

# THE JUDICIAL ENFORCEMENT OF PUBLIC SECTOR INTEREST ARBITRATION

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## I. INTRODUCTION

In recent years, the Federal Government and the vast majority of states have legislatively provided various public employees<sup>1</sup> with the right to organize for the purpose of negotiating with their respective governmental employers concerning their wages, hours, and working conditions. Where a public employer and the designated bargaining representative of its employees are able to mutually agree upon the terms of employment to be included in a new collective contract, few difficulties are encountered. However, where such parties are themselves unable to achieve a satisfactory accommodation of their competing interests, the intervention of outside neutrals may be utilized to assist them with the resolution of their negotiating impasse. The services of a labor mediator may effectively encourage the parties to reach an agreement, or a fact-finder may be employed to recommend the manner in which the unresolved bargaining issues should be settled.<sup>2</sup> Nonetheless, resort to such ancillary procedures may occasionally prove ineffective, thus leaving the parties without a satisfactory resolution of their dispute.

The impasse resolution technique most often used in the private sector where parties are unable to resolve a bargaining impasse through regular negotiations involves resort to a work stoppage. Although eight states have legislatively sanctioned this economic weapon for at least some groups of governmental employees under certain circumstances,<sup>3</sup> most have either statutorily proscribed such conduct<sup>4</sup> or prohibited such stoppages by judicial decision.<sup>5</sup> As a result, most public employees are unable to lawfully enhance

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<sup>1</sup> Although many state labor enactments generally cover all state and local public employees, subject to certain limited exclusions, other statutes only apply to particular groups of workers, such as police personnel, firefighters, or educational employees. See citations at note 10 *infra*.

<sup>2</sup> See generally H. EDWARDS, R. CLARK & C. CRAVER, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 593-606 (1979) [hereinafter cited as H. EDWARDS, R. CLARK & C. CRAVER] and authorities cited therein.

<sup>3</sup> See ALASKA STAT. § 23.40.200 (1972); HAWAII REV. STAT. § 89-12 (Supp. 1978); MINN. STAT. ANN. § 179.64 (Supp. 1978); MONT. REV. CODES ANN. § 41-2209 (Supp. 1978); OR. REV. STAT. § 243.726 (1978); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1978); VT. STAT. ANN. tit. 21, § 1730 (Supp. 1978); WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (Supp. 1978).

<sup>4</sup> See, e.g., DEL. CODE ANN. tit. 19, § 1312 (1979); KAN. STAT. ANN. § 75-4333(c)(5) (1977).

<sup>5</sup> See, e.g., *Anderson Fed'n of Teachers, Local 519 v. School City of Anderson*, 252 Ind. 558, 254 N.E.2d 329, *cert. denied*, 399 U.S. 928 (1970); *Board of Educ. of*

their position during a bargaining impasse through the application of economic self-help measures.

Many states have realistically recognized that the mere prohibition of work stoppages by public employees will not ipso facto prevent such occurrences. Where frustration over unsuccessful negotiations becomes sufficiently extreme, governmental workers may simply ignore the applicable legal proscription and engage in strike activities.<sup>6</sup> In an effort to minimize such disruptions of governmental services, numerous states have elected to provide an alternative dispute resolution mechanism.<sup>7</sup> The most common public sector device for resolving bargaining disputes where mediation and fact-finding have proved unsuccessful entails the use of binding "interest" arbitration.<sup>8</sup>

Twenty-seven states currently<sup>9</sup> authorize the use of voluntary (*i.e.*, by consent of parties) or compulsory interest arbitration to resolve ultimately some or all public sector negotiation impasses.<sup>10</sup>

Kankakee School Dist. No. 111 v. Kankakee Fed'n of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970), *cert. denied*, 403 U.S. 904 (1971).

<sup>6</sup> Regarding the extent of public sector strike activity during the past two decades, see H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 2, at 493 & Table 1.

<sup>7</sup> See BARR, *The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration be an Acceptable Dispute Resolution Method in the Public Sector?*, 39 ALBANY L. REV. 377, 378 (1975); Note, *Final Offer Arbitration: The Last Word in Public Sector Disputes*, 10 COLUM. J.L. & SOC. PROB. 525 (1974) [hereinafter cited as Columbia Note]; Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678 (1976) [hereinafter cited as Grodin].

<sup>8</sup> "Interest" arbitration is distinguished from the more familiar grievance or "rights" arbitration by the fact that in the former situation the designated neutral is employed to determine the actual contract terms which will bind the parties during the life of their new agreement, while in the latter situation the arbitrator is only empowered to decide disputes concerning the interpretation and application of the terms of an already existing contract. The grievance arbiter is generally precluded from adding to or modifying the terms of the contract in dispute. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 47-50 (1973).

<sup>9</sup> Interest arbitration provisions enacted in South Dakota, S.D. COMP. LAWS ANN. § 9-14A (Supp. 1978), and Utah, UTAH CODE ANN. § 34-20a-7 (Supp. 1978), were previously declared unconstitutional. See *City of Sioux Falls v. Firefighters Local 814*, 89 S.D. 455, 234 N.W.2d 35 (1975); *Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d 786 (Utah 1977). Regarding the constitutionality of public sector interest arbitration legislation, see discussion in Part II *infra*.

<sup>10</sup> ALASKA STAT. § 23.40.200 (1972) (police officers, firefighters, jail and correctional institution personnel, and hospital workers); CONN. GEN. STAT. ANN. § 7-473 (Supp. 1978) (local government employees); DEL. CODE ANN. tit. 19, § 1310 (1975) (state and local workers); HAWAII REV. STAT. § 89-11 (Supp. 1978) (state and local employees); Ill. Dir. of Personnel Rules and Regulations § 15, CCH PEB ¶16,069 (state personnel); IND. CODE ANN. § 22-6-4-12 (Burns Supp. 1978) (state and local workers); IOWA CODE ANN. § 90.15 (Supp. 1978) (firefighters); IOWA CODE ANN. § 20.22 (Supp. 1978) (state and local workers); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1978-79) (local government workers); ME. REV. STAT. ANN. tit. 26, § 979-D(4) (1964) (state employees); ME. REV. STAT. ANN. tit. 26, § 1026(4) (Supp. 1978-79) (university personnel); MASS. GEN. LAWS ANN. ch. 150E, § 9 (Supp. 1978-79) (state and local employees); MICH. COMP. LAWS ANN. §§ 423.231-.240 (Supp. 1978-79) (police and firefighters); MINN. STAT. ANN. § 179.38 (Supp. 1978) (hospital workers); MINN. STAT. ANN. § 179.72 (Supp. 1978) (essential employees); MONT. REV. CODES ANN. § 59-1614(9) (Supp. 1978) (state and local personnel); NEB. REV. STAT. §§ 48-810 to -819 (Supp.

The arbitral procedures followed vary widely from state to state.<sup>11</sup> In some cases, a single neutral arbitrator or a state administrative agency is employed to decide the issues in dispute, while in other cases a tripartite arbitration panel consisting of a management representative, a labor representative, and a neutral chairperson is used.<sup>12</sup> Arbitrators may be authorized to formulate any final resolution of the unresolved matters which they believe is appropriate,<sup>13</sup> or they may simply be empowered to select the most reasonable final offer made by one of the parties, either on an "issue-by-issue" basis<sup>14</sup> or

