APPENDIX C

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1973*

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Public Sector Bargaining Legislation: The Record to Date

There was a substantial amount of legislative action in 1973. Twelve states enacted or amended public employee bargaining laws; at least two local jurisdictions adopted bargaining ordinances; and Illinois Governor Dan Walker issued an executive order granting employees in the executive branch of state government the right to organize and bargain.

These 1973 developments added to the already significant growth record of public sector legislation. As of mid-1974, 36 states [1] had enacted collective bargaining statutes covering all or some categories of public employees.[2] There are only 10 states with no laws, executive orders, or attorney-general opinions authorizing public sector bargaining.[3]

The question of whether or not public employees should be allowed to strike continues to be hotly debated by legislators and practitioners. Several states—Alaska, Hawaii, Minnesota, Mon-

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1 Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington, Wisconsin, and Wyoming.

2 Attorney-general opinions authorize collective bargaining for certain public employees in Arkansas, Utah, and Virginia. In Illinois, state employees may bargain under a 1973 governor's executive order.

3 Arizona, Colorado, Louisiana, Mississippi, New Mexico (although the state personnel board has issued regulations authorizing bargaining and establishing procedures), North Carolina, Ohio, South Carolina, Tennessee, and West Virginia.

tana, Oregon, Pennsylvania, and Vermont—have adopted laws granting certain public employees limited rights to strike, depending generally upon the essentiality of the services they render.

Currently, 13 states plus several municipalities, including New York City, have statutorily decreed binding arbitration of bargaining deadlocks.[4] Charles Rehmus, James L. Stern, and J. Joseph Loewenberg are presently engaged in a U. S. Department of Labor study of the effectiveness of interest arbitration in Michigan, Wisconsin, and Pennsylvania. A partial report of their findings is included in these proceedings.[5]

It is likely that more public sector bargaining laws will be enacted next year if labor-supported candidates win governorships and seats in state legislatures and Congress in the 1974 elections. By 1975, debate will focus not so much on whether to adopt public sector bargaining laws, but rather on which categories of employees should be covered by such laws, what are the best means for impasse resolution, and what type of legislation, state or federal, will best serve the public interest and the needs of public employers and employees.

Public Sector Legislation

Indiana

(Secs. 1-14, Art. 7.5, Title 20, enacted by S.B. 255, L. 1973. Effective date: July 1, 1973.)

The first public employee bargaining law in Indiana permits teachers to organize and bargain on pay, hours, and wage-related fringe benefits. Contracts may contain a provision for binding arbitration of grievances. Employers need not bargain but may discuss:

> ". . . working conditions, other than those provided in Section 4 [subjects of bargaining]; curriculum development and revision; textbook selection; teaching methods; selection, assignment, or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations;

[4] Commentators occasionally disagree on the number of jurisdictions with such arbitration laws, depending upon how they define "compulsory, binding arbitration." By this author's count, there are 13 states: Alaska, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New York, Oregon, Rhode Island, South Dakota, Washington, Wisconsin, and Wyoming.

[5] See Ch. 3, pp. 77.

provided however, that any items included in the 1972-73 agreements between any employer school corporation and the employee organization shall continue to be bargainable."

The Act contains a management-rights provision establishing the responsibility of school employers to direct the work of employees; establish policy; hire, promote, demote, transfer, assign, and retain employees; suspend or discharge employees; maintain efficiency of school operations; relieve employees for lack of work; take actions necessary to carry out the mission of public schools.

Contract provisions may not conflict with federal or state laws or employer or employee rights under the Act, and an employer may not sign an agreement that would place it in a position of deficit financing.

The Act prohibits the right to strike. It also sets forth six employer and four employee organization unfair practices, including interfering with employees' rights, refusing to bargain or discuss, and refusing to comply with provisions of the bargaining law.

The Act establishes a bipartisan three-member Indiana Education Employment Relations Board to determine units and conduct representation elections; process unfair labor practice charges; provide mediation, fact-finding, and research services; and appoint arbitrators where parties agree to binding interest arbitration.

The timetable for coordinating bargaining with school budget requirements calls for bargaining to begin 180 days before the employer submits a budget, during which the board shall appoint a mediator if either party declares an impasse over either the negotiability or substance of an item; and either party may request the EERB to appoint a fact-finder if mediation is unsuccessful after five days. If no agreement is reached 75 days before budget date, EERB shall initiate mediation, and if disagreements persist 45 days before the date, it shall begin fact-finding. If there is still no agreement 14 days before deadline, "the parties shall continue the status quo, and the employer may issue tentative individual contracts and prepare its budget based thereon." But the employer may not unilaterally change terms and conditions of employment that are issues in dispute during this period, and nothing relieves the parties from the duty to bargain until a mutual agreement has been reached.

Fact-finders may issue advisory recommendations. The Act includes the following factors which fact-finders must consider: (1) past memoranda of agreements and/or contracts between the parties; (2) comparisons of wages and hours of the employees involved with wages of employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school corporation; (3) the public interest; (4) the financial impact on the school corporation and whether any settlement will compel the school to engage in deficit financing.

The Act also contains a provision authorizing school employer and employee representatives to submit voluntarily any issue in dispute to final and binding arbitration. The EERB is empowered to appoint the arbitrator with the stipulation that:

> "No person who has served as a mediator in a dispute between a school employer and an exclusive representative, except by their mutual consent, shall serve as a fact finder or arbitrator in a dispute arising in the same school corporation within a period of five years. Nothing, however, shall prevent an arbitrator or fact finder, if asked by the parties, to attempt to mediate a dispute."

The EERB bears the cost for mediation and fact-finding; the parties shall split the cost of an arbitrator. The EERB may make additional findings and recommendations to a fact-finder's report within five days, and after 10 days it must make the recommendations available to the public.

Under the Act's no-strike provisions, school employers are authorized to seek legal redress for any illegal work stoppage; striking organizations will lose dues-deduction privileges for one year; and school employees will not be paid for any day on which they strike.

Maine

(Ch. 63, L. 1968, as amended by Ch. 550, L. 1970, and as last amended by S.P. 644 [L.D. 1979], L. 1973. Effective date: October 3, 1973.)

The State Employees Grievance Act was amended. Former subsections 753 (1) -753 (6) were repealed and replaced with provisions that guarantee a designated representative the right to defend an aggrieved employee at all stages; reduce steps from six to five, stipulate that employer's failure to respond is automatic

waiver to the next step; and provide a new timetable for filing and processing grievances through the procedure.

Amendments also add that at least one day before an employee's grievance is presented to his supervisor, his representative may have access to his work location during working hours in order to investigate the grievance. Additionally, a department head may designate a representative with authority to take appropriate action and represent him at the appropriate step of the procedure.

The amended Act continues to provide for binding arbitration as the terminal step of the procedure, with the State Employees Appeals Board issuing final awards.

Massachusetts

(Secs. 1-15, Ch. 150 E, as enacted by S.B. 1929, L. 1973. Effective date: July 1, 1974.)

Massachusetts substantially amended its comprehensive bargaining law covering state, county, and municipal employees, including teachers and police and firemen.

The new law preserves both the arbitration board and the Massachusetts Labor Relations Commission. Managerial and confidential employees are excluded from coverage, with definitions of "managerial" and "confidential" employees included in the Act. The MLRC is empowered to certify and decertify units and conduct representation elections. Elected representatives may meet with an employer "in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. . . ."

Negotiated contracts may not exceed three years. Thirty days after the parties reach agreement, the employer must request the appropriate legislative body for sufficient funds to implement cost items; if rejected, such items are returned to the parties for renegotiation. These procedures, however, do not apply to school committees covered by laws providing for their budgetary autonomy, which would render higher legislative approval of teacher agreements unnecessary.

A significant amendment in the law provides that if a negotiated agreement contains a conflict between bargainable subjects

under the law and any municipal ordinance, bylaw, rule or regulation, regulation of a police or fire chief, or other statutory provision as expressly listed in the bargaining law, the terms of the collective agreement shall prevail. The parties may include in their contract a grievance-arbitration procedure; if they do not, the MLRC may order binding arbitration at either party's request. The law also specifies that where an employee elects arbitration as his method of grievance resolution, he may not also utilize remedies in the civil service or tenure laws.

The MLRC determines when a bargaining impasse exists. In such case, either the parties must agree to a mediator or the arbitration board appoints one, who reports back to it in 20 days. If mediation fails, the parties may agree on a fact-finder or ask the board to appoint one. He has authority to mediate and submits his recommendations to the board in 30 days; they become public 10 days later. If impasse persists after publication of the fact-finding report, the disputed issues are returned to the parties for further bargaining. The law also states that any arbitration award in a proceeding voluntarily agreed to by the parties to settle a contract dispute "shall be binding on the parties and on the appropriate legislative body and made effective and enforceable . . . , provided that said arbitration proceeding has been authorized by the appropriate legislative body or in the case of school employees, by the appropriate school committee."

Strikes and slowdowns are prohibited. If there is a strike threat and the MLRC determines that the law "has been or is about to be violated," it shall set requirements that must be complied with, including judicial proceedings. Among the law's six employer and three employee organization prohibited practices is refusal to participate in good faith in mediation, fact-finding, and arbitration procedures.

If a refusal to bargain is alleged, based on a dispute involving the appropriateness of the bargaining unit, the MLRC will issue an interim order requiring the parties to bargain, pending determination of the dispute. The MLRC or an agent will conduct hearings and render a decision that is final unless a party requests full commission review within 10 days.

Under the amendments, employees in a certified unit must pay to the union a fee that is "proportionately commensurate" with

collective bargaining and contract administration costs—where such agency shop agreement has been approved by a majority of employees in the bargaining unit.

The amendments contain new "final offer" arbitration procedures covering impasses of police officers and firefighters. A police or firemen's organization involved in an impasse that persists for over 30 days following publication of the fact-finding report shall petition the arbitration board to investigate. If the board determines that the parties have followed all other impasse procedures of the Act, and no prohibited practice charges are pending, it shall direct the disputed issues to be submitted to a three-member arbitration panel. Following hearings, each party will submit to the panel a statement containing its last and best offer for each disputed issue. Within 10 days, a majority of the panel will select one of the two written statements; this selection shall be final and binding on the parties and the appropriate legislative body. At any time before issuing the award, the panel chairman can remand the dispute to the parties for up to three weeks' additional bargaining. The following factors must be considered by the panel in making its selection: (1) the municipality's ability to pay; (2) the public interest and welfare; (3) hazards of employment, physical, educational, and mental qualifications, job training and skills involved; (4) comparisons of wages, hours, and working conditions of the employees involved with those of other workers performing similar services and with employees generally in public and private employment in comparable communities; (5) the fact-finder's recommendations; (6) the cost of living; (7) compensation and fringes presently received by the employees; (8) factors normally considered in determining wages and fringes through the collective bargaining process.

The commencement of a new municipal fiscal year just prior to an arbitration award does not impair a panel's authority, and any award may be retroactive to the beginning of the fiscal year.

Any arbitration decision, if supported by material and substantive evidence on the whole record, shall be binding and enforceable in court, provided that the scope of arbitration in police matters shall be limited to wages, hours, and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees.

Michigan

(Sec. 423.201-423.216, Act. 336, L. 1947, amended by H.D. 2953, L. 1965, last amended by Act 25, L. 1973.)

