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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years, and so have at least some idea of the procedures used by the NLRB in its limited role in private sector dispute settlement. In addition, as Director of Mediation Services for the Iowa PERB, I was in charge of the voluntary contract settlement program in the Iowa public sector during the last six of my years with PERB, overall supervising a team of mediators that included not only a small staff of PERB personnel who engaged in mediation services, but also a cadre of five to seven federal mediators stationed in Iowa and a seasonal group of about 30 ad-hoc mediators, who came from various academic and other full-time jobs and offered their assistance in mediation, often late into the night, for limited state-paid compensation.

Many of you who know me are aware that my main arbitration office is in California, where I reside, and may wonder why I am not choosing to concentrate my presentation on interest arbitration as it exists in California. I have chosen to concentrate on the Iowa system because the Iowa system—under virtually any measure—is a clear success, while interest arbitration as a dispute settlement tool in California has a success record that is, at best, spotty. Indeed, the California statewide interest arbitration statute for police and firefighters was declared unconstitutional in 2006. It is my view that the Iowa system has much to recommend it when it is considered in the context of the federal EFCA.

The Iowa Statutory Framework

The Iowa Public Employment Relations Act, enacted in 1974, is an all-inclusive collective bargaining statute that essentially covers all nonfederal public employees in the state, including state employees. It mandates an employer's duty to bargain with the employees' chosen representative, although the negotiable areas are more limited in scope than the "wages, hours, and other terms and conditions of employment" found in most other public sector collective bargaining statutes. The Act protects both employer and employee rights by proscribing certain conduct in a format similar to that of the National Labor Relations Act's unfair labor practice provisions. It sets forth procedures for determining representation matters, including bargaining unit issues. It establishes an agency, the PERB, to administer and enforce the provisions of the

statute. Finally, and most germane to this analysis, it sets forth a complex process for the resolution of bargaining impasses, which includes mediation, fact finding, and binding interest arbitration.

The Iowa statute is distinctive for a number of reasons. It provides for final-offer, issue-by-issue arbitration as the last step in the impasse procedure for all employees other than teachers (whose final step interest arbitration impasse procedure has not included fact finding since fiscal year 1992), but with a unique twist: the fact finder's recommendation on each issue offers the interest arbitrator a third final offer choice on each impasse item. The statute also covers all categories of nonsupervisory public employees, making Iowa the only state to extend interest arbitration legislation to all public employees, including state employees, rather than limiting that right to specific categories of public employees, such as police and firefighters.

The Act also sets forth a sequence of impasse procedures, progressing from negotiations to mediation, to fact finding (except for teachers), and finally to binding arbitration, absent any voluntary agreement earlier in the process. Because the Act instructs the parties, as a first step in their duty to bargain, to "endeavor to agree upon their own procedure for resolving any subsequent bargaining impasse," it clearly advocates an impasse procedure of the parties' own making, although the statutory procedure applies in the absence of such agreement.

In addition, the statutory procedure is clearly related to the employer's budget-making process. The employer's duty to bargain arises upon PERB certification of the employee organization as the bargaining representative, with bargaining required to commence "reasonably in advance of the public employer's budget making process." Although the elements of such a requirement are not fully apparent, the statute clearly creates a time relationship between the various stages of the impasse procedures and the budget certification date. Also, as the parties' bargaining relationships have become more mature, most parties agree to waive the statute's budget certification date as the required end date of the process.

Under the statutory procedure, a single party request 120 days prior to the budget certification date, the Board must appoint a mediator, and a fact finder ten days after the mediator first meets with the parties (except for teachers disputes), if the impasse

persists. The fact finder holds a hearing, issues his or her recommended terms of contract settlement within 15 days of the hearing, and the parties have only 10 days to consider it. In the absence of agreement, either party may then request the next impasse stage of interest arbitration; but within four days after such request, the parties must exchange final offers on each impasse item in dispute. The parties are not allowed to amend their final offers before the arbitrator at any time thereafter.

