APPENDIX C

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1976*

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Introduction

This report covers statutory and judicial developments at the federal, state, and local levels in 1976. It contains a state-by-state analysis of legislation enacted over the past year, a summary of developments in the federal sector under the Executive Order, and a digest of appellate and high-court decisions.

Although there was some legislative activity during the year, most of the statutory developments consisted of minor amendments to existing public-sector laws. The major developments in public-employment disputes settlement during 1976 took place in the courtrooms of the land. This year's report, therefore, emphasizes significant judicial decisions affecting public-sector labor relations, particularly those cases pertaining to grievance and interest arbitration.

The message from the courts is loud and clear. Not only has the volume of litigation affecting public-sector labor relations been growing, but increasingly courts have been establishing or enforcing standards that limit the scope and authority of grievance and interest arbitrators. Moreover, the impact of external law on the scope of bargaining and on the authority of arbitrators is being felt in the public sector, as in the private sector. While most jurisdictions have upheld agreements to arbitrate grievances and statutory interest-arbitration procedures, the limiting effect on bargaining

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and arbitration of civil service, education, home rule, and other laws has been outlined by the courts.

The judicial decisions indicate that labor neutrals should recognize that the laws of the jurisdictions in which they are called to serve may vary greatly from state to state, from state to locality, and according to the type of employer involved, for example, police, fire, education, and health services.

Clearly, the laws and court decisions have not discouraged the use of arbitration; grievance arbitration, in particular, has been growing in both the private and public sectors. (The FMCS reports 26,000 arbitration requests in fiscal 1977.) But arbitration is assuming a new dimension as arbitrators are being called upon to consider applicable laws and regulations as well as to interpret collective bargaining agreements. There is a clear need, therefore, for arbitrators to be aware of relevant statutes, judicial decisions, and labor-agency rulings in those jurisdictions where they accept public-sector cases. They should also be aware of the disputes-settlement and grievance-arbitration procedures and policies of the appointing labor-relations agency.

Space limitations and the enormous volume of cases make it impossible to report on all of the significant decisions and events that affected public employees during 1976. For this reason, we have not included a description of very significant public-employee disputes, such as the San Francisco craft and transit strike and the strike of Massachusetts state employees. Thus, rather than being a comprehensive survey, this report contains selected material that is intended to be representative of public-sector developments. As in the past, our aim has been to highlight statutory changes and judicial decisions that may be of particular interest to neutrals operating in the public sector.

Statutory Developments

Statutory developments in 1976 were neither numerous nor dramatic. Whereas prior years saw the enactment of major pieces of collective bargaining legislation, 1976 can best be characterized as a year of refinement of existing public-sector laws. The following is a summary of new laws and amendments. Statutory amendments dealing with dispute settlement are presented in detail, whereas legislative modifications related to other aspects of public-sector bargaining are merely noted.

Alaska

The Alaska Public Employment Relations Act was amended to provide that a collective agreement that incorporates union-security provisions shall safeguard the rights of nonassociation of employees having bona fide religious objections to union membership. Employees who exercise their right of nonassociation must, however, pay an amount equivalent to union dues, which the union must match and contribute to a charity of its choice not affiliated with a religious, labor, or employee organization.

California

An amendment to the Public Educational Employer-Employee Relations Act changes the operative date of the provisions authorizing the filing of unfair-practice charges within six months of occurrence to April 1, 1976. The date is changed from July 1, 1976.

Connecticut

Connecticut modified its teacher bargaining law with respect to procedures for representation elections, unit certifications, prohibited practices, and complaint charges. It also amended the statute to provide advisory arbitration in negotiations impasses between school boards and representatives of either teachers or administrators.

The governor is to appoint a standing panel of not less than 10 or more than 25 persons to serve as arbitrators. If mediation does not bring about the resolution of an impasse, the parties are to select an impartial arbitrator. If they are unable to agree upon an impartial arbitrator, the secretary of the state board of education shall make the selection. If either of the parties fails to designate its representative to the arbitration panel, the secretary of the state board of education shall select the representative arbitrator. If both parties fail to select a representative to the panel, the names of three arbitrators shall be recommended to the parties by the secretary of the state board of education. The parties shall mutually select one of those recommended to arbitrate the dispute; in the event the parties are unable to select a single arbitrator, the secretary may also select an arbitrator.

After hearing the issues, the arbitrators or single arbitrator shall render an advisory decision within 15 days. The parties shall pay the fee of the arbitrators they selected and share equally the fee of

the third arbitrator or the single arbitrator. Following the arbitration, the secretary of the state board of education may meet separately or jointly with members of the board of education, members of the employee organization, and members of the fiscal authority having budgetary responsibility for making appropriations to school districts.

Florida

The Public Employment Relations Act was amended to exclude from coverage employees of the state legislature, individuals who have been convicted of a crime, and inmates of state institutions. The board of trustees of the Florida School for the Deaf and Blind was deemed the public employer of academic and administrative personnel of such school for collective bargaining purposes. The definition of a managerial employee, who is not covered by the bargaining law, was broadened by amendment.

Florida also enacted a new law prohibiting certain employers, including public employers, employment agencies, and labor organizations, from discriminating against any employee on the basis of age. The law excludes from coverage employees of law-enforcement and firefighting agencies.

Georgia

The Georgia legislature expanded the jurisdiction of the Firefighters' Mediation Act by repealing a provision that had exempted from coverage consolidated city-county governments with a population of 150,000 or more.

Maine

The state employees' bargaining law was amended to provide that an employer may file a petition for a unit clarification where there is a certified or currently recognized bargaining representative and where the circumstances surrounding the formation of an existing unit are alleged to have changed sufficiently to warrant a modification in the composition of that unit.

Maryland

The charter of Baltimore City was amended to authorize the inclusion in municipal collective bargaining agreements of a provi-

sion requiring the payment of a service fee as a condition of employment.

Michigan

An amendment to the Policemen's and Firemen's Arbitration Act provides for the establishment of a panel of arbitrators to be known as the Michigan Employment Relations Commission Panel of Arbitrators. The arbitrators appointed to this panel by the MERC will have indefinite terms of office, take a constitutional oath or affirmation of office, be Michigan residents, and also be impartial, competent, and reputable citizens of the United States. MERC may at any time appoint new members to the panel and remove existing members.

The chairman of MERC is to select from the panel of arbitrators three persons as nominees for impartial arbitrator, or chairman, of the arbitration panel to act in any case. Each party may preemptorily strike the name of one of the nominees within five days after the list is sent by the commission. Within seven days thereafter, the commission shall designate one of the remaining nominees as impartial chairman of the arbitration panel.

The legislature also amended the Policemen's and Firemen's Arbitration Act to cover emergency medical personnel employed by a police or fire department. These persons are defined as personnel who provide assistance at emergencies occurring outside a recognized medical facility. Emergency medical personnel are also those persons who initiate stabilizing treatment or transportation of injured persons from the emergency site. Emergency medical personnel employed by private emergency medical service companies that work under contract with a government unit are not covered by the provisions of the Michigan Arbitration Act. Also excluded are individuals working in emergency service organizations whose duties are solely administrative or supportive in nature.

Minnesota

The Public Employment Relations Act was amended to provide that employees who are members of a bargaining unit but not members of the union designated as exclusive representative may be required to contribute a fair-share fee for services rendered in an amount not to exceed 85 percent of regular membership dues.

Pennsylvania

Pennsylvania modified Act 111, the police-fire interest-arbitration law, with respect to payment of the impartial arbitrator. The cost of the arbitrator selected by each party shall be paid by the respective parties. The cost of the chairman or impartial members of the arbitration panel, however, shall be paid by the Pennsylvania Labor Relations Board.

Rhode Island

The firefighters' arbitration act was amended to extend collective bargaining rights to all employees of any paid fire department in any city or town. Formerly, the law covered only the permanent uniformed members of any paid fire department.

A new law grants organization and bargaining rights to certified public-school administrators in the City of Providence. The scope of bargaining is defined as hours, salaries, and fringe benefits. Bargaining impasses are subject to mediation and binding arbitration on nonmonetary issues.

An interesting amendment deals with attorney's fees and costs. If an employer or labor organization representing municipal police appeals an arbitration award, which is binding on both sides, the party against whom the final decision of any court is adverse shall pay reasonable attorney's fees and costs to the successful party. If the final decision of the court affirms an arbitration award granting a wage increase, such award, if retroactive, shall bear interest at the rate of 8 percent from the effective retroactive date.

Washington

Washington modified the dispute-settlement provisions of its local public-employee bargaining law. As amended, the law provides that negotiations between representatives of the public employer and uniformed personnel shall be commenced at least five months prior to the submission of the budget to the employer's legislative body. If an agreement has not been reached after a 45-day period of negotiations, an impasse is declared, and either party may invoke mediation. This 45-day period may be modified by mutual agreement. If the parties have not reached agreement after a 10-day period of mediation, a fact-finding panel shall be selected. The panel shall begin holding hearings on the disputed matters within five days after its formation; it must issue its findings and rec-

ommendations within 30 days from the date on which the hearings were commenced. The costs of each party's appointee to the panel shall be borne by the party, and all other costs of the fact-finding panel shall be paid by the Public Employment Relations Commission.

If agreement is not reached by the parties within 45 days after mediation and fact-finding, the dispute shall be submitted to arbitration. Each party shall submit a list of three names to the commission, which shall appoint one from each list to the panel. The two appointed members shall select the chairperson of the panel by one of two ways: (1) the two panel members may request the commission to name a chairperson, or (2) the two appointed members shall choose a third member. Under the first option, the commission will pay all costs of the arbitration except that the parties shall pay for their own representatives on the panel. Under the second option, the costs of the arbitration shall be shared equally by the parties.

The arbitration hearings must be concluded within 20 days after their commencement. Within 15 days after conclusion of the hearings, the panel chairperson shall make a written determination of the issues in dispute. The decision of the panel shall be final and binding subject to review by the superior court solely upon the question of whether the decision of the arbitration panel is arbitrary or capricious. The law contains criteria that shall be taken into consideration by an arbitration panel in making its determination.

Wisconsin

The police and firefighters final-offer arbitration statute was amended to no longer permit the blocking of an arbitration proceeding by filing a prohibited-practice complaint alleging, for example, that the petitioner in the arbitration matter has not bargained in good faith. Another amendment requires the parties in an arbitration proceeding to present their "final offers" to the Wisconsin Employment Relations Commission mediator, who is responsible for investigating the alleged impasse. The mediator is to inform the commission in writing of the final offer of each party as it is known to the mediator at the time the investigation is closed. Thereafter, neither party may amend its final offer except with the written agreement of the other party. The arbitrator is to select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

Federal-Sector Developments[1]

The year 1976 closed without legislation for federal employees. Federal-sector unions, however, continued to marshal forces for continuing pressure for legislative action in the new Administration.

