APPENDIX C

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1979*

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Introduction

Significant developments for 1979 include statutory, judicial, and related activity in public-employment dispute settlement at the federal, state, and local levels. There is a state-by-state summary of legislation enacted during the year, a summary of experience under new legislation for federal labor relations, and a digest of significant appellate and high-court decisions. Lower-court or board decisions of particular interest have also been included.

As was true last year, relatively few states enacted new legislation. Connecticut covered teachers, and Rhode Island placed state police under collective bargaining legislation. The City of San Francisco passed a law providing for collective bargaining for its police officers and firefighters. Four states extended or modified existing legislation, and a few states passed legislation or used attorney-general opinions for housekeeping purposes.

A period of statutory stability may be implied from the small amount of new legislation as well as from the fact that no existing legislation either was repealed or failed to be extended. It is also noteworthy that interest-arbitration statutes passed or

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modified often favored the use of final-offer-by-issue interest arbitration.

On the judicial front, no state statutes were set aside as unconstitutional during the year. Action to set aside a California statute was instituted, while such action remained pending in Connecticut during the year. Interest-arbitration awards generally passed court tests, but procedural limits were imposed by Iowa, and awards in Minnesota and Hawaii were left unfunded. Overall, grievance arbitrability was supported by the courts unless there was a clear contractual or statutory limitation. Some grievance decisions were overturned where the courts found the arbitrator had exceeded his/her authority.

Duty-to-bargain cases showed courts supporting union claims that unilateral management action in mandatory bargaining areas subjected the matter to recall for discussion and negotiation. Scope-of-bargaining decisions were mixed as the courts and boards struggled with the line between managerial policy and working conditions. Some boards and courts elected to spell out the general basis for such distinctions in their localities as an aid to bargainers.

Finally, the continuing role of Proposition 13 and related measures on collective bargaining and dispute settlement is briefly considered.

The overall sense of the year is one of a reach for stability by the parties and the legislatures. Much happened that was interesting but, except at the federal level, little that could be termed new directions for public-sector labor relations. The most ominous cloud, of course, continued to be financial pressures on the parties occasioned by the weak economy.

Statutory and Related Developments

The year 1979 was relatively quiet for new statewide legislation. Only three states passed such legislation, and all three acts were limited to specific groups. The California law covers employees in the state's higher-education system, Connecticut's measure applies to teachers, and Rhode Island's provides for interest arbitration of police disputes. The Connecticut law calls for issue-by-issue interest arbitration, while the Rhode Island law requires conventional arbitration.

Modifications or extensions of existing laws occurred in Arizona, Massachusetts, Montana, and New York. The Arizona law

permits nonlawyers to represent employees at personnel hearings. Massachusetts extended its binding-arbitration law for police and firefighters for a four-year period and continued a joint Labor-Management Committee which oversees these disputes. In addition to the neutral chairman, a neutral vice-chairman was added to the committee. Montana's firefighters gave up the right to strike in exchange for final-offer arbitration of their interest disputes. New York extended its conventional interest arbitration for police and firefighter disputes for a two-year period.

Voters in San Francisco approved a charter amendment providing for final-offer-by-issue interest arbitration of police and firefighter disputes. Housekeeping adjustments were made in a few states. Experience under the Federal Service Labor-Management Relations Statute, which became effective in 1979, is reported in the section on Federal Sector Developments.

Arizona

Effective May 1, 1979, the Arizona legislature enacted a law permitting nonlawyers to represent public employees at personnel hearings. The law was tested immediately when a Maricopa County (Phoenix) hearing board refused an AFSCME official permission to represent an employee in a disciplinary matter. The holding was that county merit-system commission rules require lawyers to represent employees at personnel hearings. The stand was taken on advice of the county attorney whose written legal opinion stated that the practice of law in the state could only be regulated by the judiciary. AFSCME has appealed the matter to the Arizona Supreme Court seeking a ruling on the constitutionality of the law.[1]

California

The Higher Education Employer-Employee Relations Act became effective July 1, 1979, granting faculty and other employees in the state college and university system collective bargaining rights. The law stresses the role of higher-education faculty in governance by reserving to faculty senates matters related to the criteria and standards for appointment, promo-

[1]831 GERR 25 (1979).

tion, retention, and tenure for faculty employees. If the academic senate at the University of California or the trustees of the California State College and University System determine that these matters are no longer under their jurisdiction, they may be included in the scope of bargaining.

The law supersedes existing statutes specifying employee benefits. There are also important sunshine aspects in the law. Provision is made for student representation during the entire bargaining process. Public disclosure is required for all proposals, initial and subsequent, and opportunity must be made available to the public for comment on contract matters.

By a 5–4 margin, San Francisco voters approved a charter amendment providing for final-offer-by-issue interest arbitration for police and firefighter disputes. The law became effective January 1, 1980, and calls for a tripartite board which utilizes majority vote in its determinations. The board selects either the last offer by the parties or may make an award "that is within the parameters of the last offer of settlement by each party on each issue."

Connecticut

The Connecticut General Assembly passed a Teacher Negotiation Act, effective October 1, 1979. The measure provides for issue-by-issue final-offer arbitration of interest disputes. A 15-person arbitration panel is appointed by the governor. Five members are representatives of the interests of boards of education, five are representatives of the interests of bargaining agents, and the remaining five are representatives of the interests of the general public. The latter five are selected from lists supplied by the state board of education. All appointees serve concurrently with the governor, and their appointments require the approval and consent of the general assembly.

If the parties can agree on a single arbitrator, that mode will be utilized. Otherwise, a tripartite board hears the case with the Commissioner of Mediation appointing a third party if the parties are unable to do so. The law requires the hearing to take place on the tenth day following selection of the chairperson. Hearings must be concluded within 20 days, and the report of the board of arbitration is due 15 days after the close of the hearing.

Delaware

The Governor's Council on Labor is codifying administrative rules and regulations governing public-sector labor relations. The project is expected to be completed in 1980. During 1979, legislative hearings were held on a new public-sector collective bargaining law which provides for a limited right to strike.

Massachusetts

The Massachusetts binding-arbitration law for police and firefighter bargaining disputes, scheduled to expire on June 30, 1979, was extended for four years. A joint Labor-Management Committee to oversee these disputes was continued and accorded high marks for its stewardship of police and firefighter disputes. The committee has broad authority to assume jurisdiction over cases and may order the parties to continue bargaining, may mediate, and may specify the form of interest arbitration to be utilized. The committee was additionally granted authority to determine whether an unfair labor practice proceeding before the Massachusetts Labor Relations Commission should prevent arbitration.

Under its original structure, the committee was composed of 13 members, including a chairman. As amended, it now consists of 14 members including a chairman and vice-chairman. As in the past, the other 12 members include three nominees of the Professional Firefighters of Massachusetts, three nominees of police organizations, and six nominees of a local-government advisory committee.

Two statewide units of judicial employees were created by statute. A third such unit was created by the Massachusetts Labor Relations Commission. Judicial employees negotiated for their first collective agreement with the commonwealth in 1979.

Michigan

Last year's report noted that the Michigan electorate approved a constitutional amendment giving state troopers collective bargaining rights culminating in mandatory issue-by-issue interest arbitration. The bill provided no mechanism for implementation. In December 1978, Governor William Milliken vetoed a bill which would have given the Michigan Employment Relations Commission authority to oversee the selection of a

bargaining agent. In April 1979, Governor Milliken rejected a similar bill, arguing that the responsibility for conducting a union election for the troopers was vested in the Civil Service Commission.

The troopers also lost in the courts. In January 1979, the Michigan Court of Appeals denied a suit to allow state troopers to select a bargaining agent without involvement of the Civil Service Commission. In March 1979, the state supreme court refused to hear the troopers' request for an order forcing the state to bargain with them.

Following extended discussion among the concerned parties, agreement was reached to hold a consent election under the auspices of the American Arbitration Association. The election was won by the Michigan State Police Troopers' Association. Bargaining commenced in late 1979 between the association and the Office of the State Employer in the governor's office.

During 1979, two state departments, the Department of Labor and the Department of Management and Budget, released a study which concluded that the state's system of compulsory arbitration for police and firefighter interest disputes promoted collective bargaining and prevented strikes.

Montana

Firefighters in Montana gave up the right to strike in exchange for final-offer arbitration of interest disputes.

The state's public-employment law was also amended during the year to exclude certain confidential and other employees from collective bargaining coverage. Employees of the Board of Personnel Appeals, which administers the law, were also prohibited from being represented by any organization that represents nonboard employees.

New York

"Experimental" compulsory interest arbitration for police and firefighters was extended for two additional years. Governor Hugh Carey, in signing the bill, quoted a New York State Public Employment Relations Board report which found: (1) arbitrated awards were comparable to negotiated settlements, contrary to the belief of some that arbitrated awards were out of line; (2) litigation involving the procedures and circumstances of awards had substantially decreased; and (3) there had been no major

work stoppages, and only two or three stoppages of little consequence, since 1974.

