The Journal of Law and Education

Volume 4 | Issue 4 Article 17

10-1975

# Can Compulsory Arbitration Work in Education: A Management Perspective

Steven B. Rynecki

# Can Compulsory Arbitration Work in Education: A Management Perspective

STEVEN B. RYNECKI*

## Assessing Alternative Bargaining Impasse Resolution Techniques in Education

In order to analyze the viability of compulsory interest arbitration in the educational sector, it is necessary to consider alternative techniques of impasse resolution. In this section, I will consider only the techniques of mediation, factfinding and work stoppages. Because of the brief nature of this analysis, I will not discuss such novel techniques as the use of voter referendum, med-arb or the non-work stoppage strike for resolution of bargaining impasses.[1] At the outset, it should be noted that compulsory arbitration is merely one element in the total collective bargaining relationship. It is an important element, as we all know, however, it should be seen in its environment as one part in a highly complex relationship which encompasses not only teachers and school administrators but the entire community as well. The following forms of impasse resolution are equally important in any analysis of whether compulsory arbitration can work in education.

### *Mediation*

Studies indicate that the use of mediation to resolve bargaining impasses in the public sector has proved successful in a majority of cases.[2] This procedure, long used successfully in the private sector, has proved its worth in the public sector as well. The detractors of mediation argue that its non-binding nature precludes finality and is of limited value where the parties are truly intransigent. This view, I believe, is valid in a minority of cases but does not rebut the clear evidence of the many successes of mediation. Collective bargaining is

* Mr. Rynecki is an attorney associated with the Milwaukee law firm of Brigden, Petajan, Lindner & Honzik, s.c. Mr. Rynecki is also Labor Consultant to the International Personnel Management Association, Editor of the PUBLIC EMPLOYER RELATIONS LIBRARY and Consulting Editor to PUBLIC PERSONNEL MANAGEMENT.

[1] *Report of the Committee on State Labor Law and Public Employee Bargaining* in ABA LABOR RELATIONS LAW, 281 (1974).

[2] GILROY AND SINICROPI, DISPUTE SETTLEMENT IN THE PUBLIC SECTOR: THE STATE OF THE ART, (1972).

fundamentally a process of communication and compromise. Mediators can, and do, aid the parties in communicating their positions, arguments and limitations. As to compromise, mediators are severely limited to suggesting alternatives and fostering communication. The results indicate, however, that mediation has worked as an aid to the resolution of collective bargaining impasses even with its built-in limitations because many deadlocks in bargaining have proved capable of resolution by the mere fostering of communication between the parties which opens the way to eventual compromise and settlement.[3]

*Factfinding*

Where the problem in bargaining is an unwillingness to compromise rather than communication, a more formal process is called for. Various state legislatures have enacted statutes providing factfinding as a non-binding technique for encouraging compromise between the parties. By ascertaining the factual basis underlying an impasse and issuing recommendations for resolution of the impasse, factfinders point out avenues of compromise for the parties. As with mediation, factfinding has certain limitations. Since it is a process which results in non-binding recommendations, it is not a final resolution which the parties are compelled to adopt. However, studies indicate that in spite of its obvious limitations, factfinding is perceived to be helpful in encouraging settlement between the parties. The results of a comprehensive survey in New York are instructive on this point:

> "Although factfinding in New York State clearly has been plagued with certain problems, including insufficient deterrents, lack of public interest and effective public pressure on the parties to resolve the disputes, and the lack of a terminal, binding, and impartial procedure to resolve an impasse where factfinding fails, the factfinding process has been viewed by both parties as a generally constructive and effective dispute-settlement technique which has played a significant role in reducing the incidence of overt conflict in public sector labor management relations. Accordingly, the New York State experience seems to support the conclusion that factfinding offers more promise than illusion as a mechanism to facilitate the resolution of interest disputes in public sector negotiations." [4]

Where the parties are willing to compromise, once an avenue is recommended by a more formal process than mediation, factfinding can be an effective technique. This opinion presumes the parties are truly interested in obtaining agreement and that the recommendations of the factfinder are perceived to be acceptable. If there is a resistance to the outcome of the factfinding process, other techniques must be provided to further encourage or mandate final resolution of the impasse.

