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Fact Finding in Public Education Disputes—Its Values and Limitations: A Neutral View

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As a student of labor relations in the public sector and as a professional neutral in public employment disputes, I am both pleased and disturbed by the rapid, yet haphazard growth of factfinding as an impasse-resolving mechanism in public employment disputes. It seems clear that there is significant disagreement between agencies responsible for the administration of public employment labor relations statutes, factfinders, public employees and their representative organizations, and public employers over the definition of factfinding and the appropriate role a factfinder should play.

Perhaps the most fundamental disagreement is over the question of whether factfinding is essentially mediatory or judicial in nature. The dispute exists not only between advocates of the two views, but also appears as a concededly irreconcilable fact in the arguments of the proponents of each view.[1]

Perhaps all of us who are interested in the collective bargaining process in the public sector should not be terribly concerned about the disagreement which exists over the appropriate definition of factfinding and the factfinder's role, since disagreement has existed for three decades over the appropriate role of an arbitrator in grievance disputes,[2] and yet the arbitration process has not suffered because of these disagreements. In fact, one might argue that the process has continued to remain effective in part because these disputed issues continue to be important to all of the parties.

Thus, it is probably most accurate not to attempt to characterize factfind-

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[1] *See* Comments of Robert Howlett in the *Proceedings of the 23rd Annual Meeting of the National Academy of Arbitrators*, B.N.A., Washington, D.C. p. 170 and 179. Howlett concedes that factfinding is "part of the mediation process," but then argues that the role of the factfinder is "primarily judicial." It is clearly difficult to reconcile the above, although I suppose one could argue that the threat of judicial factfinding might be utilized as an instrument by a neutral to induce volunatry accommodation or agreement, and thus judicial factfinding might be characterized as a mediation tool.

[2] *E.g.* Is the arbitrator bound by the contract or are law and public policy pertinent to his decision? What obligation, if any, does the arbitrator have to assist the parties, including the individual grievant, to get into the record relevant evidence which would not be forthcoming but for his or her assistance?

ing as either judicial or mediatory, but instead to recognize that the role of the factfinder varies significantly, depending on many circumstances, including but not limited to:

(1) The statute under which he or she is operating.
(2) The agency responsible for the administration of the statute.
(3) The factfinder's own instincts, values and skills.
(4) The nature of the issues in dispute.
(5) The desires and bargaining skill of the parties.
(6) If mediation has preceded factfinding.
(7) If the factfinder is operating as an individual or as a member of a panel.
(8) The timing of the factfinder's intervention.

Another disputed issue is whether the factfinder's responsibility is solely to the parties (settlement at any cost), or does the factfinder also have a responsibility to the public (to assure that "quality education" will not be eroded, or to assure that "fiscal responsibility" will be adhered to). These questions will probably be with us as long as the process is utilized. Although I have an opinion, there are no "right answers." Pragmatic solutions are the rule in factfinding, as they are in grievance arbitration. While precedent is not binding, this is not necessarily harmful, and in fact, I expect it will continue to give vitality to the process.

If, then, we can expect continued disagreement over the definition and role of factfinding, are there any generalizations that may be made about the process which will be of some value to the parties as well as the factfinders themselves?

Perhaps the safest generalization is that it is far from a perfect process. Although most jurisdictions which provide for factfinding in public employment disputes characterize it as a "strike substitute," it is well established that the factfinding process has not prevented strikes. In fact, in some jurisdictions, illegal strikes by public employees have increased in frequency since statutes providing for factfinding have been enacted. Since it is clear that factfinding is not a perfect strike substitute, I would first like to examine the factors which prevent the process from obtaining perfection in this regard.

Perhaps the simplest explanation of why factfinding is not a perfect strike substitute lies in the fact that a factfinder can infrequently determine, with accurate precision, the relative political power of the parties in the community in which the dispute occurs. Thus, the report and recommendations emanating from the process may not accurately reflect the accommodations and compromises which the parties would have had to make in free collective bargaining.

Several factors inhibit the factfinder's ability to ascertain all relevant facts which are necessary to formulate an acceptable and workable solution

to a public employment dispute. It is unrealistic to assume that a factfinder can come into a strange community and in a matter of hours accurately assess the political power of the disputants in that community. Not infrequently, the parties themselves are unable to make an accurate assessment of their respective power without testing the community—most often by the use of a strike.

