APPENDIX B

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1978*

WALTER J. GERSHENFELD** AND GLADYS GERSHENFELD***

Introduction

This report covers statutory, judicial, and related developments in public-employment dispute settlement at the federal, state, and local levels in 1978. It contains a state-by-state analysis of legislation enacted during the year, a summary of federal legislation including the new statutory basis for federal labor relations, and a digest of significant appellate and high-court decisions. Lower court and board decisions of particular pertinency have also been included.

The two pieces of legislation vying for the "most significant" award were legislation establishing the new federal system of labor relations and California's Proposition 13 limiting property taxes. The promulgation of President Carter's guidelines has provided a 7 percent backdrop for negotiators.

There was relatively little in the way of new legislation at the state level. Additional laws were passed in Hawaii and Michigan, and a new law was enacted in Tennessee. Existing legislation was modified in Michigan, New York, and Oklahoma. Housekeeping amendments were made in a number of states. Constitutionality of legislation was tested in six states. In three

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**Member, National Academy of Arbitrators; Professor of Industrial Relations, Temple University, Philadelphia, Pa.

***School of Business Administration, Philadelphia College of Textiles and Science, Philadelphia, Pa.

states, Connecticut, Texas, and Virginia, all or a portion of dispute-settlement legislation was found unconstitutional. In three other states, New Jersey, New York, and Minnesota, public-sector legislation was found constitutional.

As in the past, considerable judicial review affecting public-employment dispute settlement was present. By and large, the courts tended to be supportive of arbitrator or board determinations of arbitrability or substantive issues. One major exception occurred in New Jersey where the state supreme court determined that a permissive category of bargaining issues was not intended by the legislature.

The operative word for many of the remaining determinations was *clarification.* The courts spent considerable time explaining the rights and obligations of the parties or clarifying the meaning of statutory phrases or previous decisions. For example, an Iowa court explained that "impasse item" refers to subject categories rather than individual portions of a bargaining topic. In New York a series of decisions clarified the import of the *Liverpool* decision (covered in detail in last year's report). In many cases, the judicial tone was one of assisting the actors to understand their roles.

Statutory and Related Developments

The two leading developments of the year occurred in the federal government and in California. Public Law No. 95-454, effective January 1, 1979, created a Federal Labor Relations Authority to oversee labor relations in the federal sector. The law also reorganized the Civil Service Commission by establishing an Office of Personnel Management and a Merit System Protection Board. California voters approved the Jarvis-Gann initiative (Proposition 13), which has the effect of sharply reducing property taxes. Related action has taken place in other states. The effect of the so-called "taxpayer's revolt" on the negotiation and viability of collective bargaining contracts is a current story that will be covered in more detail in next year's report.

Comprehensive new legislation was relatively scarce in 1978. California's State Employer-Employee Relations Act (passed in 1977) became effective in 1978, and a law was enacted (to be effective in 1979) providing negotiation rights for some 90,000 academic and nonacademic employees of the state's higher education system. Tennessee passed a law providing for teacher and

school-district administrator bargaining. A law calling for final-offer-by-package arbitration for fire fighters was passed in Hawaii. Michigan extended collective bargaining rights to state police personnel. The Supreme Court of Kentucky held that public employers may, but are not required to, bargain with representatives of their employees. Salt Lake City enacted an ordinance providing for bargaining by municipal employees.

A number of states modified their public-sector laws. Michigan's law now permits arbitration awards for police officers and fire fighters to be retroactive to the start of the period covered by the negotiations. Oklahoma amended its school-employee bargaining law by mandating secret-ballot elections for such employees in Tulsa and Oklahoma City. New York eliminated probation and possible loss of tenure as a strike penalty. In addition, money may now be used as a remedy for out-of-title job assignments. New York City's collective bargaining law was amended to require impasse panels and the Board of Collective Bargaining to accord substantial weight to the city's ability to pay. Determinations are reviewable by the New York City Board of Collective Bargaining and the courts. Unfair-labor-practice jurisdiction was also restored to the Board of Collective Bargaining.

The District of Columbia began consideration of a comprehensive labor relations statute. A governor's commission in Pennsylvania reported its analysis of public-sector legislation and recommended continuation of the limited right to strike. Florida voters rejected a proposed constitutional amendment that would have forbidden interest arbitration in the public sector. The Wisconsin Senate failed to override the governor's veto of a provision of its municipal-employee bargaining law calling for open bargaining. Voters in Dayton, Ohio, rejected a charter amendment that would have required binding arbitration of police and fire fighter disputes. A South Carolina attorney general's opinion held that public employers were not empowered to enter into labor agreements. Housekeeping changes were made in a number of states, including California, Massachusetts, and New York.

Constitutional challenges occurred in six states. In Minnesota, New Jersey, and New York, public-sector bargaining laws were found constitutional. Contrary findings occurred in Connecticut, Texas, and Virginia. The cases involved are discussed in the section on Constitutionality of Collective Bargaining Laws which follows later.

California

On June 6, 1978, the voters of California approved Proposition 13, the Jarvis-Gann initiative. Proposition 13 is a constitutional amendment that had the effect of reducing local property taxes by more than 50 percent. The loss of expected tax revenue by local governments and school districts was somewhat offset in the first year by state funds, but the effect of the "taxpayer's revolt" on public-sector bargaining is being watched carefully in California and other states.

The State Employer-Employee Relations Act (SEERA) was signed into law by Governor Edmund G. Brown, Jr., on September 30, 1977, and became effective July 1, 1978. Described in last year's report, SEERA provides meet-and-confer bargaining rights to more than 100,000 state permanent civil service employees. Employer and employee representatives are required to meet and confer in good faith and sign memoranda of understanding with regard to wages, hours, and working conditions.

SEERA was amended twice during 1978, the changes being primarily housekeeping in nature. Senate Bill 2113, signed by Governor Brown on July 10, 1978, took effect immediately and provides that employees of the Legislative Counsel Bureau and the Public Employment Relations Board are to be removed from SEERA and are granted other coverage for representational purposes. The Public Employment Relations Board administers SEERA. The second law, signed by the governor September 15, 1978, details employees covered by SEERA, scope of bargaining, and the responsibilities of the State Personnel Board relative to employee rights under SEERA.

Approximately 90,000 faculty and nonacademic employees of the University of California and the California State University and College system were granted the right to be represented by a bargaining agent for wages, hours, and working conditions. The law was signed by Governor Brown on September 13, 1978, and becomes effective July 1, 1979. The law seeks to preserve shared-governance mechanisms, including the faculty senate, by exempting such matters as course content, faculty appointment, tenure and promotion, and grievance procedure from the scope of bargaining.

District of Columbia

The District of Columbia city council considered a bill that would replace the Bureau of Labor Relations, created by executive order of the mayor, with a Public Employee Relations Board. The board would be granted a high degree of independence in administering labor relations in the District. The board would have its own counsel separate from the District council, could seek court enforcement of its orders, and would be authorized to issue back-pay orders. The bill prohibits public-employee strikes and provides for final-offer arbitration of bargaining impasses. No action was taken on the bill.

Florida

Binding arbitration of interest disputes is illegal in Florida. In the November elections, Florida voters rejected a proposed constitutional amendment that would have prohibited the state legislature from ever enacting a law authorizing binding arbitration for public-employee interest disputes. The proposal was part of an omnibus group of constitutional changes, so it is difficult to estimate the sentiment of Florida voters on the specific issue of binding arbitration. It is expected that statutes will be introduced in 1979 providing for some form of binding interest arbitration.

Hawaii

Final-offer arbitration by package became the dispute-settlement mode for Hawaii fire fighters during 1978. Hawaii has an eight-year-old comprehensive public-employee bargaining statute that spells out 13 statewide units; one of the units is reserved for fire fighters. On May 23, 1978, Governor George Ariyoshi signed Act 108. After declaration of impasse by the Hawaii PERB, the procedure calls for mediation followed by arbitration. The parties may, by mutual agreement, devise their own arbitration procedure. Should they fail to do so, they are required to proceed to majority-decision, final-offer-by-package arbitration by a three-member panel. Each party selects a representative on the panel; they, in turn, select the third member. If they fail to agree, the third member is to be chosen by alternate striking from a five-person list supplied by the American Arbitration Association.

The arbitration board is given a lengthy list of criteria to consider, including interest and welfare of the public; financial ability of the employer to meet the cost of the package; present and future economic condition of the counties and the state; comparison of wages, hours, and working conditions of the employees involved with those of other state and county employees; cost of living; and the overall compensation presently received by fire fighters. The parties may agree mutually to modify a decision, but agreements reached through arbitration are not subject to employee ratification votes. Items requiring financial implementation are subject to appropriations by the legislative body involved.

Kentucky

Kentucky does not have a public-employee bargaining statute. On May 23, 1978, the Supreme Court of Kentucky ruled that a public employer may choose, but is not required, to meet and bargain with representatives of its employees. The court added a proviso that exclusive representation rights may not be granted. The case is discussed further under Judicial and Related Developments.

Massachusetts

The Massachusetts Labor Relations Commission adopted a comprehensive set of new rules and regulations with regard to its procedures for public employees. The rules and regulations apply to all procedures before the commission, including petitions, charges, interventions, and conduct of hearings. Hearings may be either formal or expedited, and the authority of a hearing officer is specified in detail.