*Work Stoppages*

When peaceful attempts to resolve bargaining impasses fail public employees, including teachers, have invoked the technique of withholding their

---

[3] Note 1, *supra* at 308.

[4] YAFFE AND GOLDBLATT, FACTFINDING IN PUBLIC EMPLOYMENT IN NEW YORK STATE: MORE PROMISE THAN ILLUSION, 62 (1971).

services to encourage public management to settle the dispute on favorable grounds. In 1960 the incidence of teacher strikes was negligible, while in 1974 there were 154 teacher strikes throughout the nation. The plain truth is that teachers are more apt to strike today than ever before in our history. This propensity to strike exists even though the law in most jurisdictions clearly forbids such action on pain of injunctions, fines and other coercive penalties.

A notable trend is developing, however, which indicates legislatures today are more willing to accept public employee strikes than ever before. Some or all public employees may legally strike after certain conditions are met in Alaska, Hawaii, Oregon, Pennsylvania, Montana, Minnesota and Vermont.[5]

Irrespective of whether strikes are legal or not is the question of whether, in the best of worlds, the strike is a proper technique to resolve bargaining impasses in public education. I feel it is not. Collective bargaining with strikes as a means to coerce settlement in the education sector is an adoption of the private sector model, which is based upon the concept of economic power. A strike is the exercise of brute power during which passion and hatred is prevalent. When the strike is over, one party emerges the victor, the other the conquered. This form of warfare is accepted in the private sector but has no constructive place in education. Making widgets may not be seriously effected once a strike is settled, but making children's minds may well be. Private sector employees must compete with shareholders and profit statements in order to make economic gains because of the nature of our competitive private sector economy. Public school teachers, however, should not see their role as the antithesis of education administrators. The "battle model" of collective bargaining, when applied to the education sector, takes as its toll one of the main goals of our system of public instruction, which is the acquisition of knowledge and the formation of young human minds in an atmosphere of academic tranquility. When teachers and administrators are engaging in the hostilities which occur before, during and after a strike, the goal of our educational system becomes compromised in favor of the self-interests of the combatants. This, I submit, is not consistent with the greater interest of the public in a strike-free educational system.

## The Role of Compulsory Arbitration in Education Negotiations

When negotiations between school administrators and teachers over terms and conditions of a contract reach the point of impasse, there is a need to ascertain peaceful techniques for resolving the resulting deadlock. As was discussed earlier, mediation and factfinding have proven to be successful in a majority of cases where they have been used. However, these techniques are limited to situations where the parties are basically prone to accept compromise and find mediation or factfinding a useful technique to open avenues to agreement. When these peaceful techniques fail to achieve settlement, some other method must be used to reach a final resolution of the bargaining impasse. One method that has been used increasingly is the technique of work stoppage by teachers to coerce settlement of disputed contract terms.

[5] ABOUD AND ABOUD, THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT, 10 (1974).

TABLE I*

*Summary of Teacher Strikes, by School Year, by Organization, by Month, and by State, July 1960 through June, 1974*