The arbitrator or arbitration panel, selected from a list provided by the Board, may then conduct a hearing (although a hearing is not required), administer oaths, issue subpoenas, and take testimony. Within 15 days of the hearing, the arbitrator or panel must select "the most reasonable offer, in its judgment, of the final offers on each impasse item submitted by the parties, or the recommendation of the fact finder on each impasse item." As I have previously indicated, since 1992, the statutory procedure for teachers has not included the recommendation of the fact finder on each impasse item as an alternative final offer choice for the interest arbitrator. Any mediation efforts by the arbitrator are statutorily proscribed.

Experience Under the Statute

Although the statute was enacted with an effective date of July 1, 1974, the duty to bargain did not become effective until July 1, 1975. Because the statutory bargaining scheme and the impasse procedures were designed to activate bargaining in advance of the budget-making process, negotiations generally did not begin until Fall 1975 for contracts that would become effective on July 1, 1976.

Table 1 sets forth the sequence of cases moving through the impasse process each year, and the number of impasse cases resolved at each stage of the procedure. Because the Iowa statute does not permit voluntary recognition and requires PERB certification of the bargaining representative before an employer's duty to bargain arises, the precise number of potential negotiations (and thus potential impasse cases) at any particular time is known. In addition, the statutory change in 1991 eliminating fact finding from the statutory impasse resolution process for teacher bargaining units is largely responsible for the lower number of fact-finding reports issued in 1991–1992 and thereafter.

TABLE 1: Historical Impasse Activity

Year	Total Certified Units	Total Requests for Impasse Services	Mediated Settlements	Fact-Finding Reports Issued	Interest Arbitration Awards Issued	Interest Arbitrations as % of Total Units
1975–1976	421	305	195	44	25	5.93
1976–1977	572	357	203	60	41	7.16
1977–1978	638	440	253	36	27	4.23
1978–1979	680	448	258	57	22	3.23
1979–1980	724	475	323	43	28	3.86
1980–1981	765	522	332	74	46	6.01
1981–1982	800	568	347	42	43	5.37
1982–1983	815	593	402	94	53	6.50
1983–1984	826	611	399	71	41	4.96
1984–1985	863	695	385	103	51	5.90
1985–1986	863	792	356	94	45	5.20
1986–1987	899	680	431	86	42	4.67
1987–1988	935	673	430	70	38	4.06
1988–1989	969	628	410	97	45	4.64
1989–1990	992	673	457	110	48	4.83
1990–1991	999	693	456	65	30	3.00
1991–1992	1017	627	413	29	53	5.21
1992–1993	1027	740	496	33	36	3.50
1993–1994	1036	698	391	37	42	4.05
1994–1995	1052	726	398	21	31	2.99
1995–1996	1062	575	340	21	24	2.26
1996–1997	1070	619	351	26	34	3.17
1997–1998	1087	569	312	19	40	3.68
1998–1999	1098	661	369	23	35	3.18
1999–2000	1106	582	305	20	34	3.07
2000–2001	1111	589	313	19	30	2.70
2001–2002	1114	604	325	15	25	2.24
2002–2003	1130	677	354	37	33	2.92
2003–2004	1154	644	332	30	26	2.25
2004–2005	1157	686	319	19	22	1.90

Year	Total Certified Units	Total Requests for Impasse Services	Mediated Settlements	Fact-Finding Reports Issued	Interest Arbitration Awards Issued	Interest Arbitrations as % of Total Units
2005–2006	1171	623	306	17	17	1.45
2006–2007	1168	587	273	7	13	1.11
2007–2008	1174	582	247	12	15	1.27

Average 3.72%

Source: Iowa Public Employment Relations Board

Table 1 shows a very high rate of mediated settlements, particularly during the first 18 years of the existence of the statute, and generally a decrease thereafter between the number of mediation requests and the number of mediated settlements— in my view, an element reflective of an ability of many of the parties in what were by then long-term bargaining relationships to work out their contracts on their own without the assistance of the mediator.

