APPENDIX C

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1975*

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Introduction

Considerable activity in the area of public-sector labor legislation took place in 1975. California, Connecticut, Indiana, Maine, New Hampshire, Utah, and Washington passed comprehensive new laws, bringing to 37 the number of states with bargaining statutes covering all or some categories of public employees.[1] Also legislated in 1975 were minor amendments to statutory impasse-resolution procedures in Montana (selection of fact finder), Massachusetts (capacity of panel chairman to remand dispute for further negotiations; retroactive date of arbitration awards for police and fire fighters tied to contract expiration date rather than employer's fiscal year), and Nevada (modification of the statutory scope of bargaining; delineation of mandatory and nonmandatory bargaining subjects). By the beginning of 1976, only nine states lacked any legislative or executive authorization for public-sector collective bargaining: Arizona, Colorado, Louisiana, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, and West Virginia. In Arizona and Virginia, attorney generals' opinions authorize bargaining; in Illinois, state employees may bargain

* Report of the Committee on Public Employment Disputes Settlement. Members of the committee are Leon B. Applewhaite, Howard S. Bellman, Jacob Finkelman, Walter J. Gershenfeld, Marcia L. Greenbaum, Robert G. Howlett, Robert B. Moberly, Kenneth Edward Norman, Paul Prasow, Jacob Seidenberg, Anthony Sinicropi, and Arvid Anderson, chairman.

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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, Utah, Vermont, Washington, Wisconsin, and Wyoming.

under a 1973 governor's executive order; and in New Mexico, the state personnel board has issued regulations authorizing bargaining and establishing procedures.

Thirty of the states with public-sector bargaining legislation have fact-finding procedures, and 22 have legislated arbitration for some or all of their public employees: Alaska, Connecticut, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota (although the South Dakota Supreme Court in 1975 declared the binding-arbitration law unconstitutional), Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. In seven states, the strike, subject to limitations, is legalized or authorized: Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, and Vermont.

Because much statutory variation exists at the state and local level, it is difficult to point to consistent trends in legislation. In general, however, grievance arbitration has become widespread in public employment, and interest arbitration in lieu of the right to strike, particularly with respect to police and firemen, is being legislated by an increasing number of states.

As more jurisdictions adopt public-employee bargaining laws, the volume of judicial and agency activity expands, as does the number of grievance- and interest-arbitration cases. It would be impossible, because of space limitations, to deal in this report with all public collective bargaining developments of the past year and to summarize all of the significant decisions of labor agencies and arbitrators affecting public employees. Thus, rather than being a comprehensive survey, this report contains highly selective material that is intended to be representative of public-sector developments. Our objective has been to highlight statutory and judicial developments that may be of particular interest to neutrals operating in the public sector.

The report does contain a state-by-state analysis of the major features of the laws passed in 1975. In highlighting new legislation, our emphasis has been on dispute-settlement provisions. Also included are summaries of developments in the federal sector under the Executive Order and in Canada. The third major portion of the report is devoted to a digest of court decisions dealing with the legality and enforceability of arbitration in public employment.

Public-Sector Legislation

California

(Ch. 961, L. 1975. Effective date: July 1, 1976.)

In the fall of 1975, California enacted a new bargaining statute for employees of the state's public schools and community colleges. The statute repeals California's Winton Act, under which teacher representatives were prohibited from bargaining and could only "meet and confer" with school boards on employment conditions. The statute establishes a three-member Educational Employment Relations Board to administer the law. Interestingly, there is a specific statutory provision that sets forth the legislative intent to expand the jurisdiction of the EERB upon enactment of additional legislation covering other public-employee categories, at which time the EERB will become the Public Employment Relations Board.

The scope of bargaining under the new law is defined as wages, hours, and terms and conditions of employment. "Terms and conditions" means health and welfare benefits, leave and transfer policies, safety conditions, class size, procedures to be used for the evaluation of employees, organizational security, and binding grievance arbitration. The law authorizes the negotiation of agreements that contain grievance procedures culminating in binding arbitration. Additionally, the exclusive representative may "consult" on the definition of educational objectives, the determination of curriculum and course content, and selection of text books to the extent such matters are within the discretion of the school employer under law. All matters not expressly enumerated are reserved to the employer and "may not be a subject of meeting and negotiating." The latter restriction implies that the law does not recognize permissive subjects of bargaining inasmuch as the employer is prohibited from negotiating on subjects not specifically included as mandatory items within the scope of representation. With respect to the negotiability of "organizational security," the law provides that the employer may agree to an agency-shop provision, but may require that such a provision be severed from the rest of the contract and be voted on separately by all unit members.

The law is silent on the right to strike, and its impasse provisions do not provide for finality. Bargaining disputes are subject

to mediation and fact-finding with advisory recommendations, which must be based upon criteria set forth in the law.

A unique provision of the statute is the public-notice section, which is intended to inform and give the public an opportunity to express views on negotiating issues. All initial bargaining proposals of both employees and employers must be presented at a public meeting of the school employer where they shall become public records. Formal negotiations are not to commence until the public has had a reasonable period of time to become informed and to express itself on the proposals that have been presented. Finally, new subjects of negotiations that arise after the presentation of initial proposals must be publicized within 24 hours, and if a vote is taken on such subjects by the public employer, the vote of each member voting must also be made public within 24 hours. This public-notice section of the new California law is, in effect, a variation of the sunshine laws that have been adopted by several jurisdictions. Whether it will make negotiations more responsible and the process more responsive to public sentiment, or whether it will inhibit collective bargaining by putting the participants in a goldfish bowl where they cannot engage in the give-and-take of negotiating, remains to be seen.

Connecticut

State Employees

(P. A. 566, L. 1975. Effective date: October 1, 1975.)

Connecticut's collective bargaining law for state employees covers wages, hours, and other conditions of employment, subject to personnel-board merit policies; the agency shop is permitted. The law specifically excludes from bargaining the establishment, conduct, and grading of merit examinations, the rating of candidates, the establishment of lists from such examinations, and the appointments from such lists.

The Labor Board administers the law, which provides for unit-determination procedures, contains employer and employee organization prohibited practices, and prohibits strikes and lockouts.

If a bargaining dispute exists after a "reasonable period of negotiations" or no agreement is reached "within a reasonable period of time prior to the final date for presenting the governor's budget to the legislature," either or both parties may petition the arbitration board to initiate fact-finding.

After hearings, and within 30 days of his appointment, the fact finder is to make recommendations to resolve the dispute. He is not prohibited from trying to mediate. His costs, which are to be in line with pay schedules established by the arbitration board, are to be split by the parties.

In an effort to identify the public employer for bargaining purposes, the law states that after an organization is designated exclusive agent of employees in an appropriate unit, the employer shall be represented by the chief executive officer in the case of an executive branch employer, or his representative "who shall maintain a close liaison with the legislature relative to the negotiations and the potential fiscal ramifications of any proposed settlement." A judicial branch employer and a legislative branch employer will be represented by their respective chief administrative officers. The faculty and professional employees of each segment of the higher education system shall negotiate with their own board of trustees.

Requests for funds necessary to implement written agreements reached and for approval of any provisions in conflict with any statute or personnel-board rule are to be submitted by the employer within two weeks to the legislature, which may approve or reject such request as a whole by a majority vote of those present and voting.

If rejected, "the matter shall be returned to the parties for further bargaining," and the employer's failure to submit such request to the legislature shall be considered an employer prohibited practice. If the request receives legislative approval, the legislature shall appropriate whatever funds are required to comply with an agreement. Where there is a conflict between any collective agreement and any general or special act or rules adopted by state agents, such as a personnel board, the terms of the agreement prevail.

Municipal Employees

(P.A. 159, L. 1965, as last amended by P. As. 35, 173, 189, and 570, LS. 1975. Effective date: October 1, 1975.)

The Connecticut legislature also amended the Municipal Employee Relations Act to provide for item-by-item final-offer arbitration. The law provides for mediation and fact-finding prior to invocation of arbitration.

Within 40 days after issuing his report, the fact finder shall "personally appear before the negotiators and legislative body of the municipal employer at one meeting, and personally appear before the negotiators and membership of the employee organization at another meeting, to read his written report, verbatim, and to answer all questions concerning the same that may be directed to him." If either the city's legislative body or the union fails to notify the other within 20 days of the fact finder's meeting that it has rejected his recommendations, they "shall be deemed accepted and shall be final and binding on all parties." The fact finder's report shall be considered an approved contract and shall not require further approval of the city's legislative body.

