

CURRENT LEGISLATION

LABOR RELATIONS

COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES: AN ANALYSIS OF STATUTORY PROVISIONS

Most states, although denying public employees the right to strike, do permit them to organize and to bargain collectively. Few states, however, have enacted statutes providing collective bargaining machinery, or have otherwise attempted to provide a meaningful substitute for the right to strike.¹ It is the intent of this comment to analyze those state statutes,² as well as Federal Executive Order No. 10988,³ which make collective bargaining procedures available, and to determine whether they have materially enhanced the collective bargaining process and/or minimized the likelihood for serious disputes which threaten to result in a strike.

Seven states have statutes which establish procedures for resolving disputes between the public employer and its employees.⁴ These statutes extend to most or all public employees⁵ and feature procedures which have a history of successful use in private industry, *e.g.*, mediation and advisory arbitration.⁶ An analysis of these statutes will reveal their relative merits, and demonstrate why the approach of some of them may be considered significant attempts to provide meaningful collective bargaining.

¹ The absence of statutory procedures does not mean that collective bargaining may not exist. For instance, a study of Connecticut municipalities in 1960, before the enactment of Conn. Gen. Stat. Ann. §§ 7-467 to -477 (Supp. 1965), revealed that 31 out of 169 municipalities dealt directly with unions, and that there was a wide range of written collective bargaining agreements between municipalities and unions. Stutz, *Collective Bargaining by City Employees*, 15 Lab. L.J. 696 (1964).

² This comment is by no means an exhaustive study of state statutes which provide collective bargaining procedures, but analyzes only those statutes which cover a broad range of public employees.

³ 27 Fed. Reg. 551 (1962) [hereinafter cited as Exec. Order No. 10988].

⁴ Conn. Gen. Stat. Ann. §§ 7-467 to -477 (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, §§ 178G-N (Supp. 1965); Mich. Stat. Ann. § 17.454(27) (1960), as amended, §§ 17.455(8)-(16) (Supp. 1965); Minn. Stat. Ann. §§ 179.50-.58 (1966); N.D. Cent. Code §§ 34-11-01 to -05 (1960); Pa. Stat. Ann. tit. 43, § 215.1 (1964); Wis. Stat. Ann. § 111.70 (Supp. 1966).

⁵ The public employees affected are as follows: Connecticut—municipal employees except teachers (separate statute); Massachusetts and Michigan—municipal employees; Minnesota—all public employees except teachers; North Dakota and Pennsylvania—all public employees; Wisconsin—municipal employees (Wis. Stat. Ann. §§ 111.80-.94, effective Jan. 1, 1967, provides similar collective bargaining procedures for state employees).

⁶ The term "advisory arbitration" is used to denote referral of an issue or issues in dispute to a third party for a recommended settlement which is not binding on the parties to the dispute. In practice, the device of fact-finding with recommendations, as provided by the seven statutes examined, has many of the qualities of mediation as well as those of an arbitration award.

I. STATE STATUTORY PROVISIONS

A. *Connecticut, Massachusetts, and Wisconsin*

The Connecticut,⁷ Massachusetts,⁸ and Wisconsin⁹ statutes are similar. They provide, as a basis for collective bargaining, that an organization comprised of a majority of employees is entitled to be certified as the exclusive bargaining agent for all the employees in a bargaining unit.¹⁰ The power to certify lies in a state labor board,¹¹ which has jurisdiction to determine whether the employees of the bargaining unit alleged to be appropriate by a petitioning organization have a community of interest sufficient to allow creation of an exclusive bargaining agency, and whether the petitioning organization has a majority of the employees in its membership.¹²

To insure the right to organize and bargain collectively without interference, certain unfair labor practices are prohibited.¹³ Accordingly, the labor board may investigate a complaint, hold hearings, issue cease and desist orders, and, in the case of a union violation, withdraw its certification.¹⁴ These provisions are nearly identical to the ones existing in private industry.¹⁵

All three states, upon request of both parties, make available the facilities of a state mediation board.¹⁶ In Connecticut and Massachusetts, the arbitration facilities of this same agency are available to parties for the settlement of grievances arising out of an existing contract, but their availability does not exclude the use of any other remedy.¹⁷

Fact-finding with recommendations is the principal feature of the states' procedures in the event of an impasse in negotiations over the terms

⁷ Conn. Gen. Stat. Ann. §§ 7-467 to -477 (Supp. 1965).

⁸ Mass. Gen. Laws Ann. ch. 149, §§ 178G-N (Supp. 1965).

⁹ Wis. Stat. Ann. § 111.70 (Supp. 1966).

¹⁰ Conn. Gen. Stat. Ann. § 7-471(1)(B) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178H (Supp. 1965); Wis. Stat. Ann. § 111.70(4)(d) (Supp. 1966).

¹¹ Connecticut—State Board of Labor Relations; Massachusetts—State Labor Relations Commission; Wisconsin—Wisconsin Employment Relations Board.

¹² The Wisconsin statute stipulates that a bargaining unit made up of the employees of a particular government department should exclude those employees who are members of craft unions. Wis. Stat. Ann. § 111.70(4)(d) (Supp. 1966). The Connecticut and Massachusetts statutes similarly distinguish professional employees from nonprofessional. They also provide that firemen and policemen should comprise separate units. Conn. Gen. Stat. Ann. § 7-471(3) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178H(4) (Supp. 1965).

¹³ Conn. Gen. Stat. Ann. § 7-470 (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178L (Supp. 1965); Wis. Stat. Ann. § 111.70(3) (Supp. 1966).

¹⁴ Conn. Gen. Stat. Ann. § 7-471(4) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178L (Supp. 1965); Wis. Stat. Ann. §§ 11.07, 111.70(4)(a) (Supp. 1966) (no express provision for withdrawal of certification).

¹⁵ Cf. Labor Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 140, 146 (1947), 29 U.S.C. §§ 158, 160 (1964).

¹⁶ Conn. Gen. Stat. Ann. § 7-472(a) (Supp. 1965) (State Board of Mediation and Arbitration); Mass. Gen. Laws Ann. ch. 149, § 178K (Supp. 1965) (State Board of Conciliation and Arbitration); Wis. Stat. Ann. § 111.70(4)(b) (Supp. 1966) (Wisconsin Employment Relations Board).

¹⁷ Conn. Gen. Stat. Ann. § 7-472(a) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178K (Supp. 1965).

CURRENT LEGISLATION

of a new agreement. In Connecticut¹⁸ and Massachusetts,¹⁹ either party to a dispute may petition the state board for a fact-finding, (1) if the parties have not reached an agreement after a reasonable period of negotiation, or (2) within a reasonable period of time prior to the final date for establishment of the municipal budget, or (3) when either party has failed to bargain in good faith.²⁰ Upon receiving a petition, the state board investigates its allegations and decides whether a fact-finding is warranted.²¹ If it is, the board submits to both parties a list of persons from which they are to select the fact-finder. If they cannot agree, then the board appoints him. Wisconsin will furnish a panel of three impartial persons if both parties jointly request it.²² In preparing his findings and recommendations under these acts, the fact-finder may hold hearings, issue subpoenas, administer oaths, and take testimony.²³ He may also, at his own discretion, endeavor to mediate the dispute while acting in his capacity as fact-finder.²⁴ The government employer and the employee union are obliged to share equally the costs of the fact-finding.²⁵

In Massachusetts, any agreement, whether or not achieved with the aid of fact-finding with recommendations, must be put in the form of a written contract. If legislative action is necessary to implement its terms, a request for such is submitted to the legislative body. Should any term of the contract conflict with any law, by-law, or ordinance, the latter is to prevail.²⁶ In Connecticut, the chief executive officer of the municipality signs any agreement reached as a ministerial act, and the budget authority, where an appropriation

¹⁸ Conn. Gen. Stat. Ann. §§ 7-471(4)(B), -473(a) (Supp. 1965).