| School Year, Type of Organization, and Month | Number of Strikes | Estimated Number of Personnel Involved | Estimated Number of Man-Days Lost |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| School year | | | |
| 1960–61 | 3 | 5,080 | 5,080 |
| 1961–62 | 1 | 22,000 | 22,000 |
| 1962–63 | 2 | 2,200 | 3,000 |
| 1963–64 | 5 | 11,980 | 24,020 |
| 1964–65 | 12 | 15,083 | 27,453 |
| 1965–66 | 18 | 33,620 | 49,220 |
| 1966–67 | 34 | 10,633 | 29,079 |
| 1967–68 | 114 | 162,604 | 1,433,786 |
| 1968–69 | 131 | 128,888 | 2,733,802 |
| 1969–70 | 181 | 118,636 | 911,032 |
| 1970–71 | 130 | 89,651 | 717,217 |
| 1971–72 | 89 | 33,352 | 248,080 |
| 1972–73 | 143 | 114,508 | 1,553,223 |
| 1973–74 | 154 | 74,873 | 718,518 |
| Type of Organization | | | |
| Professional association | 752 | 439,836 | 2,434,944 |
| Teacher union | 214 | 358,336 | 5,675,266 |
| Independent organization | 8 | 2,178 | 5,018 |
| No organization | 19 | 1,189 | 2,880 |
| Joint union/association | 24 | 21,569 | 357,402 |
| Month | | | |
| August | 80 | 29,681 | 176,616 |
| September | 370 | 273,199 | 4,570,677 |
| October | 82 | 35,794 | 194,616 |
| November | 52 | 29,528 | 139,594 |
| December | 17 | 5,064 | 27,993 |
| January | 59 | 92,100 | 1,115,330 |
| February | 58 | 117,237 | 1,115,102 |
| March | 72 | 89,395 | 271,725 |
| April | 81 | 68,552 | 620,230 |
| May | 115 | 72,060 | 217,647 |
| June | 31 | 10,498 | 25,980 |
| State | | | |
| Alaska | 1 | 500 | 250 |
| Arizona | 1 | 801 | 4,005 |
| California | 37 | 43,891 | 407,376 |
| Colorado | 9 | 6,203 | 45,472 |
| Connecticut | 31 | 17,562 | 88,339 |
| Delaware | 4 | 1,709 | 5,268 |
| District of Columbia | 6 | 9,646 | 77,846 |
| Hawaii | 1 | 9,000 | 117,000 |
| Florida | 4 | 32,000 | 423,800 |
| Georgia | 3 | 179 | 913 |
| Idaho | 1 | 300 | 300 |
| Illinois | 101 | 95,488 | 619,126 |
| Indiana | 19 | 33,932 | 147,495 |
| Iowa | 2 | 209 | 592 |
| Kentucky | 7 | 55,060 | 191,810 |
| Kansas | 1 | 81 | 1,944 |
| Louisiana | 4 | 2,607 | 16,271 |
| Maryland | 10 | 18,465 | 199,725 |
| Massachusetts | 13 | 10,730 | 57,450 |

TABLE I—*Continued*

| School Year, Type of Organization, and Month | Number of Strikes | Estimated Number of Personnel Involved | Estimated Number of Man-Days Lost |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| Michigan | 227 | 89,688 | 695,089 |
| Minnesota | 2 | 2,096 | 30,960 |
| Missouri | 14 | 9,916 | 130,221 |
| Montana | 3 | 948 | 2,546 |
| Nevada | 2 | 3,200 | 5,600 |
| New Hampshire | 7 | 1,992 | 17,666 |
| New Jersey | 57 | 27,916 | 330,108 |
| New Mexico | 3 | 3,058 | 15,218 |
| New York | 61 | 143,051 | 3,341,208 |
| North Dakota | 1 | 200 | 4,400 |
| Ohio | 122 | 30,434 | 92,988 |
| Oklahoma | 5 | 24,822 | 26,932 |
| Oregon | 1 | 210 | 1,890 |
| Pennsylvania | 171 | 100,432 | 1,140,611 |
| Rhode Island | 23 | 10,770 | 66,696 |
| South Carolina | 1 | 850 | 850 |
| South Dakota | 1 | 441 | 3,969 |
| Tennessee | 7 | 1,095 | 8,744 |
| Texas | 1 | 9,000 | 18,000 |
| Utah | 4 | 12,325 | 24,950 |
| Washington | 7 | 2,267 | 9,315 |
| West Virginia | 3 | 114 | 272 |
| Wisconsin | 39 | 9,920 | 102,295 |
| Total | 1,017 | 823,108 | 8,475,510 |

* Source: GERR RF 71:1055 (1975)

Although there seems to be a trend to allow strikes under certain circumstances, it can be argued that strikes by teachers are not the best method for peacefully resolving bargaining impasses because of the trauma created in a school system under strike conditions. The strike technique, although used by teachers, is also not in the best interest of teachers themselves. Since the strike weapon is only useful to the powerful teacher groups (e.g., those in larger cities with community support), the multitude of smaller teacher organizations would find little value in a walkout when administrators are capable of keeping the school system running at an acceptable level and turning the local populace against the striking teachers. Even in larger jurisdictions, school administrators may blunt the effects of a teacher walkout by developing and implementing an effective strike plan which is designed to provide an acceptable level of instruction by a skeleton crew of non-striking teachers, substitutes and administrators.[6]