If the fact finder's report is rejected, the dispute is submitted to a three-member tripartite arbitration panel. The chief executive officer of the municipal employer and the executive head of the municipal employee organization each select one member of the panel. These two panel members jointly select the neutral third member who acts as chairman of the arbitration panel. The statute calls for an elaborate procedure for defining the unresolved issues, whereby the parties set forth contract and alternative contract language as to what provisions each finds unacceptable about the other party's position. The panel issues a statement on all the unresolved issues, and the parties file briefs with the secretary of the State Board of Mediation, who is responsible for administering these procedures. These briefs state the unresolved issues. The parties may even file reply briefs, which the secretary exchanges between them. Finally, each party files a statement of its "last best offer" on each of the unresolved issues.

The arbitration panel is to make its award on an item-by-item basis, taking account of such factors as wages, salaries, fringe benefits, and working conditions prevailing in the labor market, the ability of the municipal employer to pay, and the interests and welfare of the employees.

Indiana

(§§1–13, Ch. 4 of IC 22–6, as enacted by H.B. 1298, L. 1975. Effective date: July 1, 1975.)

Indiana passed a law giving public employees the right to organize and bargain. This new law, which supplements and resembles the 1973 statute covering public school teachers, contains a prohibition against strikes and widens the jurisdiction of the Ed-

ucation Employment Relations Board to perform the same functions for state and local employees as it had for teachers, *e.g.*, unit determination, unfair labor practice decisions, and impasse resolution. However, the law specifically excludes police, firemen, professional engineers, faculty of any university, confidential employees, and municipal or county health-care institution employees. The statutory scope of bargaining covers wages, hours, and other terms and conditions of employment, including grievance procedures culminating in binding arbitration. Public employers are given the authority to manage and direct the operations of the public agency, including the right to direct employees' work; establish policy; hire, promote, transfer, assign, retain, suspend, or discharge employees; maintain efficient operations; relieve employees from duties because of lack of work or another legitimate reason; and take action necessary to carry out the agency's statutory mission.

Impasse procedures include mediation and fact-finding. Each party has the option of notifying the other that it wants the fact-finding recommendations to be binding. If the recommendations are binding, the parties shall comply, but if the employer does not have the legal authority to comply with all or part of them, "it shall take such actions as may be necessary to enable it to comply, including the submission of requests to appropriate legislative bodies." If advisory, the settlement proposals are submitted privately to the IEERB and the parties, but any of them or the fact finder can make the recommendations public if the dispute is not settled in 10 days.

Nothing prohibits parties from agreeing to substitute their own procedure for resolving bargaining impasses, from agreeing to use any other governmental or other agency or person in lieu of the IEERB, or from voluntarily agreeing to submit any or all disputed issues to final and binding arbitration. Impasse arbitration awards are enforceable in the same manner as provided for enforcing bargaining agreements.

The law also provides a further alternative method for settling bargaining disputes whereby the parties may agree to a "final" or "last best offer" procedure. Under this, each party presents one final offer and one alternative final offer, neither of which may contain any issue that was not an issue at the time of final dispute. After continuing to negotiate for another five days, the parties then choose a three-member panel to act as the final-offer selector; if they cannot agree, they shall alternatively strike eight

names from a list of 11 submitted by the IEERB, which also sets the panel members' pay.

While the panel is to conduct an informal hearing, it cannot mediate or otherwise settle the dispute, and its members cannot communicate with third parties about recommendations for settlement. The panel shall select the most reasonable, in its judgment, of the final offers submitted, and the one selected shall be the parties' binding contract. It cannot compromise or alter the final offer it selects; selection shall be based on the content of the final offer, and no consideration is to be given to or evidence received concerning the mediation, fact-finding, or settlement offers not contained in the final offers.

The panel is directed to consider past agreements between the parties; wage, hour, and employment condition comparisons between the employees and those of employees doing comparable work, including factors peculiar to the public agency; employment security and tenure; the public interest; and the financial impact on the taxing unit of government to insure no determination will place a unit of government in a deficit-financing position. The entire cost of this final-offer selection procedure is to be borne equally by the two parties.

The law prohibits a public employer from entering into an agreement that would place it in a position of deficit financing, and any contract providing for such deficit financing is void to that extent. The law adds that "there is no intent to eliminate, or impair, any patronage employment, 60–40 employment, merit employment, bipartisan employment, or other types of employment existing at the time of the passage of this chapter, and negotiation on such method of employment is specifically prohibited. Further, the voluntary contribution of funds, by individuals, to political parties is not prohibited."

Maine

(§§1021–1034, Ch. 12 of Title 26, as enacted by Ch. 603, L. 1975. Effective date: July 1, 1976).

Maine's new law gives collective bargaining rights to employees of the University of Maine. This legislation, which supplements Maine's two other statutes for municipal and state employees, provides for election of exclusive bargaining agents; permits negotiations on wages, hours, and working conditions (including agency shop); contains employer and employee organization im-

proper practices, including a ban on strikes; and sets forth impasse-resolution procedures, including mediation, fact-finding, and arbitration. The Maine Labor Relations Board (formerly the Public Employee Labor Relations Board) will administer the law, effective July 1, 1976.

The law states that a contract may provide for binding arbitration of grievances, but the only grievances that may be submitted to arbitration "shall be disputes . . . as to the meaning or application of the specific terms of collective bargaining agreement."

The statute initially identifies six university-wide bargaining units based on the following occupational groups: faculty; professional and administrative staff; clerical, office, laboratory, and technical; service and maintenance; supervisory classified; and police. In the future, additional or modified university system-wide units may be sought and found appropriate. Excluded from coverage are persons appointed pursuant to statute, deans or members of the chancellor's staff, those acting in confidential capacities, and those employed less than six months.

The impasse procedures provide that mediation may be by unilateral request, fact-finding by joint or unilateral request, and arbitration by joint or unilateral request, after which the MLRB's executive director determines if any impasse exists and asks the parties to select an arbitrator panel via a procedure set forth in the law. The panel is to make only advisory recommendations and findings of fact with respect to a controversy over salaries, pensions, and insurance. Determinations as to other matters, if made by a majority of the arbitrators, are binding on both parties, subject to review by the superior court.

Arbitration awards must be based on the following criteria:

(1) The interests and welfare of the students and the public and the financial ability of the university to finance the cost items proposed by each party to the impasse;

(2) Comparison of the wages, hours, and working conditions of the employees involved in the arbitration proceeding with the wages, hours, and working conditions of other [public and private sector] employees performing similar services and competing in the same labor market;

(3) The overall compensation presently received by the employees, including direct salary and wage compensation, vacation, holidays, life and health insurance, retirement, and all other benefits received;

(4) Such other factors not confined to the foregoing, which are normally and traditionally taken into consideration in the resolution of disputes involving similar subjects of collective bargaining in public higher education;

(5) The need of the university for qualified employees;

(6) Conditions of employment in similar occupations outside the university;

(7) The need to maintain appropriate relationships between different occupations in the university; and

(8) The need to establish fair and reasonable conditions in relation to job qualifications and responsibilities.

The law provides that the board shall pay the costs for the first three days of services of the panel of mediators, but the parties shall share equally all other costs, including mediator's costs beyond three days; arbitrators' costs, per diem expenses, and actual and necessary travel and subsistence expenses; costs of the Federal Mediation and Conciliation Service or the American Arbitration Association; and the costs of hiring the premises where any arbitration proceedings are conducted. Services of the Maine Board of Arbitration and Conciliation, however, are available to the parties at no expense.

The law sets forth six university and four employee organization prohibited practices, including refusing to bargain collectively; interfering with employees exercising their guaranteed rights; blacklisting; and engaging in a "work stoppage, slowdown, or strike."

New Hampshire

(Ch. 273–A, as enacted by Ch. 490, L. 1975. Effective date: December 21, 1975.)

New Hampshire enacted a comprehensive public-employee bargaining law, replacing earlier statutes that had covered only certain categories of employees. A five-member Public Employee Labor Relations Board was created to implement and administer it.

The new law gives public employees the right to organize and bargain on wages, hours, and employment conditions other than management policies; it lists employer and employee unfair labor practices, which include lockouts and strikes; and it provides for mediation and fact-finding in bargaining disputes. If either party

rejects the fact-finding recommendations, they "shall be submitted to the full membership of the employee organization and to the board of the public employer, which shall vote to accept or reject so much of his [fact finder's] recommendations as is otherwise permitted by law." The statute provides further that if either the membership or the employer's board rejects the neutral's recommendations, the findings and recommendations will be submitted to the legislative body of the public employer, and if the impasse is not resolved, negotiations shall be reopened. The law also states that nothing prohibits the parties from designing their own lawful procedures for resolving impasses, as long as they do not bind the legislative body on cost items.

