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Joseph R. Grodin

UC Hastings College of the Law, grodinj@uchastings.edu

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ARBITRATION OF PUBLIC SECTOR LABOR DISPUTES: THE NEVADA EXPERIMENT

JOSEPH R. GRODIN

IN 1971, Nevada embarked on a unique experiment in impasse resolution procedures for disputes between local governments and their employees. In that year, the legislature amended Nevada's otherwise unremarkable public employee bargaining statute so as to give the governor authority, at the re-

This study examines the first two years of experience under a Nevada law that gives the governor authority, prior to the commencement of factfinding proceedings in the public sector, to order the factfinder's award to be binding on any or all issues. Based on an analysis of the records of all the Nevada factfinding cases in 1972 and 1973 and interviews with most of the principals involved in those cases, the author concludes that this state's experience shows that arbitration of public sector disputes can be consistent with both effective bargaining and political responsibility.

Joseph R. Grodin is Professor of Law at the Hastings College of the Law, University of California. This article is a condensation of a longer report based on a study financed by the Labor-Management Services Administration of the U.S. Department of Labor, but the points of view or opinions stated herein do not necessarily represent the official position or policy of the Department of Labor. Copies of the full report, or further information concerning details of the study not included in this article, can be obtained from the author.

The author wishes to thank Governor O'Callaghan and his aides, as well as the various attorneys, representatives, and factfinders (including John McGroarty, Paul Bible, Paul Lambole, Rennie Ashelman, Richard Morgan, Marvin Piccolo, John Kagel, William Eaton, Morris Myers, Joseph Gentile, Howard Block, William Gould, Adolph Koren and many others) who cooperated with the author in providing information, materials, and many valuable insights.—EDITOR

quest of either party to the dispute and prior to the commencement of factfinding proceedings, to order the factfinder's award binding on all or any issues. In making his decision, the governor is directed to consider "the overall best interests of the state and all its citizens," the "potential fiscal impact both within and outside the political subdivision," and "any danger to the safety of the people of the state or a political subdivision." In addition, the amendments require the factfinder, whether operating in an advisory or arbitral capacity, to make a preliminary determination of the financial ability of the local government based on "all existing revenues as established by the local government employer" and with "due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare, and safety of the people residing within the political subdivision." Once ability to pay is determined, the neutral is directed to utilize "normal criteria for interest disputes" in arriving at his decision.¹

Some other states that provide for voluntary or compulsory arbitration of public sector labor disputes also maintain a screening mechanism to determine whether arbitration will occur,² and some statutes include ability to pay among the criteria that a factfinder or

¹Nevada Revised Statutes (NRS) Sec. 288.200.

arbitrator must consider.³ Nevada is unique, however, in vesting the screening authority in an elected official; in establishing standards for the exercise of that authority that go beyond the simple determination of whether a bargaining impasse exists or whether further mediation would be futile; and in elevating the ability to pay criterion into an overriding precondition to a monetary award. This article undertakes to examine these unique aspects of the Nevada procedure during its first two years in operation (1972-73) in order to determine their impact on the collective bargaining process and, within very narrow limits, on the political process. An attempt will be made to evaluate the procedure both from the standpoint of Nevada and from the standpoint of other states seeking to borrow from its experience. First, a brief look at the context and genesis of the 1971 statute will be helpful in understanding its operation.

Nevada is a small state, predominantly rural, with 80 percent of its population residing in the counties of Washoe in the north (pop. 121,000) and Clark in the south (pop. 273,000). Washoe County contains Reno (pop. 73,000) and its adjacent city, Sparks (pop. 24,000); Clark County contains Las Vegas (pop. 126,000) and its adjacent city, North Las Vegas (pop. 36,000). No other county or city in the state has over 20,000 in population. Each county,

of which there are seventeen, has its own school district.

In 1969, partly in response to one-day strikes by teachers in Washoe and Clark Counties, the legislature adopted the Local Government Employee-Management Relations Act, applicable to employees of local governments and school districts. The statute declared the right of such employees to join (and refrain from joining) employee organizations; prohibited discrimination against employees for such activities; imposed on each local government employer the duty to negotiate with designated representatives over wages, hours, and conditions of employment; and created a state agency (the Local Government Employee-Management Board) to enforce these rights and obligations and to review bargaining unit and representation determinations. The statute prohibited strikes and established mediation and factfinding procedures.⁴

The Development of Collective Bargaining

Despite the statute, collective bargaining relationships developed at a slow pace. The mainstays of public employee organization are the locals, affiliated with the International Association of Fire Fighters, AFL-CIO, which represent fire fighters in most city and county governments, and the locals affiliated with the Nevada State Education

³For example, the Minnesota Public Employment Relations Act (determination by Director of Bureau of Mediation Services of whether mediation efforts would be useful) and the Wisconsin Municipal Employment Relations Act (determination by Wisconsin Employment Relations Commission of whether "impasse" has occurred).

