APPENDIX C

REPORT OF THE COMMITTEE ON PUBLIC EMPLOYMENT DISPUTES SETTLEMENT*

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This report covers some major events during 1985 and early 1986 throughout the United States in efforts to resolve or ameliorate the effects of labor-management disputes in the public sector. It is not intended to be all-encompassing but instead highlights statutory, judicial, and administrative decisions relating particularly to the arbitral settlement of such disputes.

Statutory Developments

No wholly new collective bargaining laws or interest arbitration statutes were enacted in the United States during the past year. Procedural amendments to existing laws were made in Connecticut, Florida, Nebraska, and Vermont. Most of these were designed to expedite the dispute settlement process; for example, by permitting the parties to waive some of the steps of an existing statutory procedure to allow them to move more rapidly to the ultimate dispute resolution stage.

Several states also expanded the groups of public employees to whom existing binding interest arbitration statutes applied. For example, Hawaii amended its 1981 statute to extend to police officers the requirement, previously applicable only to firefighters, that disputes over the terms of an initial or renewed agreement be submitted to final and binding arbitration. Nevada likewise gave to local government police officers the

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right, also hitherto available only to firefighters, to use final-offer interest arbitration by whole package. Oregon amended its interest arbitration statute to add "emergency telephone workers"—that is, dispatchers—to that state's employees whose strikes are unlawful and therefore are entitled to interest arbitration.

Since 1973, interest arbitration in Washington had been available only to deputy sheriffs employed in Washington's largest county. Effective July 1, 1985, law enforcement officers employed by cities in Washington with populations over 15,000 and law enforcement employees of counties with populations over 70,000 are now subject to the binding arbitration provisions of that state's statutes. In effect, deputy sheriffs in 10 of Washington's 30 counties now have binding arbitration available to them as a dispute resolution mechanism. Two small units of paramedics associated with public sector fire departments in Washington have also had interest arbitration made available to them.

The New York legislature for the second time enacted short-term legislation authorizing the State Public Employment Relations Board, upon its own motion or upon the joint request of the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority and the union of their employees, to appoint the three impartial members of the New York City Office of Collective Bargaining to serve as a binding arbitration panel to resolve an impasse in negotiations.[1] Unlike experience with a similar statute in 1982, in 1985 the parties reached a negotiated agreement and did not invoke the arbitration provisions of the statute.

New York's Taylor Law authorizes parties voluntarily to agree to interest arbitration to resolve impasses, but this statutory authorization had not previously been invoked. In July 1985, the City of New York/Board of Education and the United Federation of Teachers agreed to submit all unresolved issues to total package final-offer arbitration. This particular arbitration procedure, too, had not been used previously in New York State. The ultimate arbitration award set wages and working conditions for over 65,000 teachers and other professional employees.

On April 29, 1986, Wisconsin again amended its Municipal Employment Arbitration Law which also covers public school

[1]Ch. 15, 1985 N.Y. Laws, effective March 31, 1985.

teachers.[2] Wisconsin's history in this connection is interesting. The original 1961 statute provided for mediation and fact-finding. Final and binding arbitration for police and firefighters was added in 1971. In 1977 the legislature adopted a med-arb procedure for all other municipal employees as well as teachers. Neutral arbitrators were directed to mediate and to resort to binding arbitration only if voluntary methods of settlement proved unsuccessful. Under the 1986 amendments, however, the legislature has apparently reconsidered the value of med-arb. The new procedure leaves mediation to the Wisconsin Employment Relations Commission. Arbitrators are relieved of the duty to mediate and are to proceed directly to total package final-offer arbitration.

In Massachusetts a bill supported by a number of unions was introduced in 1985 into the Commonwealth's House of Representatives to restore the power to order binding arbitration for police and firefighters to the state's Joint Labor-Management Committee (commonly known as the Dunlop Committee). This bill was not reported out of committee and died at the end of the legislative session. It has again been introduced in the 1986 session of the Massachusetts legislature; in its present form it authorizes the Dunlop Committee to issue recommendations on issues in dispute which would be binding in an unusual but limited sense on the union and employer involved. Each of them would be required to support the recommendations before the relevant local funding body. This form of impasse resolution has been characterized by some as "Fact-Finding—Plus."