Thus, where impasse exists after mediation or factfinding have failed and the strike technique is illegal or ineffective, teachers are left with no immediately effective technique to coerce settlement by the school administration. This may be perceived by my fellow management advocates as the correct

[6] STAUDOHAR, PUBLIC EMPLOYMENT DISPUTES AND DISPUTE SETTLEMENT, 12 (1972); Patterson and Liebert, *Management Strike Handbook*, 47 PERL 28 (1974).

result because, as the theory goes, the final decision as to terms and conditions of employment should be in the hands of the voter's representatives whom the administrators serve. However, this theory of ultimate sovereignty must be viewed in light of the fundamentals of collective bargaining and contemporary personnel practices. A basic tenet of collective bargaining is that employees should have an effective voice in determining wages, hours and working conditions. If management is always in the position of making final decisions concerning these topics, there may exist little incentive for management to seriously consider teacher demands. Thus, the bargaining process may become distorted in favor of school administrators. If the teachers perceive their input into the bargaining process as futile because management is not sensitive to their demands, they will find other ways to gain inputs into the managerial decision-making process. One such technique could be a lowering of teacher morale and reduction in productivity, which could cause negative impacts on the student population of the school system. This type of non-bargaining technique is one of the reasons state legislatures originally enacted collective bargaining statutes. If teachers do not have an effective voice in determining wages, hours and working conditions because school administrators have final authority, then true collective bargaining based on a balanced input into certain decisions concerning teacher employment is thwarted because there is no coercive technique to compel true compromise.

In order to create a more balanced atmosphere for collective bargaining, various legislatures have enacted statutes requiring binding arbitration of bargaining impasses.[7] Arbitration statutes vary considerably depending upon the subject matter jurisdiction of the arbitrator or the decisional technique which may be used. In some states arbitrators are limited to deciding non-economic issues and in others they may decide all bargainable issues at impasse.[8]

From the management point of view, a problem commonly perceived concerning compulsory arbitration is its "narcotic effect", which is epitomized by the following quote:

> " 'Compulsory arbitration' would soon result in the disappearance of bargaining between employers and organized labor, for the party favored by the fore-ordained standards in a specific dispute would subject the other party to the compulsory procedures, instead of attempting painstakingly to work out a voluntary settlement." [9]

Because the employee organization is primarily the demanding party in negotiations, management feels that with compulsory arbitration as an end result, true collective bargaining will not occur if the employee representative feels ultimate victory lies in the hands of the arbitrator rather than at the

---

[7] Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973).

[8] Coughlin and Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?* 58 MARQ. L. REV. 205, 213 (1975).

[9] Frey, *Is Compulsory Arbitration of Wages Inevitable?*, in speeches, *Assn. of Labor Mediation Agencies*, quoted in Howlett, note 7, *supra*.

table. This perception is caused by the belief that arbitrators tend to "split the difference" between the parties positions. Employee representatives can strive for "more, more, more" at the bargaining table and then go to an arbitrator for even more. This result, management feels, is contrary to the precept that bargaining must be done at the table, not by a third party neutral.

In order to overcome this tendency of arbitrators to compromise, state legislatures are experimenting with a form of arbitration which will circumscribe the neutral's discretionary power. The technique is called final offer arbitration and preliminary results indicate that it may work to encourage the parties to agree at the bargaining table rather than through an arbitrator. Final offer arbitration limits the arbitrator to choosing between the last best offer of one party or the other on an entire package basis or on an issue-by-issue basis based upon a rule of reasonableness generally spelled out in the enabling legislation.[10] The virtue of this type of arbitration is that it is final and binding on the parties based upon their proposed last best offers without granting the arbitrator an undue amount of discretion. Thus, there is an element of coercion because a third party will select one of the offers as binding while there is guaranteed no compromise by the arbitrator. If the parties are sensitive to what will be perceived as reasonable by the arbitrator, they will tend to tailor their final offer in that manner. If both sides are privy to the same information regarding issues such as comparative salary levels and work practices (which are predominant standards in final offer arbitration legislation), they should be narrowing their areas of disagreement so finely that voluntary settlement will be possible.[11] This result is consistent with the purpose of collective bargaining, which is to allow the parties to reach a voluntary agreement without a mandated settlement by a third party or the chaotic influences of a work stoppage.