Michigan amended its Public Employment Relations Act to allow the negotiation of agency-shop agreements. The amendments also add a union unfair labor practice section; formerly the statute contained only employer unfair practices. With respect to impasses, another amendment provides that at least 60 days before a contract's expiration, the parties shall notify the Employment Relations Commission of the status of negotiations. If settlement is not reached by 30 days after such notification, and the parties have not requested mediation, the commission is required to appoint a mediator.

Minnesota

(Secs. 179.61-179.77, S.B. 4, L. 1971, as last amended by Ch. 635, L. 1973.)

Minnesota's comprehensive public employee bargaining law, effective as of 1972, authorized negotiations, allowed professional employees to "meet and confer" on policy matters, banned strikes, established a tripartite PERB, and gave county courts the right to enjoin unfair labor practices.

In 1973, the law was amended to grant nonessential employees the right to strike if an employer refuses to submit to binding arbitration or to comply with a binding award. The amendments also included a "fair share" provision, which requires nonmembers of an exclusive bargaining agent to pay a "fair share" of negotiation and grievance costs.

Under the Act's unfair practices section, employers are now prohibited from dominating or supporting labor organizations; refusing to supply an exclusive bargaining agent with budget, revenue, or other financial data; and refusing to adhere to a binding arbitration award. (Formerly, an employer had the option of rejecting the order of an arbitration panel. The legislature also repealed earlier provisions dealing with final-offer arbitration in disputes involving essential employees and provisions exempting supervisory and confidential employees and principals from arbitration procedures.) It is an unfair practice for employees to engage in unlawful strikes or to picket for an illegal purpose, such as secondary boycott.

The amendments provide that the director of the Board of Mediation Services shall certify an impasse to the board only when either or both parties, except for essential employees, petition for binding arbitration. The director determines the matters not agreed upon, based on his efforts to mediate the dispute. If the employee representative seeks arbitration, the employer has 15 days thereafter to reject the request to submit the dispute to arbitration. If the employer fails to respond, it shall be regarded as a rejection, and the rejection will become a defense to a violation of the law's no-strike provisions.

The amendments made the duration of a contract negotiable, but a three-year maximum is maintained. Contract provisions conflicting with rules, charters, or laws shall be returned to the arbitrator for modification to make them consistent.

Employers must give union agents reasonable time off to perform their duties and must grant leaves of absence to elected or appointed officials of an exclusive representative. All references in the election section of the Act to "a majority of votes of all employees in a unit" are changed to "a majority of those votes cast in a unit."

Unit-determination procedures were changed to place "particular importance upon the history and extent of organization and the desires of the petitioning employee representatives." The director must determine that an employee performs a majority of defined supervisory functions before excluding him as supervisory. But the administrative head of the city, municipal utility, police, or fire department, and his assistant are considered supervisory employees. Supervisory and confidential employees may form their own organization, receive exclusive representation rights, and all the rights of essential employees under the law. Employers must negotiate with the exclusive agent of such employees.

Under the amendments, the director must establish a grievance procedure to be available to any public employee working in a unit that is not covered by a negotiated grievance procedure. The section of the law dealing with PERB's functions was revised to provide for gubernatorial appointment of PERB members; formerly the chief justice of the supreme court made such appointments.

Statutory provisions regarding state employees were revised to stipulate that the employer of state employees is no longer the employee's appointing authority but "jointly the commissioner of administration and the director of civil service, or their representative." The state negotiators are authorized to enter into agreements, the provisions of which fix wages and economic fringe benefits. The contract terms, however, must be submitted to the legislature to be accepted, rejected, or modified.

Montana

(Secs. 1-17, as enacted by Ch. 441, L. 1973. Effective date: July 1, 1973.)

A comprehensive bargaining law covering all public employees except teachers and nurses, who are covered by other laws, allows employees to organize and bargain on wages, hours, fringe benefits, and other conditions of employment. The law also permits negotiation of the agency shop and binding grievance arbitration.

The Act contains a management prerogatives provision preserving the right of public employers to operate and manage their affairs, which includes directing, hiring, promoting, transferring, and laying off employees for lack of work or funds; maintaining efficient government operations, determining methods, means, job classifications, and personnel by which government operations are to be conducted; taking necessary actions to carry out the mission of the agency in emergencies; and establishing the processes by which work is to be performed.

The Act establishes a five-member Board of Personnel Appeals to determine appropriate units, conduct representation elections, adjudicate unfair labor practice charges, and assign mediators and fact-finders to bargaining impasses, which may also be submitted to binding arbitration by mutual consent of the parties.

The statute includes five employer and three employee organization unfair labor practices, the latter including refusal to bargain and use of agency-shop fees for political contributions. Employers may not interfere with employees' protected rights, refuse to bargain, or discriminate to encourage or discourage union membership (except that agency shop is expressly permitted).

If a bargaining dispute exists upon expiration of an agreement or after "a reasonable period of negotiations," the parties shall re-

quest mediation. If a bargaining dispute exists upon expiration of an agreement or 30 days following certification or recognition of an exclusive representative, either party may petition the board to initiate fact-finding.

From a board-supplied list of seven "qualified, disinterested persons," the parties shall alternately strike names to arrive at the fact-finder, and if the parties fail to request fact-finding, the board may initiate the process. The fact-finder has 20 days to hold hearings and issue findings of fact and recommendations, which may be made public five days after submission to the parties and which must be published if the dispute persists for 15 days after the parties have received the recommendations. Parties share the cost of the fact-finder, who is not prohibited from endeavoring to mediate the dispute.

The Act also adds that parties may voluntarily agree to submit any and all issues to final and binding arbitration, which, in such case, will supersede the fact-finding procedures.

Oregon

(Secs. 243.711-243.795, Ore. Rev. Stats. Ch. 579, L. 1963, as amended by S.B. 55, L. 1969, as last amended by Ch. 536, L. 1973. Effective date: October 5, 1973.)

A comprehensive law covers employees of all state agencies, cities, counties, community colleges, school districts, special districts, public and quasi-public corporations, and state government higher education. Employees are granted the right to organize and bargain on "matters concerning employment relations," including "fair share" agreements and binding arbitration provisions to resolve both rights and interest disputes.

The Act establishes a five-member Public Employment Relations Board with responsibility to administer the Act, determine bargaining units, conduct representation elections, adjudicate unfair labor practice charges, and conduct research.

Nine employer and six employee organization unfair labor practices are enumerated, including interference with protected rights, discrimination to encourage or discourage union membership (fair-share agreements excepted), refusal to bargain, violation of the law or the terms of an agreement, and communication di-

rectly or indirectly during negotiations with persons other than officially designated employer or employee negotiators.

Cities with collective bargaining ordinances may continue to operate under their own systems if PERB determines they do not conflict with the new state law and incorporate the new procedures.

If after a "reasonable" period of negotiations the parties do not reach agreement, they must notify PERB of all unresolved issues. At either party's request, or on its own motion, PERB assigns a mediator. If the dispute is not settled after 15 days of mediation, fact-finding is invoked.

If the parties cannot agree on a fact-finder within five days after notice that fact-finding is to be initiated, PERB submits a list of five names from which the parties select one or, if they prefer, a three-member panel from a list of seven choices. PERB may appoint a fact-finder if the parties do not decide in five days.

Within 30 days of hearing, the fact-finder must issue a report and recommendations. If the parties do not accept the recommendations within five days, PERB publishes them unless the parties agree to submit their dispute to binding arbitration. Fact-finding costs are shared equally by the parties.

The law provides that parties may sign a contract containing binding arbitration provisions for both grievance and bargaining disputes. Also, at any point during the imposition of statutory dispute settlement procedures, the parties may opt for binding arbitration.

Policemen, firemen, and guards at correctional institutions or mental hospitals, who are prohibited from striking, must submit their bargaining disputes to compulsory arbitration if mediation and fact-finding do not bring about a settlement. The arbitrator, or arbitration panel, is selected through the same procedure as is used for selection of fact-finder(s). In issuing awards, arbitrators consider: (1) employer's lawful authority; (2) stipulations of the parties; (3) public interest and welfare and employer's ability to pay; (4) comparison of wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in both public and private employment; (5) cost of living; (6) overall compensation presently received by employees, including wages and all fringe benefits; (7)

changes in any of the foregoing circumstances during pendency of arbitration proceedings; (8) such other factors normally taken into consideration in determination of wages, hours, and conditions of employment.

Employees other than policemen, firemen, and guards at mental and correctional institutions have a qualified right to strike. They must be in an appropriate, certified bargaining unit; statutory mediation and fact-finding procedures must first have been complied with; proceedings to prevent any prohibited practice must have been exhausted; and 30 days must have elapsed since publication of fact-finding recommendations.

The employee representative must then give PERB and the employer 10 days' notice of intent to strike. The law also states that "where the [permissible] strike occurring or is about to occur creates a clear and present danger or threat to the health, safety, or welfare of the public," the public employer may seek equitable relief in court, including injunction. If the court determines that the strike creates a clear and present danger to the public, it shall grant appropriate relief, which *must include* an order that the dispute be submitted to final and binding arbitration.

Rhode Island

(Sec. 36-11-1—36-11-12, Title 36, as enacted by S.B. 28, L. 1970, and H.B. 5354, L. 1972, and as last amended by Ch. 256, L. 1973. Effective date: May 15, 1973.)

The state employees' bargaining law was amended to provide that exclusive representatives may negotiate agency-shop contracts. The amended law also authorizes dues deduction.

South Dakota

(Ch. 3-18, L. 1970, as last amended by H.B.'s 619, 786, and 860, and S.B. 158, all L. 1973.)

South Dakota amended its state and local employee bargaining law to mandate "good faith" bargaining and require a statement of rationale for any position taken by either party in negotiations.

The amendments also delete provisions that provided strike penalty fines of up to $50,000 for organizations, $1,000 fines for individuals, and jail terms of up to one year. The law also was

amended to state that employers "may," rather than "shall," seek court injunctions against strikes.

Six employer and three employee representative unfair labor practices were added to the bargaining statute. With respect to the duty to bargain, the amendments state that the obligation to negotiate includes the duty to bargain on matters that are, or may be, the subject of a regulation promulgated by any state or local agency and to submit any agreement reached on these matters to the appropriate legislative body.

The law requires the governing officer or board of every agency to enact and publicize a grievance procedure. If such procedure is not enacted, the amendments specify that the commissioner of labor and management relations shall adopt grievance procedures and other regulations.

South Dakota also has a law providing for binding arbitration of police and firemen's disputes. Each of the parties shall appoint a member to the arbitration board. If they fail to agree upon the selection of the third and neutral member, either party may request the American Arbitration Association to utilize its procedures for selection of the neutral, who shall act as chairman of the arbitration board.

An arbitration board must render an award in accordance with the prevailing wage concept, after also considering such criteria as employment hazards; job training; skills; physical, educational, and mental qualifications. A majority decision of the board shall be final and binding upon the parties and judicially enforceable.

If the public employer refuses to arbitrate, the appropriate state district court is authorized to enforce the prevailing wage provisions "as to any unsettled issue relating to compensation and/or other terms and conditions of employment." The employer shall be assessed the court costs for any such action, and if the court determines that the prevailing wage provisions have been violated, it shall order the employer to make the affected employees whole as to their losses, establish the level of compensation and the terms and conditions of employment for the period for which the parties had been bargaining, and award the association reasonable attorney's fees.

