Chapter 6

# INTEREST ARBITRATION

## I. Interest Arbitration in Pennsylvania

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There are two models, two mindsets, two approaches to interest arbitration. One is mediation, the other adjudication. Of course, these are not mutually exclusive, and an interest arbitration case often partakes of both mediation and ruling by the neutral arbitrator. So, the process by which a given interest arbitration case is resolved may be envisioned as falling somewhere along a line or continuum, with "mediation" at one end and "adjudication" at the other.

The individual style, skills, reputation, and proclivities of the particular neutral arbitrator certainly affect how the case proceeds, including whether more or less mediation takes place. But that neutral arbitrator performs his or her task under procedures specified by law. And the statutory framework enables and encourages, even if it does not direct, how arbitrators in the state practice along the mediation-adjudication continuum.

Under interest arbitration schemes providing for a single neutral arbitrator, and especially a single arbitrator who must issue a reasoned award explaining the outcome, based on statutorily specified standards, the parties are placed in a venue in which they seek to persuade the neutral arbitrator of the "correctness" of their position. Particularly this is so when the neutral is required to select between one "final" offer or the other without authority to take a middle route. Such statutes foster an atmosphere of winning or losing, and place the advocates in the familiar mindset of litigators. While such a system may impel the parties to bargain

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between themselves, in terror of what the neutral arbitrator may do to them, it places them on a litigation track when the neutral arbitrator is in the room. It fosters the perception of the neutral as a judge, not a partner in the process.

That is not the approach in Pennsylvania. As we shall see, the statutory system for interest arbitration in Pennsylvania strongly encourages neutral arbitrators to pursue mediation, although of course the neutral arbitrator is at minimum a mediator with a stick.

Pennsylvania has no comprehensive collective bargaining statute covering all public sector employees. Instead, the legislature addressed collective bargaining among particular classes of public employees at different times, and interest arbitration varies somewhat, but not greatly, among those groups of employees who are subject to interest arbitration.

The majority of state and local employees in Pennsylvania are not subject to interest arbitration, and have the right to strike in support of their contract demands.

## Police Officers and Firefighters

Legislation (commonly referred to as Act 111) covering police and firefighters was Pennsylvania's first collective bargaining scheme, enacted in 1968. Some notion of the age of the statute is suggested by the fact that the employees are referred to as "policemen" and "firemen." The statutory provisions, particularly with respect to interest arbitration, are quite sketchy.

Thus, an examination of the statute and court cases arising under it will provide at best an incomplete understanding of how interest arbitration works with respect to police and firefighters in Pennsylvania. The system that has evolved has as much to do with custom as it does with specific statutory provisions. A relatively small cadre of attorneys represents many police officers and firefighters. Similarly, a relatively small group of employer-side practitioners represents most of the public sector employers in such cases. The practices and expectations of these lawyers have put flesh on the statutory arbitration skeleton for police and firefighters.

It is appropriate to note that smaller municipalities in Pennsylvania are much more likely to have a paid police department than a paid fire department; many local fire companies are staffed

by volunteers. There are substantially more police than fire bargaining units in Pennsylvania, and collective bargaining among these uniformed services is primarily the story of bargaining for police contracts. Many police officer bargaining units are quite tiny, some as few as two or three officers.

The subject matter of collective bargaining under Act 111 is defined somewhat more broadly than the typical collective bargaining statute: "compensation, hours, working conditions, retirement, pensions and other benefits."

Although the statute declares that "It shall be the duty of public employers and their policemen and firemen employees to exert every reasonable effort to settle all disputes by engaging in collective bargaining in good faith…," in actual practice police bargaining often consists of a list of demands and a perfunctory bargaining session or two before the parties relegate the issues to interest arbitration. The statute itself seems to accept interest arbitration after such superficial bargaining by specifying that "an impasse or stalemate shall be deemed to occur in the collective bargaining process if the parties do not reach a settlement of the issue or issues in dispute by way of a written agreement within thirty days after collective bargaining proceedings have been initiated," at which point either party may request appointment of a board of arbitration by written notice and specification of the issues in dispute. Usually it is the union that invokes the arbitration process. There is no provision for fact finding in police and fire cases, and the parties often proceed to the interest arbitration stage after little more than an exchange of written demands and a meeting or two. Although there is a sizeable corps of mediators employed by the Pennsylvania Bureau of Mediation, the parties in police and fire bargaining relationships seldom utilize their services.