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1978) (state and local personnel); NEV. REV. STAT. § 288.200 (1975) (local government employees); N.H. REV. STAT. ANN. § 273-A-12 (Supp. 1978) (state and local workers); N.J. STAT. ANN. § 34:13A-7 (1965) (state and local personnel); N.M. State Personnel Bd. Regulations § 14(c), CCH PEB ¶24,519 (state employees); N.Y. CIV. SERV. LAW § 205.3 (Supp. 1978-79) (police and firefighters); OKLA. STAT. ANN. tit. 11, § 548.1 (Supp. 1978-79) (police and firefighters); OR. REV. STAT. § 243.712(2)(c) (1975) (state and local personnel); OR. REV. STAT. § 243.742 (1975) (police, firefighters, and guards at mental and correctional institutions); PA. STAT. ANN. tit. 43, § 217.4 (Purdon Supp. 1978-79) (police and firefighters); PA. STAT. ANN. tit. 43, §§ 1101.804-.805 (Purdon Supp. 1978-79) (state and local personnel); R.I. GEN. LAWS § 28-9.1-7 (1968) (firefighters); R.I. GEN. LAWS § 28-9.2-7 (1968) (police); R.I. GEN. LAWS § 28-9.3-9 (1968) (teachers); R.I. GEN. LAWS § 28-9.4-10 (Supp. 1978) (municipal workers); R.I. GEN. LAWS § 28-9.5-9 (Supp. 1978) (school administrators); R.I. GEN. LAWS § 36-11-9 (Supp. 1978) (state employees); TEX. REV. CIV. STAT. ANN. arts. 5154C-9 to -15 (Vernon Supp. 1978-79) (police and firefighters); VT. STAT. ANN. tit. 3, § 925 (Supp. 1978) (state workers); VT. STAT. ANN. tit. 21, § 1733 (Supp. 1978) (local government employees); WASH. REV. CODE ANN. § 41.56.450 (Supp. 1978) (police and firefighters); WIS. STAT. ANN. § 111.70(4)(cm) (Supp. 1978) (municipal employees); WIS. STAT. ANN. § 111.70(4)(jm) (1974) (Milwaukee police); WIS. STAT. ANN. § 111.77 (1974) (non-Milwaukee police and firefighters); WYO. STAT. § 27-269 (1967) (firefighters).

<sup>11</sup> Procedural variations within the same state may even occur where the enabling statute authorizes negotiating parties to establish their own mutually acceptable arbitration procedures. See, e.g., HAWAII REV. STAT. § 89-11(b) (Supp. 1978).

See, e.g., WYO. STAT. § 27-270 (1967), which provides that for firefighter interest arbitration each party shall select an arbitrator, with these two individuals being given ten days to agree upon the third neutral arbiter. If these two people are unable to agree upon the neutral chair, either party may petition the district court to have it designate the neutral member.

<sup>12</sup> See generally ARBITRATION OF INTEREST DISPUTES, PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1-61 (B. Dennis & G. Somers eds. 1974); Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 INDUS. REL. L.J. 427, 464-66 (1976) [hereinafter cited as Morris]; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972) [hereinafter cited as McAvoy]; J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER & B. DENNIS, *FINAL OFFER ARBITRATION* (1975) [hereinafter cited as J. STERN ET AL.]; Comment, *Public Sector Interest Arbitration: Threat to Local Representative Government?*, 9 PACIFIC L.J. 165, 183-84 (1978) [hereinafter cited as Comment].

<sup>13</sup> See, e.g., PA. STAT. ANN. tit. 43, §§ 1101.804-.805 (Purdon Supp. 1978-79).

<sup>14</sup> See, e.g., MICH. COMP. LAWS ANN. §§ 423.231-.240 (Supp. 1978-79). See also IOWA CODE ANN. § 20.22 (Supp. 1978) which directs the arbitration panel to make an issue-by-issue determination from among not only the final offers of the disputing parties but also from the previously issued recommendations of the fact-finder. Regarding the appropriate definition of the term "issue," see *West Des Moines Educ. Ass'n v. PERB*, 266 N.W.2d 118 (Iowa 1978).

on a "total package" basis.<sup>15</sup> The arbitration award may be entirely binding upon the parties,<sup>16</sup> completely advisory,<sup>17</sup> or partially binding and partially advisory depending upon the state statute and the specific issues involved.<sup>18</sup>

As state legislatures have increasingly accepted interest arbitration as a viable means to finally resolve public sector bargaining impasses, some people have questioned the propriety of this dispute resolution procedure. It has been contended that the availability of such arbitration may actually weaken the bargaining process by encouraging parties to rely upon the arbitral alternative as a substitute for meaningful negotiations.<sup>19</sup> Some have even questioned the efficacy of this device as a strike deterrent.<sup>20</sup> Critics have also argued that interest arbitration provisions inappropriately delegate to politically unaccountable private arbiters the ultimate authority to determine important employment issues which could profoundly affect the services received by the public and the manner in which governmental revenues are to be expended.<sup>21</sup>

Although it is not the purpose of this article to engage in any significant discussion of these criticisms of public sector interest arbitration, some observations should be briefly noted. The empirical results from those jurisdictions which have adopted this device as a means of resolving bargaining impasses demonstrate that this procedure has actually diminished strike activity.<sup>22</sup> Furthermore, there has been no indication that this option has had any pernicious impact upon the bargaining process.<sup>23</sup> Nonetheless, it must be recognized that this device has undoubtedly influenced governmental institutions by imposing upon municipal entities employment terms which were not consensually accepted by the elected representatives.

It is unlikely that meaningful negotiating rights can be extended to governmental employees without impacting the political process to some extent. An effect upon the political system, however, need not be grounds for defeating labor legislation.<sup>24</sup> Even where no formal bargaining rights are granted

<sup>15</sup> See, e.g., WIS. STAT. ANN. § 111.70(4)(cm) (Supp. 1978). For an excellent comparison of the experiences under the Pennsylvania, Michigan, and Wisconsin arbitration statutes, see J. STERN ET AL., *supra* note 12.

<sup>16</sup> See, e.g., R.I. GEN. LAWS §§ 28-9.1-9, & 28-9.2-9 (1968).

<sup>17</sup> See, e.g., CONN. GEN. STAT. ANN. § 10-153f (Supp. 1978). Such "advisory arbitration" is basically analogous to fact-finding.

<sup>18</sup> See, e.g., ME. REV. STAT. ANN. tit. 26, § 979-D(4)(D) (Supp. 1978-79) (opinion advisory regarding wages, pensions, and insurance, but binding with respect to other matters); PA. STAT. ANN. tit. 43, § 1101.805 (Purdon Supp. 1978-79) (award advisory only, where legislative action required to implement it). See also OKLA. STAT. ANN. tit. 11, § 548.9 (Supp. 1978-79) (award binding if accepted by public employer, but not if rejected by it).

<sup>19</sup> See, e.g., McAvoy, *supra* note 12, at 1209-10 and authorities cited therein.

<sup>20</sup> See, e.g., *id.* at 1210-11 and authorities cited therein.

<sup>21</sup> See generally Grodin, *supra* note 7; see also McAvoy, *supra* note 12, at 1208-09; Comment, *supra* note 12, at 165-66.

<sup>22</sup> See Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 CIN. L. REV. 47, 64 (1973) [hereinafter cited as Howlett]; J. STERN ET AL., *supra* note 12, at 32, 71; Comment, *supra* note 12, at 169 n.19.

<sup>23</sup> See Howlett, *supra* note 22, at 57-61.

<sup>24</sup> See, e.g., R. SUMMERS, *COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE* (1976).

to public employees, the employees can significantly influence the political process through the use of lobbying efforts. Moreover, notwithstanding any distortion in the political process which may result from the extension of labor negotiation rights, the extension remains appropriate to enhance workers' personal dignity and to provide them a formal process for participating in the determination of their employment conditions. Interest arbitration is a useful bargaining dispute resolution technique which is appropriate where suitable substantive and procedural safeguards are provided. Thus, while public policy should not automatically preclude the acceptance of such arbitration, neither should it be ignored in determining the proper parameters of an interest arbitration scheme.<sup>25</sup>

The primary objective of this article is not to debate the policy considerations underlying a legislative decision to enact a public sector interest arbitration provision,<sup>26</sup> but rather to analyze the manner in which judicial tribunals resolve the fundamental legal issues which arise under established arbitral statutes. The two most litigated questions concern the constitutional propriety of such legislative delegations of governmental authority and the appropriate scope of judicial review to be applied to awards issued by arbitrators pursuant to such statutory schemes. The constitutional questions will be evaluated first, with the proper standards for judicial scrutiny of arbitral awards being explored thereafter.