The data reveal a similar trend when total certified units are compared with those contracts necessitating resolution by interest arbitration. While the average percentage of total certified units requiring interest arbitration to resolve their contract disputes is only 3.72 percent per year over the 32-year history of the Act—a percentage significantly lower than in virtually any other interest arbitration jurisdiction—that percentage has averaged less than a 2.45 percent resolution by arbitration in the last 14 years, and an astonishing 1.98 percent average in the use of the final arbitration step in last 8 years. That improvement in what was already a very low average percentage of cases requiring resolution by arbitration is reflective not only of the factors I will mention below, but also of the maturation of the parties and the bargaining process, including voluntary resolution without the need for such formal impasse steps.

Reasons for Success

As Table 1 indicates, the parties, PERB, FMCS, and the PERB's ad-hoc mediators have been extremely successful in resolving bargaining impasses in the Iowa public sector without the parties' need to use the available interest arbitration dispute resolution

mechanism. Several reasons for that success can be identified by examining the Iowa statutory framework, the statute's implementation methods, and other extrinsic variables. These factors are not ranked in any particular order of importance.

One of the extrinsic variables fostering such high voluntary settlement rates has been the relatively stable economic climate in Iowa, and the fact that the overall budget picture generally is known during bargaining. This is particularly true in education disputes, where school financing is based upon a foundation system that draws funds largely from state aid and provides for a relatively fixed amount of local tax support. Because of such predictable financing, school budgets offer realistic parameters for possible economic settlements.

It remains to be seen whether the general stability of the economic system in Iowa and its concomitant effect on the utility of the impasse system will continue during the current economic downturn. As of November 2008, the state was projecting a $35 million budget deficit for fiscal year 2010. That amount (although constituting only .5 percent of the state budget) will result in fewer state dollars for both education and the city/county sectors for the 2009–2010 year. If the low 2007–2008 use of arbitration in a year with less than ideal economic circumstances is any indicator, however, it is likely that voluntary settlement rates will remain very high despite the economic downturn.

Another factor contributing to the Iowa statute's high rate of voluntary settlement success relates to the structure of the statutory impasse process as a whole. First, the fact-finding and arbitration provisions of the statute have had an affirmative effect upon the high rate of voluntary contract agreements. The statute not only requires the exchange of final offers before the interest arbitration hearing, but also allows only one final offer and prohibits mediation by the arbitrator. Although the parties may continue bargaining, such a system prevents arbitration from becoming an extension of the bargaining process, because the parties have nothing to gain by withholding their best offer until they reach the arbitration stage. The inability of the parties to modify final offers, coupled with the uncertainty regarding the arbitrator's award, create distinct pressure on the parties to settle. This clearly increases voluntary settlement rates and, in my view, greatly decreases reliance on contract resolution via the ultimate interest arbitration step of the impasse procedure.

Certain PERB case decisions regarding fact finding and interest arbitration have further directed the parties' attentions away from adjudication and toward voluntary settlement. The Board has narrowly interpreted the statutory term "impasse item," thereby restricting the arbitrator's discretion and limiting the areas of potential disagreement to impasse subject categories, rather than to all areas within such a category. In addition, the Board has required in case decisions that a party may not offer a proposal to the fact finder or the arbitrator that has not previously been offered to the other party during the course of negotiations. By more clearly defining and delineating what can and cannot be done for the purpose of enhancing one's position at fact finding or arbitration, the Board has, in my judgment, enhanced the effectiveness of the voluntary settlement procedures.

