the full gamut of mediation, fact-finding, and binding arbitration. The Ohio SERB is still in process of establishing lists of indi-

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viduals interested in serving as mediators, fact-finders, and interest arbitrators under the Ohio statute.

In April 1984 the Maine legislature enacted a Judicial Employees Labor Relations Act to supplement its three earlier statutes governing labor relations for municipal employees, state employees, and those of the University of Maine. All four Maine statutes use a three-tiered process to settle impasses in negotiations; mediation, fact-finding, and interest arbitration. The parties may, however, agree in advance of their negotiations to a mediation-arbitration procedure which eliminates fact-finding.

New Hampshire has maintained a unique provision in its public employee bargaining statute which *requires* that every negotiated agreement contain a "workable grievance procedure."

Hawaii amended its public employee bargaining statutes in both 1982 and 1984. In 1982 the legislature allowed a religious exemption for conscientious objectors to agency shop payments, permitting objecting employees to have a sum equal to initiation fees and dues paid to a charitable fund. If such conscientious objectors later ask the union to employ the grievance and arbitration procedure on their behalf, however, the union may charge the individual the reasonable costs of using the procedure.

In 1984 the Hawaii legislature added to the statutory list of bargainable subjects, "amounts of contributions by the State and Counties to the Hawaii public employees health fund," immediately after "wages and hours" and before "and other terms and conditions of employment." The legislature added that negotiations over this new issue should be in good faith and the parties should not be bound by the amounts contributed under prior agreements, but then provided further that "the provisions . . . for the resolution of disputes by way of fact-finding and arbitration shall not be available to resolve impasses or disputes relating to the amounts the State and Counties shall contribute to the Hawaii public employees' health fund." If negotiating parties who go to arbitration subsequently agree to health fund contributions by the tenth day after the issue of the arbitration panel's decision, their agreement shall be added to the arbitration decision. If no agreement ensues, the parties have five days in which to submit their recommendations to the state legislature, and no strike over the health contributions issue may take place.

In 1982, the New York legislature amended the Public Employees Fair Employment Act, commonly known as the Taylor Law, to make it an improper practice for a public employer

not to continue all the terms of an expired agreement until a new agreement is negotiated. The New York PERB has held that this amendment also extends the grievance arbitration provisions of expired agreements, requiring arbitration even of grievances that arose after the agreement expired.[1]

In New York City in 1980, 35,000 employees of the Metropolitan Transit Authority and related systems represented by the Transport Workers Union violated the strictures of the Taylor Law and struck the Authority for eleven days. They ultimately settled for the same offer they had struck against, employees lost two days' pay for each day on strike as specified under the Taylor Law, and the Union was fined $1 million. In 1982, representatives of the Authority and the Union reached a new agreement as the result of voluntary arbitration, although it was widely reported that the arbitration award embodied a previously agreed-upon settlement.

When the 1982 contract expired on March 31, 1985, progress was uncertain. Negotiations were continuing, employee unrest was reported, but the Union had not authorized a strike. Nevertheless, the legislature enacted without debate Governor Cuomo's proposed statute providing for stand-by binding tripartite arbitration of any impasse that might arise. This was widely perceived as a victory for the Union. The Authority and New York's Mayor Koch had stated they preferred that negotiations continue without legislated arbitration and, even if arbitration were ultimately to become necessary, it be of the final-offer by whole package variety rather than the open-ended version that was enacted. As of mid-April desultory negotiations continued and PERB had not found an impasse to have occurred.

Finally, in a number of states it was reported that public employee collective bargaining laws are in place, and that such legislative changes or modifications that are enacted are largely housekeeping or fine-tuning measures directed to the existing statutes. In these same states it is also reported that judicial challenges to state collective bargaining laws and impasse resolution methods have largely been decided. Finally, for a majority of states that have legislation of any kind it was reported that legislatures have strengthened and supported arbitration as the preferred method to resolve impasses in public employment negotiations.

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[1] *In the Matter of Nassau County BOCES*, 17 PERB 3011 (1984).

Noteworthy Judicial and Administrative Decisions

A Michigan arbitrator upheld a police officer's discharge, finding that it was for just cause. The officer filed suit under 42 U.S.C. Section 1983 charging that he had been discharged for exercising constitutional rights. The Sixth Circuit held that since the arbitrator had considered the reasons for the police officer's discharge and the arbitration process had not been abused, the claim under Section 1983 was barred. In *McDonald v. City of West Branch, Michigan*,[2] the U.S. Supreme Court reversed, holding that while arbitration is suited to resolve contractual disputes, it cannot provide an adequate substitute for judicial proceedings to protect constitutional rights, citing *Alexander v. Gardner-Denver Corp.*[3] and *Barrentine v. Arkansas-Best Freight Systems.*[4]