⁴For example, Michigan Compiled Laws Annotated Section 423.239(c) (Supplement 1972).

⁴NRS 288.020, et. seq. Employee organizations are required to take a no-strike pledge as a condition of recognition, and breach of the pledge is grounds for withdrawal of recognition. (NRS 288.160). Strikes by public employees are declared to be illegal (NRS 288.230) and subject to court injunction (NRS 288.240). Employees who participate in a strike in violation of injunction are subject to dismissal, suspension, demotion, cancellation of contract, and loss of salaries that would otherwise accrue (NRS 288.260).

Association, which represent teachers in all but four of the seventeen school districts. These organizations, accustomed more to the political arena than the bargaining table, have moved gradually toward the development of bargaining relationships. The Nevada School Employees Association, representing the noncertificated employees of the larger districts, various independent organizations of city police and county sheriffs, and civil service-type organizations representing employees in Reno and Sparks, evidenced at the time little interest in collective bargaining as such. Except for the fire fighters and a loose affiliation between Operating Engineers and the civil service association in Sparks, no AFL-CIO organization has been involved in the representation of Nevada public employees at the local level.⁵

One factor that retarded the growth of collective bargaining was the lack of bargaining leverage possessed by employee organizations. Except for the fire fighters (who did not seek to strike), no organization was in a position to assert a credible strike threat. The advisory factfinding procedures of the 1969 statute operated effectively in some cases, in the sense that the parties either settled without it or accepted the results, but in a significant number of cases the public employer declined to accept the factfinders' recommendations, with the predictable result of creating discontent among both the officials and members of the employee organizations.⁶

⁵The largest bargaining units are those of teachers in Clark County (approximately three thousand) and Washoe County (approximately fourteen hundred). No other bargaining unit contains more than five hundred employees.

⁶In 1970, the Washoe and Ormsby school districts refused in part to comply with factfinding recommendations, as did the City of Las Vegas

It was in this context that the 1971 amendments were adopted. In 1970, the politically powerful teacher organizations were joined by the fire fighters, and, to a lesser extent, by emerging organizations of policemen, in a campaign to obtain enactment of a compulsory arbitration statute. They found support for their position in one of the gubernatorial candidates, Mike O'Callaghan, himself a former teacher. O'Callaghan declared that arbitration was a reasonable method of providing equity to public employees while avoiding strikes, and he promised publicly to seek legislation to that end. Once elected, he sought to make good on his campaign promise but met with stiff opposition in the legislature. The 1971 amendments constitute the resulting compromise.

At one level, the compromise was purely political. It was accepted by opponents of the governor on the assumption that it would prove politically embarrassing. They believed the pressures generated by employee organizations on one hand and local governments on the other would place him in a perpetual political squeeze over the exercise of his statutory authority. On another level, however, the compromise was an attempt to come to grips with the problems thought to be inherent in the use of arbitration to resolve public sector bargaining disputes—the problem of the “chilling effect” that arbitration might have on the negotiating process, and the problem of political “distortion” that might result from having individuals who have not been elected to any office, and who have no continuing responsibility to elected officials, make binding

in connection with police and fire fighter factfinding and the City of Reno in connection with fire fighter factfinding.

decisions which could have far-reaching impact in terms of public policy.⁷ The device of screening requests for arbitration on a case-by-case basis was presented to the legislature as a means of encouraging bargaining by deterring excessive reliance on the arbitral process.⁸ Having the governor do the screening, subject to statutory criteria including consideration of "adverse fiscal impact," was regarded as a means of placing responsibility on an elected official to protect local governments against arbitration that might result in "unacceptable" awards.⁹ And the criteria surrounding the neutral's decision-making process

were urged as a means of making him responsible for the consequences of his award.

Effect of the Statutory Procedure

How well the statutory procedure has achieved its objectives is difficult to measure, both because the objectives themselves are not readily definable in empirical terms and because the quantum of data is small—three dozen cases over a period of two years, with a substantial number of variables. That amount of data does not lend itself readily to generalizations based on statistics. Standard form questionnaires were next to useless, since many of the larger cases were handled by a small group of lawyers. Consequently, substantial emphasis in the study was placed on case-by-case analysis, in turn based on examination of the files in the governor's office; analysis of each of the fact-finding awards; questionnaires tailored to specific situations; and interviews with the governor, his aides, several of the factfinders, and representatives of each of the major local governments and employee organizations that participated in the process during the two-year period. The results are somewhat impressionistic in places, but they are believed to be more reliable than a purely statistical survey under the circumstances.

