

1976

Political Aspects of Public Sector Interest Arbitration

Joseph R. Grodin

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

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 *Cal. L. Rev.* 678 (1976).

Available at: http://repository.uchastings.edu/faculty_scholarship/223

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications
UC Hastings College of the Law Library

Author: Joseph R. Grodin
Source: California Law Review
Citation: 64 Cal. L. Rev. 678 (1976).
Title: *Political Aspects of Public Sector Interest Arbitration*

Originally published in CALIFORNIA LAW REVIEW. This article is reprinted with permission from CALIFORNIA LAW REVIEW and University of California, Berkeley Law (Boalt Hall).

California Law Review

VOL. 64

MAY 1976

No. 3

Political Aspects of Public Sector Interest Arbitration*

Joseph R. Grodin†

In this Article, Professor Grodin examines the impact of binding interest arbitration on the political process by showing the situations in which arbitrators are, in effect, making social policy decisions that are otherwise usually reserved for elected or appointed officials. He then discusses changes which, without sacrificing the arbitrator's neutrality, may make the arbitration process more politically responsive.

The growing number of strikes by public employees in recent years has stimulated an interest in the use of binding interest arbitration¹ as a means of resolving public sector labor disputes. Over half the states have adopted legislation expressly authorizing the voluntary use of binding interest arbitration;² and a substantial number of states and

* This Article is based on a paper delivered at the Conference for the Society of Professionals in Dispute Resolution, Los Angeles, California, October 1975.

† B.A. 1951, University of California, Berkeley; J.D. 1954, Yale University; Ph.D. 1960, University of London (London School of Economics); Professor of Law (on leave), Hastings School of Law; Member, California Agricultural Labor Relations Board.

1. The term "interest arbitration" refers to the arbitration of disputes arising from negotiations for new contract terms. In contrast, "grievance" disputes arise from the interpretation or application of an existing agreement. "Binding" interest arbitration is arbitration that results in a legally binding contract award. The term is used in this Article to include any procedure resulting in a binding award by a neutral decisionmaker or by a panel that includes such a neutral. Binding arbitration also includes any procedure, regardless of the specific statutory terms used, by which the recommendation of a factfinding panel, otherwise advisory, becomes binding under certain circumstances. *E.g.*, NEV. REV. STAT. § 28.200 (1973).

2. ALASKA STAT. § 23.40.200 (1974); CONN. PUB. ACT No. 75-570 §§ 6-7 (July 7, 1975) (West's Connecticut Legislative Service 1071); DEL. CODE ANN. tit. 19, § 1310 (1975); HAWAII REV. STAT. § 89-11 (Supp. 1974); IND. STAT. ANN. § 22-6-4-11 (Burns Supp. 1975); IOWA CODE ANN. § 20.22 (Supp. 1975); KAN. STAT. ANN. § 75-4332

municipalities have mandated its use or granted either party the right to require its use in certain situations.³

Most of the legislation mandating interest arbitration has been premised on the need for protecting the public against particularly harmful strikes. This premise is reflected in the typical limitation of such arbitration to specific classes of employees,⁴ to employees performing "essential services,"⁵ or to situations where strikes are found to cause particular public harm.⁶ But arbitration may serve other functions as well. It can permit a more reasoned and studied exploration of issues than is typically possible in "crisis bargaining," where complex issues tend to get lost.⁷ It also protects employees against the costs of a strike, and provides bargaining leverage to unions incapable of striking effec-

(Supp. Pamphlet 1974); LA. REV. STAT. ANN. § 23:890(E) (West Supp. 1975); ME. REV. STAT. ANN. tit. 26, § 965 (1974); ME. REV. STAT. ANN. tit. 26, § 979-D (1974); MASS. GEN. LAWS ANN. ch. 150E, § 9 (Supp. 1975); MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975); MINN. STAT. ANN. § 179.69 (Supp. 1975); REV. CODES OF MONTANA § 59-1614(9) (Supp. 1974); NEB. REV. STAT. § 48-801 (1974); NEV. REV. STAT. § 288.200 (1973); N.H. REV. STAT. ANN. § 98-C:4 (Supp. 1973); N.J. STAT. ANN. § 34:13A-3(d) (Supp. 1975); N.Y. CIVIL SERVICE LAW § 209(4)(c) (McKinney Supp. 1974); OKLA. STAT. ANN. tit. 11, § 548.10 (Supp. 1974); ORE. REV. STAT. § 243.742 (1974); PA. STAT. ANN. tit. 43, § 217.4 (Purdon Supp. 1975); PA. STAT. ANN. tit. 43, § 1101.805 (Purdon Supp. 1975); PA. STAT. ANN. tit. 53, § 39951(d) (Purdon Supp. 1975); PA. STAT. ANN. tit. 55, § 563.2 (Purdon 1965); R.I. GEN. LAWS ANN. §§ 28-9.1 to 9.4 (1968); R.I. GEN. LAWS ANN. § 36-11-9 (Supp. 1974); S.D. COMP. LAWS ANN. ch. 9-14A (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 9-15 (Supp. 1974); UTAH CODE ANN. § 34-20a-8 (Supp. 1975); VT. STAT. ANN. tit. 21, § 1733 (Supp. 1974); REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974); WIS. STAT. § 111.77 (1974); WYO. STAT. ANN. § 27-269 (1967).