The governor recommended use of final-offer arbitration rather than conventional interest arbitration, but he decided to accept the legislature's bill providing for no change in the method of arbitration to be used in interest disputes. During 1979, Governor Carey also vetoed a bill providing for arbitration of disputes involving state troopers.

A law permitting agency shops to continue to be negotiated in the public sector was also continued for a two-year period.

Ohio

In 1977, Governor James Rhodes vetoed a bill providing comprehensive coverage of public-sector labor relations in the state of Ohio. Since then, a number of bills have been introduced covering various aspects of public-sector labor relations, but none has been enacted. Meanwhile, public employees in Ohio are heavily unionized on a de facto or local-legislation basis. During 1979, the Ohio Supreme Court gave support to de facto bargaining in the teacher area by deciding that a recognition agreement detailing procedures to be followed in collective bargaining was valid and enforceable as long as it did not conflict with state education laws. The decision is discussed further in the Judicial and Related Developments section.

Rhode Island

Rhode Island's public-sector legislation is highly segmented. Prior to 1979, there were five separate pieces of legislation covering state employees, municipal employees, municipal police, firefighters, and teachers. A sixth statute was added when Governor J. Joseph Garrity signed a state-police arbitration act into existence.

The form of arbitration is conventional and tripartite. If the partisan arbitrators can agree on a neutral arbitrator, that individual serves as chairperson of the arbitration board. If no selection can be made, the Chief Justice of the Rhode Island Supreme Court designates the chairperson of the arbitration board, who must be a resident of Rhode Island.

Procedurally, the law is very much like the Connecticut statute for teachers, reported earlier, in that the board must be convened within ten days after appointment of the chairperson

(with at least seven days' notice to the partisan arbitrators), the proceedings must be concluded within 20 days, and the decision of the board of arbitration must be delivered within ten days after the hearings are closed.

Tennessee

A series of opinions by the state attorney-general sought to clarify the Tennessee Professional Negotiations Act for teachers which became effective in 1978. The attorney-general held that assistant principals are covered by the law; only principals devoting a majority of their time to professional personnel management or fiscal affairs are excluded from negotiating units; a school board's negotiators must be supervisors or board members; bargaining and *strategy sessions* [emphasis supplied] must be open to the public; and the negotiation of closed-shop contracts is illegal. The attorney-general also ruled that a board of education may suspend negotiations with a recognized organization if a decertification petition has been presented (at least one year following an election) to the board of education and the board has a good-faith belief that the organization no longer represents a majority of the employees.[2]

A new Tennessee law requires sunshine bargaining between localities and unions representing public employees.

Federal Sector Developments[3]

Federal Labor Relations Authority

Administration. The Authority began operations at the beginning of 1979 with a backlog of 995 cases carried over from the old Executive Order program. Of those 995, 778 were pending with the Authority's nine regional offices, 118 with the Authority's national office, and 99 with the Authority's Office of Administrative Law Judges. In addition, the Impasses Panel carried forward 27 cases filed with it under the Executive Order.

On top of that carryover caseload, 3985 new cases were filed in the regional offices during 1979, of which 3367 were unfair

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[2]826 GERR 12 (1979).

[3]Provided to the Committee on Public Employment Disputes Settlement by Ronald W. Haughton, Chairman, Federal Labor Relations Authority, and Howard W. Solomon, Executive Director, Federal Service Impasses Panel.

labor practice charges and 618 were representation petitions. At the national-office level, 584 new cases were filed with or otherwise reached the Authority for final disposition. The Authority's Office of Administrative Law Judges received 265 cases, and the Federal Service Impasses Panel received 129 requests for consideration. For all constituent parts of the Authority, this caseload substantially exceeded estimates and projections developed in 1978, based upon activity under the Executive Order.

During the year, the General Counsel closed or otherwise disposed of 2982 cases at the regional-office level. The Authority closed 306 other cases at the national-office level. In addition, the Authority's Office of Administrative Law Judges disposed of 210 cases by way of settlement or recommended decision and order. The Federal Service Impasses Panel closed 100 of the 156 cases brought before it in 1979.

Arbitration and Exceptions to Arbitrators' Awards. Some of the most significant changes ushered in by the Federal Service Labor-Management Relations statute were in the area of negotiated grievance procedures and grievance arbitration. Under the statute, as under the Executive Order, negotiated grievance procedures must be included in all agreements negotiated in the federal sector. However, unlike under the order, these grievance procedures are required to provide for binding arbitration as the final step of the procedure. In addition, the statute leaves to the parties the matter of devising a method for resolving questions of grievability and arbitrability—issues which, under the order, generally were submitted to an Assistant Secretary of Labor for resolution.

The statute also greatly expanded the range of subjects covered by negotiated grievance procedures including, for the first time in the federal sector, matters involving major discipline of employees. Under the statute, grievance procedures will automatically extend to all matters covered by the definition of "grievance" in the statute unless the parties specifically exclude any of those matters in their agreement. Thus, parties in the federal sector no longer negotiate matters *into* coverage under their grievance procedure; they negotiate them *out.* And "grievance" is broadly defined as meaning any complaint:

> "(a) by any employee concerning any matter relating to the employment of the employee;
> "(b) by any labor organization concerning any matter relating to the employment of any employee; or

"(c) by any employee, labor organization, or agency concerning—
"(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
"(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

The only matters specifically excluded by the statute from coverage under the grievance procedure are:

"(1) any grievance concerning prohibited political activities;
"(2) any grievance concerning retirement, life insurance or health insurance;
"(3) any suspension or removal for national security reasons;
"(4) any grievance concerning examination, certification, or appointment, or
"(5) any grievance concerning the classification of any position which does not result in the reduction in grade or pay of an employee."

Thus, with the broad definition of grievance and the few matters that are mandatorily excluded, grievance procedures can cover a wide variety of disputes which have been, until now, resolved exclusively under statutory appeal procedures. Moreover, in many of these cases, where the matters have not been excluded by the parties, the negotiated grievance procedure will be the *sole* procedure available to employees in exclusive units for appealing them. In cases where they have been excluded, the statutory appeal procedures will be available, as they will be for employees not covered by collective bargaining agreements. Generally speaking, this will mean appeal to the Merit Systems Protection Board (MSPB).

In cases involving removals or demotions for unacceptable performance, or adverse actions (removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs of 30 days or less), an employee will have an option of raising the matter under the negotiated grievance procedure, if the procedure covers it, or of appealing the matter to the Merit Systems Protection Board. If the employee chooses to use the negotiated procedure and the matter is ultimately submitted to arbitration, the statute provides that an arbitrator must apply the same statutorily prescribed standards in deciding the case as would have been applied had the matter been appealed to the MSPB. And those standards, as established by the act, are: (1) the decision of the agency shall be sustained in the case of an action based on unacceptable performance only if the decision

is supported by substantial evidence, and (2) in any other case only if the decision is supported by a preponderance of the evidence.

Another area in which employees will have an option of using either the negotiated procedure (if the procedure covers it) or a statutory procedure is in discrimination complaints. And in those cases, the statute provides that opting to use the negotiated grievance procedure in no manner prejudices the right of the employee to request either the MSPB or the Equal Employment Opportunity Commission, as appropriate, to review the final decision in the case.

The statute also provides that either party to arbitration (only the union or the agency may invoke arbitration) may file an exception to an arbitrator's award with the Federal Labor Relations Authority, other than an award relating to a removal or demotion for performance reasons, or an adverse action. Awards in these areas are appealable by the employee directly to court. When an award is appealed to the Authority, the statute provides that if, upon review, the Authority finds the award deficient because it is contrary to any law, rule, or regulation, or deficient on other grounds similar to those applied by federal courts in private-sector labor-management relations cases, then the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

In appeals decided thus far under the statute, the Authority, in addition to recognizing that it will sustain a challenge to an arbitration award if it finds the award contrary to law or regulation, has specifically recognized two grounds "similar to those applied by Federal courts in private sector labor-management relations" upon which it will sustain a challenge to an award. These are: (1) the award does not draw its essence from the collective bargaining agreement, and (2) the award is based on a nonfact. However, while the Authority has acknowledged these as grounds applicable in the federal sector, it has not yet overturned an award based on these grounds. The Authority has also made it clear that an arbitrator's award in the federal sector is not open to review on the merits, and that it will not review an arbitrator's reasoning and conclusions, findings of fact, or interpretation of the collective bargaining agreement.

Federal Service Impasses Panel

The significant developments involving the Panel during its first year under the Federal Service Labor-Management Relations statute reflect both a continuation of earlier trends in the resolution of disputes and the new language of the statute. These developments were a very high percentage of voluntary settlements, experimentation with different dispute-resolution techniques, and a clarification of how compliance with orders of the Panel is to be achieved. These will be discussed in turn.