There are two types of evidence that register the effect of the process on collective bargaining. First, there is the "objective" evidence, consisting of the readily observable behavior of the parties in requesting or not requesting binding factfinding and in reaching or not reaching a settlement. If the existence of the statutory procedure has a chilling effect on the bargaining process, one would expect that (a) parties would increasingly seek to invoke the statutory

⁷One of the best and most sophisticated expressions of these concerns is contained in Harry Wellington and Ralph Winter, *The Unions and the Cities* (Washington, D.C.: The Brookings Institution, 1971). For evaluation of final-offer selection as a method of avoiding the chilling effect in one jurisdiction, see Gary Long and Peter Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," *Industrial and Labor Relations Review*, Vol. 27, No. 2 (January 1974), p. 186. For evidence that even "orthodox" arbitration may not have a chilling effect, see Robert Howlett, "Contract Negotiation Arbitration in the Public Sector," *Columbia Law Review*, Vol. 72 (1972), p. 1192.

⁸"It creates an element of uncertainty in the negotiating procedure. Nobody knows when they start out whether finally they're going to have a binding arbitration or an advisory arbitration. We feel that this will impel serious negotiations." Senator Carl F. Dodge (principal sponsor of the original act and of the 1971 amendments), in *U.S. Dept. of Labor, Proceedings of the Secretary of Labor's Conference on State and Local Government Labor Relations* (1971) at p. 67.

⁹Senator Dodge, in explaining the bill to the Nevada Senate, stated:

The other thing that is defective about automatic binding arbitration is the terminal procedure . . . [and] the question of accountability. A factfinder who is brought in, say from Los Angeles, can make a decision on binding arbitration and can commit the local subdivision of the government to a pretty tough course of action that has broad financial implications throughout the State of Nevada and after making that award, he can climb on the plane and go back to Los Angeles and be lost in the smog and nobody ever hears any more about him. But we who are left here in the State of Nevada, including the legislature, have to live with his decision. *Nevada Senate Daily Journal* (April 23, 1971), p. 35.

procedure; (b) whenever a request for binding factfinding was pending, the parties would tend not to settle until the governor had acted on the request; and (c) whenever the governor granted a request for binding factfinding, the parties would tend not to settle prior to the award. Conversely, if the requests of binding factfinding were to diminish over time or if parties developed a pattern of settlement prior to the factfinding hearing, such evidence would tend to indicate that the existence of the statutory procedure did not have a chilling effect on the bargaining process.

In 1972, there were initially eleven requests to the governor for binding factfinding. All requests came from employee organizations, including five teacher groups, four police or firemen's groups, and two municipal employee groups. Except for three of the teacher groups, all of the requests came from Washoe and Clark Counties.¹⁰

The governor had to make a decision in only nine of the eleven cases, however. Clark County agreed to binding factfinding with its fire fighters, and the City of Reno reached a settlement with its fire fighters, before the statutory deadline for gubernatorial action. In both situations, the public employer had failed to comply with factfinding recommendations the previous year, and their assumption that the governor would probably take that into account in reaching his decision clearly played a role in the agreements that were reached.

In the remaining nine cases, the governor denied the request for binding

factfinding in three and granted the request with respect to all or specified issues in the remaining six.¹¹ In all six cases in which the governor ordered binding factfinding, and in the Clark County fire fighters case in which the parties had agreed to binding factfinding, there was no settlement prior to the factfinding hearing. In two cases that went to hearing, however, the factfinder was successful in mediating a settlement without the necessity of a formal award.

The 1972 record thus suggests that those employee organizations that opted to seek binding factfinding were determined to rely on a formal award, and in that sense, the existence of the procedure had considerable chilling effect on the bargaining process. It does not appear that any employee organizations voluntarily opted for advisory factfinding in 1972, but there were a handful of settlements by organizations that did not seek to utilize factfinding at all.

In 1973, however, the picture was different. There were considerably more requests for binding factfinding—twenty in all. Ten of these requests, however, came from employee organizations that were not in existence the previous year, or at least did not engage in collective bargaining under the statute. Three organizations that had requested binding factfinding in 1972 did not do so in 1973 and settled without any form of factfinding.

Of the twenty cases pending before the governor in 1973, seven were settled before the governor had to make a decision. Mediation efforts conducted by the

¹⁰Requests were filed by fire fighter groups in Clark County, Las Vegas, and Reno; by police in Las Vegas; by teacher groups in Clark, Mineral, Churchill, White Pine, and Washoe Counties; and by municipal employee associations in Reno.