In September 1976, the district court in *National Treasury Employees Union* v. *Paul J. Fasser, Jr., et al.*,[2] vacated the Decision and Order of the Assistant Secretary of Labor for Labor-Management Relations[3] in which the union was held to have violated Section 19(b)(4) of the Executive Order 11491, as amended,[4] by its picketing of several Internal Revenue Service facilities in the course of a labor-management dispute with that agency.

In doing so, the court determined that the application of Section 19(b)(4) to the precise fact situation of the case contravened the First Amendment. It denied the union's request, however, that the picketing ban of the Order be declared unconstitutional, and it ruled that picketing could be constitutionally prohibited if it "actually interferes or reasonably threatens to interfere with the operation of the Government agency."

The Federal Labor Relations Council subsequently issued a statement on major policy.[5] It announced that consistent with the court's suggestion, it will delineate picketing which is permissible or nonpermissible, under Section 19(b)(4) of the Order, on a case-by-case basis. This will be done through the adjudicatory procedures established under Executive Order 11491 rather than through rulemaking.

Another council pronouncement of interest to arbitrators was the information announcement of July 2, 1976. The council set forth guidance concerning grievance arbitration in the federal service, with particular emphasis on the limited grounds for review of arbitration awards: (1) the award violates applicable law; (2) the award violates appropriate regulation; (3) the award violates the Executive

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

[2] Civil Action No. 76-408 (D.D.C. 1976).

[3] A/SLMR No. 536, sustained by the Federal Labor Relations Council in FLRC No. 75A-96 (March 3, 1976), Report No. 97.

[4] Section 19(b)(4) of Executive Order 11491, as amended, provides as follows "Sec. 19. *Unfair labor practices*. . . . (b) A labor organization shall not . . . (4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it [.]"

[5] Federal Labor Relations Council, Statement on Major Policy Issue, FLRC No. 76P-4 (January 5, 1977), Report No. 117.

Order; (4) the arbitrator exceeded his authority; (5) the award does not draw its essence from the collective bargaining agreement; (6) the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible; (7) the award is based on a nonfact; (8) the arbitrator was biased or partial; and (9) the arbitrator refused to hear pertinent and material evidence. The announcement is accompanied by numerous footnotes as well as a bibliography of selected cases in which the recognized grounds are discussed.[6]

The influence of the Comptroller General was once again felt in his Decision B-156287 (September 15, 1976) rescinding a prior 160-hour limit on the amount of official time per year which federal employees could utilize for union-representation duties. The earlier decision (February 23, 1976) had been suspended so that a solution to the matter of inadequate regulatory controls could be devised by interested unions, management, and third parties who had registered protests at the time of the initial pronouncement. The Comptroller General, by his latest decision, agreed to defer to newly promulgated Civil Service Commission guidelines on the use of official time for representational purposes. While containing no fixed maximum for official time allocation, the guidelines require accurate record keeping and efficient use of time. Furthermore, the amount of official time authorized is to be determined through a balancing of the effective conduct of the Government's business with the rights of employees to be represented.

The Federal Service Impasses Panel, granted broad powers under Sections 5 and 17 of Executive Order 11491 to bring disputes to settlement through whatever means appropriate, issued two Decisions and Orders during the year. (On only two other occasions since its inception in 1970 has the panel had to impose the terms of settlement.) The first case—*Pennsylvania National Guard, Annville, Pennsylvania and Pennsylvania State Council, Association of Civilian Technicians, Inc.*[7]—involved issues concerning reduction in force and military uniforms. The parties had been bargaining for two years for an initial agreement, during which time Executive Order 11491 had been amended. Since the amendments offered the possibility that the role of regulations pertaining to the impasse issues might be altered soon after the panel issued its recommendations, the panel declined to adopt the employer's proposal which

[6] Federal Labor Relations Council, Information Announcement, July 2, 1976.
[7] Case No. 75 FSIP 7, February 27, 1976, Panel Release No. 62.

encompassed the relevant agency regulations, with no reopener provision. Rather, it adopted the union's proposal that the agreed-upon matters, plus a reopener provision for further negotiations on reduction in force and military uniforms, comprise a two-year agreement. In addition, a time constraint of six months was placed upon the union's reopener rights.

Having been advised that the employer had rejected the panel's recommendation for a reopener provision, a subpanel of the panel held a final-action hearing. In the Decision and Order imposing on the parties the previously recommended terms of the settlement, the panel emphasized that neither party was foreclosed from exercising any rights it had under Executive Order 11491. That is, during future negotiations, the employer remained free to challenge the negotiability of union proposals and the union could challenge the "compelling need" for any regulation relied upon as a bar to negotiations.

An issue concerning private-office space for two professional employees was the cause of the second Decision and Order in *National Labor Relations Board, Washington, D.C. and National Labor Relations Board Union.*[8] Multiunit bargaining for three headquarters units had resulted in the resolution of all matters except for the single issue concerning the two-person professional unit. The union had proposed that the two people who shared an office should be assigned separate offices. Arguing that the employer had already agreed in principle, the union stated that the only issue before the panel concerned whether the provision should be subject to the grievance and arbitration procedures. The employer disagreed on both counts.

In its recommendation for settlement, the panel found that however receptive the employer may have been to the proposal, it had clearly made any agreement contingent on the exclusion of the provision from the grievance and arbitration procedures, but the union had rejected that approach. Accordingly, the panel determined to address "the entire issue." In so doing, the panel recommended that the employer's proposal be adopted. This called for safe and healthful working conditions including "reasonable office space" and required that the employer give careful consideration to providing "appropriate physical surroundings." The panel concluded that the provision should be subject to the negotiated grievance and arbitration procedures, as it was in the parties' other agreements.

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[8] Case No. 75 FSIP 41, September 14, 1976, Panel Release No. 71.

In reaching the foregoing conclusions, the panel noted that the two employees had adequate space, within General Services Administration guidelines, despite a shortage of space at the employer's headquarters. Moreover, it observed that the employer had made several offers to enhance the privacy of the office space, all of which had been rejected by the union. Furthermore, the evidence presented did not show that conditions for other public-sector employees—federal or nonfederal—in comparable work situations were generally different.

The employer accepted the panel's recommendation, but the union refused to do so, even though the panel had issued a reaffirmation. The union insisted that it required a specific panel direction before it would include such a provision in the agreement. The employer requested that the panel formalize its recommendation in an Order. Without holding further hearings, the panel issued a Decision and Order requiring the parties to incorporate in their contract the provision set forth in its recommendation for settlement.

In another case, *Department of Justice, U.S. Marshals Service, Washington, D.C. and International Council of U.S. Marshals Service Locals, American Federation of Government Employees, AFL-CIO,*[9] the panel's post-fact-finding recommendation served as the basis for a mediated settlement in the context of a final-action hearing before a subpanel of the panel.

The four issues therein involved the union's desire to control alleged inconsistencies in the manner in which "regular overtime" and "administratively uncontrollable overtime" were paid by the employer and the scope of the grievance and arbitration procedures with respect to overtime regulations and past practices.

Continuing the trend of prior years, the great majority of cases closed by the panel in 1976 were disposed of without need for post-fact-finding recommendations. Essentially all of these were resolved by the parties through further negotiations. Often this occurred while the request for assistance was in the initial-inquiry stage of the panel's procedures. Mediation assistance by the Federal Mediation and Conciliation Service, or by panel staff at various steps of the panel's procedures, contributed to many settlements.

Robert G. Howlett was designated member and chairman of the Federal Service Impasses Panel by President Ford on March 15, 1976. He filled the vacancy left by Jacob Seidenberg, the panel's

[9] Case No. 75 FSIP 38, June 23, 1976, Panel Release No. 66.

first chairman, whose resignation had been accepted with regret by President Ford on December 31, 1975.

Judicial Developments

A. Constitutional Issues

1. Limits on Congressional Authority to Regulate State and Local Government.

In *National League of Cities* v. *Usery,*[10] the Supreme Court, in a five-to-four decision, invalidated the 1974 amendments to the Fair Labor Standards Act, which had extended federal minimum-wage and maximum-hour provisions to state and local employees. Congress had passed the amendments under its power to regulate interstate commerce, but the Court held the legislation to be an unconstitutional infringement of the Tenth Amendment.

In addition to overturning the FLSA amendments, the Court overruled its 1968 decision in *Maryland* v. *Wirtz.*[11] In that case the Court had upheld the 1966 amendments to the FLSA, which had extended the Act's coverage to employees of state-operated hospitals and schools.

Writing the majority opinion in *National League of Cities,* Justice Rehnquist held that Congress may not exercise its power under the Commerce Clause "so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." "Such assertions of power," he explained, quoting Justice Douglas's dissenting opinion in *Wirtz,* would "allow the national government to devour the essentials of state sovereignty."

Clearly, *National League of Cities* establishes that the Commerce Clause is not the basis for federal bargaining legislation covering state and local employees. The majority and minority opinions acknowledge, however, that Congress might condition financial aid, revenue sharing, and other grants upon compliance with federal standards. Footnote 17 of the majority opinion states:

> "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of State Governments by exercising authority granted it under other sections of the Constitution such as the Spending Power. Art I §8 cl 1 or §5 of the Fourteenth Amendment."

[10] 426 U.S. 833, 96 S.Ct. 2465, 22 W.H. Cases 1064 (1976).
[11] 392 U.S. 183 (1968).

Soon after deciding *National League of Cities,* the Supreme Court, in *Fitzpatrick* v. *Bitzer,*[12] upheld the constitutionality of the 1972 Amendments to Title VII of the Civil Rights Act which authorized federal courts to award back pay and attorneys' fees against a state. Justice Rehnquist wrote the majority opinion, which concluded that Congress's extension of Title VII to public employers was permissible under Section 5 of the Fourteenth Amendment. (Section 5 grants Congress broad power to enact legislation to enforce the substantive provisions of the Fourteenth Amendment.) The *National League of Cities* case was distinguished on the ground that it involved only the Commerce Clause.

The Supreme Court's decisions in *National League of Cities* and *Bitzer* threw into question the applicability of the federal Equal Pay and Age Discrimination Acts to public employers. In *Usery* v. *Board of Education of Salt Lake City,*[13] the U.S. District Court for Utah held that coverage of state- and local-government employees under the Age Discrimination in Employment Act was constitutional. Under the decision, the Secretary of Labor was authorized to sue the Salt Lake City Board of Education on behalf of three school officials who claimed that the Board's promotion procedures discriminated on the basis of age in violation of the Age Discrimination in Employment Act. The court declared, "Congress may constitutionally regulate discriminatory state employment practices under the Commerce Clause where the national interest in employment significantly outweighs the state's interest in discriminatory employment policies and practices."