The emerging evidence of the results of final offer arbitration lead to a tentative conclusion that it is a technique worth serious consideration by policy-makers. In Eugene, Oregon, where a local ordinance provides for final offer arbitration, the following observation has been made:

> "One can conclude, after examining these experiences, that the incentive to bargain is increased primarily because of the 'sudden death' nature of the procedure: either party may 'lose the entire ball game' if the arbitrators deem its offers less reasonable than one of those made by the other party. The 1971–72 arbitration experiences with police and firefighters and the 1972–73 experience with AFSCME demonstrated this possibility. The police and AFSCME experiences revealed the futility of asking for economic gains that considerably exceed prevailing market standards, and the firefighters experience revealed that it is possible to lose an entire package because of the inclusion of one objectionable provision. These experiences have made all the parties in Eugene aware that a successful

[10] For example, the Iowa Public Employment Relation Act provides for issue-by-issue determination while the Wisconsin Employment Relations Act calls for determination by total package.

[11] Feuille, *Final Offer Arbitration: Concepts, Developments and Techniques*, 50 PERL 1 (1975).

> final offer arbitration strategy is the antithesis of a successful conventional arbitration strategy: instead of maintaining wide areas of disagreement in hope of a more favorable compromise award, each side must develop more reasonable proposals than the other side, which, on economic issues in Eugene, translates into narrowing the areas of disagreement around a central figure supplied by market comparisons."[12]

More recent evidence on a broader scale indicates that experiences under final offer arbitration tend to be consistent with the proposition that it deters over reliance on the discretion of a neutral third party. In a recent comprehensive study of the effects of final offer arbitration in police and firefighter negotiation impasses in Wisconsin and Michigan, Professors Stern and Rehmus report that the technique is encouraging the parties to settle impasses voluntarily. Professor Stern reports:

> "In about two-thirds of the 173 negotiations in 1973, the parties reached agreements without any third party assistance. Mediation took place in the remaining one-third of negotiations, either upon direct request of the parties or, as a result of their petitions for arbitration, in the course of the Commission's investigation. About three-fourths of the mediated disputes were resolved, including the few that were settled by the parties themselves during the procedure leading to the arbitration hearing, or at the hearing with the aid of the arbitrator. *In only 9 percent of the 173 negotiations were arbitral awards issued.* In negotiations of the 1974 agreements, the experience was similar: As of April 1, the proportion of negotiations in which the parties sought third-party assistance was still about one-third."[13]

Professor Rehmus reports that his study of the unique Michigan final offer process where arbitrators are allowed to choose between issues rather than select one entire package over the other (as is the case in Wisconsin) that arbitrators are using their flexibility to mediate disputes and thereby encourage the parties to settle voluntarily. This resulting mediation-arbitration he contends:

> ". . . is not a panacea for all disputes, whether agreed to directly by the parties themselves or resulting from a final-offer arbitration procedure. But in many cases, mediation-arbitration is a constructive alternative to a strike or to conventional arbitration. It seems at the present time to be an interesting outcome of our Michigan statutory final offer experiment, simply because it helps to serve the public interest by promoting the peaceful settlement of impasses in crucial negotiations in the public sector by the parties themselves."[14]

In Wisconsin, where public safety employees and managers have been bargaining under the final offer procedure since April 1972, there has been no noticeable attempt to revoke the statute or modify the process. Indeed, the representatives of the parties have learned to bargain successfully in the face

---

[12] Long and Feuile, *Final Offer Arbitration: "Sudden Death" in Eugene,* 27 IND. & LAB. REL. REV., 187, 197 (January, 1974).

[13] Stern, *Final Offer Arbitration—Initial Experience in Wisconsin,* MONTHLY LABOR REV. 40 (September, 1974).