¹¹Requests were denied in the cases of the Reno and Sparks Municipal Employee Associations and the White Pine County School District. Requests were granted in the case of Las Vegas fire fighters; Las Vegas police; and teacher groups in Clark, Mineral, Churchill, and Washoe Counties.

governor's aide contributed to the settlement of several of these, involving small, and mainly new, bargaining units in the city of Sparks.

In disposing of the thirteen cases remaining, the governor sent eight to binding factfinding on some or all issues. Of that group, four cases were settled prior to the factfinding hearing, leaving only four cases for determination by the factfinder. The record for the cases in which binding factfinding was denied was substantially the same: two were settled prior to hearing; one was settled in the course of mediation conducted by the factfinder; and one went to advisory recommendations. The record in 1973 suggests either that the employee organizations were not so intent on going to binding factfinding as they were in 1972, or public employers were more willing to settle, or both.¹² (In both years, there were also "settle-

ments" by employee organizations that at no time requested factfinding, but they are not included in this analysis because of the relatively small size of the units involved and the somewhat unilateral manner in which most of the settlements were determined.)

Criteria for Governor's Decision

These bare statistics are supported by evidence concerning the manner in which the system operates and how the parties perceive its operation. Both these factors suggest reasons why the parties probably feel motivation toward settlement despite the potential availability of the arbitration procedure.

First, there is the process by which the governor makes his determination whether to give binding effect to the factfinding recommendations on any or all issues. The party seeking to invoke his authority makes its request in writing and supplies certain information deemed relevant to the determination. The opposing party is given opportunity to respond, also in writing. Then, at the request of either party, a hearing is conducted in the state capitol building by the governor's representative. At this hearing an attempt is made, not only to sort out the relevant facts but to mediate the dispute as well. At the conclusion of the hearing, if the issues are not otherwise resolved, the representative makes a report and recommendations to the governor, who then makes a decision.

The basis of the governor's decision is shrouded in mystery. The statutory criteria provide little guidance. The statute characterizes the governor's authority as being "emergency" in

¹²The tally sheet for 1973:

(a) Settled without making request for binding factfinding: Las Vegas police (missed statutory deadline); Reno Municipal Employees Association; Reno fire fighters.

(b) Requested binding factfinding but settled prior to determination: Clark County sheriffs; White Pine teachers; Sparks Municipal Employees Association; Sparks fire fighters; Sparks police (three separate units).

(c) Binding factfindings denied: Las Vegas fire fighters (settled prior to hearing); Clark County school employees (settled prior to hearing); Washoe County school employees (settled prior to hearing); Washoe County teachers (settled in hearing through mediation); Carson-Tahoe hospital district (advisory award rendered).

(d) Binding factfinding ordered, but settled prior to hearing: North Las Vegas police (new group); North Las Vegas fire fighters (new group); Clark County teachers; Ormsby County teachers.

(e) Binding factfinding ordered—no settlement prior to hearing: Clark County fire fighters; Washoe County sheriffs; Mineral County teachers; Churchill County teachers.

nature.¹³ In another state, that might be taken to mean he is to invoke binding factfinding where there appears to be a likelihood of a disruptive strike, but here have been no serious strike threats since the passage of the statute, so that factor cannot explain the occasions on which the governor has ordered binding effect to the factfinder's recommendations. Similarly, the statutory requirement that the governor take into consideration "the safety of the people of the state or a political subdivision" has little meaning in the context of the cases to date. Also, the statutory declaration that the governor consider "the overall best interests of the state and all its citizens" merely states the governor's obvious political obligation as head of state. The only statutory criterion that appears to be meaningful is the requirement that the governor consider the "potential fiscal impact" of his determination, but the meaning of this phrase is far from clear. Presumably, the legislature intended that the governor assume some responsibility for any adverse fiscal effects the award might have. Clearly, however, there is some overlap between his responsibility in that regard and the responsibility of the neutral who must determine ability to pay. It appears that the governor's view of the overlap is that he should determine only whether the local government's budgetary situation is such that some money would be available after funding those facilities and services necessary to "health, welfare, and safety," leaving

the appropriate allocation of that money to the neutral.¹⁴ Even this limited determination, of course, is not applicable to nonmonetary issues.

In addition to the relatively useless statutory criteria, the governor and his aides have indicated that he will take various factors into account. The most significant of these are the negotiating history of the parties and "whether [they] have negotiated in good faith."¹⁵ One aspect of negotiating history has to do with the public employer's record of acceptance or rejection of past factfinding recommendations: if a public employer fails to abide by the results of advisory factfinding in one year, it is quite likely the governor will order binding factfinding the next. Another aspect is far more subjective: the governor attempts to determine on the basis of negotiating history, or lack thereof, whether binding factfinding is "necessary." In several cases, for example, the governor denied a request for binding factfinding on the grounds that he was "unable to find any evidence to indicate the negotiations process has not worked or will not work in the absence of binding factfinding." The subjectivity of this standard is increased by the fact that it apparently involves some evaluation of the probable results of bargaining, beyond the mere fact of potential agree-

¹⁴This was the view of the governor's aide, *Ibid.*, p. 40. The same view was implied in letters the governor wrote in granting requests for binding factfinding.