Michigan

Governor William Milliken signed a bill permitting interest-arbitration awards for police officers and fire fighters to be retroactive to the beginning of the period affected by negotiations. The state's Public Employment Relations Act had been amended in 1969 to provide for binding arbitration of police and fire fighter interest disputes. Pay raises determined by arbitration were not scheduled to be effective until the start of a new fiscal year unless a fiscal year began during the process of arbi-

tration. Thus, unions representing such personnel might request arbitration before the end of the fiscal year in order to protect their interests. The new law is meant to encourage the parties to continue negotiations and not rush prematurely to arbitration because of the fear of potential retroactive loss.

In November 1978, the Michigan electorate passed a constitutional amendment giving the classified state troopers collective bargaining rights, culminating in mandatory interest arbitration as now provided by law for other protective services. The amendment is ambiguous as to the designation of the public employer and is silent on who shall have the responsibility to implement the amendment. The right to bargain in Michigan now inures to local public employees and state troopers, but does not extend to other state civil service employees.

New York

New York's Taylor Law prohibits public-employee strikes, and penalties had included loss of two days' pay for each day of strike, placement of striking employees on probation for one year, and possible loss of tenure. On July 5, 1978, Governor Hugh Carey signed into law S.B. 6859 which removed probation and possible loss of tenure as strike penalties. The law was hailed as a victory by public-employee unions, who noted that more than 2,500 teachers were in probationary status at the time the law was enacted. In addition, Governor Carey signed a bill permitting the payment of money as a remedy if a public employer violated a collective bargaining agreement provision prohibiting the assignment of work outside of the employee's job title.

During the year the Public Employment Relations Board revised and added to its rules and regulations. One change permits either or both parties or the executive director of the board to petition the board for an expedited determination with regard to scope-of-bargaining disputes. The decision as to expedited or regular procedure is at the discretion of the board.

The New York City Collective Bargaining Law (NYCCBL) impasse-resolution procedures were changed by the New York state legislature when it amended and extended the Financial Emergency Act for the City of New York (Chapter 201, New York Laws of 1978). The amended procedures require impasse panels to accord substantial weight to the city's ability to pay

when considering demands for increases in wages or fringe benefits. The law defines the ability to pay as the "financial ability of the city . . . to pay the cost of any increase in wages or fringe benefits without requiring an increase in the level of city taxes existing at the time of the commencement of [the impasse proceeding]."

The state legislature also amended the provisions of the NYCCBL providing for review of impasse-panel recommendations or interest-arbitration awards to require the Board of Collective Bargaining, on review of an appealed panel decision, to make "a threshold determination as to whether such report or recommendation for an increase in wages or fringe benefits is within [the city's] ability to pay." The Board's determination is subject to *de novo* court review concerning ability to pay, and judicial review of other aspects of a board decision follows the standards of Article 75 of the New York Civil Practice Laws and Rules. The law gives standing to the state Financial Control Board for the City of New York to appear as a party before an impasse panel, before the Board of Collective Bargaining when it reviews appealed panel awards, and before a court when a board decision on an award is appealed. The new impasse-resolution procedures are set forth in Section 23.3 of Chapter 201, New York Laws of 1978.

During 1978 jurisdiction to decide and remedy improper practices allegedly committed by a public employer and/or public-employee organization was restored to the Office of Collective Bargaining by amendment to the Taylor Law, Section 205 (5)(d).

Ohio

Voters in Dayton, Ohio, rejected a city-charter amendment which would have required binding arbitration of police and fire fighter interest disputes and the dismissal of security force members who participated in strikes. The bill had been supported by police officers and fire fighters, but had been opposed by city officials. In addition, unions representing the city's clerical and blue-collar workers opposed the bill, expressing a fear that gains in arbitration by police and fire fighters might be at their expense.

Oklahoma

The state school-employee bargaining law was amended twice in 1978. Governor David Boren signed H.B. 1115 into law on April 24, 1978. The law provides that local boards of education shall recognize a professional organization that secures authorization cards from a majority of the professional educators employed by the board. However, districts with average daily pupil population in excess of 35,000 (Tulsa and Oklahoma City) must follow mandated secret-ballot election procedures. House Bill 1170 was signed by the governor on April 12, 1978, but became effective 90 days after legislative adjournment in April. This bill permitted principals and assistant principals in districts with an average daily attendance of 35,000 or more to form their own collective bargaining groups. The legislature later enacted S.B. 494, which provided funding for the state's school districts and also specified that H.B. 1170 applied only to those districts with a county population of over 500,000, thereby removing Tulsa principals and assistant principals from coverage of H.B. 1170. During the year the state senate killed a bill that would have provided for arbitration of teacher-school district disputes.

Pennsylvania

The Governor's Study Commission on Public Employee Relations issued a report after an 18-month review of Act 195 and Act 111. Act 195 is the state's basic public-employee labor law covering state and local employees, and Act 111 provides for compulsory arbitration of police and fire fighter disputes.

The commission recommended continuation of the right to strike for all employees except security-force and court-related employees. Strikes would remain enjoinable for health, safety, and welfare reasons. An improved bargaining timetable, unilateral access to fact finding, and a variety of voluntary-arbitration alternatives were suggested. The commission recommended removal of the Bureau of Mediation and the Pennsylvania Labor Relations Board from the Department of Labor and Industry and formation of a separate agency covering both private- and public-sector matters. The commission supported continuation of compulsory arbitration for police and fire fighter disputes.

Worthy of note is the fact that the commission conducted or supported research on public-sector experience which was util-

ized in reaching its conclusions. No action has as yet been taken by the legislature with regard to commission recommendations.

Tennessee

The Tennessee Education Professional Negotiation Act was passed, permitting bargaining by Tennessee teachers and administrators. Provision was made for special election committees, composed largely of representatives of the parties, to conduct representation elections when a showing of interest on the part of 30 percent of a bargaining unit was present. The number of management personnel to be excluded from the bargaining unit is limited by formula to two in the smallest districts and a maximum of eight in the largest districts. Mandatory bargaining subjects include salaries, grievance procedures, insurance, fringe benefits (with the exception of pensions), working conditions, leave, student discipline procedures, and payroll deductions. Other terms of employment may be discussed, but it is not bad faith to refuse to discuss other topics.

Either party may request the services of the Federal Mediation and Conciliation Service to mediate disputes. The terminal point of the procedure is fact-finding/advisory arbitration. No item that requires funding can be effective until the appropriate governing authority provides funds. Grievance procedures may terminate in binding arbitration.

United States Government

Labor relations in the federal sector are now governed by law rather than by executive order. During 1978, Public Law No. 95-454 was enacted (effective January 1, 1979). The law reorganized the Civil Service Commission into an Office of Personnel Management and Merit System Protection Board. Labor relations activity was consolidated into a new Federal Labor Relations Authority. A detailed discussion of these changes is found under Federal Sector Developments.

Utah

The Salt Lake City Board of Commissioners passed a resolution on November 17, 1978, providing for collective bargaining for its public employees. It became thereby the first municipality in the State of Utah to permit collective bargaining by public

employees. Provision is made for representation elections, and terms and conditions of employment are bargainable. Mediation may be utilized, but the final step of the procedure (for both interests and rights) is determination by the city commissioners. Strikes are prohibited.

Wisconsin

Wisconsin enacted a public-sector labor relations law for local employees in 1977. The law is avowedly experimental and is programmed to expire in 1981. It provides for final-offer arbitration by package for interest disputes and permits a limited right to strike. Should both parties decline to submit final-offer packages to arbitration, the union is free to strike. One provision of the law calls for bargaining sessions to be open to the public. Governor Martin Schreiber vetoed this section of the law. On January 24, 1978, the Wisconsin Senate failed to override the veto on open bargaining when it voted 16–16 on the question; a two-thirds majority was required.

Federal-Sector Developments[1]

Federal Service Labor-Management Relations Statute

The principal development in the federal-sector labor-management relations field in 1978 was the enactment of a statute to replace Executive Order 11491, as amended. As part of the Civil Service Reform Act of 1978,[2] Congress enacted a Title VII, referred to as the Federal Service Labor-Management Relations Statute,[3] which became effective on January 11, 1979.

The central administrative body is the Federal Labor Relations Authority (FLRA or the Authority)—a three-member, neutral, independent agency. Members are appointed for five-year terms by the President, by and with the consent of the Senate, and may be removed only for cause. Ronald W. Haughton and Henry B. Frazier III have been named chairman of the Authority and member, respectively. There is also a general counsel who is appointed by the President for a five-year term.

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[1]Provided to the Committee on Public Employment Disputes Settlement by Howard W. Solomon, Executive Director, Federal Services Impasses Panel, Washington, D.C.
[2]Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[3]5 U.S.C. §7101 et seq. (1978).

The FLRA and the general counsel will function along lines similar to the National Labor Relations Board. The general counsel, through nine regional offices, will supervise representation elections, investigate alleged unfair labor practices, file complaints, and prosecute unfair labor practices. The Authority will perform several functions that are unique to the federal sector, in addition to its leadership role, such as determining whether there is a duty to bargain with respect to proposals and considering exceptions to arbitrator's awards.

Section 7119 of the statute establishes the Federal Service Impasses Panel (FSIP or the Panel) as an entity within the Authority. The Panel was originally established under Executive Order 11491, and all of the members who were serving under the order were reappointed by President Carter under the statute. The chairman is Howard G. Gamser, who was named to a five-year term. Also receiving five-year terms were Charles J. Morris and Beverly J. Schaffer. Three-year terms were given to James E. Jones, Jr., and Arthur Stark; Jean T. McKelvey and Irving Bernstein were appointed to one-year terms.

The Federal Mediation and Conciliation Service (FMCS) is authorized to provide its services and assistance to agencies and unions in order to resolve negotiation impasses. If voluntary arrangements, including the services of FMCS or any other third-party mediation, fail to resolve the impasse, either party may request Panel assistance, or the parties may agree to adopt a binding arbitration procedure, if the Panel approves it.