The aggregate effect of the impasse steps also creates a variety of pressures on the parties to move toward voluntary agreement. The first form of such pressure relates to the statutory time deadlines. Impasses under the statutory procedure must be completed within a 120-day time frame. Once the process is begun, the parties using the statutory procedures are very quickly forced to assess whether they should settle the dispute or whether they are able to put together a case allowing them to do better at a future impasse step, as the time period between the start of the mediation and any subsequent fact-finding hearing date generally encompasses a mere three to four weeks (10 weeks for teachers disputes where the next impasse step is arbitration rather than fact finding). An extension of this time pressure is what former University of Iowa professors Gallagher and Pegnetter called an "imminence pressure."[1] As their study showed, the approach of actual participation in an impasse step often generated increased pressure to negotiate a settlement immediately prior to that step. Because the Board appoints a fact finder (or sends a list of fact finders) and establishes a hearing date shortly after the expiration of the 10-day mediation period, the utility of voluntary settlement is enhanced by the imminence of the fact-finding hearing.

Another pressure-creating feature of the statute relates to the impact of final offer selection and the role of the fact finder's recommendation as a third alternative choice for the arbitrator. The last-best offer system is based upon the assumption that the

[1]Daniel Gallagher and Richard Pegnetter, *Impasse Resolutoin Under the Iowa Multistep System,* Industrial and Labor Relations Review 32 (1979), page 338.

arbitrator will tend to select the more reasonable of the alternative choices, and that the parties will tend to move toward a middle position in attempting to fashion a reasonable, and hence attractive, final offer. The parties' judgments regarding their ability to prevail at arbitration, however, are clearly affected by the third choice—the fact finder's recommendation—which quite often lies somewhere between the final offers of the parties.

The marked tendency of arbitrators to select the fact finder's recommendation rather than the final offer of either party creates additional pressure. A review of interest arbitration awards in Iowa has revealed that the arbitrator selects the fact finder's recommendation rather than either party's final offer in more than 80 percent of the cases. This unique combination of impasse structures is undoubtedly a factor contributing to the low use of arbitration in this jurisdiction, and clearly has a positive effect upon voluntary settlement.

One other section of the statute has also had a positive effect upon the percentage of voluntary settlements, and may be more directly related to mediation success. Section 9 of the Act limits the scope of bargaining to a relatively clearly defined "laundry list" of bargainable areas, and is to be contrasted with most other public sector statutes where the scope of bargaining covers a full gamut of wages, hours, and terms and conditions of employment. The Board's rules and regulations enforce this section of the statute by requiring that topics outside of its scope be barred from the fact finding or arbitration stages of the impasse procedures, unless the inclusion of such topics at these steps has been agreed to by the parties. And, as previously indicated, the Board has interpreted the term "impasse item" narrowly. Because the scope of bargaining is narrower than that found in most other jurisdictions, there are fewer potential areas of disagreement. More than likely this limited scope of bargaining has a salutary effect upon voluntary settlement, if only because the parties have fewer areas upon which they may disagree. The effectiveness of mediation is also enhanced, because the mediation stage generally provides a last chance for the parties to include areas outside of the mandatory bargainable "laundry list" in the contract, as the parties are precluded, absent agreement, from taking such subjects to further impasse steps.

In addition in this area, it is interesting to note that just last year, Iowa's Democratic Governor, Chet Culver, vetoed an amendment to the statute that would have provided for an open, broader

scope of bargaining for "wages, hours and other terms and conditions of employment." In doing so, Governor Culver cited, among other things, the success of the statute in bringing about voluntary settlement, and the low use of the interest arbitration final impasse step under the existing system.

The Board's methodology in administering the statute also contributes to the success of voluntary contract settlement in Iowa. It is the Board's policy to place extra emphasis on mediation and less emphasis on the more adjudicatory steps, despite the statute's apparent opposite emphasis. Although the statutory period for mediation is a meager 10 days, the Board does not assume mediation to be complete until the parties have either reached voluntary agreement or received the arbitration award. As a result, mediation assistance is available to the parties (and is aggressively offered by the PERB) at any time during the course of the impasse procedures.