Unit-determination provisions in the statute are conventional. The most notable sections provide that the PELRB may not certify a unit of less than 10 employees with the same community of interest, and it may certify a unit of professional and nonprofessional employees only if both sets of employees vote separately to join the proposed combined unit. Also, persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise. Unit determinations made by a board designee may be appealed to the full board. With regard to bargaining by state employees, the law stipulates:

> "Cost items and terms and conditions of employment affecting state employees generally shall be negotiated by the state, represented by the negotiating committee set out below, with all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the state negotiating committee. For purposes of bargaining under this section, the state negotiating committee shall include representatives of the office of the attorney general, the department of administration and control and the department of personnel, and such other members of the executive branch as the governor may designate. The governor shall designate a chairman from among its members."

Nevada

(§§288.010–288.280, as enacted by Ch. 650, L. 1969, and as last amended by Ch. 539. Effective date: May 18, 1975.)

The Nevada legislature amended the state's public-employee bargaining statute by designating mandatory and permissive subjects of teacher bargaining and by establishing an employee-man-

agement relations advisory committee to recommend members the governor appoints to the Local Government Employee Management Relations Board.

The issue of scope of bargaining erupted in 1974, when the Nevada Supreme Court issued a decision finding preparation time, class size, professional improvement, student discipline, teacher performance, differential staffing, teachers' work load, and instructional supplies to be within the scope of mandatory bargaining.

The legislature responded by repealing the statutory provision that had mandated bargaining on "wages, hours, and conditions of employment" and inserting the following language:

> "1. Except as provided in subsection 4, it is the duty of every local government employer to negotiate in good faith through a representative or representatives of its own choosing concerning the mandatory subjects of bargaining set forth in subsection 2 with the designated representatives of the recognized employee organization, if any, for each appropriate negotiating unit among its employees. If either party so requests, agreements reached shall be reduced to writing. Where any officer of a local government employer, other than a member of the governing body, is elected by the people and directs the work of any local government employee, such officer is the proper person to negotiate, directly or through a representative or representatives of his own choosing, in the first instance concerning any employee whose work is directed by him, but may refer to the governing body or its chosen representative or representatives any matter beyond the scope of his authority.
> "2. The scope of mandatory bargaining is limited to: salary or wage rates or other forms of direct monetary compensation; sick leave; vacation leave; holidays; other paid or nonpaid leaves of absence; insurance benefits; total hours of work required of an employee on each work day or work week; total numbers of days' work required of an employee in a work year; discharge and disciplinary procedures; recognition clause; the method used to classify employees in the negotiating unit; deduction of dues for the recognized employee organization; protection of employees in negotiating unit from discrimination because of participation in recognized employee organizations consistent with provisions of this chapter; no-strike provisions consistent with the provisions of this chapter; grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements; general savings clauses; duration of collective bargaining agreements; safety; teacher preparation time; [and] procedures for reduction in work force.
> "3. Those subjects which are not within the scope of mandatory bargaining and which are reserved to the local government em-

ployer without negotiation include: the right to hire, direct, assign, or transfer an employee as a form of discipline; the right to reduce in force or layoff any employee because of lack of work or lack of funds, subject to paragraph (t) of subsection 2 [work force reduction procedures]; [and] the right to determine: appropriate staffing levels and work performance standards, except for safety considerations, the content of the workday, including without limitation workload factors, except for safety considerations, the quality and quantity of services to be offered to the public, and the means and methods of offering those services.

"4. Notwithstanding the provisions of any collective bargaining agreement negotiated pursuant to this chapter, a local government employer is entitled to take whatever actions may be necessary to carry out its responsibilities in situations of emergency such as a riot, military action, natural disaster, or civil disorder. Such actions may include the suspension of any collective bargaining agreement for the duration of the emergency. Any action taken under the provisions of this subsection shall not be construed as a failure to negotiate in good faith.

"5. The provisions of this chapter, including without limitation the provisions of this section, recognize and declare the ultimate right and responsibility of the local government employer to manage its operation in the most efficient manner consistent with the best interest of all its citizens, its taxpayers, and its employees.

"6. This section does not preclude, but this chapter does not require the local government employer to negotiate subject matter enumerated in subsection 3 which are outside the scope of mandatory bargaining. The local government employer shall discuss subject matters outside the scope of mandatory bargaining but it is not required to negotiate such matters."

Utah

(§§1–10, S.B. 190, L. 1975. Effective date: May 13, 1975.)

Utah's first piece of public-sector labor legislation is a bargaining statute for fire fighters, giving them the right to bargain on wages, hours, and other conditions of employment. Collective agreements may not exceed two years in duration and must contain a no-strike clause.

Whenever wages, rates of pay, or any other matter requiring appropriation of money by a city, town, or county are included as a matter of collective bargaining conducted under the act, the bargaining agent must serve written notice of request for bargaining at least 120 days before the last day on which funds can be appropriated to cover the contract period that is the subject of bargaining.

If the parties cannot reach agreement within 30 days of negotiations, all unresolved issues are submitted to tripartite, binding arbitration. Arbitration expenses are shared equally by the parties.

Washington

(§§1–20, 23–25, Title 41, as enacted by S.B. 2500, L. 1975, effective January 1, 1976; Title 41 RCW, as enacted by Ch. 296, L. 1975, effective January 1, 1976, and as amended by Ch. 5. Effective date: September 8, 1975.)

The State of Washington repealed its previous teacher negotiation law and passed a new Educational Employment Relations Act covering public school teachers. The new law calls for bargaining on wages, hours, and terms and conditions of employment; permits negotiation of agency-shop and binding grievance arbitration; and is silent on teachers' right to strike.

Washington also enacted a new law creating a three-member Public Employment Relations Commission. Effective January 1, 1976, PERC assumes the regulatory functions of labor relations involving education employees, local government employees, community college faculty, state university staff and support employees, and port district workers. The new agency will administer mediation and fact-finding and conduct secret-ballot elections wherein the employer's last offer of settlement is submitted to vote of the unit membership.

At the request of either party, PERC assigns mediators or fact finders to resolve impasses. Within 30 days after appointment, the fact finder makes findings of fact and recommends terms of settlement. Such determinations are advisory and may be made public. Fact finders are deemed agents of the state, and their costs are borne by PERC.

In addition, PERC designates fact finders and arbitration panel chairmen in resolving impasses involving uniformed personnel.

Federal Sector Report [2]

In 1975, there was some movement toward collective bargaining legislation for federal employees. At the present time a sub-

[2] Provided to the Committee on Public Employment Disputes Settlement by Howard W. Solomon, Executive Secretary, U.S. Federal Service Impasse Panel, Washington, D.C.

committee of the Committee on Post Office and Civil Service of the House of Representatives is marking up a bill that may be reported out on the floor of the House in 1976. Major questions facing the legislators include the scope of bargaining and union-security provisions of any new bill.

On February 6, 1975, Executive Order 11491, which establishes the current collective bargaining framework for federal employees, was amended. The major changes included (1) establishment of procedures to facilitate the consolidations of existing bargaining units within an agency; (2) authorization to the Assistant Secretary of Labor to resolve negotiability issues that have arisen in the context of unfair-labor-practice proceedings resulting from unilateral changes in established personnel policies, practices, and matters affecting working conditions; (3) authorization to the Assistant Secretary of Labor independently to investigate unfair-labor-practice complaints; (4) establishing that questions as to whether a matter is arbitrable under the terms of the negotiated grievance and arbitration procedure may, by mutual agreement of the parties, be submitted to an arbitrator for resolution or referred to the Assistant Secretary for decision; (5) expansion of the scope of bargaining to permit negotiation on the scope of the grievance procedure with statutory appeal procedures as the sole mandatory exclusion; and (6) expansion of the scope of bargaining by providing that only those internal agency regulations issued at the agency headquarters level or at the level of a primary national subdivision for which a "compelling need" exists, under criteria to be established by the Federal Labor Relations Council, may bar negotiations with respect to a conflicting proposal.

On December 23, 1975, the council's criteria for determining "compelling need" for agency policies and regulations went into effect. They are as follows:

> "1. The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or the primary national subdivision;
> "2. The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;
> "3. The policy or regulation is necessary to insure the maintenance of basic merit principles;
> "4. The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

"5. The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest."