Voluntary Settlements. Firmly believing that informal settlements provide the best kind of dispute resolutions, the Panel has been encouraging voluntarism in the resolution of impasses ever since its inception in 1970. This has been reflected in figures which show that only a small percentage of disputes required the Panel's formal intervention on the substantive issues. Last year was no exception. Sixteen percent of the 100 cases closed by the Panel required either a formal recommendation for settlement or a decision and order. Eliminating those impasses in which recommendations led to a settlement, just 13 percent of these closed cases necessitated final action by the Panel in the form of a binding decision. This represents a small fraction of the roughly 800 sets of negotiations which took place in the federal sector during this period.

Different Dispute-Resolution Techniques. The Panel continued to experiment with different dispute-resolution techniques. This trend began in 1978, but intensified last year under the very broad language of the statute. Indeed, unpredictability and flexibility best characterize the procedural actions taken by the Panel. Some examples follow:

a. Decision and Order After Rejection of Postfactfinding Recommendations. In *General Services Administration,* Panel Release No. 124, the Panel issued recommendations, based on the factfinder's report, calling for the employer to offer office space to the union. When the dispute remained unresolved, a final-action hearing before a subpanel of three Panel members was held. The union, the American Federation of Government Employees (AFGE), AFL-CIO, and the employer remained at impasse over suitable office space following the subpanel hearing. The Panel then issued a *decision and order* directing the employer to identify three alternative office sites for the union's use at no cost.

b. Decisions Based upon Written Submissions. The parties requested the Panel to issue a final and binding decision based upon their written submission in *Kansas Army National Guard,* Panel Release No. 112. The technicians, members of the National Association of Government Employees (NAGE), were directed to continue wearing the military uniform, since they had had insufficient time to assess the effect of their recent agreement to continue wearing the uniform. With respect to another issue, however, the Panel decided that there would be no fee charged to the union for the deduction of dues.

A very different use of written submission was evident in *California National Guard,* Panel Release No. 121. The Panel issued an *order to show cause* why previous recommendations concerning the wearing of the military uniform should not apply. The parties, California National Guard and NAGE, were to indicate what material facts, if any, were significantly different from those contained in earlier Panel cases. After reviewing the written submissions, the Panel concluded that no cause had been shown and ordered that technicians should have the option of wearing either the military uniform or standard civilian attire.

In *Farmers Home Administration,* Panel Release No. 129, the Panel used a final-offer selection procedure to make a binding decision. The union, AFGE Local 3354, proposed a 15-minute paid rest period during each four-hour segment of regular duty or overtime, with an additional rest period at the end of the normal workday for employees who were to work overtime immediately thereafter. The exact times for the rest periods were to be negotiated separately. The Panel selected the employer's proposal of 13-minute staggered breaks with scheduling to be at the discretion of the employer.

c. Supplementary Decision and Order. The FMCS commissioner requested a clarification of certain language in a Panel decision involving the *Oregon Army/Air National Guard,* Panel Release No. 121. The Panel issued a letter setting forth its intent with respect to the language and gave the parties a deadline by which the issue was to be resolved. When no settlement was reached, the Panel issued a supplementary *decision and order,* clarifying its previous *decision and order* to the effect that technicians could wear either the military uniform or standard civilian attire on a daily basis.

d. Panel Recommendations Following Factfinding. The Panel issued a *report and recommendation* in *Department of Defense, Depend-*

ents Schools, Panel Release No. 127, concerning appropriate tours of duty. The union, the Overseas Education Association, represented some 6500 teachers, guidance counselors, and training instructors in a worldwide, consolidated bargaining unit, although the dispute was limited to those assigned to schools in the Philippines. It proposed a one-year tour of duty; the employer sought to continue the practice of two-year tours. The Panel concluded that the two-year tour of duty was reasonable in view of the compensation, the geographic location, and available travel benefits as compared with other federal employees in the same area. Both parties accepted the recommendation.

e. Request for Approval of Arbitration Procedure. The statute places a greater emphasis on binding arbitration by persons outside the Panel; however, Panel approval is still required. There were three requests for authorization of outside arbitration during 1979, all of which were denied.

The parties in *Federal Election Commission,* Panel Release No. 126, jointly requested approval to use an arbitrator in lieu of the Panel in disputes arising from midcontract bargaining, but the request was denied because it failed to meet the requirements set forth in the Panel's interim regulations. Those regulations provided, among other things, that the parties submit a list of the issues at impasse as well as the issues to be heard by the arbitrator.

The two other requests involved the Department of the Interior, Bureau of Reclamation. The Panel denied the request in *Lower Colorado Region,* Panel Release No. 128, for failure to meet the Panel regulations as in *Federal Elections Commission, supra.* In the other case, *Yuma Projects Office,* Panel Release No. 128, the Panel determined that its approval was not required since the request involved the use of advisory arbitration.

Compliance with Panel Decisions. Under Sections 7116(a)(6) and (b)(6) of the statute, it is an unfair labor practice for either party to "fail or refuse to cooperate in impasse procedures and impasse decisions. . . ." In *Puerto Rico Air National Guard,* Panel Release Nos. 107 and 110, the Panel issued a *decision and order* to resolve an impasse over the wearing of the military uniform by National Guard technicians. It subsequently denied the employer's petition for reconsideration and other relief, but the employer then petitioned the Authority for a major policy decision in this case (which petition was later withdrawn). In re-

sponse to the union's request that the Panel enforce its *decision and order,* the Panel noted that no explicit provision of the statute gives the Panel the right to enforce its decisions through court action. Rather, the Panel said, failure to comply with a final action of the Panel could be remedied through the unfair practice provisions of the statute.

Postal Service

In September 1978, Arbitrator James Healy issued an interest award in the dispute between the U.S. Postal Service and national postal-service unions. As part of his decision, he directed the parties to negotiate on the procedures to implement job-security and layoff provisions of his award. The parties were unable to agree during the stipulated 90-day period, and the matter was resolved by a supplemental award by Arbitrator Healy in February 1979.

One of the more unusual cases in a structural sense involved the Northeastern Region of the Postal Service and the American Postal Workers Union. A variety of questions involving a series of pending discharge cases for alleged strike activity were decided en banc by the arbitration panel for the region. Thus, arbitrators Daniel Kornblum, Edward Levin, Herbert L. Marx, Jr., Milton Rubin, Peter Seitz, Allan Weisenfeld, and Arnold M. Zack all were involved in the decision. The number of arbitrators signing the opinion may constitute a record.

Judicial and Related Developments

Constitutionality of Collective Bargaining Laws

In two states, Kansas and Oregon, the constitutionality of collective bargaining laws was tested and upheld. Three other cases involving constitutionality were in process during 1979, but final decisions did not appear in the calendar year. These cases arose in California, Connecticut, and New York.

The role of the Secretary of Human Resources was challenged by the school board in Bourbon County, Kansas. Under the Teachers' Collective Negotiations Act, the secretary is authorized to take part in and mediate negotiations. The school board argued that this role interfered with the "general supervision of public schools" assigned to the State Board of Education.

The state supreme court found no interference and no viola-

tion of the constitution. The court said: "The functions of the Secretary of Human Resources under the act are limited and confined to professional negotiations, an area not considered by the court to be within the basic mission of the public schools of this state."[4]

The Oregon case involved the compulsory-arbitration provisions of the state's public-employment statutes. A bargaining dispute between the City of Medford and its firefighters went to arbitration, but the city would not sign an agreement as required by law. The city claimed that the arbitration process violates the home-rule provisions of the Oregon constitution and delegates legislative authority without adequate standards or safeguards.

The court of appeals followed a previous state supreme court case and found that "Requiring arbitration in lieu of strikes is a substantive state policy which the legislature clearly intended to prevail over conflicting local preferences."[5] On legislative authority, the court pointed to eight criteria for arbitral determination, with judicial review as an additional safeguard.

In California, the state's attorney-general filed a suit challenging the constitutionality of the State Employer-Employee Relations Act, passed in 1977 to cover approximately 130,000 state civil-service employees.[6] The act does not affect teachers, higher-education employees, or local government workers, all of whom are under separate bargaining systems. The suit charged that the law removed from the State Personnel Board its constitutional power to determine salaries and working conditions for state employees. In 1980, the Third District Court of Appeal ruled in favor of the attorney-general. A final report on the case is likely to include an appeal to the California Supreme Court.

The Connecticut story continues from last year's report of a 1978 lower-court ruling against the compulsory final-offer arbitration amendment to the Municipal Employee Relations Act. The case was appealed to the state supreme court, but a decision was not forthcoming in 1979.

New York's situation involved appeals of the constitutionality of amendments to the state's Financial Emergency Act for the City of New York. The Patrolmen's Benevolent Association

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[4]*National Education Association—Fort Scott* v. *Board of Education, Unified School Dist. No. 234, Bourbon County*, 225 Kan. 607, 592 P.2d 463, 101 LRRM 2827 (1979).