The board of arbitration is a three-member panel, with two party-designated arbitrators and a neutral chair. The process for selection of the chair may reflect the political influence of police and firefighters at the time the statute was enacted: if the party-appointed arbitrators fail to agree on a neutral chair within 10 days, then either may request a list of three Pennsylvania residents from the American Arbitration Association (AAA), with the employer making the first strike from the list. The employer is entirely responsible for the compensation of the neutral arbitrator as well as any stenographic or other expenses of the hearing.

The AAA plays no role in administering the case, beyond providing a panel of three names, and the AAA procedural rules do not apply.

The statute includes a requirement that the board "shall commence the arbitration proceedings within ten days after the third arbitrator is selected and shall make its determination within thirty days after the appointment of the third arbitrator." Many neutral arbitrators deal with the attenuated commencement date by delaying official acceptance of the appointment until the beginning of the hearing, and the parties typically waive the 30-day requirement for the award. In many cases the advocates also serve as arbitrators for their respective clients at the hearing. This practice seems more prevalent in the western than the eastern half of the state.

The statute says nothing whatsoever about the conduct of the hearing, except that the arbitrators shall have the authority to compel testimony and production of evidence, and to administer oaths. In fact, Act 111 does not explicitly refer to a "hearing" at all. In actual practice, the neutral arbitrator normally schedules a hearing. The hearing may continue for more than one day, and one hearing in Philadelphia under Act 111 lasted 13 days. While the statute makes no mention of the factors to be taken into account by the board, the evidence usually includes exhibits (typically presented in ring-binder format) dealing with demographics; comparability considerations, both with respect to other employees of the employer and with respect to public safety employees elsewhere; economic considerations such as inflation; and the employer's economic circumstances, including ability to pay and the tax effort of its citizens.

Most of the time, the advocates present oral testimony. This serves the dual function of allowing the advocates' constituencies an opportunity to address whatever is on their minds, and simultaneously providing the neutral arbitrator with some insight about the relative importance of the issues. Some union-side attorneys designate themselves as arbitrator for their party, and use a bargaining unit member to make the presentation at the hearing, perhaps guiding a bit through questions. This helps reassure the bargaining unit that it has had its day in court.

The formal hearing is usually the first and last face-to-face contact between the neutral arbitrator and the parties themselves.

Neutral arbitrators usually do not arrange for mediation sessions between negotiation teams.

The three arbitrators normally meet in executive session sometime after the formal hearing, not necessarily immediately afterward, however. It is in the executive session that the real work of the panel is usually accomplished. The statute is completely silent as to how the three arbitrators are to resolve the issues in dispute, and makes no mention of an executive session. Thus, in theory the neutral arbitrator could treat the matter as an adjudication, and simply choose between the two offers, or perhaps do so on an issue-by-issue basis, achieving a shifting majority with respect to each issue. In actual practice, however, the three arbitrators determine the outcome through an executive session or sessions, in a process more reminiscent of mediation and compromise than adjudication and decision. Individual styles among neutrals differ of course, but in general the neutral will wheedle and armtwist, exhort and extort, sometimes with both party-appointed arbitrators present, sometimes in separate caucuses, in the effort to achieve, to the greatest extent possible, a consensus among his or her party-appointed colleagues. Thus the executive session is often a negotiation among the three arbitrators.

The process works best when both party-appointed arbitrators are savvy and experienced in public safety arbitration. Sometimes the party-appointed arbitrators can resolve the issues themselves outside the presence of the neutral arbitrator, but even when this sanguine outcome is not possible, experienced advocates can usually narrow the dispute, perhaps with some pressure from the neutral arbitrator where a party's position is out of line. At worst, the neutral may be forced to select within a fairly narrow band of disagreement.

