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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lic sector, I do not want this paper to be cited as an endorsement of this process for use in private sector first contract arbitration. The context is different and the problems are different. If there is going to be mandatory first contract arbitration in the private sector, then there is room for a great deal of debate about which system would be best.

As I am sure most of you know, Wisconsin was a pioneer in the development of public sector labor relations, and the statutory and administrative processes that have given shape to it. What has been in place in Wisconsin for most city, county, and school employees since 1978 is final offer total package interest arbitration.

When I said "for most city, county, and school employees," it is because there is a separate, although very similar, statute for police and fire employees in which the decision-making criteria are different in several respects, and there is a separate statute applicable to the Milwaukee police that is not governed by final offer provisions.

This is not a history lesson, so I will quickly pass over many of the developments.[1] From the outset of the Municipal Employment Relations Act (MERA), which was passed in the early 1960s, the Wisconsin Employment Relations Board (now the Wisconsin Employment Relations Commission (WERC)) administered the statute.[2]

When parties are unable to resolve the terms of a new contract, they may request mediation, or they may bypass that step and petition to initiate interest arbitration. In either event, they get a Commission mediator, although if there has been a petition for interest arbitration by either party, or the parties jointly, the mediator is called an "investigator." The investigator attempts to mediate and if the dispute is not resolved, the investigator determines whether the parties are at an impasse.[3] Once an impasse has been certified, the parties then select an arbitrator from a panel

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[1]For those of you interested in the legislative history, I refer you to Zimmerman & Kava, Dispute Resolution Procedures for Municipal Employees (Wisconsin Legislative Fiscal Bureau).

[2]It should be noted that many past and present Academy members have served as the Chair or as Commissioners of the WERC, including Morris Slavney, Arvid Anderson, Zel Rice, Howard Bellman, Herman Torosian, Marshall Gratz, and Jos. Kerkman.

[3]It should be noted that many additional past and present Academy members have been Commission staff members who served as mediators and investigators in these disputes, including Amedeo Greco, George Fleischli, Ed Krinsky, Sherwood Malamud, Tom Yaeger, Stan Michelstetter, Bob Moberly, Neil Gundermann, Dan Nielsen, Alan Harrison, and Mary Jo Schiavoni.

provided to them by the WERC. The WERC Commissioners and staff do not serve as interest arbitrators.

In the early days of the statute, there was no interest arbitration. Rather, the appointed third-party neutral was designated as a fact finder, whose role was to make nonbinding recommendations for resolving the dispute, after giving consideration to the various factors spelled out in the statute.

The statute evolved in response to pressure from unions to have a binding result, and in response to pressure from employers to reduce any likelihood that there would be strikes. Fact finding with recommendations was replaced by final offer package mediation-arbitration, where the neutral received the parties' certified final offers from the WERC, and was then mandated by the statute to attempt to mediate. If those efforts were unsuccessful, then the mediator-arbitrator put on his or her arbitrator hat and made a binding decision by selecting one of the final offers in its entirety (so-called total package arbitration).

The statute was later changed again. Mediation-arbitration was replaced by final offer total package interest arbitration where the arbitrator was no longer required to attempt to mediate.

Under each of these systems (i.e., fact finding, mediation-arbitration, arbitration), the neutral's decision was to be made after consideration of factors enumerated in the statute, such as ability to pay; the interest and welfare of the public; cost of living changes; internal, external, and private sector comparisons; overall compensation of the employees; and the catch-all of other factors commonly used in dispute resolution.

It is final offer total package interest arbitration that is in place today. In preparing this paper I was entertained, in reading some of the literature, to see references to the Wisconsin system as "draconian," which Webster tells us means "marked by extreme severity or cruelty." (See: "Interest Arbitration in the Public Sector" reporting on a one day conference about "varieties of interest arbitration in the public sector," reported in the 12/82 Arbitration Journal. In the same issue, Charles Rehmus called Wisconsin's statute a "draconian procedure"; in the 12/87 Arbitration Journal, Homer C. La Rue wrote "An Historical Overview of Interest Arbitration in the United States," and also described the Wisconsin system as draconian.)

We Wisconsinites have been living with this draconian-ness for more than 30 years and, at least so far, we have lived to tell the tale without seeming to be extremely severe or cruel to one another.

Pursuant to the parties' selection of the arbitrator, the WERC then sends the arbitrator an order of appointment, as well as the certified final offers and the parties' tentative agreements. From that point forward, the only way that a party may amend a final offer is with the consent of the other party. The arbitrator ultimately must select one final offer or the other in its entirety.