[5]*Medford Fire Fighters Ass'n Local 1431* v. *City of Medford*, 595 P.2d 1268, 102 LRRM 2633 (1979).

[6]*See Pacific Legal Foundation* v. *Brown*, 103 LRRM 3131 (1980).

challenged the provision that impasse panels must accord substantial weight to the city's ability to pay when considering demands for increases in wages or fringe benefits. A New York supreme court upheld the constitutionality of the amendments in 1978. The appellate division affirmed the lower-court ruling in 1979.[7] It can be noted here that a final motion to appeal to the state's highest court, the New York Court of Appeals, was denied in 1980.

Interest Arbitration

Legislative Funding. The right of legislative bodies to countermand "final and binding" arbitration decisions was tested in two states, and the arbitration process was left the loser in each case. The issue in Minnesota went to the state supreme court, while in Hawaii it remained with the Public Employment Relations Board.

Under their state public-employment law, the Minnesota Education Association and the Minnesota Community College System submitted a salary impasse to binding arbitration in 1977. The parties then signed a contract incorporating the award. The legislature subsequently funded less than the contractual increases, based on increases granted to state university faculty. When the education association filed suit at the district-court level, the state argued that both the contract and the law require wage agreements to be approved by the legislature; therefore, the union had waived its right to judicial appeal. The lower court disagreed, accepting the union's right to bring suit and the validity of an unfair labor practice charge in not complying with the arbitration award.[8] The court distinguished between voluntary bilateral agreements and arbitrated settlements, and ordered $1,500,000 in back pay.

On appeal, the Minnesota Supreme Court reversed the district court, considering the final contract, not the arbitration award alone, as the agreement submitted for legislative review.[9] Under this interpretation, the legislature had a statutory right to modify the arbitration award.

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[7]*Samuel DeMilia, President of the PBA* v. *State of New York,* 421 N.Y.S.2d 70 (1st Dep. 1979).

[8]*Minnesota Education Association* v. *State of Minnesota,* 804 GERR 17, 101 LRRM 3068 (1979).

[9]*Minnesota Education Association and Minnesota Community College Faculty Association* v. *State of Minnesota,* 282 N.W.2d 915, 103 LRRM 2195 (1979).

The Hawaii issue was left without judicial review as the result of a negotiated settlement. Under the state's comprehensive bargaining statute, final-offer arbitration is provided for firefighters. A panel in 1979 awarded a cost-of-living adjustment along with specified wage increases over two years. Governor George Ariyoshi took issue with the COLA provision and did not take the award to the legislature as required for funding. Consequently, the legislature adjourned in April without appropriating money to fund the "binding" award.

The firefighters voted to strike as of July 1, 1979, and also filed unfair labor practice charges with the Hawaii Public Employment Relations Board. On June 15 the board, in a split decision, dismissed the charges, finding that the "final and binding" arbitration provisions really meant "advisory arbitration." Narrowly averting a strike, but leaving the statutory issue of finality unsettled, the parties reached a settlement with more money and no COLA in the second year.

Substantive and Other Issues. Two cases in Pennsylvania supported the decisions of arbitrators in settling interest disputes, while procedural limits were imposed in two cases before the Iowa Supreme Court. In New Jersey, the state's Cap Law on budget increases was applied to interest arbitration awards.

An interesting additional note in Iowa, under its state law requiring binding arbitration for all public-sector negotiations, is the award handed down in a dispute between the United Faculty at the University of North Iowa at Cedar Rapids and the Iowa State Board of Regents. It represented, according to the university, "the first time in the United States that a collective bargaining agreement at a public university has resulted from binding interest arbitration imposed by the state."[10]

One case in Pennsylvania brought the question of a two-year award to the commonwealth court.[11] Employees of the Media Police Department challenged the award, arguing denial of their rights under Act 111, which states, "Collective bargaining shall begin at least six months before the start of the fiscal year. . . ." They also argued that the borough council could not bind its successors. Affirming a common pleas court decision, the commonwealth court turned down the appeal, citing labor stability rather than denial of the right to bargain as the result of

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[10] 805 GERR 22 (1979).

[11] *Borough of Media* v. *Media Police Dept.*, 397 A.2d 844, 101 LRRM 2137 (1979).

two-year agreements from negotiations or arbitration. The court considered a two-year term reasonable and legitimate since it was not "indefinite or long extended."

The second case in Pennsylvania arose from an arbitration award resolving a negotiations impasse between the City of Harrisburg and AFSCME-represented city workers. One issue was a residence requirement, and the arbitrator ruled that city residence was not required.

The city council filed a petition for review with the county court of common pleas, which found that (1) employee relations is in the domain of the mayor and not the city council under the "Mayor-Council Plan A" form of government, and (2) the Public Employment Relations Act takes precedence over a city residence ordinance, since residency is a mandatory subject of collective bargaining.[12]

Procedural questions came to the Iowa Supreme Court in 1979 from an impasse between the Maquoketa Valley Community School District and the Maquoketa Valley Education Association. Reversing a district-court ruling, the high court remanded the case to the parties, permitting new final offers and different arbitrators.[13] The primary errors were: (1) A final offer on salary had to be selected in toto as an "impasse item" under the law. This decision conforms with *West Des Moines Education Association* v. *PERB* (1978), which interpreted "impasse item" to mean "subject category." (2) The panel report exceeded a 15-day limitation deemed essential to the law in meeting budget-submission dates.

The ruling on meeting budget-submission dates followed another Iowa Supreme Court case that called for completion of impasse procedures by March 15 since cities, counties, and school districts have a state-imposed budget deadline.[14]

The Public Employment Relations Board had permitted binding arbitration after March 15 in a 1977 impasse, but the court found that legislative intent required adherence to the time limits in order to assure "effective and orderly operations of government."

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[12]*City of Harrisburg* v. *American Federation of State, County, and Municipal Employees, AFL-CIO, Local 521*, 836 GERR 11 (1979).

[13]*Maquoketa Valley Community School Dist.* v. *Maquoketa Valley Education Association*, 279 N.W.2d 510, 102 LRRM 2056 (1979).

[14]*City of Des Moines* v. *Public Employment Relations Board and Des Moines Association of Professional Firefighters*, 275 N.W.2d 753, 101 LRRM 2026 (1979).

New Jersey passed a Local Government Cap Law in 1977, limiting annual budget increases to 5 percent. Unions in Atlantic City and Irvington claimed that allowable exceptions should include compulsory arbitration awards, because the arbitration provisions of the Employer-Employee Relations Act were passed after the Cap Law. The state supreme court said no, acknowledging that cities would have to cut expenditures in other areas to fund mandatory awards.[15]

The court reasoned that if the parties reached a settlement without arbitration, the costs would be included in the 5-percent limitation. They should not be able to avoid the law by going to arbitration. The court also stated that the legislature could have excluded the awards if it so intended. What it did was include the Cap Law constraints as a criterion to be considered by the arbitrator.

Grievance Arbitration

Arbitrability. Arbitrability issues arising in education settings were subject to judicial review in eight states during 1979. Overall, more decisions supported than denied arbitral determination, although some of them occurred at lower-court levels. Noneducation cases on grievance arbitrability are reported from four states: California, Illinois, Michigan, and New York.

In the first of the education cases, Chicago teachers were awarded $2.8 million in back pay by the Cook County district court as a result of an early school closing in June 1977.[16] The Chicago Teachers Union grieved the loss of a day's pay, the Board of Education claimed that layoffs were a nonarbitrable matter of board policy, and the court sustained the board's position. The court distinguished between grievances of individual employees under a contract and matters of enforcing an agreement on compensation and duration of employment. The court itself then went on to decide the substantive issue and found that the board used "accounting legerdemain" to avoid its agreement on a full, 39-week school year.

A certificated employee's right to transfer from a position of librarian to that of elementary teacher was upheld in arbitration

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[15]*City of Atlantic City, PBA Local 24, IAFF Local 198, and Teamsters Local 331* v. *John F. Laezza,* 403 A.2d 465, 102 LRRM 2409 (1979).

[16]*Board of Education, City of Chicago* v. *Chicago Teachers Union, AFT Local 1,* 808 GERR 13, 101 LRRM 3045 (1979).

and appealed for enforcement to the Maryland Court of Special Appeals. The court ordered compliance, finding that by taking no action the board of education had exceeded time limits for vacating the award under the Maryland Uniform Arbitration Act.[17] The opinion stated, "We think they have not only slept on their rights but have made the bed in which they slept."

The Massachusetts Court of Appeals sustained a superior court's stay of arbitration in a grievance filed by the Burlington Education Association after a strike at the start of the 1972–1973 school year.[18] The school committee docked the teachers' pay for strike days, although the agreement contained an annual salary and a fixed number of school days. Two aspects of the case were judged nonarbitrable—payment for strike days, illegal under the state law; and rescheduling the number of school days, a matter of educational policy. One aspect could be arbitrated—compensation for days tacked onto the original school calendar.