The Act imposes heavy fines for violation of no-strike and no-lockout provisions. A court may also suspend an association's

dues check-off privileges for up to 12 months if it engages in a strike. However, if the court finds that the public employer or its agents engaged in "such acts of extreme provocation as to detract substantially from the responsibility of the association for the strike," the court may reduce the amount of the fine.

The Act also provides for individual strike penalties. Any firefighter or policeman who engages in a work stoppage is precluded from receiving a pay increase for one year after the violation occurs, and the violator will be placed on probation for two years with respect to civil service status, tenure of employment, or contract of employment.

The Act states that it supersedes any conflicting laws and preempts any local ordinance adopted by the state or municipalities through personnel boards and civil service commissions. Any negotiated contract provisions take precedence whenever the contract "specifically so provides." Additionally, any existing benefit provided by law relating to police or firefighter compensations, pensions, hours of work, and other conditions of employment shall not be repealed or reduced by the Act.

Texas

(Secs. 1-20, H.B. 185, L. 1973. Effective date: 90 days after adjournment of legislative session [May 28, 1973].)

The first public employee bargaining law in Texas grants all police and firefighters (with the exception of chiefs) the right to organize and bargain on wages, hours, working conditions, and all other terms and conditions of employment, but only if voters in local jurisdictions petition their governments for a referendum and adopt the bargaining law by a majority vote.

The Act requires that local jurisdictions provide police and firefighters with compensation and conditions of employment that are "substantially the same" as those prevailing in comparable private employment. Negotiations are to be "in good faith" and "open to the public."

Strikes, lockouts, and slowdowns are prohibited. Therefore, the law states that "reasonable alternatives" must be made available to resolve disputes involving police and firemen. Such alternatives include arbitration and judicial enforcement of the statutory

requirements concerning wages and working conditions of police and firefighters.

If the public employer and exclusive representative of its employees cannot reach a settlement, either party, after serving written notice to the other party specifying the disputed issues, may request appointment of an arbitration board. However, a party may not request arbitration more than once during a fiscal year.

If the parties do not reach agreement within 60 days after initiation of bargaining, an impasse will be deemed to exist. The 60-day period may be extended by written agreement for additional periods of time on the condition that each extension is for a definite period of not more than 15 days. Before invoking arbitration, the parties "shall make every reasonable effort to settle," including mediation, which shall be conducted by a mediator selected by the parties or appointed by an "appropriate" state agency.

The Act requires that a request for arbitration be submitted at the end of the 60-day preimpasse period or within five days following an agreed-upon extension of the period; the request must be in the form of a written agreement to arbitrate. However, "nothing contained herein shall be deemed a requirement for compulsory arbitration," the Act states.

Vermont

(Sec. 1721-1734, 21 V.S.A. Ch. 20, repealing 21 V.S.A. Ch. 21, as amended by H.B. 239, L. 1973. Effective date: July 1, 1973.)

A new Act replaces the former municipal bargaining law. It covers municipal employees, police, and firefighters and permits bargaining on wages, hours, and conditions of employment, including binding arbitration of grievances and the agency shop. The scope of bargaining excludes "matters of managerial prerogative," which are defined as "any nonbargainable matters of inherent managerial policy."

The Act is administered by the State Labor Relations Board, which administered the former municipal bargaining law. The SLRB determines bargaining units, conducts representation elections, conducts investigations and hearings and renders decisions in unfair labor practice cases.

The new Act prohibits employers and employee organizations from restraining or coercing employees, interfering with the other party's operations, refusing to bargain, or discriminating against persons because of race, color, religion, creed, sex, age, national origin, or political affiliation. Employers may not discriminate or fire employees because of their union membership. The law also prohibits employers from refusing to appropriate funds to implement a negotiated agreement. Employee organizations are prohibited from engaging in recognitional picketing or from inducing a strike "with the aim of forcing or requiring any employee to join an organization or forcing . . . any person to cease doing business with any other person. . . ." It is also an unfair labor practice for an employee organization to compel employees covered by a union security agreement to pay an initiation fee that the board finds "excessive" or "discriminatory."

The Act allows a limited right to strike. Strikes are not prohibited unless they occur: (1) before 30 days after the issuance of a fact-finding report; (2) after both parties voluntarily submitted a dispute to final and binding arbitration, or after an arbitrator has issued an award; and (3) when the stoppage will endanger the health, safety, or welfare of the public.

If the parties reach a bargaining impasse, either may request the state commissioner of labor and industry to appoint a mediator, or the commissioner may appoint a mediator in the absence of a request if he determines the public interest requires it. If, after at least 15 days following appointment of a mediator, the dispute is not resolved, a fact-finder will be appointed. A fact-finder must consider the following criteria in reaching his conclusions: (1) the lawful authority of the employer; (2) the parties' stipulations; (3) the public interest and welfare and the employer's ability to pay; (4) comparisons of wages, hours, and conditions of employment of the employees involved in the dispute and those received by employees in similar public and private employment in comparable communities; (5) cost of living; (6) overall compensation presently received by the employees.

The Act permits parties in a bargaining impasse voluntarily to submit their dispute to final and binding arbitration; the arbitrator must consider the same factors in issuing an award as those considered in fact-finding.

When a grievance or controversy submitted to arbitration concerns an employee's tenure, "whether or not pursuant to the provisions of a collective bargaining agreement," binding arbitration is the exclusive procedure for resolving the grievance or controversy, notwithstanding any contrary provision of any general statute, ordinance, charter, or judicial decision.

If any collective agreement is found to conflict with "any state law, charter, or special act, such law shall prevail," except as provided to the contrary in the section concerning binding arbitration of tenure grievances. However, if a collective agreement conflicts with an ordinance, bylaw, or regulation adopted by a municipal employer, the vote of the legislative body approving the agreement shall validate the agreement and supersede such ordinance, bylaw, or regulation.

Washington

(Sec. 10, Ch. 19, L. 1971, codified as Sec. 28B.16.100, as last amended by H.B.'s 489 and 1099, L. 1973. Effective date: June 7, 1973. Secs. 41.56.010-41.56.950, Ch. 108, L. 1967, as amended by Ch. 215, L. 1969, as last amended by Chs. 59 and 131, L. 1973. Effective date: June 7, 1973.)

Washington has five public employee bargaining laws covering local government employees, public school teachers, community college faculty, certain state university staff and support personnel, and port district employees. Additionally, state employees are covered by a civil service statute.

In 1973, the civil service law and state university system classified employee law were amended to permit the agency shop, provided that a majority of the members in a bargaining unit vote in favor of the agency shop.

The local government employee law was also amended to establish compulsory binding arbitration of police and firemen's bargaining disputes.

Additionally, the amendments provide that in bargaining between employers and uniformed personnel, if agreement is not reached in 45 days, mediation may be requested. If mediation fails, a fact-finding panel will be established. Such panel must issue its findings within 30 days. If the parties have not reached agreement 45 days after mediation and fact-finding procedures

commenced, an arbitration panel will be created. The Act contains procedures for mutual selection of arbitrators. The arbitration panel has 35 days in which to hold hearings and issue its report. Its decision is final and binding, subject to judicial review solely on the question of whether the arbitrator's decision was arbitrary or capricious.

The following factors must be considered by the arbitration panel: (1) the employer's legal authority; (2) comparisons of wages, hours, and fringes of uniformed personnel of cities and counties of similar size on the West Coast; (3) the Consumer Price Index; (4) other factors normally considered in determining wages, hours, and working conditions; (5) any changes in these during the course of the proceedings.

The Act also stipulates that during arbitration proceedings, existing wages, hours, and working conditions shall not be changed by either party without the consent of the other party. Strikes and work slowdowns are prohibited. The courts are authorized to impose fines for illegal strikes.

San Francisco City and County Employee Relations Ordinance

(Amends San Francisco Administrative Code by adding Art. XI.A thereto. [October 1973].)

San Francisco adopted an ordinance giving city and county employees rights to organize and meet and confer on wages, hours, and terms and conditions of employment.

The ordinance establishes an employee relations division in the office of the chief administrative officer, to be headed by a director to represent the city and county, coordinate the meet-and-confer process, and seek assistance from city and county departments and staff agencies. Additionally, the ordinance creates a Municipal Employee Relations Panel comprised of three impartial members. MERP certifies employee organizations, determines the scope of bargaining, conducts elections, holds hearings, investigates unfair labor practices, and adopts rules and regulations to administer the ordinance. The employee relations director determines managerial, confidential, and supervisory employees, with MERP resolving any disagreements on determinations.

Under the ordinance, however, the city and county retain all rights embodied in the city charter, existing ordinances, and civil

service rules, although amendments to these ordinances and rules may be proposed through the meet-and-confer process.

The ordinance contains four employer and union unfair labor practices, including engaging in a strike, slowdown, or work stoppage of any kind. In unfair practice cases, the parties must equally bear MERP's costs.

The ordinance requires the parties to meet and confer on all matters relating to wages, hours, and working conditions. However, it stipulates that charters, ordinances, and city and county civil service rules supersede an agreement. If agreement is reached by the parties on matters subject to approval by a determining body or official, they must jointly prepare a memorandum of understanding and present it for approval. Agreements must contain a no-strike clause and a provision affirming the employer's right to establish or modify performance standards and discipline employees who work at unacceptable levels of performance.

Under the ordinance's impasse procedure, the parties must bargain to impasse before mediation will be provided. If, after mediation, a bargaining dispute persists, a fact-finder or fact-finding panel is appointed. The parties may voluntarily choose final and binding arbitration, and if the dispute involves employees in vital services affecting public health, safety, or welfare, then their dispute, having persisted through mediation and fact-finding, must be submitted to binding arbitration. Arbitrators are selected from a conciliation service list of 10, by each party alternately striking off a name.

With respect to grievances, "it is the intent of this ordinance, that the grievance procedure established by the Civil Service Commission Rules will continue to be used. . . ."

Prince George's County, Md., Local Ordinance

(Effective date: June 1973.)

Prince George's County, Md., adopted an ordinance granting county employees the right to unionize, bargain, and strike in limited circumstances. The ordinance also created a nine-member Public Employment Relations Board whose members function in three separate three-member panels to handle representation, unfair practice and negotiability, and impasse matters.

The ordinance provides means for selection of appropriate units; requires parties to negotiate on wages, hours, and other conditions of employment; preserves certain merit principles; and establishes procedures for handling disputes and strikes. Negotiation of agency-shop agreements is permitted. Contracts may also contain binding grievance-arbitration provisions, and the ordinance also allows employees to authorize "voluntary binding arbitration with respect to [a] negotiation impasse."

The three-panel board is appointed by the county executive, and confirmed by the county council, from a list of names submitted by the National Center for Dispute Settlement. Members may serve concurrently on more than one panel.

Appropriate bargaining units are determined by the representation panel, but supervisors and nonsupervisors cannot be in the same unit, and professionals and nonprofessionals cannot be combined unless the former vote separately for inclusion.