The school board had argued that the age law, like FLSA in *National League of Cities,* unconstitutionally included within the definition of "employer" state and local governments. The court, however, determined that the application of the Age Discrimination Act to state employment was consistent with *National League of Cities'* "balanced limitation on congressional commerce power over integral state government operations." The court stated:

> "Congress has a national interest in preventing arbitrary discrimination in employment on the basis of age and this includes protecting the significant number of individuals employed by states or instrumentalities and agencies thereof. This national interest is particularly significant when balanced against the defendant's nominal interest in arbitrarily

[12] 427 U.S. 445, 96 S.Ct. 2666, 12 FEP Cases 1586 (1976).
[13] 421 F.Supp. 718, 13 FEP Cases 717 (1976).

discriminating in its employment decisions on the basis of age. Such a policy choice to discriminate on the basis of age in selecting individuals for employment within a state education system is outweighed by the significant national interest in insuring nondiscriminatory employment practices in areas affecting interstate commerce, even assuming that public education represents an integral state government operation.

"In addition, the degree of federal intrusion into this area of state concern is minimal since the ADEA only imposes a limited negative obligation on the state employer not to arbitrarily use age as an employment criterion, however the remaining criteria may be structured, rather than an affirmative obligation to totally restructure an integral state operation of the school board."

In *Usery* v. *Allegheny County Institution District,*[14] the U.S. Court of Appeals for the Third Circuit held that Tenth Amendment restrictions on the federal government's power to regulate state and local government employment do not extend to enforcement of the Equal Pay Act. Specifically, the court ruled that an Allegheny County, Pennsylvania, hospital violated that law by paying female beauticians less than male barbers for performing substantially similar jobs.

Although the Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act, the court rejected the contention that it could not therefore be made applicable to public employers. The appeals court noted that in *Fitzpatrick* v. *Bitzer* the Supreme Court "made it perfectly clear (1) that Congress has Section 5 Fourteenth Amendment power to prohibit sex discrimination in employment, and (2) that such power despite the Tenth Amendment, extends to the state as employer." Other decisions upholding the applicability of the Equal Pay Act to public employers include *Christensen* v. *State of Iowa*[15] and *Usery* v. *University of Texas at El Paso.*[16]

2. Freedom of Speech and Association.

In *Norbeck* v. *Davenport Community School District,*[17] the Court of Appeals for the Eighth Circuit held that a high-school principal had no constitutional right to negotiate on behalf of a teachers union that represented teachers whom the principal supervised. The court ruled that the Davenport school board did not violate a school principal's First Amendment rights when it refused to renew the principal's contract because the board's interest in efficient school

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[14] 544 F.2d 148, 13 FEP Cases 1188 (3d Cir. 1976).
[15] 417 F.Supp. 423, 13 FEP Cases 161 (N.D. Iowa 1976).
[16] _____ F.Supp. _____, 22 W.H. Cases 1388 (W.D. Tex. 1976).
[17] 545 F.2d 63, 93 LRRM 2985 (8th Cir. 1976).

administration outweighed any right the principal might have had to associate freely with the teachers union.

Reversing two lower courts, the Supreme Court, in *Mt. Healthy Board of Education* v. *Doyle,*[18] unanimously held that a nontenured teacher's exercise of protected First Amendment rights does not necessarily insulate him from discharge if the school board's decision not to rehire him would have occurred in any event on the basis of his performance record. Fred Doyle, an Ohio teacher, was discharged by the school board after he telephoned a local radio station to reveal the contents of a school-board memorandum regulating teacher dress and appearance. A district court decision, which was affirmed by the Sixth Circuit Court of Appeals, held that Doyle's conduct was protected under the First Amendment and that he was entitled to reinstatement because the radio station incident played a "substantial part" in the school board's decision not to rehire him for the coming year.

Writing for the Court, Justice Rehnquist stated that an employee should not be placed in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The Court noted evidence in the record that Doyle had previously been involved in arguments with fellow teachers and had used obscene gestures to correct students. These incidents allegedly were also considered by the school board in reaching its decision not to rehire Doyle.

The Court emphasized that a judicially imposed requirement that Doyle be rehired would have the effect of granting him tenure. In light of this fact, the Court concluded that the school board should be given the opportunity to prove to the trial court that quite apart from the radio incident, Doyle's record was such that he would not have been rehired in any event. The case, therefore, was remanded.

3. Procedural Protections.

In 1972, the Supreme Court, in *Perry* v. *Sinderman*[19] and *Board of Regents* v. *Roth,*[20] established the principle that tenured public employees—those who could be discharged only for cause—had a constitutionally protected property interest in continued employment and, therefore, could be discharged only after notice and hearing. Nontenured employees lacked such interest and were not

[18] _____ U.S. _____, 97 S.Ct. 568 (1976).
[19] 408 U.S. 593 (1972).
[20] 408 U.S. 364 (1972).

entitled to any hearing on termination, unless termination and the circumstances surrounding it constituted a "stigma"; in such case, the employees' liberty interests (as protected by the Fifth and Fourteenth Amendments and construed to include an individual's interest in his or her reputation) were involved and a hearing was required. In *Arnett* v. *Kennedy,*[21] the Court reaffirmed the principles of *Roth* and *Sinderman* and held that while such a hearing was required, it did not have to be held prior to termination.

In *Bishop* v. *Wood,*[22] the Supreme Court again tackled the problem of determining what constitutes a "property interest" or "liberty interest" sufficient to invoke the requirements of due process.

In *Bishop,* a policeman who held the classification of "permanent employee" was discharged without being afforded either a pre- or post-termination hearing. (A city ordinance provided that after a six-month probationary period, a policeman became a "permanent" employee.) Relying on the opinion of the district judge that the ordinance did not confer tenure, the Supreme Court concluded that the policeman did not have a sufficient property interest to invoke the requirements of the Due Process Clause. Justice Stevens, writing for a sharply divided Court, noted that a property interest in employment can "be created by ordinance, or by an implied contract," but that in either case, "the sufficiency of the claim of entitlement must be decided by reference to state law." The Court concurred with the district court's conclusion that the policeman in question "held his position at the will and pleasure of the city" and that, accordingly, his discharge "did not deprive him of a property interest protected by the Fourteenth Amendment."

The Supreme Court also dealt with the stigma issue and the concept of liberty interests. The policeman was discharged for failure to follow orders, causing low morale, and "conduct unsuited to an officer." He claimed that these reasons damaged his good name in the community and, therefore, constituted a stigma of sufficient proportion to warrant a hearing at which the officer could "clear" his name. The Supreme Court, however, found no stigma inasmuch as the police officer was advised of the reasons orally and in privacy.

As for the policeman's claim that the reasons given for his termination were false, the Court held that "the truth or falsity of the City Manager's statement determines whether or not his decision . . . was correct or prudent, but neither enhances nor diminishes

[21] 416 U.S. 134 (1974).
[22] 426 U.S. 341, 96 S.Ct. 2074 (1976).

petitioner's claim that his constitutionally protected interest in liberty has been impaired."

4. Substantive Protections.

In *Hortonville Joint School District* v. *Hortonville Education Association,*[23] the Supreme Court considered the issue of "whether the Due Process Clause of the Fourteenth Amendment prohibits a school board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties."

The case arose out of a long teacher strike in Hortonville, Wisconsin. The school district discharged the strikers on grounds that they violated state law by striking. The teachers admitted they had struck, but argued that the school board was an adversary in bargaining and could not act impartially in disciplining them. They contended that they were entitled to a hearing before an impartial tribunal. The Supreme Court disagreed, holding that "the board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged."

In reaching its decision, the Court balanced the teachers' interests in due process against the government's interests, and it concluded that the public employer's interest in and obligation to make policy decisions regarding the operation of the school system prevailed. The Court stated:

> "Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law."

The constitutionality of a police department hair-grooming regulation was at issue in *Kelly* v. *Johnson.*[24] In that case the Court noted that the Constitution does not guarantee the personal liberty of police officers to choose a style of appearance. Writing the majority opinion in this six-to-two decision, Justice Rehnquist held that police department interests in making police officers readily recognizable and developing an esprit de corps are sufficiently rational reasons for promulgating hair-grooming regulations.

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[23] 426 U.S. 482, 96 S.Ct. 2308, 92 LRRM 2785 (1976).
[24] 425 U.S. 238, 96 S.Ct. 1440 (1976).

The Court concluded that no federal court is in a position to weigh the policy arguments for and against a hair-grooming regulation governing a uniformed civilian service: "Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the state's police power." Thus, the question is not, as the court of appeals framed it, whether the state can establish a "genuine public need" for the regulation, but rather whether the employees can show that there is no rational connection between the regulation and the promotion of safety of persons and property. The Court found that the PBA failed to demonstrate that the police department's hair rule was so irrational that it could be branded as "arbitrary."

Affirming without opinion a three-judge federal district court ruling, the U.S. Supreme Court in *Vorbeck* v. *McNeal*[25] upheld the constitutionality of a Missouri law that excluded police and teachers from the state's collective bargaining statute, while striking down provisions of that law that prohibit police from belonging to labor organizations.

Missouri's public-employee bargaining law grants organizing and bargaining rights to most public employees, but exempts police, deputy sheriffs, state highway patrolmen, national guard, teachers, and university educators. The St. Louis police officers filed suit in a federal district court, claiming that the state law and a related city ordinance violated the Equal Protection Clause of the Fourteenth Amendment. The Court upheld the constitutionality of the statutes and ruled that they bear a rational relationship to a legitimate governmental objective in view of the officers' "unique place in society."

5. Union Security and Dues Checkoff.

In *City of Charlotte* v. *Local 660, IAFF,*[26] the Supreme Court considered the issue of whether a municipality could lawfully refuse to check off union dues for a labor union, even though it agreed to make such deductions for other purposes. The IAFF, operating under a state law that prohibits municipal collective bargaining, challenged the city's refusal to check off dues for its members which, the IAFF contended, was necessary to maintain insurance benefits. In a unanimous opinion written by Justice Marshall, the

[25] 426 U.S. 943, 96 S.Ct. 3160, 92 LRRM 2861 (1976).
[26] 426 U.S. 283, 96 S.Ct. 2036, 92 LRRM 2597 (1976).

Supreme Court held that the city's refusal did not violate the Equal Protection Clause of the Fourteenth Amendment. After noting that "the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny," the Court concluded that the city's concern for administrative costs and convenience if it granted checkoff privileges to every organization that wanted it constituted a rational basis for denying dues-withholding to labor unions.

A U.S. Supreme Court decision is pending in *Abood* v. *Detroit Board of Education.*[27] A Michigan court held that a statutorily authorized agency-shop clause contained in a labor agreement did not violate First and Fourteenth Amendment rights of teachers to freedom of speech and association. The court did hold, however, that agency-shop fees collected from teachers could not be used for political purposes where the teachers "have specifically protested the use of their funds for political purposes to which they object."