## II. CONSTITUTIONAL CONSIDERATIONS

Numerous constitutional challenges to public sector interest arbitration statutes have been made. The most frequently litigated issue and the one engendering the most intricate judicial scrutiny has concerned the assertion that such enactments constitute impermissible delegations of legislative authority to politically unaccountable private individuals. However, various other constitutional claims have also been raised. Although they have usually been expeditiously disposed of by judicial tribunals, they are deserving of at least brief consideration.

### A. *Non-Delegation Challenges*

Five distinct non-delegation theories have been relied upon by parties questioning the constitutional validity of interest arbitration statutes. Public employers have contended that such enactments contravene due process and

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<sup>25</sup> The alternative to an arbitral dispute settlement procedure is not infrequently resort to strike action, and it must be emphasized that the distortion of the political process which can be achieved through such conduct could easily transcend that which may be indigenous to an interest arbitration scheme. See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 167-69 (1971).

<sup>26</sup> This is not intended to denigrate the importance of such basic policy considerations. It must be acknowledged that this involves an issue over which reasonable people can disagree and, as has already been indicated, I simply accept the philosophical notion that a properly circumscribed public sector interest arbitration scheme can constitute an appropriate impasse resolution device.

equal protection principles, the one-man-one-vote doctrine, home rule authorizations, and governmental taxing power.<sup>27</sup>

In *Harney v. Russo*,<sup>28</sup> the Pennsylvania Supreme Court was presented with the argument that a state interest arbitration statute unconstitutionally permitted arbitrators to ignore due process standards. The court recognized that such a contention assumed that procedural safeguards would generally not be satisfied. It appropriately indicated that the possibility of such an impropriety in a specific case could not taint the statutory scheme itself, but only the results of the improperly conducted proceeding.<sup>29</sup> Since the availability of judicial review would presumably prevent the enforcement of awards emanating from hearings conducted in an arbitrary or unfair manner, there would be no reason to sustain such a challenge to the entire underlying enactment.<sup>30</sup>

Statutes authorizing arbitration of bargaining disputes for only specific groups of public employees have been challenged as being violative of equal protection rules. Courts, however, have had no difficulty in concluding that such legislative distinctions are completely permissible since they are supported by rational considerations.<sup>31</sup> So long as the elected representatives are not making wholly illogical demarcations, the fact that a provision applies to certain government workers but not to others should be irrelevant.<sup>32</sup>

Litigants have contended that interest arbitration enactments are unconstitutional since they authorize the performance of quasi-legislative functions by private arbiters who have not been selected in conformity with the one-man-one-vote doctrine. Nonetheless, this argument has been summarily rejected by courts. As the Pennsylvania Supreme Court stated in *Harney*, "the mere fact that the arbitration panel . . . could affect the spending of public funds is clearly not sufficient to make that body legislative and thus subject to

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<sup>27</sup> See generally Weisberger, *Constitutionality of Compulsory Public Sector Interest Arbitration Legislation: A 1976 Perspective* in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 35 (A. Knapp ed. 1977) [hereinafter cited as Weisberger]; Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129, 137-43 (1968).

A writer has even suggested that an interest arbitration provision may impermissibly breach the separation of powers concept by enmeshing the judicial branch in legislative decision-making through the power of courts to review and enforce arbitral awards. See Note, *Binding Interest Arbitration in the Public Sector: Is It Constitutional?*, 18 WM. & MARY L. REV. 787, 816-17 (1977). Such an argument ignores the fact that the judicial review of such quasi-legislative awards is really no different from that traditionally exercised over administrative agencies when they perform similar quasi-legislative functions.

<sup>28</sup> 435 Pa. 183, 255 A.2d 560 (1969).

<sup>29</sup> 435 Pa. at 192-93, 255 A.2d at 565.

<sup>30</sup> Cf. *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 260 N.E.2d 508 (1970) (upholding binding interest arbitration law for non-profit hospitals). See Morris, *supra* note 12, at 817-18.

<sup>31</sup> See *City of Everett v. Fire Fighters*, 87 Wash. 2d 572, 555 P.2d 418 (1976); *Illinois Ass'n of Fire Fighters, Local 73 v. City of Waukegan*, 37 Ill. 2d 423, 226 N.E.2d 606 (1967).

<sup>32</sup> Cf. *Vance v. Bradley*, 440 U.S. 93 (1979) and authorities cited therein (sustaining age 60 retirement mandate for Foreign Service personnel).

the one man, one vote principle.”<sup>33</sup> Thus, the courts have refused to acknowledge the notion that statutorily appointed arbiters are “unelected representatives” without authority to appropriate public monies.

Judicial tribunals have similarly dismissed assertions that interest arbitration schemes enacted by state legislatures conflict with home rule provisions in state constitutions delegating authority over local matters to municipal entities. However, such constitutional limitations usually include specific exceptions for legislative enactments of general, as opposed to limited, applicability. Thus, courts have uniformly sustained statutes that have provided for state-wide coverage, despite the resulting impact of such laws upon local governments.<sup>34</sup>

The final non-delegation challenge to interest arbitration statutes has concerned the effect such enactments have upon the taxing power of municipalities. It has been argued that such laws impermissibly provide arbitrators with the capacity to regulate taxes, a matter within the exclusive domain of elected representatives. This claim has been rejected, since no taxing authority is actually transferred by such statutes to arbitrators. While an arbitral decision may provide the impetus for a reconsideration of the existing tax structure, any change will appropriately be effectuated by elected officials and not by the arbitrator.<sup>35</sup> It has similarly been recognized that the legislative enactment of an interest arbitration provision does not usurp the taxing authority vested in local governments. As the Supreme Court of Washington noted, “although [such a law] may result in the need for local taxation, it does not itself impose any [tax].”<sup>36</sup>

### B. Delegation Challenges

The most consequential challenge to public sector interest arbitration statutes has involved the contention that such laws impermissibly delegate legislative authority to politically unaccountable arbitrators. Although the majority of judicial decisions considering this argument have found it unpersuasive, it has frequently precipitated strongly divergent opinions.<sup>37</sup>

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<sup>33</sup> *Harney v. Russo*, 435 Pa. 183, 192, 255 A.2d 560, 564 (1969). *Accord*, *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290 (1975); *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 352 N.E.2d 914 (1976).

<sup>34</sup> *See City of Everett v. Fire Fighters*, 87 Wash. 2d 572, 555 P.2d 418 (1976); *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 352 N.E.2d 914 (1976); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290 (1975). *See also* Comment, *supra* note 12, at 171-72.

The fact that a state may permissibly impose interest arbitration procedures upon local governments does not, however, mean that in the absence of pre-emptive state legislation such local entities are free to enact their own arbitration laws. If their governmental enabling charter specifically directs local legislative bodies to determine employment matters, an attempt by those bodies to redelegate that authority to outside arbitrators may transcend the scope of their power. *See Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 553 P.2d 1140 (1976).

<sup>35</sup> *See City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290 (1975).

<sup>36</sup> *City of Spokane v. Police Guild*, 87 Wash. 2d 457, 461, 553 P.2d 1316, 1319 (1976). *See City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 41, 332 N.E.2d 290, 302 (1975) (Fuchsberg, J., concurring).

<sup>37</sup> *See generally* H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 2, at 612-17; Staudohar, *Constitutionality of Compulsory Arbitration Statutes in Public Employment*, 27 LAB.

Professor Summers previously has noted that "private employment collective bargaining is a process of private decisionmaking shaped primarily by market forces, while in public employment it is a process of governmental decisionmaking shaped ultimately by political forces."<sup>38</sup> When a public sector bargaining impasse is referred to arbitration for final resolution, the political process could conceivably be *distorted* as private arbiters directly or indirectly determine governmental priorities which are generally decided by elected representatives.<sup>39</sup> Nonetheless, "once a legislative judgment in favor of binding arbitration has been made, that should be the overriding consideration and should ordinarily dispose of the political distortion argument."<sup>40</sup> This sage opinion has, unfortunately, not always prevailed in the courts.