The council's rules provide that a compelling need exists for an applicable policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the above illustrative criteria.

In 1975, the council continued the trend of modifying or overturning arbitration awards on a highly restrictive basis.[3] In this regard, Section 2411.37 (a) of the council's rules of procedure provides that "[a]n award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations."

Prior to October 31, 1974, the Comptroller General had consistently overturned arbitrator awards involving back pay. In the latter part of 1974, he held for the first time that the violation of a mandatory provision of a negotiated agreement resulting in the loss or reduction of an employee's pay, allowances, or differentials is an unjustified or unwarranted personnel action, provided the mandatory provision was properly included in the agreement; and that such violations are subject to the Back Pay Act, 5 U.S.C. 5596; and, therefore, the Back Pay Act is the appropriate statutory authority to compensate an employee for pay, allowances, and differentials that the employee would have received but for the violation of the mandatory provision of the negotiated agreement.[4]

The Comptroller General has continued to expand his influence on the federal labor-management relations program, supporting the collective bargaining process through his decisions. In 1975, the Comptroller General held that (1) a finding by an appropriate authority, such as the Assistant Secretary for Labor-Management Relations, that an employee has undergone an unjustified and unwarranted personnel action as a result of an

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[3] *See, e.g., Long Beach Naval Shipyard and Federal Employees Metal Trades Council,* FLRC No. 74A–40 (January 15, 1975), Report No. 62, Steese, arbitrator; and *NAGE Local R8–14 and Federal Aviation Admin., Oklahoma City, Okla.,* FLRC No. 74A–38 (July 30, 1975), Report No. 79, Stratton, arbitrator.

[4] *See* 54 Comp. Gen. 312 (1974) and 54 Comp. Gen. 403 (1974).

unfair labor practice that directly caused the employee to be deprived of pay which he would otherwise have received but for such action, would entitle the employee to back pay; [5] and (2) back pay may be given to any employee who has undergone an unjustified or unwarranted personnel action, without regard for whether such action was one of omission (including whether such acts involve a failure to promote in a timely fashion or a failure to afford an opportunity to work overtime in accordance with requirements of agency regulations or a collective bargaining agreement) or commission.[6]

In March 1975, the Federal Service Impasses Panel, for the second time since its inception in August 1970, imposed a settlement on parties involved in a negotiation impasse. Under Sections 5 and 17 of Executive Order 11491, the panel is granted broad authority to "take any action it considers necessary to settle an impasse" or "settle the impasse by appropriate action." In *Department of Justice, Immigration and Naturalization Service, Washington, D. C. and National Council of INS Locals and the National Border Patrol Council, American Federation of Government Employees, AFL-CIO,*[7] the panel exercised this authority and issued a *Decision and Order* directing a settlement on two impasse issues.

The panel's *Decision and Order* was preceded by postfact-finding recommendations for settlement on 13 issues concerning discipline, grievance arbitration, equal employment opportunity counselors, health and safety, uniforms, and a contract reopener. These recommendations provided the framework for resolution of 11 of the 13 issues. The two unresolved issues concerned (1) the time allowed an employee for responding to a notice of proposed disciplinary action where the preliminary investigation had been unusually prolonged and (2) the disposition of grievances arising under the parties' separately negotiated Merit Promotion Plan.

Following notification by the parties of the continuation of the impasse, the unresolved issues became the subject of a final-action hearing before a subpanel of the panel. Subsequently, the full panel took action pursuant to Section 2471.15 of its Rules of Procedure by issuing a *Decision and Order.*

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[5] 54 Comp. Gen. 760 (1975).
[6] File No. B-175275, June 20, 1975, 54 Comp. Gen. 1071.
[7] Case No. 73 FSIP 14, March 19, 1975.

In reaching its decision concerning the first issue, the panel recognized the necessity for law enforcement officers to defend themselves as well as the employer's need for a thorough investigation prior to proposing disciplinary action. It found merit in the union's proposal, which sought to assure employees a reasonable extension of time where investigations had been prolonged, and the desire of the employer to retain some flexibility in considering each request on its merits as mandated by Civil Service Commission regulations. It, therefore, directed the parties to include in their agreement specific language to provide employees with the assurance that where investigations are unduly prolonged, the employer will grant a reasonable extension of the response period to the proposed disciplinary action.

In arriving at its decision with respect to the promotion-grievance issue, the panel was cognizant of the fact that the issue was intertwined with questions concerning the scope of the grievance procedure and the nature of the Merit Promotion Plan to be developed by the parties. It concluded that, despite the history and context of bargaining in this case, neither the parties' long-range collective bargaining relationship nor the intent of Executive Order 11491 would be well served if bargaining on this issue of major importance were to be foreclosed by the panel's actions. Consequently, the parties were directed to hold in abeyance consideration of a procedure for resolving promotion grievances until they commenced negotiations for a new Merit Promotion Plan and to include a specific reopener clause in their agreement that would provide for the negotiation of the Merit Promotion Plan and a procedure for the resolution of promotion grievances. To prevent protracted negotiations for the new Merit Promotion Plan, the panel established a time frame of 90 days for their completion. One other element of the panel's *Decision and Order* was its direction to the parties to sign off on all items that had been agreed upon.

A significant court case in 1975 was *National Treasury Employees Union* v. *Nixon*,[8] in which attorneys' fees and litigation expenses were awarded to the National Treasury Employees Union (NTEU). This determination was the result of NTEU's successful prosecution of a claim that former President Nixon violated the Federal Pay Comparability Act by denying a 5.14-percent pay

[8] 172 U.S. App. D.C. 217, 521 F.2d 317 (1975).

increase scheduled to become effective in October 1972.[9] As a result, approximately 3.5 million federal employees received retroactive salary payments ranging from $69 to more than $450. Subsequently, NTEU filed an application for an award of counsel fees and litigation expenses and suggested that each employee who benefited from the union's suit and who was still on the payroll contribute 10 cents toward the cost of maintaining the successful action. The U.S. District Court for the District of Columbia rejected the application as being without legal foundation, but the court of appeals reversed the judgment. The court held in pertinent part: [10] "Where the members of a distinct class of persons, such as these federal employees, derive a significant sum of money from the efforts of a few, it is only just to permit the few to spread their reasonable expenses to all members of the class."

Furthermore, the appeals court said that the district court might approve a plan requiring each federal employee who benefited from the NTEU court suit to contribute an agreed-upon amount to the NTEU legal fund. Employees who objected could be exempted but would have to take the necessary action to be exempted. The significance of this case is that this would be a departure from the present procedure for employee support of federal labor unions, *i.e.*, federal employees are assumed not to want to support unions unless they take affirmative action to do so. The court's rationale might also be relied upon to support the validity of the agency shop.

More Highlights of Federal Public-Sector Developments

Another significant development in 1975 was President Ford's pay-raise victory in Congress. The Civil Service Commission and Office of Management and Budget had recommended a pay hike of 8.66 percent in order to bring federal salaries to parity with private-sector salaries, as required by the Federal Pay Comparability Act of 1970. The President, however, issued an "alternative plan" under the Act to limit the 1975 general schedule increase to 5 percent. And, to the surprise of federal employee union lobbyists, Congress did not pass a resolution disapproving the 5-percent ceiling. Passage would have required payment of the

[9] *National Treasury Employees Union* v. *Nixon*, 160 U.S. App. D.C. 321, 492 F.2d 587 (1974).
[10] 521 F.2d 317 at 321 (1975).

full comparability increase as determined by the CSC and the OMB. Some observers say that by rejecting the 8.66-percent increase, Congress "did far more than signal a sharp change of attitude on federal pay. It also indicates that the public employee unions are in for a period when Congress will be giving them 'a hard way to go.' "

Federal employees were also dissatisfied by the report of the President's Panel on Federal Compensation. In December 1975, this panel, chaired by Vice President Nelson Rockefeller, issued its report containing 20 recommendations to revamp the federal pay structure.

One suggestion advanced by the panel is that merit rather than length of service be the determining factor in awarding within-grade pay increases. The report also advocates that the general schedule, under which 1.4 million civilian employees are paid, be split in two—a clerical/technical service, to be compensated at geographical rates, and a professional/administrative/managerial/executive service, to be paid national rates as is the case currently.

The emphasis of the report is on total compensation rather than merely on salary. While the report reaffirms the notion that federal pay should be comparable to the going rate for similar jobs in the private sector, it would include fringe benefits as part of the total compensation package in arriving at the comparability figures, and it would expand the universe of workers to include state and local government employees "when needed."