The Supreme Court heard oral argument in this case on November 9, 1976. One of the issues presented to the Court was whether the Michigan law, which authorized negotiation of the agency shop as a condition of public employment, on its face constitutes a violation of the First Amendment.

In *Robbinsdale Education Association* v. *Robbinsdale Federation of Teachers,*[28] the Minnesota Supreme Court upheld the constitutionality of a provision in the Minnesota public-employee bargaining act that expressly authorizes an involuntary payroll deduction from the salary of nonunion employees as a "fair share" fee for services provided to such employees by the exclusive bargaining representative.

6. Principle of Exclusive Representation.

In *City of Madison Joint School District No. 8* v. *WERC,*[29] the Supreme Court reviewed a decision of the Wisconsin Supreme Court (affirming a ruling of the Wisconsin Employment Relations Commission) that a school board committed a prohibited practice when it permitted a nonunion teacher to speak at an open school-board meeting in opposition to a matter that was subject to negotiations between the school board and the exclusive bargaining agent. In a unanimous decision, the Court held that the WERC's finding a

[27] 60 Mich. App. 92, 230 N.W.2d 322 (1975), *prob. juris. noted* 96 S.Ct. 1723 (1976).
[28] 239 N.W.2d 437, 92 LRRM 2417 (1976).
[29] 429 U.S. 167, 97 S.Ct. 421, 93 LRRM 2970 (1976).

prohibited practice on the part of the school board constituted a violation of First Amendment rights.

In affirming WERC, the Wisconsin Supreme Court recognized that the Constitution protects freedom of speech and the right to petition government, but it noted that these rights may be abridged in the face of a clear and present danger that the speech will bring about evils that the legislature is empowered to prevent. In this case, the state court concluded that abridgment of speech was justified in order "to avoid the dangers attendant upon relative chaos in labor-management relations."

The U.S. Supreme Court disagreed. It pointed out that the teacher who spoke at the open meeting did not seek to bargain with the school board and was not authorized by any other teachers to enter into any agreement on their behalf; the teacher addressed the board not only as an employee but also as a concerned citizen; and the board may not be required to discriminate at public meetings between speakers on the basis of their employment or the content of their remarks. The Court stated that "the participation in public discussion of public business cannot be confined to one category of interested individuals."

7. Patronage System.

In a five-to-three ruling in *Elrod* v. *Burns,*[30] the Supreme Court dealt a severe setback to the patronage system. The question confronted by the Court, as posed in the concurring opinion of Justices Steward and Blackmun, was "whether a nonpolicymaking nonconfidential government employee can be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." The Court said "no."

In this case, non-civil-service employees of the Cook County sheriff's office were discharged when that office changed to Democratic control. The reason for the discharges was simply because the employees were Republicans.

The plurality opinion by Justice Brennan held that patronage dismissals restrict the First Amendment freedom of association. Although the Cook County sheriff argued that patronage motivates more effective and efficient employees and contributed to the democratic process by assisting political parties, Brennan rejected these contentions, concluding:

[30] 427 U.S. 347, 96 S.Ct. 2673 (1976).

". . . patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. . . . Indeed, unlike the gain to representative government provided by the Hatch Act . . . the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights."

The *Elrod* decision affirms that government may place restrictions on active political management by its employees since this impediment to First Amendment rights constitutes a positive gain to representative government. However, government may not discharge a non-civil-service, nonpolicymaking or nonconfidential employee for his political beliefs or associations.

8. Residence Requirements.

Three questions arise in connection with residence requirements in public employment: (1) Is it constitutional for a public employer to require employees to live in the jurisdiction where they are employed? (2) Is it constitutional to require residence within the jurisdiction for a period of time prior to employment? (3) May a jurisdiction enact new legislation requiring present nonresident employees to move into the jurisdiction as a condition for maintaining their jobs? In *McCarthy* v. *Philadelphia Civil Service Commission,*[31] the U.S. Supreme Court answered "yes" to question (1) and left (2) and (3) unresolved.

The petitioner in *McCarthy* had been a Philadelphia firefighter for 16 years, during which time he lived in Philadelphia. A city ordinance requires that employees of Philadelphia reside within the city. Petitioner moved to a Philadelphia suburb (in New Jersey) and was discharged for doing so.

The fundamental issue involved in municipal- or state-residence requirements is the constitutionally protected right of interstate travel. In *McCarthy,* the Court reaffirmed that right, but it pointed out that there is a difference between a condition that a person be a resident "at the time of his application" and one that a person have been a resident for a given duration prior to application. The Philadelphia ordinance required residence at the time of application and thereafter during employment. The Court held that this regulation was not arbitrary or irrational. In essence, the Court found that an employee has no constitutional right to be employed by a city *while* living elsewhere.

[31] 424 U.S. 645, 96 S.Ct. 1154 (1976).

B. Interest Arbitration

1. Constitutionality of Compulsory Interest Arbitration.

During 1976 the constitutionality of binding interest arbitration laws was tested in several states: Massachusetts, Washington, Colorado, Maryland, Utah, and California. As in the past, the state court decisions continue to split on the subject, so that at this point there are judicial precedents on both sides of the issue.

The Massachusetts Supreme Judicial Court upheld the constitutionality of the final-offer arbitration law that covers police and firefighters. In *Town of Arlington* v. *BCA,*[32] the court ruled that the statute does not constitute an illegal delegation of legislative authority because (1) the legislature may delegate to a board or an individual the implementation of details of a legislative policy; (2) the statute sets forth standards and procedures to protect against arbitrary action; and (3) the arbitration panel that establishes salaries lacks the power to appropriate funds. The court also rejected arguments that the arbitration law violates home-rule amendments to the state constitution, contravenes the "one-man, one-vote" concept in violation of the Fourteenth Amendment, and conflicts with provisions of the state's general laws and finance statutes.

The Washington Supreme Court rendered two decisions concerning the constitutionality of the Washington act providing for compulsory arbitration of labor disputes between uniformed personnel and their employers, *City of Spokane* v. *Police Guild*[33] and *City of Everett* v. *Fire Fighters.*[34] In *City of Spokane,* the court found no merit in the claim that the arbitration law violated the state constitution by imposing a tax on municipalities. The contention had been that the legislature, through the arbitration statute, causes cities to pay additional expenses in the form of increased wages. The court ruled that even though the act may result in the need for local taxation, it does not itself impose any "burden or charge." Nor does it surrender, suspend, or contract away the power of taxation in violation of the constitution. Moreover, held the court, work stoppages by police and firefighters are matters that concern the safety and welfare of the state at large and not merely a particular municipality. The court also ruled that the arbitration law does not improperly delegate legislative power. It noted that the law precisely describes the composition and functions of the arbitra-

[32] 352 N.E.2d 914, 93 LRRM 2494 (1976).
[33] 87 Wash.2d 457, 553 P.2d 1316, 93 LRRM 2373 (1976).
[34] 87 Wash.2d 572, 555 P.2d 418, 93 LRRM 2772 (1976).

tion panel, contains explicit standards and guidelines, and sets forth procedural safeguards through superior court review of arbitration decisions.[35] Shortly after deciding *City of Spokane,* the Washington Supreme Court in *City of Everett* rejected arguments that the binding-arbitration law violated the home-rule powers of the city or violated the Equal Protection Clause of the Constitution.

Taking a different view of interest arbitration than did the Massachusetts and Washington courts, the Colorado Supreme Court held that an amendment to the charter of the City of Greeley, which provided for binding impasse arbitration in police disputes, violated the state constitution by illegally delegating the authority of elected officials.[36] Although the electorate had approved the Greeley charter amendment, the court invalidated the binding-arbitration section because in its view:

> "A contrary holding . . . would seriously conflict with basic tenets of representative government. Fundamental among these tenets is the precept that officials engaged in government decision-making (e.g., setting budgets, salaries, and other terms and conditions of public employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public."

The court, however, upheld the remaining portions of the Greeley charter amendment requiring the city to bargain with the police union on wages, rates of pay, grievance procedures, working conditions, and all other terms and conditions of employment. The court noted that the amendment contains a specific severability clause and that the remaining portions "are complete in themselves and can be given full effect."

In Utah, a district court in the case of *Salt Lake City* v. *Firefighters*[37] struck down the provision in the Utah Firefighters Negotiation Act requiring binding arbitration of impasses. The Utah court agreed with those judiciaries that have held compulsory arbitration to be an unconstitutional delegation of legislative power and an illegal commission to an arbitrator to perform functions constitutionally reserved to municipalities.

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[35] A final question considered by the court in *City of Spokane* was whether the time limits specified in the arbitration statute are mandatory or merely directory. The court held that they are directory and that the parties, therefore, may waive strict compliance with the act's deadlines for good cause. It was the court's conclusion that an interpretation of the law mandating strict compliance with time deadlines would severely hamper the effectiveness of the statute: "Certain delays are inevitable in this procedure and must be allowed."

[36] 553 P.2d 790, 93 LRRM 2382 (1976).

[37] 92 LRRM 3710 (1976).

A lack of adequate statutory standards was the basis of a Maryland circuit court decision invalidating a county-council ordinance that had provided for binding interest arbitration. In *Employees Association* v. *Anderson,*[38] the court acknowledged the right of the county council to delegate authority to an arbitrator, but ruled that the particular ordinance in question constituted an illegal delegation of legislative authority because it contained no standards to guide the arbitrator. This case is also noteworthy in that the charter amendment provided for an interesting sequence of impasse procedures: mediation, fact-finding, mediation again, and finally arbitration. The parties agreed to waive mediation and fact-finding and to proceed directly to binding arbitration. The court ruled that the charter amendment *required* the parties to submit to mediation and fact-finding before resorting to binding arbitration.

In *Bagley* v. *City of Manhattan Beach,*[39] the California Supreme Court denied a writ of mandate sought by the firefighters to compel the city council to place an initiative measure on the ballot providing for final and binding arbitration of bargaining impasses and grievances. The court majority held that when the legislature empowered the city council to determine salaries, it precluded delegation by the city to an arbitrator. As evidence of legislative intent, the majority opinion cited several bills that had been introduced in the California legislature providing for binding impasse arbitration that had not been enacted. The majority opinion also interpreted the Meyers-Milias-Brown Act as prohibiting the parties from agreeing to arbitration of negotiations disputes.