3. The terms "mandated arbitration" and "compulsory arbitration" are used interchangeably to identify any procedure requiring arbitration whether or not all parties agree to arbitrate. Some statutes require that at least one of the parties want the arbitration. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975); N.Y. CIVIL SERVICE LAW § 209(4)(c) (McKinney Supp. 1974). Others compel arbitration even if neither party wants to arbitrate. *E.g.*, NEV. REV. STAT. § 288.200 (1973); R.I. GEN. LAWS ANN. §§ 29-9.1 to 9.2 (1968). Unless indicated, the term "mandated arbitration" is used in this Article to refer to both situations.

4. The limitation typically applies to police officers and fire fighters. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1972); S.D. COMP. LAWS ANN. ch. 9-14A (Supp. 1975); WIS. STAT. ANN. § 111.77 (Supp. 1975). Some states also specify prison guards (ALASKA STAT. § 23.40.200(3)(b) (1974); PA. STAT. ANN. tit. 43 § 1101.805 (Purdon Supp. 1975)); hospital employees (ALASKA STAT. § 23.40.200(3)(b) (1974)); public transportation workers (LA. STAT. ANN. § 23:890(E) (West Supp. 1975); PA. STAT. ANN. tit. 53, § 39951 (Purdon Supp. 1975)); and port authority employees (PA. STAT. ANN. tit. 55, § 563.2 (Purdon 1964)).

5. MINN. STAT. ANN. § 179.72 (Supp. 1975) establishes arbitration procedures for all public employees and mandates binding arbitration for "essential employees," if their union requests it.

6. ALASKA STAT. § 23.40.200(3)(c) (1974) (permits public utility, snow removal, sanitation, school and certain other educational employees to strike, subject to mandatory injunction if their strike imperils public health, safety or welfare).

7. Polland, *Meditation-Arbitration: A Trade Union View*, 96 MONTHLY LABOR REV. 63, 64 (1973).

tively.⁸ Finally, where arbitration is mandated for a wide range of public employees, it can serve to protect the public against disruption of services that are important although perhaps not essential for the public health or welfare. Several states and a number of municipalities have adopted mandatory arbitration systems covering broad categories of public employees,⁹ and further movement in this direction is predictable.

The trend toward legislatively mandated interest arbitration raises three cautionary concerns. Two of these—that arbitration may not in fact deter strikes and that it may, on the other hand, chill collective bargaining—have been the subject of numerous commentaries and will not be reconsidered here.¹⁰ This Article assumes that it is possible to design a system of arbitration, if it does not already exist, that meets both these objections. Thus, the Article focuses on the third concern, which is that a system of legislatively mandated interest arbitration may intrude upon the central democratic premise that governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate.¹¹

There has been considerable discussion of the political implication

8. See Grodin, *Arbitration of Public Sector Labor Disputes: The Nevada Experiment*, 28 IND. & LAB. REL. REV. 89, 102 (1974). If the wages and working conditions of some government employees are fixed by arbitration, other public employees may view their right to strike as less advantageous than the right to arbitrate. Donald S. Wasserman of American Federation of State, County, and Municipal Employees (AFSCME) recently articulated this concern:

AFSCME members in a few local governments have paid a heavy price for the wage gains made by others through compulsory arbitration awards. After large settlements awarded to police or fire, our members have been told in effect there is no more money. And, our members could not fall back on compulsory arbitration. Obviously, this situation cannot long be tolerated.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL WINTER MEETING 315, 316 (1974).

9. Several states provide mandatory binding arbitration for all public employees irrespective of the nature of service they perform. *E.g.*, Iowa Public Employment Relations Act, IOWA CODE ANN. § 20.22 (Supp. 1975); ME. REV. STAT. ANN. tit. 26, § 965 (4) (1974) (advisory only with respect to salaries, pensions and insurance; binding on all other issues); ORE. REV. STAT. § 243.742 (1974); R.I. GEN. LAWS ANN. §§ 28-9.1 to 9.4 (1968), § 36-11-9 (Supp. 1974) (five separate statutes applicable to state employees, municipal employees, teachers, firefighters and police officers; advisory on wages, binding on other issues). NEB. REV. STAT. ch. 48, art. 8 (1968) provides for a Court of Industrial Relations to arbitrate disputes involving proprietary employees; and NEV. REV. STAT. § 288.200 (1973) allows the governor to order that the results of fact-finding, otherwise advisory only, will have binding effect.