¹⁹ Mass. Gen. Laws Ann. ch. 149, § 178J(a), L (Supp. 1965) (a "reasonable period of time" is stipulated to be 60 days).

²⁰ Wisconsin applies only the first and third criteria. Wis. Stat. Ann. § 111.70(4)(e) (Supp. 1966).

²¹ Conn. Gen. Stat. Ann. § 7-473(b) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178J(b) (Supp. 1965); Wis. Stat. Ann. § 111.70(4)(f) (Supp. 1966).

²² Wis. Stat. Ann. § 111.70(4)(f) (Supp. 1966), as amended by Wis. Laws 1963, c. 87. The reason given for the amendment is that "some complicated fact finding cases might arise that could not be handled reasonably by a single fact finder." 3 Wisconsin Legislative Council General Report 42 (1963).

²³ Conn. Gen. Stat. Ann. § 7-473(c) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178J(c) (Supp. 1965); Wis. Stat. Ann. § 111.70(a) (Supp. 1966).

²⁴ Conn. Gen. Stat. Ann. § 7-473(f) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178J(f) (Supp. 1965). There is no specific provision in the Wisconsin statute allowing a fact-finder to endeavor to mediate a dispute, but this has often been the case in practice. Letter from Wisconsin Employment Relations Board, Oct. 7, 1966.

²⁵ Conn. Gen. Stat. Ann. § 7-473(e) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178J(e) (Supp. 1965); Wis. Stat. Ann. § 111.70(4)(h)2 (Supp. 1966). In Connecticut and Massachusetts, however, if a fact-finding results from a petition alleging refusal by a party to bargain collectively, the party at fault must pay full costs. Conn. Gen. Stat. Ann. § 7-471(4)(B) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178L (Supp. 1965). Statistics of actual costs based on the experience in Wisconsin show that the average cost for a fact-finding is approximately \$500, but costs may go as high as \$15,000 in an extremely complex case. Stern, *The Wisconsin Public Employee Fact-Finding Procedure*, 20 Ind. & Lab. Rel. Rev. 3, 7-8 (1966).

²⁶ Mass. Gen. Laws Ann. ch. 149, § 178I (Supp. 1965). *Contra*, Conn. Gen. Stat. Ann. § 7-474(f) (Supp. 1965).

is needed, is required to comply with the contract terms.²⁷ If legislative action is necessary, a request for such must be submitted. The terms of a contract prevail over any existing municipal ordinances or rules.²⁸ In Wisconsin, the employer must put a written agreement in the form of an ordinance or resolution, but it is binding on the parties "only if express language to that effect is contained therein."²⁹

In conjunction with these specific provisions, the statutes of Connecticut and Massachusetts expressly impose upon an employer and an employee organization the obligation to bargain in good faith and to "meet at reasonable times, including meetings appropriately related to the budget-making process."³⁰ The Wisconsin statute requires, by implication, good-faith bargaining.³¹

B. Minnesota

Of the four other states analyzed, Minnesota's statute, as amended in 1965,³² most closely resembles the provisions of the ones outlined above. Any employee group regardless of size may be granted "informal recognition," a status which entitles that group to meet and confer with an employer. "Formal recognition" is given to an organization having in its membership a majority of the employees within an appropriate bargaining unit.³³ The authority to certify employee representation, to hold elections, and to resolve disputes over the appropriateness of a bargaining unit is vested in the state labor conciliator, or a person designated by him.³⁴

Prior to 1965, the Minnesota statute empowered the state labor conciliator to "certify . . . the name or names of the representatives that have been designated or selected by the employees"³⁵ and to hold elections if necessary. In that year, the statute was amended in order to clarify and expand this and other existing provisions. The changes were prompted by *Richfield Fed'n of Teachers v. Richfield Educ. Ass'n*,³⁶ where the existing

²⁷ Conn. Gen. Stat. Ann. § 7-474(b), (c), (f) (Supp. 1965).

²⁸ See note 26 supra. The conflict between this provision and the corresponding one in Massachusetts has little significance, since, in Connecticut, legislative action must be taken to approve or reject any contract term which conflicts with an existing law. Thus, in Connecticut, such a conflicting contract term prevails only until the legislature resolves the conflict.

²⁹ Wis. Stat. Ann. § 111.70(4)(i) (Supp. 1966). While this provision does allow an employer to enter into a bilateral contract, it does not compel him to. Furthermore, there is no provision placing the responsibility for negotiations on the highest executive official. Thus, the Wisconsin statute does not guarantee, as the Connecticut and Massachusetts acts do, that negotiations will not be a mere prelude to a final unilateral decision of a government official, rather than a vehicle for arriving at a bilateral contract.

³⁰ Conn. Gen. Stat. Ann. § 7-470(c) (Supp. 1965). See Mass. Gen. Laws Ann. ch. 149, § 178I (Supp. 1965) (slightly different wording).

³¹ Wis. Stat. Ann. § 111.70(4)(e) (Supp. 1966) provides that fact-finding may be initiated "where an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement."

³² Minn. Stat. Ann. § 179.50-.58 (1966), as amended by Minn. Laws 1965, c. 839.

³³ Minn. Stat. Ann. § 179.52 subd. 3 (1966). Compare Exec. Order No. 10988, §§ 4-6.

³⁴ Minn. Stat. Ann. § 179.52 subd. 4 (1966).

³⁵ Minn. Laws 1957, c. 789, § 1.

³⁶ 263 Minn. 21, 115 N.W.2d 682 (1962).

CURRENT LEGISLATION

statute was criticized for its failure to provide a method for determining employee unit appropriateness and *unit* representation.³⁷

Sections 179.521 and 179.57 of the Minnesota statute provide two different procedures in the case of negotiation disputes.³⁸ Under section 179.521, either party may request the state labor conciliator to act if (1) no settlement has been reached after a reasonable period of negotiating, or (2) either party has failed or refused to meet and bargain in good faith. The conciliator "shall then take whatever steps he deems expedient to bring about a settlement, including assisting in preparing information necessary to an understanding of the issues and of a settlement."

Section 179.57 applies to a controversy over "wages, hours, or other terms and conditions of employment."³⁹ The employer, either on its own initiative or at the request of a formally-recognized employee organization, sets up a three-member panel. Each party appoints a delegate to the panel, and the third member is chosen by these appointees. If they cannot agree to a third person, the court appoints him. The expenses of the third member are shared equally by the two parties. If further negotiations fail to bring about an agreement, the three-member panel may hold hearings and submit a finding of facts with recommendations. The establishment of this three-member panel divests the state labor conciliator of the duties conferred upon him by section 179.521. That section provides for mediation and fact-finding without recommendations and is intended to precede the fact-finding *with* recommendations provided under section 179.57. It is too early to perceive whether these provisions are compatible, or whether section 179.521 is a significant addition.

The 1965 changes in terminology in section 179.57,⁴⁰ however, were definitely significant. The words "adjustment of grievances"⁴¹ were replaced by "settlement of a controversy involving wages, hours, or other terms and conditions of employment."⁴² The confusion created by the word "grievances" had necessitated a series of attorney-general opinions to interpret the types of disputes intended to be covered by this section.⁴³ In connection with this alteration, section 179.571 was also added in 1965;⁴⁴ it guarantees employees the right to an independent review of grievances pertaining to disputes over

³⁷ *Id.* at 26, 115 N.W.2d at 686. The case concerned the petitions of two unions to the state labor conciliator for certification as representatives of certain teachers before the school board. One union suggested that the bargaining unit should be comprised of teachers in grades seven through twelve. The other union argued that the unit should be comprised of teachers in grades one through twelve and kindergarden. The court held that in the absence of statutory authority, the labor conciliator had no jurisdiction to determine what the bargaining unit should be.