The process works less well where one advocate-arbitrator is inexperienced in public safety interest arbitration, especially where the advocate lacks full authority to commit to a compromise outcome.

The two party-appointed arbitrators may be able to identify an acceptable outcome to the neutral, while denouncing the outcome to their clients. When such an award involves middle positions on critical issues, neither partisan arbitrator may be able to sign as concurring in the entire award, or even to the resolution of a particular issue. To avoid the need to identify the majority on

each issue, and to afford partisan arbitrators cover with their clients, the three arbitrators may sign an award below an affirmation such as the following:

> With regard to the various items awarded or denied, the Board of Arbitration may not have been in unanimous accord on each. At least the majority of the Board, however, concurred with each awarded item and to the denial of all others.

Act 111 specifies that the determination be in writing, but does not require an explanation of the reasons for the award. Since the actual award is normally the product of compromise among the three arbitrators rather than a decision by the neutral, the custom is that the award merely sets forth the terms of the new collective bargaining agreement, without any supporting rationale.

Pennsylvania's system encourages the parties to continue the bargaining process and the effort to optimize the outcome for both sides at the arbitration stage. By establishing a tripartite panel, the statute empowers and suggests that the neutral seek to craft a compromise between his or her colleagues on the panel. The bare bones procedure, requiring only that the neutral arbitrator obtain a second vote, without mandating a selection between the parties' "final" offers, either on an overall or issue-by-issue basis, enables the neutral to promote compromises among the party-appointed arbitrators. The absence of a requirement for a written opinion, and the custom of forgoing one, furthers the mediation mindset. Requiring a rationale for the outcome makes the neutral arbitrator the author and thereby the owner of the award. In Pennsylvania, there may not *be* a rationale, other than that the outcome was one that both party appointed arbitrators believed their clients could live with.

Statistics compiled by the AAA provide some indication of the extent of use of interest arbitration for public safety employees in Pennsylvania (see Table 1). The AAA does not record whether the arbitration request involves police or firefighters, but anecdotal experience indicates that the bulk of the requests involve police officers. After appointing the arbitrator, the AAA has no further involvement, and information is lacking as to how many of the appointments result in awards, as distinguished from party-negotiated agreements after the designation of a neutral chair.

**Table 1: Extent of Use of Interest Arbitration for Public Safety Employees in Pennsylvania**

| Year | Panel Requests Received | Arbitrators Appointed |
|---|---|---|
| 2008 | 184 | 159 |
| 2007 | 81 | 75 |
| 2006 | 64 | 56 |
| 2005 | 120 | 102 |
| 2004 | 134 | 121 |
| 2003 | 137 | 121 |
| 2002 | 124 | 111 |
| 2001 | 131 | 126 |

Source: American Arbitration Association

### Corrections Officers, Court-Appointed Employees, and Court-Related Employees

The Pennsylvania Public Employee Relations Act, commonly called Act 195, enacted in 1970, comes as close to a comprehensive public sector collective bargaining law as exists in Pennsylvania. It is something of a catch-all, covering bargaining among employees not addressed by other legislation, and it also includes bargaining procedures for specific categories of public employees. Under Act 195, the scope of bargaining is "wages, hours and other terms and conditions of employment," although there are also specific provisions addressing matters of inherent managerial policy and dues deductions.

Parties subject to Act 195 must "call in the service" of the Pennsylvania Bureau of Mediation if no agreement has been reached within 21 days of the commencement of negotiations or 150 days prior to the budget submission date, whichever is first. So, unlike bargaining for police and fire agreements, negotiations for other categories of public sector employees are more likely to utilize the services of a state mediator.

If mediation fails to achieve a settlement, then the Pennsylvania Labor Relations Board (PLRB) has discretion to appoint a fact finder, or a panel of three, although in practice it rarely does so. In recent years, the total number of fact finders appointed by the PLRB, among employees other than public school employees, has been as presented in Table 2.