In recent years, only three state supreme courts have invalidated public sector interest arbitration enactments based upon the notion that such laws impermissibly delegate governmental power to private arbitrators.<sup>41</sup> In *City of Sioux Falls v. Firefighters Local 814*,<sup>42</sup> the South Dakota Supreme Court invalidated the South Dakota Firemen's and Policemen's Arbitration Act, which provided for the arbitral resolution of bargaining impasses, on the ground that it constituted an inappropriate delegation of legislative authority to politically unaccountable arbiters. A similar conclusion was reached in *Greeley Police Union v. City Council*,<sup>43</sup> in which the Colorado Supreme Court found unconstitutional a city charter amendment which prescribed interest arbitration to settle police negotiation impasses.<sup>44</sup> This constitutional analysis was also adopted by the Utah Supreme Court in *Salt Lake City v. Firefighters*,<sup>45</sup> wherein the court succinctly summarized the *ratio decedendi* underlying this line of judicial precedent:

[T]he [Firefighters Negotiation] act authorizes the appointment of arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The legislature may not surrender its legislative authority to a body wherein the public interest

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L.J. 670 (1976); Weisberger, *supra* note 27; Note, *Binding Interest Arbitration in the Public Sector: Is It Constitutional?*, 18 WM. & MARY L. REV. 787, 797-816 (1977). See also Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25, 103-12 (1974).

<sup>38</sup> Summers, *Public Employer Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

<sup>39</sup> See Morris, *supra* note 12, at 472. See also Grodin, *supra* note 7, at 681-82.

<sup>40</sup> Morris, *supra* note 12, at 473.

<sup>41</sup> Although in *Everett Fire Fighters v. Johnson*, 46 Wash. 2d 114, 278 P.2d 662 (1955), the Washington Supreme Court had found a city charter initiative provision specifying the arbitral resolution of bargaining impasses to constitute an unconstitutional delegation of legislative power, it subsequently rejected this position when, in *City of Spokane v. Police Guild*, 87 Wash. 2d 457, 553 P.2d 1316 (1976), it sustained the propriety of a state interest arbitration statute covering uniformed personnel.

<sup>42</sup> 89 S.D. 455, 234 N.W.2d 35 (1975).

<sup>43</sup> 191 Colo. 419, 553 P.2d 790 (1976).

<sup>44</sup> The Colorado Supreme Court reaffirmed its *Greeley* analysis in *City of Aurora v. Firefighters Ass'n*, 193 Colo. 437, 566 P.2d 1356 (1977).

<sup>45</sup> 563 P.2d 786 (Utah 1977).

is subjected to the interest of a group which may be antagonistic to the public interest.

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The power conferred on the panel of arbitrators is not consonant with the concept of representative democracy. The political power, which the people possess under [the state constitution], and which they confer on their elected representatives is to be exercised by persons responsible and accountable to the people—not independent of them. The act is designed to insulate the decision-making process and the results from accountability within the political process; therefore, it is not an appropriate means of resolving legislative-political issues.<sup>46</sup>

The substantial majority of state supreme courts which have considered the constitutional delegation issue have, however, rejected this rationale in favor of one sustaining such enactments.

The fundamental constitutional question created by public sector interest arbitration provisions concerns the fact that legislative authority is entrusted to basically non-governmental individuals. It would be possible for a state to avoid this legal morass by simply establishing a politically accountable administrative agency to resolve bargaining impasses. This alternative was accepted by Nebraska through its creation of the Court of Industrial Relations.<sup>47</sup> It might also be feasible to circumvent the constitutional dilemma by contending that governmentally authorized private arbitrators effectively act as "public officials" when they perform their arbitral functions, thus rendering them "politically responsible." Although this semantical prestidigitation was accepted by the Rhode Island Supreme Court as the basis for sustaining the constitutionality of the Rhode Island Fire Fighters Arbitration Act,<sup>48</sup> other courts have quite properly refused to engage in such legal conjuration. They have thus had to directly confront the basic delegation issue.

The prevailing contemporary judicial philosophy recognizes that, while "purely legislative power cannot be delegated, . . . where a law embodies a reasonably clear policy or standard to guide and control administrative officers, so that the law takes effect by its own terms when the facts are ascertained by the officers and not according to their whim, then the delegation of power will be constitutional."<sup>49</sup> Public sector interest arbitration statutes usu-

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<sup>46</sup> 563 P.2d at 789, 790. See *Greeley Police Union v. City Council*, 191 Colo. at 423, 553 P.2d at 792 (1976).

Although the statutes involved in the *Sioux Falls* and *Salt Lake City* cases provided no specific standards to guide arbitrators when they were making their determinations, neither decision indicated that this statutory omission meaningfully affected the resolution of the constitutionality issue.

<sup>47</sup> See NEB. REV. STAT. §§ 48-801 to -838 (Supp. 1978). The right of that administrative tribunal to engage in interest arbitration is established in § 48-818 of that enactment. This legislative option could be utilized in states which have found the use of private interest arbitrators to be unconstitutional.

<sup>48</sup> See *City of Warwick v. Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969).

<sup>49</sup> *City of Richfield v. Fire Fighters Local 1215*, \_\_\_\_ Minn. \_\_\_\_, 276 N.W.2d 42, 45 (1979). Accord, *Town of Arlington v. Board of Conciliation & Arbitration*, 370

ally satisfy this benchmark, since they primarily empower arbitrators merely to determine the relevant factual circumstances surrounding bargaining disputes and to interpret those facts in accordance with prescribed guidelines. Such enactments do not delegate "any power to make the law. The only authority conferred is power to execute the law already determined and circumscribed."<sup>50</sup>

Although interest arbitrators are not directly accountable to the public, appropriate statutory and judicial constraints adequately insure their competency and responsibility.<sup>51</sup> Most interest arbitration enactments specifically list factors which should be considered by arbiters when they are formulating their decisions.<sup>52</sup> Some provide very detailed criteria, as does the Rhode Island Policemen's Arbitration Act:

The factors, among others, to be given weight by the arbitrators in arriving at a decision shall include:

- (a) Comparison of wage rates or hourly conditions of employment of the police department in question with prevailing wage rates or hourly conditions of employment of skilled employees of the building trades and industry in the local operating area involved.
- (b) Comparison of wage rates or hourly conditions of employment of the police department in question with wage rates or hourly conditions of employment of police departments in cities or towns of comparable size.

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Mass. 769, 352 N.E.2d 914 (1976); *State of Wyoming v. City of Laramie*, 437 P.2d 295 (Wyo. 1968); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290 (1975); *Division 540, Transit Union v. Mercer Improvement Authority*, 76 N.J. 245, 386 A.2d 1290 (1978); *City of Spokane v. Police Guild*, 87 Wash. 2d 457, 553 P.2d 1316 (1976); *Firefighters v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971 (1974); *East Providence v. Firefighters, Local 850*, 117 R.I. 329, 366 A.2d 1151 (1976).

<sup>50</sup> *State of Wyoming v. City of Laramie*, 437 P.2d 295, 301 (Wyo. 1968). In addition to the cases cited in note 49 *supra*, see also *City of Biddeford v. Teachers Ass'n*, 304 A.2d 387 (Me. 1973) and *Fire Fighters v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975), wherein the constitutionality of state interest arbitration statutes was sustained by equally divided courts. It is interesting to note that while the equally divided *City of Dearborn* court upheld the propriety of arbitration panels appointed by the chair of the Michigan Employment Relations Commission (MERC), a majority found invalid that portion of the enactment which authorized arbitration by panels selected by the disputing parties themselves. The court believed that since the MERC chair was appointed by the Governor, there was sufficient overall political accountability regarding the selection of the arbitral panels, while this was not considered present with respect to panels appointed through the alternative mechanism. This would appear to me to be an artificial and rather meaningless distinction, since it is naive to think that the Governor will really be held politically responsible for the results of an intemperate award emanating from an arbitral panel appointed by the chair of MERC. If anything, the political repercussions would likely be greater where a local municipality has consented to the selection of an irresponsible panel than if the panel had been designated by a more distant, non-elected state official.