A large number of settlements therefore occur with assistance from a mediator between completion of the 10-day mediation period and the fact finding hearing, between issuance of the fact-finding report and arbitration, and/or between the end of the 10-day mediation period and the arbitration hearing in teacher cases.

A final factor impacting voluntary settlement rates relates to the Board's emphasis on activist mediation style. Both the author and past and present PERB personnel believe that the public sector mediator must be especially assertive in creating pressure on the parties to settle rather than to proceed to the next impasse procedure step. In a sense, he or she must construct that pressure, as the strike threat is not present to automatically provide it. The PERB's emphasis upon such activist mediation style has, in my judgment, also contributed to the high rate of voluntary contract settlement.

The Iowa Experience and the Employee Free Choice Act

Section 8(h)(3) of the current proposed Employee Free Choice Act (EFCA) contains extremely minimal statutory language concerning settlement of new contract disputes via interest arbitration, in the absence of voluntary contract agreement in negotiations or mediation. It provides, in toto, in a mere 57 words, that absent such agreement "... the FMCS shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by FMCS. The arbitration panel shall render a deci-

sion settling the dispute, and such decision shall be binding on the parties for a period of two years unless amended during such period by written consent of those parties."

It is fervently hoped by this arbitrator and former PERB interest mediation-arbitration administrator that FMCS will establish regulations under this section that do more than merely set forth how an arbitration board is to be established. At minimum, such rules should address how and under what circumstances a union is to receive employer financial information that may be necessary to put together a case on any economic elements of the parties' bargaining dispute—an area generally not at issue in the public sector, where such elements are normally matters of public record—and the criteria upon which the award must be based, as exists in virtually all public sector interest arbitration statutes.

Similarly, consistent with Iowa's success in directing the parties' attention away from the ultimate interest arbitration step and toward possible voluntary contract resolution, FMCS and/or the NLRB would be well served by passing regulations to administer new language that:

- sets a definitive time period for exchange of arbitration offers;
- prevents the parties from modifying their arbitration offers once made;
- prevents either of the parties from making an offer in arbitration that has not been made to the other party either in mediation or in negotiations; and
- ensures that mediation assistance is available to the parties and aggressively offered by FMCS at all times during the course of the impasse procedures.

Each of these other elements, in my judgment and based upon my Iowa experience, would go a long way in helping to secure voluntary settlements even where the impasse resolution system under the EFCA culminates in interest arbitration.

The one thing that I do not think transfers well from the Iowa system to EFCA is the absence in Iowa of a tri-partite interest arbitration panel. I believe such a panel, when used properly by the neutral arbitrator, has much to offer as a potential voluntary settlement tool.

Finally, and again consistent with my Iowa experience in this area, FMCS should emphasize an activist mediation style in these cases, and should be highly assertive in that style to create pressure

upon the parties to reach voluntary settlement, since the strike or lockout threat is not present in these cases to automatically supply such pressure. Two studies of public sector mediation in interest arbitration systems have found that intensive, activist mediators are more likely to be successful in interest arbitration systems than mediators who do not utilize such qualities. The Iowa system's emphasis on activist mediator style and the success of mediation and voluntary settlement in the Iowa interest arbitration system are consistent with those findings.

Conclusion

The Employee Free Choice Act, if it is enacted, will change the landscape in private sector employee representative choice recognition and dispute settlement, in the latter area by providing for interest arbitration in new bargaining relationships in the absence of a voluntary contract agreement reached by the parties within certain time periods.

In enacting regulations to implement what is by any standard a current paucity of EFCA statutory language concerning interest arbitration, FMCS and the NLRB should consider regulations both fleshing out requirements under the statute in this area and focusing the parties' attention toward voluntary settlement rather than the ultimate interest arbitration step. Those agencies would do well in administering the EFCA to examine the voluntary settlement record in Iowa and the actions of the Iowa PERB in administering that EFCA statute, in developing regulations designed to encourage voluntary settlement and thus make effective the interest arbitration provisions of the EFCA.