A recognized exclusive bargaining agent must represent all unit employees but shall have exclusive rights to utilization of any negotiated grievance procedure and to check-off privileges. An employer is not required to bargain on countywide issues, such as pensions, unless a union represents more than 50 percent of all employees subject to such uniform rules. The employer and majority agent, however, may bargain for a variation of a countywide policy where considerations are special and unique to the class of employees or unit involved.

Requests for funds necessary to implement an agreement or approval of a provision in conflict with any county law or rules must be submitted to the council to approve or reject it, and if rejected, the pact is returned to the parties, either of which may reopen all or part of it.

An approved contract's terms prevail over conflicting merit system or personnel rules, and the council must appropriate funds to implement a contract it approves. The ordinance also states:

> "The employer shall have the obligation to bargain on matters which, although otherwise within the scope of bargaining, require action by a body, agency, or official other than the county executive or the county council. In addition, the employer shall have the obligation to bargain on the question of whether it should request such a body, agency, or official to take such action or support such request,

provided, however, that no impasse panel . . . shall be empowered to recommend that the employer make or support such a request."

The impasse panel may take any action it deems necessary to resolve a bargaining deadlock, as long as it does not impose a final and binding settlement on the parties except by mutual agreement or where the panel has denied the union the right to strike.

A single panel member generally furnishes dispute resolution services, but he may not act as a mediator and fact-finder or arbitrator in the same case without the parties' consent. An employer and union may negotiate their own impasse resolution procedure into their contract, and an employer may agree to submit disputed issues to final and binding arbitration, with any resulting agreement subject to council approval.

From the date a bargaining notice is filed to the date agreement is reached or neutral efforts to resolve a dispute have terminated, employees may not strike and employers may not make unilateral changes in wages, hours, or working conditions.

Employees at impasse may strike if the dispute has not been referred to binding arbitration, all impasse procedures have been exhausted, 30 days have elapsed since the council attempted to settle the dispute, and the union has given 10 days' notice of intent to strike—unless the panel decides that the public health and safety are endangered. An employer unfair labor practice is no defense to a prohibited strike.

The ordinance specifies seven employer and eight employee organization unfair labor practices. The unfair labor practice panel decides cases involving unfair practice charges and may issue judicially enforceable cease-and-desist orders.

Illinois

(Executive Order, September 4, 1973.)

Illinois Governor Dan Walker issued an executive order granting employees in the executive branch of state government the right to organize and elect bargaining representatives to bargain with state agencies on wages, hours, and terms and conditions of employment. The order excludes members of the state police force and employees of state colleges and universities.

The order creates the Office of Collective Bargaining to adminster the order. The OCB is to determine appropriateness of bargaining units and promote the interest of the state in bargaining on a statewide basis by "considering statewide units presumptively appropriate." Professional and nonprofessional employee groups may not be combined, however, unless the OCB determines that such combinations do not conflict with the duties of each group and a majority of professionals vote for inclusion.

The scope of bargaining includes wages, hours, and other terms and conditions of employment "so far as may be appropriate and allowable under applicable law and subject to laws regarding the appropriation and expenditure of state funds and the rules of the department of personnel." Additionally, the state is not required to bargain on the merit principle and competitive examination system; an agency's policies, programs, and statutory functions; its budget and structure; decisions on standards, scope, and delivery of service; utilization of technology; the state retirement system; life and health insurance; and "anything required or prohibited by law."

The director of personnel has the duty of conducting negotiations. The order establishes a six-member State Employee Labor Relations Council to advise the personnel director in writing rules to carry out the order. The council consists of the civil service commission chariman, the state directors of labor and of personnel, and three members appointed by the governor. The rules the personnel director is instructed to issue relate to procedures for certification and recognition, unit determination, handling of unfair labor practices, and standards for employee organizations.

The order states that nothing shall interfere with the current status of employee organizations that historically have represented certain groups of state employees, unless a majority of employees so represented express a contrary desire.

Court and Agency Decisions

California

Adcock v. *Board of Education, San Diego Unified School District*, Calif. Sup. Ct., Sept. 13, 1973.

The California Supreme Court, affirming a lower court, held that a school board's transfer of a high school teacher infringed

his exercise of First Amendment rights and was not justified by any compelling state interest. The teacher was transferred from Clairemont High School to another school within the San Diego district because of his outspoken criticism of certain school policies and regulations.

Citing the U. S. Supreme Court decisions in *Tinker* v. *Des Moines* and *Pickering* v. *Board of Education,* the California court emphasized that a teacher's right to speak is constitutionally protected as long as it does not result in any disruption, impairment of discipline, or material interference with school activities. According to the court:

> "In balancing the important right of school authorities to administer the system efficiently, . . . the court must look carefully into both the dynamics of why the administrative action was taken and the inherent effect of taking it. . . . Disharmony and friction are the healthy but natural results of a society which cherishes the right to speak freely . . . and these resultant by-products should never prevent an individual from speaking or cause that individual to be penalized for such speech. Any attempt to do so abrogates the protections that the First Amendment afford to all."

In the court's view, the teacher's speech did not pose a threat to the school district which would justify a speech limitation.

Florida

Dade County Classroom Teachers v. *Legislature of the State of Florida,* 269 So.2d 684, 81 LRRM 2899 (1972).

The Florida Supreme Court dismissed a teacher organization's petition to compel the state legislature to enact guidelines regulating the right of collective bargaining by public employees. However, in a second judicial warning to Florida lawmakers, the court stated that if the legislature did not establish bargaining guidelines for its public employees and teachers "within a reasonable time," the court would have "no choice but to fashion such guidelines by judicial decree." The court's decision was based on the fact that as of 1968 the state constitution guaranteed to public employees the same bargaining rights as are granted to private sector employees, except for the right to strike. Because the legislature had thus far failed to enact legislation implementing public employees' constitutional rights, the court warned that it would do so through judicial fiat, if legislative foot-dragging persisted.

Maine

City of Biddeford v. *Biddeford Teachers Association,* 83 LRRM 2098 (1973).

In an evenly divided decision interpreting the state's Municipal Employees Labor Relations Act, the Maine Supreme Court held that the statute's binding arbitration provisions are constitutionally sound.

Three judges concurred with the Biddeford school board that in submitting certain interest disputes to arbitration, it was unconstitutionally delegating its authority to nonelected individuals who were not responsible to the electorate. These judges also found that the law lacked specific standards to guide an arbitration panel.

The other, and prevailing, half of the court held that the statute, in its totality, expressly and implicitly, contains adequate standards and "intelligible principles" to guide arbitrators. The legislative mandate that arbitrators act reasonably and fairly is, in itself, "adequate" to sustain arbitration provisions.

The court also relied on the fact that the Maine statute is of limited scope; wages, pensions, and educational policy are excluded from binding arbitration. The court expressly held the following matters to be educational policies excluded from the scope of an arbitration award: (1) class size; (2) length of teachers' working day; and (3) vacations and commencement of the school year. The following areas involve issues that primarily affect teachers and public employees, and thus they are subject to a binding award: (1) preimposed school hours; (2) preimposed school days for teacher attendance; (3) teachers' aides for nonteaching functions; and (4) special teachers to teach special subjects.

Michigan

City of Detroit and Detroit Police Officers Association and Detroit Fire Fighters Local 344, IAFF, and Detroit Police Lieutenants and Sergeants Association, 491 GERR B-9 (2/19/73).

The Michigan Employment Relations Commission dismissed charges filed by the Detroit Police Officers Association that the City of Detroit unlawfully refused to bargain by insisting, on the

basis of an arbitration award involving the city and its firefighters, that there be parity between Detroit police and firemen.

In a contract dispute between the city and the firefighters' union, an arbitration panel ordered continuance of the traditional police-fireman parity relationship. But the MERC found that in negotiating with DPOA, the city did nothing more than "consider the facts of economic life" that the city-firefighter arbitration award imposed on it. Similarly, the commission ruled that the city did not illegally use its agreement with the Detroit Police Lieutenants and Sergeants Association as a limitation on bargaining with the DPOA. Rather, the public employer again "considered" the historical salary relationship between supervisory lieutenants and sergeants and their subordinate police officers as one more "fact of economic life."

AFSCME, Local 1518 v. *St. Clair County Board of Commissioners*, 204 N.W.2d 269, 82 LRRM 2927 (1972), 498 GERR B-6 (4/9/73).

A Michigan court of appeals ordered a public employer to implement provisions for binding grievance arbitration contained in an impasse arbitration award under the state's police-fire compulsory arbitration act. In the court's view, such provisions were "within the spirit and intendment of the act to provide a mandatory means of settling disputes between the parties."

Compulsory arbitration had been invoked to resolve an impasse between St. Clair County and Local 1518, AFSCME, concerning a new contract for deputy sheriffs. The county refused to comply with certain provisions of the arbitration award, and a circuit court ordered enforcement of all of the provisions except the one for compulsory arbitration of disputes concerning contract interpretation and application.

Disagreeing with the lower court with respect to the enforceability of the grievance-arbitration provision, the appellate court stated:

> "By requiring policemen and firemen and their public employers to submit unresolved disputes to compulsory arbitration, the legislature evinced an overriding public policy favoring peaceful and expeditious resolution of labor disputes affecting policemen and firemen. Arbitration panels . . . have extraordinary power of writing the terms of a new contract; the panel is empowered to decide such issues normally left to the parties to decide. . . .

"It would be most incongruous if the legislature, in providing for compulsory arbitration of such matters . . . did not at least permit compulsory arbitration of the comparatively minor disputes bound to arise from time to time in the administration of the contract."

Regents of the University of Michigan v. *MERC and University of Michigan Interns-Residents,* 204 N.W.2d 218, 82 LRRM 2909 (1973).

The Michigan Supreme Court held that interns, residents, and postdoctoral fellows working at the University of Michigan Medical Center are public employees within the meaning of the state's public sector bargaining statute.

The threshold issue in the case was whether application of the PERA to interns and residents violates the state constitution by infringing on the university regents' authority. The court stated that since the constitution was amended in 1963 to provide for resolution of public employee disputes, efforts must be made to harmonize this amendment with other constitutional provisions. This can be done, concluded the court, even though the scope of intern-resident bargaining may be limited if the proposed subject matter falls clearly within the "educational sphere" or interferes with the autonomy of the regents.

New Jersey

Dunellen Board of Education v. *Dunellen Education Association,* 311 A.2d 737, 85 LRRM 2131 (1973).

The New Jersey Supreme Court reversed a lower court ruling and held that a school board decision to consolidate the chairmanships of two departments "could not legally" have been submitted to binding arbitration, since the state school laws relegate disputes in matters of "educational policy" to determination by the commissioner of education.

Emphasizing the difficulty of defining the statutory phrase "terms and conditions of employment" in the absence of explicit legislative guidelines, the court concluded:

"Surely the legislature . . . did not contemplate that . . . boards of education would and could abdicate their management responsibilities for . . . educational policies. . . .

"So far as our educational policies are concerned, it is entirely clear that the board had the statutory responsibility for [the con-

solidation]. . . . And . . . it is equally clear that the commissioner had an overall responsibility for supervising such educational determinations. . . .

"Strictly this holding relates only to arbitrability but all that has been said earlier in this opinion leads to the conclusion that the consolidation was not a proper subject of either arbitration or mandatory negotiation under [the NJ Employer Employee Relations Act]."

Board of Education of the City of Englewood v. *Englewood Teachers Association,* 311 A.2d 729, 85 LRRM 2137 (1973).