There are numerous other impediments to effective factfinding, particularly in public education disputes.

Perhaps one of the most difficult problems for a factfinder is determining whether demands made during negotiations reflect attempts by the parties to resolve legitimate problems. If the factfinder is to be of any effect in persuading the parties to respond to their opponent's demands, he must also persuade them that legitimate problems lie behind the demands, and that these problems must be dealt with. Because the parties, as well as the factfinder, know that many demands are "throw aways," the chore of separating the wheat from the chaff is often that of the factfinder's. Without extensive discussion of such demands, most effectively in a mediatory capacity, it is unlikely that the factfinder will be able to accomplish this task with relative accuracy. Under such circumstances, the factfinder's recommendations are not likely to be treated very seriously by the parties.

In disputes which arise in public education, the factfinder is hindered not only by the parties' bargaining strategy, which often creates false issues, but also by the unique complexity of many of the issues confronting him or her. In a recent study of factfinding cases in New York it was learned that the number of issues submitted to factfinding in teaching cases far exceeds the number of issues in nonteaching cases.[3] The majority of the major issues in disputes are similar to those which exist in the private sector[4] but the minor issues are unique to the profession.[5] Because of the number and complexity of the issues which arise in public education disputes, factfinders have in some cases agreed to help the parties resolve only the major issues in dispute.[6]

Even issues which on their surface appear to be rather simple become quite complex in public education. Disputes over salaries involve not only questions of "how much more?" but relate to disputes over the viability and applicability of evaluation systems, methods and formulas for compensating individuals on the basis of longevity, methods of granting credit for graduate work, etc. The parties frequently reach an impasse over issues involving questions of professional responsibility and educational policy.

[3] B. YAFFE AND H. GOLDBLATT, FACTFINDING IN PUBLIC EMPLOYMENT DISPUTES IN NEW YORK STATE: MORE PROMISE THAN ILLUSION 31 (1971).

[4] *Id.* at 32. The one exception is payment for extracurricular duties.

[5] *E.g.*, in-service credit, class size, preparation time, teacher-administration liaison.

[6] B. YAFFE AND H. GOLDBLATT, *supra* Note 3 at 50. This was true in approximately 25 percent of the cases surveyed.

Do teachers' demands for extramural compensation, paid preparation time and teachers' aides dilute their professional responsibilities? The satisfactory resolution of such disputes requires expertise in the substantive areas of dispute, and perhaps even more importantly, insight into the operation of the district.

Unfortunately, it is unrealistic to expect a factfinder to have both the expertise and insight referred to above when he serves disputing parties on an *ad hoc* basis. Several proposals have been made to alleviate this problem. One is to utilize a factfinding panel which would provide greater substantive expertise than a single individual. However, such panels often make the process more formalistic, hinder mediation, and often obstruct the ability of the factfinder to recommend solutions to the impasse which are acceptable to the parties, even though they may be informed and otherwise useful. Another solution to this problem is to let the parties know at the beginning of the factfinding proceeding that the most they can expect from the factfinder with respect to the resolution of complex educational policy issues are possible alternative solutions to legitimate problems.

In order to accomplish this end, the parties must be persuaded by the factfinder that they are better able to resolve these problems than the factfinder, and that they have a significant role to play in the factfinding process. They must not be allowed to rely too heavily on the factfinder. They should be forced to respond to proposed alternative solutions, so that if formal recommendations are necessary, the factfinder will be able to anticipate the parties' response to the recommendations. Furthermore, the factfinder should be aware of potential problems that may be created by his or her recommendations. In order to accomplish this goal it is the factfinder's responsibility to get the parties reactions to possible recommendations before they are formalized. This process may result in voluntary agreement without a formal report, and should result in recommendations which will heal rather than exacerbate the dispute.

Factfinding is a mechanism designed to facilitate voluntary settlement. Thus, both the factfinder and the parties must recognize its limitations, viewing formal recommendations only as guides for settlement which in many instances must be modified by the negotiation process.