The arbitrator then schedules a hearing and the parties present their cases. As previously mentioned, the statute no longer mandates that the arbitrator attempt to mediate. Many arbitrators, particularly those who have experience as mediators, offer the parties the opportunity to engage in further settlement discussions, with or without their active assistance. If the opportunity is declined, or if the further settlement efforts are not successful, then the final offer arbitration process continues.

With mediation no longer mandated at the arbitration stage, most parties come to the arbitration hearing prepared only to arbitrate. Unless there has been some significant change in circumstances since the investigation stage, the parties are no longer interested in further efforts to resolve matters voluntarily. They view the investigation stage as the opportunity for making concessions, and they do not want the investigation to be used simply as a step for making some concessions but with the knowledge that there may be more pressure asserted on them to make more concessions at a later stage of the process.

Reinforcing these attitudes of not being interested in further mediation, undoubtedly, is the fact that by this stage the parties may have invested large amounts of time and money in representation and in the development and preparation of exhibits and arguments. They each may also be confident that they have the "winning hand" with their existing final offers.

The hearings, typically, are extremely boring affairs, with all of the excitement that comes with watching paint dry. Any emotion that the parties may have exhibited during bargaining and mediation has usually dissipated entirely. What takes place is the presentation by each party of one or more large loose-leaf binders of exhibits. The hearing consists of a representative of each party going through the exhibit book briefly, numbering the exhibits, and describing what they are. The other party and the arbitrator may ask questions, or may ask for clarification of what has been presented.

In most hearings, if there are witnesses, then their testimony is usually quite brief. The basic facts are usually not in dispute.

In a typical hearing, the employer may present an administrator or comptroller who will try to impress upon the arbitrator the employer's difficult financial condition, as well as the serious efforts that have been made to constrain spending and avoid layoffs, while at the same time maintaining consistency of treatment of its various bargaining units and arguing that its offer is reasonable also compared with relevant external units. There also may be a health insurance consultant who will testify about current trends and the reasonableness of what the employer has in place and/or has proposed.

The union may present a health insurance expert from its parent organization, or perhaps an outside consultant, for the same purpose—to persuade the arbitrator about the reasonableness of the union's offer in contrast with the employer's offer. The union may also present a staff person or someone from the bargaining team to elaborate on the reasonableness of its proposed wage increase. The witness will explain all that the union has given up in the way of proposed or existing benefits and the reasonableness of what the union is proposing in light of settlements reached among comparable employees elsewhere, and why the unit is deserving of greater increases than have been given to other internal bargaining units.

Typically, after the hearing ends the parties file briefs and reply briefs. Some two months or more after the arbitration hearing, the ball is finally in the arbitrator's court. The rules of the WERC require that a decision be rendered within 60 days after the close of the hearing. The arbitrator is required to select one party's package of proposals in its entirety. It is not unusual for the decision to be issued a year or more after the petition to begin the process was submitted. It also is not unusual for the arbitrator's decision to decide the terms of a 2-year contract that has expired by the time the decision is issued.

Has this been a successful system of dispute settlement?

In at least four respects, the answer to that question is a clear "yes." First, since binding arbitration became effective in 1978, there have been a very small number of strikes. The Wisconsin Legislative Fiscal Bureau, citing information filed by the WERC, reports that prior to 1978 there were 111 strikes, and there were 11 more between 1978 and 1981. There has been only one strike since 1982, although there have been occasional job actions. Certainly, a union is not likely to risk going on strike prior to exhausting the statutory dispute settlement system. Once having done

that, there would be great difficulty with the public, the media, the legislature, and the courts if the union then struck after the issuance of a statutorily binding decision.

Second, during all of the years since binding final offer total package interest arbitration has been in place, that part of the statute has not changed. I am not aware of any efforts by legislators or representatives of the parties to change to another system. Thus, as discussed earlier, even though some early reviewers and critics of the system viewed it as "draconian," final offer total package interest arbitration has not been viewed that way by its participants.

Further measures of success proceed from a bias that it is better for bargaining and labor relationships if arbitration is used infrequently and not as a replacement for bargaining. Viewed in this light, a third measure of success is that few issues are presented to the arbitrator in a typical case. Usually the number of issues arbitrated is five or fewer, and in most cases it is three or fewer. (For example, at the 2007 Wisconsin Public Sector Labor Relations Conference held by the WERC, Sherwood Malamud reviewed the decisions issued in 2006. There were 43 cases. Of these, 37 involved 3 or fewer issues, and the median number was 2.) As should come as no surprise, by far the most common issues in arbitration were wages and health insurance.