Under the statute, the Panel will investigate impasses when it receives requests for assistance, and may recommend procedures for resolving the impasse or assist the parties in resolving the impasse through whatever methods and procedures, including fact finding with recommendations, it may consider appropriate. If this assistance does not resolve the impasse, the Panel may hold hearings, take testimony and depositions under oath, subpoena witnesses or documents, administer oaths, and take whatever action is necessary to resolve the dispute. Unless the parties agree otherwise, any final action by the Panel in a dispute is final and binding on the parties during the life of the agreement. As an alternative to direct Panel involvement in a dispute, the statute authorizes use of outside arbitration to resolve a dispute, if approved by the Panel.

The statute mandates that every collective bargaining agreement contain a grievance procedure culminating in final and

binding arbitration. The scope of grievance arbitration has been broadened significantly to include most statutory appeals procedures, unless the parties have agreed to exclude any matter from coverage in their collective bargaining agreement.

The grievance procedure is the exclusive procedure for matters falling within its coverage except for adverse actions, removals or demotions based upon unacceptable performance, or discrimination complaints. As to the first two matters, the employee has an option of using either the applicable statutory appeal procedure or the negotiated grievance procedure. In discrimination complaints, the employee's election of the negotiated grievance procedure does not preclude the employee from requesting review of the final decision by either the Equal Employment Opportunity Commission or the Merit System Protection Board (MSPB). In deciding grievances involving adverse actions and removals and demotions based on unacceptable performance, the arbitrator must apply the same statutorily prescribed standards in deciding the case that would apply if the employee had elected to appeal the matter to the MSPB. Such arbitration awards are subject to direct judicial review under the same conditions as decisions by the MSPB. All other arbitration awards may be appealed by either party to the Authority on grounds that the award violates law, rule, or regulation, or other grounds similar to those applied by federal courts in private-sector labor-management relations. There is no judicial review of FLRA decisions on appeals from arbitration awards.

The Back Pay Act[4] has been amended to strengthen the authority of arbitrators to award back pay and leave. Attorneys' fees may also be awarded if the employee or the union substantially prevails in an unfair labor practice case or a grievance.

Significant Actions of the Federal Service Impasses Panel

In 1978, the Panel granted a number of joint requests by employers and unions to utilize procedures tailored to meet the needs of the respective parties. These actions reflect an expansion of the procedural alternatives that the Panel utilizes in the resolution of negotiation impasses. In three cases, the use of written submissions in lieu of a hearing was approved by the Panel. But the procedure to be followed by the Panel after its

[4] 5 U.S.C. §5596 (1978).

review of the written submission varied in each case. In *Puget Sound Naval Shipyard,* Panel Release Nos. 106 and 111, the Panel selected one of the parties' final offers; in *Kansas Army National Guard,* Panel Release No. 112, the Panel issued a final and binding decision; and in *Philadelphia Corps of Engineers,* Panel Release No. 92, the Panel made recommendations for settlement.

For the first time the Panel also approved joint requests to use an outside arbitrator. In *Bureau of Reclamation, Sacramento,* Panel Release No. 91, the Panel approved the parties' joint request to have an outside arbitrator resolve the issues relating to the wages for some 300 wage-board employees in positions such as electrician, power plant operator, and mechanic. In *Air Force Logistics Command,* Panel Release No. 109, the Panel approved (1) the use of a final-offer-selection procedure, and (2) the selection of an outside arbitrator to resolve all remaining issues in the parties' negotiations for their initial agreement. The union represents some 75,000 wage-grade and general-schedule employees in one consolidated unit.

But in *Bureau of Reclamation, Denver,* Panel Release No. 106, the Panel found that authorization of outside arbitration was not necessary in the circumstances of the case. This determination was based on the fact that the parties' agreement had provided for this method of resolution of wage disputes since 1960, and the Federal Labor Relations Council had interpreted the savings clause provision of the Order to mean that such an agreement provision remained valid.

During 1978 the Panel issued a number of recommendations and decisions and orders following fact-finding hearings on an issue concerning whether National Guard technicians should be required to wear the military uniform. In all but one of these cases, the Panel recommended or ordered that technicians have the option of wearing either military uniform or agreed-upon standard civilian attire while performing their technician duties. The parties were also to agree to the circumstances and occasions for which the military uniform would be required.

Despite these recommendations and decisions and orders, the Panel still had 20 National Guard disputes involving the wearing of the military uniform on its docket. After fully considering the circumstances of these cases and determining that each dispute appeared similar to those previously de-

cided, the Panel concluded that it was necessary, pursuant to its authority under Sections 5 and 17 of Executive Order 11491, as amended, to settle these protracted impasses promptly through appropriate action. Accordingly, the parties in each case were ordered to show cause as to why the language recommended or ordered in earlier cases should not be mandated in a decision and order (Panel Release Nos. 103 and 107). Thereafter, the parties in two states voluntarily resumed negotiations and reached agreements. Three other cases were not decided on the merits pending resolution of threshold questions concerning the duty to bargain. In the remaining 15 cases, the Panel determined that the parties' responses to the orders to show cause did not contain material facts that were significantly different from earlier cases and, therefore, issued decisions and orders in each case.

The Panel also issued one decision and three Panel reports and recommendations in matters unrelated to National Guard cases. In *Puget Sound Naval Shipyard,* Panel Release No. 111, the employer and union were deadlocked over when the basic workweek for 500 third-shift employees should begin. Utilizing a final-offer selection procedure agreed to by the parties (discussed above), the Panel selected the employer's proposal which provided that third-shift employees would commence their workweek at midnight Monday rather than Sunday as was the practice.

Panel recommendations in three other cases led to settlements without the need for further Panel action. In *Philadelphia District, Corps of Engineers,* Panel Release No. 92, the issue concerned whether employees should begin and end the workday at their administrative duty station (union's proposal) or at the actual jobsites (employer's proposal). The panel had granted a joint request that its recommendations be based on written submissions in lieu of a fact-finding hearing. Because the Panel found that the facts and arguments presented were essentially the same as those previously considered by the Panel, when it recommended the employer's proposal in an earlier case involving these parties and this issue, the Panel recommended that the union's proposal be withdrawn.

In 1978, the Panel also issued recommendations on issues concerning official time for union representation, midcontract negotiations, promotions, and contract duration in *Bureau of*

Retirement and Survivors Insurance, Panel Release No. 105. Recommendations by the Panel led to a settlement of issues concerning ground rules for negotiations in *Bureau of Hearings and Appeals,* Panel Release No. 108.

Review of Arbitration Awards

In 1978, the Federal Labor Relations Council (FLRC or Council)—the predecessor to the Authority—received 52 appeals from arbitration awards and three requests for reconsideration of its decisions in earlier cases. Review was denied in 27 cases, and 22 cases were accepted for review. A total of 28 merits decisions were issued, and the Council set aside 11 awards, modified 14 awards, and sustained three awards.

In its nine-year history, the Council received a total of 239 exceptions to arbitration awards, of which 84 were accepted for review. Seventy-four merits decisions were issued. Of these, awards were set aside in 23 cases, modified in 37 cases, sustained in 13 cases, and remanded in one case. A total of 23 cases were pending before the FLRC when it went out of business on December 31, 1978, and these cases have been transferred to the FLRA for decision under the standards of E.O. 11491.

The General Accounting Office

Several decisions of the Comptroller General concerning arbitrator's awards are worthy of note.

In Comptroller General Decision B-190494, May 8, 1978, the Comptroller General overturned an arbitration award involving overtime for Department of Labor (DOL) compliance officers after the FLRC denied review of the award. In this case, the employees were required to travel on Sunday to attend a Monday morning training session, but were denied overtime on the ground that the agency had control over the scheduling of training. By law, the employees would have been entitled to overtime pay if the scheduling was beyond the employer's control. The arbitrator found that the contractor providing the training had full control of scheduling and granted the grievance. The Comptroller General, however, found that the DOL had control because the contractor had to coordinate scheduling with the Department's representative, and that employees could not be granted overtime. The general rule is that travel time outside of duty hours is not compensable except as provided by law, and

arbitrators must look to the Federal Personnel Manual for guidance in determining when overtime is permitted.

In *Matter of Ross and Squire,* B-191266, June 12, 1978, the Comptroller General advised the FLRC that an arbitrator could order that employees be temporarily promoted to a higher grade when they have met the contractual requirements for a temporary promotion, even if there is no vacancy in the higher grade position. However, there must be an existing classified position at the higher grade. The Comptroller General ruled that the assignment of higher level duties for the required minimum period of time is sufficient, and that an employee not be formally detailed to a position.[5]

In *Matter of John Cahill,* B-192455, November 1, 1978, the Comptroller General adhered to his earlier decisions involving career-ladder promotions where clerical errors delay the effective date of the promotion. In this case, the necessary papers were lost, resulting in a 10-week delay in the promotion. The arbitrator ruled that the grievant should be retroactively promoted. Because the authorized official had not approved the promotion before the papers were lost, however, the Comptroller General ruled that the award could not be implemented. Only after all required discretionary actions by the appropriate officials have been taken can an arbitrator make a retroactive career-ladder promotion. Thus, violations of nonmandatory provisions will not support retroactive promotions. Mere unfairness is not sufficient.

Finally, in *Matter of Customs Patrol Officers,* B-192727, December 19, 1978, the Comptroller General refused to upset an arbitrator's finding of fact concerning whether certain overtime was regularly scheduled, entitling employees to time-and-one-half payment. The Comptroller General will not object to awards if the result reached by the arbitrator is one which the agency could lawfully reach on its own.