[14] Rehmus, *Is "Final Offer" Ever Final?,* MONTHLY LABOR REV. 43 (September, 1974).

of the final offer process. The award rate between the parties has been about even over the last three years, which has encouraged one management advocate to recommend to government managers that "employers can win" at final offer arbitration.[15]

The evidence presented thus far concerning the efficacy of binding arbitration has been limited to public employment other than the education sphere. However, much can be learned from the experiences of others in the public sector, and this writer is of the opinion that the results indicated above can hold true for those who bargain in education. An example of the use of final offer arbitration in education is instructive on this point. This writer was retained by a school board in Iowa as its representative in a final offer arbitration hearing held on January 22, 1975. The parties had negotiated under a mutually determined procedure, which was adopted from the Iowa Public Employment Relations Act.[16] The Act provides for binding arbitration of bargaining impasses on an issue-by-issue basis after mediation and fact-finding have been utilized. The arbitrator must choose between the final offers of the parties or the recommendations of the factfinder. Since the Act's provision for inclusion of the factfinder's recommendations came after the arbitration agreement of the parties, it was not included as a provision in the arbitrator's jurisdictional mandate. Thus, this initial experience in Iowa must be considered in light of any impact of possible recommendations by a factfinder. The parties had bargained for two months over 15 issues and could agree on only 4 items. The remaining 11 issues were negotiated with the assistance of a mediator provided by the Federal Mediation and Conciliation Service. His input proved successful to the point of narrowing the issues in dispute to three: salaries, school calendar (specifically, in-service days) and paid teacher leave for association activities. These three issues were submitted to arbitration in a formal hearing open to the public. After a full day hearing, where 6 witnesses and 30 exhibits were presented, the arbitrator rendered his award. On the issue of salary he chose the teacher's final position while ruling in favor of the school board on the issues of in-service days and paid leave for association activities.[17] It should be noted that the difference between the school board and the teachers on the salary issue amounted to only .75 percent (school board 11.25 percent; teachers 12 percent) and had there been a factfinder's recommendation as to wages, voluntary settlement would have been highly probable and the remaining issues may have also been settled since there were informal indications that they hinged upon the salary issue.

This initial experience indicated to me that binding arbitration did play a positive role in the negotiations process in an education setting. The virtue of compulsory final offer arbitration in this case was that it forced the parties to rationalize their positions during the mediation stage in order to prepare for

---

[15] Walsh, *Compulsory Binding Arbitration: Employers Can Win,* THE (Wisconsin) MUNICIPALITY, 144 (August, 1973).

[16] GERR, RF 51:2411.

[17] 597, GERR, E-1 (1975).

the test of reasonableness which would be used by the arbitrator. This accounted for settlement of a large majority of the unresolved issues. Thus, in this sense, it is consistent with the tentative conclusions drawn from the experiences in Wisconsin, Michigan and Eugene, Oregon. However, the Iowa model of final offer arbitration is not as rigorous as it could be from a management point of view. Under the Iowa process, the arbitrator can select final offers on an issue-by-issue basis, thus, there is room for compromise between issues. The virtue of final offer is the element of "sudden death" which encourages reasonable total packages and voluntary settlement. In issue-by-issue selection, there may be an incentive to go to arbitration with many issues unresolved in order to take advantage of the arbitrator's discretion. This will result in a disincentive to complete voluntary settlement where one party perceives any future trade off by the arbitrator. This criticism aside, however, the evidence seems to argue strongly for this form of compulsory arbitration as a peaceful dispute resolution tool.

## Can Compulsory Arbitration Work in Education Negotiations?

Collective bargaining has resulted in a grant of power to teachers at the expense of diminishing the authority of school administrators. The model of education administration before collective bargaining was one of unilateralism where administrators were granted full authority and responsibility for making all decisions related to delivery of educational services to the local community. With collective bargaining, the unilateral power of administrators has become eroded to the extent that teachers may now bargain over certain terms and conditions of employment. This process of bilateral decision-making will inevitably lead to some disputes between administrators and teachers over what the terms of a contract should be. Since strikes are, as a policy matter, not perceived to be a viable technique for resolving bargaining impasses, some peaceful and acceptable technique must be implemented. Initial evidence seems to indicate that final offer arbitration can work to resolve disputes and encourage the parties to voluntarily agree to terms of a contract.