The fiscal crisis in New York and other jurisdictions and a public referendum in San Francisco after the police-fire strike in that city were other indicators of the swing of public opinion against public-employee unions. All of these events have contributed to a waning of congressional enthusiasm for a federal law establishing bargaining rights for local, state, and federal employees.[11]

Also related to the question of the passage of a federal law for state and local employees is the uncertainty resulting from the pendency of two key cases before the U.S. Supreme Court: *National League of Cities* v. *Usery* and *California* v. *Dunlop*. These cases, which have been reargued in 1976, challenge the constitutionality of the 1974 Fair Labor Standards Act amendments that set wage and overtime requirements for state and local employ-

[11] "Public Opinion Seen Swinging Against Government Employees Unions: Productivity Advances Predicted," 626 *GERR* Z-1 (10/6/75).

ees, particularly police and firemen. It is generally agreed that these cases have broad implications because a high court decision declaring the FLSA extension unconstitutional probably would diminish the immediate chances for passage of a federal law, no matter how conditional such law might be with respect to federal aid to state and local governments.

On June 24, 1976, the Supreme Court decided the cases and held, in a five-to-four decision, that the federal wage and hour standards cannot be applied to employees of state and local governments. Reversing *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), the Court stated that the 1974 amendments extending FLSA coverage to states and their political subdivisions exceeded Congress's power under the Commerce Clause of the federal Constitution. (*See* 96 S.Ct., 2465, 22 W. H. Cases 1064, GERR 663, E-1.) The Supreme Court decision and its effects will be discussed more fully in the next committee report.

Significant Developments in Public-Service Bargaining in Canada—1975 [12]

Following the tabling in Parliament of the Finkelman Report, "Employer-Employee Relations in the Public Service of Canada, Proposals for Legislative Change," a Special Joint Committee of the Senate and of the House of Commons was established to consider the report, hear witnesses, and make recommendations to Parliament. The committee began its sittings late in 1974 and continued throughout most of 1975.

It soon became clear that the magnitude of the task would prevent the committee from making an early report. At the same time it had been made evident to the committee that the Public Service Staff Relations Board, composed largely of part-time members able to meet only at infrequent intervals, would be unable to cope with its increasing load of business. Consequently, the committee prepared an interim report recommending the establishment of a full-time public-member board with a chairman, vice-chairman, and at least three deputy chairmen, which would take over, in addition to its own former functions, those of the Arbitration Tribunal and the adjudicators (arbitrators in the private sector).

The effect of the amendment referred to in the preceding para-

[12] Prepared by Jacob Finkelman, Chairman, Public Service Staff Relations Board.

graph is that the board will deal not only with the usual matters handled by a labor relations board, but will become a tribunal which will also deal with interest disputes (formerly referred to the Arbitration Tribunal) and grievances concerning the interpretation and application of collective agreements and disciplinary matters (formerly determined by the adjudicators).

The interim report was tabled in Parliament on May 29, 1975. Legislation implementing the interim report was enacted in July 1975, assented to July 30, 1975, and proclaimed in force on October 1, 1975. Several full-time members have since been appointed to the board. The legislation provides also for part-time members, and the former part-time board members, arbitration tribunal chairmen, and adjudicators have been appointed as part-time members of the board.

The Special Joint Committee continued its work on the remaining recommendations contained in the Finkelman Report and the report of its final recommendations is expected to be tabled in Parliament early in 1976.[13]

Court Decisions

Constitutionality of Interest Arbitration

Dearborn Fire Fighters Union v. *City of Dearborn*, 231 N.W.2d 226, 90 LRRM 2002 (1975).

In a lengthy decision, the Michigan Supreme Court split on the constitutionality of the state's police-fire arbitration law, with two of the four separate opinions finding the law constitutional and the other two taking the opposite view. The effect of the decision was to uphold the lower court and require the City of Dearborn to implement the final-offer arbitration award issued to resolve an impasse in 1970.

In an opinion upholding the law's constitutionality, Judge Mary Coleman ruled the act constitutionally valid when the arbitrator, "acting as an adjunct to the PERA bargaining process, is not at liberty to impose his own solutions or to go beyond the boundaries established by the parties' bargaining positions." The arbitrator's "singular duty," she said, "is to fashion a workable

[13] For a detailed analysis of federal developments in Canada, see the comprehensive Report to Parliament "Employer-Employee Relations in the Public Service of Canada" by the Special Joint Committee on Employer-Employee Relations in the Public Sector.

resolution for the dispute in keeping with the limits set by the parties and the dynamics of the particular bargaining situation. Even this limited decision may be appealed to the courts." Judge Coleman termed the arbitration law a "fair implementation of a constitutional directive," noting that the panel is a public body performing public functions, costs are evenly apportioned, statutory criteria are set forth, and arbitrators' duties are clearly spelled out in the law.

Judge Mennen Williams took the position that the law is constitutional only when the arbitrator is appointed by the chairman of the Michigan Employment Relations Commission (MERC), but not when the arbitrator is selected by representatives of the two parties.

Judge Charles Levin, with the concurrence of Judge Thomas G. Kavanagh, concluded the law is an unlawful delegation of legislative powers because it grants decision-making powers to an independent party who is not politically responsible for his or her rulings.

Further, Judge Levin found that the arbitrator functions in a quasi-judicial capacity and that the award does more than resolve the differences between the parties because it "affects the allocation of public resources, the level of public services provided the community as a whole and the cost of government."

The ruling here is prospective only and does not have a retroactive effect on prior arbitration decisions. While finding the act unconstitutional, Judge Levin clarified that there is nothing to "preclude the legislature from vesting the authority to resolve disputes concerning public employees in a governmental officer or agency with continuing responsibility for the day-to-day exercise of that delegated power."

In a brief separate opinion, Judge Kavanagh emphasized that compulsory arbitration is constitutionally permissible when public employees are prohibited from striking, and "although the present law's provision for hit-and-run arbitrators is constitutionally defective, a law providing for a continuing politically responsible arbitrator could meet the constitution's demands."

In light of the disagreement among the supreme court judges, it is likely that there will be more litigation in Michigan on the constitutional issue.

City of Amsterdam v. *Helsby,* 37 N.Y.2d 19, 371 N.Y.S.2d 404 89 LRRM 2871 (1975).

The constitutionality of provisions of the New York Taylor Law for binding arbitration of impasses involving police and firemen was upheld in a unanimous decision of the New York Court of Appeals. A state supreme court judge in Erie County had upheld the law, while a supreme court judge in Montgomery County had declared the law unconstitutional on the questions of equal representation or "one man, one vote" principle, and the suspension of the taxing power of government.

The court of appeals said that the state constitution makes it "abundantly clear that Home Rule powers" are limited to areas not regulated by "general laws" enacted by the legislature. The court defined a "general law" in this context as "[a] law which in terms and in effect applies alike to all counties other than those wholly included within a city, all cities, all towns or all villages." The Taylor Law, according to the court, is a "general law," and since "neither of the challenged amendments to that law is any narrower in application, it follows that each amendment is itself a 'general law.' "

Both Buffalo and Amsterdam argued that the legislature had unconstitutionally delegated the cities' legislative authority to the arbitration panel. The court stated that there is "no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment. . . . Here, the legislature has delegated to PERB and through PERB to ad hoc arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen in the limited situation where an impasse occurs. It has also established specific standards which must be followed by such a panel. . . . We conclude that the delegation here is both proper and reasonable." The court also found the "one man, one vote" argument without merit.

City of Sioux Falls v. *Sioux Falls Firefighters Local 814, Fraternal Order of Police, Lodge No. 1, et al.*, 90 LRRM 2945 (1975).

The South Dakota Supreme Court ruled that portions of the state's Firemen's and Policemen's Arbitration Act, which provided for tripartite binding arbitration of police and fire fighters' bargaining disputes, violated the state constitution and struck down the entire statute. Specifically, the court found that the statutory provision calling for binding arbitration was an illegal delegation of legislative authority and contrary to the state constitution.

The court referred to Wyoming, which construing a like constitutional provision, upheld a binding arbitration law similar to the South Dakota statute in question. But the court observed that the Wyoming court did not properly interpret an article of its own state constitution. The court explained:

> "That provision of the Wyoming Constitution . . . is identical to Article III, Section 20 of the Pennsylvania Constitution. . . . While the Wyoming court has relied heavily on decisions of the Pennsylvania court, it should be observed that, in order to support the constitutionality of binding arbitration, language has been added to the Pennsylvania Constitution specifically authorizing that legislation."