³⁸ Section 179.521 was enacted in 1965, whereas the somewhat similar provisions of section 179.57 have been in effect since 1951, except for changes in terminology in 1965.

³⁹ Minn. Stat. Ann. § 179.57 subd. 1 (1966).

⁴⁰ Minn. Stat. Ann. § 179.57 (1966), as amended by Minn. Laws 1965, c. 839, § 5.

⁴¹ Minn. Laws 1951, c. 146, § 7.

⁴² Minn. Laws 1965, c. 839, § 5.

⁴³ E.g., Op. Att'y Gen. No. 270-D (Minn. 1959) (discharge of an employee may be the basis for a "grievance"); Op. Att'y Gen. No. 165, at 304 (Minn. 1952) (inadequacy of compensation is a "grievance").

⁴⁴ Minn. Stat. Ann. § 179.571 (1966), as added by Minn. Laws 1965, c. 839, § 6.

existing employment terms and conditions. Thus, the distinction between disputes arising out of *existing* agreements and those arising out of negotiations for a *new* agreement is clearly delineated by these 1965 amendments.

Another 1965 amendment to the Minnesota statute specifies that any agreement reached by an employer and its employees shall be presented to the governing body or officer having authority to put it into effect.⁴⁵ The governing body or officer may take such action as it considers appropriate, including submission of the agreement to a legislative body if necessary. This section is an unfortunate addition because it distinguishes between the government employer and the chief executive officer of that government unit.⁴⁶ The officer is free to accept or reject any agreement and, therefore, to nullify the product of negotiations. Where such a prerogative exists in a high executive official, unilateral decision as opposed to bilateral bargaining is the rule.⁴⁷

Despite the 1965 amendments, which evidence recognition of some of the problems plaguing public employer-employee relations, the Minnesota statute still has certain weaknesses. For example, the use of a three-member panel where two members are partisan is not as effective in resolving disputes as a totally impartial fact-finder. The greatest weakness of the statute is that the chief executive officer is not directly obligated to negotiate with the employees. Thus, he is in a position to reject a settlement agreed to by a subordinate management official. Where this situation is permitted to exist, the collective bargaining machinery may be of little consequence to the employees.

C. Michigan

The Michigan provisions,⁴⁸ part of the Hutchinson Act, were also extensively amended in 1965.⁴⁹ Before these amendments, the statute contained only the provision for mediation and fact-finding.⁵⁰ According to this provision, the State Labor Mediation Board is obligated to mediate a dispute upon request of a majority of employees or the employer. The same agency may also make findings of fact, but only if the employer has, prior to the request for mediation and fact-finding, consented to the special procedures by a resolution of its governing body.⁵¹ Under the procedures, each party chooses a representative, and the two chosen discuss the issues of the dispute. If they are unable to reach an agreement within twenty days, they select a third person; should they fail to agree on a third person, the chairman of

⁴⁵ Minn. Stat. Ann. § 179.522 (1966), as added by Minn. Laws 1965, c. 839, § 4.

⁴⁶ But see Conn. Gen. Stat. Ann. § 7-474(e) (Supp. 1965).

⁴⁷ The injurious effects of such a situation are demonstrated by *City of Minot v. General Drivers Union No. 74*, 142 N.W.2d 612 (N.D. 1966), discussed fully pp. 280-81 *infra*.

Compare Minn. Stat. Ann. § 179.522 (1966) with Conn. Gen. Stat. Ann. § 7-474(a) (Supp. 1965) and Mass. Gen. Laws Ann. ch. 149, § 178I (Supp. 1965). The latter two statutes provide that the chief executive officer of the government unit has the responsibility for the negotiations with an employee organization.

⁴⁸ Mich. Stat. Ann. § 17.454(27) (1960), as amended, Mich. Stat. Ann. §§ 17.455(8)-(16) (Supp. 1965).

⁴⁹ Mich. Pub. Acts 1965, No. 379.

⁵⁰ Mich. Stat. Ann. § 17.454(27) (1960) (retained without change).

⁵¹ *Ibid*.

the labor board appoints him.⁵² The three-member panel then submits written findings and recommendations which are not binding on either party. The disputing parties must pay the costs of the impartial member of the panel.

The statute does not explicitly describe the types of disputes subject to the mediation and fact-finding procedures. The use of the word "grievances" to describe the disputes has been a source of conflict in interpreting the statute. In *Labor Mediation Bd. v. Jackson County Road Comm'rs*,⁵³ the government employer argued that mediation and fact-finding were available only in disputes over wages, hours, and terms of the conditions of employment.⁵⁴ The Michigan Supreme Court, overruling a lower court's concurrence with this argument, held that the term "grievances" was unambiguous and was not open to the definition urged by the government employer. Instead, "grievance" must be read in the statute in its generally accepted sense.⁵⁵

The 1965 amendments include procedures for the designation of an employee organization as exclusive representative of employees within an appropriate bargaining unit.⁵⁶ In addition, certain unfair labor practices are prohibited.⁵⁷ Finally, the employer is obligated to meet and bargain in good faith with the employee organization.⁵⁸ These provisions are similar to those in Connecticut, Massachusetts, and Wisconsin.⁵⁹ Another amendment gives an employer the authority to enter into collective bargaining contracts with an exclusively-recognized employee union.⁶⁰ This clause unequivocally validates bilateral agreements and does away with the necessity for adoption by a governing body. The validity of such agreements, however, does not mean that fiscal implementation by a legislative or budget-making body is eliminated. It does mean that a collective bargaining agreement will not be negated by the failure of a governing body to ratify it by passage of an ordinance or resolution to that effect.⁶¹

The impact of the 1965 amendments is to transform an essentially negative approach—only a dispute resolving procedure—into a positive approach—the formulation of a collective bargaining system. The statute still fails to distinguish between disputes emanating from existing contract terms and those developed in the course of negotiations over the terms of a new contract. The three-member panel is not the most effective form of fact-finding with recommendations in the negotiation impasse situation, although

⁵² Mich. Stat. Ann. § 17.454(27)(c) (1960).

⁵³ 365 Mich. 645, 114 N.W.2d 183 (1962).

⁵⁴ Id. at 650-51, 114 N.W.2d at 186. Cf. *Garden City School Dist. v. Labor Mediation Bd.*, 358 Mich. 258, 99 N.W.2d 485 (1959).

⁵⁵ 365 Mich. at 654-55, 114 N.W.2d at 187-88. The alleged "grievance" was employee dissatisfaction with a "work policy" adopted by the employer and with his subsequent failure to adopt the employees' submitted work policy.

⁵⁶ Mich. Stat. Ann. § 17.455(11) (Supp. 1965).

⁵⁷ Mich. Stat. Ann. § 17.455(16) (Supp. 1965).

⁵⁸ Mich. Stat. Ann. § 17.455(15) (Supp. 1965).

⁵⁹ Conn. Gen. Stat. Ann. §§ 7-468, -470, (c) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, §§ 178H, I, L (Supp. 1965); Wis. Stat. Ann. §§ 111.70(3), (4)(d) (Supp. 1966).

⁶⁰ Mich. Stat. Ann. § 17.455(15) (Supp. 1965).