<sup>51</sup> See *City of Richfield v. Fire Fighters Local 1215*, \_\_\_ Minn. \_\_\_, 276 N.W.2d 42, 47 (1979).

<sup>52</sup> See generally *McAvoy*, *supra* note 12, at 1199-1201; *Morris*, *supra* note 12, at 469-71; *Comment*, *supra* note 12, at 180.

- (c) Interest and welfare of the public.
- (d) Comparison of peculiarities of employment in regard to other trades or professions, specifically:
  - (1) Hazards of employment
  - (2) Physical qualifications
  - (3) Educational qualifications
  - (4) Mental qualifications
  - (5) Job training and skills.<sup>53</sup>

Other arbitration provisions are more general, as typified by the Minnesota Employment Relations Act:

In considering a dispute and issuing its order the panel shall give due consideration to the statutory rights and obligations of public employers [*sic*] to efficiently manage and conduct its operations within the legal limitations surrounding the financing of such operations.<sup>54</sup>

However, a few statutes, such as the Pennsylvania Police-Firefighter Collective Bargaining Act,<sup>55</sup> do not specify any particular standards which must be weighed. Nevertheless, as the Pennsylvania Supreme Court appropriately recognized in *Harney v. Russo*,<sup>56</sup> a statute is not unconstitutional merely because of the absence of any specifically prescribed arbitral guidelines, for sufficient guidance may readily be derived from the basic policies underlying the adoption of the particular enactment in question and from the decisions issued by arbitrators acting under similar laws.

An examination of the different criteria specified in the various statutes indicates to those familiar with the interest arbitration process the fact that most of the prescribed standards merely codify those factors which seasoned arbiters would likely apply even if no legislative guidelines were provided.<sup>57</sup> This conclusion is substantiated by the fact that experiences with arbitral decisions in Michigan and Pennsylvania have demonstrated no discernible difference between awards governed by detailed statutory standards and those not regulated by any specified criteria.<sup>58</sup> Furthermore, should an aberrational decision ever be issued, the situation could be judicially rectified.

Courts sustaining the constitutionality of interest arbitration statutes have generally stressed the importance of judicial review as a device to guarantee substantive and procedural fairness:<sup>59</sup>

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<sup>53</sup> R.I. GEN. LAWS § 28-9.2-10 (1968).

<sup>54</sup> MINN. STAT. ANN. § 179.72(7) (Supp. 1978).

<sup>55</sup> PA. STAT. ANN. tit. 43, § 217.4 (Supp. 1978-79).

<sup>56</sup> 435 Pa. 183, 255 A.2d 560 (1969).

<sup>57</sup> See Klapper, *Legislated Criteria in Arbitration of Public Safety Contract Disputes*, 29 ARB. J. 115, 116-18 (1974) [hereinafter cited as Klapper]. See also Grodin, *supra* note 7, at 690-91.

<sup>58</sup> See Klapper, *supra* note 57, at 116. See generally J. STERN ET AL., *supra* note 12.

<sup>59</sup> See, e.g., *Division 540, Transit Workers v. Mercer Improvement Authority*, 76 N.J. 245, 252, 386 A.2d 1290, 1294 (1978). See generally cases cited at note 49 *supra*. See also Note, *Compulsory Arbitration: The Scope of Judicial Review*, 51 ST. JOHN'S L. REV. 604, 607-08 (1977) [hereinafter cited as St. John's Note]. But see *City of Washington v. Police Dep't*, 436 Pa. 168, 172-73, 259 A.2d 437, 440 (1969).

Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official [*i.e.*, the arbitrator] has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature.

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Due process of law requires . . . that the contract imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in law and the record before him . . .<sup>60</sup>

However, the extent of judicial review which should be available must be carefully determined. If judicial intervention were too readily permitted, the legislative objective of providing an expeditious and final resolution of bargaining impasses would be seriously compromised. On the other hand, if arbitral awards were accorded excessive deference, the public interest could occasionally be substantially prejudiced by intemperate arbitral action.

### III. JUDICIAL INTERVENTION/REVIEW

Judicial involvement can occur either before or after an arbitration proceeding has been conducted. A pre-arbitration suit may contend that arbitration should be precluded on the ground that either the issues in dispute are not subject to arbitration or the procedural prerequisites to arbitration have not been satisfied.<sup>61</sup> Following the issuance of an award, judicial relief may be sought on the ground that the arbitral decision is substantively or procedurally defective.<sup>62</sup>

#### A. *Pre-Arbitration Intervention*

Courts have traditionally been hesitant to enforce private sector agreements to resolve negotiation impasses through interest arbitration procedures.<sup>63</sup> This predilection should not, however, adversely influence the will-

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<sup>60</sup> *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 505, 507, 260 N.E.2d 508, 515 (1970). *Accord*, *Division 540, Transit Workers v. Mercer Improvement Authority*, 76 N.J. 245, 252, 386 A.2d 1290, 1294 (1978); *City of Providence v. Fire Fighters*, 111 R.I. 586, 590, 305 A.2d 93, 95 (1973).

<sup>61</sup> Although these issues are often presented in suits by public employers to prevent arbitration being sought by workers, the same questions could also be raised by governmental entities as defenses to actions commenced by representative labor organizations to compel arbitration where such public agencies refuse to participate in arbitral proceedings which cannot be unilaterally instituted by the unions themselves. The methods discussed in this article to resolve the basic underlying issues apply equally to both types of litigation.

<sup>62</sup> Such relief could either be directly sought by a party dissatisfied with a particular award or be precipitated by a public employer's refusal to comply completely with the results of an arbitral decision which would force the affected labor organization to seek judicial enforcement of the award.

<sup>63</sup> See Friedman, *Arbitration of Disputes Over New Labor Contract Terms*, 15 W. RES. L. REV. 735, 750-52 (1964); Note, *Court Enforcement of Arbitration: Provisions for New Contracts*, 10 B.C. IND. & COM. L. REV. 159 (1968). See also Note, *Federal Enforcement of Agreements to Arbitrate New Contract Terms*, 52 NW. U.L. REV. 284 (1957).

ingness of judicial tribunals to sustain public sector interest arbitration, because such proceedings, instead of being merely authorized by private parties, are legislatively sanctified. Since such public sector enabling statutes unquestionably demonstrate governmental respect for the interest arbitration process, pre-arbitration judicial intervention should be severely limited.

Where a public employer can indisputably demonstrate that an allegedly applicable interest arbitration law does not actually cover the employees involved in an existing bargaining dispute, it would not be inappropriate for a court to grant the employer's request for an order precluding arbitration.<sup>64</sup> The legal question presented by such litigation would concern the legislative intent underlying the statute in question, a matter peculiarly within the expertise of judges. Furthermore, there would be little likelihood that the development of an arbitral record would meaningfully assist a court with its decision.

A more difficult problem concerns the propriety of pre-arbitration judicial intervention where a party contends that mandatory procedural prerequisites have not been satisfied. In *City of Des Moines v. Public Employment Relations Board*,<sup>65</sup> the Iowa Supreme Court decided that since the legislative history of the relevant statutory provisions clearly indicated that compulsory arbitration could not be required following the passage of the established budget submission date, there was no reason why an order prohibiting the initiation of time-barred arbitration should not be issued. However, courts must be careful to recognize that temporal limitations should not always be accorded unquestioned deference. If a labor organization can demonstrate that compliance with a statutory time scheme has been prevented by management's own dilatory tactics, the apparent statutory deficiency should generally be equitably excused.<sup>66</sup> The dilemma created by such similar, yet critically distinguishable situations, concerns the fact that during the judicial proceedings arbitration is usually not progressing. Since time is of the essence with respect to the resolution of bargaining disputes and the prevention of work stoppages which could be precipitated by worker frustration,<sup>67</sup> such pre-arbitration litigation should be handled in a most expeditious manner. Furthermore, courts should unequivocally proclaim that arbitration will only be precluded where an employer can convincingly establish that the legislature intended not to permit arbitral proceedings under the particular circumstances involved. This would beneficially indicate to recalcitrant governmental entities the futility of using disingenuous pre-arbitration litigation as a device to thwart the arbitration process.