The court then noted that Article III, Section 26, of the South Dakota constitution, which governs delegation of state authority, was almost identical to Article III, Section 20, of the original Pennsylvania constitution that was amended to permit arbitration.

The unions had urged the court to adopt the rationale of the Michigan and Rhode Island courts upholding binding arbitration, but the South Dakota court stated that the "distinction between those decisions and our own in this case lies not only in the history of our constitutional provisions but also on differing constitutional provisions." Like Pennsylvania, Michigan has a specific constitutional provision that governs, while Rhode Island, noted the court, has no provision in its constitution similar to South Dakota's Article III, Section 26, with which to confront the court.

Community School Corp. v. *IEERB,* 91 LRRM 2521 (1976).

An Indiana circuit court has held that the Indiana Public Employees Collective Bargaining Act, which contains a provision prohibiting any judicial review of the Indiana Education Employment Relations Board's bargaining-unit determinations, violates the "due process guarantee" of the Indiana constitution. The court granted a permanent injunction against the state board, prohibiting future proceedings under the act and ruling the act void in its entirety since the unconstitutional provisions are an integral part of the statutory scheme and thus are not severable from the remaining provisions.

The right of a party to judicial review of state administrative action is not subject to the grace of the legislature, held the court, but is a matter of constitutional right. Rejecting the state board's contention that Indiana's general Administrative Adjudi-

cation Act would allow for judicial review of final orders, the court found that the public-employee statute preempts the broader administrative statute for the purpose of unlawfully precluding judicial review of representation proceedings altogether. The elimination of judicial review from the organization process was intended to shield basic determinations of the IEERB from any judicial examination. Since such decisions are crucial to the enforcement of the act, the entire scheme must fall, concluded the court.

The case is on appeal.

Enforceability of Grievance Arbitration

Antinore v. *State of New York*, 371 N.Y.S.2d 213, 49 A.D.2d 6, 90 LRRM 2127 (1975).

A collective bargaining agreement between the State of New York and Civil Service Employees Association providing for binding arbitration in disciplinary cases as the only appeals procedure available to civil service employees is valid and constitutional, under a ruling of the appellate division of the New York Supreme Court.

In the early 1970s, the New York Civil Service Law was amended to permit statutory provisions to be "supplemented, modified or replaced by agreements negotiated between the state and an employee organization." The CSEA and the state, in their 1973 contract, included a provision for binding arbitration as the only procedure available to employees challenging disciplinary actions, thereby eliminating appeals to the civil service commission or the courts.

The challenge to that provision was filed by a child-care worker at a state training school under the state Division of Youth following a termination notice. The lower court held that the binding-arbitration provision "deprives plaintiff of due process and equal protection guaranteed by the Fourteenth Amendment which the plaintiff has not waived and consequently, sections 75 and 76 are unconstitutional to the extent that they allow the negotiated procedure to become the only appeals procedure."

More particularly, the lower court held that the arbitration procedure in the agreement did not satisfy the due-process requirements in that it did not state that "the arbitrator state the

reasons for his decision" or stipulate that he is "bound by the rules of law" including the confrontation of adverse witnesses.

On review, the appellate court concluded that the contractual arbitration provision had to be viewed in terms of the whole contract and balanced against the procedural safeguards contained in the state law (CPLR) governing arbitration generally, *i.e.*, the right to present evidence, cross-examine witnesses, be represented by counsel, etc. Furthermore, in the court's view, the due-process and equal-protection arguments cannot prevail "when they have been waived by the party seeking to assert them, as by voluntarily entering into an agreement for the resolution of disputes. . . ."

The court found that the contract was binding on the plaintiff, who was required to accept both its benefits and possible disadvantages. The court elaborated:

> "The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him. Labor relations involving any sizeable group cannot be expected to proceed only with the consent of each member of the group. Orderly process requires that agreements be made and complied with even in the face of minority dissent or disapproval. . . . If plaintiff or others in his unit are dissatisfied with their agent's product, there are means available to effect a change in representation and certification."

The court observed that the negotiated arbitration procedures advanced the public good by resolving disciplinary disputes in a simpler, more expeditious manner than would attend their disposition by one of the methods set forth under the Civil Service Law. Concluding, the court held that the arbitration provisions were constitutional and that plaintiff waived his rights under the law.

Kaleva-Norman-Dickson School District No. 6 v. *K-N-D Teachers Association*, 227 N.W.2d 500, 89 LRRM 2078 (1975).

Reversing two lower courts, the Michigan Supreme Court held that a probationary teacher's grievance over her nonrenewal was arbitrable inasmuch as the school board did not specifically exclude from arbitration this type of claim.

The contract between the parties reserved to management the right "to hire all employees and, subject to the provisions of law, to determine their qualifications, and the conditions for their continued employment or their dismissal or demotion. . ." (Ar-

ticle II). It also provided that "no teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause" (Article XI (C)). The arbitration clause of the contract gave teachers the right to grieve any alleged "violation, misinterpretation or misapplication" of the agreement, and stated that any grievance unresolved through mediation may be appealed to arbitration.

The court cited decisions of the U.S. Supreme Court and concluded that the "policy favoring arbitration of disputes arising under collective bargaining agreements, as enunciated by the United States Supreme Court in the Steelworkers' Trilogy, is appropriate for contracts entered into under the PERA" [Public Employment Relations Act].

The court stated, "The Board did not specifically reserve from arbitration claims arising under Article XI (C). There is no evidence, forceful or otherwise, of a purpose to exclude from arbitration claims based on Article XI (C)."

Noting that the lower state courts ruled that the dispute could not be arbitrated because of the management-rights clause, the opinion added:

> "In deciding whether a dispute involving an issue of contract interpretation is arbitrable, a court should guard against the temptation to make its own interpretation of the substantive provisions of the contract encompassing the merits of the dispute. If the parties have agreed that an arbitrator shall decide questions of contract interpretation, the merits of the dispute are for the arbitrator."

Dayton Classroom Teachers Association v. *Dayton Board of Education*, 41 Ohio St.2d 127, 323 N.E.2d 714, 88 LRRM 3053 (1975).

Overturning two lower court decisions, the Ohio Supreme Court held that collective bargaining agreements between school boards and their employees' representatives that do not infringe on "policy-making authority" are legally binding.

The case arose after the Dayton Classroom Teachers Association attempted to submit several grievances involving working conditions and job-posting procedures to arbitration. The Dayton Board of Education declined to discuss the grievances, alleging that it lacked the proper authority to execute and abide by collective bargaining agreements.

On appeal to the Ohio Supreme Court, the justices found no legal impediment to a school board's manifesting its policy in

written contracts, holding that the agreement in question was binding on the parties. In deciding in favor of the Teachers Association, the court found that a board of education does not exceed its statutory authority whenever it agrees to a written contract establishing employment conditions. Although there is no public-sector bargaining law in Ohio, the court noted that state law requires a school board to "make rules and regulations as are necessary for its government and the government of its employees."

Turning to the specific grievance-arbitration provisions in question, the court cited the ruling of the Wisconsin Supreme Court in *Local 1226* v. *Rhinelander*:

> "The city has contended that to require the city to submit to binding arbitration is an unlawful infringement upon the legislative power of the city council and a violation of its home-rule powers. Yet in all of its arguments the city is talking about arbitration in the collective-bargaining context—arbitration to set the terms of a collective bargaining agreement. Such is not this case, which involves arbitration to resolve a grievance under an existing agreement to which the city is a party."

In its decision that grievance arbitration is lawful and binding in Ohio, the court concluded that arbitration has been considered a favorable method to resolve differences and avoid costly, needless litigation.

Susquehanna Valley Central School District v. *Susquehanna Valley Teachers' Association,* 37 N.Y.2d 614, 90 LRRM 3046 (1975).

In denying a school board's petition for a stay of arbitration, the New York Court of Appeals held that where a collective bargaining agreement stabilized average class sizes and staff size, arbitration of whether a staff reduction included in a school budget violated the agreement was not precluded on the basis that staff size, as a matter of law and policy, was within the board's prerogative and, therefore, not arbitrable.