⁶¹ Contra, Minn. Stat. Ann. § 179.522 (1966).

it may very well be suitable to resolving grievances arising out of the existing terms of employment.⁶² The failure to distinguish the two types of disputes undoubtedly accounts for the unfortunate retention of the mediation and fact-finding procedures without any change.

D. North Dakota

The North Dakota statute⁶³ merely provides for written recommendations by a three-member panel in the event of a "grievance or matter in dispute."⁶⁴ A panel is established upon the request of the employer or a majority of the employees. Upon such request, the chief executive officer of that government unit appoints a representative for each party. These two appointees then choose a third.⁶⁵ The government unit involved must pay all the expenses of the panel. The panel determines the issues and makes its recommendations, which are studied by both parties but are not binding.⁶⁶

The recent case of *City of Minot v. General Drivers Union No. 74*⁶⁷ reveals some of the shortcomings of the North Dakota statute. Representatives of both parties met several times in March, April, and May of 1965 to negotiate the terms of a new contract that would take effect upon termination of the existing one on June 1, 1965. The negotiators did not submit their proposals to the parties until June; the union accepted the proposed settlement, but the city rejected it. Further discussion proved fruitless, and on June 22 the union requested a panel as provided by the statute. Accordingly, the appointees of each party met and agreed on a third person. On three occasions, this third person refused the position. With no settlement forthcoming, the union struck on July 16, a month and a half after the previous contract had expired. The employer subsequently obtained a temporary restraining order.⁶⁸ A three-member panel was finally formed, and it soon rendered a majority report in favor of the union's position.⁶⁹ The city nevertheless rejected the recommendation, and, when the injunction was later made permanent, the union was without recourse and compelled to accept the city's terms.

It is readily apparent that the three-member panel had no effect upon the outcome of the dispute, and certainly did not provide the union with a substitute for the right to strike. Of particular importance is the fact that

⁶² See pp. 284-85 *infra*.

⁶³ N.D. Cent. Code §§ 34-11-01 to -05 (1960).

⁶⁴ N.D. Cent. Code § 34-11-02 (1960).

⁶⁵ There is no clause providing for the appointment of the third member in the event that the two partisan members are unable to agree to the third.

⁶⁶ If the recommendations are rejected, either party is "entitled to ask the board of mediators for further consideration." N.D. Cent. Code § 34-11-04 (1960).

⁶⁷ 142 N.W.2d 612 (N.D. 1966).

⁶⁸ There is no statutory prohibition of strikes by public employees in North Dakota. The court held that it was nevertheless a well-recognized principle that public employees had no right to strike and that the enactment of § 34-11 was not intended to alter this principle. *Id.* at 617.

⁶⁹ The principal issue in the negotiation dispute was the union's request for a contract clause allowing voluntary check-off of union dues. *Id.* at 613. Compare Conn. Gen. Stat. Ann. § 7-477 (Supp. 1965).

CURRENT LEGISLATION

the negotiations in the three months prior to June 1 were carried on by persons who were without authority to bind the parties. This case is an excellent example of how the collective bargaining rights of public employees may be circumvented by the government employer exercising his prerogative to reject the product of negotiations.⁷⁰

The steadfast refusal of the city to accept the negotiators' agreement and the panel's recommendations might very well suggest that the city lacked good faith. The statute, however, does not impose such an obligation. The statute is also unsatisfactory because it fails to provide a method insuring creation of the three-member panel as expediently as possible.⁷¹ Indeed, the statute makes no reference as to the appropriate time for the formation of the panel. This is in sharp contrast to the Connecticut, Massachusetts, and Wisconsin statutes, which strongly imply that fact-finding provisions should be invoked with sufficient time to allow for the submission of recommendations before the present contract expires.⁷²

E. Pennsylvania

The scope of the Pennsylvania statute⁷³ is similar to that of North Dakota, *i.e.*, limited to a procedure for the settlement of disputes. A government agency shall, at the request of its employees, set up a three-member panel consisting of a representative of each party and a third impartial member chosen by the other two. If the partisan members cannot agree to the third person, the court appoints him. The government agency must pay all the expenses of the panel. If within thirty days after creation of the panel, negotiations have not produced an "adjustment of the grievances," the panel may hold hearings and submit findings. The head of the agency involved shall comply with these recommendations as far as he is able and, if necessary, present them to the legislative body for implementation.

The imprecise wording of the Pennsylvania statute has caused a certain amount of confusion as to its scope and application. The meaning of the term "grievances" has been litigated in this state just as it has been in Michigan.⁷⁴ In private industry, "grievances" is a term ordinarily used to denote disputes pertaining to an *existing* contract.⁷⁵ The Pennsylvania courts

⁷⁰ But see Conn. Gen. Stat. Ann. § 7-474(e) (Supp. 1965).

⁷¹ See note 65 *supra*. The Michigan, Minnesota, and Pennsylvania statutes do not cover the exact situation in this case, *i.e.*, where the third person agreed to by both parties refuses the position, but the fact that they give the parties only five days to agree (in Pennsylvania fifteen days) suggests that the failure to form a panel at the end of this period, regardless of the cause, would mean the third person would be appointed.

⁷² See pp. 274-75 *supra*.

⁷³ Pa. Stat. Ann. tit. 43, § 215.1 (1964).

⁷⁴ *DeBlasio v. Capra*, 413 Pa. 148, 196 A.2d 352 (1964); *Pittsburgh City Fire Fighters Local 1 v. Barr*, 408 Pa. 325, 184 A.2d 588 (1962); *Broadwater v. Otto*, 370 Pa. 611, 88 A.2d 878 (1952); *Erie Fire Fighters Local 293 v. Gardner*, 26 Pa. D. & C.2d 327 (C.P. Erie County 1961), *aff'd*, 406 Pa. 395, 178 A.2d 691 (1962). Compare *Labor Mediation Bd. v. Jackson County Road Comm'rs*, *supra* note 53. See generally Finkelhor, *Municipal Corporations, 1963-1964 Survey of Pennsylvania Law*, 26 U. Pitt. L. Rev. 195 (1965).

⁷⁵ See *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

have rejected this narrow definition in interpreting the meaning of the statute, and have construed "grievances" to embrace all disputes no matter what their source.⁷⁶

Since the statute states that the chief executive officer of the government unit involved "shall take the proper administrative measures . . . to comply with the findings of the panel,"⁷⁷ the court in *Erie Firefighters Local 293 v. Gardner*⁷⁸ had to determine whether the three-member panel's finding was binding or merely advisory. Citing the unconstitutionality of any binding arbitration,⁷⁹ the court concluded that it was the legislature's intent to make it advisory. The court also pointed out that even if the panel's findings were binding, the provision would be meaningless, since, under another statutory provision,⁸⁰ the chief executive officer of the City of Erie, the Mayor, was without authority to enter into a contract with the union.⁸¹

In *Broadwater v. Otto*,⁸² plaintiff was fired from his job as a guard at defendant's prison. Consequently, plaintiff's union requested that defendant set up a three-member panel in compliance with the statute.⁸³ The issues sought to be discussed concerned job security and union recognition in reference to the union's allegation that plaintiff was fired solely because of his involvement in union affairs. The defendant refused the union's request, and in plaintiff's suit for a writ of mandamus, the court upheld defendant's position, finding that the statute did not apply to an employee dismissal where a strike was not involved.⁸⁴

Although the decision in the *Broadwater* case may be unnecessarily narrow,⁸⁵ it is submitted that the real fault lies in the inadequacy of the statute to provide comprehensive measures which would have avoided the need for mandamus, or would have aided an amicable settlement without recourse to the courts. The unfortunate results of the failure to include in the statute a union recognition procedure, a prohibition of unfair labor practices, and

⁷⁶ In *Pittsburgh City Fire Fighters*, supra note 74, the defendant argued that "grievances" meant only disputes arising out of an existing contract and did not pertain to wage and hour terms of a new agreement. The court, in rejecting this argument, cited the Michigan case of *Garden City School Dist. v. Labor Mediation Bd.*, supra note 54.