**TABLE 2: Recent PLRB Fact-Finder Appointments**

| Year | Fact-Finder Appointments Made |
|---|---|
| 2006 | 0 |
| 2005 | 7 |
| 2004 | 1 |
| 2003 | 2 |
| 2002 | 4 |
| 2001 | 4 |

Source: Harrisburg, Pennsylvania Labor Relations Board, 2006 Annual Report, Table 9 and Appendix V.

Unlike some states that rely heavily on outside fact finders to act as mediators, Pennsylvania has a fairly large contingent of state mediators. (As discussed in more detail below, Pennsylvania requires by statute that a minimum complement of 25 state mediators be employed.) Act 195 authorizes the parties to public sector impasses to enter into agreements for binding interest arbitration, but such agreements are relatively rare.

Strikes by most public employees are permissible under the statute, but not "guards at prisons or mental hospitals, or employees directly involved with and necessary to the functioning of the courts," who are subject to the binding arbitration procedure described below. (But a strike by other public employees that "creates a clear and present danger or threat to the health, safety or welfare of the public" may be enjoined. Other legislation, discussed below, deals with strikes in the public schools.)

Court employees constitute a larger group in Pennsylvania than an outsider would expect. Typically, court employees in Pennsylvania are organized on a county-by-county basis, in separate bargaining units of court-appointed employees, and court-related employees. Court-appointed employee bargaining units need no further explanation, but court-related employees may include probation officers, deputy sheriffs, and even assistant district attorneys and public defenders.

Impasses in bargaining for corrections officers and court employees are subject to "final and binding" interest arbitration, "with the proviso that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only." The system specified is a three-arbitrator panel, one arbitrator appointed by each party, and the third chosen by

agreement of the two party-appointed arbitrators, or from a panel of seven supplied by the PLRB, with the employer making the first strike from the list. The neutral arbitrator is compensated by the PLRB.

Table 3 indicates the extent to which interest arbitration is used in cases involving corrections officers, court-appointed employees, and court-related employees.

**Table 3: Interest Arbitration Use With Corrections Officers, Court-Appointed Employees, and Court-Related Employees**

| Year | Interest Arbitration Panels Submitted by PLRB | Resulting Awards |
|---|---|---|
| 2006 | 42 | 29 |
| 2005 | 30 | 22 |
| 2004 | 33 | 23 |
| 2003 | 34 | 25 |
| 2002 | 35 | 30 |
| 2001 | 25 | 18 |

Source: The number of panels submitted annually is published in Pennsylvania Labor Relations Board, 2005 Annual Report, Appendix V. The number of resulting awards was graciously compiled from PLRB records by PLRB Secretary Patricia Crawford. The awards are those resulting from appointment in the year indicated, although some of these awards issued in a later year.

The interest arbitration provisions under Act 195 closely resemble those under Act 111 for police and fire bargaining units, discussed earlier. The statute does not include any standards or criteria on which the arbitration panel is to base its award, nor does it dictate procedures or timelines for the panel to follow. The statute does not even explicitly direct that the arbitration panel conduct a hearing.

Typically the parties in bargaining for corrections officers and court employees have engaged in more extensive negotiations than is often the case for police officers. While the fraternity of advocates representing management and labor in police bargaining is a fairly small one, there seems to be a larger, less specialized corps representing the parties in bargaining for court employees and corrections officers. Police officers and firefighters are almost always represented by an attorney, who acts as their partisan arbitrator and often as their advocate at the hearing as well. Full-time

union officers are more likely to be the arbitrators and advocates for court employees.

As with police bargaining, the custom is for the panel to issue an award simply setting the terms for the new contract, without supporting rationale.

There is no prescribed pattern for the hearing. As in police and fire cases, the advocates often serve as the party-appointed arbitrators for their respective clients at the hearing. Usually each party produces a ring binder of exhibits addressing comparability, demographics, and the employer's financial situation. They may do this in the format of an extended statement by the advocate, leading the neutral chair through the exhibits, but sometimes the advocate will use a live witness to comment on the exhibits. All parties understand that rules of evidence are inapplicable, and objections are heard less frequently than in grievance arbitration.