¹⁵Reference to these factors is contained in both the article by Paul Bible, "The Governor's Power in Public Sector Labor Disputes," and in letters by the governor to parties requesting or opposing requests for binding factfinding. Another factor originally was "negotiability," i.e., whether the issue was within the scope of bargaining. After much controversy, the governor decided to leave that determination to the appropriate agency and the courts.

¹³Paul Bible, serving as the governor's aide in administering the 1971 statute, has written that in his view the word *emergency* was used to limit the governor's role to cases "where a pressing necessity requires binding factfinding." Paul Bible, "The Governor's Power in Public Sector Labor Disputes," *Inter Alia*, July 1973, p. 38.

ment. In one case where there was no prior history of bargaining, for example, the governor denied the request for binding factfinding on the grounds stated, whereas in another case where there was no prior bargaining history, the request was granted. The difference between the two cases lies, apparently, in the governor's determination that in the first case the public employer was likely to be reasonable in his approach, whereas in the second case the wages and conditions of the employees were so far below comparable standards that the governor believed binding arbitration necessary in order to produce an equitable result.

The factor of bargaining history thus tends to merge with the concept of bargaining in "good faith." By "good faith" the governor apparently means more than what is required by the law in the way of bargaining practices. In a letter written to all parties in 1972, the governor declared

I would hope neither side in a dispute would adopt initially and continue to maintain an inflexible approach to issues in dispute. Both sides must be reasonable in their proposals. They must make reasonable efforts to resolve their difficulties. To do otherwise would perhaps constitute some evidence of bad faith. I will watch closely the course of negotiations to see if either side is trying to take advantage of the other through outrageous demands or hypertechnical procedural requirement. I will look at all circumstances before deciding if there is no intention to bargain in good faith and whether to invoke the binding arbitration provisions on one or more issues.

The parties are on notice, therefore, that the governor will make some attempt to assess the "reasonableness" of their positions in determining whether to order binding factfinding.

Selecting Issues

Once the governor determines that a case is appropriate for binding factfinding, it does not follow that all issues will be subjected to that procedure. On the contrary, in the great majority of cases, the governor has sent only certain issues to binding factfinding, relegating the remaining issues to the advisory process. Analysis of the results in particular cases does not reveal any discernible pattern. In 1972, for example, the governor ordered binding factfinding in six cases, in which a total of fifty-two issues were involved. Of the fifty-two issues, the governor ordered binding factfinding in nineteen. Issues that went to binding factfinding in one jurisdiction went to nonbinding factfinding in another. Basic salary increases went to binding factfinding in five cases and to nonbinding in the sixth. Where wages went to binding factfinding, in all but one of the cases, other costs items went to nonbinding. Issues involving health insurance went to binding factfinding in two cases and to nonbinding in three. In one school district, the issue of leave for union officers went to binding factfinding, whereas issues concerning business and personal leave went to nonbinding; in another district, military leave went to binding factfinding but maternity leave went to nonbinding. A similar mixed pattern developed in 1973. The governor indicated in an interview with the author that such decisions were based in part on his personal evaluation of the merits of each proposal, in terms of whether it was within the range of what might "reasonably" be negotiated in view of the content of comparable agreements, and, in part, on his estimate of the priority that the employee organization itself attached to that proposal as compared to others.

In addition to these factors, which the governor or his aides say he considers in making his determination, it is assumed by the parties that political considerations play a role. Indeed, it is improbable that an elected official could entirely ignore political pressures on matters with respect to which groups with political clout have important interests at stake. Because of the variety of factors involved in each case, however, and the degree of subjectivity inherent in the stated criteria, it is impossible to evaluate the extent to which considerations of political advantage have determined the outcome.

The governor's decision-making process thus contains two identifiable features. One is unpredictability: although certain factors in the process can be identified, the pattern of decisions cannot be accounted for on the basis of any formula that is either declared or readily observable. The other is an element of judgment as to the "reasonableness" of the parties' bargaining positions, taking into consideration (on money issues) the financial position of the local government employer. Both of these features are understood by the parties and play a role in encouraging settlement prior to the time for the governor's decision. The unpredictability factor means that neither party can safely predict the outcome. Moreover, in view of the judgmental factor, both parties feel to some extent that their chances with the governor will be improved if they display a flexible attitude toward bargaining in the predecision phase. For similar reasons, there is some motivation to settle in response to the mediation attempts conducted by the governor's office, although largely for lack of time and expertise, these efforts have not been particularly successful to date.

