political jurisdictions where the public safety employee force is also small, the economic costs of arbitration and the potential publicity that may surround it do not seem to deter parties from utilizing the procedure. The real potential penalty the parties must consider is the arbitration award.

All of these results will not necessarily be replicated if interest arbitration were introduced into the private sector, but they should at least give pause to unquestioning acceptance of the common wisdom regarding interest arbitration. There is no reason to believe that collective bargaining will inevitably deteriorate or that settlements will be exceedingly costly if arbitration were a private sector impasse procedure. Different bargaining patterns and traditions may require adapting details of the procedure, but the basic concept will have application in the private sector if the parties will it. The key remains the parties' willingness to accept the process as a viable alternative to strike action in negotiations.

Critics of interest arbitration may find much in the Pennsylvania experience with which to quarrel. Arbitrators are often among the most suspicious of interest arbitration. But no one can gainsay the facts that to date interest arbitration in Pennsylvania has accomplished the primary purposes of the 1968 law: It has provided an alternative to strikes, and it has enabled public safety employees to obtain wages and working conditions that they consider satisfactory.

To the skeptics who remain unconvinced, I can only paraphrase a popular advertisement of the day: "Try it, you *might* like it!"

IS A "FINAL OFFER" EVER FINAL?

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The Three Princes of Serendip, so the fable tells us, had the happy faculty of making discoveries of valuable things they were not in quest of. Based upon our investigation thus far of public

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sector final-offer arbitration,[1] it appears likely that we in Michigan have similarly found one thing while seeking another. Final-offer arbitration was designed in theory to obviate frequent recourse to interest arbitration and to limit the range of arbitral discretion when it does have to be used. In practice, however, the Michigan statutory procedure appears to look more and more like that powerful neutral hybrid, mediation-arbitration, or med-arb as it is known. This is occurring not because we Michigan arbitrators are peculiarly able mediators or because we are unwilling to choose between final offers, but rather because of the intrinsic nature of the bargaining process. As any experienced negotiator knows, a fixed and unalterable "final offer" is ordinarily a contradiction to the terms of good-faith bargaining. This is simply because the parties' so-called "final" offers frequently are not and will not stay final.

The proponents of final-offer, forced-choice arbitration believed that the logic of the procedure itself would force the parties, even in threatened impasses, to continue moving ever closer together in search of a position on the issues that would be most likely to receive neutral sympathy. Ultimately, so the argument went, in the course of this process, they would come so close together that despite the earlier threat of stalemate, they would practically always find their own settlement. My tentative judgment about final-offer arbitration in Michigan is that this is not happening, or at least is not happening any more frequently than occurred under conventional interest arbitration procedures. Parties who for whatever reason were able in the past to make their own settlements are still doing so. Parties of greater intransigence or facing more intractable issues fall into disagreement seemingly about as often as they always did and make application to go to final-offer arbitration as frequently as they did to go to conventional arbitration.[2]

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[1] U.S. Department of Labor (LMSA) Research Project, "Impact of 'Final Offer' Arbitration on Public Sector Bargaining." Project directors: James L. Stern (Wisconsin), J. Joseph Loewenberg (Pennsylvania), and Charles M. Rehmus (Michigan).

[2] During the 38 months that the Michigan statute provided for conventional interest arbitration in police, firefighter, and deputy sheriff bargaining impasses, 180 petitions for arbitration were received—about five per month. In the first 15 months of the final-offer statute, 93 petitions for arbitration from bargaining units of the same employee groups have been received—about six per month.

The Michigan final-offer statute, which covers police, firefighters, and deputy sheriffs and which applies only to economic issues, does not require that the parties have to specify their final offers on such issues at any particular point in the proceeding. Instead, it simply directs the parties to submit their "last offers of settlement" to the panel "at or before the conclusion of the hearing. . . ." [3] In practice, this has meant that while some parties have submitted their last offers in writing at the beginning of the hearing, others have taken one position on the economic issues during the hearing and then submitted somewhat different last offers during the course of or at the end of the hearing. In one of my own final-offer hearings, one representative stated that he was sure of neither the issues nor what his final offer would be if he knew them. In the course of our interviews, some parties tell us they hope not to have to state their final offers until they have received some indication from the neutral member of the panel as to his general feeling about the issues they have placed before him. Still others tell us that they will not submit their "last" final offers until the arbitration panel meets in executive session following the formal hearings, after which they will receive some indication of the neutral's views through their appointed representatives to the panel. In short, many of the parties in Michigan are conceiving of the final-offer arbitration hearing as a continuation of the negotiation process. Each seeks at least the opportunity to modify its offers based upon changes in the other's position and upon whatever inferences they can draw or information they receive as to the likely ruling of the neutral member of the panel on the issues.