⁷⁷ Pa. Stat. Ann. tit. 43, § 215.1(b) (1964).

⁷⁸ 26 Pa. D. & C.2d 327 (C.P. Erie County 1961), aff'd, 406 Pa. 395, 178 A.2d 691 (1962).

⁷⁹ Id. at 335.

⁸⁰ Pa. Stat. Ann. tit. 53, § 35902 (1957).

⁸¹ The authority to prescribe duties and compensation was vested in the five-man city council of which the Mayor was a member.

⁸² 370 Pa. 611, 88 A.2d 878 (1952).

⁸³ Pa. Stat. Ann. tit. 43, § 215.1(b) (1964).

⁸⁴ 370 Pa. at 616, 88 A.2d at 881. The court cited an unreported 1950 opinion of the attorney general which declared: "It is quite clear that the grievance machinery was to provide for presentation of complaints . . . during employment in order to deter strikes in accordance with the over-all purpose of the legislation."

⁸⁵ The rationale of the court was that because the statute was enacted to prevent strikes, and because a discharged employee obviously cannot strike, there was no "grievance" within the meaning of the statute. Cf. Op. Att'y Gen. No. 270-D (Minn. 1959) (discharge of an employee may be the basis for a "grievance").

an obligation to meet in good faith, meant that plaintiff's employment security was at the mercy of his employer.

II. ANALYSIS

The statutes of Michigan, Minnesota, North Dakota, and Pennsylvania were initially enacted as strike prevention measures,⁸⁶ and, as such, contributed little to the collective bargaining process. Recent amendments have substantially altered the significance and approach of the Minnesota and Michigan statutes. Several shortcomings remain, notably in the fact-finding procedures and, in Minnesota, in specifically permitting higher administrative review of an agreement.

On the other hand, the statutes of Connecticut, Massachusetts, and Wisconsin were initially enacted with the objective of providing meaningful labor-management relations in public employment.⁸⁷ They present a more coherent and orderly system for collective bargaining. All three, in addition to mediation and fact-finding, provide for: (1) the recognition of an employee union as exclusive bargaining agent for the members of an appropriate bargaining unit; (2) jurisdiction in a state agency to determine recognition questions, including elections if necessary; (3) placement of responsibility for negotiations upon the head of the employer agency; (4) the legal obligation on both parties to bargain in good faith; and (5) the prohibition of certain unfair labor practices, and procedures for enforcement of the prohibitions. A further examination of the principal problems observed in the public employment area will substantiate the contention that these three statutes are to be considered an exemplary step forward.

Perhaps the single most important factor in any labor-management relationship is the existence or absence of an atmosphere which tends to promote good-faith intentions.⁸⁸ Management personnel among public employers often harbor prejudices against unions and union activity. There is a widespread reluctance by such persons to recognize the value of amicable relations with employees or to appreciate the possible advantages of management-union cooperation.⁸⁹ In order to encourage an atmosphere conducive to constructive

⁸⁶ E.g., Pa. Stat. Ann. tit. 43, § 215.1 (1964) is entitled "Strikes by Public Employees."

⁸⁷ See, e.g., Report of the Interim Commission To Study Collective Bargaining by Municipalities (Conn. 1965), where it is recommended that

the General Assembly should adopt comprehensive legislation to set the standards for collective bargaining in municipal jurisdictions. There is no longer any real question about the benefits which derive from according public employees a meaningful voice in determining the conditions under which they work.

Id. at 8. The statute proposed by this commission was adopted without material change.

⁸⁸ As one commentator has succinctly stated, "employers get exactly the kind of employee relations they deserve." Fay, *Before Collective Bargaining Begins*, in *Developments in Public Employee Relations* 41 (Warner ed. 1965).

⁸⁹ Id. at 41-44; Terry, *Collective Bargaining in the U.S. Department of the Interior*, Symposium, 22 Pub. Admin. Rev. 19 (1962); Thompson, *Collective Bargaining in the Public Service—The TVA Experience and Its Implications for Other Government Agencies*, 17 Lab. L.J. 89 (1966); Zander, *A Union View of Collective Bargaining in the Public Service*, Symposium, 22 Pub. Admin. Rev. 5 (1962).

relations, the Connecticut, Massachusetts, and Wisconsin statutes, and the amended Michigan statute, impose an unambiguous obligation on parties to meet and bargain in good faith. Supplementing this imposition are the procedures for union recognition and the inclusion of an unfair labor practice standard. The Minnesota statute evidences recognition of the importance of this obligation, but does not clearly manifest an intent to impose it upon employers and employee representatives.

The Connecticut, Massachusetts, and Wisconsin statutes clearly distinguish between the negotiation impasse situation and grievances arising out of an existing contract. As observed previously, fact-finding with recommendations by a three-member panel consisting of two partisan and one non-partisan member has been applied in other states to both those circumstances.⁹⁰ The distinction is, however, an important one and reflects the greater sophistication of the Connecticut, Massachusetts, and Wisconsin statutes, which provide that fact-finding with recommendations by a totally impartial fact-finder⁹¹ should be applied only to the negotiation impasse situation. The importance of the distinction lies in the fact that grievance disputes usually pertain to a single employee, or a complaint against certain practices of supervisory officials.⁹² Settlement of these disputes requires an interpretation or application of, or a supplement to, existing employment provisions.⁹³ Grievances are not likely to involve complex issues, and are conducive to a settlement, the scope of which can be confined to the particular facts of the grievance. On the other hand, fact-finding, in the event of a negotiation deadlock over the terms of a new contract, often requires an exhaustive study of budgetary and statutory limitations, comparative wage and hour structures, cost-of-living indices, and all the other factors pertinent to an agreement.⁹⁴

As a result of its give-and-take debate, a three-member panel where two are partisan and one nonpartisan may well be suited to resolving grievance disputes. The study called for in the negotiation impasse situation, however, requires objectivity rather than debate, and thus a totally impartial fact-finder is definitely preferable for resolving this type of dispute. The fact-finder's impartiality takes on additional significance in view of his potential role as a mediator.⁹⁵ The Wisconsin experience is especially revealing,

⁹⁰ See text accompanying notes 43 (Minnesota), 55 (Michigan), 74 & 76 (Pennsylvania) *supra*.

⁹¹ In the three states referred to, the "totally impartial fact-finder" is one person, except in those instances in Wisconsin where both parties request a three-member panel.

⁹² See generally Massey, *Employee Grievance Procedures*, in *Developments in Public Employee Relations* 64 (Warner ed. 1965); Harper, *Labor Relations in the Postal Service*, 17 *Ind. & Lab. Rel. Rev.* 443 (1964).

⁹³ The usual type of grievance procedure is an appeal process starting from the immediate supervisory official and culminating in a final decision by the highest official. Arbitration, whether complementing the appeal system or not, is not infrequent and most often is binding.

⁹⁴ Only Minn. Stat. Ann. § 179.57 subd. 4 (1966) suggests criteria to be used in the panel's findings and recommendations.

⁹⁵ See note 24 *supra* and accompanying text.