In Minnesota, the state supreme court found that neither the Education Association contract nor the individual teacher's contract made nonrenewal of a coaching assignment a grievable condition of employment.[19] Certified as a wrestling coach and having coached winning teams for over 20 years, the teacher was reprimanded for using "unprovoked discipline" on a team member and subsequently was not renewed. Under the contract, grievances are disputes concerning "terms and conditions of employment," but coaching assignments must be expressly identified as part of a teacher's continuing contract. In this case, the assignment was not so identified, and the school district was not required to go to arbitration.

The New Jersey Supreme Court expanded on bargaining issues established narrowly as mandatory or nonnegotiable in the 1978 *Richfield Park* case.[20] The agreement between the Bernards Township Board of Education and the Bernards Township Education Association provides arbitration with the arbitrator's "authority to advise" on withholding a teacher's salary increment

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[17]*Board of Education, Charles County* v. *Education Association of Charles County,* 398 A.2d 456, 100 LRRM 3112 (1979).

[18]*School Committee of Burlington* v. *Burlington Educators Ass'n,* 385 N.E.2d 1014, 101 LRRM 2478 (1979).

[19]*Albert Lea Education Ass'n* v. *Independent School Dist. No. 241,* 286 N.W.2d 1, 103 LRRM 2378 (1979).

[20]78 N.J. 144, 393 A.2d 278, 95 LRRM 3285 (1978).

for "inefficiency or other just cause." The board claimed that the issue was a management right under the state education law. The court, however, distinguished between advisory and binding arbitration, finding in this case that the arbitrator's decision would not replace review powers of the Commissioner of Education.[21]

Similarly, the New York Court of Appeals, the state's highest court, expanded on a landmark case, the *Liverpool Central School District* case.[22] In that case, the court rejected the private-sector presumption of arbitrability and approved public-sector arbitration only if (1) it is not prohibited by statute, decisional law, or public policy; and (2) the particular dispute clearly comes within the arbitration clause of the contract. The court's decisions in 1979 charted an erratic course in school district-teacher association cases:

In *Mineola Union Free School District,*[23] where the agreement provided for authorization of dues deduction and the arbitration clause defined a grievance to include application of any provision of the agreement, the court found that a dispute over the obligation to deduct dues owed by terminated employees was arbitrable.

In *South Colonie Central School District,*[24] charges were filed against a teacher under a provision of the Education Law which provided a statutory method of review. The agreement contained a broad arbitration clause covering disputes "arising from events and conditions of employment as well as interpretation of the Agreement . . . ," but which excluded from arbitration any dispute for which a method of review is prescribed by law. The court stated that it must stay arbitration unless there is "an express, direct and unequivocal agreement to arbitrate the dispute. . . ." Since the grievance filed in this case fell within the ambit of both the inclusionary and the exclusionary provisions of the arbitration clause, there was no express and unequivocal agreement to arbitrate.

In *Wyandanch Union Free School District,*[25] the court found that although a substantive clause in the contract might be ambigu-

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[21] *Board of Education of Bernards Twp., Somerset County* v. *Bernards Twp. Education Ass'n,* 79 N.J. 311, 399 A.2d 579, 101 LRRM 2251 (1979).
[22] 42 N.Y.2d 509, 399, N.Y.S.2d 189, 96 LRRM 2779 (1977).
[23] 46 N.Y.2d 568, 101 LRRM 2220 (1979).
[24] 46 N.Y.2d 521 (1979).
[25] 48 N.Y.2d 669 (1979).

ous, a grievance relating to that clause was arbitrable under a provision defining "grievance" to include all controversies "affecting the meaning, interpretation or application" of the agreement.

In *Norwood-Norfolk Center School District,*[26] the arbitrator's award was upheld where the employer's argument—that dismissal of a teacher was required by statute because of her failure to obtain permanent certification under the Education Law—was first raised in the arbitration proceeding. The court said, "Unless law or strong public policy prohibits its submission, a party that wishes to challenge the arbitrability of any issue must do so before the process gets under way."

The North Dakota Supreme Court upheld arbitrability in a Grand Forks case emanating from the school district's instituting a one-hour hall-monitoring program to reduce vandalism.[27] A contract had been signed with the teachers, providing two preparation periods a day. The matter of changed working conditions was negotiable, but after the contract was signed the grievance procedure was the proper avenue for appeal.

Two cases on arbitrability arose in California outside the education setting. In the first, the City of Berkeley argued that its charter grants the city manager exclusive power to discipline and remove employees. The state's supreme court ruled that such authority does not preclude a discharged employee from seeking reinstatement through arbitration,[28] thus affirming an award that modified the discharge of a police inspector. The court found no bar in the charter to an agreement on binding arbitration of personnel matters.

The second California case involved time limits in the grievance procedure of Napa County and its employees. The county claimed that the union waived its right to arbitration because a request was not timely. The court of appeal reversed the trial court, indicating that the obligation to follow contractual time units was a matter for the arbitrator to weigh.[29]

Not leaving the determination of an arbitrable grievance to

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[26]____N.Y.2d____, decided December 29, 1979.

[27]*Grand Forks Education Ass'n* v. *Grand Forks Public School Dist No. 1,* 285 N.W.2d 578, 103 LRRM 2945 (1979).

[28]*John L. Taylor* v. *Charles Crane* and *Berkeley Police Ass'n* v. *City of Berkeley,* 595 P.2d 129, 101 LRRM 3060 (1979).

[29]*Napa Ass'n of Public Employees* v. *Napa County,* 98 C.A.3d 263, 159 Cal. Rep. 522, 103 LRRM 2499 (1979).

the arbitrator, the Appellate Court of Illinois, Second Judicial District, found that the issue of additional pay for firefighters performing the duties of acting officers was outside the agreement.[30] The agreement provided for arbitration of grievances involving "the interpretation or application of the express provisions of this Agreement. . . ." Therefore, the dispute was found a proper subject for a grievance but not for arbitration.

Deputy sheriffs and police officers received opposite rulings on arbitrability in two Michigan cases. One arose from a 1972 grievance filed by a deputy sheriff not reappointed in St. Clair County after 15 years of service. The trial court found appointment and termination of deputies a legal prerogative of county sheriffs. The court of appeals found arbitration mandatory under the Police and Fire Department Compulsory Arbitration Act. Finally, the supreme court majority found that the Compulsory Arbitration Act applies to negotiations impasses and not to grievance disputes. It does not, then, supersede the 1846 law on appointing deputies.

Police officers in Clinton Township negotiated a contract adopting civil service hearings plus the option of binding arbitration. When an employee's dismissal was grieved, the township claimed that the arbitration provisions conflicted with the civil-service law. The Michigan court of appeals, however, deemed civil-service hearings "permissive rather than mandatory" and the contract a supplement to the law.[31]

The New York City Board of Collective Bargaining contributed two rulings on grievance arbitrability. In *Matter of the City of New York and Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO,* Decision No. B-10-79, the board found that the union's grievances alleging violation of two contract clauses were not arbitrable. One grievance dealt with fire department policy on assignment and transfer of uniformed personnel. The other concerned the change of annual leave to sick leave. Resolution of the cases depended on interpretation of the phrase, "The Department's decision is [shall be] final." Despite the policy of favoring arbitration of grievances, the clear and unambiguous wording of the clauses made the fire department's decisions final on the relevant subjects.

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[30]*Croom* v. *City of DeKalb,* 389 N.E.2d 647, 102 LRRM 2947 (1979).

[31]*Township of Clinton* v. *William Contrera and Police Officers Ass'n,* 284 N.W. 2d 787, 103 LRRM 2464 (1979).

In its Decision No. B-8-79, *Matter of the City of New York and Patrolmen's Benevolent Association, Inc.,* the board denied the union's request for arbitration because relief was first sought in the Supreme Court, New York County. As a condition to the right to invoke arbitration under New York City public-employee law, both the employee organization and the grievant are required to sign a waiver of the right to bring the dispute to another forum except for enforcement of an arbitrator's award. Although the union maintained that the proceeding in this case was only to gain injunctive relief prior to arbitration, the city's answer to the union's complaint addressed the substantive issues. The board said that the court found no merit in the underlying complaint and it had no power of review over decisions of a New York State supreme court.

Substantive and Other Issues. A range of substantive issues arose in grievance arbitration cases that brought arbitrators' awards before the courts. Generally, the courts had to decide whether the arbitrators exceeded their authority. Unlike the arbitrability cases reported above, relatively few substantive cases are reported for 1979.

In *Cupertino Education Association* v. *Cupertino Union School District,*[32] the California Court of Appeals upheld an award calling for fringe-benefit contributions for October 1976, when the teachers were on strike. In the employer's view, the "payment would constitute a gift of public funds." The arbitrator found the employer's action punitive, contrary to a reprisal clause in the contract. The court pointed out the lack of defects in the arbitration process and also considered the substantive claim, finding adequate consideration for the transfer of money in the agreement reached by the parties.