The Michigan Municipal League and Detroit's Mayor Coleman Young continue to press the legislature to reform or repeal that state's interest arbitration statute. The first allegation made in support of such reform is that the neutral chairs of arbitration panels have wholly forgotten the citizen-taxpayers who must pay for their awards. The second is that the arbitration procedure has become so protracted as to deny equity to employees and administrative rationality to their employers. While the validity of the first allegation is as doubtful in Michigan[3] as elsewhere,[4] the second charge of undue delay is apparently well-founded.

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[2]1985 Wisconsin Act 318, effective May 7, 1986.

[3]*Compulsory Arbitration in Michigan*, Citizens Research Council, Report No. 279 (January 1986), 21.

[4]Feuille, Hendricks, & Delany, The Impact of Interest Arbitration on Policing, (Urbana: Univ. of Ill. Press, 1983), 160.

For example, hearings involving Detroit police officers' most recent arbitration petition began in August 1983. The award of the panel on economic issues was made during June and that on noneconomic issues in July 1985—two years later! This meant that the parties had only about two months of operations under their "new agreement" before they began negotiations on its successor for 1986–1989.[5] Thus far, however, the Michigan legislature seems to have shown no interest in amending its final-offer compulsory arbitration statute, either to repeal it or to mandate more expeditious arbitration procedures.

Noteworthy Judicial and Administrative Decisions

In *Cornelius v. Nutt*[6] the United States Supreme Court substantially constrained arbitrator autonomy in the federal sector by limiting the permitted bases of arbitral reversal of federal agency disciplinary action to those that are used by the Merit Systems Protection Board (MSPB) when appeals are made to it. The case arose when an arbitrator found that the General Services Administration violated its agreement with State, County, and Municipal Employees (AFSCME) by failing to follow two contractually specified procedures in removing two employees for wrongful conduct—conduct the arbitrator found the employees had committed. Because of the contract violations, however, the arbitrator found that the removals were not for just cause and reduced them to two-week suspensions. The Supreme Court reversed the Court of Appeals, which had upheld the arbitrator, finding that the contractual violations had prejudiced the union but not the grievants, and therefore the removals should have been sustained. The Court noted that the MSPB will only reverse an agency action if grievants show "harmful error" to themselves in the application of the agency's procedures. The Court reasoned that the legislative history of the Civil Service Reform Act indicates that the same standard in judging agency actions has to be applied both by the MSPB and by arbitrators. Not only does *Cornelius v. Nutt* eliminate some of the effectiveness of a collective bargaining agreement in providing federal employees with procedural safeguards, it also tends to make the role of arbitrators functioning in the federal sector much like

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[5]Kruger, *Interest Arbitration Revisited,* Lab. L.J. 504–505 (1985).
[6]53 USLW 4837, 119 LRRM 2905 (1985).

that of hearing officers for the MSPB. External law *must* be considered in federal arbitrations, where 20 percent of all awards are appealed and the reversal rate of those brought before the Federal Labor Relations Authority is 13 percent, largely for failure to interpret correctly or follow the law and precedents.[7]

The most important state judicial decision affecting public employment dispute settlement during 1985 was that of the California Supreme Court holding that public employee strikes are legal unless the strike poses an imminent threat to public health or safety.[8] This is the first decision by any supreme court in the United States specifically rejecting the common law principle that public employee strikes are not legal unless expressly authorized by legislation. The California plurality's decision in *County Sanitation District* spoke into the "stony silence" on the right to strike left by the California legislature and concluded that meaningful bargaining requires a right to strike, from which must be inferred the legislative intent. Further, Chief Justice Rose Bird most surprisingly stated that a total ban on public sector strikes might be unconstitutional under the involuntary servitude provisions of the California and U.S. Constitutions. Whether this decision will awaken sympathetic echoes in other state supreme courts is as yet unknown. Certainly public employees in California have not welcomed it with any noticeable intensification of strike levels.