The Costs of Binding Factfinding

If the governor orders binding factfinding, other factors operate to encourage settlement prior to hearing. First, there is the element of cost. As in most states, the Nevada statute provides that the costs of factfinding (except for those incurred in the preparation and presentation of the case) shall be paid equally by the parties. Fees for neutrals have averaged between \$1,200 and \$2,500 per case. Representatives of the parties estimate that the average cost per case including fees for neutrals, attorneys, and accountants, together with transcript costs and other preparation expenses, ranges between \$2,500 and \$10,000 for each party. The cost factor is likely to be more significant for employee organizations than for public employers, both because they are more likely to have to pay out-of-pocket for preparation and presentation services that are available to the employer through staff personnel and because the amounts are likely to represent a greater proportion of total resources. One employee organization was forced to borrow money from a bank in order to pay costs; another had to levy an assessment against its members.

There is also, of course, the fear of an adverse decision. Both parties are likely to share apprehension of the results, in degrees varying with their estimate of what is at stake and their evaluation of the neutral's probable reaction to their respective positions. In one sense, the public employer always has more at stake, since reduction in wages or fringe benefits is not a realistic alternative and there is no objective upper limit to the amount of the increase that may be ordered. Employee organizations, on the other hand, are reluctant to expose themselves to decisions that may give

them less than what they could have received across the bargaining table and at the same time establish adverse precedent for future negotiations. As experience under the statute has developed, some employee organization representatives have the impression that factfinders confronted with the prospect of rendering a final and binding award, and subject to the restrictive ability-to-pay criterion, tend to produce more conservative results than factfinders rendering advisory awards. The cases are too few and the variables too numerous to allow meaningful generalization based on analysis of the awards, but one gubernatorial aide has written that of all the cases going to binding factfinding in 1972, in only one did the employee organization receive substantially more than was offered by the public employer in the course of mediation in the governor's office.¹⁶

An example of these factors in operation occurred in bargaining between Clark County and its sheriffs and between the City of Las Vegas and its fire fighters in 1973. Both employee groups initially requested binding factfinding from the governor but subsequently communicated to him informally, prior to the deadline for his decision, that they were not anxious to have binding factfinding; their requests, therefore, were denied. The reasons for their action, according to reliable sources, were that they had made progress in negotiations by that time; they were concerned with the costs involved; and they were afraid of an adverse opinion, which might have long-run negative effects. At the same time, the City of North Las Vegas is reported to have reached settlement with its fire fighters

prior to the binding factfinding proceeding that the governor ordered in 1973, in part because the city did not want the factfinder probing too deeply into its budget. These instances suggest why the chilling effect of the statutory process, evident in 1972, seems to have undergone a considerable thaw.

The factfinding process itself contains potential for settlement, provided the parties and the neutral are willing to use a combined "med-arb" approach. One settlement has occurred in the course of advisory factfinding, but this did not occur in any cases in which the factfinder was called on to issue a binding award in 1973.

Credibility of Collective Bargaining

It is likely that in other ways the existence of the statutory procedure has contributed to the growth, quantitatively and qualitatively, of public employee bargaining in Nevada. Some labor representatives report that the potential of binding factfinding increases the credibility of collective bargaining among employees: they now see something more meaningful than unilateral action by their employer at the end of the road. The emergence of new bargaining relationships since 1971 has been aided by that factor.

There appears also to be some improvement in the degree to which the parties are prepared at the bargaining table to support their positions with arguments and data. This has been a difficult problem in Nevada. Factfinders have often commented on the failure of public employers to share their data with employee organizations prior to the hearing. One neutral characterized the attitude of a school district in this regard as "obstructionist and antedi-

¹⁶Bible, "The Governor's Power in Public Sector Labor Disputes," p. 40.

luvian.”¹⁷ In one 1972 case, data produced for the first time at the hearing revealed that the school district had made an error in computing the cost of its own wage proposal, and the actual cost was more than twice the estimated cost. The factfinder had a difficult time salvaging the district’s previous proposal.¹⁸ At times, employee organizations have also been guilty of not doing their homework. Although these problems continue to exist, both labor and management representatives report a greater degree of sophistication in bargaining on both sides. One would expect increased sophistication with experience; however, the awareness of each party that its position may be subject to scrutiny by an outsider with effective decision-making power has probably added impetus to that development.