Contrasting with the *Dunellen* decision was the New Jersey Supreme Court's holding in the *Englewood* case. There the court decided that a school board was required to submit to arbitration its unilateral decision to extend, without compensation, the working hours of special education teachers so that they would conform with the hours of other teachers. The court based its decision on the governing contract's "maintenance of benefits" provision. In a second issue in the case, the court held that the school board was also required to submit to arbitration grievances concerning the board's failure to reimburse a teacher for postgraduate work and failure to place him on an "MA + 30" salary scale based on the attainment of a master's degree plus additional course credits.

In reaching its decision, the court stated that all of the matters in question were arbitrable since they "directly and intimately affect the employment terms and conditions" of teachers. It added that "no issues of any substance under the school laws are presented and the expertise of the commissioner of education would not significantly further the interpretive process" regarding the contract.

Burlington County College Faculty Association v. *Board of Trustees, Burlington County College,* 311 A.2d 150, 84 LRRM 2857 (1973).

In a companion case to *Dunellen* and *Englewood,* the New Jersey Supreme Court held that the school calendar was not a mandatory subject of bargaining between a county college board of trustees and the faculty association. In the court's view, although the calendar fixes when the college is open to students, "it does

not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation," which are mandatory bargaining subjects. Moreover, the determination of the calendar involves a major educational decision that traditionally has been an administrative responsibility. The court concluded:

> "Nothing in [the Employer Employee Relations Act] deals specifically with the subject and . . . we are unable to discern a legislative purpose that it become a subject of mandatory negotiation. . . . If there be any such purpose it may hereafter be legislatively expressed in clear and distinct phraseology."

New York

Antonopoulou v. *Beame,* 32 N.Y.2d 126, 343 N.Y.S.2d 346, 83 LRRM 3092 (1973), *rev'g* 39 App. Div. 2d 685, 332 N.Y.S.2d 464 (1st Dept. 1972).

This case concerned a proceeding to compel the New York City Comptroller to comply with a grievance settlement between the Board of Higher Education and a professor who had been placed on forced maternity leave and ultimately reinstated with back pay. The question presented to the New York Court of Appeals was whether the payment of public moneys pursuant to a grievance settlement awarding back pay for a period when concededly no services were performed would constitute a gift of public funds in violation of the New York constitution.

In reversing the lower court, the court of appeals held that the grievance award was a bargained-for, legally enforceable contractual right. Thus, it was "no more a 'gift' than any other award for damages for unlawful deprivation of an opportunity afforded by contract." The court added:

> "That an award of a collective bargaining grievance procedure is a legally enforceable contractual right as opposed to a proscribed gratuity is clear from both the provisions of the Taylor Law and our decision in *Board of Education of Union Free School Dist. No. 3, Town of Huntington.* . . . [T]he United States Supreme Court has observed, '[T]he processing of disputes through grievance machinery is actually a vehicle by which meaning and context are given to the collective bargaining agreement. . . .' A settlement arrived at through an agreed upon grievance procedure is thus as much a contemplated part of the parties' collective bargaining agreement as any express term contained therein."

Associated Teachers of Huntington, Inc. v. *Board of Education, UFSD No. 3, Town of Huntington,* 33 N.Y.2d 229, 351 N.Y.S.2d 670, 306 N.E.2d 791 (1973).

Reversing the appellate division, the New York Court of Appeals held that an arbitrator's award ordering a school board to grant sabbatical leaves to teachers did not contravene the state's Sabbatical Leave Moratorium Act.

On April 12, 1971, a nonretroactive legislative moratorium for leaves of absence became effective. A collective bargaining agreement existed between the teachers' association and the school board requiring applicants to file for leaves by April 1. Twenty-one teachers applied for sabbaticals to begin on July 1, 1971. On May 1, notice was given that pursuant to the intervening Moratorium Act, the board would grant no leaves for 1971-1972. Three applicants claimed they were wrongfully denied the leaves, and upon submission of the dispute, the arbitrator held that the association had contractual rights existing and enforceable prior to the effective date of the Moratorium Act.

In upholding the arbitrator, the court of appeals ruled that the applicants had contractual interests, analogous to those of third-party beneficiaries. Furthermore, under the policy in favor of arbitration, the award could not be vacated even if the arbitrator had incorrectly applied the law of contracts. The court stated:

> "Under its agreement with the board, the association had an existing and enforcible [sic] contractual right to the sabbaticals at the time of the effective date of the Moratorium Act. Therefore, the arbitrator's award neither contravened the statute nor its public policy. Moreover, the issue was a proper subject for arbitration and, in any event, the limited public policy involved did not justify a judicial overriding of the arbitrator's award."

Board of Education v. *Chautauqua Teachers Association,* 41 App.Div.2d 47, 341 N.Y.S.2d 690 (4th Dept. 1973).

The appellate court held that the school board compliance with the contract procedure before failing to renew a probationary teacher's contract was an issue for the arbitrator, notwithstanding that the contract did not affirmatively provide for arbitration of dismissal of teachers. The contract broadly defined "grievance" as "any claim, violation . . . pertaining to this agreement," and raises a presumption favorable to arbitrability. The

court stated that any reinstatement ordered by the arbitrator must be for a reasonable period of time and could not vest the teacher with tenure. Upon compliance with the contract or statutory procedures at the end of a reasonable period, the school board is free to exercise its power to determine the competence of the teacher and to dismiss him if it finds him not competent.

Board of Trustees v. *Faculty Association,* N.Y.S. Ct., Suffolk Cty., 82 LRRM 2975 (1972).

The board of trustees is entitled to stay of arbitration relating to its failure to grant or deny sabbatical leaves for the year 1972-1973. The contract provided that the board, upon recommendation of the president, after consultation with the association, could grant sabbatical leaves for full-time faculty members. The president did not recommend any sabbatical leaves. The court held that the granting of applications for sabbatical leaves was at the sole discretion of the board on the recommendation of the president, and there was no evidence that the president recommended leaves. The court clearly construed the contract.

In the Matter of State of (New York Dept. of Correctional Services) and Prisoners' Labor Union at Green Haven, 6 PERB 3033, at 3067 (1973).

The Public Employment Relations Board held that prisoners in New York's correctional institutions are not "public employees" under the state's Taylor law. The union had sought organizational and bargaining rights for inmates at the Green Haven, N. Y., prison, arguing that the statutory definition of public employee extended to any person "holding a position by appointment or employment in the service of a public employer. . . ." The union also contended that reference in the Correction law that inmates were to be employed should be equated to the use of "employment" in the civil service law. The PERB, however, held that it lacked jurisdiction over prisoner labor and that the Taylor law definition of "employee" and "employment" did not encompass inmate labor.

Shelofsky v. *Helsby,* (N.Y. Ct. App.) 32 N.Y.2d 54, 343 N.Y.S.2d 98, 295 N.E.2d 774, 83 LRRM 2067 (1973); U.S. Sup. Ct. (1973) [*dism'g app.* 83 LRRM 2067], 84 LRRM 2421 (1973).

The New York Court of Appeals, affirming the appellate division (39 A.D.2d 168, 332 N.Y.S.2d 723, 80 LRRM 1162 [1972]),

held that amendments to the Taylor law providing that managerial and confidential employees be barred from membership in public employee labor organizations did not deprive such employees of freedom of association and equal protection of laws under the U. S. Constitution. Nor did the amendments, ruled the court, impair contractual benefits under an insurance program sponsored by the employee organization because (1) the insurance contracts were entered in contemplation of the state government's continuing power to legislate on matters affecting public employment, (2) participation in insurance plans was made contingent on continued union membership, and (3) the state employer secured similar insurance coverage for the affected employees.

The court noted that the statutory criteria designating managerial employees for purposes of excluding them from collective bargaining and labor organizations were similar to those enumerated in the federal National Labor Relations Act and were sufficiently clear to withstand a constitutional attack for vagueness. In the court's view, exclusion of managerial employees from bargaining association membership was not an unreasonable limitation in light of the state's need for a loyal and responsible cadre of management personnel to formulate policy and to handle labor relations. As Mr. Justice Breitel concluded: "Withholding the benefits of collective bargaining from management personnel has long been approved in private employment. Its carry-over into public employment is a reasonable means of promoting harmonious labor relations." (On appeal, the U. S. Supreme Court dismissed the case for want of a substantial federal question, with Mr. Justice Douglas dissenting.)

New York City

In the Matter of the Impasse Between City of New York and Civil Service Bar Association, New York City Board of Collective Bargaining, Dec. No. B-4-73.

An appeal from the recommendations of an impasse panel was found to be without substance by the New York City Board of Collective Bargaining, and the panel's order was, therefore, affirmed in a dispute between the city and the Civil Service Bar Association. The association had contended that the impasse panel's recommendations were not based on substantial evidence, that the panel had not properly weighed the criteria specified in

the New York City Collective Bargaining law, and especially that the panel did not give adequate weight to comparative salaries earned by New York and federal attorneys.

The BCB held that the law does not require that all of its criteria be equally applied, and comparability of wages is a standard that an impasse panel is required to consider but not required to adopt *pro forma.* The BCB also held that an impasse panel report will be upheld when the panel has (1) conducted a full and fair hearing; (2) considered all the relevant facts before it; (3) evaluated the record, guided by the criteria set forth in the law; and (4) written a reasoned, balanced report based upon substantial evidence. According to the board, it is not its function to conduct hearings *de novo* in impasse cases.

Ohio

Hamilton Local Board of Education v. *Mrs. Judith Arthur et al.,* Ohio Ct. of App., 10th Dist., 84 LRRM 2468 (1973).

Overturning a lower court's order that a contract dispute over wages be submitted to arbitration, the Franklin County Court of Appeals (Ohio) held that a school board may not delegate its authority to determine salaries to a third party—notwithstanding a contractual clause providing for binding arbitration in the event of an impasse in negotiations. In the court's words:

> "What we feel is squarely before this court is the question of the authority of a board of education to enter into a contract which has within it a provision for binding arbitration, which . . . gives over unto a completely different party the right to make binding policy decisions, which . . . have been by law placed within the jurisdiction of the various boards of education in Ohio."

The court concluded that a board's discretionary authority, legislatively bestowed, may not be delegated because it involves "the very basic operation, control and protection of the school system in the school districts. . . ."

Pennsylvania

Bellefonte Area Education Association et al. v. *Board of Education Area School District and Pennsylvania School Board Association,* 304 A.2d 922, 83 LRRM 2874 (1973).

Reversing a lower court decision, the Commonwealth Court of Pennsylvania ruled that the 1972 Bellefonte Area Education Asso-

ciation strike was legal because it did not menace public health, safety, or welfare, and because all procedures prerequisite to a statutorily legal strike were performed. The Pennsylvania Labor Relations Board had been informed of an impasse, and the court held that the board, by failing to invoke statutory impasse procedures, which was within its discretion to do, actually made the decision that the process should not be used.

The public health, safety, or welfare were not endangered because, in the court's view, the strike "was attended with no violence or, indeed, with anything which could be characterized as unpleasantness, except [for] the clash of wills and opinions. . . ." As for the PLRB's failure to implement fact-finding, the court held that this discretionary action was not an oversight, but a resolve that fact-finding should not be used. Moreover, even if the PLRB had been lax, the law did not impose upon employees a duty "to stir up an inert Board," as the lower court had suggested.