CURRENT LEGISLATION

because the fact-finding procedures have been in effect since 1962.⁹⁶ As of October 1, 1966, unofficial statistics show that there have been 113 petitions for fact-finding, only 41 of which have resulted in the issuance of recommendations.⁹⁷ The remainder of the petitions were withdrawn because the parties had reached a settlement, either through mediation by the fact-finder or through further negotiations or, more likely, through a combination of both.⁹⁸ The Connecticut statistics, based on a much shorter period of time, show similar trends.⁹⁹ It is evident that the importance of fact-finding is not simply in producing a recommended solution, but is also in bringing the parties together for further discussion and hopefully a settlement before a recommendation is made. An impartial fact-finder is more suitable for this purpose than the three-member panel used in Michigan, Minnesota, North Dakota, and Pennsylvania.

It is important that fact-finding not be an automatic procedure, resorted to at the slightest indication of conflict between employer and employees. A blue ribbon committee, created in New York after the 1966 transit workers strike, reported that

impasse procedures often tend to be overused; they may become too accessible, and as a consequence, the responsibility and problem-solving virtues of constructive negotiations are lost. Dispute settlement procedures can become habit-forming, and then negotiations become only a ritual.¹⁰⁰

This tendency has been witnessed in Wisconsin¹⁰¹ and presumably exists in the other states. The statutes of Connecticut, Massachusetts, Michigan, and Wisconsin have attempted to offset the tendency by implying that fact-finding is to be made available as a matter of discretion on the part of the state labor board, and not as a matter of right.¹⁰² This implication is to

⁹⁶ There has been extensive analysis of the Wisconsin fact-finding procedure. See, e.g., Stern, *The Wisconsin Public Employee Fact-Finding Procedure*, 20 *Ind. & Lab. Rel. Rev.* 3, 7-8 (1966); Note, *Municipal Employment in Wisconsin*, 1965 *Wis. L. Rev.* 652; Note, *Municipal Employment Relations in Wisconsin: The Extension of Private Labor Relations Devices Into Municipal Employment*, 1965 *Wis. L. Rev.* 671.

⁹⁷ Letter from Wisconsin Employment Relations Board, Oct. 7, 1966. The writer emphasizes that these statistics are approximations and are not to be regarded as official board figures.

⁹⁸ *Ibid.*

⁹⁹ The Connecticut statute became effective on June 4, 1965. As of Oct. 10, 1966, nine petitions for fact-finding had been received by the Connecticut Board of Mediation & Arbitration. Three petitions were withdrawn during the board's investigation to determine if fact-finding was warranted. Of the remaining six cases, the fact-finder was able to resolve two disputes through his mediation efforts. Thus, of the nine cases, five were settled without the need for a final fact-finding report. Letter from Connecticut Board of Mediation & Arbitration, Oct. 10, 1966. There are no meaningful statistics based on the Massachusetts experience because the fact-finding procedures did not go into effect until 1966.

¹⁰⁰ Final Report, Governor's Committee on Public Employee Relations 45-46 (N.Y. 1966).

¹⁰¹ Note, *Municipal Employment in Wisconsin*, 1965 *Wis. L. Rev.* 652, 665.

¹⁰² Conn. Gen. Stat. Ann. § 7-473(b) (Supp. 1965); Mass. Gen. Laws Ann. ch. 149, § 178J(b) (Supp. 1965); Mich. Stat. Ann. § 17.454(27) (1960); Wis. Stat. Ann. § 111.70-

be contrasted with the statutes of the other three states examined, which indicate that all that is required to set up a fact-finding panel is the request of a majority of employees.¹⁰³

Two other factors in relation to the use of fact-finding should be mentioned. The first is the cost provisions of the seven states examined. All except North Dakota and Pennsylvania provide that the costs of fact-finding are to be shared equally by the employer and the employees.¹⁰⁴ In those two states, the costs are paid wholly by the employer.¹⁰⁵ Although obviously of limited effect, the shared-costs provisions tend to minimize the number of fact-findings and to discourage frivolous requests for them.¹⁰⁶ The second factor is the force of public opinion. Because management officials are answerable to an electorate, either directly or through a higher, elected official, public opinion is important in public employment labor relations.¹⁰⁷ The publication of a fact-finding with recommendations furnishes a standard by which the public may judge the merits of the contentions of each party to the dispute, and thereafter assert a well-informed opinion. It has been pointed out that

fact-finding is not so much a case of finding facts of which the parties are ignorant, but rather of sharpening the consequences of the facts already known. From the viewpoint of both parties then, the position of public opinion is one of the major consequences to be evaluated.¹⁰⁸

This same commentator analogizes the union's economic power as a factor in private collective bargaining to the pressure of public opinion as a factor influencing the government employer.¹⁰⁹

As already seen in the *General Drivers*¹¹⁰ and *Erie*¹¹¹ cases, the presence of an administrative hierarchy and the division of authority between executive

(4)(f) (Supp. 1966). In practice, a petition is rarely rejected. In the preliminary investigation before a fact-finder is selected, however, the mediation efforts of the investigator have often resulted in a settlement, a fact which suggests that the alleged dispute was not serious enough to constitute a true negotiation deadlock. Letter (Wisconsin), *supra* note 97; Letter (Connecticut), *supra* note 99.

¹⁰³ Minn. Stat. Ann. § 179.57 subd. 1 (1966); N.D. Cent. Code § 34-11-02 (1960); Pa. Stat. Ann. tit. 43, § 215.1(b) (1964).

¹⁰⁴ Conn. Gen. Stat. Ann. § 7-473(e) (Supp. 1965) (full costs to party guilty of bad faith); Mass. Gen. Laws Ann. ch. 149, § 178J(e) (Supp. 1965) (full costs to party guilty of bad faith); Mich. Stat. Ann. § 17.454(27)(d) (1960); Minn. Stat. Ann. § 179.57 subd. 3 (1966); Wis. Stat. Ann. § 111.70(4)(h)2 (Supp. 1966). Cf. Krinsky, *Public Employment Fact-Finding in Fourteen States*, 17 Lab. L.J. 532, 540 (1966).

¹⁰⁵ N.D. Cent. Code § 34-11-05 (1960); Pa. Stat. Ann. tit. 43, § 215.1(b) (1964).

¹⁰⁶ Connecticut Interim Comm. Report, *supra* note 87, at 16; Stern, *supra* note 96, at 8.

¹⁰⁷ See New York Final Report, *supra* note 100, at 53; Belasco, *Resolving Dispute over Contract Terms in the State Public Service: An Analysis*, 16 Lab. L.J. 533, 542 (1965); Thompson, *supra* note 89, at 92; Note, *The Strike and Its Alternative in Public Employment*, 1966 Wis. L. Rev. 549, 560-62.

¹⁰⁸ Belasco, *supra* note 107, at 542.

¹⁰⁹ *Ibid.*

¹¹⁰ 142 N.W.2d 612 (N.D. 1966).