10. *E.g.*, Anderson, *Compulsory Arbitration in Public Sector Dispute Settlement: An Affirmative View*, in DISPUTE SETTLEMENT IN THE PUBLIC SECTOR (T. Gilroy ed. 1972); Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973).

11. For a discussion of this point in relationship to the New York binding arbitration statute, see Barr, *The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration Be an Acceptable Dispute Resolution Method in the Public Sector?* 39 ALBANY L. REV. 377 (1975).

of public sector collective bargaining per se or, at least, of collective bargaining coupled with the opportunity to strike. Professors Wellington and Winter suggest that public sector collective bargaining may distort the "normal" political process by providing the union with a dispute-settlement forum from which other competing political interests are to some extent excluded, and that the right to strike may distort the process even more by generating pressures the governing body will find difficult to resist.¹² Other commentators have taken issue with Wellington, pointing to variables that may reduce the political impact of collective bargaining and strikes in particular situations.¹³

Whatever impact collective bargaining and strikes may have upon the political process, however, there is a qualitative difference between that impact and the effect of interest arbitration. Under a regime of collective bargaining, whether or not accompanied by strikes,¹⁴ the public employer retains ultimate power to approve or disapprove the agreement, and the decision is therefore a product in part of political influence. In the case of binding interest arbitration, however, this ultimate power to decide is given to a person who, typically, is neither elected nor directly responsible to any elected official. Under all existing statutory schemes, the arbitrator is chosen by the parties or through some statutory process of selection.¹⁵ He or she is independent of direct

12. Wellington and Winter argue that since the services provided by government are often important to public health and safety, and since the demand for these governmental services is relatively inelastic, disruption is likely to produce intense political pressure for a settlement at any cost. H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* (1971).

13. Professors Burton and Krider have argued that market restraints operate to a greater extent and public pressure for settlement to a lesser extent than postulated by Wellington and Winter. Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 *YALE L.J.* 418 (1970).

More recently, Professor Summers has suggested that the alignment of interest groups will vary depending upon the specific bargaining issues. Thus, on salary issues, for example, Summers has argued that public employees are likely to be at a political disadvantage in the absence of collective bargaining since wage increases confront a more or less united phalanx of taxpayers opposed to increases in governmental expenditures. Summers, *Public Employee Bargaining: A Political Perspective*, 83 *YALE L.J.* 1156, 1160 (1974) [hereinafter cited as Summers].

14. It has become academic, in the public sector, to speak of the "right to strike," since strikes may and frequently do occur without effective legal sanction. It is the premise of this Article that strikes by public employees should be legally permissible except as limited by a statute providing for binding arbitration.

15. In most states arbitration is conducted by a tripartite panel consisting of one person appointed by each of the parties and a jointly selected neutral chairman. If the partisan members are unable to agree upon the selection of a neutral, two alternative procedures are implemented. In the majority of states the parties retain maximum control insofar as they are allowed to select the neutral by alternate striking of names from a list supplied by an agency. *E.g.*, IOWA CODE ANN. § 20.22(5) (Supp. 1975) (State Public Employee Relations Board); ME. REV. STAT. ANN. tit. 26, § 965(4) (1974); PA. STAT. ANN. tit. 43, § 217.4(b) (Purdon Supp. 1975) (American Arbitration Associa-

political control.¹⁶ Yet the arbitrator's decision is a substitute for the decision of the legislative body ultimately approving or disapproving the agreement. Arbitration can thus be said to establish an essentially closed legislative process from which the play of political forces is excluded, except to the extent that these forces determine the position of the public employer in the arbitration proceeding or the selection of the neutral arbitrator.

This skew between the arbitral process and traditional notions of legislative accountability becomes a more compelling cause of concern when the nature of the issues the arbitrator typically confronts is taken into account. In many situations a public sector arbitrator faces issues that extend beyond those over which labor and management customarily bargain in private sector disputes. They can involve significant elements of social planning.¹⁷

The relationship between public sector interest arbitration and the political process may, in some states, pose substantial issues of constitutional law. So far, all but one of the courts that have considered the

tion); UTAH CODE ANN. § 34-20a-8 (Supp. 1975) (the Federal Mediation and Conciliation Service). In other states, in the event of disagreement the neutral is appointed by a judge or, more commonly, by a state official. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975) (chairman of the state mediation board); R.I. GEN. LAWS ANN. § 20-9.1-8 (Supp. 1975) (judge). In all states, the neutral is appointed to serve on an ad hoc basis and is not a permanent officer or employee of the state. Most often, he or she regularly serves as a neutral arbitrator in private sector labor disputes.

These statutes reflect a clear underlying theme that views arbitration as an extension of the collective bargaining process rather than as a part of the political process. That function will be best fulfilled, it is believed, if the arbitrator is selected by the parties and is independent and free of political control.