IAFF Local 1038 v. *Allegheny County,* 299 A.2d 60, 82 LRRM 2425 (1973).

In a case involving Pennsylvania's compulsory arbitration law for police and firemen, the Commonwealth Court held that an agency-shop provision and a grievance procedure ending in binding arbitration, both of which were contained in an impasse arbitration award for Allegheny County firemen, were illegal. According to the court, the agency-shop clause would have compelled the county to perform an illegal act in conflict with civil service law, and the binding grievance-arbitration provision was a constitutionally questionable delegation of authority to a nongovernmental body.

Pennsylvania Labor Relations Board v. *Board of School Directors of the Bethlehem Area School District,* 505 GERR B-2, E-1 (5/28/73).

In a case involving the issue of whether or not one of the parties involved in collective bargaining can compel the other party to bargain in front of a "public monitor," the PLRB held that a school district refused to bargain with a teachers' association by insisting that newsmen observe negotiations. In this case of first impression, the PLRB stated: "Bargaining is the mutual obligation of the parties. The parties can only impose their presence

upon each other. Bringing in non-mutually-agreed-upon third parties is a violation of the obligation of the party who brought the third party into the negotiations."

State College Education Association v. *State College Area School District,* 306 A.2d 404, 83 LRRM 3079 (1973).

In a case involving a school district's refusal to bargain on 21 separate items with a teachers' association, the Pennsylvania Commonwealth Court held that all of the items were nonmandatory subjects of bargaining falling within the exempt scope of inherent managerial policy under the state's Public Employment Relations Act. According to the majority opinion, an employer must bargain on wages, hours, and terms and conditions of employment. But if such an item *also* involves matters of inherent managerial policy, it is not bargainable. Employers must "meet and discuss" policy matters affecting wages, hours, and working conditions as well as the impact thereon.

Rhode Island

City of Providence v. *Fire Fighters Local* 799, 305 A.2d 93, 84 LRRM 2197 (1973), 518 GERR B-4 (8/27/73).

Rebuffing a challenge by the city of Providence to a firemen's arbitration award, the Rhode Island Supreme Court held that an arbitration panel did not exceed its authority under the Rhode Island Fire Fighters' Arbitration Act by awarding Providence firemen time and a half for overtime work.

The city argued that the tripartite arbitration panel improperly compared working conditions of Providence firemen with those of firemen in lesser-sized communities rather than adhering to the statutory requirement that comparisons be made between municipalities of "comparable size." The court, however, took a "regional" or "metropolitan" view of the arbitration statute and decided that the arbitrators' comparisons adhered to the statutory criteria.

School Community of the Town of Westerly v. *Westerly Teachers Association,* 299 A.2d 441, 82 LRRM 2567 (1973).

The Rhode Island Supreme Court held that public employees do not have the constitutional or legislative right to strike. It also held, however, that injunctions to restrain public employee work

stoppages cannot issue automatically; the courts must hold hearings to determine if irreparable harm will result, since "*ex parte* relief . . . can make the judiciary an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining process."

Town of North Kingston v. *North Kingston Teachers Association,* 297 A.2d 342, 82 LRRM 2010 (1972), 483 GERR E-1 (12/18/72).

The Rhode Island Supreme Court unanimously held that the ban in the Teachers Arbitration Act against requiring union membership as a condition of employment does not prohibit agency-shop agreements as long as the agency fee is limited to the actual cost of representation. The court, therefore, upheld an arbitration award authorizing the agency shop, which had been challenged on the grounds that it violated existing law.

Noting the difficulty of ascertaining legislative intent on this issue merely from examining the relevant statutory provisions, the court relied heavily on the "free-rider" argument in ruling that nonunion members could be required to pay a "just portion" of their bargaining agent's representation costs.

Utah

Fisher v. Walker, 464 F.2d 1147, 81 LRRM 2654 (CA 10 1972).

Affirming the findings of the district court, the Tenth Circuit held that a Utah fireman was properly suspended for maligning fire officers after they had disaffiliated with the IAFF and formed their own organization. The suspended fireman, president of his local union, contended that his suspension for publishing derogatory material in the local's newsletter deprived him of the First Amendment right of free speech. Distinguishing the instant case from *Pickering* v. *Board of Education* wherein the U. S. Supreme Court upheld the appeal of a teacher who had criticized school board spending in his letter to a newspaper, the Tenth Circuit stated:

> "Where, as here, the published criticism is false, where it is criticism of an immediate superior; where it has a divisive effect aligning the firemen against their immediately superior officers; where it is disruptive and injurious to the morale of the department; where the author of the letter refuses to try to ameliorate the situation; where the matter discussed is of departmental rather than of general public

> interest and where in the exercise of restraint the chief suspended the writer for five days instead of discharging him. . . ,"

the discipline did not infringe on constitutional rights.

The appellate court also cited in support of its decision a footnote in *Pickering* in which the Supreme Court indicated that it might not reach the same decision where "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them. . . ."

United States

United States Civil Service Commission et al. v. *National Association of Letter Carriers, AFL-CIO, et al.*, 935 S.Ct. 2880, 413 U.S. 548 (1973), 497 GERR A-9 (4/2/73).

In a 6-3 decision, the U.S. Supreme Court reversed the Court of Appeals for the District of Columbia and reaffirmed its holding in a 1947 case that the Hatch Act is not unconstitutional. The Hatch Act, passed in 1939 to restrict partisan political activity by federal employees, was challenged as being unconstitutionally overbroad and vague. Mr. Justice Byron White, writing for the Court, stated that Congress has a legitimate interest in regulating political activities of federal workers, and that the Act's provisions and implementing Civil Service regulations are not excessively broad or vague. Justices Douglas, Brennan, and Marshall dissented.

APPENDIX D

EVALUATION OF PROGRAMS SEEKING TO DEVELOP ARBITRATOR ACCEPTABILITY*

THOMAS J. MCDERMOTT**

In past reports of the Committee on the Development of New Arbitrators, various programs established for the development of new arbitrators have been described in some detail. The most prominent among these programs was the one in western New York that was organized and carried out by the Academy and many of its members in cooperation with the Federal Mediation and Conciliation Service, the American Arbitration Association, and the Western New York chapter of the Industrial Relations Research Association. Other programs were two sponsored by the U.S. Department of Labor at the University of California, Los Angeles, and the University of California, Berkeley; an AAA program for the Machinists Union in New York; and programs in Cleveland and Philadelphia.

In addition to these programs, several expedited arbitration procedures were introduced that offered promise of giving inexperienced and partially experienced persons an opportunity to gain acceptability as arbitrators. The AAA instituted a series of such procedures in various regional offices throughout the country. Other expedited procedures were the steel industry-Steelworkers Union program and a Textile Workers Union program in western New York.

The work of the committee for 1973-1974 has been an attempt to evaluate some of the results of these programs and to determine the degree to which persons participating in them gained acceptability or had their acceptability enhanced.

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* Report of the Committee on the Development of New Arbitrators for 1973-1974. Members of the Committee are Thomas J. McDermott, John R. Conlon, Harold W. Davey, Wayne E. Howard, David R. Kochery, Jean T. McKelvey, Paul Prasow, John C. Shearer, and Benjamin H. Wolf.

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The Western New York Program [1]

The western New York program began with 20 candidates, and on May 23, 1973, graduation ceremonies were held before an audience of 200 labor and management representatives from the western New York area. Of the 13 candidates receiving certificates indicating completion of the program, six were from the faculties of area universities, two were practicing attorneys, and five held positions in public employment. All candidates were placed on the active panels of the AAA and the FMCS and on the panel for the Textile Workers expedited program; six were selected to serve on the panel for the steel industry-Steelworkers expedited program.[2] Of the seven who did not "graduate," three had not completed their written decision assignments, one had decided that he did not want to become an arbitrator, and three had moved from the area.[3]

In an effort to evaluate the extent to which the candidates from this program have gained acceptability, two studies were made. One was in response to a request for particular information from the AAA regional office in Syracuse, N. Y., and from the FMCS Arbitration Department. The other was a survey of the candidates conducted by Jean McKelvey and Alice Grant.

The following three tables present data on the exposure given to the graduates and the results achieved by the Syracuse AAA regional office: a summary of other appointments received by 11 of the graduates through November 1973; the AAA experience from December 1973 through March 1974; and the total AAA experience to the latter date. Unfortunately, the FMCS was unable to provide comparable data.

It is clear from the data in Table 1 that one person, Arbitrator D, gained a remarkable degree of acceptability in a short six-month period. Up to the end of November, he had been jointly

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[1] For details relating to this program, see Thomas J. McDermott, "Activities Directed at Advancing the Acceptability of New Arbitrators," in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), at 340.

[2] See Thomas J. McDermott, "Progress Report: Programs Directed at the Development of New Arbitrators," in *Arbitration of Interest Disputes*, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1974), at 247 ff. for details relating to these programs.

[3] Report dated Jan. 31, 1974, from Academy member Alice Grant.

selected by the parties from AAA panels in nine instances. For four cases, he was the first selection and was appointed. This arbitrator is also listed on the arbitration panels of the Civil Service Employees Association and the State of New York and of the Public Employment Relations Board, and he is on a three-man arbitration panel for the city of Rochester and the Rochester Police Locust Club. Finally, he was appointed a permanent arbitrator for the IAM Lodge 2106 and Spaulding Fibre Company. His caseload, in addition to the four appointments referred to above, has been 12 cases from his permanent appointment, 15 cases from PERB, and two cases from the CSEA-State of New York panel. Also, he has served as a fact-finder in 12 cases and a mediator in one. In November 1973, Arbitrator D was appointed to fill a membership vacancy on PERB. He had had no prior arbitration experience when he entered the western New York program.

Through November, three arbitrators had received appointments through the AAA, with two showing considerable promise. Another was jointly selected, but he was not the first choice of the parties and therefore did not receive the appointment. All but one person had been selected by one of the parties. All selec-

Table 1
LISTINGS AND APPOINTMENTS, GRADUATES WESTERN NEW YORK PROGRAM, MAY THROUGH NOVEMBER 1973

Arbitrator	Times AAA Listed		Experience				Apts. Other Than AAA Cases	
			Times Selected			Times Appointed		
	Public	Private	Union	Employer	Jointly		Private	Public
A	1	1		1			2	1
B	5	1						
C	5		1	1	1	1		
D	27		14	12	9	4	12	17
E	9	1		4			3	1
F	5			1			1	
G	5							
H	4		1	1			2	
I	5		1	2	1			
J	5		1	2			1	
K	19		7	5	4	2	no report	
L	3						1	
M [a]								

[a] Not available for arbitration during this time period.

tions were for public sector cases. However, it should be noted that the names of only three persons were listed on private sector panels, for only one time each.

The record of appointments for cases other than from the AAA has been very good. Seven graduates have had at least one labor arbitration case, with all seven having at least one case from the private sector. However, with the exception of Arbitrator D, these private sector cases resulted for the most part from membership on the steel expedited arbitration panel. Three have received public sector cases.