¹¹¹ *Supra* note 78.

management and legislative fiscal control may negate the product of collective bargaining agreements. A simple statement of the problem is impossible because of the great variation in the degree of government authority. For instance, state executive department employees are in a different position from those of semi-autonomous state agencies. Statutes or charters delegating fiscal authority to municipal corporations provide several variations. One factor common to most government departments is that final authority for basic work conditions such as wages and hours is vested in a legislative or budget-making body.¹¹² Courts have consistently refused to allow any abrogation of this final authority, and consequently have not permitted executive officers, governing boards, or commissions to bind the government unit to compensation terms in a bilateral contract.¹¹³ There has also been controversy as to the power of a municipality to contract with a group of employees as to *any* terms of employment. The landmark case of *Norwalk Teachers Ass'n v. Board of Educ.*,¹¹⁴ however, has established a trend upholding bilateral contracts between a government employer and its employees.¹¹⁵

With or without the necessity for final legislative appropriation to fulfill the compensation terms, it is essential to bilateral bargaining that there be no administrative review of a settlement reached by negotiations. Only Connecticut¹¹⁶ and Massachusetts¹¹⁷ have included provisions which place responsibility for negotiations upon the chief executive officer of the government unit involved. These provisions preclude higher review by other than a legislative body. The Connecticut Interim Commission reported:

A key provision in this legislation is the fixing of the responsibility for representing the municipality in bargaining in the chief executive officer of the municipality. This is an administrative function, not legislative . . . and we are providing that he should sign any agreement as a ministerial act.¹¹⁸

The Connecticut statute goes one step further. It requires the budget-making

¹¹² See generally Male, *Labor Crises and the Role of Management*, in *Developments in Public Employee Relations* 103, 106 (Warner ed. 1965).

¹¹³ See 3 McQuillin, *Municipal Corporations* §§ 12.35, .38 (rev. ed. 1963); 4 McQuillin, *Municipal Corporations* §§ 12.176, .177, .179 (1949 ed.). The theoretical principle behind this rationale is stated in the leading case of *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947):

It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers and any delegation thereof is void If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers.

Id. at 1251, 206 S.W.2d at 545.

¹¹⁴ 138 Conn. 269, 83 A.2d 482 (1951).

¹¹⁵ See Mich. Stat. Ann. § 17.455(15) (Supp. 1965). See generally Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. Pa. L. Rev. 43 (1958); Strayhorn, *Municipal Employees and the Law*, 1961 U. Ill. L.F. 377, 383-87.

¹¹⁶ Conn. Gen. Stat. Ann. § 7-474(a) (Supp. 1965).

¹¹⁷ Mass. Gen. Laws Ann. ch. 149, § 178I (Supp. 1965).

¹¹⁸ Connecticut Interim Comm. Report, *supra* note 87, at 16-17.

authority to implement the terms of any agreement by the necessary appropriation, "notwithstanding any provision of any general statute, charter, special act or ordinance to the contrary."¹¹⁹ Consequently, the employer negotiator who previously was subject to budget limitations has direct authority to bind the municipality to an agreement reached with an employee representative.¹²⁰ The impact of this provision is to provide meaningful bilateral bargaining without the specter of review by a higher authority.

III. EXECUTIVE ORDER NO. 10988

The federal executive branch has taken a somewhat unique approach to the establishment of a systematic collective bargaining process. This approach is embodied in the procedures outlined in Executive Order No. 10988¹²¹ issued by President Kennedy in 1962. The provisions of that Order, and the problems encountered since its proclamation, shed light on similar provisions and problems in the state statutes.

Under the Order, employee groups are accorded informal, formal, or exclusive recognition. Any group not qualified for the other two classifications is entitled to informal recognition and, accordingly, is granted the right to present its views at reasonable times.¹²² Formal recognition is given when no organization is entitled to receive exclusive recognition, and the petitioning organization's membership contains at least ten per cent of the employees in the bargaining unit. A formally recognized group may not only present its views, but is also entitled to consult with its employer concerning work conditions and personnel practices.¹²³ Exclusive recognition is accorded an organization which consists of a majority of employees within a bargaining unit. Such an organization must represent all employees and negotiate agreements for them. The employer must meet at reasonable times with the exclusively recognized union.¹²⁴ Any agreement reached is put in the form of a written memorandum, and must be approved by the agency head. An agreement is subject to any existing laws controlling its terms.¹²⁵ Such an

¹¹⁹ Conn. Gen. Stat. Ann. § 7-474(c) (Supp. 1965).

¹²⁰ In *Risi v. City of Norwalk*, 144 Conn. 525, 134 A.2d 514 (1957), the police board was obligated to fix the salaries of policemen. The board reached an agreement with the policemen which included a salary schedule calling for gradual wage increases. The board included this schedule in their estimate of expenses to the board of estimation and taxation, which was the budget authority. The latter board refused to appropriate funds necessary to meet the increases specified in the salary schedule. The court held that while the board of estimation and taxation cannot refuse to grant an appropriation, it does have discretionary power to reject what it considers to be extravagant requests. Had Conn. Gen. Stat. Ann. § 7-474(c) (Supp. 1965) been in effect, however, the appropriation would have been mandatory upon the budget authority.

¹²¹ 27 Fed. Reg. 551 (1962), [hereinafter cited as Exec. Order No. 10988]. Supplementing the Order is the Presidential Memorandum of May 21, 1963, which established an unfair labor practices code governing employees covered by the Order. Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, 28 Fed. Reg. 5127 (1963).

¹²² Exec. Order No. 10988, § 4.

¹²³ Exec. Order No. 10988, § 5.

¹²⁴ Exec. Order No. 10988, § 6.

¹²⁵ Exec. Order No. 10988, § 7.

CURRENT LEGISLATION

agreement may include provisions for a grievance procedure, including advisory arbitration. The advisory arbitration, however, shall not extend to any alteration of an agreement.¹²⁶ The Secretary of Labor shall provide an arbitrator, through the Federal Mediation and Conciliation Service, who will decide questions of bargaining unit appropriateness and hold an election if necessary.¹²⁷ Another provision states that the Civil Service Commission should maintain a program to further the objectives of the Order.¹²⁸

There is a noticeable lack of any negotiation impasse procedure. The principal reasons advanced by the President's Task Force, whose report was the basis of the Executive Order, were (1) "that the availability of arbitration would have an escalation effect whereby the parties, instead of working out their differences by hard, serious negotiation, would continually take their problems to a third party for settlement . . .,"¹²⁹ and (2) that the lack of experience in negotiating on the part of government officials and employees would make advisory arbitration inappropriate.¹³⁰

Limitations on the power of the federal executive branch may further explain why the Task Force omitted an impasse procedure. Negotiations are necessarily restricted in scope because of congressional authority to prescribe pay, hours of work, and fringe benefits for most personnel.¹³¹ These items are thus excluded from federal negotiations, although in state and municipal government they are invariably the focal point of discussion despite the fact that final fiscal appropriation may be necessary. This exclusion undoubtedly lessens the probability of a serious dispute.¹³² A fact substantiating the conclusion that an impasse procedure is not needed is that a strike by federal employees has not been reported since World War II.¹³³

The Task Force Report noted that up to 1962 certain government officials had construed the absence of collective bargaining procedures "as an excuse for hostile and obstructionist attitudes,"¹³⁴ and that where heads of government agencies have attempted to effectuate cooperative relations, the vertical chain of command has proven a barrier to the implementation of this goal.¹³⁵ Reports on the effectiveness of Executive Order No. 10988 indicate that these problems still persist.¹³⁶ Management reaction to the

¹²⁶ Exec. Order No. 10988, § 8.

¹²⁷ Exec. Order No. 10988, § 11.

¹²⁸ Exec. Order No. 10988, § 12.

¹²⁹ President's Task Force on Employee-Management Relations in the Federal Service, *A Policy for Employee-Management Cooperation in the Federal Service* 19 (1961). Compare pp. 285-86 *supra*.

¹³⁰ *Ibid.*

¹³¹ For those subjects which have been negotiated, see U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1451, *Collective Bargaining Agreements in the Federal Service, Late Summer 1964* (1965).

¹³² The Task Force reported that "major employee organizations . . . are aware of these limitations and are quite content to negotiate within them." *Supra* note 129, at 18.

¹³³ Vosloo, *Collective Bargaining in the United States Federal Civil Service* 200 n.70 (1966).