2. Judicial Review and Enforcement of Interest-Arbitration Awards.

In *School Committee* v. *Town of Winslow,*[40] the Maine Supreme Court considered the relationship between the scope of bargaining and binding impasse arbitration. The teachers association had sought to include in the collective agreement a provision that would have prohibited the school committee from disciplining, reprimanding, demoting, suspending, dismissing, and failing to renew a teacher's contract unless there was just cause. The teachers' proposal also provided that a probationary teacher

[38] 93 LRRM 2997 (1976).
[39] 132 Cal.Rptr. 668, 93 LRRM 2435 (1976).
[40] 363 A.2d 229, 93 LRRM 2398 (1976).

whose contract was not renewed would be entitled to written notice of the reasons and a hearing. A panel of arbitrators ultimately ordered the teacher-rights section in the parties' contract to be expanded to include the just-cause section and arbitration of "just-cause" grievances. The employer sought review of the arbitration decision, and the Maine Supreme Court held that the school committee could not be compelled through interest arbitration to broaden the teacher-rights clause of the contract by imposing a "just-cause" requirement on the employer's disciplinary actions or decisions on nonrenewal of a contract.

The court suggested that a determination as to whether a matter is subject to interest arbitration involves a two-step inquiry: Is the matter within the statutorily defined scope of bargaining, and if so, is the matter limited by any other existing statutory enactments?

In *Winslow,* the court focused its discussion on the conflict between interest arbitration and other laws governing the rights and duties of educational institutions. The education code provides for dismissal of teachers who are unfit or whose services the committee deems to be unprofitable to the school. It also requires the school committee to take certain steps, to explain its reasons before dismissing a teacher, and to hold a hearing for nonrenewal of a contract. Thus, the court held that preexisting education laws have given school committees exclusive power with respect to dismissals and nonrenewal of teacher contracts. This power may not be diminished by an interest-arbitration award providing for a teacher-rights contract clause.

In reaching its decision, the court noted that inasmuch as the arbitration decision was invalid on the basis of its conflict with preexisting education laws, it did not have to reach the question of whether the just-cause clause was an educational-policy decision exempt from collective bargaining by an express provision of the Maine Public Employee Relations Act.

In New York there have been several cases in which either county or municipal governments have refused to comply with an interest-arbitration award. In 1976, three of these cases reached the Court of Appeals, the state's highest court, which upheld the authority of the arbitration proceeding and compelled the employer to honor the award.

Two such cases were consolidated and decided in *Caso* v. *Coffey* and *Albany Permanent Professional Firefighters Assn.*

Local 2007 v. *Corning.*[41] In that decision, the high court confronted the question of the manner and scope of judicial review of arbitration awards rendered pursuant to the Taylor Law's provisions for police-fire arbitration. The employers had asserted that they lacked the ability to pay and that the awards should be vacated for not paying sufficient attention to the statutory criterion of ability to pay.

The court held that interest-arbitration awards are reviewable and that the standard for review is whether the arbitration panel was arbitrary, capricious, or lacking a rational basis for decision. An arbitration award should be enforced, said the court, as long as it appears from the decision that the statutory criteria were "considered" in good faith by the panel and the resulting award had a "plausible basis." Moreover, in an arbitration-enforcement proceeding, the burden of proof will be on the party challenging the award to show that the determination lacks a rational basis.

The court also considered whether the judicial review of the arbitration award should be directed against the arbitration panel or PERB or should come before the court in the form of a petition to enforce the award. The court held that an action brought against the arbitration panel, which has no budget to defend its award, "could only work to discourage qualified and competent persons from serving as arbitrators and, perhaps, even to frustrate the flexible design of the arbitral process itself." Therefore, the court concluded that a proceeding for enforcement of the arbitration award (under Article 75) would allow the real parties in interest, the employer and the employee organization, to be brought "face-to-face with one another as advocates of their respective positions."

Finally, the court reviewed the arbitration awards that had been rendered in both cases and concluded that the panels had given "careful consideration" to the criteria contained in the Taylor Law and that their awards had rational bases.

In *Patrolmen's Benevolent Association* v. *City of New York,*[42] the Court of Appeals was asked by the PBA to enforce an order and judgment requiring New York City to pay a 6 percent salary increase for the 1975-76 fiscal year. This 6 percent increase had been part of an arbitration award, with which the city initially complied. Several months later, however, it refused to implement

[41] 41 N.Y.2d 153, 94 LRRM 2195 (1976).
[42] 41 N.Y.2d 205, 359 N.E.2d 1338, 94 LRRM 2212 (1976).

the salary increase on the grounds that the emergency wage-freeze law that had been adopted by the legislature subsequent to the award prohibited it from paying the increase. A default judgment was entered against the city for failure to comply with the award; approximately six months later it filed a motion to vacate and modify the judgment. This motion was denied and the city appealed.

The lower court had held that the wage-freeze legislation was not applicable where the increase was contained in a judicial judgment, but it did impose a stay on enforcement of its judgment until 1978, declaring that it was doing so "in the interests of justice and equity and in an attempt to further the recovery of the City. . . ." The appellate division affirmed but lifted the stay, noting that the state's Financial Emergency Act (and wage-freeze provisions) referred only to collective bargaining agreements and did not suspend the enforcement of judgments. The Court of Appeals affirmed, holding that since the judgment was rendered prior to the time that the wage freeze was imposed, the judgment had to be honored. Moreover, the Financial Emergency Act evinced no legislative intent for the wage freeze to suspend a judicially mandated salary increase.

The Washington Supreme Court, in *Lodge 1296, UAFF* v. *City of Kennewick,*[43] was faced with a challenge to an arbitration panel's award on the ground that the panel chairman had several drinks with a union official. The supreme court reversed a lower court decision that had set aside the arbitration award because the incident violated the "appearance of fairness" rule. In reaching its decision, the supreme court held that the only relevant statute is Washington's local-government-employee's law, which provides that an arbitration award is final and binding and subject to court review upon the application of either party *solely* upon the question of whether the panel's decision was arbitrary or capricious. Since the trial court made no such finding, the panel's arbitration award was upheld.

The case arose because during an interest-arbitration proceeding, the neutral arbitrator on the panel accepted a ride to the airport with a union representative, and after their arrival, they had several drinks together. Although the trial judge believed that the incident might have affected the panel's decision, the trial court did

[43] 86 Wash.2d 156, 542 P.2d 1252, 92 LRRM 2118 (1976).

not make any finding that the arbitration award was arbitrary and capricious.

In *Bethlehem Steel Corp.* v. *Fennie,*[44] a New York supreme court set aside an arbitration panel's award on the ground that the arbitration panel had been improperly constituted. The three-member panel consisted of a representative of both the employer and the employee organization and a neutral chairman. The employer's representative concurred with the employee organization's representative to order a wage increase and other changes in the working conditions of the members of the employee organization. Bethlehem Steel, as a taxpayer of the City of Lackawanna, argued that the city representative had a conflict of interest in agreeing with the union representative. The neutral chairman dissented and held that the award did not serve the interests of the citizens of Lackawanna.

The conflict of interest as alleged by the Bethlehem Steel Corp. arose as a result of a change in city government which would have inevitably led to the removal of the city representative from a position as Commissioner of Safety and would have caused him to return to a position as police captain. As a potential police captain, he had an overwhelming personal interest in raising the rate of pay for the police officers, lieutenants, and captains. Therefore, in voting to order a substantial increase for the police officers, the city representative engaged in a conflict of interest. The court agreed that this conflict of interest was serious and that the raise ordered by the arbitration panel was excessive. Therefore, the arbitration panel's decision was annulled and a new arbitration was ordered. The court also held that the corporate plaintiff had standing to bring the action in that it paid approximately 71 percent of the property taxes of the City of Lackawanna.

An interesting and complex issue was decided by the California court of appeals in *Firefighters* v. *City of San Francisco.*[45] In that case, the court set aside an arbitration award that covered matters which, under the city charter, were exclusively reserved to the fire commission.

A firefighters local union and the city entered into a memorandum of understanding that provided for binding arbitration of grievances concerning "terms and conditions of employment as established by rules and regulations of the city's fire commission."

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[44] 383 N.Y.S.2d 948, 92 LRRM 3470 (1976).
[45] 57 Cal.App.3d 173, 92 LRRM 2351 (1976).

Thereafter, the union and its members considered themselves aggrieved by several of the fire commission's rules and regulations. Their grievances were submitted to an arbitrator for a determination as to whether the rules and regulations should be continued, modified, or rescinded. The issues included the scope and authority of the company commanders over firefighters' discipline for incompetence and unlawful violence, requirements of physical fitness, and a prohibition against firefighters having other occupations. Because the union sought to change or eliminate some of these rules and regulations, the arbitration became, in effect, an interest rather than a grievance arbitration.

The parties were able to resolve some of the issues in dispute during the proceeding, but the arbitrator did have to render an award, ruling in favor of the city on some items and in favor of the union on others. The court, on review, did not concern itself with the merits of the arbitrator's decision. Rather, it focused on the issue of whether, under the city charter, the city and its agencies were authorized to approve the memorandum of understanding insofar as it provided for arbitration of the fire commission's rules and regulations.

The appellate court, reversing a trial court decision that had upheld the award, concluded that the city charter expressly reserved to the fire commission the right to promulgate rules and regulations and that it had no authority to delegate its rule-making power to an arbitrator.

The union defended the city's right to submit rules and regulations to arbitration on the basis of the California Supreme Court's decision in *Firefighters Union* v. *City of Vallejo*.[46] But the court distinguished the instant case from *Vallejo* because the *charter* of the City of Vallejo had specifically provided for arbitration in impasses between the city and its employees. The supreme court merely gave effect to that charter provision. In the *San Francisco* case, the city's charter did not provide for arbitration of the rules and regulations dispute, "but instead placed exclusive power and duty to formulate them in the fire commission."

The court further added that the state's Meyers-Milias-Brown Act, which is a meet-and-confer law, did not support the union's argument that the memorandum's arbitration procedure was valid. The court stated that the Act expressly provides that the memorandum of understanding shall be binding and will become binding

[46] 12 Cal.3d 608, 87 LRRM 2456 (1974).

only when approved by the public body pursuant to the law, which in the instant case would require an appropriate amendment to San Francisco's charter.

Under the Rhode Island Firefighters Arbitration Act, promotion procedures for city firefighters are bargainable rather than being a management prerogative. Consequently, the Rhode Island Supreme Court found, in *City of Cranston* v. *Hall,*[47] that an arbitration board convened pursuant to the Act did not exceed its jurisdiction in authorizing firefighters' promotion procedures at variance with those specified in the city charter, as the Act supersedes the home-rule charter provision. However, the record was remanded to the arbitration board for further proceedings (the court retaining jurisdiction), as the arbitration board's opinion was conclusional rather than factual. The court ruled that the arbitration board's decision "must contain a statement of the reasons and grounds upon which it is predicated, and must point out the evidence upon which the ultimate findings rest."

