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Good faith bargaining results in collective bargaining agreements in most instances. In some, however, the parties, despite their efforts to do so, seem unable to find a basis for a mutually acceptable agreement. Even in the private sector, neither party is usually eager to have a strike. Therefore, mediation is readily accepted as a mechanism to assist the parties in trying to reach agreement. The mediator is after only one thing—voluntary settlement. He or she does not attempt to impose an agreement on the parties. Instead, the mediator tries to induce the parties to reach it on their own.

If mediation does not work in the private sector, the parties resort to self help and the use of power. This means the use of the strike, lockout and related activities. In the public sector, such collective action is invariably viewed as something which should be avoided if at all possible. The prevalent view is that the strike is repugnant to the public sector, but even where the strike is allowed it is generally limited when there is a danger to the public health, safety, or welfare.[1]

To avoid the strike some jurisdictions have imposed compulsory arbitration.[2] Almost all states that require collective bargaining in the public sector require fact finding as either a strike substitute or as a means, short of a binding third party solution, to avert it. Those allowing the limited use of the strike generally require exhaustion of fact finding as a condition precedent to a permissible strike. In fact, Vermont's local government act was amended in 1973 to add just such a condition.[3] One could interpret the court decisions which have declared an illegal strike to be enjoinable only if equity standards have been met to also require an employer to have exhausted impasse procedures available.[4]

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[1] This, with some variation, is the standard in Alaska, Hawaii, Minnesota, Oregon, Pennsylvania, and Vermont (excluding state employees).

[2] This "substitute" is more prone to be applied solely to the protective or safety service such as in Pennsylvania or Michigan.

[3] Secs. 1730, 1732; GER RF 51: 5420.

[4] *See, e.g., Holland School District v. Holland Education Association,* 380 Mich. 314, 157 N.W.2d 206, GT LRRM 2916 (Mich. 1968).

This technique is fairly unique to the public service. It is used in the national emergency procedures of the Taft-Hartley Act, but not with wide acclaim.[5] It is used also by Presidential Emergency Boards under the Railway Labor Act, but with mixed reviews.[6]

Despite its prevalence in the public sector, it seems enigmatic to many. Its accepted spelling varies from "fact finding" to "factfinding" to "fact-finding". Similarly, experts cannot agree on what it is. It is subject to attacks of witicism, such as, "I didn't know the facts were lost." The confusion, and hence its need for its examination in the *Journal,* stems from the fact that its characteristics vary considerably with the fact finder or fact finding panel and the parties—sometimes despite what may be expected by the state law. In addition, the state laws vary not only with respect to the nature of fact finding but also with regard to other essential elements affecting its use: whether mediation is a necessary condition precedent, whether genuine impasse is a precedent, whether the fact finder can engage in mediation, whether public recommendations are permitted and when, whether parties who reject the recommendation must go to a show cause hearing, the timing, cost, and the relation to the budget process, as well as the criteria the fact finder must use.

The process often becomes advisory arbitration. At other times it becomes advisory arbitration with liberal use of mediation techniques. In other situations it becomes a means of determining certain basic parameters so that the parties may then use a common base and go on bargaining from there (e.g. if comparability with school districts A, B and C is declared by the fact finders, both sides may feel threatened by aspects of the salary schedules and may be impelled to negotiate their own before the third party spells out his view of the minimums, maximums and the interim qualifications). Or not too dissimilarly, the decision might be written in such a way as to induce the parties to reject it and in a display of disdain for their now common enemy—the fact finder—reach their own agreement. In still other situations, the process is used to do what the parties cannot do themselves. They may be in agreement, but they need someone else to "impose" the settlement. Or they might need the fact finder's recommendation to convince the public, the legislative body or the union membership which might have to ratify the ultimate agreement. Yet another variation is the recommendation needed to save face with one's own

[5] Charles M. Rehmus, at the Innaugural convention of the Society of Professionals in Dispute Resolution in 1973, described the emergency boards as "nothing more than a whistle-stop on the road to an injunction."

[6] See "Procedures under the Railway Labor Act: A Panel Discussion", *Proceedings of the 18th Annual Meeting of the National Academy of Arbitrators* (Bureau of National Affairs, 1965) pp. 27–65, in which the emergency board procedures were likened to a "Kabuki dance" or a as the "mating ritual of the Great Crested Grebe".

team, i.e. a union that has promised too much and cannot back down without losing the faith of the membership or a mayor that does not want to backdown on a point when it will cost him supporters but he knows the "price" of a settlement is small in labor relations terms.

Just as the techniques of fact finding vary and cover a wide range, so do the criteria employed. Many times the "award" is based on what might be acceptable to the parties, or in other cases it might be based on what might be acceptable to the public. Some claim that the fact finder writes the decision in a way most likely to assure his being used again. Other factors may include equity, the fact finder's assessment of what is correct or right ("absolute truths"), a guesstimate of what would have occurred had there been a strike, comparisons with various standards such as what others are paying like workers, cost of living, community standards or past history. The "ability to pay" is sometimes disregarded and sometimes deemed quite crucial. There has been concern expressed that not only should ability to pay be weighed heavily but also that the fact finder should suggest how funds can be derived to pay for whatever employee benefits are recommended.

Needless to say, with such varied techniques and criteria often at cross-purposes, fact finding has been subjected to its share of criticism. Moreover, some find it to be lacking because it does not have finality while others want to add to the uncertainty so that parties will not make the entry of the third party part of their negotiating strategy.

In hopes of equipping the parties with insights needed to better utilize this impasse device, we have tried to describe the experience with fact finding. It has been our practice to present at least a trilogy—concurrent articles from the neutral, employer and union side. However, after waiting in vain for our union author to submit his article, skipping an issue to preserve the balance desired, and now almost having to omit the articles a second time, we have decided to print the series without the union presentation. This decision is based also on the timeliness of the two articles and the excellence of their content which merit current attention.

Both authors are unusually well versed. Byron Yaffe, a professor at Cornell University, has engaged in a substantial amount of fact finding both in New York and in Wisconsin, where he was a staff member of the Wisconsin Employment Relations Commission. He and Howard Goldblatt have engaged in a Ford Foundation study, the results of which have been printed in *Fact Finding in Public Employment Disputes in New York State: More Promise Than Illusion,* ILR Paperback No. 10, 1971. In addition, Professor Yaffe, as an attorney, has represented public management and public unions.

Stanley B. Hineman, Jr., has had a great number of years of experience

as Director of Personnel Relations for the New York State School Boards Association, after extensive service as an attorney for private sector management.

The articles have been prepared in a manner so as to not dwell on the peculiarities of the New York experience (perhaps despite desires of both to express themselves on the statutory requirements of the Taylor Act), but rather to hopefully provide insight into fact finding wherever it is used and in whatever form it manifests itself.