¹³⁴ Task Force Report, *supra* note 129, at 6.

¹³⁵ *Ibid.*

¹³⁶ See generally Vosloo, *Collective Bargaining in the United States Federal Civil Service* (1966); Report of the Committee on Law of Government Employee Relations,

Order has not always been receptive. An additional problem has been that many government negotiators are ignorant of restrictive laws or regulations, and agreements consequently have to be rejected by the agency head.¹³⁷ Sometimes the agency head has rejected an agreement simply because he did not like its terms.¹³⁸

As a result of these problems, the greatest criticism of the Order has concerned the lack of a central authority.¹³⁹ The Civil Service Commission has taken steps to improve this situation by offering advice and assistance. For example, the Commission's Office of Career Development has conducted three-day workshops intended to familiarize management officials with negotiation techniques and to provide them with the proper background so that they can enter into meaningful negotiations.¹⁴⁰ The Commission has nevertheless been accused of undermining the objectives of the Order by endorsing the policies of those agency officials who are reluctant to enter into meaningful negotiations with employee unions.¹⁴¹

Since the collective bargaining procedures of the Order were established by the executive branch itself, it is not unreasonable to expect that the diffusion of authority problem and the reluctance of some officials to accede to the spirit of the Order can be overcome by time and the efforts of high-level officials to fully implement the goals of the Order. One very salutary effect has already been observed in the application of the Order: the provisions entitling an employee group to at least informal recognition have resulted in many instances in a significant increase in communication between employer and employees.¹⁴² Such occurrences are the foundation for a solid relationship leading to effective collective bargaining negotiations.

Due to the circumstances surrounding Executive Order No. 10988—the clearly defined limitations on the subject matter of negotiations, the history of no strikes, the structure of the executive department—its provisions or lack thereof do not have a great deal of pertinence to the state and municipal situation.¹⁴³ States and municipalities, however, would do well to examine the administrative difficulties discussed above, which are typical of

ABA, 1965 Proceedings of the Section of Labor Relations Law 321; Report of the Committee on Law of Government Employee Relations, ABA, 1964 Proceedings of the Section of Labor Relations Law 355; Hart, *The Impasse in Labor Relations in the Federal Civil Service*, 19 *Ind. & Lab. Rel. Rev.* 175 (1966); Hart, *The U.S. Civil Service Learns to Live with Executive Order 10988: An Interim Appraisal*, 17 *Ind. & Lab. Rel. Rev.* 203 (1964).

¹³⁷ Vosloo, *op. cit.* supra note 136, at 109.

¹³⁸ ABA Report (1964), supra note 136, at 361.

¹³⁹ See Vosloo, *op. cit.* supra note 136, at 68-91; ABA Report (1965), supra note 136, at 329.

¹⁴⁰ ABA Report (1964), supra note 136, at 360.

¹⁴¹ Hart, *The Impasse in Labor Relations in the Federal Civil Service*, supra note 136.

¹⁴² Vosloo, *op. cit.* supra note 136, at 137.

¹⁴³ See *Bargaining Rights of Public Employees*, 63 *L.R.R.* 40 (Sept. 12, 1966), in which it was reported that members of the joint convention of labor mediation agencies and the National Association of State Labor Relations Agencies agreed that the approach of Executive Order No. 10988 should not be applied to the states because it stresses the differences between public and private employment.

CURRENT LEGISLATION

the problems encountered when systematic collective bargaining procedures are instituted in public employer-employee relations.

IV. OTHER APPROACHES

Two approaches other than the ones witnessed in the federal government and in the states have been advocated. The first is the use of compulsory arbitration, and the second is a revision of the denial of the right to strike.

Compulsory arbitration is a controversial subject. One proponent of this procedure notes that "this proposed solution is itself engulfed in a tangle of legal, historical and emotional problems—so much so that its implementation would be extremely difficult."¹⁴⁴ Compulsory arbitration provisions have been held to be an unwarranted delegation of governmental authority,¹⁴⁵ and thus raise serious problems of validity under state constitutions. Instances of compulsory arbitration provisions in public employment do exist, however, either by virtue of statutory authority¹⁴⁶ or by a contract provision between an employer and an employee union.¹⁴⁷ The tendency, noted earlier, of weakening negotiating efforts by providing impasse procedures is quite obviously intensified when compulsory arbitration prevails. As one commentator put it, compulsory arbitration fails "because public management and public employees both sit back and do nothing about honest-to-goodness negotiations."¹⁴⁸ Because of this tendency, the constitutionality issue, and the controversial nature of the procedure, compulsory arbitration is at this time an unacceptable solution to the problems inherent in the public employment area.

Those who advocate revising the prohibition of the right to strike for public employees concede that certain types of employees should never be allowed to strike.¹⁴⁹ A distinction has been suggested between "governmental" and "proprietary" functions,¹⁵⁰ comparable to that found in the governmental tort immunity doctrine.¹⁵¹ A more logical distinction is between services essential to the public welfare, such as policemen and firemen, and those services which, if suspended by strike, would not inflict an intolerable hardship upon the public. This distinction has never been recognized by any legislative or executive body, and would entail a statutory enactment of

¹⁴⁴ Shenton, *Compulsory Arbitration in the Public Service*, 17 *Lab. L.J.* 138 (1966).

¹⁴⁵ The leading case is *Mugford v. Mayor of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945).

¹⁴⁶ E.g., Minn. Stat. Ann. § 179.38 (1966) (employees of public hospitals).

¹⁴⁷ E.g., Agreement, Massachusetts Bay Transportation Authority and Division 589 of the Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America (1958, as amended, Feb. 1966).

¹⁴⁸ Male, *op. cit. supra* note 112, at 108.

¹⁴⁹ E.g., Collective Bargaining Policy Statement, American Fed'n of State, Municipal, and County Employees, AFL-CIO, cited in Kay, *State, County, and Municipal Employees: Biennial Convention*, 89 *Monthly Lab. Rev.* 736, 738 (1966).

¹⁵⁰ Local 266, *IBEW v. Salt River Project*, 78 Ariz. 30, 275 P.2d 393 (1954). Compare *Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen*, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).

¹⁵¹ But see *Delaware River & Bay Authority v. Organization of Masters, Mates, and Pilots*, 45 N.J. 138, 146, 211 A.2d 789, 793 (1965); *City of Alcoa v. Local 760, IBEW*, 203 Tenn. 12, 23-25, 308 S.W.2d 476, 481-82 (1957).

considerable elaboration in order to establish a workable standard. As the New York Governor's Committee concluded:

To begin with, a differentiation between essential and nonessential governmental services would be the subject of such intense and never-ending controversy as to be administratively impossible. There is, however, an even more telling reason. Careful thought about the matter shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).¹⁵²

In conclusion, only seven states and the federal government have established collective bargaining procedures covering most or all of their public employees. The relative merits of these procedures involve complex issues and a variety of problems. It is apparent that a provision for advisory arbitration in the form of fact-finding with recommendations is, by itself, not enough. A more comprehensive approach is needed to deal with the many problems encountered. Only a positive attitude, not limited solely to the negative purpose of preventing strikes by offering arbitration, will enable a state legislature to achieve this end. It is to be hoped that the progressive examples established by Wisconsin and Executive Order No. 10988, and improved upon by Connecticut and Massachusetts, will continue. Only through improvement of the collective bargaining process for public employees will the likelihood of mutual hostility and of serious disputes be minimized, and a meaningful alternative to the right to strike established.

SAMUEL P. SEARS, JR.

¹⁵² Final Report, Governor's Committee on Public Employee Relations 19 (N.Y. 1966).