16. Most states that provide for a state official to appoint the arbitrator do so not to impose political responsibility, although the process may in fact have that effect, but simply because it is a convenient way to supply the parties with an acceptable neutral when they cannot agree on one. The arbitrator's responsibility is, however, to the parties and not to the appointing authority. His other function is to get the parties to agree or, failing that, to impose a fair and equitable settlement. It is not to implement some state policy as to what the terms and conditions of local government employment ought to be.

This means that the interest arbitrator is unlike the administrative officials to whom the legislature customarily delegates policymaking authority. The arbitrator is usually appointed by an elected or appointed official only when the parties are unable to agree, he or she serves on an ad hoc rather than a continuing basis, and his or her performance is not subject to continuing legislative or administrative oversight. This independence from political control is almost judicial, although the actual function of arbitration is more legislative in character. Although judges can and do decide important questions of public policy, they do so in the context of determining individual rights based on some asserted violation of legal principles, and the norms used are subject to ultimate legislative and constitutional control. Thus, while a grievance arbitrator functions like a judge and determines the rights of parties by interpreting an existing agreement, the interest arbitrator's concern with the terms of new agreements is more like legislative policymaking.

17. See text accompanying notes 23 through 43 *infra*.

question have upheld the validity of interest arbitration against the contention that it involves an improper delegation of legislative authority.¹⁸ In two recent cases, however, the courts reaching that result were equally divided courts.¹⁹ In one of these cases, *Fire Fighters Union v. City of Dearborn*,²⁰ the Supreme Court of Michigan affirmed the state's compulsory arbitration legislation in a combination of opinions providing an extremely narrow basis for its continued operation.²¹

The primary focus of this Article is the policy rather than the constitutional issues involved in interest arbitration. Nondelegation doctrine is an unusually murky area of constitutional law. At its core is the notion that the power of legislatures to insulate policymaking from ultimate political control must have some limits. Courts have never developed meaningful criteria for the imposition of those limits, however, and their inability to do so reflects both the complexity of modern government and the reluctance, at least in recent decades, of the judiciary to intrude too deeply into legislative discretion in the structuring of the decisionmaking process.²² It can be assumed, for the purposes of this analysis, that most state courts will continue to allow legislatures to delegate authority to arbitrators, and that the key question is not what a legislature can get away with but what it ought to do.

In answering that question, this Article first examines the impact of interest arbitration on the political process in terms of the numerous policy decisions an arbitrator may make or influence. The Article then explores whether and to what extent a system of interest arbitration may be structured so as to minimize that impact.

I

IMPLICATIONS OF ARBITRATION FOR SOCIAL PLANNING

A. *Salary Issues*

In the private sector, interest arbitration is rare.²³ Where it is

18. *E.g.*, *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 622 n.13, 526 P.2d 971, 981 n.13, 116 Cal. Rptr. 507, 517 n. 13 (1974) (dicta); *City of Biddeford v. Teachers Ass'n*, 304 A.2d 387 (Me. Sup. Jud. Ct. 1973); *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 199 N.W.2d 752 (1972); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *Warwick v. Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969); *State ex rel. Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295 (Wyo. Sup. Ct. 1968). *Contra*, *City of Sioux Falls v. Firefighters Local 814*, No. 11406, 11411, 11424 (S.D., October 9, 1975).

19. *City of Biddeford v. Teachers Ass'n*, 304 A.2d 387 (Me. Sup. Jud. Ct. 1973); *Fire Fighters Union v. City of Dearborn*, ___ Mich. ___, 231 N.W.2d 226 (1975).

20. ___ Mich. ___, 231 N.W.2d 226 (1975).

21. For a discussion of this case, see the text accompanying notes 51-57.

22. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2:00 (Supp. 1970).

23. Feller, *The Impetus to Contract Arbitration in the Private Area*, in *PROCEED-*

used, it functions within fairly narrow parameters. The desire of employees for improved wages and working conditions is balanced against the interest of the employer in operating his business in the most efficient and economical way possible. Neither the employer's claimed inability to pay nor the impact of particular decisions upon the public is likely to be taken into account.²⁴

It is possible to structure a system of public sector arbitration with similarly limited parameters. Thus, with respect to salary issues, the arbitrator would be limited to determining the proper wage for a group of employees without regard to the fiscal impact of the decision. It should be recognized, however, that such a system would presuppose a policy determination that employees should be paid whatever they are "worth," in the same way that public agencies purchase goods at whatever price the market dictates. In some cases the proper wage could be defined in terms of a precise formula based on objectively ascertainable facts, such as cost of living increases or the collectively bargained wage rates of private employees in the same or similar crafts. If the wage could be determined by a formula, the arbitrator's function would become essentially one of judicial factfinding and interpretation.²⁵ More realistically, since the process would be expected to be more mediative and legislative than judicial,²⁶ the arbitrator might be given authority to consider a variety of factors. Either way, the fiscal impact of the award would not be considered. If the public could not "afford" the price of labor as determined by the arbitrator, it would then be required to choose among the options of: (1) doing without the labor, or part of it; (2) making cuts elsewhere in the budget, and living with whatever layoffs of other employees or limitations on other services might result; (3) raising taxes; or (4) borrowing money. Under the "proper wage" model the arbitrator, by definition, would be insulated from considering any of these options.