General Accounting Office review of arbitration awards appears to be a thing of the past under the new statute. The Conference Report to the Federal Service Labor-Management Relations statute states that awards of arbitrators are not subject to review by the Comptroller General.

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[5]See also *Internal Revenue Service, Jacksonville District and National Treasury Employees Union* (Smith, Arbitrator), FLRC No. 77A-97 (July 12, 1978), Report No. 152.

The Postal Service

Another event of interest to Academy members was the negotiation of the fourth collective bargaining agreement between the U.S. Postal Service and unions representing its 600,000 employees nationwide. After the first agreement failed to be ratified, a final settlement was achieved through a special procedure agreed upon by the parties with assistance from Director of the Federal Mediation and Conciliation Service Wayne L. Horvitz. Under the procedure, Professor James J. Healy of the Harvard Business School was to mediate during 15 days of renewed negotiations and arbitrate any unresolved issues. His award incorporated all the terms of the rejected agreement except the wage package and the no-layoff clause. He granted $500 per worker across the board for the first year, 3 percent the second year, and $500 the third year of the agreement. A cost-of-living increase, with no cap, of 1 percent per 0.4 percent increase in the Consumer Price Index was also awarded.

As for the no-layoff clause, employees hired after September 15, 1978, were to receive no job security until completion of six years of employment. All other employees were to receive full protection, thereby providing security during their lifetime.

The rejected agreement, which had been negotiated under the watchful eye of the Carter Administration, had provided for a 2 percent wage increase immediately, a 3 percent increase a year later, and a 5 percent increase in the final year of the agreement; cost-of-living increases based on the same formula, but capped at the total paid over the term of the prior three-year agreement; retention of the no-layoff clause first negotiated in 1971; and no improvements in benefit areas such as leave entitlement, holidays, or employer contributions to health insurance.

Judicial and Related Developments

Constitutionality of Collective Bargaining Laws

Courts in New York and Minnesota upheld the constitutionality of collective bargaining laws. A public-transit law providing for interest arbitration was upheld in New Jersey. Constitutional defects in collective bargaining laws were found in Connecticut, Texas, and Virginia.

A lower New York court upheld the amendments to the New

York City Collective Bargaining Law's impasse procedures which were passed by the state legislature when it extended and amended the Financial Emergency Act for the City of New York. The amendments are discussed in Statutory Developments, above.

The court found the amended procedures did not violate: (1) provisions of the state constitution concerning the city's taxing powers, (2) the equal-protection clauses of the federal and state constitutions, (3) the alleged statutory balance attained by the no-strike prohibition coupled with interest arbitration, and (4) the state constitution's home-rule provisions. The court held the new impasse procedures constitutional.[6]

In New Jersey, the state supreme court upheld the interest-arbitration provisions of NJSA 40:37 A-96, one of a series of statutory amendments designed to facilitate the public acquisition of a private transportation system. The Mercer County Improvement Authority challenged the constitutionality of the requirement that the authority submit to arbitration any labor dispute, including those relating "to the making or maintaining of collective bargaining agreements" and "the terms to be included in such agreements." The court found the law constitutional since it provides (1) standards to guide the arbitrator, (2) adequate procedural safeguards, and (3) implied opportunity for judicial review.[7]

A state law requiring binding arbitration for essential public employees was reaffirmed in Minnesota. The City of Richfield and fire fighters belonging to the International Association of Fire Fighters (IAFF), AFL-CIO, reached an impasse in negotiations and were directed to arbitration under the law. The city appealed to the fourth district court of Minnesota after nine issues were decided by the arbitration panel. The key questions before the court were the delegation of legislative authority under the state's Public Employment Labor Relations Act, procedural safeguards under the act, and the power of taxation by an arbitration tribunal.

The judge followed an earlier ruling of the district court that the delegation of discretionary power to an arbitration panel is constitutional with adequate legal safeguards. In this case, the

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[6]*DeMilia* v. *State of New York*, 412 N.Y.S.2d 953, 100 LRRM 2625 (1978).

[7]*Division 540, Amalgamated Transit Union, AFL-CIO* v. *Mercer County Improvement Authority (Mercer Metro Division)*, 76 N.J. 245, 386 A.2d 1290, 98 LRRM 2526 (1978).

arbitration panel was guided by standards stated in the act. On the matter of taxation, the judge found that the arbitration award is not directed to the citizenry. "The city retains the right to increase or decrease personnel and to adjust its budget accordingly."[8] The decision of the district court has been affirmed by the state supreme court.

Connecticut's 1965 Municipal Employee Relations Act was amended in 1975 to provide for compulsory final-offer arbitration to resolve interest disputes. On June 26, 1978, Hartford County Superior Court Judge Joseph H. Goldberg found the 1975 statute unconstitutional. Judge Goldberg noted that the law gave flexibility to arbitrators without accountability to the state legislature, lacked reasonably precise decision-making standards, and did not provide for meaningful judicial review of awards. The judge indicated that a properly drawn statute might be constitutional.[9] The case has been appealed. Pending a state supreme court decision, the state mediation board has permitted existing cases to continue to be heard.

The Supreme Court of Texas declared unconstitutional that portion of the Fire and Police Employee Relations Act that delegated (under certain circumstances) the function of setting pay and benefits for police and fire fighters to the judiciary. Under the law, if an employer refuses arbitration, the district court determines whether the employer is violating the statutory provision calling for the establishment of prevailing wages and conditions. If a violation is found, the court then sets pay and conditions based on comparable private-sector work in the labor market. The court found the guidelines imprecise, leading to a determination that was legislative in nature.[10]

In 1977, the Supreme Court of Virginia had voided collective bargaining agreements by municipalities and public-employee unions because they lacked legislative sanction. In 1978, the supreme court declared the use of binding arbitration for teacher grievances to be unconstitutional. A 1973 teacher grievance procedure law provided for arbitration as its terminal step. It was this provision of the teacher grievance law that the Vir-

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[8]*City of Richfield and Fire Fighters Local 1215 and State of Minnesota,* Minn. 4th Jud. Ct., Case No. D.C. 735758 (February 10, 1978). *Affirmed,* CCH (Minn. 1979) Sup. Ct. 1979–80, PBC ¶36,501.

[9]*Town of Berlin et al.* v. *Frank Santaguida et al.*, 773 GERR 10, 98 LRRM 3259 (1978).

[10]*International Association of Fire Fighters Local No. 2390 et al.* v. *City of Kingsville,* 761 GERR 33 (1978).

ginia supreme court found to be an unconstitutional delegation of local school-board authority.[11]

Interest Arbitration

Arbitrability. The public acquisition of a transit company is discussed above where a New Jersey law was tested in the state courts. Another case involving collective bargaining in a transit transfer resulted in a decision by the U.S. Eighth Circuit Court of Appeals.[12] It is significant because of two rulings:

> "1. A federal district court has jurisdiction over a controversy between a public-transit agency and a union involving an agreement under Section 13(c) of the Urban Mass Transportation Act.
>
> "2. The Kansas City Area Transportation Authority is required to resolve a dispute through interest arbitration under such an agreement with the Amalgamated Transit Union."

The authority serves an area that includes Kansas City, Kansas, and Kansas City, Missouri. Its agreement with the union provides for arbitration of "any labor dispute." The court interpreted the language to include interest arbitration at the expiration of the agreement.

The court recognized that in some states public employees do not have collective bargaining rights; nevertheless, a public transit agency dependent on federal assistance under the Urban Mass Transportation Act is obliged to abide by the terms of the Section 13(c) labor agreement "regardless of general state law or policy." Section 13(c) calls for an agreement protecting employees of a previously private transit company as a condition for federally supported public acquisition.

Substantive and Other Issues. Where states have final-offer arbitration laws, definitional problems can arise in interpreting what is a final offer. Supreme courts in Iowa and Massachusetts dealt with such interpretations in 1978. Two Michigan cases are pending involving application of other terms of the state's Police-Firefighters' Arbitration Act. In Idaho, the supreme court broadly interpreted the right to strike under a law covering fire fighters.

While most discussions center on the merits of final-offer-by-

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[11] *School Board of the City of Richmond* v. *Margaret W. Parham et al.*, 759 GERR 52 (1978).

[12] *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Transit Authority*, 582 F.2d 444, 99 LRRM 2408 (1978).

package versus final-offer-by-issue, the Iowa Supreme Court has ruled in favor of final offer by subject category. Iowa's law covers all public employees and provides for an item-by-item award. In a case brought by the West Des Moines Education Association against both the Public Employment Relations Board and Iowa Association of School Boards,[13] the court rejected the education association's definition of "impasse item."

The education association used the grievance procedure to illustrate the distinction between subject category and individual items. According to the teachers, if there were an impasse over the grievance procedure, not only the right to grieve, but also the definition of a grievance, time limits, and group grievances should be considered as separate issues by the arbitrator.

The supreme court upheld a ruling of the PERB, after extensive research into the goals of final-offer arbitration and the experience of other states. In order to reduce the number of issues brought to arbitration, the court interpreted the phrase "impasse item" to mean "subject category" rather than individual aspects of a subject.

The Massachusetts case involved separability of an issue deemed illegal. The state's supreme judicial court separated a group-insurance issue out of an arbitration award and supported the balance of the award, despite the municipality's claim that the issue was an integral part of the last and best offer.[14]

Fire Fighters Local 1347 proposed that the Town of Watertown increase its group-insurance contribution from 50 to 75 percent. The town argued that legislative action would be required and that fire fighters could not be singled out for special treatment. The union's last offer, granted by the arbitration panel, included a lump-sum payment to fire fighters above the 50 percent contribution, unless the increased payments were made.