The most difficult question which is likely to be presented to courts prior to the commencement of arbitration concerns an allegation that a particular bargaining topic is not subject to interest arbitration resolution. Most interest

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<sup>64</sup> See *Detention Officers v. City of Lincoln Park*, 76 Mich. App. 358, 256 N.W.2d 593 (1977) (police/firefighter arbitration act not applicable to detention officers).

<sup>65</sup> 275 N.W.2d 753 (Iowa 1979).

<sup>66</sup> See *Firefighters Local 463 v. City of Johnstown*, 468 Pa. 96, 360 A.2d 197 (1976).

<sup>67</sup> See Grodin, *supra* note 7, at 699.

arbitration legislation assumes that the scope of arbitral coverage is congruent with the scope of bargaining, thus restricting arbitral authority to mandatory subjects for negotiation.<sup>68</sup> The dilemma created by a claim that a disputed matter does not constitute a mandatory bargaining topic involves the fact that the distinction between obligatory wages, hours, and working conditions and merely permissible managerial prerogatives is often quite nebulous.

The preferable procedure for resolving questions pertaining to the arbitral propriety of particular impasse items has been recognized by the California Supreme Court:

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours, and working conditions") or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service" [management prerogatives]).<sup>69</sup>

This method would prevent any prejudice which would result to employees from a delay of the arbitral process during the judicial determination of the negotiability question, yet it would not detrimentally affect public employers since "after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers."<sup>70</sup>

#### B. *Post-Arbitration Review*

For many years, the national labor policy has recognized the exalted status of private sector grievance arbitration procedures by permitting strictly limited judicial review of awards emanating from such contractual dispute resolution schemes. So long as a grievance decision "draws its essence from the collective bargaining agreement," it is entitled to judicial respect.<sup>71</sup> As Justice Douglas observed:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construc-

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<sup>68</sup> See *id.* at 695; *School Committee, Town of Winslow v. Education Ass'n*, 363 A.2d 229 (Me. 1976).

Where parties have themselves voluntarily agreed to more expansive arbitration of bargaining impasses covering all items in dispute, permissive, as well as mandatory, topics may be subject to arbitral jurisdiction. See *Boston School Committee v. Teachers Local 66*, 372 Mass. 605, 363 N.E.2d 485 (1977).

<sup>69</sup> *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 620-21, 526 P.2d 971, 979 (1974).

<sup>70</sup> *Id.*, 12 Cal. 3d at 615 n.6, 526 P.2d at 976 n.6. The portions of the challenged arbitration award pertaining to concededly mandatory bargaining topics could then be immediately effectuated, while only those parts covering allegedly non-obligatory items would be held in abeyance during the judicial review process. See also *Sheriffs' Ass'n v. Milwaukee County*, 64 Wis. 2d 651, 221 N.W.2d 673 (1974).

<sup>71</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

tion which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his.<sup>72</sup>

One might logically argue that the need for arbitral finality unfettered by time-consuming judicial involvement should support the adoption of this restrictive review standard for public sector interest arbitration. However, critical differences between grievance arbitration and interest arbitration militate in favor of a somewhat stricter standard of judicial review pertaining to interest arbitration awards.

Grievance arbitration generally results from the voluntary agreement of the parties involved, while public sector interest arbitration is usually statutorily imposed, not infrequently upon unenthusiastic governmental employers. Another critical distinction concerns the fact that a grievance arbitrator is merely authorized to interpret and apply the express terms of an existing contract, while an interest arbitrator is empowered to formulate the actual employment terms which will govern the parties' relationship during the life of the resulting agreement.<sup>73</sup> Although the grievance arbitrator's discretion is delineated by the terms of the relevant bargaining agreement, the interest arbitrator possesses wide latitude to recommend whatever final resolution seems appropriate. As a result of the discretionary freedom enjoyed by interest arbiters, aberrational decisions may occasionally be produced which reflect neither the desires of the parties nor the realities of the pertinent employment market.<sup>74</sup> To preclude the effectuation of such deviant awards, some meaningful judicial review must be available.

Some public sector interest arbitration statutes specifically define the scope of judicial review to be applied to arbitral decisions, while most enactments are either silent with respect to this subject or they provide no really definitive standards.<sup>75</sup> Where express review criteria are legislatively prescribed,<sup>76</sup> courts are generally apprised of the reviewing function they are

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<sup>72</sup> *Id.* at 599. "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." *Id.* at 598. See generally Comment, *Judicial Enforcement of Labor Arbitrators' Awards*, 114 U. PA. L. REV. 1050 (1966).

<sup>73</sup> See Overton, *Criteria in Grievance and Interest Arbitration in the Public Sector*, 28 ARB. J. 159, 161-63 (1973); Recent Development, *Judicial Enforcement of Contract-Arbitration Agreements*, 21 STAN. L. REV. 673, 675 (1969). See also Mironi, *The Functional Approach to Judicial Oversight of Specialized Tribunals—A Case Study*, 52 N.Y.U. L. REV. 745, 789-91 (1977) [hereinafter cited as Mironi]. But cf. Fleming, *Interest Arbitration Revisited*, 7 J. LAW REF. 1 (1973).

<sup>74</sup> See Columbia Note, *supra* note 7, at 526. But cf. Howlett, *supra* note 22, at 64.

<sup>75</sup> See McAvoy, *supra* note 12, at 1204; Morris, *supra* note 12, at 492-93; St. John's Note, *supra* note 59, at 618-24.

<sup>76</sup> For example, The Connecticut Municipal Employee Relations Act, CONN. GEN. STAT. ANN. § 7-473c(c)(3) (Supp. 1978), provides that the relevant provisions of the Connecticut General Arbitration Act, CONN. GEN. STAT. ANN. §§ 52-408 to -424 (Supp. 1978), shall govern the judicial review of interest arbitration decisions. The criteria for vacating an award are defined in § 52-418:

expected to perform.<sup>77</sup> However, in the many jurisdictions where no delineated guidelines are articulated, judges are required to develop their own standards of review.

If courts so narrowly restrict their review function that they effectively provide arbitral determinations with almost total deference, there exists the possibility of catastrophic consequences resulting from an entirely intemperate award.<sup>78</sup> Conversely, if judicial intervention is liberally countenanced, one of the fundamental objectives underlying interest arbitration enactments, the expeditious and final resolution of bargaining disputes, may be substantially compromised.<sup>79</sup> The challenge is to apply standards of review that will discourage frivolous appeals which only delay the impasse resolution process, while simultaneously permitting judicial intervention in those occasional situations where corrective action is warranted.

Judicial tribunals could analogize their interest arbitration review function to that performed with respect to grievance arbitration awards<sup>80</sup> or to the

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(a) if the award shall have been procured by corruption, fraud or undue means; (b) if there shall have been evident partiality or corruption on the part of the arbitrators or either of them; (c) if the arbitrators shall have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; (d) if the arbitrators shall have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject-matter submitted was not made.

The grounds for *modifying* an award are stated in § 52-419:

(a) If there shall have been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (b) if the arbitrators shall have awarded upon a matter not submitted to them unless it be a matter not affecting the merits of the decision upon the matters submitted; (c) if the award shall be imperfect in matter of form not affecting the merits of the controversy.

Compare the Michigan Policemen's and Firemen's Arbitration Act, MICH. COMP. LAWS ANN. § 423.242 (Supp. 1978-79), which permits judicial review "only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means."

<sup>77</sup> Even where specific standards are statutorily prescribed, sufficient latitude usually exists to provide reviewing courts with significant discretion.

<sup>78</sup> Cf. St. John's Note, *supra* note 59, at 630 (effective judicial review urged).