An initial caveat is in order at this point. Before binding arbitration can play a useful role in education negotiations, certain conditions must be met. These conditions are related to the overall collective bargaining scheme, a portion of which includes binding arbitration. As a first step, school administrators must perceive their role in collective bargaining as one of an advocate for the overall school community. Administrators must realize that collective bargaining grants teachers a unique input into the resource allocation process of the local community. This input allows teachers to speak with a unified voice through a formal process which precludes inputs from competing interest groups and compels a written agreement which is binding upon the school district for a definite period of time.[18] The result of this unique decision-making process is that the person responsible for contract negotiations serves

[18] Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L. J. 1156, 1164–68 (1974).

as a gatekeeper to the resources of the school jurisdiction. When teacher organizations demand "more, more, more" the negotiator must hold ground and insure that the interests of the community at large are not compromised by the demands of the teachers. While forestalling excessive demands by teachers, the administrator must simultaneously strive for smooth employer-employee relations in order to insure the highest morale and productivity possible. These two countervailing concepts may at first glance seem irreconcilable, but in actual practice they are not. Seasoned employee representatives know full well that management cannot afford to "give away the shop" and still function effectively. Employee representatives expect a tough battle at the bargaining table and respect a strong well-reasoned management position. Mr. Victor Gotbaum, a well-known public employee union leader from New York has said an honest and tough adversary relationship should exist between public management and labor and that exaggerated feelings between the parties to date has stymied the development of a proper professional attitude in the public sector.[19]

Adoption of a tough but reasonable bargaining attitude by management can lead to a higher degree of employee morale and productivity based on mutual respect and professionalism. Before this highly desirable goal can be achieved, however, public officials must establish a strong management team instilled with a proper management bargaining philosophy and a high degree of authority and responsibility for contract negotiations. This team should be well-rewarded and never undermined in the eyes of employees.[20] If gearing up for collective bargaining calls for changes in management structures, they must be made in order to insure a cohesive management group which can successfully negotiate and administer labor agreements with teacher organizations.[21]

These changes in attitudes, resource allocation and administrative structures are absolutely necessary if management in the education sector is to achieve that level of sophistication in labor matters required to maintain a mature employer-employee relations program which will serve the greater public interest.

Once school administrators have effectively prepared themselves for coping with collective bargaining, the proper framework for resolving logjams in negotiations must exist to allow the parties opportunity to settle disputes voluntarily. Mediation has proved to be a very successful technique for aiding voluntary settlement and should exist as an initial step in the impasse resolution process. Since inexperienced negotiators from both sides have a tendency to reach impasse relatively soon without true bargaining, it is imperative that the mediator be allowed to apply some coercion to the parties to insure a deadlock exists only after extensive bargaining. In this respect the

[19] Gotbaum, *Collective Bargaining and the Union Leader,* in PUBLIC WORKERS AND PUBLIC UNIONS (S. Zagoria ed. 1972).

[20] Shaw and Clark, *The Practical Difference Between Public and Private Sector Collective Bargaining,* 19 U.C.L.A. L. REV. 867 (1972).

[21] Burton, *Local Government Bargaining and Management Structure,* 11 INDUSTRIAL RELATIONS 123 (1972).

statutory scheme should mandate that the mediator certify a true impasse exists over certain issues. The statute should also define the term "impasse" in such a manner as to preclude use of the mediation process without good faith bargaining beforehand.

If mediation proves to be ineffective, there should be a provision for the use of factfinding with recommendations to indicate to the parties how settlement can be facilitated. The factfinding process should be designed as a quasi-formal procedure which clearly delineates what the issues at impasse are, as well as the positions of the parties and their supporting rationale. In order to insure that the parties seriously consider the recommendations of the fact-finder, any later binding arbitration proceeding should take cognizance of the results of factfinding.