Table 2 presents the AAA listing and selection experience for the period December 1973 through March 1974.[4] It should be noted that Arbitrator D was not listed for public sector cases. As a member of New York's PERB, he may not take public sector cases in that state. However, he was listed 11 times for private sector cases and was a joint selection once; as he was the parties' first choice, he received the appointment. Of the 13 graduates, five received appointments. For Arbitrators E, J, and M, their appointments were their first through the AAA, while Arbitrators D and K had received prior cases, as shown in Table 1.

[4] Report dated May 3, 1974, from committee member Jean McKelvey.

Table 2

AAA EXPERIENCE DECEMBER 1973 THROUGH MARCH 1974

Arbitrator	Number Times Listed		Number Times Selected			Number Times Appointed
	Public	Private	Union	Employer	Jointly	
A	2	1				
B	1				1	
C	6		1			
D		11	4	2	1	1
E	13	3	8	4	2	1
F	2	1		2		
G	4					
H	1	1	1			
I	8		1	3		
J	3		2	1	1	1
K	8	8	7	5	2	1
L	2					
M	9		3	5	2	1

Table 3 is a composite of all AAA listings and selection experience from May 1973 through March 1974. Overall evaluation indicates that Arbitrator D had gained an extremely high degree of acceptability. While most of his experience has been in the public sector, the experience he will receive from his private permanent umpireship and his relatively high degree of acceptance by at least one of the parties in his AAA private listings should enable him to win further acceptability in that area.

Of the others, nine have taken at least the first step toward achieving acceptability. Arbitrators E and K are moving well in the direction of gaining acceptability. Arbitrator E has had five cases—one from the AAA, one from the FMCS, one from other sources in the public sector, and two from the steel expedited panel. In addition, he has received five appointments as a fact-finder and one as a mediator in a public employment dispute. Unfortunately, no report was received for Arbitrator K on his experience exclusive of AAA appointments. However, his high degree of acceptability to the parties separately and jointly and the three appointments he has received represents a good selection record for a newcomer to the field.

It should be noted that the frequency with which the names were listed by the AAA office varied substantially. Arbitrators D,

Table 3
AAA EXPERIENCE MAY 1973 THROUGH MARCH 1974

Arbitrator	Number Times Listed		Number Times Selected			Number Times Appointed
	Private	Public	Union	Employer	Jointly	
A	3	2		1		
B	6	1			1	
C	11		2	1	1	1
D	27	11	18	14	10	5
E	22	4	8	8	2	1
F	7	1		3		
G	9					
H	5	1	2	1		
I	13		2	5	1	
J	8		3	3	1	1
K	27	8	14	10	6	3
L	5					
M	9		3	5	2	1
Totals	152	28	52	51	24	12

E, and K were listed more frequently than the others because they demonstrated a greater degree of acceptability to the parties. Arbitrator A's name was seldom listed because he asked to be submitted only to parties in the immediate area of his home city.

It is interesting to see, in Table 3, the relatively high number of instances in which at least one of the parties selected a program graduate from a panel. Union representatives selected graduates in 52 of 180 listings, and management representatives did so for 51 cases. There were 24 joint selections, another very high figure considering that all but two members of the group had had no prior arbitration experience. These numbers of selections appear to support the conclusions that the parties in the western New York region are fulfilling their commitment to accept the graduates of this program. All in all, the evidence indicates that the western New York program has been very successful in achieving acceptability for its graduates during the 10 months following its completion.

The Program of the Institute of Industrial Relations, University of California, Los Angeles

Another program in which the Academy served as a cooperating agency in the presentation of a program for training neutrals was one sponsored by the U.S. Department of Labor and conducted by the Institute of Industrial Relations at UCLA. Howard Block was project director.[5]

From 70 applicants, a tripartite committee chose 22 candidates, all of whom completed the program. Only one is from a university faculty, five are practicing attorneys, and nine continue to work as advocates for management or labor. Of the remaining seven, one is a National Labor Relations Board field examiner, one is an assistant regional manager for the AAA, and five are in other occupations.

Following "graduation" of the 22 candidates, the program administrators sponsored a series of activities directed at enhancing the acceptability of the new arbitrators.[6] A booklet was prepared,

[5] See McDermott, *supra* note 2, at 253-255 for a presentation of the makeup of that program.

[6] This section is drawn from the report dated May 21, 1974, of committee member Paul Prasow.

setting forth how the program was developed and the candidates selected, the content of the program, and detailed biographies of all the graduates. Approximately 3,000 of these booklets were distributed to the labor-management community throughout California and other western states.

In addition, the institute had two "practitioner luncheons," one for public sector and the other for private sector labor and management representatives. Approximately 25 representatives attended each luncheon at which the graduates were introduced. The Arbitration Section of the Los Angeles County Bar Association requested and was given detailed information regarding several of the graduates for the purpose of recommending to clients their use as arbitrators. Other administrators of the program, who are practicing attorneys, have encouraged parties to select graduates for arbitration cases. Also, five of the graduates are being used as instructors in various institute training programs and classes on labor-management relations, which provides them with exposure to the parties.

All of the graduates who applied were placed on neutral panels of the AAA, the National Center for Dispute Settlement, and the California State Conciliation Service. Five of the graduates are on the FMCS lists, but that was accomplished through their own efforts. Plans are to survey these agencies to determine the extent to which graduates are being used. On the basis of reports received from the graduates themselves, the following usage as neutrals has resulted up to May 1, 1974:

	Number of Graduates
Regularly hearing cases	5
Acted as an election umpire	1
Received first arbitration cases during 1973-1974	2
Received first fact-finding cases during 1973-1974	3
Teach in labor relations training programs	5
Approximate total number of cases heard	40 cases

Of the nine graduates who continue to hold full-time positions as labor and management advocates, only one has received an arbitration case.

AAA Expedited Arbitration Programs

All expedited arbitration programs have had as objectives a reduction in the cost of arbitration, a speeding-up of the process, and a simplification of the results. An additional objective of the American Arbitration Association's expedited programs was to attain acceptability for members of their panels who had no experience and to increase the acceptability of those who had minimal experience.

In an effort to determine the extent to which the programs have attained these objectives, committee members surveyed various AAA regional offices to determine what their experience with the programs had been.[7] Returns were received from nine regional offices where formal panels were established. At the time the data were gathered, seven offices had had their programs in effect for at least one year, one for eight months, and one for only about two months. A summary of these data in tabular form is presented at the end of this report.

All offices reported that substantial efforts were made to notify parties to grievance arbitration in their regions of the nature and availability of the expedited procedure by means of announcements in the *AAA Newsletter* and at meetings of labor and management representatives attended by AAA personnel, direct mailings, and press releases to various media in the regions.

Despite these efforts, the number of cases generated was extremely modest. For all regions reporting, a total of only 80 cases were processed after introduction of the program; arbitrators were appointed in 75 cases, and decisions were issued in 66 of the 75. However, two of the nine regional programs—New York City with 25 cases and Dallas with 24—accounted for three quarters of the cases. Chicago, where the program had been in effect for a year, and Seattle, where it had been in effect for about two months, reported no cases completed; the remaining four regional offices had between one and four completed cases each.

Such limited use of the procedure does not indicate any strong desire on the part of the parties to arbitration for an expedited

[7] A debt of gratitude is due the following committee members for their assistance: John T. Conlon, Harold W. Davey, Jean T. McKelvey, Paul Prasow, John C. Shearer, and Benjamin H. Wolf. Our thanks go also to Academy members Mark L. Kahn, Alice B. Grant, and Edwin R. Teple.

procedure. John Church, writing from the Boston office where the initial program was specifically geared to the public sector, states:

> "...Many, many hours and days were spent in developing and promoting the concept. Admittedly, we made our mistakes, but for the most part we aggressively pushed the program because of a heavy 'demand' for it. The 'demand' was a fiction, and where there was NO demand we tried to create it, not by ambulance chasing, but in formal and informal meetings. . . . I must confess that with hindsight I now *know* that 99 percent of those who scream for its place in the SUN actually are giving it the old lip service 'for the record.'" [8]

Charles Bridge of the Chicago office reports that despite what he considered to be a massive mail campaign to publicize the availability of expedited arbitraton over a 14-month period, no cases were filed, but some interest was created. One company and union have written the expedited procedure into their contract for certain types of grievances. Bridge remains optimistic, however, that cases will be forthcoming.[9]

One area of hope has been that expedited programs would give new arbitrators an opportunity to break into the field. However, of 54 arbitrators appointed, for only three was the appointment their first arbitration case. Thirty-five appointments went to persons who had already gained a fair to good degree of acceptance in that they had prior experience of more than five cases a year. Sixteen appointments were given to persons who had had some experience, but less than five cases a year. All of the regional offices except Los Angeles made some appointments from the latter category. New York City appointed two persons with no experience, five from the less-than-five-cases-a-year category, and five from the over-five-a-year category.

The Dallas regional office reports that most of its regular panel members are now on the expedited panel and that 21 of 24 appointments under the expedited program went to these experienced arbitrators. There the parties can choose their arbitrators from the panel; direct appointments are made only when the parties are unable to agree on one individual.

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[8] Letter dated Jan. 31, 1974, from John W. Church, regional director, Boston, to committee member John T. Conlon.

[9] Letter dated Jan. 10, 1974, from Charles H. Bridge, Jr., regional director, Chicago, to committee member Harold W. Davey.

In view of the fact that Dallas is one of the regions showing substantial success with the expedited program, it would appear that the parties want not only experienced arbitrators to be available but also the right to select them. Apparently they are selecting the experienced arbitrators, and thus there is little likelihood that the expedited program is going to serve as an entry to arbitration for the newcomers. Of the three persons with no prior cases who received an appointment in the Dallas region's expedited program, only one was jointly selected later by parties on the regular panel and for more than one case.

On the other hand, the program has some potential for helping those with limited experience to improve their acceptability. Of the 16 persons whose experience was with less than five cases a year, 11 received joint selections from the regular panel subsequent to their expedited cases; nine of the 11 received more than one appointment.

Experience in terms of speed in setting hearing dates and rendering awards was excellent. For 59 cases reported from all offices, the average number of days from receipt of the request for arbitration by the AAA office to the date of the hearing was 12.1 days; from that date to the release of the award, the average was 5.2 days.

The Detroit office reported an unusually high average number of days between receipt of request and scheduled hearing, 27, due primarily to two cases where the parties requested a delay in setting the hearing date; in one case the delay was for 46 days and the other for 22 days. If those two cases were excluded, the Detroit average would be eight days. However, this exclusion would not alter the overall average appreciably.

The 5.2-day average time span between hearing and award also is an excellent record. In six cases, only awards were issued; the other 60 awards had accompanying written opinions averaging 1.8 pages in length. The average number of pages of opinion for the separate regions varied from one to six pages. It is interesting to note that in Los Angeles, where all three awards were issued on the same day as the hearing, two of the three were accompanied by opinions six pages in length.

Finally, there is the matter of cost. Here it is clear that the saving in arbitration costs lies in the expedited nature of the pro-

gram. The average cost per case for the 66 cases reported was approximately $200. The average varied from $125 for Boston and Cleveland to $250 in Dallas and $251 in Los Angeles. In the latter two regions, the parties relied on experienced arbitrators, and the higher average fees reflect the higher rates charged by those arbitrators.