As a matter of policy, there is much to commend the "proper wage" model. It asserts, in effect, that employees should not be required to subsidize government operations out of deserved wage increas-

INGS OF NEW YORK UNIVERSITY TWENTY-FOURTH ANNUAL CONFERENCE ON LABOR 79 (1972).

24. Zack, *Ability to Pay in Public Sector Bargaining*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-THIRD ANNUAL CONFERENCE ON LABOR (1970).

25. Some cities presently have charter provisions requiring that wage rates be determined in relationship to specifically enumerated criteria; these provisions are enforceable through the judicial process. For a list of such cities in California, see Schneider, *Introduction to Prevailing Rates in California: A Symposium*, CALIF. PUB. EMPLOYEE RELATIONS, June 1971, at 5.

26. Rehmus, *Legislated Interest Arbitration*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL WINTER MEETING 307, 311 (1974).

es.²⁷ It suffers, however, from two defects, one technical, the other political. The technical defect stems from the degree of subjectivity, and in some cases artificiality, involved in determination of the proper wage. For example, a policy that public employees should be paid no less than private employees performing the same work may have clear application where the work involved is that of a craft for which a single rate has been established in private employment through collective bargaining; its application is less clear where the classification involved is one for which the wage scales in private employment vary considerably; and its application becomes artificial where the work involved is unique to public employment, or where the number of employees who perform that work in public employment is so great in relation to the private sector that the wage rate established by the public body in effect determines the rate to be paid by private employers. A policy that public employees should be paid by reference to comparable rates in other public employment is likely also to be artificial in a context in which the wages paid by other public employers are themselves determined by arbitration on the basis of the same criteria: the process becomes circular, with each arbitrator looking to the results of arbitration in other areas.

Admittedly, these technical limitations on the proper wage model are not necessarily determinative. There are classifications for which the wage rates in private employment provide substantial guidance; wage rates for other comparable public employment may in fact be negotiated rather than arbitrated (though even then, there is an arguable circular effect); and in addition to comparability criteria, changes in the cost of living index may provide a substantial basis for determining the range of an appropriate wage increase. But added to these technical limitations is a fact of political reality: the current state of the economy is catching public employees in a fiscal squeeze created by rising costs which justify substantially increased wages but simultaneously reduce the government's capacity to meet such obligations. Citizens of a township verging on bankruptcy are simply not about to give an arbitra-

27. For a forceful statement of this position, see DISPUTES PANEL, DETROIT POLICE OFFICERS ASS'N AND CITY OF DETROIT, FINDINGS AND RECOMMENDATIONS ON UNRESOLVED "ECONOMIC" AND OTHER ISSUES (February 27, 1968), excerpted in R. SMITH, H. EDWARDS, & R. CLARK, LABOR RELATIONS IN THE PUBLIC SECTOR: CASES AND MATERIALS 844, 852 (1974):

In all probability . . . the City will not be able to solve these problems without finding new sources of revenue or sharply curtailing many kinds of City services and programs. But we do not think the City of Detroit, any more than other public employers, can expect its employees to subsidize the public service for an extended period by working at salaries substantially below the levels which, in terms of applicable criteria, are proper. If the citizenry are unwilling to pay a fair price for employment services they will, in our judgment, have to be willing to live with reduced services.

tor carte blanche to award wage increases that could push them over the brink.²⁸

There is an alternative model that would also insulate the arbitrator from the political consequences of his or her decision, but in a quite different way: it would limit the arbitrator's discretion over money issues to whatever funds were "available" on the basis of the budget prepared by the governing authority. If the arbitrator were required to accept that authority's determinations regarding the available revenues and their allocation among competing claims for priority, he or she would simply be called upon to determine how any or all of the residual amount should be allocated among salary and other cost benefits.

This "residual" model, while possibly appealing to public management, would clearly be unacceptable to labor because it allows the governing body to predetermine the limits of salary increases by unilateral fiat. There is little point in having arbitration if the arbitrator acts solely, or primarily, as a rubber stamp for predetermined management decisions.

Many of the statutes mandating arbitration seek a compromise between these two models by requiring the arbitrator to take into account the public employer's ability to pay.²⁹ Except for Nevada, which conditions a monetary award on the arbitrator's determination of fiscal ability,³⁰ the statutes adopting the "ability to pay" model are vague

28. The arguments in favor of considering ability to pay as a factor in public sector interest arbitration have been ably stated in Block, *Criteria in Public Sector Interest Disputes*, in *ARBITRATION AND THE PUBLIC INTEREST: PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 161, 169-75 (G. Somers ed. 1971).