The court noted that a general contribution of more than 50 percent was voted down at an annual town meeting. Further, under a town-law amendment in 1973, no governmental unit could provide different rates to one group within the unit. The court approved the single standard, to promote economies in

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[13] *West Des Moines Education Association v. Public Employment Relations Board and Iowa Association of School Boards*, 265 N.W.2d 625, 98 LRRM 2839, 766 GERR 15 (1978).

[14] *Watertown Fire Fighters Local 1347 v. Town of Watertown*, 383 N.E.2d 494, 100 LRRM 2375 (1978).

insurance costs and to prevent competitive bargaining by employee groups.

On the matter of separability, the court applied an earlier case and enforced the remainder of the award, since "the arbitrators would surely have approved the offer, had it been so reduced in the first place."

Two Michigan cases are in process testing the application of the state's Police-Firefighters' Arbitration Act. In 1975, the constitutionality of the act was upheld by an evenly divided Michigan Supreme Court, in *Dearborn Firefighters* v. *City of Dearborn.*[15] The constitutional attacks have not been renewed. However, several major employers in the state have recently begun to challenge the statute in operation by appealing interest-arbitration awards. During 1978, both the City of Detroit and Wayne County sought to upset arbitral awards, for police supervisors and patrolmen, respectively, alleging either that the award showed no fidelity to the specified statutory criteria or, alternatively, that the arbitrator made decisions on issues that were not mandatory bargaining subjects. Decisions are pending on these matters.

A very basic issue arose in a controversial case coming under a fire fighters' bargaining law in Idaho. A majority of the Idaho Supreme Court held that since the law is silent on the right to strike, except for prohibiting strikes during a contract term, fire fighters can strike at a contract's expiration.[16]

An impasse was reached in Coeur d'Alene when the city's contract with the International Association of Fire Fighters, Local 1494, expired. The firemen struck before a fact-finder's report was issued. All 17 employees were discharged, the local civil service commission supported the discharges, and the high court reviewed the matter.

The supreme court found that the strike was not illegal under the law, which does not contain an absolute ban on strikes and apparently leaves the parties free to negotiate with economic force after expiration. Further, the discharges were not made in "good faith" by the city, which had withdrawn benefits, denied retroactivity, refused to negotiate during the fact-finding delay, and had not sought injunctive relief.

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[15] 394 Mich. 229, 231 N.W.2d 226, 90 LRRM 2002 (1975).

[16] *Local 1494, International Association of Fire Fighters* v. *City of Coeur d'Alene,* 586 P.2d 1346, 100 LRRM 2079 (1978).

Grievance Arbitration

Arbitrability. Court decisions in 1978 were generally supportive of board or arbitrator determinations on arbitrability. The decisions were particularly notable in New York where a 1977 decision, *Liverpool Central School District* v. *United Liverpool Faculty Association,* [17] by the New York Court of Appeals, held that grievances were presumed nonarbitrable unless they were on issues clearly made arbitrable by the grievance-arbitration clause; further, arbitrability determinations were a matter for the courts to decide. In addition to the 1978 New York cases, actions by state supreme courts in Delaware and Minnesota follow the supportive trend.

In *City of New York* v. *Anderson,* [18] a lower New York court affirmed, over the city's objections, a Board of Collective Bargaining decision finding arbitrable a grievance alleging bypassing for promotion. The city argued that under the court of appeals decision in the *Liverpool* case, the grievance was not arbitrable because it was not expressly, directly, and unequivocally covered by the grievance-arbitration clause. The court pointed out that, unlike the *Liverpool* case, there is in this case an express public policy of the public employer, the city, that arbitration of disputes is to be favored and encouraged. In addition, the court noted that the grievance-arbitration clause at issue in this matter is not inclusionary/exclusionary as was the clause interpreted by the court of appeals in the *Liverpool* case. The court held that the Board of Arbitration properly found the grievance arbitrable.

The New York Court of Appeals refused to order a stay of arbitration where, in the view of the employer, the arbitrator's decision could result in a violation of public policy.

The Port Washington Union Free School District and the Port Washington Teachers Association were involved in two arbitrability cases.[19] In one, the superintendent instituted an educational program without consulting a contractually established advisory joint committee. The employer unsuccessfully sought a stay of arbitration on the grounds that the school district cannot delegate control of curriculum. In the other, the superintendent

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[17] 42 N.Y.2d 509, 397 N.Y.S.2d 737, 95 LRRM 2985 (1977).

[18] N.Y.L.J., July 21, 1978, 5 (N.Y. Cty. 1978).

[19] *Port Washington Union Free School District* v. *Port Washington Teachers Association,* 45 N.Y.2d 411, 408 N.Y.S.2d 453, 99 LRRM 3045 (1978).

eliminated certain extracurricular activities resulting in reduced extra pay for teachers. A lower court granted a stay of arbitration to preserve the school district's "supervisory responsibility."

The appeals court found that either stay "would foreclose any remedy for alleged violations of the contract." Under the advisory joint committee, the superintendent reserves decision-making authority, and strong public policy would not be violated by an arbitrator's remedy. Where demands for restoration of activities and back pay for teachers were involved, the lower court stay was premature and speculative as to the educational policy that might be involved in an arbitrator's ruling.

Similarly, in *South Colonie Central School District* v. *Longo,*[20] a dispute involving a no-reprisal clause in a contract executed at the end of a strike was found arbitrable, even though the clause was being invoked on behalf of an employee not in the bargaining unit. Whether the clause was applicable was a matter for the arbitrator to decide.

In a case of first impression, the Delaware Supreme Court deferred to arbitration when fire fighters represented by the IAFF sued over a unilateral change in their medical plan by the City of Wilmington.[21] When the city abolished the position of fire physician and revised the employees' medical coverage, the union filed suit for violation of both agreement and state law. The city argued that the proper recourse was the grievance procedure.

Guided by private-sector law on this issue, the court related the case to the NLRB *Collyer* doctrine, in which deferral to arbitration takes place when violations are charged and the case is in the prearbitral stage. In support of voluntary procedures to settle labor disputes, the court ordered the parties to proceed under the grievance procedure of their contract.

The Minnesota Supreme Court said that "Minnesota has a strong public policy favoring arbitration as a means of resolving labor disputes" in a case where both the union and the employer considered the issue nongrievable.[22] A teacher who had been on leave for 13 years after resigning because of pregnancy wanted to restore her seniority to her first date of hire. Such a maternity

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[20] 43 N.Y.2d 136, 400 N.Y.S.2d 798, 97 LRRM 2015 (1978).

[21] *City of Wilmington et al.* v. *Wilmington Fire Fighters Local 1590, IAFF,* 385 A.2d 720, 98 LRRM 2375 (1978).

[22] *Bernice Ellerbrock* v. *Board of Education, Special School District No. 6,* 269 N.W.2d 858, 99 LRRM 3304 (1978).

policy was agreed to by the Dakota County Board of Education and the South Saint Paul Federation of Teachers, but applied only to teachers with shorter breaks in continuous service.

The trial court found that the passage of 13 years excluded her from the maternity-leave provision, and it affirmed her layoff by the school board. Appealing to the state supreme court, the teacher asked whether failure to exhaust contractual remedies barred her access to the court. Using the above quotation, the court concluded that she should have used the grievance machinery, but her request for a writ of certiorari in the trial court was not based on that procedural aspect. The trial court had correctly sustained the school board's decision by discharging the writ.

Substantive and Other Issues. The judicial review of grievance-arbitration awards frequently involves consideration of both arbitrability and substantive issues. The cases reported above put greater emphasis on the threshold issue of arbitrability. The cases reported below center on substantive issues that are of particular interest. The first group all involve matters of discipline and discharge. Another group involves matters of public policy—especially the delegation of public authority.

The Vermont Supreme Court dealt with the concept of progressive discipline in reversing a decision of the Vermont Labor Relations Board. *In re Grievance of Albert Brooks*[23] was initiated by a building custodian at a state facility. Six months before his dismissal, the employee was involved in altercations with two fellow employees, including physical force against a female co-worker. These incidents were reflected in his performance evaluation, and his supervisor conferred with him about the behavior. The employee was dismissed after a later incident involving verbal abuse of a second female worker.

The VLRB ordered him reinstated with back pay, based on the employer's failure to abide by "generally accepted principles of progressive discipline." The supreme court held that the state had given the employee fair notice that his abusive conduct would be ground for discharge and that "progressive discipline" is not inherent in the concept of "just cause." The agreement with the Vermont State Employees Association provided that the employer could "dismiss an employee for just cause

[23]Vt. Sup. Ct., Case No. 149-77 (December 6, 1978).

with two weeks' notice or two weeks' pay in lieu of notice."

Rights of nontenured teachers were at issue in an arbitration decision overturned by the Florida Second District Court of Appeals in *Lake County Education Association* v. *School Board of Lake County, Florida.*[24] Citing precedent in other states, including New York, Illinois, and Massachusetts, the court ruled that a clause protecting teachers from dismissal "except for proper cause" need not be applied to reappointment of nontenured teachers.

The arbitrator had found that the school board of Lake County refused to renew a first-year contract where the evidence did not support deficiencies found by the school principal. The circuit court for Lake County ruled that the arbitrator exceeded his powers by substituting his judgment for that of the school board. On appeal, the district court supported a primary argument of the school board that application of the "proper cause" standard to nontenured teachers is contrary to state law. According to the court, Florida statute gives school boards the exclusive authority to reappoint nontenured teachers; therefore, the arbitrator exceeded his powers by applying the "proper cause" standard to the school board's decision.