As the advocates representing the parties in court and corrections bargaining are more diverse, so are their expectations. So while the neutral arbitrator usually conducts a hearing and a later executive session (or sessions, as the generally larger bargaining units may produce more issues or more complicated issues that take longer to resolve), with the goal of mediating a mutually accepted award during the executive sessions, the neutral arbitrator often is obliged to do more "deciding" in court and corrections cases than in police bargaining.

So, while the statute provides the same opportunity and impetus for the neutral arbitrator to act as a mediator with clout as in police and fire arbitration, the larger bargaining units and the greater heterogeneity of the advocate corps more often require the neutral to be a decision maker as well.

### Transit Employees

Port authority acts for some classes of counties provide interest arbitration schemes similar to the above.

### Public School Employees

A statute enacted in 1991, commonly referred to as Act 88, amended the Public School Code to provide bargaining procedures applicable to public school employees, both teachers and support personnel. The legislation created an elaborate, and somewhat difficult to follow, timeline that provides a limited right

to strike while ensuring that students receive the statutory minimum number of days of instruction (currently 180 days) by June 30.

The statute directs the parties to "call on the service" of the Pennsylvania Bureau of Mediation no later than 45 days after the commencement of negotiations or 126 days prior to the end of the employer's fiscal year, whichever is earlier. Act 88 mandates that the Pennsylvania Bureau of Mediation employ at least 25 mediators.

No later than 81 days prior to the end of the fiscal year, either party to the negotiations may request fact finding. Upon such a request, the PLRB is required to appoint a fact-finding panel. Under the statute, the Board has discretion to appoint either a single fact finder or a three-member panel, but in practice the Board always appoints a sole fact finder. The parties may submit a mutual request for fact finding at any other time (except when the dispute is subject to arbitration) and the Board is once again required to make the appointment. Finally, the Board on its own motion may appoint a fact finder or a fact-finding panel at any time other than when the dispute is subject to the arbitration procedure described below, or between the time a strike notice is given and the conclusion of the strike. The Board pays half the fee of the fact finder and the parties split the remaining half.

Fact finding in Pennsylvania is used almost exclusively in public school bargaining units. The number of fact-finding appointments annually in public school bargaining units is presented in Table 4.

**Table 4: Annual Public School Bargaining Unit Fact-Finding Appointments**

| Year | Fact-Finding Appointments (Includes both professional and nonprofessional bargaining units) |
|---|---|
| 2006 | 53 |
| 2005 | 44 |
| 2004 | 28 |
| 2003 | 29 |
| 2002 | 37 |
| 2001 | 22 |

Source: Pennsylvania Labor Relations Board, 2006 Annual Report, Table 9.

The PLRB appoints the fact finder from its roster, rather than submitting a list for the parties to make alternate strikes. In practice the Board honors joint requests to appoint a particular individual as fact finder, but does not honor unilateral requests. The fact finder has 40 days from the date of appointment to mediate, conduct the hearing, and issue a report and recommendations. The deadline cannot be extended, even upon mutual consent of the parties. (In unusual cases, the parties have circumvented the deadline by making a second fact-finding request near the end of the 40-day period, with the understanding that the Board will appoint the same individual for a second round of fact finding, but the Board will not routinely allow parties to bypass the deadline in this manner.) Most fact finders attempt to achieve a mediated settlement, or at least to craft a set of recommendations that the lead negotiators have indicated in sidebar is the middle ground most sellable to both constituencies. Fact finders typically issue reports that include supporting rationales for their recommendations, but occasionally, such as where the negotiating teams themselves reach tentative agreement but perceive the need for a neutral's imprimatur for ratification, the report may be in bottom line format, as is typically the case with interest awards under Act 111 and Act 195, discussed earlier. The parties are to accept or reject the fact-finding report within 10 days. If either party rejects it, then the report is made public and the parties decide for a second time whether to accept or reject.