29. The statutes of Michigan, Wisconsin and Oregon require the arbitrator to consider the interests and welfare of the public and the financial ability of the unit of government to meet these costs. MICH. COMP. LAWS ANN. § 423.239 sec. 9(c) (Supp. 1975); WIS. STAT. ANN. § 111.70 (1974) (applies only to Milwaukee police); ORE. REV. STAT. § 243.746 (1974). The New York statute provides that the arbitration board should take into account so far as it deems them applicable various criteria, including "the interests and welfare of the public and the financial ability of the public employer to pay." N.Y. CIVIL SERVICE LAW § 209(4)(c)(v) (McKinney Supp. 1974). In Oklahoma, the criterion is phrased in terms of "interest and welfare of the public and revenues available to the city or town"; in Iowa, "the interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the standard of services." OKLA. STAT. ANN. tit. 11, § 548.10(4) (Supp. 1974); IOWA CODE ANN. § 20.22(9)(c) (Supp. 1975). In Minnesota, the arbitrator is required to give "due consideration to the statutory rights and obligations of public employers to efficiently manage and conduct its operations within the legal limitations surrounding the financing of such operations." MINN. STAT. ANN. § 179.72 subdiv. 7 (Supp. 1975). In other states, for example Maine, South Dakota, and Washington, the applicable statutes contain no criteria relevant to ability to pay. ME. REV. STAT. ANN. tit. 26, § 965(4) (1974); S.D. COMP. LAWS ANN. tit. 9-14A-3 (Supp. 1975); REV. CODE WASH. ANN. § 41.56.460 (Supp. 1974).

30. See Grodin, *supra* note 8. NEV. REV. STAT. § 288.200 (1973).

as to both how the factor should be taken into account and what weight it should be given in relation to other factors. Arbitrators themselves tend to remain noncommittal.³¹

However the ability-to-pay factor is applied, it is apparent that rather than resolving the question of political responsibility it shifts the issue to new ground. Except to the extent that the arbitrator can detect errors in the calculation of income or expenditures, any consideration of ability to pay necessarily involves the arbitrator in policy decisions. If there are insufficient funds to meet what the arbitrator considers to be an appropriate award, he or she explicitly or implicitly determines what particular items are to be cut out of the budget or (if applicable law permits) whether taxes should be increased. The former may involve questions such as the extent to which other employees of the same employer are entitled to a salary increase or perhaps even to continued employment and whether a particular program should be cut or eliminated.³² The latter may raise esoteric issues, such as consideration of comparative tax effort and consideration of the impact of a tax increase upon the future of the tax base.³³

31. Arbitrator Charles C. Killingsworth suggests that the employer's ability to pay may properly be taken into consideration only within the limits of a "zone of reasonableness." This zone is determined by examining wage rates in other cities for similarly situated public employees. R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS IN THE PUBLIC SECTOR: CASES AND MATERIALS* 858 (1974).

Professor Smith submits that arbitrators who consider the employer's ability to pay are not greatly swayed by a scarcity of funds but typically make an award which is claimed to be somewhat less than that which would otherwise have been made. Smith, *Comment*, in *ARBITRATION AND THE PUBLIC INTEREST, PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 180, 184-87 (G. Somers ed. 1971).

32. See, e.g., the opinion of Howard Block in the 1971 dispute between the Clark County School District and the Clark County Classroom Teachers Association, reprinted in part in J. GRODIN & D. WOLLETT, *LABOR RELATIONS AND SOCIAL PROBLEMS, UNIT FOUR, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 373 (2d ed. 1974). Arbitrator Block, operating under Nevada's requirement for finding of ability to pay, undertook to divide the school budget into "Priority No. 1 items" (those deemed essential for the current year) and "Priority No. 2 items" (those desirable but not indispensable, or essential but deferrable). He considered the former beyond reach under the applicable statute, but subjected the latter to proof by the employee organization that they should give way to wage increases on the basis of normal interest criteria. Applying these standards, he decided that budget items for a new subschool and additional deans belonged in the second category (on grounds that the new subschool was a belated addition to the budget and that the addition of deans could be deferred); and among the Priority 2 items he thought the justification for a cost-of-living increase was sufficiently substantial that it should take precedence over both the funding of an integration program for the general budget (there being sufficient funds for that purpose in contingency reserve) and the "hot lunch" program, (since part of it could be funded from bond issues). Interviews with Arbitrator Block and the participants indicates that these decisions were arrived at through consultation with the parties and represented, in part, a negotiated result. Grodin, *supra* note 8, at 101.