An arbitrator was judged to have exceeded his authority in a Massachusetts case heard by the appeals court.[33] A Boston police officer served a year's suspension and a year's probation after threatening civilians with his service revolver when off duty and intoxicated. The employer requested a psychiatric evaluation before reissuing the gun, backed by state law on the police commissioner's authority to control weapons. The officer grieved. The arbitrator found the denial of the revolver punitive after the employee's return to duty and ordered return of the

[32]*Cupertino Education Ass'n* v. *Cupertino Union School Dist.,* 817 GERR 9 (1979).
[33]*City of Boston* v. *Boston Police Patrolmen's Ass'n,* 389 N.E.2d 418 (1979).

gun. The court found the public safety "policy consideration concerning the issuance of a weapon here far outweighs any other concern," and, further, the psychiatric evaluation was a proper condition for reissuance.

Public safety was an issue, too, in the *Grand Rapids Employees Benefit Association* case.[34] A school-bus driver was dropped under Michigan Board of Education regulations because she accumulated more than seven points for driving violations. She was offered alternative employment at less pay until her driving record improved. The employee association argued that the board of education lacked authority to issue the seven-point rule. The arbitrator agreed that the rule was not authorized by statute. But the circuit court found that the arbitrator was not authorized to decide on the validity of the regulation. Substantively, the court found the seven-point standard rational, based on empirical data, and within the authority of the board to insure the safety of the school-busing program.

Money remedies in arbitration cases are frequently questioned as to amount or propriety. Two cases, in New York and Pennsylvania, reached the courts on such questions.

In a *Niagara-Wheatfield School District* case, the New York Court of Appeals upheld an arbitration award of $1500 to a teacher who had been improperly bypassed for a guidance-counselor position. The arbitrator did not specifically detail the manner of arriving at the amount of damages. The court stated:

> "Merely because an arbitrator's award is not arrived at by precise mathematical computations does not make it punitive. Indeed, much of the laudatory value of arbitration lies in the arbitrator's power to construct a remedy best suited to the situation without regard to the restrictions or traditional relief in a court of law. . . . Merely because the computation of damages may be so speculative as to be insupportable if awarded by a court does not make the award infirm, for, as we have firmly stated, arbitrators are not bound by rules of substantive law, or, indeed, rules of evidence. . . .
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> "Having chosen arbitration as their forum, the parties must recognize that an award may differ from that expected in a court of law without being subject to attack for that reason alone. . . ."[35]

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[34]*Grand Rapids School Employees Benefit Ass'n* v. *Board of Education, City of Grand Rapids, and State Board of Education,* 803 GERR 15 (1979).

[35]*Board of Education, Central School Dist. No. 1, Towns of Niagara, Wheatfield, Lewiston, and Cambria* v. *Niagara-Wheatfield Teachers Ass'n.*, 46 N.Y.2d 533, 415 N.Y.S.2d 790, 101 LRRM 2208 (1979).

The court also allowed interest on the damages from the date of the award.

A matter of interest computed on state paychecks delayed by a budget impasse in the state legislature came before the Pennsylvania Commonwealth Court.[36] An arbitrator had directed 6-percent interest on about $19,000 withheld from 66,000 employees for three weeks in 1977. The state's agreements with AFSCME call for salary payments every other week, but the state argued that the constitution prohibited salary payments without legislative authorization. The court, like the arbitrator, found a contract violation and found no prohibition against the interest as a remedy.

Duty and Scope of Bargaining

The duty to bargain and the scope of bargaining are interrelated. The duty to bargain is a broad concept referring to any procedural or substantive aspect of the parties' legal obligation to bargain. The scope of bargaining is substantive, dealing with the actual topics on which the parties may reach an agreement.

Disputes over the duty and scope of bargaining can reach adjudicatory bodies either because management takes a unilateral action or because there is a refusal to bargain over a given topic during negotiations. The cases below include 1979 disputes that arose from both circumstances.

In the first case, the Indiana First District Court of Appeals supported the Indiana Education Employment Relations Board and a trial court to the effect that the Evansville-Vanderburgh School Corporation had improperly instituted a teacher-evaluation plan without discussion with the Evansville Teachers Association. The appeals court concluded that an unfair practice had been committed because the evaluation plan fell within the required bargaining area of working conditions. Since the evaluation plan might result in recommendations for transfer or dismissal, the appeals court ruled that the association was entitled to an opportunity for input prior to establishment of the plan.[37]

The Massachusetts Supreme Judicial Court supported an ar-

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[36]*Commonwealth of Pennsylvania* v. *Council 13, AFSCME, AFL-CIO,* 401 A.2d 1248, 102 LRRM 2356 (1979).

[37]*Evansville-Vanderburgh School Corp.* v. *Roberts,* 392 N.E.2d 810, 102 LRRM 2872 (1979).

bitrator's award which stated that the Boston School Committee had an obligation to consult and negotiate with the Boston Teachers Union before implementation of final examinations for elementary-school students. The agreement between the parties included a clause that required the committee to consult and negotiate over any change involving a proper subject for collective bargaining. The arbitrator found the final examinations to be a proper subject of collective bargaining and thus subject to the consult-and-negotiate obligation of the agreement. The Massachusetts Superior Court disagreed, holding the award would infringe on the prerogative of the school committee to establish educational policy. The supreme judicial court noted that the matter was arbitrable, and it was not reviewing the merits of the arbitrator's decision. The narrow issue before the court had to do with the possible existence of a noncontractual, legal barrier. The court concluded that the contract clause involved might under certain circumstances improperly obstruct the freedom of a school committee to promulgate policy, but such was not the case here. The court found the committee more likely to benefit from consultation with trained professionals over final examinations.[38]

The Minnesota Supreme Court held that an agreement between the St. Louis County Independent School District 704 and General Drivers Union Local 346 precluded the school district from contracting out its bus services. The parties were in agreement that contracting out is a mandatory subject of bargaining under the state's Public Employee Relations Act. The school district relied on a broad management-rights clause as the basis for its subcontracting. The court found that any waiver of the statutory right to bargain over a mandatory subject must be clear and explicit. Since that was not the case here, the school district was ordered to refrain from contracting out its bus services.[39]

The New York County Supreme Court held that the use of one-man supervisory patrol cars was a mandatory subject of bargaining because of certain safety factors involved. The court upheld a decision of the New York City Board of Collective

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[38]*School Comm. of Boston* v. *Boston Teachers Union Local 66, AFT, AFL-CIO,* 372 Mass. 605, 389 N.E.2d 970, 103 LRRM 3095 (1979).

[39]*General Drivers Union Local 346* v. *Independent School Dist. No. 704, Proctor School Board,* 283 N.W.2d 524, 102 LRRM 3004 (1979).

Bargaining which ordered the city to bargain with the Sergeants' Benevolent Association and the Lieutenants' Benevolent Association regarding three safety-related factors. The board had found that the reductions in manning achieved by the one-man patrol plan were appropriate management objectives, but that certain safety factors which were present in a similar plan for rank-and-file officers were lacking in the plan for sergeants and lieutenants.[40]

The Pennsylvania Supreme Court for the Eastern District ruled that the Williamsport Area School District acted improperly in unilaterally modifying the terms and conditions of its professional employees represented by the Williamsport Education Association while they were working after the contract expired. The supreme court thus agreed with the Pennsylvania Labor Relations Board and the Court of Common Pleas of Lycoming County, but overruled reversal by the commonwealth court. The supreme court found that good-faith collective bargaining was impossible if the status quo was not maintained as to the terms and conditions of employment.[41] The ruling on this case was an affirmation of a decision in 1978, *Cumberland Valley School District,*[42] covered in last year's report.

The Supreme Court of the State of Washington supported lower court decisions by holding that the Blaine School Board violated its agreement with the Blaine Education Association by unilaterally imposing a mandatory retirement age. A previous agreement had required retirement at age 65, but the section was removed from the agreement at the request of the association. When the superintendent of schools informed a teacher that she must retire at age 65, she indicated her intention to continue working. The school board thereupon voted in 1976 to reaffirm the mandatory retirement age of 65. The court held that the school district had abandoned its compulsory retirement age and could not reimpose it unilaterally.[43]

Considerable interest has been expressed in developments in

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[40]*Sergeants' Benevolent Ass'n of the Police Dept. of the City of New York and the Lieutenants' Benevolent Ass'n of the Police Dept. of the City of New York* v. *Board of Collective Bargaining of the Office of Collective Bargaining of the City of New York and Police Dept. of the City of New York,* 832 GERR 12 (1979).

[41]*Pennsylvania Labor Relations Board* v. *Williamsport Area School Dist.*, 406 A.2d 329, 103 LRRM 2299 (1979).

[42]482 Pa. 134, 394 A.2d 946, 100 LRRM 2059 (1978).