The varieties of public sector employees' bargaining and judicial experience in the 50 states may perhaps be emphasized by contrasting the California decision above with two recent decisions from southern states. In Mississippi, in a case of first impression, a chancery court found teachers' strikes to be illegal, unprotected, contrary to public policy, a willful breach of contract, and an abandonment of employment.[9] In Louisiana the state supreme court held that a school board had no power to call a referendum election to determine if it should recognize and bargain with a teachers' union. Nevertheless the Louisiana court did find that the board had the power to bargain, but only if it voluntarily desired to do so.[10]

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[7]Frazier, *Arbitration in the Federal Sector,* Arb. J. 70 (1986).

[8]*County Sanitation Dist. No. 2, Los Angeles County v. Service Employees Local 660,* 38 Cal.3d 564, 119 LRRM 2433 (1985).

[9]*Jackson Municipal School Dist. v. Mississippi Ass'n of Educators,* Miss. Ch. C. of Hinds County, First Judicial Dist., Civil Action No. 126,666 (Mar. 1985).

[10]*St. John the Baptist Parish Ass'n of Educators v. James Brown,* L.S. Ct., No. 85-C-0099, (Feb. 1985).

Moving west from the Deep South, no political subdivision in the state of Texas may recognize a labor organization as a bargaining agent for any group of public employees. Nevertheless, according to a recent decision of the Texas Attorney General, a public employer is not precluded from "sitting and discussing" grievances with a local union provided that union does not assert the right to strike.[11] Further, the Attorney General stated that the obligation to meet and confer is mandatory when a grievance has been actually filed but only permissive when the grievance is oral.

Farther west, New Mexico has no labor relations statute for public employees except those in the state-classified civil service. Civil servants have the right to organize and bargain in New Mexico but excluded from their negotiations are such subjects as employee classification or reclassification, work standards, or any limitations on the unfettered right of the state to hire, promote, transfer, assign, relieve for lack of work, or dismiss for cause. Agreements are subject to ratification by both parties, with the employer defined as the agency, the department of finance, the state attorney general, and the state personnel board.

Arizona has no statute affecting collective bargaining rights for any of that state's public employees. Nevertheless, Phoenix has adopted a comprehensive ordinance providing for collective bargaining for its public employees, and many have elected to do so. In Tucson, the school district agreed a decade ago to bargain with its 3,100 teachers after a week-long recognition strike. Subsequent rounds of two-year contracts have been negotiated without further work stoppages, in part because the parties themselves have adopted a sophisticated form of nonbinding med-arb as their favored dispute resolution technique, and have retained experienced neutrals from throughout the United States as their private mediators. But the lack of a state regulatory system in Arizona is emphasized by the anomaly that the most recent round of negotiations between the Tucson School District and the Tucson Educational Association was complicated by a severe dispute over whether certain categories of nonteacher-credentialed professional employees should continue to be included within or excluded from the bargaining unit. Further, the parties are now pleading before the Arizona Supreme

[11]Texas Ops. Att'y. Gen., No. JM-156 (1985).

Court on whether their negotiated binding grievance arbitration procedure is an obligation the District validly undertook.

Section 13 of Michigan's police-firefighter compulsory arbitration statute specifies, "During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party. . . ." Deputy Sheriff Jaklinski received her notice that she would not be reappointed and filed a grievance over it while an interest arbitration proceeding was under way. In a decision which is difficult to understand, the Michigan Supreme Court in a four-to-three decision written by Justice G. Mennen Williams concluded that Jaklinski's "right to be reappointed except for just cause" was not the kind of right which could accrue or vest after the expiration of a collective bargaining agreement. Hence she no longer had an arbitrable grievance. The dissenting minority of three noted that Section 13 includes all mandatory subjects of bargaining of which the grievance procedure is surely one.[12] Of interest primarily because of *Jaklinski* is another case in which the Michigan Court of Appeals denied the City of Detroit the right to change its medical insurance program while interest arbitration proceedings were in process. The court said that Section 13 required the maintenance of the status quo on all mandatory subjects of bargaining. Medical insurance seems no more and no less a mandatory subject of bargaining than grievance arbitration, but the Michigan Supreme Court denied leave to appeal.[13]

A recent case in Indiana highlights a problem that often occurs in the course of teacher bargaining. In the Mill Creek School District bargaining continued after the expiration of the collective bargaining contract. The school district thereupon stopped the automatic step increases, or increments, which teachers receive based on years of service and degrees held. The annual cost of such increments in many school districts is often higher than the percentage increases that are now being negotiated across the board. Nevertheless, the Indiana court held that unilaterally stopping payment of increments was an unfair labor practice and that the provisions of the prior contract must be continued during bargaining.[14]

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[12]*County of Ottawa v. Jaklinski*, 423 Mich. 1, 120 LRRM 3260 (1985).