Perhaps the greatest deficiency in factfinding as it is presently conceived is that everybody expects too much of it. It would be unfortunate if the parties expected and relied on the factfinder to determine how much a school district can afford to pay or how it must reallocate its public resources. These decisions must be made by the parties in negotiations. Unless they have engaged in hard bargaining over these issues before the factfinding process is completed and the factfinder is aware of the substance of that bargaining process, it is unlikely that the factfinder will have a

sufficient understanding of both parties' problems to come up with a recommendation which will be acceptable to both.[7]

When issues over ability to pay arise in public employment disputes, it must be kept in mind that the employer's economic decisions are often dominated by political considerations about which the factfinder, as well as the parties, often have very little information. Inability to pay is often the result of an unwillingness to raise local taxes. Thus, there is often an elasticity or inelasticity in management's position which cannot be explained or justified by traditional market restraints. For the foregoing reasons, the factfinder has little persuasive power in "judging" the employer's reading of the community, particularly since he is unfamiliar with the legislative body to whom the employer is accountable and the entire community to whom all parties are ultimately accountable. Thus, public employees who expect a factfinder to *judge* an employer's good faith and economic judgments under such circumstances are bound to be disappointed with the service the factfinder can render.

The overreliance on factfinding is often reflected in its overuse. It certainly has an addictive quality, particularly where the parties incur few risks and minimal cost when they utilize the process. Factfinding has frequently been built into the parties' bargaining strategy. Parties can be discouraged from overusing it by increasing its costs. However, that solution in some instances could dramatically distort the balance of power between the parties. For example, a small number of employees performing a critical public service may have substantial political power by virtue of the nature of the service they provide the community. If the cost of factfinding were to become prohibitive to such employees, a persuasive argument could be made that the impasse procedure is being utilized to prevent those employees from exercising the power which would be determinative in a free collective bargaining relationship.

Another method to deter overuse of factfinding would be to give the agency administering the statutory impasse procedure the discretion to refuse to offer the parties factfinding unless it can be demonstrated that bargaining with the assistance of mediation will be absolutely fruitless, and that it is likely that the factfinding will contribute to settlement of the impasse. This discretionary use of factfinding may prevent the parties from building it into their bargaining strategy and may give the process more clout with the parties.

One suggestion which might facilitate this end entails consolidating mediation and factfinding—allowing one individual to serve in both capacities at his own discretion. Under such an arrangement, the neutral could

[7] *Id.* at 71. In the New York State study referred to above, 70 percent of the employers who rejected the factfinder's recommendations indicated that hard bargaining did not occur until factfinding had been completed.

use the threat of public recommendations as a mediation tool, but only to be resorted to if a genuine breakdown in the bargaining process occurs. Such a procedure would also give the neutral the opportunity to explore possible public recommendations with the parties, and the parties could more accurately anticipate the outcome of a factfinding proceeding. Although some would argue that the parties would be likely to "hold back" during mediation under such a procedure, I would submit that they would normally use mediation more effectively, since their failure to approach the process in good faith might result in their being publicly identified as obstructionists to a reasonable settlement. Perhaps it should be noted that in New York one individual often serves as both mediator and factfinder. I believe the results of this consolidation have been quite promising.

Although this list is not exhaustive, I believe one other major failure in the factfinding process is its lack of finality. Perhaps the most frustrating aspect of bargaining in the public sector is the perpetual extension of procedures designed to facilitate termination of the bargaining process. We have proceduralized public sector bargaining to death. Unless we begin to recognize and deal with this problem, the value and contribution that each procedure, including factfinding, can make toward settlement will inevitably diminish to the point where it becomes nonexistent. If mediation and factfinding have legitimate roles to play in public employment disputes, whether or not factfinding is the terminal step, both processes will be undermined unless we assure that costs of nonagreement will be built into our public employment impasse system.

Factfinders must recognize that their recommendations might not be palatable to the parties adversely affected by them. However, the recommendations must be ultimately acceptable to these same parties, including the employees and the political body to whom the public employer is ultimately responsible. The New York study referred to earlier indicates that in teaching cases, acceptability and comparability were the criteria used most frequently by factfinders in formulating their recommendations.[8] It is also interesting to note that "acceptability" was seldom explicitly referred to in the factfinding reports as a rationale for the recommendations. The same study also indicated that the majority of the factfinders in teaching cases were confident that their recommendations would be acceptable to the parties.[9] It is difficult to assess how useful the factfinding process and the resulting report were in contributing to the resolution of the bargaining impasse where recommendations are only partially acceptable.