There are two likely reasons for there being few issues taken to arbitration. First, both parties have an interest in resolving their own differences and leaving as few items as possible to be imposed by an arbitrator, particularly language items. Second, and perhaps just as important, is that neither party is interested in giving the arbitrator an excuse to award in favor of the other party's total package; hence, less exposure is better.

There are exceptions, of course, although fortunately for the parties and the arbitrators they occur infrequently. In exceptional cases parties are able to agree on very little, usually during the negotiation of a first contract. I recall one such case in which I had to make a final offer total package decision on 38 outstanding issues. We all know that no one party is going to be right on 38 issues. It becomes a real "crap shoot" for the parties. The arbitrator can only hope that his or her reputation as an experienced neutral will not be damaged severely when the word gets out that the ruling was entirely in favor of one party on 38 issues.

A fourth measure of the system's success is that arbitration has been used relatively infrequently. A report by the Wisconsin

Legislative Fiscal Bureau in January 2007 showed that between 1978 and 2006, Wisconsin's bargaining units of nonprotective employees had their disputes end in arbitration awards just 14.9 percent of the time. 81.7 percent of the cases were resolved voluntarily (8,881) and 3.4 percent of the cases ended in consensual binding awards, so called consent awards (368) [Information Paper 95 Dispute Resolution Procedures for Municipal Employees]. An unofficial count of awards issued in nonprotective units shows the following number of awards issued from 2004 through 2008: 2004: 31, 2005: 18, 2006: 36, 2007: 20, 2008: 21.

The percentage of cases ending in arbitration awards has remained quite consistent over the years. In a study that I coauthored with Howard Bellman in 1980, reporting on the first two years of experience under the mediation-arbitration law, 18 percent resulted in arbitration awards.[4]

Interestingly, in the cases that resulted in arbitration awards between 1978 and 2006, the results were essentially evenly split, with the union winning 49.1 percent and the employer winning 50.9 percent. The updated figures published by the Wisconsin Legislative Fiscal Bureau through 2008 show that the won/lost percentages have not changed. I do not know how these utilization rates or these won/lost figures compare with experience under the different arbitration systems in other states.

The relatively infrequent use of the process and the close won/lost percentages would seem to reinforce the notion that the parties face maximum uncertainty about the ultimate outcome. Such uncertainty is a good thing if the goal of the statute is to achieve voluntary settlement rather than the use of arbitration. The parties reasonably may view voluntary agreement as a better alternative. An esteemed colleague used to say that the uncertainty of the final offer total package system would be increased still more if the appointed arbitrator were a rhesus monkey.

Although it sounds like a contradiction in terms, the Wisconsin arbitration system also maximizes certainty. The outcome is uncertain and both parties take a gamble in hopes of winning all, rather than losing all. Tempering that, however, is the certainty

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[4]Krinsky & Bellman, *The Effect of the Senate Bill 15 Amendments to the Municipal Employment Relations Act*, A Study by the Wisconsin Center for Public Policy, submitted to the Wisconsin Legislative Council Dec. 1, 1980.

about what it is that they might lose. The other party's package is there for all to see, and a loss means the implementation of the opponent's package. If the risk of loss is perceived as being too high, then there is still the opportunity to try to bargain a less-risky voluntary settlement and avoid arbitration. Of course, that assumes an opponent who would rather have a voluntary settlement than a victory in a game of "gotcha."

The focus thus far has been on the positive aspects of the final offer total package interest arbitration system. There are some perceived negatives.

First is the effect on bargaining, which may be shortened considerably and without adequate consideration being given to issues that one party or the other does not agree are important. Thus, for example, issues of concern to employees or managers, but not viewed by the union or the employer as important enough to take to impasse, may never get dealt with or even seriously discussed. At any time during the bargaining, a party that wants to limit the bargaining to what it perceives as crucial issues (e.g., wages and insurance) may petition for interest arbitration, not make concessions on other issues, and submit a final offer on what it views as the crucial issues. This strategy does not necessarily limit the other party to the same small number of issues, but there is little or nothing to be gained by the party that wants to keep talking where the other party has exercised its right to initiate arbitration.

Another example illustrates the negative effect of final offer total package interest arbitration on bargaining. Suppose that the petitioning party has a total package that contains 1–5 items. Will the other party submit a final offer with 8–10 issues? Probably not, unless those other items are viewed as crucial. Unless the party with the larger number of issues has a high degree of confidence that the arbitrator will support it on all of those issues, the risk of going forward with a larger package may be too great. Rather, the focus of both final offers will be on the smaller number of issues, and the other issues may not be addressed. This is bound to have adverse consequences for morale, relationships, and operations.