In a Pennsylvania case,[25] the commonwealth court on appeal found that an arbitrator should have accepted the facts established by a criminal trial jury and ordered the arbitrator to re-examine a discharge under those facts.

AFSCME District Council 89 grieved the discharge of three employees of the City of Lebanon following a criminal mischief conviction for opening a fire hydrant. The parties agreed to an arbitral determination based on the trial court transcript. The arbitrator ruled that he was not bound by the jury's finding. He was not convinced of their guilt, found no just cause for discharge, and reinstated the employees.

The court determined that the arbitrator's ruling was not "derived from the agreement" and that as a matter of law he was not in a better position than the jury to judge the facts. The issue of just cause was resubmitted, to be based on the jury's finding.

Criminal proceedings also resulted in a discharge in *Binghamton Civil Service Forum* v. *City of Binghamton.*[26] An employee,

[24]360 S.2d 128, 99 LRRM 1334, 770 GERR 11 (1978).
[25]*City of Lebanon* v. *District Council 89, AFSCME,* 388 A.2d 1116, 98 LRRM 3180, 769 GERR 11 (1978).
[26]44 N.Y.2d 23, 403 N.Y.S.2d 482, 97 LRRM 3070 (1978).

granted immunity, testified in a criminal proceeding to his receipt of bribes from the defendant therein. At the conclusion of the criminal trial, the employee was summarily discharged. An award, reducing the penalty to a six-month suspension without pay, was upheld. The court held that the dispute was properly brought before the arbitrator and that the reduction of the penalty did not violate any expressed policy of the state.

Two cases in New York and one in Wisconsin established circumstances where arbitral decisions were consistent with public policy. Cases in Illinois and Montana illustrate contrary findings.

In the *Niagara Wheatfield* case,[27] a provision tying school administrators' salaries in with teachers' salaries came before the New York Court of Appeals. An arbitrator had ruled that the Niagara Wheatfield Central School District violated the provision during contract negotiations.

The teachers had negotiated a new agreement with salary increases. Although their agreement had expired, the Niagara Wheatfield Administrators Association demanded salary adjustments under their previous clause, which was to "remain in effect until modified or changed by mutual agreement in subsequent negotiations."

The school district argued that continuation of the tie-in provision was contrary to public policy since it hampered subsequent negotiations. The court of appeals disagreed, finding that the school board still had control over its negotiations, including agreement on the teachers' salaries.

In *Port Jefferson Teachers Association* v. *Brookhaven Comserwogue School District,*[28] an award was upheld which barred assignment of specialist teachers outside their area of specialty.

The court pointed out that the parties' contract required the school district to maintain an agreed-upon level of specialist services. The district had the power to conclude that such services were necessary and to agree to maintain them for the period of the contract. "No strong public policy, however derived, is violated by such a provision in a short-term collective bargaining agreement." The court went on to state: It is only when "an award contravenes a strong public policy, almost in-

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[27] *Niagara Wheatfield Administrators Association* v. *Niagara Wheatfield Central School District*, 44 N.Y.2d 68, 404 N.Y.S.2d 82, 98 LRRM 2322 (1978).

[28] 1 NPER 33-17502 (N.Y. 1978).

variably an important constitutional or statutory duty or responsibility," that the award may be set aside.

The Wisconsin case[29] reached the state supreme court when an arbitrator's award upholding seniority in promotions raised an apparent conflict between a collective bargaining agreement and a home-rule provision.

Under the promotion clause, signed by the City of Glendale and the Glendale Professional Policemen's Association, preference is given to the qualified applicant with the greatest seniority. Under the home-rule amendment, police chiefs have the authority to appoint subordinates.

When an officer who scored the highest on an examination was selected as sergeant, the most senior officer, who had scored almost as high, filed a grievance. In arbitration, the senior employee was awarded the promotion, and the arbitrator found that the Municipal Employees Relations Act could modify the impact of the home rule where a mandatory subject of bargaining was concerned.

On appeal, the supreme court decided that the police chief could exercise his authority based on certain rules, including both the examination results and the terms of the labor agreement. Since he continues to determine who is qualified, the police chief retains appointment power. The promotion provision "complements rather than contradicts" the home-rule amendment.

Absent a statewide statutory bargaining authority, Illinois courts continue to look hard at school board agreements that affect their legislated powers. In *Board of Education, South Stickney School District No. 111, Cook County* v. *Robert Murphy and Southwest Suburban Teachers' Union Local 943,*[30] an Illinois court overturned an arbitration award granting a sabbatical leave to a teacher in a Cook County school district. The court held that Illinois law does not permit a school board to delegate its discretionary power to grant leave, either to a contractually established committee or to an arbitrator.

In a similar decision, the Montana Supreme Court found that an arbitrator may not order reinstatement of a teacher. In *Wi-*

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[29]*Glendale Professional Policemen's Association* v. *City of Glendale*, 264 N.W.2d 594, 98 LRRM 2362, 772 GERR 19 (1978).

[30]56 Ill.App.3d 981, 14 Ill.Dec. 620, 372 N.E.2d 899, 97 LRRM 2441 (1978).

baux Education Association v. *Wibaux County High School et al.*,[31] the court held that Montana statutes required such decisions to be at the sole discretion of school boards. The court agreed that arbitration was available if a school failed to follow agreed-upon evaluation procedures, but then declared it was not prepared to state what remedy might be available. The remedy, however, could not include reinstatement.

Scope of Bargaining

Judicial decisions on the scope of bargaining have resulted in most cases from unfair-labor-practice charges brought before state boards. The issues themselves, however, have consequences not only for the duty to bargain, but also for potential grievances and arbitration cases.

The decisions reported below start with a key trio of cases coming before the New Jersey Supreme Court. Then follow cases grouped by the nature of issues involved: educational policy, grievance procedures, union security, and other bargaining issues.

The first case presents a strong statement by the New Jersey Supreme Court in *Ridgefield Park Education Association* v. *Ridgefield Park Board of Education.*[32] Acting specifically contrary to federal precedent in the private sector, the supreme court determined that a "permissive" category of bargaining issues was not intended by the New Jersey legislature.

The Ridgefield Park Board of Education had negotiated a clause on procedures for teacher transfers and reassignments. After a series of involuntary reassignments that prompted grievances from teachers, the matter of arbitrability was submitted to the Public Employee Relations Commission. PERC found no violation of statutes or public policy in voluntary bargaining on teacher transfers.

On review, the court disagreed, holding that 1974 amendments to the state bargaining law do not show a legislative intent to create the voluntary category. Therefore, only two categories exist in the public sector: "mandatorily negotiable terms and conditions of employment and non-negotiable matters of government policy." In the court's view, the school boards are

[31]573 P.2d 1162, 97 LRRM 2592 (1978).
[32]78 N.J. 144, 393 A.2d 278, 98 LRRM 3285 (1978).

responsible to the electorate on educational-policy decisions and cannot delegate such decisions to a private area except under statutory mandate.

The New Jersey Education Association hopes to secure a legislative amendment creating the permissive category of negotiations.

In two other cases, the New Jersey Supreme Court dealt with bargaining issues. One involved the International Federation of Professional and Technical Engineers and the Service Employees International Union.[33] The state Department of Transportation had conducted major layoffs that prompted negotiation requests for seniority rights. The state refused to bargain, citing civil service jurisdiction.

Again PERC decided in favor of negotiability, within statutory minimum and maximum standards. The supreme court, to prevent total diversity in employment terms by separate state units, established standards for negotiating on employment matters covered by statute. Provisions in excess of minimum state standards are mandatory bargaining issues. Provisions in excess of maximum standards are neither negotiable nor enforceable.

In *Galloway Township Board of Education* v. *Galloway Township Education Association,*[34] the court upheld a PERC decision where the commission issued its finding of an improper bargaining practice after an agreement had been reached by the parties. The board of education had been deemed violative of state bargaining law when it withheld teachers' step increments during impasse procedures. While a lower court judged the issue moot, the higher court supported PERC's imposition of a continuing obligation to refrain from unfair practices.

The balance between educational policy and conditions of employment continued in 1978 to be tested in state cases. The Rhode Island Supreme Court sought guidance from federal private-sector interpretation of "terms and conditions of employment" in *Barrington School Committee* v. *State Labor Relations Board.*[35] The court ruled that the elimination of 12 teaching positions required bargaining between the school committee and the teachers' association.

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[33]*State of New Jersey* v. *State Supervisory Employees Association, Local 195,* 78 N.J. 54, 393 A.2d 233, 98 LRRM 3267 (1978).

[34]78 N.J. 1, 393 A.2d 207, 100 LRRM 2250 (1978).

[35]388 A.2d 1369, 99 LRRM 3083 (1978).

The school committee had unilaterally ended 11 departmental chairmanships and the position of athletic director. The teachers' organization argued before the State Labor Relations Board that the positions had been subjects of bargaining in previous contracts, and the teachers were upheld by the board, but not by a lower court.

On appeal, the supreme court reversed the lower court ruling and followed federal interpretation. While management policy was involved in reorganizing and creating a new role of coordinators, teachers had been paid extra compensation and received released time in their previous positions. Since terms of employment were clearly involved, the school committee had a mandatory obligation to bargain.

The Connecticut Labor Relations Board issued an order to bargain on a dress code for teachers in Enfield.[36] The Enfield Board of Education had unilaterally adopted a dress code after some discussion on the subject with the Enfield Teachers Association. The association objected its adoption, but the parties agreed to postpone further action until the U.S. Court of Appeals, Second Circuit, decided another dress-code case. The court found certain aspects of the dress code unconstitutional, but the superintendent of schools refused to revoke the Enfield code.