[8] *Id.* at 51.

[9] Factfinders Perception of Acceptability of Total Report in Teaching Cases:

	Employee Organization	Employer
Confident	62 percent	52 percent

Factfinders Perception of Acceptability of Part of the Report in Teaching Cases:

I do not dispute the validity of judicial factfinding. However, if the factfinder is concerned at all with acceptability of his recommendation, efforts at mediation seem almost an essential ingredient to effective factfinding. The New York study seems to support this hypothesis. In the teaching cases studied, mediation during factfinding was much more successful than the mediation which occurred prior to factfinding.[10]

Thus, mediation has been used quite successfully by factfinders to explore the viability of alternative solutions to the disputing parties' problems, to explore the parties' perceptions of their relative power in the community, to explore the parties' priorities, and to determine what problems lie behind the parties' respective demands. All of this information is necessary if the factfinder is to effectively serve the parties, and without the tools of mediation, it is difficult if not impossible to obtain.

In addition to acceptability, comparability appears to be an equally utilized criterion in the factfinding decision-making process.[11] Unfortunately, the parties too often rely on this criterion as the sole basis for the positions they take during negotiations and in factfinding proceedings. They fail to recognize that the concept of comparability allows for significan flexibility. The prevailing wage concept is a useful frame of reference for a factfinder, as well as the parties, but the parties often fail to concede that "comparisons" offer the factfinder a wide range of choice. When an innovative approach is necessary, comparability may not be a useful concept which is repugnant to the parties.

In disputes over "educational policies," the issue of negotiability (what is negotiable) often arises. Generally, factfinders shy away from a legal determination of negotiability, particularly where the issue has not been clearly resolved by an appropriate administrative agency or the courts.

In disputes over class size, factfinders normally agree that class size has a definite impact on teachers' working conditions, but they are reluctant to set hard and fast limits on class size because of the many other considerations beyond teachers' working conditions which are affected by class size. Generally they have recommended loosely worded guidelines to be observed "where possible," recognizing that class size is negotiable, but that

	Employee Organization	Employer
Confident	72 percent	53 percent

Id. at 52–53.

[10] Effectiveness of Mediation:

	Before Factfinding	During Factfinding
Substantial effect in reducing the number of issues	15 percent	44 percent
Substantial effect in narrowing the gap between the parties	16 percent	32 percent

Id. at 34.

[11] *Id.* at 51.

loose guidelines are needed to protect the legitimate interests of the district.[12] Factfinders have utilized similar approaches in other types of workload disputes, including the need for aides and preparation time, by recommending desirable guidelines to be utilized where possible.[13]

Factfinders have also been reluctant to recommend new compensation plans, particularly where they incorporate a merit or evaluation system, recognizing that such major modifications must be arrived at by agreement of the parties.[14]

Factfinding can be an effective educational process, but the parties must not expect too much of it. It can aid the parties in identifying legitimate problems they are facing and can help them develop alternative solutions which will meet their needs to the maximum extent possible. It can provide solutions to problems which will help the parties save face and survive institutionally. It can force the parties to treat the bargaining process seriously if the factfinder makes it clear that he is willing to publicly identify either of the parties as an obstructionist to legitimate problem solving.

Even though factfinding cannot be expected to prevent all strikes in public employment, it can serve as an effective instructional tool which can minimize the miscalculation which often results in unnecessary strikes in the public sector. Miscalculation as to the reasonable expectations (or minimal levels of acceptability) of the other party in a bargaining relationship is a common cause of strikes in the public sector. Factfinding, if properly utilized, can apprise both parties of their opponent's minimal levels of acceptability and of the possible terms of settlement which they probably would have reached in a free collective bargaining system.

If factfinding were viewed by the parties, as well as the agencies and factfinders responsible for its administration, as a means of reducing that miscalculation, it would become a more effective instrument in resolving impasses in public employment. For the foregoing reasons, I believe factfinding is a viable and effective impasse mechanism which should precede any public employee strike, whether or not it be prohibited by statute.

[12] B. Doering, *Impasse Issues in Teacher Disputes Submitted to Factfinding in New York*, 27 ARBITRATION J. 5 (1972).

[13] *Id.* at 7–8.

[14] *Id.* at 11.