An additional and important side effect of the manner in which the governor uses his authority to order binding factfinding is the increased likelihood that the parties will accept the result of advisory factfinding when it occurs. This effect stems from the parties’ awareness that failure by a public employer to accept a factfinder’s recommendation one year will probably result in an order for binding factfinding the next, and the factfinder the second time around is likely to take the behavior of the recalcitrant party into account when he frames his award. The Churchill County School District, for example, failed to comply with the recommendations of the factfinder in 1972 that it negotiate further with the teacher group

when financial information became available and enter into further factfinding proceedings if they were unable to agree. Instead, the district eliminated experience increments for the 1971–72 school year. In 1973, the governor ordered the district to binding factfinding at the teachers’ request and the parties chose, rather remarkably, the same factfinder for this second case. Expressing the view that, by deleting the experience increments, the district had “unilaterally changed the salary schedule,” the factfinder awarded not only a substantial increase in salary levels but restoration of the frozen increments on a retroactive basis. His total award reflected an approximately 8.5 percent increase.¹⁹

Ability to Pay

The political implications of the statutory process are difficult to assess. Certainly, one goal of the legislature—to make the governor ultimately responsible for the operation of the process—has been achieved. The neutrals themselves are not directly influenced by political factors, unless the desire for all neutrals to maintain acceptability is deemed political, since they are chosen through American Arbitration Association lists, almost uniformly from California. What can be evaluated is the impact on neutrals of the “ability to pay” criterion that was designed to impose on them responsibility for the fiscal impact of their decisions.

The statute requires the neutral to determine ability to pay “based on all existing available revenues as estab-

¹⁷Factfinder William Gould, in his 1973 award involving Mineral County School District. Gould also criticized the teacher organization for failing to respond adequately or in time to the data presented.

¹⁸Factfinder William Eaton, in his 1972 award involving the Washoe County School District.

¹⁹The long-range implications of this development are difficult to predict. Presumably, the practical difference between advisory and binding awards will tend to disappear, and to that extent the role of the governor’s screening process may decrease in significance.

lished by the local government employer." The effect of that restriction is to preclude the neutral from finding ability to pay based on new sources of revenue that the governing body is unwilling to tap or higher tax rates that it is unwilling to impose. The concept of "comparative tax effort," available to neutrals in other states, is thus out of bounds in Nevada.

The phrase "available revenues" could be interpreted to mean that the neutral is bound by the governing body's predictions of the amount of revenue that will accrue and even by its determination of the amounts to be expended on nonwage items. Such an interpretation, however, would lock the neutral into any tentative budget adopted by the governing body and leave him little, if anything, to decide. The legislative history does not support that interpretation, and it has been rejected, explicitly or implicitly, by all but possibly one of the neutrals. Factfinders have displayed willingness to inquire into income projections, particularly where it appears that the local government has a history of underestimating revenues in particular categories, or where its projections fail to take into account some demonstrable predictive factor. They have also been willing to review projections of expenditures on a similar basis.

It is, however, with respect to priorities—the determination of whether limited revenues should be allocated to increased salaries or benefits for a particular employee group or whether they should be allocated to other purposes—that the most substantial issue of political responsibility exists. Most neutrals have undertaken some critical examination of priorities, "finding" available money in a contingency fund,

a projected opening balance, or even in specifically allocated budget items that they consider ought to have lower priority than wage increases.²⁰ One neutral has suggested that the proper approach is for the factfinder to divide the budget into Priority No. 1 items (those deemed essential for the current year to provide facilities and services meeting the statutory standard of health, welfare, and safety) and Priority No. 2 items (those desirable but not indispensable and those essential but deferrable). Although Priority No. 1 items are beyond the reach of the neutral, Priority No. 2 items are subject to his discretion, based on proof by the employee organization that (1) claimed additional wages or benefits are justified in terms of normal interest criteria and (2) they should rank higher in terms of priority than other budget expenditures in the Priority No. 2 category.²¹ Applying these criteria in a case involving school teachers, for example, this neutral decided that budget items for a new subschool and additional deans belonged in Category No. 2 on grounds, with respect to the subschool, that it was a belated administration addition to the budget and had not been acted on by the school board and, with respect to the additional deans, that it was an item that could be postponed for an additional year. At the same time, he decided among Priority No. 2 items that the justification for a cost-of-living increase for teachers was sufficiently substantial that it should take precedence over the funding of an

²⁰One neutral, for example, proposed a 10 percent reduction in the total amount budgeted for nonsalary items; another proposed a cut-back in salary adjustments unilaterally granted to nonteaching employees.

²¹Factfinder Howard Block, in 1972 awards involving the Clark County School District and the city of Las Vegas (fire fighters factfinding).

integration program from the general budget (since there were sufficient funds for that purpose in the contingency reserve) and over a "hot lunch" program (part of which involved capital expenditures available from bond funds).