[13]*Detroit Police Officers Ass'n v. City of Detroit*, 142 Mich.App. 248, *leave to appeal denied*, 422 Mich. 965 (1985).

[14]*Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 118 LRRM 3224 (Ind. 1985).

A recurrent problem in Pennsylvania has been the issue of binding interest arbitration as it relates to court-employed personnel. Pennsylvania's Public Employment Relations Act provides for final and binding interest arbitration in disputes involving "employees directly involved with and necessary to the functioning of the courts." This section has been repeatedly challenged by Pennsylvania judges who contend that the collective bargaining and arbitration process cannot encroach upon judicial authority to select, supervise, and discharge court-employed personnel. Although no court has yet found this section of the statute unconstitutional, Pennsylvania courts have held that interest arbitrators may not render awards in cases involving court employees on issues such as vacations, seniority, scheduling, shift differential pay, leaves, suspension, or discharges.[15] Such decisions have had the practical effect of excluding court employees from the interest arbitration provisions of the Pennsylvania statute.

Another interesting Pennsylvania case involved grievance arbitration. An inferior court had vacated an arbitrator's award solely on the ground that he had bifurcated the proceeding, separating the hearing on procedural matters from that on the merits. The Supreme Court of Pennsylvania reversed, concluding that "an arbitrator's determination as to procedural matters is to be given at least as much freedom from judicial interference as substantive matters." Nevertheless, the court noted, "We do not approve of bifurcated proceedings as a general practice in settling disputes arising under collective bargaining agreements."[16]

Recent judicial decisions in New Jersey appear increasingly to limit mandatory subjects of bargaining. One decision held that a state agency serving as an employer could without judicial objection adopt personnel regulations that had the effect of limiting the scope of negotiations for its own employees.[17] Another New Jersey case found subcontracting by a public employer in that state not to be negotiable.[18] Only courts in New Hampshire and California have reached a similar conclusion. Finally, the New

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[15]See, for example, *AFSCME v. Pennsylvania Labor Relations Bd.*, 477 A.2d 930 (1984).

[16]*Scranton Fed'n of Teachers Local 1147 v. Scranton School Dist.*, 403 A.2d 1355 (Pa. Commw. Ct. 1979); *rev'd* 444 A.2d 1144 (1984).

[17]*New Jersey State College Locals v. State Board of Higher Education*, 449 A.2d 1244 (N.J. 1982).

[18]*In re Professional & Technical Eng'rs Local 195*, 443 A.2d 187 (1982).

Jersey Supreme Court has held that issues of interest to public employees in that state are either mandatory subjects of bargaining or are nonnegotiable. Hence there are in general no permissive subjects in New Jersey. The court also noted that issues involving inherent managerial functions are not subject to binding arbitration, but advisory arbitration is to be encouraged as "such a process will have sound and beneficial results."[19]

Similar to the *New Jersey College* decision noted above, in 1982 the Georgia legislature reserved to management a number of issues that had previously been decided through collective bargaining. Secretary of Labor Donovan nevertheless granted the Metropolitan Atlanta Rapid Transit Authority (MARTA) eligibility to receive federal mass transit funds. The Court of Appeals for the District of Columbia Circuit held that the Secretary of Labor is not free to certify an agreement that does not provide for the continuation of collective bargaining rights. Writing for the court, Judge Harry Edwards explained that the "Georgia Legislature is of course free to continue its current policies with respect to MARTA's transit workers, but it may not underwrite the policies with federal funds."