<sup>79</sup> See Anderson, *Compulsory Arbitration Under State Statutes* in PROCEEDINGS OF 22D ANN. N.Y.U. CONF. ON LABOR 259, 279-80 (T. Christensen ed. 1970); Mironi, *supra* note 73, at 803-04.

<sup>80</sup> See *Joint School Dist. v. Education Ass'n*, 78 Wis. 2d 94, 253 N.W.2d 536 (1977), wherein the Wisconsin Supreme Court stated:

The decision of an arbitrator cannot be interfered with for mere error of judgment as to law or fact. Courts will overturn an arbitrator's award if there is a perverse misconstruction [of the contract] or if there is a positive misconduct plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy.

*Id.* at 117-18, 253 N.W.2d at 547. See generally Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEXAS L. REV. 329 (1980).

more involved role they discharge concerning administrative decision-making.<sup>81</sup> They could alternatively recognize the relatively unique nature of public sector interest arbitration and endeavor to develop novel guidelines specifically suited to the particular objectives sought to be achieved.<sup>82</sup> Thus far, however, no single approach has been uniformly accepted.

Although it is established that the burden of persuasion rests upon those parties challenging arbitral decisions,<sup>83</sup> courts do not always agree upon the exact review procedures to be followed. Some courts compare the interest arbitration process with quasi-legislative administrative action and thus decide that it is proper to utilize the same basic procedures which pertain to the review of regular administrative adjudications.<sup>84</sup> However, they reasonably modify the usual administrative review process by requiring the disputing parties, and not the arbitral body, to litigate the appeal. Other courts reject this approach. They instead focus upon the fact that administrative review provisions literally direct the challenged adjudicatory entity to formally defend its position in court. To avoid the adverse impact which would clearly result if private interest arbitrators were forced to become involved in such frequently protracted and expensive proceedings, these courts find it preferable to simply follow the review procedures applied to grievance arbitration cases.<sup>85</sup> Nonetheless, since the two alternative methods accepted for appeals from arbitral determinations require only the directly interested disputants to participate, it is readily apparent that their procedural differences are more theoretical than real.

Even though courts do not uniformly agree upon the semantical label to be attached to judicial review proceedings emanating from public sector interest arbitration awards, they are quite consistent with respect to the substantive standards of review to be applied to such awards. No interest arbitration decision procured by fraudulent or corrupt means is entitled to judicial acceptance.<sup>86</sup> However, the mere allegation of arbitral misconduct does not automatically preclude enforcement of the challenged award. The claimed

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<sup>81</sup> With respect to judicial review of administrative decisions, see generally Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>82</sup> See Mironi, *supra* note 73, at 746-47; Weisberger, *supra* note 27, at 41-43.

<sup>83</sup> See, e.g., *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 687 (1976).

<sup>84</sup> See, e.g., *Maquoketa Valley Community School Dist. v. Education Ass'n*, 279 N.W.2d 510 (Iowa 1979). Cf. *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 38-39, 332 N.E.2d 290, 300-01 (1975) (Fuchsberg, J., concurring) (indicating that classification of arbitral function as legislative, judicial, or administrative should not be critical factor regarding appropriate standard of review).

<sup>85</sup> See, e.g., *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683 (1976).

<sup>86</sup> Cf. *Bethlehem Steel Corp. v. Fennic*, 383 N.Y.S.2d 948 (Sup. Ct. Erie Co. 1976), *aff'd*, 391 N.Y.S.2d 227 (App. Div. 1977), wherein the court vacated a 2-1 arbitration award where the majority consisted of the union and police department representatives and it was established that the employer representative, who was then the city safety commissioner, had shifted his loyalty prior to the award from the police department to the union, following an intervening mayoral election, since he knew that he would no longer be retained as safety commissioner but would instead be returning to his former position as police captain.

transgression must be clearly established. Additionally, it must be demonstrated convincingly that the questioned behavior actually influenced the decision.<sup>87</sup>

Where all or part<sup>88</sup> of an arbitral order is procedurally or substantively defective, judicial intervention is usually obtainable. Therefore, if an arbitration statute specifically mandates the issuance of decisions within a certain number of days following the commencement or termination of the evidentiary hearings, any opinion rendered after the expiration of the requisite time limit would likely be denied enforcement.<sup>89</sup> Judicial tribunals similarly respect express legislative restrictions imposed upon arbitral authority. For example, where an enactment specifically precludes the issuance of arbitral directives operating beyond a certain time period, any order obligating a public employer for a longer duration would be curtailed.<sup>90</sup> An analogous result would probably be achieved if an arbiter, who possessed only the power to render an award effective prospectively, announced an award requiring retroactive application.<sup>91</sup>

Even where no explicit legislative provisions limit the authority of arbitrators, courts do not sustain arbitral directives which require the performance of improper acts. The Pennsylvania Supreme Court has observed:

In spite of the fact that neither the relevant constitutional provisions nor the enabling legislation clearly delineates the power of arbitration panels, we are of the opinion that such panels may not mandate that a governing body carry out an illegal act. We reach this result by quite frankly reading into the enabling legislation the requirement that the scope of submission to the arbitrators be limited to conflicts

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<sup>87</sup> See *City of Manitowoc v. Police Dep't*, 70 Wis. 2d 1006, 1019-20, 236 N.W.2d 231, 239 (1975); *Firefighters Local 1296 v. City of Kennewick*, 86 Wash. 2d 156, 162, 542 P.2d 1252, 1256 (1975). These decisions recognized that mere contact between the arbitrator and one party under circumstances creating the impression of possible impropriety did not require vacation of the award where no inappropriate influence was substantiated.

<sup>88</sup> If only part of an arbitral decision is unenforceable, the remaining portion of the award will usually be left intact by the reviewing court, so long as it appears that the invalid part did not impermissibly taint the other sections. See *Firefighters Local 1714 v. City of Marlborough*, 1978 Mass. Adv. Sh. 1820, 1822-30, 378 N.E.2d 437, 439-41 (1978). See also *Firefighters Local 1347 v. Town of Watertown*, 1978 Mass. Adv. Sh. 2956, 2967-69, 383 N.E.2d 494, 500 (1978). Where evidence indicates that the improper part of a decision may have affected the other recommendations, the court should, if possible, remand the case to the arbitrator for reconsideration.

<sup>89</sup> See *Maquoketa Valley Community School Dist. v. Education Ass'n*, 279 N.W.2d 510 (1979). If such a time limitation were found to be merely suggestive instead of mandatory, a belated award would probably be enforceable, except perhaps where undue prejudice to one of the parties had been caused by the delay.

<sup>90</sup> See *Town of Tiverton v. Lodge 23*, 118 R.I. 160, 372 A.2d 1273 (1977); *East Providence v. Firefighters Local 850*, 117 R.I. 329, 339-40, 366 A.2d 1151, 1157 (1976).

<sup>91</sup> See *Council 23, AFSCME v. Board of Comm'rs*, 86 Mich. App. 453, 272 N.W.2d 681 (1978). But cf. *Crete Education Ass'n v. School Dist.*, 193 Neb. 245, 226 N.W.2d 752 (1975) (upholding effectively retroactive decision of Court of Industrial Relations despite proscription against retroactive orders).

over legitimate terms and conditions of employment. . . . [A]n arbitration award may only require a public employer to do that which it could do voluntarily.<sup>92</sup>

This judicial doctrine does not, however, permit recalcitrant governmental entities to circumvent their labor obligations through the enactment of self-imposed legal restrictions. Thus, as the Pennsylvania court noted:

An arbitration award which deals only with proper terms and conditions of employment serves as a mandate to the legislative branch of the public employer, and if the terms of the award require affirmative action on the part of the Legislature, then they must take such action, if it is within their power to do so.<sup>93</sup>

The most delicate issue which regularly confronts courts concerns the degree of judicial review to be imposed upon the discretionary evaluations made by interest arbitrators. Courts appropriately recognize that such arbitral tribunals do perform quasi-legislative functions, since they dictate the terms of employment which must be adopted by the relevant legislative bodies, and they reasonably extrapolate from their extensive experience pertaining to the review of administrative adjudications.