Clearly such an approach involves policy judgments that reach beyond immediate issues of wages and benefits and that are normally made by the elected officials or their responsible representatives. Carried to an extreme, judgment of priorities could also involve substantial intrusion on the legislative function of the governing body. It would be a mistake, however, to evaluate such an approach entirely on the basis of the neutral's written award. Interviews with the neutral mentioned above, as well as with other neutrals who employ a similar approach and with participants, disclose that the judgment of priorities is actually less free-wheeling than it appears. It is, in part, a negotiated judgment, arrived at after consultation by the neutral with representatives of the parties after he has disclosed to them his general opinion regarding the proper increase in wages and benefits. Applied in such a manner, with sensitivity to the "real" priorities of management, the priority analysis appears to be an effective compromise between the alternatives of giving a neutral free rein over the budget and depriving him of any meaningful review.

Of the eight cases that culminated in factfinding recommendations in 1972, there were three (two binding and one nonbinding) in which the factfinder determined an absolute inability to pay additional salaries or benefits. In four cases (three binding and one nonbinding), the factfinder determined there was an ability to pay the amounts recommended in his award, and in the re-

maining case (binding), the factfinder declined to determine the ability to pay issue on the ground that there was not sufficient financial information at hand. Instead, he recommended that the parties negotiate further and enter into factfinding proceedings if necessary when the information became available. In 1973, there were five cases that culminated in factfinding recommendations. In one of these, an advisory situation, the factfinder recommended acceptance of the public employer's wage proposals without expressly reaching the ability to pay issue. In the remaining four cases, all involving binding awards, an ability to pay was found. On the whole, the legislative objective of ensuring that neutrals will proceed with caution and with sensitivity to the needs of public management appears to have been fulfilled.

Concluding Remarks

The Nevada experiment is not without its drawbacks. The governor's office lacks the time and expertise necessary for either effective mediation or effective screening of requests for arbitration under the broad standards employed.²² Although these problems might be solved through the addition of qualified personnel, there remains the more important issue of the propriety of the governor's role. The current governor's background in labor relations and his sensitivity to the bargaining process

²²Another problem requiring resolution occurs (as it has once in Nevada) when two employee groups of the same employer go to factfinding in the same year. Although the same problem can arise in other states, it is aggravated by Nevada's insistence on a preliminary finding of ability to pay, posing the issue of whether a factfinder is bound (legally or practically) by a prior determination of that question. Paul Bible has suggested tripartite proceedings as the answer to this problem.

have contributed substantially to whatever success the experiment has had. It is questionable whether it would work as well with a governor who did not have these qualifications. In addition, the appearance if not the reality of political influence inevitably casts doubt on the impartiality of the process, whoever the governor might be. The objective of political responsibility appears adequately served by the stringent criteria applicable to the neutral's decision. The objective of providing a stimulus to bargaining might be better served by vesting screening authority in a person or tribunal with expertise in the labor field.

With or without these changes, it is questionable whether the current procedure will provide the optimum long-term solution for labor disputes in Nevada's public sector. Until now, only employee organizations have sought to invoke the governor's statutory power. They see the existence of the procedure not so much as a substitute for the legal right to strike, in which they have little interest at present, but for their ability to strike effectively.²³ This is true even though the procedure, with its gubernatorial screening and the ability to pay limitation, probably operates more conservatively from labor's perspective than a system of automatic arbitration without such a limitation, and even though the cost deterrent operates mainly to their detriment. If and when employee

organizations become better organized and more militant, they may perceive greater advantage in the strike than in the statutory procedure.

Meanwhile, however, the 1971 experiment has contributed substantially to the development of public sector labor relations in Nevada. This is true not only from the standpoint of employee organizations, which have gained some leverage they did not previously possess, but also from a public point of view, if encouragement of healthy bargaining in the public sector is considered an appropriate criterion. Partly as a result of those 1971 amendments, new collective bargaining relationships have emerged and the quality of bargaining has improved. The chilling effect observable in the first year of operation seems to have dissipated, and in the cases that have survived the governor's screening process, the neutrals have generally applied the statutory criteria with a degree of caution and sensitivity that has avoided any serious confrontation with the political process.

Nevada's experience is not for everyone. The sort of personal role that the governor has played in that state is based on a familiarity with local conditions and personnel that would be unlikely in larger states, and the impact of such a scheme is also bound to be different where there exist well-developed bargaining relations, militant unions, and the potential for effective strikes. The Nevada experiment does suggest, however, that public sector dispute resolution through arbitration can be consistent both with effective bargaining and with political responsibility.

²³During the 1973 legislative session, a management representative proposed, perhaps with tongue in cheek, that the factfinding procedure be scrapped in exchange for the right to strike. As everyone expected, the proposal was opposed by the employee groups.