In Florida, after certification by the state PERC, AFSCME has recently negotiated a new two-year contract covering approximately 68,000 state employees. West Virginia, on the other hand, has no public employee bargaining statute. The University of West Virginia attempted to use its "no solicitation" policy to prevent AFSCME from organizing its employees and had disciplined two employees, co-chairs of the AFSCME organizing campaign, for violating the policy. The West Virginia Supreme Court of Appeals nevertheless ordered the University to modify its policy to permit organizing campaigns. Additionally, the state's Supreme Court of Appeals held that a municipality is authorized and empowered to enter into a binding collective bargaining agreement and further, that the municipality must abide by the terms of the agreement it made.[20]

The pace of public sector bargaining in Ohio has accelerated since that state adopted its collective bargaining statute. The State Employment Relations Board (SERB) conducted representation elections in 1985 involving state employees. AFSCME

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[19]*Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n*, 462 A.2d 137, 113 LRRM 3320 (N.J. Sup. Ct. App.Div. 1983).

[20]*AFSCME Local 598 v. City of Huntington*, W.Va., 317 S.E.2d 167, 119 LRRM 2797 (1984).

gained representation rights for the largest number, approximately 35,000 employees. Other unions winning representational elections for groups of state employees included the Fraternal Order of Police (FOP), the Food & Commercial Workers (UFCW), and the Ohio Education Association. The state government is concluding its first agreements but is still in negotiations with most of these new bargaining units. SERB has also received 2,145 notices of municipal and school negotiations. It has appointed 937 mediators, 508 fact-finders, and 52 conciliators, as interest arbitrators are designated in Ohio. SERB apparently intends to adhere strictly to the terms of its statute, binding the City of Lima to accept a fact-finder's recommendations when the City failed to notify SERB that it had rejected the report within 24 hours of its receipt. Finally, an inferior Ohio court found that the interest arbitration provisions of the Ohio Public Employee Relations Act are constitutional.[21]

A most interesting case that received substantial publicity arose in Massachusetts. Six hundred school bus drivers employed by two private bus companies were under contract with the Boston School Committee to furnish transportation to school for thousands of public school students. The bus drivers went on strike and after several weeks a private advocacy group unaffiliated with either the bus companies or the School Committee sought to enjoin the strike. A Superior Court judge granted a temporary restraining order. A three-judge panel of the Superior Court not only affirmed the order but also imposed a $10,000 per day fine for continuation of the stoppage. In effect, the court ruled that the employees of the private bus companies simply because of the nature of the service they were performing were public employees and not eligible to strike. The matter was of course appealed to the Massachusetts Supreme Judicial Court. That court held that individual citizens had no standing to obtain injunctive relief against the drivers' strike,[22] and thus avoided the interesting issue of whether private employees fulfilling a public function can be deprived of their right to strike. The decision revoking the injunction led to an immediate resumption of negotiations and settlement of the dispute.

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[21]*City of Columbus v. SERB and FOP,* Franklin County Common Pleas Court, 85-CV-02-797 (1985).

[22]*Allen v. School Comm. of Boston,* 396 Mass. 582 (1986).

Some Emerging Problems

One of the most important Supreme Court decisions of the last year arose in the public sector and has a substantial impact upon many public sector jurisdictions. The Court in *San Antonio Metropolitan Transit Authority v. Garcia*[23] overruled its decade-old decision in *National League of Cities v. Usery*[24] and held that state and local governments are liable for minimum wage, time-and-a-half overtime, and other requirements of the Fair Labor Standards Act. The *Garcia* decision and the 1985 FLSA amendments mean that more of many public employers' budgets must be spent on wages. These changes, coming at the same time as the cuts in federal funding resulting from the Gramm-Rudman-Hollings Act, are likely to mean that negotiations and interest arbitration in the public sector may well be more difficult than ever. While the 1985 FLSA overtime amendments permit a public employer to pay time and one-half by use of either cash payments or compensatory time, compensatory time payments may be used only where a contract or specific agreement permits it. Unions are likely to resist strongly any such attempt to reduce overtime wage payments. One nonunion jurisdiction solved its *Garcia* problem simply but by Alexandrian means. Chester County, South Carolina will pay overtime to comply with the FLSA but the County Council cut base salaries 15 percent for all employees likely to receive overtime payments.