In about 17 percent of the cases where a fact finder is appointed, the parties reach a tentative agreement without the issuance of a fact-finding report. In another 23 percent of the cases (28 percent of the cases in which a report issues), both parties accept the fact finder's recommendations.[1] So more than half the time, fact finding does not directly result in the consummation of a new collective bargaining agreement, although the fact finder's recommendations may provide the basis for a settlement down the road.

Act 88 also provides for "arbitration" in public school bargaining units, but the process really is fact finding in disguise, as the award is not binding on the parties. There may have been a fact finding proceeding prior to the arbitration, but fact finding is not a prerequisite to interest arbitration (which is in effect fact finding all over again).

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[1]Pennsylvania Labor Relations Board, 2006 Annual Report, Table 9.

At any time except while the parties are engaged in the fact-finding process, either party may request voluntary arbitration, and the other is free to accept or reject the offer.

If a strike or lockout occurs, and would preclude the completion of the minimum number of days of instruction required by law (currently 180 days) prior to June 15, then the parties are required to submit to "mandated final best offer arbitration." Note that what is mandatory is only submitting to the process: either party is free to reject the award issued by the panel.

The arbitration panel is a three-member panel, with one arbitrator appointed by each party, and the chair selected from a seven-name list provided by the AAA. After supplying the list, the AAA plays no further role in administering the proceeding. By statute, the employer strikes first from the list. Often, but not always, the party-appointed arbitrators are also the parties' advocates at the hearing.

For voluntary arbitration, the parties split the fee and expenses of the neutral chair. In mandatory arbitration, the Commonwealth pays half the cost and the parties split the remainder.

The arbitration panel is required to select either of the parties' last offers, or the fact finder's recommendations (if fact finding has been used) on one of the following bases: entire package, issue-by-issue, or economic terms as a package and non-economic terms as a package. Before the proceeding begins, the parties are to bargain over whether the arbitration panel shall select between the proposals (and the fact finder's recommendation if there is one) on an overall, economics/non-economics, or issue-by-issue basis. If they fail to agree, then the State mediator assigned to the case determines which of the three options will apply, a rare instance where a mediator has any power of decision.

The employer is to post the final offers of both parties, and the public is invited to submit comments to the arbitration panel.

The statute directs the panel to begin (but not conclude) hearings within 10 days of the selection of the neutral chair, but the parties usually circumvent this unrealistic deadline, either by waiver or by having the neutral arbitrator declare the hearing open at his or her office with no one else present, and thereupon continuing it to a later date. Unlike the 40-day nonwaivable period for issuance of a fact-finding report, there is no deadline by which an arbitration panel must issue its award. The panel is required to hold a hearing, and to issue an award within 20 days after the close

of the hearing, but there is no statutory restriction on how long the hearing may continue.

Act 88 provides fairly common standards for the award:

1. The public interest.
2. The interest and welfare of the employee organization.
3. The financial capability of the school entity.
4. The results of negotiations between the parties prior to submission of last-best contract offers.
5. Changes in the cost of living.
6. The existing terms and conditions of employment of the employee organization and those of similar groups.
7. Such other documentation as the arbitration panel shall deem relevant.

While the statute does not explicitly mandate that the panel apply these standards, it does direct the parties to supply the arbitration panel with documentation on the above factors.

Strikes and lockouts are prohibited during the arbitration proceeding. If either party rejects the award, then a strike or lockout may resume. As a practical matter, however, the right to strike is of limited duration. The Secretary of Education is authorized to (and in practice does) seek an injunction whenever a strike would preclude the students from completing the mandatory minimum number of days of instruction (currently 180 days) by June 30.

That the procedure amounts to fact finding camouflaged as arbitration is evident from the statutory provision regarding the effect of the award: "The determination of the majority of the arbitrators…shall be final and binding…provided that within ten (10) days of the receipt of the determination the employee organization or the employer does not consider and reject the determination at a properly convened special or regular meeting."