[43]*Tonevold* v. *Blaine School Dist. No. 503, Whatcom County,* 91 Wash. 2d. 632, 590 P.2d 1268, 101 LRRM 2279 (1979).

New Jersey following two New Jersey Supreme Court decisions reported last year. The *Ridgefield Park* case eliminated the permissive category of negotiations, and the *State Supervisory Employees Association*[44] case established that provisions in excess of maximum standards are neither negotiable nor enforceable. New Jersey's Public Employment Relations Commission (PERC) received many cases during 1979 requiring interpretation of the supreme court decisions. One of the more important cases involved the promotion clause in the agreement between the State of New Jersey and the New Jersey State Troopers Association. In this case, PERC held that the state was not required to bargain over criteria for promotion, but must bargain over promotion procedures.

More important, PERC's opinion made its position clear on a number of issues. PERC first noted that police officers are covered by a separate statute which explicitly contemplates permissive negotiations. Thus, the *Ridgefield Park* decision was not applicable. Moreover, PERC held that the same standard for mandatory bargaining subjects applied to all public-employee bargaining in New Jersey. Thus, the *State Supervisory Employees Association* decision was read as limiting negotiations to those terms and conditions within the discretion of the public employer and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives involved in the determination of government policy.[45] PERC used this standard to make its decision on numerous cases involving negotiability of topics and arbitrability of grievances.

In an unusual Indiana case, a Madison County Superior Court judge set aside an agency-shop provision in an agreement between the Anderson Community School Corporation and the American Federation of Teachers, Local 519. The negotiated clause was challenged by 115 teachers supported by the Legal Defense Committee of the National Right to Work Committee. The court found no express statutory authorization for an agency shop and noted that job termination for breach of the agency-fee clause would be a cause for dismissal not contem-

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[44]*State of New Jersey* v. *State Supervisory Employees Ass'n Local 195, IFPTE, and Local 518 SEIU*, 78 N.J. 54, 393 A.2d 233, 98 LRRM 3269 (1978).

[45]*State of New Jersey and State Troopers NCO Ass'n of New Jersey*, N.J. PERC No. 79–68, 816 GERR 20 (1979).

plated by the law governing teacher tenure. The clause was ordered purged from the agreement.[46]

An important "test state" for the scope of bargaining was Kansas. There, amendments to the state's Collective Negotiations Law led to a deluge of cases involving the scope of negotiations. An illustrative case involved the Topeka Board of Education and the National Education Association-Topeka. In that case, the supreme court held that class size and removal of disruptive handicapped children from class were not mandatory bargaining subjects, but dues checkoff, paid leave for transacting union business, use of interschool mail systems, distribution of copies of the contract, and conditions of extended employment were mandatory bargaining subjects.[47]

Shortly afterward, the Kansas Supreme Court made an effort to curtail the large number of scope-of-bargaining cases by issuing standards for district courts to follow. Among these standards were the following:

> "In determining a proposal sought to be made mandatorily negotiable under the 'impact test' portion of K.S.A. 1978 Supp. 72–5413 (1), the district court should consider (1) the nature of the mandatorily negotiable items specifically included in the statute; (2) that these specifically enumerated items relate directly to terms and conditions of professional service; (3) the fact that each of the specifically enumerated items would be equally appropriate to negotiations for factory workers, maintenance people, etc.; (4) that for any proposal to be made mandatorily negotiable under this test it should have a similar relationship to terms and conditions of professional service; (5) that any such item should be a logical extension of the enumerated items and not an unauthorized invasion into the board's policy-making duties and obligations."[48]

The following four cases, all at the state supreme-court level, illustrate the range and diversity of scope-of-bargaining determinations. In the first case, the Iowa Supreme Court held that health-and-medical insurance coverage for family members and dependents of Charles City Community School District teachers was a mandatory subject of collective bargaining. At the same time, the court ruled that a proposal from the Charles City

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[46]*Edna Mae Alexander* v. *Anderson Federation of Teachers,* 818 GERR 15 (1979).

[47]*NEA—Topeka, Inc.* v. *Topeka Board of Education, Unified School Dist. 501* and *Shawnee County* v. *National Education Ass'n—Topeka, Inc.,* 225 Kan. 445, 592 P.2d 93, 101 LRRM 2611 (1979).

[48]*Chee-Craw Teachers Ass'n* v. *Unified School Dist. No. 247, Crawford County,* 225 Kan. 561, 593 P.2d 406, 101 LRRM 2774 (1979).

Education Association to permit its grievance committee members to work on grievances during regular business hours without loss of pay to be a permissive, but not a mandatory, bargaining issue.[49]

In a case involving the State Education Association, the New Hampshire Supreme Court laid down rules harmonizing the state's 1975 bargaining law with its 1950 statute setting up the state's personnel system. The court ruled that matters regarding the policies and practices of the merit system were outside the scope of collective bargaining. Thus, such issues as employee classification, promotions, layoffs, seniority rights, employee discipline and termination, and wage and salary administration were not negotiable. The court added that the existence of a state personnel commission rule on a subject did not eliminate the topic from bargaining. The restricted bargaining area covers that portion of managerial policy within the sole prerogative of the employer.[50]

The often difficult-to-determine line between policy and working conditions was illustrated by a Michigan case involving Central Michigan University. An administrative law judge supported an unfair labor practice charge filed by the Central Michigan University Faculty Association following unilateral implementation of a teaching-effectiveness program by Central Michigan University. The Michigan Employment Relations Commission disagreed, finding the matter to be primarily an issue of educational policy not mandatorily negotiable. The commission decision was upheld at the court-of-appeals level, but reversed in a split decision by the supreme court, which found the teaching-effectiveness program to be more a condition of employment than an educational policy, and therefore mandatorily negotiable.[51]

Another case involving educational policy and working conditions took place in Nebraska. There, the Nebraska Supreme Court overruled the Nebraska Court of Industrial Relations when it held that Metropolitan Technical Community College was not required to negotiate with the Metropolitan Community

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[49]*Charles City Community School Dist.* v. *Public Employment Relations Board,* 275 N.W. 2d 766, 100 LRRM 3163 (1979).

[50]*State Employees Ass'n of New Hampshire, Inc.* v. *New Hampshire Public Employees Relations Board,* 805 GERR 15 (1979).

[51]*Central Michigan Faculty Ass'n* v. *Central Michigan University,* 273 N.W.2d 21, 100 LRRM 2401 (1979).

College Education Association over the workload of its faculty, counselors, vocational evaluators, and librarians. The court found the number of contact hours for faculty, for example, to be a fundamental value judgment which was at the heart of the college's educational philosophy and therefore not bargainable.[52]

The final case reported is a New York City Board of Collective Bargaining case. The case shows the interplay between the nonnegotiable and negotiable portions of a topic. The board ruled that a demand to guarantee the higher salary of Principal Administrative Associates serving in Levels II and III of the broadbanded title regardless of lower-level assignments is a demand relating to wages and is therefore a mandatory subject of bargaining. The board noted that there was no indication that the demand would infringe on the city's right to classify personnel, but conceded that there might be an impact upon the related management right to make unilateral assignments within titles. However, the issue, the board said, is whether a demand that provides for a guaranteed pay level following satisfactory performance in a job title is a mandatory subject of bargaining and not whether the demand may, even in part or indirectly, aim at controlling assignments. Recognizing that management has the prerogative to determine assignments unilaterally, the board noted that the union has an equally clear right to bargain on a demand to give permanence to wage levels achieved and maintained by covered employees.[53]

The scope-of-bargaining cases considered here point up real difficulties in making negotiability determinations. Bargaining-scope decisions were almost equally split between the parties in the cases reported. It is noteworthy, however, that the determinations varied considerably from state to state. Thus, that which may be a mandatory topic of bargaining in one state may well not be negotiable under similar language in another state.

Other Judicial Issues

Discrimination and Individual Rights. Three cases involving charges of religious, racial, or pregnancy-related discrimination

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[52] *Metropolitan Technical Community College Education Ass'n* v. *Metropolitan Technical Community College Area*, 281 N.W.2d 201, 102 LRRM 2142 (1979).

[53] *Matter of the City of New York and Local 1180, Communications Workers of America, AFL-CIO*, Decision No. B-19-79.

are reported here. Two additional cases are interesting because of "ethical" objections to union dues.

The first case involving discrimination occurred in California, where a teacher was discharged for absences without permission to observe holy days designated by the Worldwide Church of God. The California Supreme Court found the Ducor Union School District in violation of the state constitution.[54] The court found that the constitutional ban against disqualification from pursuing employment because of creed implies a duty of reasonable accommodation. In this case, adequate substitute teachers were available to replace the plaintiff with no additional cost to the employer. The teacher's absence for five to ten days a year was not deemed "a hardship sufficiently severe to warrant disqualifying him from employment as a teacher."