33. See Ross, *The Arbitration of Public Employee Wage Disputes*, 23 *IND. & LAB. REL. REV.* 3 (1969).

No doubt there are arbitrators capable of passing reasoned and sound judgment on such matters. The point, however, is that the exercise of judgment in this area involves broad issues of social planning that are most appropriate for resolution through the legislative process. Arbitrators are naturally aware of these observations and shy away from making such judgments precisely because of their greater magnitude. To the extent that they do so, however, they are being unfaithful to the policy embodied in the legislative mandate.

B. Other Issues Involving Cost to the Employer

The proper, residual and ability to pay models are also applicable to the settlement of other public employer-employee issues involving monetary costs and therefore a fiscal impact. Three additional considerations, however, must be taken into account. First, it is more difficult to establish what demands are reasonable outside the area of wages. If the employees are asking for a dental plan, and every other comparable public employee in the state has one, it would probably be reasonable to grant the benefit. But, as is more likely to be the case, if other employees have dental plans of varying quality and some have no dental plan at all, it becomes difficult to characterize any result as "unreasonable," except, perhaps, in relation to the total package of wages and benefits. Comparison on the basis of the total package, however, is extremely difficult. Items entailing determinable costs to the employer but not determinable monetary benefit to the employee, such as those arising out of teacher demands for smaller class size or additional time for class preparation, practically defy "package" analysis on a comparative basis.

Second, non-wage cost items may involve an indeterminable fiscal impact in the future. A pension plan with deferred or partially deferred funding, for example, constitutes an encumbrance upon future budgets, and to that extent funds future governing boards. Some items, such as personnel increases that can only be met by additional facilities, may require capital investment.³⁴ If an arbitrator has authority to decide such issues, the range of policy questions he or she may be called upon to consider is considerably expanded.³⁵

34. The issue is not at all academic. In *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the union's initial proposals with respect to manning would have required the construction of a new fire house and the purchase of new equipment.

35. In *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the court remarked that the union's demands, if they involved capital expenditures, "could very well intrude upon management's role of formulating policy." 12 Cal. 3d at 619, 526 P.2d at 978, 116 Cal. Rptr. at 514. But since the union had changed its position, the court found it unnecessary to decide that issue,

Finally, non-wage cost issues may directly involve important social policy considerations. Class size is an example in the area of education. Although the number of students assigned each teacher may be a bargainable issue because of its impact upon working conditions,³⁶ it triggers an underlying question of educational policy as well. This is so, not necessarily because the teachers are motivated by such considerations, although that also may be true,³⁷ but because class size reductions are an element of school cost and therefore require an arbitrator to weigh competing educational claims for the available funds. The question confronting the arbitrator is not only the same as that involved in deciding wage disputes, but it is also a clear expression of governmental policy with social planning implications that cannot easily be finessed. Similar questions may be posed by the demand of social workers for smaller caseloads or of firefighters for a particular ratio of employees to equipment.³⁸

C. *Non-Salary Issues Involving No Significant Cost*

The monetary cost of an interest arbitration settlement is not the only factor posing political questions. Indeed, issues involving no significant costs may carry substantial political overtones. While most personnel matters—such as seniority, protection against unjust disciplinary action, and scheduling of vacations—involve limited issues of the kind that labor arbitrators are experienced in resolving, in the public sector these can take on a political dimension. The Supreme Court of Michigan held, for example, that a police residency requirement relates to working conditions and is therefore a mandatory subject of bargaining under Michigan law.³⁹ The court found that the parties had

Id. The issue arose in the context of a local charter provision requiring arbitration of disputes not resolved in negotiations.

36. Class size has been held to be a bargainable issue on that ground. *E.g.*, *Education Association v. DeCourcy*, 162 Conn. 566, 295 A.2d 526 (1972); *School District v. Local Government Employee Management Relations Board*, 530 P.2d 114 (Nev. 1974).

37. The difference in focus between class size as a matter of educational policy and class size as a matter of teaching load may depend largely upon whether the teacher group is adequately advised regarding applicable law. D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 6:61 (1974).

38. In *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the court reasoned that if the union's manpower proposal were directed to standards of fire prevention, the city's objection based on management prerogative would be well taken, but that if it involved matters of workload and safety, the issue would relate to working conditions and would therefore be both bargainable and arbitrable. *See also* *County Employees Ass'n v. County of Los Angeles*, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (2d Dist. 1973) (caseloads for social workers held to be bargainable on the basis of similar reasoning).