A few neutral arbitrators regard their roles as adjudicators, as a literal reading of the statute would suggest. This approach has little prospect for a mutually acceptable award. Recall that the arbitration panel does not have the option of crafting its own middle ground between the poles of the parties' offers. If the choice is to be between the parties' offers on a whole package basis, then the disappointed party will surely reject the award. If the choice is to be between the parties' economic and non-economic packages, then the panel will almost surely select the economic package of one party and the non-economic package of the other. Otherwise,

the award has no chance of acceptance by the party that has lost on both packages. But the obvious strategy of accepting one party's economic package and the other's non-economic package has scarcely greater prospects for acceptance. If such a crude trade-off had been acceptable to the parties, then they likely would not have needed an arbitration hearing to find the compromise.

Even a more calibrated choice between the parties' offers on an issue-by-issue basis has only slightly greater chances of mutual acceptance. The difficult negotiations that the parties themselves have been unable to conclude are unlikely to be susceptible to resolution by horse trading between issues.

In all likelihood, if there has been a fact-finding report, the neutral arbitrator will choose the fact finder's recommendations as a middle ground between the extremes of the parties' positions. The problem with this approach, however, is that the fact finder's recommendations have already been found unacceptable by one or both parties—else the impasse would not have reached Act 88 arbitration.

The recognition that the Hobson's choice available to the arbitration panel under the statute is unlikely to produce an award acceptable to both parties, and Pennsylvania custom in interest arbitration under Act 111 and Act 195, lead most neutral arbitrators selected under Act 88 to try to achieve a mediated award like those typical under those statutes.

Some neutrals, recognizing the likelihood that an award accepting one side's position will be rejected by the other, but who nonetheless approach the case as more of an adjudication, may issue a for-the-record award choosing between or among the options on a package, economics/non-economics, or issue-by-issue basis, as agreed to by the parties or determined by the mediator, and then lament that he or she did not have the leeway to craft a more nuanced middle ground. The neutral arbitrator then specifies the award that he or she would have issued, had that option been available, together with supporting rationale. Of course, the parties vote to accept or reject the official award, and not the neutral's "if-only-I-could" hypothetical award. The neutral arbitrator who issues such an award and opinion fully expects that the official award will be rejected, but experience suggests that the hypothetical award may be useful as the basis for a compromise settlement. So, as is sometimes the case with other forms of fact finding, a rejected award may still serve a salutary purpose.

But the approach preferred by most neutral arbitrators is to treat the case like the fact-finding procedure that it actually is. The neutral arbitrator, like a fact finder, has a bit of extra clout with the parties that a mediator may lack, although not as much as a "real" arbitrator under Act 111 or Act 195, and some parties refer to the skillful playing of this role as super-mediation. Like a fact finder, the Act 88 arbitrator who has sufficient skill and persistence may be the catalyst for a negotiated settlement. And unlike the fact finder who is officially designated as such, the Act 88 neutral arbitrator is not subject to the 40-day straight jacket. If he or she decides that additional sessions may prove fruitful, then the neutral chair can simply declare that the hearing continues.

For political purposes, the parties may prefer to have a tentative agreement characterized as an award by the panel majority. One possible course for the neutral chair in such circumstances (with the at least tacit concurrence of the party-appointed panel members) is to simply denominate the terms of the settlement as an award, ignoring the fact that the neutral is acting beyond the scope of his or her authority under Act 88. If the parties both vote to accept such an award, then the process has reached a successful conclusion.

## II. Public Sector Interest Arbitration in Wisconsin: Winner Take All

Edward B. Krinsky*

This panel was charged with describing public sector interest arbitration as structured and practiced in several states. My assignment is to describe the Wisconsin system.

This paper is being presented at a time when there is a great deal of discussion, both within the National Academy of Arbitrators and outside of it, about the proposed federal Employee Free Choice Act. My paper does not address those issues. While, as you will see, I have a generally very favorable view of how final offer total package interest arbitration has worked in Wisconsin's pub-

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