This kind of flexibility in the timing and nature of final offers is obviously an open invitation to the arbitrators to mediate. The data suggest that they are doing so. Under conventional arbitration, in 24 percent of the cases where hearings were held, no award was necessary because a settlement had been made during the course of the arbitration proceeding. Under final offer thus far, the comparable figure has jumped to 45 percent. Neither of these figures include an unknown, but surely substantial, number of cases when a mediated settlement was reached but where,

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[3] Sec. 8, 1969 Mich. PA 312, as amended 1972 Mich. PA 127; *Mich. Stats. Ann.* 17.455 (38).

usually for political reasons, the parties nevertheless desired that an award be issued.

Under the flexible Michigan statute, the arbitrator can hardly fail to mediate even if this should not be his intention or desire. The statute permits the arbitrator to remand the dispute to the parties for three weeks of further bargaining. Some panel chairmen hold hearings, make suggestions on the issues, and then remand—retaining jurisdiction to make their award if settlement is not reached. Moreover, as long as the parties wish to continue making new "final offers" which move in the direction of narrowing the gap between them, it hardly seems sensible to refuse to let them do so. Those who refuse to permit such changed offers seem to me to be taking a draconian view of final-offer arbitration, insisting that it should be as unpalatable to the parties as possible. This may be what proponents of final offer intended, but I cannot believe it is good for the bargaining relationship or fair to the employees and governmental unit involved.

Some parties in Michigan who have negotiated their own final-offer impasse procedures have deliberately anticipated the possibility of mediation. For example, the arbitration agreement in one contract contains the statement that "nothing shall prevent either party from altering its last offer of settlement on any disputed issue at any time prior to the closing of the hearing." [4] A broadly supported Michigan bill to use final offer for resolving impasses in teacher bargaining contains the same kind of ambiguity regarding the arbitration process. The bill requires the Michigan Employment Relations Commission to certify the final position of the parties to the panel before the arbitration hearing begins. But a subsequent section of the same bill states that the panel "may arbitrate any matter to a position other than the final position submitted. . . ." [5] Here again, it is clear that in operation such a final-offer statute, rather than restricting the range of arbitral discretion, will give the arbitration panel considerable power to influence the parties to change positions and ultimately, in many cases, to mediate a settlement.

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[4] 1972-73 Faculty Agreement, Oakland University and American Association of University Professors, par. 87.

[5] Sec. 21 (2), H.B. 5655 (1973), introduced by Representative Larsen and 33 others.

Nor is the experience in Michigan unique. The city of Eugene, Ore., which has considerable experience under its own final-offer ordinance, has found the same sequence of events as we in Michigan. The Eugene final-offer ordinance has not prevented frequent recourse to the procedure. Its arbitration panels have had to issue relatively few awards, however. Continued bargaining and/or mediation takes place all during the arbitration hearing, and this has frequently resulted in a settlement without the need for an award.[6] In both Eugene and Michigan, it appears that the interaction between the partisan panel members and the neutral, on the one hand, and both parties' bargaining committees, on the other, is crucial to the med-arb process.

Some representatives of the parties may decry this evolution. Those negotiators who view bargaining and final-offer arbitration as a kind of zero-sum game deeply resent arbitral pressure on or permission to either party to change final offers. This complaint is voiced when one representative is convinced that if both parties had been required to sit tight on their first final offer, then his side would have "won" the game. Yet many negotiators feel that the process of med-arb has considerable virtue in situations where strikes are destructive and where conventional interest arbitration by neutrals alone is repugnant. They feel that the parties retain a sense of direct participation in the result of the arbitration process to a greater extent than under any other impasse procedure.[7] I should stress that med-arb is not a panacea for all disputes, whether agreed to directly by the parties themselves or coming as a serendipitous result of the resort to final-offer arbitration. But med-arb in many cases is a constructive alternative to a strike or to conventional interest arbitration. It seems at the present time to be an interesting outcome of our Michigan statutory final-offer experiment simply because it helps to serve the public interest by promoting peaceful settlement *by the parties themselves* of impasses in crucial public sector negotiations.

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[6] Gary Long and Peter Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," 27 *Ind. & Lab. Rels. Rev.* 186-203 (1974).

[7] Harry Pollard, "Mediation-Arbitration: A Trade Union View," in "Exploring Alternatives to the Strike," a Special Section, 96 *Monthly Lab. Rev.* 35 (Sept. 1973), at 63-65; Laurence P. Corbett, "Mediation-Arbitration from the Employer's Standpoint," 96 *Monthly Lab. Rev.* 52-53 (Dec. 1973).