In *City of York* v. *Reihart,*[48] a Pennsylvania court held that an arbitration award requiring the city to pay each police officer $15 for each day or portion thereof spent in appearance in court or hearing during off-duty hours is valid since (1) the award involves a bargainable issue over "terms and conditions of employment," and (2) the award unambiguously provides that payment shall be made on a per diem basis and not on the basis of number of appearances. Therefore, payments are rationally related to compensation of police officers for police duty during times when he otherwise would be off duty. However, the case was remanded to the trial court for determination of whether payments in fact were made lawfully on a per diem basis or unlawfully on the basis of appearances. The latter method would constitute an unlawful "fee," according to the court.

C. Grievance Arbitration

1. Effects of External Law and Multiple Forums.

Although the judicial waters in this area remain murky, several recent decisions have held that arbitration is an appropriate, and sometimes mandatory, forum for the resolution of disputes in the face of claims that the controversy should be submitted to a civil service commission, local administrative body, or court.[49]

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[47] 354 A.2d 415, 92 LRRM 2765 (1976).

[48] 365 A.2d 693, 93 LRRM 2866 (1976).

[49] See generally, Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation,* 89 Harv. L. Rev. 752-92 (1976).

In two companion cases, *Board of Police Commissioners of New Haven* v. *White*[50] and *Board of Police Commissioners of New Haven* v. *Maher*,[51] the Connecticut Supreme Court held that police officers who had been discharged for misconduct by the City of New Haven were entitled to invoke the grievance procedures contained in the applicable collective agreement between the city and the Connecticut Council of Police Unions. The court found that the employer's "positive duty" to bargain collectively on matters of discipline and discharge altered the managerial right of the board of police commissioners to suspend and discharge employees. In so ruling, the supreme court affirmed two superior court decisions which held that the officers could pursue their grievances up to the state board of mediation, if necessary, as provided by the contractual grievance procedure.

In *White,* the employer argued that the board of mediation was not empowered to arbitrate questions of discipline and discharge because of the statutory delegation of those personnel actions to the police commissioners. The court agreed with the union, however, that there was no serious conflict between charter provisions granting the employer authority to discipline employees and a collective agreement that provides for arbitration of discharge grievances. Noting that the applicable contract did not attempt to delegate authority to discharge to anyone but the board of police commissioners, the court added:

> "In any event, any conflict or inconsistency which may exist between the charter provisions and the collective bargaining agreement is clearly resolved by that portion of . . . The General Statutes which provides that '[W]here there is a conflict between any agreement reached by a municipal employer and an employee organization . . . inclusive on matters appropriate to collective bargaining . . . , and any charter, special act, ordinance, rules or regulations adopted by the municipal employer . . . the terms of such agreement shall prevail.' "

In *Maher,* the court affirmed the *White* ruling and resolved the additional question of the jurisdiction of the board of mediation. The supreme court affirmed the lower court holding that while the mediation board does not have automatic jurisdiction in hearing grievance arbitrations, as the union claimed, it is an available tribunal when specified in a contract. The court added, however, that the authority to arbitrate is "strictly limited" by the provisions of the agreement.

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[50] 171 Conn. 553, 93 LRRM 2637 (1976).
[51] 171 Conn. 613, 93 LRRM 2641 (1976).

In *Red Bank Board of Education* v. *Warrington,*[52] the New Jersey Superior Court, Appellate Division, refused to enjoin arbitration of a grievance concerning the school district's assignment of an additional teaching period. In so ruling, the court held that the state's public-employee bargaining act evidenced a clear legislative intent that disputes over contractual terms and conditions of employment be resolved through grievance procedures.

A trial court had found that the matter was arbitrable under the parties' contract, but nevertheless ruled against arbitration on the ground that the grievance related to a matter which, by virtue of the state's school laws, was reserved to the Commissioner of Education to hear and determine. Reversing, the appellate division concluded that although the Commissioner of Education is empowered to determine "all controversies and disputes arising under the school laws," contract disputes should be resolved under the bargaining law, which provides that disputes over contractual terms should be settled through the grievance procedures. Finally, the court held that the issue of assignment of additional teaching periods was a mandatory subject of negotiations since it affected working conditions.

In New York, two judicial decisions supporting binding arbitration as a choice of forum are particularly noteworthy. In a 1975 case, *Hackett* v. *State,*[53] an employee sought a judicial declaration that he could elect to have his disciplinary proceedings considered under civil-service-law procedures rather than under the grievance provisions of a collective agreement. The agreement was silent on certain rights specifically guaranteed by civil-service law, such as an employee's right to be represented by counsel and to call witnesses on his own behalf. Nevertheless, the court refused to presume that constitutional guarantees of due process and equal protection would not also be afforded to the employee by contractual procedures. The court, therefore, denied the employee the right to have his case considered originally under civil-service law.

In *Antinore* v. *State,*[54] the court of appeals affirmed without decision an appellate division ruling upholding the constitutionality of a collective agreement between the state and the Civil Service Employees Association that provided for binding arbitration in disciplinary cases as the only appeals procedure available to employees. The court of appeals agreed with the lower court that the contrac-

[52] 138 N.J.Super. 564, 351 A.2d 778, 91 LRRM 2742 (1976).
[53] 375 N.Y.S.2d 895 (1975).
[54] 40 N.Y.2d 921, 389 N.Y.S.2d 576, 94 LRRM 2224 (1976).

tual arbitration procedures would resolve disciplinary disputes more expeditiously than would one of the methods provided by civil-service law. For an extended discussion of the appellate division's decision in *Antinore,* see last year's committee report.[55]

In several cases during the past year, statutes or local charter provisions were alleged to ban the enforceability of grievance-arbitration clauses.

In *Board of Education, Yonkers School District* v. *Yonkers Federation of Teachers,*[56] the issue was "whether a public employer is free to bargain voluntarily about job security and also free, under the collective agreement's provisions, to submit to arbitration disputes about job security." The case involved a job-security clause in the contract between the parties. The school board had terminated the services of some teachers covered by the job-security clause, citing the City of Yonkers's fiscal crisis. The teachers' union demanded arbitration under the collective bargaining agreement, and the board brought a proceeding to stay arbitration. The lower New York courts granted the stay and declared the job-security provision invalid as contrary to public policy.

The school board argued that the New York State Financial Emergency Act for the City of Yonkers, upon which the school board was fiscally dependent, acknowledged that the city was in a state of fiscal emergency and evinced a legislative determination of public policy that job abolition must be permitted in the instant case. The New York Court of Appeals disagreed and reversed the lower courts, stating:

> "The act evidences no policy favoring abrogation of collective agreements and abolition of teacher positions. . . . [T]he act provides that it should not be construed to impair the right of employees to bargain collectively. . . .Indeed, the overriding purpose of the act was to protect those who had entered into agreements with the city and to insure that these agreements would be kept, not only bondholders and noteholders, but all others who had engaged in contractual arrangements with the city. A job security provision insures that, at least for the duration of the agreement, the employee need not fear being put out of a job. . . . A job security clause is useless if the public employer is free to disregard it when it is first needed."

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[55] Anderson and Weitzman, *Significant Developments in Public Employment Disputes Settlement During 1975,* Appendix C in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 312.

[56] 40 N.Y.2d 268, 386 N.Y.S.2d 657, 92 LRRM 3328 (1976).

Thus the court concluded that the job-security provision in question, negotiated before a legislatively declared emergency, short term in duration, and indistinguishable from the city's other contractual obligations which remain enforceable, was not vulnerable to attack as a violation of public policy. In sum, the court holding means that a collective bargaining agreement is as valid as any other municipal obligation.

In a recent Michigan Supreme Court decision, *Council No. 23, Local 1905, AFSCME* v. *Recorder's Court Judges,*[57] the court held that the specific provisions of a probation-officer-removal statute are the only procedures necessary for the discharge of a probation officer, despite a conflict with PERA obligations. In so ruling, the court concluded that the recorders' judges who complied with the requirements of the probation-officer-removal statute were not required to arbitrate an officer's discharge grievance pursuant to the collective bargaining agreement providing for binding grievance arbitration.

In *Board of Education, Bellmore-Merrick Central High School District* v. *Bellmore-Merrick United Secondary Teachers, Inc.,*[58] the New York Court of Appeals upheld an arbitration award ordering the temporary reinstatement of a nontenured probationary teacher on the grounds that the teacher was not given an opportunity to be evaluated in accordance with procedures set forth in the collective bargaining agreement.

The contract between the parties contained a provision which required "conferences and confrontations" with regard to evaluatory statements. The probationary teacher alleged that she was denied tenure on the basis of parental complaints of which she had never been apprised. The Board of Education asserted that, under the state education law, it possessed the absolute power to terminate the employment of a probationary teacher and argued, inter alia, that the arbitrator's award violated public policy in that it rendered nugatory the Board's power to discharge teachers. The court of appeals found no merit in this argument. The court stated:

> "The award merely requires that respondent follow procedures it has agreed to adopt in its decision-making process in the area of tenure. Finally, it should be noted that there is no claim that public policy barred petitioner from agreeing to provide certain procedural guarantees for nontenured teachers."

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[57] 248 N.W.2d 220, 94 LRRM 2392 (1976).
[58] 39 N.Y.2d 167, 347 N.E.2d 603, 92 LRRM 2244 (1976).

In a second case involving the dismissal of a nontenured probationary teacher, the New York Court of Appeals made clear the distinction between the nonarbitrability of the decision to grant or not to grant tenure and the arbitrability of grievances regarding the procedures leading up to the decision. In *Cohoes City School District* v. *Cohoes Teachers' Association,*[59] the court of appeals reviewed an arbitration award which ordered the reinstatement of a nontenured probationary teacher on the grounds that the school board had not followed the procedures set forth in the collective bargaining agreement for evaluation of the performance of probationary teachers and that the school board had breached a provision of the contract which stated that "No teacher shall be discharged . . . without just cause."

The court held that the board of education could not relinquish its ultimate responsibility, under the state education law, with respect to tenure determinations and that the provisions of the collective bargaining agreement which would have had that effect were unenforceable as against public policy. The court stated: "We find no difficulty with the clauses of the collective bargaining agreement that augmented normal evaluation procedures or that prohibited discharge without cause during the probationary period." However, the court found that to the extent the contract provision purported to prohibit termination without just cause at the end of the probationary period, it was unenforceable as against public policy.

The court affirmed its holding in *Bellmore-Merrick* that the bargained-for right to supplemental procedural steps preliminary to a school board's final action to grant or withhold tenure "is not to be rendered a nullity because of the board's right to deny tenure without explanation." Thus, the court upheld the award as modified by the lower courts, pursuant to which the teacher was ordered reinstated without tenure for an additional year to enable the school board to reevaluate the teacher's performance in accordance with the procedures specified in the collective bargaining agreement.