The issue then came to the labor board, which ruled that the code in question was a condition of employment more than a matter of educational policy, and therefore a mandatory subject of bargaining.

The availability and the financing of grievance procedures became scope-of-bargaining issues in three cases decided by labor boards and a lower court.

The Board of Labor Relations for the District of Columbia not only issued a decision, but also reconsidered it twice and suffered resignations as a result of the conflict with city officials. The case involved the right of police officers to grieve minor disciplinary action under their negotiated grievance procedure.[37]

In the first instance, the board ordered the chief of police to process the grievances. He refused. In a request for reconsidera-

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[36] *Enfield Board of Education and Enfield Teachers Association*, Conn. Board of Labor Rels., Case No. TPP-4026, Dec. No. 1609, 754 GERR 10 (1978).

[37] *IBOP Local 442 and Metropolitan Police Department*, D.C. Board of Labor Rels. Cases 6G001-6G003, 767 GERR 13 (1978).

tion by the police department and the personnel office, the board found it had not exceeded its authority. The mayor remanded the case for reconsideration again, based on an opinion of the corporation counsel that disciplinary action was not within the scope of collective bargaining. The board, relying on federal-sector labor relations practice, once more supported the use of the grievance procedure in the event of minor discipline of police officers.

Under 1977 amendments to the Florida public-employee bargaining law, the Public Employees Relations Commission was authorized to issue declaratory statements in response to petitions. One of the first such statements deals with the requirement for a grievance procedure ending in binding arbitration in all contracts.[38]

The PERC members found that their statute does indeed mandate a grievance procedure to settle disputes over the "interpretation or application of a collective bargaining agreement." However, whether issues of employee discipline are necessarily subject to the grievance procedure depends on the provisions of the agreement to be interpreted. The law, according to the statement, does not guarantee the right by its own terms.

Reversing a decision by the Iowa Public Employment Relations Board, an Iowa district court has determined that two issues are not mandatory subjects of bargaining:[39] (1) The method of financing the processing of grievances. The grievance procedure itself is a mandatory subject, but payment is a separate matter, in the court's view. The court went further and stated that payment of wages during processing would be contrary to public policy. (2) Insurance coverage for employees' family members. The court relied on precedents requiring a relationship between the insurance provided and the employees' performance of duties. Additional state law restricts payment for insurance coverage.

The court challenged widespread labor relations thinking about the therapeutic value of a grievance procedure to a total collective bargaining relationship. It said, "The grievance is not in the interests of the employer and is, in fact, against such

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[38] *In re Petition for declaratory statement of Communications Workers of America,* PERC Case No. DS-77-001, Order No. 78D-102, 757 GERR 17 (1978).

[39] *Charles City Community School District* v. *PERB,* 98 LRRM 2696, 753 GERR 17 (1978).

interests, and the processing of it is for the benefit of the grievant." Therefore, public funds should not be used for this "private purpose."

An aspect of union security was involved in a Milwaukee case before the Wisconsin Supreme Court.[40] The court reversed both a lower court and the Wisconsin Employment Relations Commission in deciding that, despite exclusive bargaining rights by a majority union, a minority union may also have a dues checkoff.

Under a 1971 legislative amendment, the Milwaukee Board of School Directors and the Milwaukee Teachers Education Association negotiated a fair-share payroll deduction along with a dues checkoff. Following a 1969 state supreme court ruling supporting the right to a dues checkoff for the minority Milwaukee Federation of Teachers, two additional minority unions sought similar arrangements.

Three co-respondents, the WERC, the school board, and the majority union, argued that changes in the law since 1969 made the earlier practice contrary to the union-security protection currently in effect. The high court disagreed, finding that the function of sharing the cost of representation by the majority organization is different from the function of the dues checkoff in self-perpetuation of the organization. While the certified union may bargain for deduction of appropriate fees from both union and nonunion employees under a fair-share agreement, minority-union members are not denied the opportunity to have their dues checked off.

Other scope-of-bargaining issues arose in New Hampshire, California, and Nevada. The New Hampshire Supreme Court held that shift changes at prisons must be negotiated, thus supporting a decision of the state Public Employees Relations Board.[41]

In *United Public Employees 390, SEIU* v. *City of Richmond,*[42] the California appeals court upheld the right of the City of Richmond to contract out its tree-trimming work. Seven members of

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[40]*Milwaukee Federation of Teachers Local 252* v. *WERC, Milwaukee Board of School Directors and the Milwaukee Teachers Education Association,* 266 N.W.2d 314, 98 LRRM 2870, 769 GERR 10 (1978).

[41]*State Employee Association of New Hampshire* v. *Board of Trustees, New Hampshire State Prison; New Hampshire State Prison* v. *New Hampshire PELRB,* 388 A.2d 203, 99 LRRM 2437 (1978).

[42]98 LRRM 3206, 766 GERR 11 (1978).

the bargaining unit were laid off by the Department of Recreation and Parks when an outside contractor was engaged. The court concentrated on reconciling two portions of the state bargaining law: (1) "wages, hours and working conditions" and (2) "merits, necessity or organization of any service." In resolving the case, the court relied on the labor agreement to decide in favor of the city, based on the contractual right to lay off "because of . . . material changes in duties or organization." The subcontracting was determined to be such a change.

The Nevada case[43] was decided by the Nevada Local Government Employee-Management Board, when the police department in Henderson instituted for male police officers a physical agility test "to pinpoint any problems which may require special attention in their annual physical examination." A police officer who failed the test was told that he would not be considered for merit increases or promotions until he passed and that retaining his job depended on passing it by a given date.

The city argued for its management rights under state law, which reserved "work performance standards, except for safety considerations," to the local government. The Henderson Police Officers Association claimed that "safety" was related to personal physical conditions. The board found that agility-testing is a "safety consideration" and therefore negotiable. Unlike other employees requiring a safe *place* of work, a police officer's safety depends on his being physically sound wherever he is dispatched.

Duty to Bargain

Many cases involving the duty to bargain emerge during the course of a year. The following cases were selected for inclusion here because they emphasize either general statements of policy or procedural matters affecting dispute settlement. Duty-to-bargain issues turning on specific scope questions are found in the preceding section.

Kentucky does not have a broad public-sector bargaining law. In its absence, the Kentucky Supreme Court has defined public-sector bargaining rights in a case involving the University of Kentucky and nonprofessional workers represented by

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[43] *In the Matter of the Request for a Declaratory Ruling by City of Reno,* Local Gov. Employee-Management Rels. Board, Case No. A1-045315, 787 GERR 15 (1978).

AFSCME District Council 51. The court held:[44] "a. Public employers have the right but not the duty to bargain with employee representatives. b. The employer may not enter into an agreement providing for exclusive representation. c. Public employees do not have the right to strike under common or statutory law."

In Utah, a police local union and a police officer argued before the Utah Supreme Court that the state's Labor Disputes Act made it public policy that public employees may join unions and enter into negotiations over terms and conditions of employment. The supreme court disagreed, holding that the statute was written to cover private employees.[45] It ruled that, without an explicit designation of coverage by such a statute, the language could not be applied to employees of the state or its political subdivisions and that, therefore, no duty to bargain was present. The case involved police employees of Salt Lake City. As noted under Statutory and Related Developments, Salt Lake City subsequently passed an ordinance permitting bargaining by municipal employees.

An attorney general's opinion in South Carolina held that, while public employees were protected in their right to join unions, public employers had neither the right nor the obligation to enter into collective bargaining agreements with organizations representing public employees.[46]

The California Supreme Court held that local civil service commissions are required to meet and confer with employee representatives.[47] The case arose when Los Angeles County unions asked the civil service commission to meet and confer over proposed new layoff regulations. The commission declined the invitation, noting that it had a statutory obligation to hold public hearings, but it did not believe that it was also required to meet and confer over a subject wholly within its jurisdiction.

The court disagreed, holding that the pertinent Meyers-Milias-Brown Act did not exempt civil service commissions from

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[44] *Board of Trustees of University of Kentucky* v. *Public Employees Council 51, AFSCME et al.*, 571 S.W.2d 616, 98 LRRM 2746 (1978).

[45] *Westly and International Brotherhood of Police Officers Local 470* v. *Board of City Commissioners of Salt Lake City Corporation*, 573 P.2d 1279, 97 LRRM 2580 (1978).

[46] *Opinions of South Carolina Office of Attorney General*, September 27, 1978, 777 GERR 11 (1978).

[47] *Los Angeles County Civil Service Commission* v. *Superior Court*, 73 Cal.App.3d 998, 97 LRRM 2065 (1978).

a meet-and-discuss obligation. Further, the court held that there was no inherent conflict between tentative understandings reached at a meet-and-confer session and an objectively conducted public hearing. The court pointed out that a civil service commission was free to revise a meet-and-discuss understanding on the basis of more persuasive evidence if such were presented at a public hearing. A possible constitutional question was averted when the court decided that the meet-and-confer requirement of Meyers-Milias-Brown did not violate the home-rule charter because there was no conflict between the act and the charter.