The Michigan Supreme Court again emphasized, over the objection of a school district that had argued that the standards for judicial review of an arbitrator's decision should be similar to those involving statutory arbitration, that the standard for judicial review appropriate for application to labor arbitration in Michigan's public as well as private sector was that established by the U.S. Supreme Court in the *Steelworkers* Trilogy.[5]

In another interesting case, the Michigan Supreme Court applied a stringent rule, perhaps more stringent than the rule enunciated in *Vaca v. Sipes*, to a union's duty of fair representation. A grievance had been filed by a number of employees who had been forced to retire, placed on leave of absence, or given benefits under workers' compensation. Their grievance was denied at step three, and the union failed to proceed to step four within the contractually specified 15 days. The grievance was then denied as untimely. The workers then filed an unfair labor practice charge against the union which the Michigan Employment Relations Commission (MERC) dismissed. The Supreme Court reversed, saying:

> [i]n addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept con-

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[2]466 U.S. ___, 104 S.Ct. 1799 (1984).
[3]415 U.S. 36, 7 FEP Cases 81 (1974).
[4]450 U.S. 728, 24 WH Cases 1284 (1981).
[5]*Roseville School Dist. v. Roseville Fed'n of Teachers*, Docket No. 73091, not yet reported, 1985.

duct undertaken with little care or with indifference to the interest of those affected. . . .[6]

In several other cases the Michigan Court of Appeals held that public employers may not unilaterally change terms and conditions of employment during the pendency of an arbitration under that state's police/fire fighter arbitration act. Decisions of this kind prevented a county from laying off deputy sheriffs because of budget reductions,[7] or changing rotating shift assignments which were a mandatory subject of bargaining.[8] Such decisions have led to renewed insistence by the City of Detroit that the police/fire fighter arbitration act be repealed or amended to expedite these proceedings.

In an unusual case involving an unrepresented public sector employee in Michigan, the employee was discharged following an internal grievance procedure which culminated in a decision of a top management official. The Michigan Court of Appeals held that such a management official is not "an impartial decision maker" and that when an employee's due process right to an impartial decision is violated, the employee is entitled to a trial by jury.[9]

The Maine Supreme Court in 1982 affirmed that state's interest arbitration statute. The City of Bangor School Committee challenged the statute on the basis that it represented an unconstitutional delegation of the school board's authority. The court said that interest arbitration was not an unconstitutional delegation because of the safeguards provided in the statute including enumerated criteria for decision making, the provisions for conduct of arbitration hearings, and the availability of judicial review.[10]

The Maine and New Hampshire Supreme Courts differed, however, on the problem of conflict between a statutory provision of authority and a collective bargaining agreement. A Maine school board negotiated an agreement which admittedly limited its authority to fill vacancies, which by state statute the school board had the specific obligation to fulfill. The Maine Supreme Court said that it could not bargain legally to limit its

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[6]*Goolsby v. City of Detroit*, 419 Mich. 651 (1984).
[7]*Police Officers Ass'n of Mich. v. Oakland County*, 135 Mich. App. 424 (1984).
[8]*Detroit Police Officers Ass'n v. City of Detroit*, 135 Mich. App. 660 (1984).
[9]*Vander Toorn v. City of Grand Rapids*, 132 Mich. App. 590 (1984).
[10]*School Comm. of Bangor v. Education Ass'n*, 1981–83 CCH Pub. Barg. Cases #38,406 (Maine 1982).

authority in this manner.[11] The Supreme Court of New Hampshire addressed this same problem in 1983. A town agreed in collective bargaining to limit its discharge power by means of a grievance procedure ending in arbitration, even though a state statute conferred exclusive power on a town board to appoint and remove police officers. The Supreme Court of New Hampshire held the town was bound by its collective bargaining agreement and had to follow its negotiated grievance procedure.[12]

The Supreme Court of Nevada in 1985 limited the scope of judicial review of interest arbitration awards rendered pursuant to a special experimental provision of the Local Government Employee-Management Relations Act enacted in 1977. The city appealed an interest arbitration award based upon the contention that the arbitrator's decision had to be reviewed according to the standards established for governmental agencies in the Nevada Administrative Procedures Act. The Nevada court instead limited review to the general terms of the Steelworkers Trilogy and the Uniform Arbitration Act.[13]

New York's highest court, the Court of Appeals, has strongly reaffirmed that only a grievance arbitrator's final award and not the explanatory decision will be reviewed. The court said, "the path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny."[14]

With respect to interest arbitration provisions under the Taylor Act, the New York legislature has provided that the arbitration panel must specify the basis for its findings and take into consideration the number of statutorily enumerated factors. New York courts are therefore requiring that interest arbitration awards contain specific factual findings with respect to each stated statutory factor for decision making.[15] The New York interest arbitration statute has been held to be applicable not only to disputes over contractual terms, but also to disputes arising during the life of a contract over the impact of a nonnegotiable managerial decision upon employees' terms and conditions of employment.[16]

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[11]*Maine School Admin. Dist. 36 v. Teachers Ass'n*, 1979–81 CCH Pub. Barg. Cases #37,240 (Maine, 1981).