2. The Duty of Fair Representation.

The duty of fair representation was extended to public-sector unions by the federal District Court for Delaware in *Cofrancesco* v. *City of Wilmington.*[60] In that case, the court held that a discharged municipal employee, Cofrancesco, was entitled to an opportunity to

[59] 40 N.Y.2d 774, 390 N.Y.S.2d 53, 94 LRRM 2192 (1976).
[60] 419 F.Supp. 109, 93 LRRM 2387 (1976).

prove in court that his union failed to represent him adequately in an arbitration proceeding which ultimately upheld his discharge.

The case arose when, after the arbitration, Cofrancesco sued the city and the union, alleging that his dismissal violated substantive due process and the First Amendment and that his union failed to represent him fairly at the arbitration hearing. Relying on the U.S. Supreme Court's decision in *Hines* v. *Anchor Motor Freight,*[61] he contended that he should be allowed to prove that the arbitration "process has fundamentally malfunctioned by reason of the bad faith performance of the union" in its representation of him.

In a decision substantially based on *Hines,* the court interpreted the Delaware law governing public-sector collective bargaining to provide protection similar to that extended under the federal NLRA. The court stated that under *Hines,*

> ". . . when the parties agreed to a contract providing that arbitration awards will be final, they assume that the arbitration process will give them an opportunity to fully air their grievance. When this assumption proves to be ill-founded because the union breaches its duty to fairly represent its members, the bar of finality should fall and the courts should consider the employees' complaints."

The court held that the employee would have the burden at trial to demonstrate that the union breached its duty of fair representation and that this breach "seriously undermined the integrity of the arbitral process." Additionally, even if he did prove the breach, he would have to show that his dismissal violated substantive due process or abridged his First Amendment free speech and association rights.

3. The Scope of Judicial Review.

The scope of judicial review of arbitration awards in the public sector is generally limited by statute and by the collective agreement. Recent cases indicate that where applicable statutes permit judicial latitude, the state courts are moving toward the more traditional scope of review applied in the private sector.

This was evident in two Michigan court of appeals cases wherein the court reaffirmed a policy of deference to grievance arbitration. In *Ferndale Education Association* v. *School District for the City of Ferndale,*[62] the court enforced an arbitration award after concluding that a trial court had abused its discretion when it substituted its interpretation of certain provisions in a contract between a school

[61] 424 U.S. 553, 91 LRRM 2481 (1976).
[62] 242 N.W.2d 478, 92 LRRM 3543 (1976).

district and teachers association for that of an arbitrator. Judicial review, held the court, is limited to determining whether an arbitration award "draws its essence" from the contract. Going further, the court added that it was irrelevant that the arbitrator's contract interpretation might have been wrong. Inasmuch as the award did not go beyond the scope of the contract, the arbitrator did not exceed his authority in reinstating a teacher who had been improperly denied tenure, even though reinstatement resulted in her acquiring tenured status.

The court had enunciated this policy earlier in *Chippewa Valley Schools* v. *Hill,*[63] wherein it cited the following Michigan Supreme Court language:

> "Even [an arbitrator's] erroneous view of the law would be binding, for the parties have agreed to accept his view of the law. Were it otherwise . . . , arbitration would fail of its chief purpose; instead of being a substitute for litigation, it would merely be the beginning of litigation. Error of law renders the award void only when it would require the parties to commit a crime or otherwise to violate a positive mandate of the law. *(Frazier* v. *Ford Motor Co.,* 364 Mich. 648, 656-657 (1961))."

A New York supreme court, appellate division, upheld an arbitrator's award in *Board of Education, Greenburgh Central School District* v. *Greenburgh Teachers Federation,*[64] adopting a standard that when an arbitrator's construction of a contractual provision is not "completely irrational," it should be upheld. The court held that an arbitration award directing the school board to adhere to its contractual commitment on class size did not violate public policy since class size is a permissive bargaining subject, which the employer could lawfully negotiate and include in the contract. As the court stated: "Having voluntarily agreed to the inclusion of a class size provision in the contract, the board was also, therefore, free to submit disputes about class size to arbitration. This is so because the freedom to arbitrate is restricted only by plain and clear . . . prohibitions in the statute or decisional law."

In *City of Hartford* v. *Police Officers,*[65] the Connecticut Supreme Court held that a trial court improperly ruled on the binding effect of an arbitration award since the collective agreement between the city and police union reserved to the arbitrator the issue of determining the award's finality. Citing the trilogy's *American Manufacturing Co.* decision, the court stated: "If the question has been

[63] 233 N.W.2d 208, 90 LRRM 2976 (1976).
[64] 381 N.Y.S.2d 517, 92 LRRM 2816 (1976).
[65] 93 LRRM 2321 (1976).

entrusted to the arbitration tribunal, then the court should not rule upon the merits of the issue and it should not usurp the function conferred upon that tribunal by the parties to the agreement."

In *Hartford,* the employer challenged an arbitration award which held that the city had discharged a police officer without just cause. The city argued that the award should be vacated for several reasons, including bias on the part of the arbitration-panel chairman. In rejecting this contention, the court added: "It is the established policy of the courts to regard awards with liberality. Every reasonable presumption and intendment will be made in favor of the award and of the arbitrators' acts and proceedings."

In Pennsylvania, however, the scope of review remains unclear. In *South Allegheny School District* v. *South Allegheny Education Association,*[66] a commonwealth court affirmed an arbitration award, stating:

> ". . . an award will be affirmed as long as it draws its essence from the collective bargaining agreement, that is, so long as the award can in any rational way be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention; only where there is manifest disregard of the agreement, totally unsupported by the principles of contract construction and the law of the shop, may a reviewing court disturb the award."

But in *Leechburg School District* v. *Leechburg Education Association,*[67] another commonwealth court departed from this standard, largely because it disagreed with an arbitrator's interpretation of a contract provision.

The case arose after an arbitrator held that under the terms of a collective bargaining agreement, the school district was required to give credit for years of teaching experience acquired outside its district. The court set aside the arbitration award since the Pennsylvania Public School Code provides for determination of salaries and increments based on teaching experience within a school district and, in the court's view, the contract between the parties did not by its language clearly enlarge on the statutory scheme. The court stated: "What we hold here is that to enlarge on the statutory benefits, the agreement must do so in a clear and unmistakable manner and in such a way as to admit of a reasonable interpretation."

In light of these lower court decisions, the Pennsylvania Supreme Court heard argument in both *Leechburg* and *Community College*

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[66] 360 A.2d 829, 93 LRRM 2360 (1976).
[67] 92 LRRM 2368 (1976).

of Beaver City, Society of the Faculty.[68] In *Beaver,* as well as in *Leechburg,* the commonwealth court set aside an arbitration award because it disagreed with the arbitrator's interpretation of a contract term. Decision is expected in 1977, especially in light of the Pennsylvania Supreme Court's decision in *International Brotherhood of Firemen and Oilers* v. *School District of Philadelphia.*[69] In that case, the court upheld an arbitration award because the arbitrator's construction of the contract between the parties was "reasonable." The court left unresolved, however, the question of whether the Pennsylvania General Arbitration Act of 1927, with a broad scope of judicial review, or the narrow common law standard of review is applicable to public-employee grievance arbitration.

Under the Arbitration Act of 1927, a court may modify or correct an award "where the award is against the law, and is such that had it been a verdict of the jury, the court would have entered a different or other judgment notwithstanding the verdict." In contrast, under the common law standard, "the arbitrator is the final judge of both fact and law; his decision will not be set aside unless it is alleged and proved by clear, precise and convincing evidence that the parties were denied a hearing or that there was fraud, misconduct, corruption or some other irregularity on the part of the Arbitrator. . . ." It remains to be seen which standard of review the Pennsylvania high court will adopt for labor arbitration cases arising under the Public Employee Relations Act.

D. Scope of Bargaining

1. Tests for Determining Bargainable Subjects.

Disputes concerning the appropriate subjects for collective bargaining continue to be litigated throughout the country. The courts have developed several different tests for determining negotiability under public-sector statutes. Last year's report summarized the *State College Area* case,[70] wherein the Pennsylvania Supreme Court adopted a "balancing" test to determine whether subjects were mandatory. That test involves an assessment of the relative effects of an issue on working conditions, on the one hand, and on the employer's operation and mission, on the other.[71]

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[68] 331 A.2d 921, 88 LRRM 2633 (1975).

[69] 350 A.2d 804, 91 LRRM 2710 (1976).

[70] 337 A.2d 262, 90 LRRM 2081 (1975). See Anderson and Weitzman, *supra* note 55, at 321.

[71] See also, *Sutherlin Ed. Assn.* v. *School Dist.*, 25 Ore.App. 85, 92 LRRM 2693 (1976), discussed *infra.*

In contrast, the Nebraska Supreme Court has held that only those matters that are "directly" related to wages, hours, and terms and conditions of employment are mandatorily negotiable.[72] Still other courts have ruled that mandatory subjects are only those that are "significantly" related to wages, hours, and working conditions[73] or that "materially" affect working conditions.[74]

From *City of Beloit* v. *WERC*[75] emerges another test for determining negotiability. This case came to the Wisconsin Supreme Court on an appeal by a school board and teachers association from a circuit court judgment affirming and modifying a scope-of-bargaining ruling of the Wisconsin Employment Relations Commission. Affirming the lower court, the supreme court noted that bargaining under Wisconsin's public-sector law falls into three categories: areas where it is required, those where it is permitted, and others where it is prohibited. The court stated that an employer's duty to bargain

> ". . . extends only to matters of wages, hours and conditions of employment. Beyond such limits is the area of subjects reserved to management and direction of the governmental unit, where the public employer may, but is not required, to meet and confer and may, but is not required to agree in a written and signed document. Beyond such limit of voluntary bargaining is the area involving the exercise of the public employer's powers and responsibilities to act for the . . . good order of the municipality, its commercial benefit and the health, safety and welfare of the public. Here the proper forum for the determination of the appropriate public policy is not the closed session at the bargaining table. . . . [B]argaining sessions [on these subjects] are not to replace public meetings of public bodies in the determination of the appropriate policy."

Further construing the statute, the court held that mandatory bargaining is required on (1) matters that are "primarily," or fundamentally, related to wages, hours, and working conditions, and (2) the impact of the "establishment of educational policy" affecting wages, hours, and conditions of employment.

Applying its "primarily" standard, the court found the following subjects mandatorily bargainable: (a) *Teacher evalution.* While this relates to management and direction, it also involves wages,

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[72] *School Dist. of Seward Ed. Assn.* v. *School Dist. of Seward,* 188 Neb. 772, 80 LRRM 3393 (1972).

[73] *Clark County School Dist.* v. *Local Govt. EMRB,* 530 P.2d 114, 88 LRRM 2774 (Nev. 1974).

[74] *Aberdeen Ed. Assn.* v. *Aberdeen Bd. of Ed.,* 215 N.W.2d 837, 85 LRRM 2801 (S.D. 1974).