Another effect of total package interest arbitration is one, which, depending on one's point of view, may be good or bad. As indicated above, the process removes emotion from the mix. It minimizes the occurrence of events that might otherwise help unions to organize and maintain a committed membership, things like demonstrations, picketing, or strike preparations. By the same

token, managers may feel less of a stake in the outcome where they do not engage in extended bargaining and do not have to participate in plans to counter union tactics or strategies about how to get public support. Rather, the process is largely left in the hands of representatives, attorneys, and research analysts to fight the war of the notebooks. It is an intellectual exercise.

There is yet another effect of total package interest arbitration that, depending on one's point of view, may be good or bad. The process does not result in innovation. That is good if you believe that innovation should be left to bargaining, not arbitration. It is bad if you believe that something should be implemented, even if most other municipalities are not doing it. Or, it is bad if you are trying to hold on to something innovative that you have already, but that most other municipalities do not have. The total package approach tends to reward final offers that are in line with what is being done elsewhere. If a package has things in it that "stick out," then there is a risk that it will not be implemented.

Earlier I discussed the uncertainty that the parties have in deciding whether to risk going to final offer total package interest arbitration. There is another aspect of uncertainty, rarely made explicit in arbitration decisions, that should contribute to the parties' uncertainty to the extent that they are aware of it. Any interest arbitrator in Wisconsin will tell you, if speaking candidly, that there are many cases in which the arbitrator has difficulty developing a persuasive rationale for choosing one package over the other. The parties expect the arbitrator to give a cogent explanation for the outcome. A coin flip won't do and the arbitrator has to resist the temptation to say: "I rule in favor of party X 'because I said so'."

A typical case illustrates the problem. The municipality bargains with four other bargaining units. Each of those units has been offered and accepted the same health insurance program. The employer, insisting on internal consistency, includes the identical program in its final offer. The union's health insurance program is both reasonable and somewhat more in line with what has been offered and accepted in comparable external bargaining units.

Again, for reasons of internal consistency, the employer has offered the same percentage wage increase to each of the other units, and they have reached voluntary agreement. The employer includes that same percentage increase in its final offer. The union's final offer is to increase wages an additional 1 percent in each year of the contract, and the union's offer is completely

consistent with the wage offers made and accepted in each of the external comparable bargaining units.

Which package does the arbitrator select, and why? One side is going to win and the other is going to lose, even though a fairer outcome, if the system permitted it, might be to award the wage offer to the union and the health insurance offer to the employer. Moreover, if there are other issues in the package, the most reasonable offers on the most important issues may lose because of the way that they are packaged with other issues that the arbitrator does not want to select.

The gamble for each party in final package arbitration is to propose a package that the arbitrator will not view as worse than the other party's package. I am not alone among arbitrators, I'm sure, who have chosen package #1 because in the arbitrator's view it was less bad than package #2. On several issues there may be nothing to distinguish the packages in terms of viewing them as good or bad, or fair or unfair, but on the remaining issue the arbitrator may view it as the determining factor, not because it is the most important issue, but because it offends the arbitrator to award in favor of a package that contains that offer.

By the same token, the arbitrator may not want to award in favor of a particular part of an offer, but may decide to overlook it because of the greater significance of the remaining parts of the offer. This may result in the winning side achieving something that it probably would not have been able to get were that issue to be evaluated on its own, or as part of an issue-by-issue process. It is for the parties to try to guess whether anything in their packages will cause the arbitrator to rule in favor of the other party. An incorrect guess can cause an otherwise completely reasonable package to be not selected.

An important aspect of this guessing game involves the question of quid pro quo. If Party A proposes something new, does it have to give up something to get it? Or, if Party A has enjoyed a benefit for years that is not in place among the comparables, does it have to make a concession in order to keep it or does the other party need to offer something to get rid of it? This really is a guessing game. If you take the trouble to read interest arbitrations, then you will find that it is not easy to predict when a quid pro quo will be required, or whether the offered quid pro quo will be adequate. I dare say that if you were an advocate deciding on the selection of an arbitrator, you would have difficulty predicting

the outcome of quid pro quo arguments even if you thought you knew the arbitrator's general approach to the subject.

Before concluding, there is one additional subject that is worth discussing here. For anyone who is trying to compare the merits of one interest arbitration system with another, it is important to know what you are comparing. I have described to you, for ease of explication, the essential elements of Wisconsin's total package interest arbitration for nonprotective employees as it was developed and practiced in its early years.