The court observed: "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may . . . restrict the freedom to arbitrate." In the court's view, "[k]ey to the analysis is that the freedom to contract in exclusively private enterprises on matters does not blanket public school matters because of the governmental interests and public concerns which may be involved, however rarely that may ever be." In the instant case, however, the employer did not point to,

nor did the court find, any restrictive policy limiting the freedom to contract on staff size. Moreover, continued the court, there is a distinction between a duty to engage in collective bargaining and a freedom to agree to submit disputes, whether or not subject to mandatory bargaining, to arbitration.

In the instant case, the employer voluntarily bargained about staff size and, in fact, included language on that subject in the collective agreement. The employer, therefore, was free to agree to submit to arbitration disputes about staff size and was precluded from claiming that such disputes were nonarbitrable on the basis of the fact that staff size as a matter of law was a nonmandatory subject of bargaining.

Justice Fuchsberg wrote a concurring opinion in *Susquehanna* which, in light of subsequent New York court decisions (summarized below), was significant. Although he agreed with the court's determination, he suggested that the majority erred in writing "in restrictive tones and vague generalities, of public policy 'concerns which may be involved' . . . even though 'it does not appear that there is any restrictive policy' involved in this case."

Justice Fuchsberg quarreled with the notion that courts may freely assume the role of arbiters of public policy, "especially in the face of a statutory scheme which bespeaks of its own policy considerations." In his view: "[t]he public policy pronouncements made by the majority hold out an 'open sesame' of hope to those who would have the courts contravene the well-recognized statutory preference for bargaining and arbitration . . . and will but encourage proliferation of litigation rather than composition of differences in public employment disputes."

Justice Fuchsberg's opinion foreshadowed events to come with respect to the mischief that might result from judicial determination of public policy. As a result of the fiscal crisis facing not only New York City but also several jurisdictions within the State of New York, several cases have been litigated concerning the public employer's right to abrogate collective bargaining agreements in order to deal with financial emergencies. The trend of the judicial decisions has been to rely upon "public policy" considerations to uphold the employer's job-abolition power and other prerogatives pertinent to the provisions of essential services, regardless of contractual agreements that might have been entered into with employee representatives. Summaries of several of these recent New York decisions follow.

Impact of Fiscal Crisis on Enforceability of Contracts

DeLury v. *City of New York*, 51 A.D.2d 288, 381 N.Y.S.2d 236, 92 LRRM 2497 (1976).

In *DeLury*, the Appellate Division (1st Department) of the New York Supreme Court declared that the contract in effect between the city and Uniformed Sanitationmen's Association did not provide for guaranteed employment during its term, and further, that the city had the right to terminate any sanitationmen to alleviate the fiscal crisis.

The USA had attempted to block the layoff of some 2,934 sanitationmen by relying on a provision of its contract which stated that "[t]he City agrees to employ each of the employees for the period between July 1, 1974 and June 30, 1976 for 261 (eight-hour) working days per annum at the respective annual compensations set forth in Schedule 'A' of this Article III." The USA contended that this clause provided a guarantee of employment to each sanitationman. The city disagreed that this clause was ever intended to provide job security and relied on Section 1173–4.3 (b) of the New York City Collective Bargaining Law which entitles the city to "relieve its employees from duty because of lack of work or for other legitimate reasons" and to "take all necessary actions to carry out its mission in emergencies. . . ."

The appellate division sustained the city on the meaning of the disputed contract provision, finding that it was not intended as a job-security clause but, rather, was adopted to establish a formula for compensation on the basis of an annual wage. Furthermore, in the court's view, the contract had to be interpreted in conjunction with the above-quoted management-rights clause of the New York City Collective Bargaining Law and "against the background of the well-publicized financial crisis facing the City of New York."

Citing decisions of the U.S. Supreme Court, the appellate division went on to hold that "the rights of contract are 'subject to the proper exercise of the police power of the state' " and that the authority of preexisting laws and the state's reservation of sovereign powers must be read into contracts. The court also concluded that the management-rights section of the NYCCBL "is limned against the background of the police power." That section of the law, said the court, "specifically and clearly removes

from collective bargaining considerations of the right of the public employer to retire its employees from duty and the right of the employer to act in emergencies." The court cited with approval three other decisions of New York appellate courts (see below) which have held that labor-contract provisions providing for job security cannot serve to deprive the public employer of its power to abolish jobs that, in its judgment, must be abolished by virtue of economic necessity. The thrust of the court's decision is that whenever a fiscal crisis threatens a public employer's "very ability to govern and provide essential services," the employer "must not be stripped of its means of survival."

Burke v. *Bowen,* 373 N.Y.S.2d 387, 90 LRRM 3167 (1975).

Members of the fire department of the City of Long Beach brought a proceeding to annul action of the city council that terminated the employment of 13 employees. The New York Supreme Court, Appellate Division, affirming the lower court, held that the city council was authorized to determine how many firemen were necessary for the conduct of fire department operations. Consequently, provisions of the collective bargaining agreement requiring a minimum complement of fire fighters and a minimum staff per tour did not constitute terms and conditions of employment, were not proper subjects of collective bargaining, and were not binding upon the city council.

Petitioners did have a right, however, to demand negotiations with respect to the impact of the city council's action and, also, with respect to the number of fire fighters to be assigned per piece of fire-fighting equipment. These were held to be terms and conditions of employment, and the petitioners could insist on negotiating such terms even though the current collective agreement was in midterm.

Board of Education, Yonkers City School District v. *Yonkers Federation of Teachers,* 379 N.Y.S.2d 109 (1976).

On appeal in a proceeding to stay arbitration, the New York Supreme Court, Appellate Division, held that a collective bargaining agreement that purported to grant all members of the bargaining unit absolute job security, except in cases of unsatisfactory job performance, could not deprive the school board of its power to abolish positions that, in its judgment, had to be abolished by virtue of economic necessity. Citing the *Susquehanna* case, *supra,* the court stated:

"Even were we to accept the concept that a public employer may voluntarily choose to bargain collectively as to a non-mandatory subject of negotiation and agree, generally, to submit contract disputes to arbitration, public policy demands that arbitration be denied in this case and that the public employer's job abolition power remain unfettered. The New York State Legislature has declared the City of Yonkers' fiscal situation a 'disaster' which creates a 'state of emergency' and has deemed it a matter of overriding State concern that the city's finances be again put in order. The petitioner . . . must retain the power to discharge employees when it is absolutely necessary to do so."

On July 1, 1976, the New York State Court of Appeals reversed the appellate division's determination of this case. (See 92 LRRM 3328.) The court of appeals' decision will be discussed in the next committee report.

Schwab v. *Bowen*, 379 N.Y.S.2d 111, 91 LRRM (1976).

On appeal in a proceeding to enjoin the City of Long Beach from discharging employees, the New York Supreme Court, Appellate Division, held that provisions of the collective bargaining agreement between the city and the Civil Service Employees Association, which purported to grant all employees hired prior to a certain date absolute job security except in cases of misconduct, could not deprive the city of its power to abolish jobs that it had itself previously created, even if the public employer voluntarily chose to bargain collectively as to a nonmandatory subject of negotiation.

Enforceability of Interest Arbitration Award

City of Alpena v. *Alpena Fire Fighters Association,* 224 N.W.2d 672, 88 LRRM 3304 (1975).

Affirming a circuit court decision, the Michigan Court of Appeals upheld an arbitrator's award that the city had challenged on grounds of procedural deficiencies. Specifically, Alpena had charged that the impasse arbitration panel violated Act 312 by failing to (1) base its decision on criteria set forth in the law; (2) make written findings of fact; (3) make a verbatim record of the proceedings; and (4) support its decision by competent, material, and substantial evidence on the whole record. The city also had charged that the panel lacked jurisdiction to make the award.

With respect to the first allegation, the court stated that the law "does not require that the panel consider each factor; if no

evidence is presented upon a particular factor, the panel can't be expected to base its decisions on it." As to the second charge, the court found that the panel made a "sufficient finding of fact." In dealing with the city's allegation regarding a verbatim record of proceedings, the court noted that since Alpena's only court reporter was out of town during the arbitration hearing, the proceedings were tape recorded. The court concluded that "while there are a few small gaps [in the transcribed tapes, they are] comprehensible and substantially complete." With respect to the city's charge on insufficiency of evidence, the court determined that there "was sufficient evidence to support this order." Finally, as to the panel's jurisdiction, the court concluded that "the jurisdiction of an arbitration panel extends, at a minimum, to disputes concerning 'wages, hours, and conditions of employment,' inasmuch as the law makes these subjects mandatory subjects of bargaining and disputes over them are arbitrable."

Arbitrability of Subject Matter

Mt. Clemens Fire Fighters and MERC v. *Mt. Clemens,* 89 LRRM 2481 (1975).