From this analysis of experience with the AAA expedited program, it appears that the problem of gaining acceptance of expedited arbitration is not unlike the problem new arbitrators face in gaining acceptability. The cry that more arbitrators are needed, accompanied by the lack of willingness on the part of the parties to select inexperienced persons, is similar to the cry that the arbitration process must be speeded up and made less costly, accompanied by little or no demand for a more rapid and cheaper procedure when it is made available. Such has been the experience in seven of the nine AAA regions. Considering the fact that most of the regional offices reporting have very high annual caseloads, it is clear that the number of cases going through the expedited procedure is negligible in all but the New York and Dallas regions. On a relative basis, the Dallas region has had very substantial success. It may be that when emphasis is placed on the availability of the regular panel of experienced arbitrators and the parties are given the opportunity to make their own selections, there will be a market for the expedited procedure of handling cases. However, the Chicago office reports that it followed the same procedure to no avail.

At any rate, if that route is followed, the expedited program will offer little in the way of an avenue for the admission of newcomers into the arbitration profession. It does offer speed and, with speed, a reduction in the arbitrator's total cost per case. These savings are offset by a loss of more carefully thought-out and written decisions. It would appear, therefore, to be a procedure appropriate only for cases where both parties want an award and only a cursory summary of the rationale.

John Church reports that it is his judgment that expedited arbitration can be successful only where the parties write the procedure into their agreements. He feels that it will rarely work where the parties have to join in an ad hoc agreement.[10] Charles

[10] Church, *supra* note 8.

Bridge believes that the problem with acceptance of the procedure is that both parties attach great importance to a case before it is tried, and it is only in retrospect that they conclude that it was not all that important and that they did not need the full treatment with a comprehensive opinion.[11] These impressions might explain the paradox of a clamor for speedier arbitration and shorter opinions, but the parties' refusal to use the process, when it is available, for an upcoming case. It would appear that agreement to use expedited arbitration must be made before actual cases arise, which means that the procedure will have to be written into the contract, the specific types of cases to go to expedited arbitration will have to be defined, and some escape route will have to be provided, should one side later want a full arbitral treatment of his case.

Results From Other Expedited Programs

In past reports we have referred to other expedited programs as offering some possibility of entry for persons with very limited or no experience in arbitration: the Machinists program in New York City,[12] the steel industry-Steelworkers expedited arbitration program,[13] and the Textile Workers program in western New York.[14] Some results have been reported on these programs.

The Machinists Program

The Machinists program, initiated in March 1971, was developed by the AAA under the auspices of District 9, International Association of Machinists, and a group of management attorneys who service companies in that district's jurisdiction. Of the 18 persons who began the program, 10 have succeeded in establishing some local reputation as arbitrators. All had had some limited arbitration experience. The acceptability of nine of them had been almost exclusively in the public sector, where they had done fact-finding and mediation as well as arbitration. Six have begun to show fairly broad public sector acceptability, particularly with teachers and school boards and others in professional employment. One of the 10 established substantial private sector

[11] Bridge, *supra* note 9.
[12] McDermott, *supra* note 1, at 336.
[13] McDermott, *supra* note 2, at 257.
[14] *Id.*, at 256.

acceptability, and he is already a member of the Academy.[15] As pointed out in the 1971-1972 report of this committee, acceptability in this program was enhanced by the parties' commitment to select the participants for arbitration cases.[16]

Steel Industry-Steelworkers Union Program

The most extensive expedited arbitration program is, of course, that of the steel industry and the Steelworkers Union. For the most part, the individuals selected to serve as expedited arbitrators were rather young and inexperienced in arbitration. Other than the data for graduates of the western New York program who were selected for the panel there, no information is available as to whether any members of the various panels have made the transition from expedited arbitration to regular arbitration. The reports received indicate a very substantial increase in the number of cases being processed under the program. In Chicago alone, there was an increase from 12 cases processed in 1972 to 49 in 1973.[17]

One development in connection with this particular program is worth reporting—an extension of the apprenticeship program conducted by Sylvester Garrett, chairman of the U.S. Steel-United Steelworkers Arbitration Board. Each of the parties recommended four persons serving on the expedited panel in the western Pennsylvania area for consideration as arbitration apprentices. After interviews with all eight, Garrett selected four to serve as ad hoc arbitrators for cases from the Board's regular case docket. One of the four is a woman.

The four were given some indoctrination in job classification and incentive-plan cases and are being given on-the-job training comparable to the apprenticeship training Garrett provided in the past for others who have become highly acceptable arbitrators. Consideration is being given to adding some individuals to the program from the midwest panel.

Textile Workers Union Program

The Textile Workers Union established an expedited panel in 1973 to service the western New York area. Up to January 1974,

[15] Memorandum dated Mar. 4, 1974, from Joel C. Solomon, AAA, New York City, to committee member Benjamin H. Wolf.
[16] McDermott, *supra* note 1, at 336.
[17] Bridge, *supra* note 9.

only two cases had been heard under the program, and both were assigned to one of the graduates of the western New York arbitrator development program. It was reported that some companies with which the union has contracts have refused to use the procedure.[18] At any rate, the program has not been in effect very long, and more time is required before a conclusive evaluation can be made.

Other Programs

Two other programs were cited and described in a prior report. One was the Teple program in Cleveland.[19] Following completion of the academic phase of the program, the 12 candidates sat in on several arbitration hearings with Academy members and prepared mock decisions which were reviewed by the arbitrators. Completion of the program was acknowledged at a luncheon on December 4, 1973, which was part of the Cleveland Conference on Labor Arbitration. These graduates have been admitted to AAA panels, and their names have been submitted to parties with a reference to the fact that they are graduates of the training program. Of the 12 graduates, three are making some progress toward gaining acceptability.

There is no evidence that any firm results can be attributed to the Philadelphia program.[20]

Conclusions

On the basis of evidence to date, a few general conclusions may be made. One is that expedited arbitration systems, except for the steel program, are unlikely to serve as an entry to the profession for new arbitrators. The experience with the AAA program indicates that persons with some arbitration experience may find the expedited program to be an avenue for generating more acceptability. However, for this goal to be accomplished, there will have to be far greater acceptance of the expedited process by the parties than has been evidenced so far. Also, if there is a continuation of the trend of giving the parties an opportunity to select an arbitrator from a multiple-names list drawn from the regular panel, it is unlikely that those having minimal experience will gain any more exposure than they have been getting from the

[18] Grant, *supra* note 3.
[19] McDermott, *supra* note 1, at 337.
[20] *Id.*, at 339.

regular panels. This eventuality, of course, will depend on the extent to which arbitrators with relatively high degrees of acceptability make themselves available for the expedited program.

The increasing caseload in the steel expedited program certainly will enable persons on those panels to gain substantial experience in conducting arbitration hearings and to become known to various union representatives and management personnel who conduct arbitration work. Out of that should come increasing acceptability in the regular arbitration area for many of these fledgling arbitrators. Certainly, if past history is any criterion, those fortunate enough to be chosen as ad hoc apprentices in programs such as that being conducted at the U. S. Steel-Steelworkers Board of Arbitration will be moving in a few years into the ranks of the professionals. The extent to which this program and others that may be established are expanded will determine the numbers entering the profession via that route.

In so far as entry can be developed in programs directed at training new arbitrators, the results are still mixed. The success of the Machinists program in New York City can be attributed to two factors: first, that the parties committed themselves to selecting the participants in that program for regular cases; and second, that the program was initiated when the demand for arbitrators in the public sector was increasing, so that persons with some experience were able to gain fairly rapid acceptance.

Although it is still too soon to make a final evaluation of the western New York program, the results to date are very encouraging. Nine of the 13 graduates, by receiving their first case, have made a start down the long road of gaining acceptability. One is already at a level of almost full acceptability, and two others appear to be doing well. Over time, the results from this program should indicate a reasonably high degree of success.

Several factors might be cited as to why the western New York program has shown such good results. One is that it was well designed and had an excellent combination of academic and on-the-job training. A second factor is the wide support that the program was given by the labor-management community and the substantial publicity it received. A third is that applications for participation were opened to all, and the candidates selected had excellent backgrounds. Finally, the selection was done by a very representative committee of arbitration practitioners in the area.

Of the other programs, the one in Cleveland can claim some success; the Philadelphia program had none. Five of the graduates of the UCLA program are hearing cases regularly—an indication of some firm success. However, it must be noted that three of the five already had some arbitration experience prior to their entry into the program; yet it would appear that their participation in the program has enhanced their acceptability. In addition, three graduates have gained fact-finding experience that should lead to acceptance as arbitrators in the public sector. The experience of the nine who continue to act as labor and management advocates adds support to what has been generally observed: that persons who serve as advocates will find it extremely difficult to gain acceptance as neutrals.

In the case of the UCLA program, substantial efforts are being made to provide exposure for the graudates, and it will be interesting to see the further results from this program. Also, it will be interesting to see the degree to which the parties will make use of the graduates of this as well as the other programs that were designed to prepare persons to perform in an arbitral capacity. In the final analysis, the value of any of these programs will have to be determined by the parties themselves. If they are willing to use the graduates, the programs will be deemed successful, and there will have been developed a definable road of entry into the labor arbitration profession other than by the apprenticeship system.

STUDY OF EXPERIENCE WITH AAA EXPEDITED ARBITRATION PROGRAMS

1. On what date was the program put into effect?

Region	*Date*
Boston	1972
Chicago	Nov. 1, 1972
Cleveland	Jan. 1, 1973
Dallas	Jan. 1973
Detroit	Nov. 10, 1972
New York City	April 1972
Los Angeles	Feb. 1973
San Diego	May 25, 1973
Seattle	Nov. 16, 1973

2. How were the parties advised of the availability of the program?

	Announcements at Meetings	*Direct Mail*	*Media Releases*
Boston	x	x	
Chicago		x	
Cleveland	x		
Dallas		x	x
Detroit		x	x
New York City		x	x
Los Angeles		x	
San Diego		x	
Seattle			x

3. Number of cases processed, arbitrator appointments, and decisions?

	Number Processed	*Number of Arbitrators Appointed*	*Number of Decisions Rendered*
Boston	4	4	4
Chicago	none		
Cleveland	1	1	1
Dallas	24	24	24
Detroit	7	7	6
New York City	37	33	25
Los Angeles	3	3	3
San Diego	4	3	3
Seattle	none		
Totals	80	75	66

4. Of the arbitrators appointed, for how many was it—

	(a) *The First Arbitration Case?*	(b) *With Prior Experience But Less Than 5 Cases a Year?*	(c) *With Prior Experience But More Than 5 Cases a Year?*
Boston		4	
Chicago			
Cleveland		1	
Dallas	1	2	21
Detroit		2	5
New York City	2	5	5
Los Angeles			3
San Diego		2	1
Seattle			
Totals	3	16	35

5. For category (a) in question 4, how many of those persons have since been selected as an arbitrator from the regular panels?

	(a) *Selected*	(b) *Selected for More Than One Case*
Dallas	1	1

(None of the other regional offices listed any persons from category (a) since selected as an arbitrator from the regular panels.)

6. For category (b) in question 4, how many have since been selected (a) as an arbitrator from the regular panels, (b) for more than one case?

	(a) *Selected*	(b) *Selected for More Than One Case*
Boston	4	4
Chicago		
Cleveland	1	1
Dallas	2	2
Detroit	2	2
New York City	2	
Los Angeles		
San Diego		
Seattle		
Totals	11	9