The system has been made much more complicated by the legislature since the early 1990s. The legislature imposed additional changes to MERA and to other laws that affect the arbitrator's decision making and the parties' decisions to go to arbitration. Describing a "final offer total package" system as better or worse than an "issue-by-issue" system may not do either system justice unless the comparisons take into account the underlying rules of the game that may limit the contents of offers and the manner in which they may be considered by arbitrators.

As mentioned previously, MERA always contained criteria that the arbitrator was directed to consider, factors common to many arbitration systems. However, the legislature's concerns with keeping down property taxes led it to impose additional factors.

In 1993, the legislature imposed the so-called Qualified Economic Offer (QEO) to limit the rate at which school costs were increasing. It singled out school board–teacher relationships. If the school board makes a final offer to increase wages and benefits by 3.8 percent or more, then the union has no access to interest arbitration. The result has been to make interest arbitration of teacher disputes quite rare. Of course this limit has affected the size of settlements of other unionized employees both in schools and in other areas of municipal government. For example, what is the likelihood that other school employees will be offered and receive wage or benefit increases above and beyond what teachers are allowed to receive?

Also in 1993, the legislature imposed levy limits on how much employers may increase taxes. Thus, where an employer can show that it is levying taxes up to or very close to the allowable maximum, a union is going to have a difficult time prevailing in arbitration with a final offer containing larger increases in wages and benefits than the employer has offered. The previously existing levy limits were made much more restrictive in 2006 and 2007, where increases in allowable levies were limited to 2 percent of the

local rate of new growth. The figure was raised to 3.86 percent in 2008, but was lowered to 2 percent once again for 2009.

In hopes of further controlling tax increases, in 1997 the legislature added two criteria to the interest arbitration statute: one criterion to be given the greatest weight, and the other to be given greater weight. These factors make the use of arbitration even less attractive to unions seeking to raise significantly the economic standards of their members. These factors also make it very difficult for arbitrators to minimize the importance of the economic context in which these disputes occur.

The greatest weight factor states:

> In making any decision . . . the arbitrator . . . shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator . . . shall give an accounting of the consideration of this factor in the arbitrator's . . . decision.

The greater weight factor states:

> In making any decision . . . the arbitrator . . . shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the [other] factors specified. . . .

Prior to the imposition of these criteria, interest arbitration was already a conservative process, in my view, in the sense that typically it did not produce innovative or unusual results and did not impose major changes. These additional legislative enactments have undoubtedly contributed further to this conservatism, affecting what occurs in bargaining, as well as the utilization and outcomes of the interest arbitration process. They have undoubtedly affected the decisions of arbitrators, whether or not the arbitrators have cited them explicitly.

The effects of other statutes is illustrated by a recent article in the *Wisconsin State Journal*[5] that cited statistics compiled by the Wisconsin Association of School Boards that show percentage salary and benefit increases given to Wisconsin teachers in the years prior to and since the passage of the QEO. For the years 1984–1985 through 1992-1993, the average increase was 7.46 percent, ranging from 6.9 percent to 8.4 percent. Since the implementation of the QEO, for the years 1993–1994 through 2008–2009, the

[5]Nov. 23, 2008.

average increase was 4.17 percent, ranging from 3.7 percent to 4.9 percent.

It should be noted that as a result of the most recent election, the governorship and both houses of the Wisconsin legislature are controlled by Democrats, and there is now serious consideration being given to eliminating the QEO and to modifying the revenue caps. If these changes are made, then there undoubtedly will be effects on the frequency of use of arbitration and its outcomes.

It is my hope that this paper has given you some insight into the Wisconsin system, and has highlighted some of the issues that those of you in other states might want to consider before revising an existing arbitration statute or adopting a new one.

III. The Interest Arbitration Voluntary Settlement Success Story in the Iowa Public Sector and Its Applicability to the Employee Free Choice Act

RONALD HOH*

I am pleased to be able to share with you the interest arbitration success story in the Iowa public sector, and my thoughts regarding what both the parties under the Employee Free Choice Act (EFCA), as well as the administering agency for purposes of the EFCA interest arbitration provisions, the Federal Mediation and Conciliation Service (FMCS), can learn from the Iowa interest arbitration and voluntary settlement experience.

I do so from what I believe is a unique perspective. I was a staff member, mediator, administrative law judge, and arbitrator for the neutral agency administering the Iowa law—the Iowa Public Employment Relations Board (PERB)—for the first 11 years of the existence of the Iowa Public Employment Relations Act, and have since 1985 regularly served as a fact finder and interest arbitrator for cases arising in Iowa. Prior to that, I served as a Field Examiner with the National Labor Relations Board (NLRB) for about 2½

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