[12]*In re Appeal of Town of Pelham*, 1984–86 CCH Pub. Barg. Cases #34,115 (N.H. 1983).

[13]*City of Boulder v. Teamsters*, Docket No. 15414, not yet reported, 1985.

[14]*Central Square Teachers Ass'n v. Central Square CSD*, 52 N.Y.2d 918 (1981).

[15]*City of Yonkers v. Mutual Aide Ass'n of Paid Fire Dep't*, 80 A.D.2d 597 (1981); *Buffalo PBA v. City of Buffalo*, 82 A.D.2d 635 (1981).

[16]*City of Newburgh v. PERB*, 97 A.D.2d 258 (1983); *aff'd*, 63 N.Y.2d 793 (1983).

The Hawaii Supreme Court issued several decisions involving grievances on promotion or tenure brought by the University of Hawaii Professional Assembly against the University. All arose under a clause in the parties agreement stating:

> In any grievance involving the employment status of a Faculty Member, the Arbitrator shall not substitute his judgment for that of the official making such judgment unless he determines that decision of the official is arbitrary or capricious. . . .

In one case, the university contended that the grievances were not arbitrable because the grievants did not meet the minimum qualifications for promotion listed in the Faculty Handbook, and that it alone had the power to set and interpret promotion criteria. The agreement also had a provision which gave an arbitrator the power to determine arbitrability. The Hawaii Supreme Court held that where the agreement gives an arbitrator the power to decide issues of arbitrability the court should compel arbitration. The arbitrator's decision would then be upheld unless there was fraud, corruption, procedural misbehavior or the arbitrator exceeded his powers.

In a second case, the university argued that the quoted contractual clause conflicted with a Hawaii statute which prevented a public employer from entering into a contract that interfered with its right to promote or reclassify employees. The court concluded that it would enforce arbitration under the quoted statutory language because, although the university had the power to establish criteria of promotion and tenure, once it had done so, the procedure for review of whether the criteria were followed would be enforced.

Finally, in a third case, an arbitrator empowered a special tenure review panel to make the decision for him as to whether the university's decision regarding tenure had been arbitrary and capricious. The Hawaii Supreme Court held that while the arbitrator had the power to substitute his judgment for that of an official whose decision the arbitrator concluded was arbitrary or capricious, the arbitrator could not delegate that power to another committee, and that his doing so was an exercise exceeding his contractual powers. The arbitrator's award was therefore vacated.

Other Developments

In Massachusetts, the Board of Conciliation and Arbitration reports that it has been increasingly involved and successful in

the mediation of grievance disputes. The Board has the statutory responsibility to provide staff arbitrators in both the public and private sectors. In 1979 the Board instituted a practice of having disputes mediated on the day of the arbitration hearing. Starting in 1982, in select cases, a staff member other than the one who would conduct the hearing was sent to the plant site prior to the hearing to attempt to resolve the grievance. In 1984 mediation was extended to an even greater percentage of the Board's caseload. In the fall of 1984, if the parties so desired, they were given access to grievance mediators not on their staff. The Board reports that mediation of grievances appears to be proven worthwhile and reported that 67 percent of the cases mediated during 1984 were successfully settled without the need for an arbitration hearing.

The Michigan Employment Relations Commission established a policy over a decade ago of deferring to arbitration in cases which involve both an unfair labor practice charge and a contract violation as well. This broad deferral principle was invalidated by the Michigan Supreme Court in 1980, which held in *Detroit Fire Fighters* that MERC was not deprived of jurisdiction to remedy unilateral changes of working conditions notwithstanding the fact that the change might also constitute a breach of contract.[17] More recently, however, MERC said:

> Nothing in *Detroit Fire Fighters Association* . . . suggests that the Court in that case intended the Commission to undertake the resolution of routine contract disputes, even though many if not most of these disputes may be cognizable as unfair labor practices. . . .[18]

It appears that MERC may not be willing "wholeheartedly" to follow *Detroit Fire Fighters*. At any rate, it appears to look for every excuse not to do so, and to defer to arbitral decision making and remedies.

In Hawaii, as noted earlier, the state supreme court appears to be willing to defer to arbitral decision making under all reasonable circumstances. Notwithstanding the NLRB's gradual retreat from *Collyer*, the same also continues to appear true in the majority of the states.

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[17]*Detroit Fire Fighters Ass'n v. City of Detroit*, 408 Mich. 663 (1980).

[18]*Plymouth-Canton Community Schools* and *Plymouth-Canton Ass'n of Educ. Office Personnel*, 1984 MERC Lab. Op. 894.