[75] 73 Wis.2d 43, 92 LRRM 3318 (1976).

etc., insofar as it concerns the procedures to be used. These go to the right of teachers to have notice and input into such procedures as affect their job security. (b) *Access by teachers to their personal files.* Since they are kept for evaluation purposes, they affect continued employment. (c) *A "just cause" standard for teacher contract renewal.* This is mandatory insofar as it entails teacher entitlement to a minimum procedure for notice and hearing. (d) *Seniority with respect to teacher layoffs.* This affects conditions of employment, but the proposal is modified so as not to invade the school board's right to determine curriculum and to retain, in case of layoff, teachers qualified to teach particular subjects. (e) *Student misbehavior.* This also relates to conditions of employment, but only to the extent that it involves physical threat to teacher safety. (f) *School calendar, including "in-service" days.* This was found negotiable in a prior supreme court case *(Bd. of Ed.* v. *WERC,* 78 LRRM 3040 [1971]). (g) *Impact of class size.* While the school board has the right to unilaterally establish class size, it nevertheless must bargain the impact thereof, as it affects salaries, hours, and working conditions. (h) *Reading program.* If a reading program is established and it involves teachers, its impact on working conditions is mandatorily negotiable.

The Oregon Court of Appeals applied a balancing test in two 1976 cases, *Sutherlin Ed. Assn.* v. *School District*[76] and *Springfield Ed. Assn.* v. *School District.*[77] In *Sutherlin,* the court ruled that the Employment Relations Board (ERB) erred in holding that the statutory duty of a local school board to promulgate student discipline rules consistent with those promulgated by the State Board of Education required a finding that a proposed subject for bargaining concerning student discipline was a permissive rather than mandatory issue. The court held that the proper test to be applied in determining a subject's negotiability is to weigh the element of educational policy involved against the effect that the proposed subject has on a teacher's employment. It was this court's further conclusion that statutes concerning a proposed subject do not preclude a local board from negotiating as to a subject covered by the statutes; they only preclude the board from agreeing to a proposal *inconsistent* with the statutes involved. The case was remanded to allow the ERB to perform the court's balancing test.

[76] 25 Ore.App. 85, 548 P.2d 204, 92 LRRM 2693 (1976).
[77] 25 Ore.App. 407, 549 P.2d 114, 92 LRRM 2694 (1976).

In *Springfield,* the Oregon Court of Appeals affirmed an ERB ruling that daily teaching loads, required planning periods, final responsibility for grading, and a just-cause provision for teacher reprimands are mandatory subjects for bargaining. The court noted that under the Public Employee Collective Bargaining law, employers are required to bargain on "employment relations," a term statutorily defined as including, "but not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." The court agreed with the ERB that the disputed subjects fell within the broad language of the statutory definition of "employment relations."

However, in the same decision, the court set aside an ERB ruling that the subject of a district's contracting with the University of Oregon over student-teacher programs was a prohibited subject of bargaining by virtue of other state statutes preempting that issue. Applying the balance test discussed above with respect to *Sutherlin,* the court held that the issue of student-teacher contracts was permissive.

Shortly thereafter, the court of appeals reconsidered its *Springfield* decision and found that it erred when it performed the balancing test and determined the issue of student-teacher contracts to be permissive. The court admitted that the proper procedure, and the one consistent with its *Sutherlin* holding, would have been to remand the case to the ERB to allow it to balance the interests involved with respect to the bargainability of the disputed subject.

2. The Conflict Between Laws.

Many scope-of-bargaining controversies stem from the conflict between collective bargaining statutes and other laws dealing with terms and conditions of employment. The California Court of Appeals, in *Huntington Beach Police Assn.* v. *Huntington Beach,*[78] clarified the relationship between the Meyers-Milias-Brown (MMB) Act and local ordinances or resolutions adopted pursuant to Section 3705 of that Act, which authorizes local agencies to "adopt reasonable rules and regulations . . . for the administration of employer-employee relations under this chapter."

In *Huntington Beach,* the court held that a city violated the MMB Act when it unilaterally imposed a change in employees' work schedules in disregard of the union's request to "meet and confer."

[78] 58 Cal.App.3d 492, 92 LRRM 2996 (1976).

The case arose after the police chief changed employees' four-day, ten-hour work schedule, as provided in the parties' Memorandum of Agreement, to a five-day, eight-hour schedule. The employer argued that the subject of work schedules had been excluded from the meet-and-confer requirements of the MMB Act (1) by the "management rights" provisions of a resolution that had been adopted by the city council providing for the administration of labor relations, and (2) by the parties' Memorandum of Agreement. Disagreeing, the court held that labor relations was a matter of statewide concern that was controlled by the MMB Act. Moreover, the provisions of the city's resolution purporting to exclude the subject of working hours from the meet-and-confer process "are in direct conflict with provisions of the MMB Act imposing on government bodies of public agencies an obligation to meet and confer in good faith regarding wages and other terms and conditions of employment." Invalidating the city's resolution that purported to render work schedules nonnegotiable, the court stated: "Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMB Act."

In the court's judgment, the city was obligated to meet with the police union "to consider fully such presentations as are made . . . prior to arriving at a determination of policy or course of action" regarding the work schedules. The court also held that the evidence failed to establish that the parties' Memorandum of Agreement excluded the subject of work schedules from the meet-and-confer process.

On the other hand, a local jurisdiction, operating under a statewide labor-relations statute, *may* have the power to adopt local ordinances that are merely reflective of existing "management rights" provisions in the state statute. Thus, the California Court of Appeals upheld a county employee-relations ordinance that excluded job classifications from the scope of negotiations where the state law[79] provided that it was not intended to preempt local charters and ordinances establishing a merit system of employment, and where the county's charter specifically reserved questions of job classification to its civil service commission.[80]

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[79] Meyers-Milias-Brown Act, Cal. Gov. Code, §§3500 *et seq.*

[80] *AFSCME* v. *City of Los Angeles*, 49 Cal.App.3d 356, 122 Cal.Rptr. 591, 90 LRRM 2554 (1975).

The effects of a provision of a charter of a home-rule city on the city's duty to bargain collectively under state law was at issue in a Michigan case decided in 1976.[81] The City of Pontiac had refused to bargain with the Pontiac Police Officers Association on grievance procedures for disciplined police officers, relying on a provision of its city charter which provided for a civilian trial board to review charges of police misconduct and, where necessary, impose discipline, including discharge. The union filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC), which concluded that employee discipline is a mandatory subject of bargaining under the state's Public Employee Relations Act (PERA).

The Michigan Supreme Court held that grievance and disciplinary procedures for police officers are mandatory subjects of bargaining under PERA and that the duty to bargain collectively on disciplinary procedures prevails over the conflicting provisions of the city charter.

The relationship between public-employee bargaining laws and the merit system and education laws remains unclear in many jurisdictions. Several recent decisions, however, have limited an employer's authority to reach agreement on matters specified in statutes.

In *Wesclin Association* v. *Board of Education,*[82] the court found that a school board's authority did not extend so far as to permit it to agree to a teacher-evaluation system which would, in effect, require "conditions" precedent to the dismissal of a teacher other than those provided by state law. A similar result on the same issue was reached by the Maine Supreme Court in the case of *Superintending School Committee of the Town of Winslow* v. *Winslow Education Assn.*[83]

The appellate division of the New Jersey Superior Court also narrowed the scope of bargaining with respect to matters covered by the state's school laws. In *Union County Board of Education* v. *Union County Teachers Assn.* and *Cranford Board of Education* v. *Cranford Education Assn.,*[84] the court set aside an order of the Public Employment Relations Commission which required a public employer to negotiate the impact of its economically motivated decision to reduce personnel. Specifically, the court held that where

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[81] *Pontiac Police Officers Assn.* v. *City of Pontiac,* 397 Mich. 674, 246 N.W.2d 831, 94 LRRM 2175 (1976).

[82] 331 N.E.2d 335 (5th Cir. 1976).

[83] *Supra* note 40.

[84] 145 N.J.Super.435, 368 A.2d 364, 94 LRRM 2367 (1976).

local boards have decided to reduce personnel by not renewing contracts of nontenured teachers, the PERC is not empowered to compel such boards to negotiate the criteria or guidelines to be used in selecting the teachers who are not to be renewed or to negotiate the subject of reemployment rights. The court stated:

> "Under the statutory scheme established by the Legislature for the administration and operation of our public school system . . . , nontenured teachers have no right to the renewal of their contracts; the local boards, in turn, are vested with virtually unlimited discretion in such matters, and non-tenured teachers whose contracts of employment are not renewed by reason of a reduction in force plainly are denied any reemployment rights whatever."

This case is currently on appeal to the New Jersey Supreme Court.

3. "Parity."

The issue of "parity" has frequently been litigated with respect to the scope of collective bargaining. During 1976, the Connecticut Supreme Court, affirming the Connecticut Labor Relations Board, held that the City of Naugatuck and the firefighters union violated the Municipal Employee Relations Act when they entered into a contract containing a parity clause providing that any increase in wages granted to police would be granted simultaneously to firefighters.[85]

In the court's view, the parity clause would deprive police of the exercise of bargaining rights guaranteed by law, since the Act required that police and firefighters be in separate bargaining units, and the parity clause in the firefighters' contract would impose equality for the future upon police who had no part in making the parity arrangement. The court's decision was based on a prior CLRB ruling in *City of New London,* in which it was first held that parity clauses were illegal. Quoting from that *New London* case, the court concluded:

> "We find that the inevitable tendency of such an agreement is to interfere with, restrain and coerce the right of the later group to have untrammeled bargaining. And this affects all the later negotiations (within the scope of the parity clause) even though it may be hard or impossible to trace by proof the effect of the parity clause upon any specific terms of the later contract. . . . The parity clause will seldom surface in the later negotiations but it will surely be present in the minds of the negotiators and have a restraining or coercive effect not always consciously realized."

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[85] *Fire Fighters Local 1219* v. *CLRB,* 93 LRRM 2098 (1976).

A recent decision of the New York Public Employment Relations Board also found parity to be an unlawful subject of bargaining. In *City of New York* v. *Patrolmen's Benevolent Assn.*,[86] the PERB held that provisions in several of New York City's contracts which tied compensation and other terms to agreements reached with the PBA were unlawful in that they diminished the bargaining rights of the PBA.

See also *Firefighters Assn.* v. *City of Lewiston*,[87] wherein the Maine Supreme Court held that the Municipal Public Employees Labor Relations law impliedly repealed a city-charter provision that required the city to pay firefighters wages "no less" than those paid to police.

[86] 41 N.Y.2d 205, 359 N.E.2d 1388, 94 LRRM 2212 (1977).
[87] 92 LRRM 2029 (1976).