In Pennsylvania, the supreme court found the termination of payments toward employee fringe benefits by a school district to be a coercive act and violative of a good-faith bargaining requirement. The Cumberland Valley School District ended these payments after its agreement with the Cumberland Valley Education Association had expired, but while negotiations were continuing. Affirming the decision of the Pennsylvania Labor Relations Board and reversing the commonwealth court, the supreme court held that employees were entitled to protection from such unilateral action. Otherwise, the union's status as collective bargaining agent of the employees would be undermined.[48]

In Michigan, premature withdrawal from bargaining was found to be violative of the duty to bargain. The Michigan Employment Relations Commission found a teachers' union guilty of bad-faith bargaining when, after one day of mediation that had narrowed the issues in dispute from 25 to 10, it refused to continue in mediation and went on strike. Although saying that a work stoppage does not constitute a per se refusal to bargain, the commission applied the totality-of-circumstances test to find that the union was guilty of bargaining in bad faith by calling a strike when mediation had not been exhausted. The effect of the decision, in *Lamphere Schools* v. *Lamphere Federation of Teachers,*[49] was to require parties at impasse to utilize fully the resources of mediation, and fact finding if necessary.

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[48] *In re Appeal of Order of Commonwealth Court of Pennsylvania, No. 1306 C.D. 1976,* Pa. Sup. Ct., Cases 244–245, 793 GERR 15 (1978). (*Pennsylvania Labor Relations Board* v. *Cumberland Valley School District,* PERA-M-6966-C, Sept. 9, 1975).

[49] 1978 MERC Lab. Op. 194.

Other Judicial Issues

Application of Federal Law. Advocates of federal legislation covering state and local public-employee labor relations received a setback in the 1976 *National League of Cities* v. *Usery* decision.[50] There, the Court held that federal minimum wage and overtime requirements cannot be enforced against states and localities under the commerce clause of the United States Constitution. Many authorities believed that the action precluded federal preemption of the regulation of state and local labor relations.

Shortly afterward, however, in *Fitzpatrick* v. *Bitzer*, [51] the Court held that congressional power under the Fourteenth Amendment supported application of the sex-discrimination provisions of Title VII of the 1964 Civil Rights Act to state employees. The Third, Fourth, Sixth, and Seventh Circuit Courts have now ruled that the Equal Pay Act applies to states and localities.

The most recent of these decisions emanated from the U.S. Court of Appeals for the Sixth Circuit.[52] The court noted that Congress had the power under the Fourteenth Amendment of the Constitution to extend the provisions of the Equal Pay Act to states and their subdivisions.

Supporters of federal legislation with either broad or minimum standards for public-sector bargaining have indicated review of their positions in light of these developments.

Procedural Issues. A number of courts considered ground rules for bargaining or related procedural matters.

The Iowa Supreme Court addressed the question of opening bargaining sessions to the general public. The court supported decisions of the state's Public Employee Relations Board and a district court that a public employer should not unilaterally decide to open bargaining sessions to the public. In the absence of mutual agreement, bargaining is to remain closed.[53]

California Attorney General Evelle J. Younger decided that meet-and-confer sessions between a county board of supervisors and an employee association were not required to be open to the public. The attorney general found that labor negotia-

[50]426 U.S. 893 (1976).
[51]427 U.S. 445 (1976).
[52]*Ray Marshall* v. *Owensboro-Daviess County Hospital et al.*, 17 FEP Cases 1448, 774 GERR 43 (6th Cir. 1978).
[53]*Burlington Community School District* v. *Public Employment Relations Board and Burlington Education Association*, 268 N.W.2d 517, 99 LRRM 2394 (1978).

tions under the Meyers-Milias-Brown Act did not have to conform with sunshine requirements of the Brown Act. Additionally, the attorney general found that the question of tape-recording bargaining sessions was a matter that required mutual agreement before taping could take place.[54]

Although Virginia is clearly on record prohibiting public employers from granting exclusive recognition to unions or negotiating public-sector agreements, public employers may discuss terms and conditions of employment with organizations representing their employees.[55]

The City of Richmond had held discussions with unions representing its fire fighters and sanitation workers. When the police designated Teamsters Local 592 to represent them, the city refused to engage in discussions. U.S. District Court Judge Robert R. Merhige, Jr., accepted the police argument that the city, by meeting with one set of unions and refusing to meet with the Teamsters, violated the police officers' right to equal protection under the law and their First Amendment right to free speech and association. Refusing the police request for declaratory and injunctive relief, monetary damages, and an award of court and attorney fees, Judge Merhige felt the police were entitled to a statement of their rights and noted that "for good cause shown" either the city or the union could reopen the case. The retention of jurisdiction would permit further court action in the event meetings did not take place.

Florida's Public Employees Relations Commission addressed the difficult problem of employer transition from adversarial posture to impartial legislative body. In *Boca Raton Fire Fighters, IAFF Local 1560* v. *City of Boca Raton and Richard Houpana,*[56] the commission found that at impasse the legislative body had failed to conduct a hearing in a fair and impartial manner. Since Florida does not permit the right to strike by public employees nor binding arbitration of interest disputes, the commission noted that the legislative body had a duty to maintain fairness when it takes action to resolve a dispute, after impasse has been reached. Special treatment of the city's negotiator, failure to

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[54]*California Attorney General Opinion,* No. CV 77/132, January 4, 1978, 751 GERR 13 (1978).

[55]*Robert L. O'Brien et al.* v. *William J. Leidinger et al.,* 452 F.Supp. 720, 98 LRRM 2998, 772 GERR 13 (1978).

[56]Florida PERC Cases 8H-CA-776-1008 and 1009, Order No. 78U-013, 752 GERR 13 (1978).

accord proper weight to a master's report, and a councilman's statement to the effect that the proper course for the body was to accept the labor relations advice of the city manager were illustrative of a lack of transition from adversary to judicious neutrality.

Proposition 13 and Negotiated Agreements. After California's Proposition 13 was adopted by the electorate, the state legislature enacted what was termed "bailout legislation," providing that counties and cities could share in the state's surplus funds. A caveat was present, denying counties and cities the right to grant any wage increase to their employees in excess of that granted to state employees. Governor Jerry Brown successfully vetoed a bill providing pay raises for state employees. When counties and localities refused to implement previously negotiated increases as they became due, a number of suits were filed by employee organizations seeking payment of previously negotiated increases.

The first of these cases was decided in Riverside County.[57] There, Superior Court Judge Ronald Dreissler ruled that legislative attempts to bar pay raises for local employees was unconstitutional and void. The first of the post-Proposition 13 cases to reach the California Supreme Court was decided in early 1979. In that case, the court held that denial of previously negotiated cost-of-living increases was unconstitutional.[58] This case and others that may arise as a result of the bailout legislation will be covered in detail in next year's report.

Miscellaneous Issues. Two cases of contract voiding were reported, but with different outcomes. The City of Casper, Wyoming, had voluntarily bargained agreements for a number of years with the Police Protective Association representing its police officers. The last negotiated agreement continued "until June 30, 1976, and thereafter from year to year unless altered or modified by collective bargaining, or by mediation, conciliation, or fact finding."

Subsequently, the city decided that it lacked the authority to enter into collective bargaining agreements and declined further negotiation with police representatives. The city's position was upheld at the district court level, and, on appeal, the Wyo-

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[57] *Public Employees Association of Riverside County, Inc.* v. *County of Riverside*, Cal. Superior Ct., Riv. Cty, Case No. 126383, 775 GERR 12 (1978).

[58] *Sonoma City Organization of Public Employees* v. *City of Sonoma*, 100 LRRM 3044 (1979).

ming Supreme Court declared the agreement null and void because it lacked an expiration date.[59] The court noted that the agreement permitted alteration or modification, but not termination. Two justices dissented and pointed out that, in their opinion, the court was ducking the only real issue in the case—that is, the question of whether or not the city could legally bargain with its employees.

In Massachusetts, the supreme judicial court ruled that once a municipal body approves measures to implement a collective bargaining agreement, it cannot overturn that decision at a later date. *Labor Relations Commission* v. *Board of Selectmen of Dracut et al.*[60] developed after a town meeting had approved all but one item necessary to implement an agreement. The approvals were withdrawn at a meeting held two months later. The court took the position that the first measures implementing terms of the new agreement created certain vested rights for police officers that could not be rescinded by a later meeting.

A case involving clarification of a state board's power occurred in Indiana. Teachers in Indiana are covered by a state bargaining law administered by the Indiana Education Employment Relations Board, but now they must seek a final reinstatement order from the courts in the event of improper discharge for engaging in protected activity. In a case involving dismissal of three teachers who were bargaining-association officers, the Indiana First Circuit Court of Appeals ruled that the board may issue temporary reinstatement orders, but does not have authority for a permanent remedy.[61]

The board of school trustees in the Worthington-Jefferson Consolidated School Corporation appealed an IEERB reinstatement order. The court found that the Certified Educational Employee Bargaining Act empowers the IEERB to issue temporary orders, but if an employer does not reinstate the teacher, the court must fashion a remedy to cure whatever injustice has taken place. The court must review the factual determination by the board before issuing a permanent injunction.

The final case involves New York State's Taylor Law penalty of loss of two days' pay for each day of illegal strike. Under a

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[59]*Police Protective Association of Casper* v. *City of Casper,* 575 P.2d 1146, 98 LRRM 2113 (1978).

[60]373 N.E.2d 1165, 98 LRRM 2161 (1978).

[61]*Board of School Trustees of the Worthington-Jefferson Consolidated School Corporation* v. *Indiana Education Employment Relations Board et al.,* 380 N.E.2d 93, 99 LRRM 2886 (1978).

New York Court of Appeals decision, the employee's tax bite is to be based on the total compensation the employee would have received. In other words, the government loses no income tax because the illegal striker is required to pay tax on both income received and penalty withheld. To do otherwise, the court held, would not penalize the employees involved at twice the daily rate of pay as prescribed by law.[62] Some public-employee dissatisfaction has been expressed with this decision.

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[62] *Eddie Phillips et al.* v. *New York City Health and Hospital Corporation et al.*, 44 N.Y.2d 807, 377 N.E.2d 743 (1978).