Problems with respect to both polygraph testing and drug testing are emerging ever more frequently, particularly as they affect public employees. Increasing drug use has caused many public employers to develop programs to test employees for the presence of controlled substances. Concerns about the reliability of test results as well as constitutional issues are always raised, resulting in an increasing number of leading decisions. For example, blanket or random urinalysis testing of public employees is an unconstitutional search and seizure within the meaning of the Fourth Amendment,[25] except where critical public safety considerations are deemed to require it.[26] Arbitrators are likely to encounter related problems in this area with increasing frequency.

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[23]469 U.S. 528, 27 WH 65 (1985).
[24]426 U.S. 833, 22 WH 1064 (1976).
[25]*Jones v. McKenzie*, 628 F. Supp. 1501, 121 LRRM 2901 (D.D.C. 1986).
[26]*Turner v. FOP*, 120 LRRM 3294 (D.C. Cir. 1985).

While it is not a new problem, reports from half a dozen states cite continuing problems with the appropriate amounts and collection of agency shop fees. In March 1986, a unanimous Supreme Court placed new and stringent restrictions on agency shop agreements.[27] The Court has now required that union agency fee collection and refund procedures must include: (1) advance and adequate notice of the amount assessed, (2) an escrow arrangement for potential refunds of overpayments, and (3) a prompt opportunity for nonmember agency fee payers to challenge the fee before an impartial decision-maker. In situations where the parties have voluntarily adopted such procedures in the past, neutrals have been called upon to distinguish representation and bargaining-related expenditures from those for political activities. The Supreme Court's new requirements are likely to create many more such occasions.

Conclusion

Research findings from a number of states increasingly support the conclusion that the use of binding interest arbitration to resolve public employment disputes has had little or no measurable effect on economic outcomes, at least insofar as comparisons between negotiated and arbitrated wage and fringe levels are concerned. As a precursor to the 1986 amendment of the Wisconsin Municipal Arbitration Law that was described earlier, the Wisconsin Legislative Council conducted a comprehensive study of its earlier municipal collective bargaining law which was completed in November 1985.[28] The staff studies concluded that regardless of the methodology used there was no evidence that interest arbitration had generated higher salary increases than negotiations. The one statistically significant exception was that by one method of evaluation it could be concluded that public school salaries were about 5 percent higher because of arbitration. But teacher salaries throughout the United States have been rising more rapidly for a decade than salaries for almost any other group, whether bargained or not and largely without arbitration. Similar conclusions regarding the limited salary impact of Michigan's police-firefighter

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[27] *Teachers Local 1 (Chicago) v. Hudson*, 54 USLW 4231, 121 LRRM 2793 (1986).

[28] *Legislation Relating to the Municipal Collective Bargaining Law*, Wisconsin Legislative Council, Report No. 19 (1985).

interest arbitration law were reached by the Citizens' Research Council of that state.[29] A recent study of arbitrated salary awards in New York found that they averaged 7.3 percent while voluntary settlements during the same period had averaged 7 percent.[30] Another recent study shows that the availability of both collective bargaining and interest arbitration have a modest upward effect on police salaries, but in states providing the arbitration option salaries do not differ significantly between cities that use arbitration and those that do not.[31]

In the jurisdictions discussed above as well as several others it was reported that both resort to arbitration and resort to strikes were declining. Yet despite these declines in the two most coercive forms of impasse resolution, during 1985 when settlements in the private sector averaged 3.7 percent, voluntary settlements in the public sector averaged double that amount—about 8 percent. One, of course, cannot be sure whether these peaceful yet effective results of public employee bargaining were caused by more experienced and effective negotiators, more extensive and skilled mediation efforts, a favorable public economic climate, a general political climate promoting private accommodation of interests and avoidance of confrontation, or some combination thereof. But surely those who once argued that public employee bargaining without the right to strike would be little more than a sterile ritual must be given pause. Contemporary events in the public sector seem to support an observation Walter Reuther is said to have made, "There is persuasion in power, but there is also power in persuasion."

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[29]*Supra* note 1.

[30]Doherty, *Trends in Strikes and Interest Arbitration in the Public Sector*, in Proceedings of the Industrial Relations Research Association, Spring Meeting, Atlanta, Ga., 1986.

[31]Feuille & Delaney, *Collective Bargaining, Interest Arbitration, and Police Salaries*, 39 Indus. & Lab. Rel. Rev. 228 (1986).