Factual determinations that are rationally supported by the evidentiary record are usually confirmed. In the words of the Rhode Island Supreme Court:

[T]he only question . . . is whether the [arbitration] board has abused its discretion. In making this determination, we do not weigh evidence or act as factfinders. All we shall do is to examine the record made before the board to determine whether it contains any competent evidence that would support the board's action.<sup>94</sup>

While the adoption of this objective standard is certainly proper, circumspection must be maintained in specific cases to insure that questionable factual determinations are not perfunctorily accepted by overly deferential judges. Because of the significant impact upon the general public which could result from an intemperate arbitral decision, a court should cautiously examine the entire record before confirming a challenged factual conclusion. Even though a court should never simply substitute its assessment of the factual record for that of the arbitrator, since the legislature has designed that individual as the

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<sup>92</sup> *City of Washington v. Police Dep't*, 436 Pa. 168, 176-77, 259 A.2d 437, 442 (1969). *Accord*, *Firefighters Local 1347 v. Town of Watertown*, 1978 Mass. Adv. Sh. 2956, 383 N.E.2d 494 (1978); *Conley v. Joyce*, 482 Pa. 263, 393 A.2d 654 (1978); *School Comm., Town of Winslow v. Education Ass'n*, 363 A.2d 229 (Me. 1976).

<sup>93</sup> *City of Washington v. Police Dep't*, 436 Pa. 168, 177, 259 A.2d 437, 442 (1969).

<sup>94</sup> *City of Cranston v. Hall*, 118 R.I. 20, 28, 371 A.2d 590, 594 (1977). *Accord*, *Firefighters Local 1714 v. City of Marlborough*, 1978 Mass. Adv. Sh. 1820, 1827-30, 378 N.E.2d 437, 441 (1978). Regarding the frequently followed federal standard of review, see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 480-90 (1951). See generally Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951). See also Grodin, *supra* note 7, at 698-99.

person who is to make the necessary factual evaluations, a reviewing tribunal should not hesitate to vacate arbitral findings which are unquestionably contrary to the evidentiary record.<sup>95</sup>

Arbitral awards that have a reasonable foundation in the statutorily prescribed or judicially developed interpretive criteria<sup>96</sup> are usually accorded judicial deference:

[T]he presence of evidence pertaining to any or all of the specific criteria which are to be "considered" is a factor to be taken into account when determining whether the award itself is founded on a rational basis . . . . An award may be found on review to be rational if any basis for such a conclusion is apparent to the court . . . . And it need only appear from the decision of the arbitrators that the criteria specified in the statute were "considered" in good faith and that the resulting award has a "plausible basis" . . . .<sup>97</sup>

It is thus quite unusual for a reviewing court to interpose its judgment for that of an interest arbitrator.<sup>98</sup>

Where a court is asked to ascertain whether an interest arbitration award has correctly explicated the applicable interpretive criteria and properly applied them to the underlying factual determinations, it should scrutinize the arbitral opinion to insure the presence of a rational foundation.<sup>99</sup> If pertain-

<sup>95</sup> See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

<sup>96</sup> Where a statute provides a detailed set of criteria to guide interest arbitrators, it is possible that some courts will decline to impose any additional factors on the ground that "where a statute or ordinance enumerates the things upon which it is to operate, . . . it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention." *Nebraska City Education Ass'n v. School Dist.*, 201 Neb. 303, 306, 267 N.W.2d 530, 532 (1978). This analysis is certainly cogent where the legislature has expressly indicated its desire to limit the interpretive criteria to those enumerated in the enactment. However, this intention should not be presumed simply from a statutorily prescribed list of standards, particularly where the provided factors are of a typically general nature. If it is not readily apparent that the legislative body intended that the statutory criteria be exclusive, courts should be willing to develop such additional guidelines as are consistent with those specified in the law.

<sup>97</sup> *Caso v. Coffey*, 41 N.Y.2d 153, 158, 359 N.E.2d 683, 686-87 (1976). *Accord*, *Firefighters Local 1714 v. City of Marlborough*, 1978 Mass. Adv. Sh. 1820, 1827-30, 378 N.E.2d 437, 441 (1978); *City of Buffalo v. Rinaldo*, 41 N.Y.2d 764, 767, 364 N.E.2d 817, 819 (1977); *City of Manitowoc v. Police Dep't*, 70 Wis. 2d 1006, 1016-18, 236 N.W.2d 231, 237-38 (1975).

<sup>98</sup> It is interesting to note that in Nebraska, where the Court of Industrial Relations, instead of private arbitrators, is utilized to resolve public sector bargaining disputes, there has been a somewhat greater tendency for reviewing courts to re-examine final determinations than there has been in other states using the services of private arbiters. See *Firefighters Local 644 v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977). *But cf.* *Omaha Ass'n of Firefighters v. City of Omaha*, 194 Neb. 436, 231 N.W.2d 710 (1975) and *Crete Education Ass'n v. School Dist.*, 193 Neb. 245, 226 N.W.2d 752 (1975) (substantial deference given to determinations made by the Court of Industrial Relations).

<sup>99</sup> One court has indicated that it will not always require interest arbitrators to provide written decisions which explicate the rationale underlying the resulting award. See *City of Manitowoc v. Police Dep't*, 70 Wis. 2d 1006, 1017, 236 N.W.2d 231, 237-38

nent guidelines have been impermissibly ignored or have been interpreted in an unequivocally incorrect manner, the award should be vacated. Furthermore, while a court should not reject arbitral recommendations simply because it would not have reached the same conclusions had it been the original arbiter, it should not sustain an award that has applied the relevant criteria to the pertinent facts in an entirely irrational manner.<sup>100</sup>

Judges reviewing interest arbitration decisions are endeavoring to maintain a precarious balance. They properly recognize that they must not impermissibly usurp the authority of the arbitrator by injudiciously interfering with that person's conclusions. They conversely realize that they should not abdicate their judicial obligation by providing arbitral determinations with undue deference. As long as this equilibrium continues to be maintained, the arbitration process and the public interest should appropriately be protected.

#### IV. CONCLUSION

In recent years, many states have adopted interest arbitration statutes as a means to resolve public sector bargaining disputes. Although a few courts have found that such enactments unconstitutionally delegate legislative authority to politically unaccountable private individuals, most have reasonably recognized the validity of such legislation where appropriate statutory or judicial guidelines circumscribe the discretion vested in such neutrals and their final awards are subject to judicial scrutiny.

Reviewing courts generally accept factual determinations made by interest arbitrators if they are supported by substantial evidence on the whole record. The recommendations culminating from the application of the relevant criteria to such factual findings are accorded similar judicial deference when they have a rational foundation. However, where an arbitral decision does not satisfy these prerequisites, courts quite properly decline to enforce them. Arbitrators are thus provided with the latitude they need to perform their function, and the public is protected from the consequences of completely aberrational awards.

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(1975). However, other judicial tribunals have quite reasonably been reluctant to countenance such a practice.

[A] decision, at least where the evidence is conflicting, must be factual as well as conclusional, must contain a statement of the reasons and the grounds upon which it is predicated, and must point out the evidence upon which the ultimate findings rest.

*City of Cranston v. Hall*, 116 R.I. 183, 187, 354 A.2d 415, 418 (1976). Even though a written decision does not necessarily express the actual reasons for the arbitrator's recommendations, that adjudicator should at least be forced to think through the case utilizing the applicable guidelines. This would require the arbiter to properly substantiate the award, and it is the only way in which meaningful judicial review can be preserved.

<sup>100</sup> Where a reviewing court vacates a discretionary finding or recommendation contained in an arbitral award, it should, if possible, remand the case to the arbitrator for reconsideration of the relevant portion of the award. Such a re-evaluation should not be initially undertaken by the court, since it is not the party designated by the legislature to make such determinations. The other non-tainted parts of the award should, of course, be immediately enforced by the court.