The pregnancy-related ruling interpreted state law in Michigan, where the legislature had amended its state antidiscrimination law to include pregnancy-related disabilities under the definition of "sex." The state attorney-general held that such disabilities could be used to draw sick-leave days from sick-leave bank plans negotiated in collective bargaining agreements.[55] Where employees agree to pool sick-leave days, they may use them in the same manner as individual sick-leave days, and therefore exclusion of childbirth- or pregnancy-related disabilities would violate the law.

A charge of discrimination was raised by a black employee disciplined under an agreement between the New York State Department of Correctional Services and AFSCME Council 82. The U.S. District Court for Southern New York denied his charge, rooted in a 1975 criminal complaint alleging public lewdness.[56] The employee was first suspended and later dismissed, although the criminal case was dropped. Among the claims of the former corrections officer was that the parties' prehearing suspension procedure discriminates against blacks, who are more likely than whites to be arrested. The plaintiff failed to use the contractual grievance procedure, again charging an adverse impact on blacks. The union in this case demonstrated that there was no evidence of discrimination based on

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[54]*Rankins* v. *Commission on Professional Competence of Ducor Union School Dist.*, 154 Cal. Rep. 907, 593 P.2d 852, 19 FEP Cases 925 (1979).

[55]Opinion of the Attorney General, State of Michigan, Opinion No. 5475, April 6, 1979.

[56]*Smith* v. *Carey*, 473 F.Supp. 268 (1979).

arrest records. The court also found no violation of due process in the clause permitting summary suspension of corrections officers for criminal charges.

Objections to payment of union dues were raised in Hawaii and in Oregon. Plaintiffs in both cases failed to show violations of their constitutional rights.

The case in Hawaii related to the Public Employee Relations Board's review of service fees collected by the Hawaii Government Employees' Association. The case came before a U.S. district court after a series of challenges by one retired nonunion employee before HPERB and state courts. The plaintiff was joined by a current nonunion employee. Together, they alleged that fees approved by HPERB resulted in monies deducted from their pay in violation of their First Amendment right of freedom of association. They also claimed the monies were used for other than collective bargaining purposes. The court found HPERB's actions to be constitutional and also held no proof of intent to misuse funds was present.[57]

The Oregon case turned on the difference between "ethical" and "religious" grounds for nonpayment of union dues. The Oregon Court of Appeals approved the deduction of an agency fee from a teacher's salary in the Douglas County School District. She had requested that the agency fee be paid to a designated charity, based on the state public-employment law which specifies "bona fide religious tenets." The union requested a letter from a minister, but she submitted personal ethical tenets and claimed First Amendment protection.

The court held: "Granted the defendant has shown that she has certain arguably religious beliefs, and assuming without deciding that such beliefs are entitled to constitutional protection, an examination of the record reveals that the defendant has failed to carry her burden of demonstrating the nexus between her beliefs and her unwillingness to join or pay dues to the association."[58]

Procedural Issues. The right of union representatives to perform their designated functions was considered in three states —Alaska, Florida, and Maryland. Other procedural problems in

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[57]*Jordan* v. *Hawaii Government Employees' Ass'n Local 152, AFSCME, AFL-CIO,* 472 F.Supp. 1123 (1979).

[58]*Gorham* v. *Roseburg Education Ass'n,* 808 GERR 26 (1979).

bargaining and grievance handling brought decisions from the U.S. Supreme Court and two state supreme courts.

The Alaska Supreme Court ruled that the Kenai Peninsula Borough School District cannot grant its noncertificated employees the right to bargain collectively and decree (1) who the employees may send to the bargaining table, and (2) with whom they may affiliate.[59] The court's ruling upholds the Alaska superior court, which ordered the school district to resume negotiations with the Kenai Peninsula Borough School District Classified Association on the ground that the restrictive provisions of the school district's labor policy were unconstitutional.

In Florida, the First District Court of Appeals held that the Duval County school board was not guilty of an unfair labor practice involving lack of union representation at a predismissal conference.[60] The state Public Employees Relations Commission had found that the school board in 1977 illegally refused to allow representation at a teacher's conference with her principal on insubordination. The court reversed the PERC order because the state law as it existed in 1976 did not provide an employee with standing to bring the charge and did not provide language for the substantive right of union representation. The statute's language was changed subsequently to cover representation, but was not retroactive.

In Maryland, 1800 members of the Montgomery County Education Association sought direct action to set aside a collective bargaining agreement substituting per diem summer work for previous 12-month contracts. The Maryland Court of Appeals held that the dissatisfied minority of former 12-month employees could not bypass the exclusive bargaining agent for their unit. The court said: "They are not entitled to have certain provisions of that agreement set aside or renegotiated, regardless of whether the School Board negotiated in good faith with the Association. Once the union fulfilled its duty to fairly represent the employees, it alone may pursue avenues of relief against the employer."[61]

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[59]*Kenai Peninsula Borough School Dist.* v. *Kenai Peninsula Borough School Dist. Classified Ass'n,* 590 P.2d 437, 100 LRRM 3116 (1979).

[60]*Barbara Seitz* v. *Duval County School Board and Public Employees Relations Commission,* 366 So.2d 119, 100 LRRM 2623 (1979).

[61]*Offutt* v. *Montgomery County Board of Education,* 285 Md. 557, 404 A.2d 281, 101 LRRM 3035 (1979).

The U.S. Supreme Court became involved in procedural issues when the Arkansas State Highway Commission refused to consider grievances that were not submitted in writing by the employees to the employer's representative. The union, Arkansas State Highway Employees Local 1315, first submitted the grievances. The employer refused to act until the employees filed written complaints, although the union represented the employees at subsequent meetings.

The High Court reversed the Eighth Circuit Court, which found a First Amendment violation of the union's right to submit grievances. The Supreme Court held:

> "The fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable, hardly establishes that such procedures violate the Constitution. Although the First Amendment protects public employees' right to associate, the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or, in this context, to recognize the association and bargain with it."[62]

Constitutional rights to due process were judged by the Kansas Supreme Court to be properly waived by a negotiated grievance procedure. The case arose from discipline assigned to two police officers charged with violating state gambling laws. The officers and the trial court considered a grievance hearing before union and employer representatives to be influenced by the authority of the chief of police over police officers on the joint grievance board. However, the higher court found otherwise, holding that the parties' memorandum of understanding contained "reasonable and workable provisions for the protection and enforcement of officers' rights."[63]

Having previously found in *Dayton Teachers Association* v. *Dayton Board of Education* that boards of education have the authority to negotiate collective bargaining agreements that do not conflict with their statutory duties, the Ohio Supreme Court now upholds an agreement outlining procedures to be followed in reaching such an agreement.[64] The "recognition agreement," which was voluntarily signed in 1972, provides that the board of

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[62]*Maurice Smith* v. *Arkansas State Highway Employees Local 1315*, 809 GERR 29 (1979).
[63]*Richard Gorham and Alfonso Sanchez* v. *City of Kansas City, Kan.*, 590 P.2d 1051, 101 LRRM 2290 (1979).
[64]*Loveland Education Ass'n* v. *Loveland City School Dist. Board*, 58 Ohio St.2d 31, 387 N.E.2d 1374, 102 LRRM 2594 (1979).

education cannot "reduce, negotiate, nor delegate its legal responsibilities." The court found that arbitration of proposed terms would be an illegal delegation of such responsibilities.

Proposition 13 and Related Matters. Last year's report noted that "bailout legislation" passed after approval of Proposition 13 by California voters in 1978 provided state funds for counties and cities. The caveat was that wage increases for local employees were to be limited to those granted to state employees. Governor Edmund G. Brown, Jr., vetoed a wage increase for state employees. Thereupon, a number of suits were filed by employee organizations representing county and municipal employees seeking implementation of previously negotiated wage increases. On February 15, 1979, the California Supreme Court decided that the public-employee pay-freeze portion of the bailout legislation was illegal and negotiated wage increases must be granted.[65]

Later in 1979, California voters approved Proposition 4, which amended the state constitution to place limits on appropriations of state and local governments. One outcome of public spending and taxation limitations, reported by some California observers, has been an increase in the militancy of public workers.

In addition to California, eight other states have approved some form of limitation on taxation or spending. The states involved are Arizona, Colorado, Hawaii, Idaho, Michigan, New Jersey, Tennessee, and Texas. Idaho's version may have been the most stringent, providing that property taxes are limited to 1 percent of market value. Assessments may rise no more than 2 percent per year. One aspect of the New Jersey legislation was a 5-percent limitation on spending increases for school districts, counties, and municipalities. As noted earlier in this report, the New Jersey Supreme Court held that the 5-percent limitation on spending applied regardless of the amount awarded in any statutory interest arbitration.

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[65] *Sonoma County Organization of Public Employees* v. *Sonoma County,* 23 C.3d 296, 152 Cal.Rep. 903, 591 P.2d 1, 100 LRRM 3044 (1979).