Where mediation and factfinding fail to resolve the bargaining impasse, final offer arbitration should be provided for on a total package basis under a carefully drawn statutory provision. The recommendations of the factfinder should be considered by the arbitrator as one of the three possible awards. Before this form of binding arbitration can work successfully, it is necessary that the enabling legislation clearly delineate the proper scope of bargaining to insure that essential managerial prerogatives are not subject to the arbitration or factfinding process. Also, the factors which a factfinder or arbitrator must consider when rendering a recommendation or award should be spelled out in the statute. An example of the type of standards which should be used are the provisions of Assembly Bill 605 currently being considered by the Wisconsin Legislature:

> " 'Factors considered.' In making any recommendation or other decision under fact-finding and arbitration procedures authorized by this subsection, the fact-finder shall give weight to the following factors:
> a. The lawful authority of the employer.
> b. Stipulations of the parties.
> c. The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
> d. Comparison of wages, hours and conditions of employment of the employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in comparable communities and in private employment in comparable communities.
> e. The average consumer prices for goods and services, commonly known as the cost-of-living.
> f. The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
> g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
> h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between the parties, in the public service or in private employment."

If the initial reports of success of final offer arbitration hold true, this process offers a unique opportunity to facilitate voluntary settlement of disputes without use of the strike tactic. In order to insure this, however, the strike must be specifically outlawed and its exercise by individual teachers and teacher organizations must result in swift and sure penalties. Also, teachers should not be allowed a guaranteed work year when they strike as is generally the rule today. A statutory provision must be enacted to forestall a guarantee of a certain number of workdays per year. A current proposal by the Wisconsin Association of School Boards is a good example of the statutory language needed:

> "No employee shall be paid for any day he fails, as a result of a strike, to report for work. Notwithstanding any other statutory provision, regulation or rule with respect to the minimum length of the school year or length or number of days on which school shall be taught or conducted, no makeup days shall be required and no loss of state aid shall result if the public school or schools are closed as a result of a strike by school employees. In the event of a public school employee strike, state aids shall be recomputed by the Department of Public Instruction so as to determine and delete those aidable costs which were not expended as a result of a strike." [22]

Finally, the important role of the arbitrator under this recommended impasse resolution process must be recognized. In order for binding arbitration to be accepted by the parties as a viable procedure, it is necessary that arbitrators be above reproach and extremely well-qualified to render decisions. This may seem a truism, but it should be noted that no formal process presently exists to train arbitrators for the important role they play in the resolution of public sector bargaining impasses. The problem of training new arbitrators (who are appearing predominantly in the public sector) is not a new one as the following quote from Frederick Livingston, Co-chairman of thd American Bar Association's Labor Law Section, Committee on Labor Arbitration illustrates:

> "In my own judgment, this is one of the few groups I know of that holds itself out as a profession, yet has no standards for determining what makes one eligible to be part of this profession. I think . . . the people actively engaged in arbitration have to face up to the fact that some standards must be established. . . . The stakes involved in arbitration frequently exceed the stakes involved in litigation in the courts. It, therefore, becomes essential that standards be established for the practice of arbitration. This should no longer be something that a person decides to just do. It is a very high ambition. But it is one that a person is not entitled to aspire to unless he has had the educational background, the experience in industrial relations problems and exposure to the various types of experiences that are essential." [23]

The words of this speaker hold true even more so today than in 1962, because of the tremendous rise in the use of arbitration in the public sector.

---

[22] Wisconsin Ass'n of Sch. Bds., *Legislative Letter,* 75-16 (May, 1975).

[23] Livingston, *Discussion on the Development of Qualified New Arbitrators,* 15 ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 206–207 (1962).

Yet, very little has been done to alleviate the problem of developing a cadre of people who are acceptable to both public management and public employee organizations. Compulsory arbitration will not achieve a high state of respect by the parties involved until the arbitration profession and the responsible state agencies come to grips with the problem of adequate training of arbitrators to insure the rendering of awards that the parties can live with.

In conclusion, I recommend compulsory arbitration as a technique for resolving bargaining impasses in education. However, compulsory arbitration by itself is no panacea. It can only be successful when certain conditions have been met. The presence of these conditions along with the unique form of arbitration I have spelled out in this paper, I submit, can encourage voluntary settlement by the parties while insuring a balance of bargaining power without the need for strikes in our nation's schools.