The Michigan Court of Appeals held that the Michigan Employment Relations Commission acted within its statutory authority when it ordered Mt. Clemens to submit a dispute with its fire fighters to arbitration.

In May 1973 the city changed its method of computing retirement benefits. Before that time, an employee's pension was computed on the basis of his average salary for the last five years of service, and all accumulated sick leave—regardless of when it was earned—was generally allocated to the last year of service. The city amended this policy by excluding from consideration all sick leave earned before the last five years of service. Local 838 of the International Association of Fire Fighters grieved and lost. When it requested that the matter be submitted to arbitration, the city refused. MERC ruled that the refusal was a violation of the Public Employment Relations Act.

The city appealed from MERC's decision, saying the dispute was not grievable, that MERC was not the proper forum to order it to arbitrate, and that MERC did not have the authority to order it to submit to an arbitration proceeding that could result in an order that would violate the city's charter.

The court cited *Detroit Police Officers Association* v. *Detroit* (*GERR 548,* B–13) in which the court held that "MERC was cor-

rect in holding that changes in the police retirement plan are mandatory subjects of bargaining." It also noted that the agreement between the parties had a maintenance-of-benefits clause and that pension benefits "are contractual and therefore become vested rights."

Second, the court noted that an issue is arbitrable unless the contract expressly excludes it from arbitration, or unless there is "forceful evidence" of a purpose to exclude the issue. Neither of these criteria pertained in the instant dispute, and the court found the dispute arose under the contract and was arbitrable. Therefore the dispute was properly before MERC and not the courts.

Scope of Bargaining

Pennsylvania Labor Relations Board v. *State College Area Board of School Directors and AFSCME*, 337 A.2d 262, 90 LRRM 2081 (1975).

The Pennsylvania Supreme Court held that school boards and other public employers may not refuse to bargain on issues that might also touch upon managerial policies. The court left to the Pennsylvania Labor Relations Board the task of determining which of the 21 items raised during the 1971 negotiations between the teachers and State College's school board may be bargained. The court determined that the PLRB should balance the effect of a proposal of teachers against its impact on the school system.

The controversy revolved around three sections in the Public Employee Relations Act: Sections 701, 702, and 703. Section 701 requires parties to negotiate on wages, hours, and terms and conditions of employment. The next two sections eliminate from bargaining "matters of inherent managerial policy" and anything in conflict with state law or municipal home-rule charters.

The commonwealth court held that any issue, even though it might deal with wages, hours, or terms and conditions of employment, was not bargainable if it also affected policy matters or other responsibilities of public employers laid down by statute.

The Supreme Court decided that this view "emasculates Section 701 and thwarts the fulfillment of the legislative policy sought to be achieved by the passage of the act." The Court ruled that:

". . . where an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and con-

ditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy.

"It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

"If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon request by the public employee's representative. . . ."

Miscellaneous

Hortonville Education Association v. *Hortonville Joint School District No. 1*, 225 N.W.2d 469, 88 LRRM 3075 (1975).

The Wisconsin Supreme Court in 1975 held that a school board was permitted under Wisconsin law to discharge teachers who engaged in an illegal strike. The court also concluded that the action of the Hortonville school board in discharging teachers instead of obtaining a judicial order (injunction) did not constitute selective enforcement of the Wisconsin prohibition of public employee strikes. In handing down its decision, the court upheld the state's strike ban and ruled that the board, though it had other options (*e.g.*, injunction, fact-finding before the Wisconsin Employment Relations Commission, etc.), did not discriminate by firing the teachers; the district treated them all equally in affording them notice, hearings, and the right to apply for reinstatement. The supreme court also rejected the teachers' argument that state law discriminates by providing binding arbitration for policemen and fire fighters, but not for other employees, since a strike by the uniformed forces would create "imminent and immediate danger to the community." Likewise, the court declined to strike down the distinction between private employees (who are permitted to strike) and public employees (who are not). The court concluded: "If the no-strike ban legislatively imposed on public employees is to be abolished or altered, it must be done by the legislature and not the courts."

The Wisconsin court did sustain the HEA, however, in finding that teachers who were discharged for their strike activity and breach of contract were deprived of property and liberty within the intendment of due process of law under the U.S. Constitution. Hortonville teachers were fired for (1) allegedly breaching

their contracts and (2) engaging in an illegal strike. In the court's opinion, "[s]uch charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges."

In this connection, the court also found that teachers were denied due process of law inasmuch as the decision to terminate their employment was made by the school board, which "was not an impartial decision-maker in a constitutional sense." Stating that it would fashion a judicial remedy until the legislature establishes a different procedure, the court declared that whenever a teacher is discharged or disciplined and due process is required, and the school board is in an adversary position, the teacher can obtain a *de novo* court hearing on the issues involved. Thus, the court remanded the case to the circuit court for an "impartial hearing."

On October 6, 1975, the Supreme Court granted the school board's request for certiorari in the *Hortonville* case. The question was presented to the high court: Are elected members of a public school board who have exclusive authority under state law to discharge teachers engaging in an illegal strike prohibited by the Fourteenth Amendment's Due Process Clause from doing so because they are not sufficiently impartial decision-makers?

The Supreme Court, on June 17, 1976, answered the question in the negative, reversing the Wisconsin Supreme Court and remanding the case back to it. (See 92 LRRM 2785.) The Supreme Court's decision will be discussed in the next committee report.

St. Paul Professional Employees Association v. *City of St. Paul,* 226 N.W.2d 311, 88 LRRM 2861 (1975).

The Minnesota Supreme Court held that public employers must submit disputes to binding arbitration when negotiations with supervisory employees reach an impasse. The basis of the court's decision was its finding that under the Public Employment Labor Relations Act, supervisors are "essential" employees who are prohibited from striking and whose disputes are to be resolved by binding arbitration.

The statute provides for two types of impasse arbitration, depending upon whether the employees involved are "essential" or "nonessential." The latter may have their unresolved bargaining demands submitted to nonbinding arbitration, but they are ac-

corded the conditional right to strike if the employer rejects the advisory award. Essential employees may invoke binding arbitration, but they are denied the right to strike.

The court noted that the original 1971 public-sector bargaining law expressly excluded supervisory and confidential employees from coverage. The 1973 amendments, however, removed this exclusion and provides:

> "Supervisory and confidential employees, principals, and assistant principals may form their own organizations. An employer shall extend exclusive recognition to a representative of or an organization of supervisory or confidential employees, or principals and assistant principals, for the purpose of negotiating terms or conditions of employment, in accordance with all other provisions of Laws 1973, Chapter 635, as *though they were essential employees*" (emphasis added).

The court concluded that the legislature clearly evinced an intent to accord organizations of supervisory employees the rights of essential employees, including binding arbitration. The city's failure to submit to arbitration its dispute with the St. Paul Professional Employees Association was found to be an unfair labor practice.

Jefferson County Board of Supervisors v. *New York State Public Employment Relations Board and Faculty Association of Jefferson County,* 36 N.Y.2d 534, 300 N.E.2d 621, 89 LRRM 2713 (1975).

The New York Court of Appeals ruled that PERB, having determined that a public employer or a public employee organization has failed to negotiate in good faith by unilaterally changing terms and conditions of employment (in violation of Section 209-a.1 (d) of the Taylor Law), is empowered only to order the offending party to negotiate in good faith.

In a 1973 decision, PERB held that the Jefferson County Board's unilateral limitation of the number of Jefferson Community College faculty members to receive merit increments was a violation of its duty to negotiate. It ordered the Board to "desist from refusing to pay . . . merit salary increments."

The court of appeals upheld a determination by the appellate division that "although PERB had jurisdiction of the charge alleging a failure to negotiate in good faith, it exceeded its powers when, in effect, it ordered the County to pay the merit increments in accordance with the contract."

The court further stated:

"[W]e are mindful of the fact that PERB has the express power to formulate and establish procedures for the prevention of improper employer and employee organization practices. . . . Furthermore, we are cognizant of the fact that the Legislature has mandated that PERB 'shall exercise exclusive nondelegable jurisdiction' of the powers conferred upon it. . . . Thus, PERB is authorized to fashion such procedures as will effectuate the purposes and provisions of the Taylor Law, and the exercise of its discretion will not be set aside unless its action is arbitrary and capricious. . . . However, PERB may not disregard an explicit legislative directive to the effect that, as in the instant situation, it is precluded from doing anything more than entering an order requiring the County to negotiate in good faith."