39. *Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 214 N.W.2d 803 (1974).

bargained to impasse over the residency issue, and concluded that the city was free to take unilateral action in the form of an ordinance imposing the residency requirement. At the time these events occurred, Michigan had not yet passed its compulsory arbitration statute.⁴⁰ A subsequent arbitration proceeding found the residency requirement to be valid.⁴¹

A similar situation occurred in Berkeley, California, after voters approved an initiative establishing a citizens' Police Review Commission.⁴² As soon as the Commission began to consider procedures that would require an officer accused of misconduct to attend public hearings inquiring into the matter, the local police association sought and obtained an injunction preventing the Commission from adopting such procedures prior to "meeting and conferring" with the association as required by California law.⁴³ Eventually, the Commission met and conferred with the police association, agreed to some modifications in the procedures, and adopted the procedures despite continued police association opposition. No applicable law required arbitration of the dispute.

In both the Michigan and California cases, the judicial determination that the issues in dispute were proper subjects of mandatory bargaining seems correct as a matter of statutory interpretation; it is difficult to quarrel with the proposition that rules determining where employees may live while working or how their conduct may be called into account involve "working conditions" in a fairly direct and substantial way. Yet the political implications of a system that subjects such disputes to binding decision by an arbitrator are also direct and substantial. It means that an arbitrator is to be given the political task of assessing the impact of proposed rules on the interests of the broader community as well as those of employees. In the two police cases, an arbitrator would be expected to take into account all the policy arguments asserted in favor of or against police residence requirements or the use of public hearings to control police behavior.

II

CHECKS ON THE POLITICAL IMPACT OF INTEREST ARBITRATION

The strong terms in which the political implications of arbitration were discussed above require some qualification. Most arbitrators are sensible people, constrained by feelings of responsibility to the commu-

40. MICH. COMP. LAWS ANN. § 423.231 (Supp. 1972).

41. *City of Detroit v. Police Ass'n*, 627 GERR B-13 (1975) (Platt, Arbitrator).

42. Berkeley, Cal., Ordinance 4644-NS (April, 1974).

43. *Police Ass'n v. Police Review Comm'n*, Civil No. 459-645-9 (Alameda County Sup. Ct., Feb. 7, 1975).

nity and by a desire for continued acceptability. They are not likely to render a decision they know or believe will bring financial ruin to a community or create disruptive political reaction. On the contrary, they are likely to view the arbitral process as an extension of the negotiating process and to seek consensus where it is possible.⁴⁴ Moreover, this search for consensus is aided by the unions' interest in avoiding havoc, maintaining stability, and continuing the employment of their members. There is evidence that a substantial number, perhaps a majority, of interest arbitration awards rendered by tripartite panels are unanimous; and even where they are not, the evidence indicates that dissent may be more pro forma than real.⁴⁵ The disruptive impact of disputed awards can be minimized through the arbitrator's ability to locate areas of flexibility through his or her consultations with the parties.⁴⁶ Finally, there is evidence that, over a period of years, arbitrators' decisions on salary matters may not vary substantially from accords reached through collective bargaining.⁴⁷

On an ad hoc basis, therefore, a reasonable legislator might well conclude that the risks of arbitration are less than the risks of the political and economic dislocation a strike or other conflict might cause. More, however, than the results in particular cases must be considered. The benevolence of a dictatorship and the likelihood that it will reach decisions similar to those that would be reached under a democratic system does not justify its existence. What must be considered also are the longrange consequences of institutionalizing a system which makes the decision of an arbitrator available as a matter of course.⁴⁸

This is not to conclude that the observations made in Part I of this Article necessarily argue against the use of arbitration on an institutionalized basis. They do suggest, however, that the arbitration process

44. Rehmus, *supra* note 26, at 310-11.

45. *Id.* at 308.

46. See Grodin, *supra* note 8, at 98, 99-101.

47. Data on the results of compulsory arbitration for Michigan police and fire-fighters between 1969 and 1972 indicates only slight differences in the size of salary increases when compared with the increase obtained under other forms of dispute settlement. Bezdek & Ripley, *Compulsory Arbitration Versus Negotiations for Public Safety Employees: The Michigan Experience*, 3 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 167 (1974).

48. Professor Summers suggests that if the arbitration system is applied generally its effects will be to rearrange but not escape the political process. In brief, "the crucial political decision . . . [becomes] the selection of the arbitrator, based on his past performance." Summers, *supra* note 13, at 1200. Such an arbitrator, however, "is likely to be less responsible to his constituency because his defined role is to be objective and his award is disguised as nonpolitical." *Id.* This view seems correct with one addition. Under a system in which both parties participate equally in the selection of the arbitrator, he or she will still have a "constituency," albeit one that is clearly different from the constituencies of elected officials.

needs to be structured so as to maximize political responsibility.⁴⁹ The rest of this Article offers a number of suggestions, not necessarily as a recipe, but at least as a listing of possible ingredients.

A. *The Arbitral Tribunal*

The nature of public sector interest arbitration supports the widespread use of a tripartite panel consisting of a neutral and two partisans, rather than a single neutral decisionmaker. The tripartite panel is likely to force the neutral arbitrator to consult with his partisan colleagues, to allow for compromise, and to diminish the risk that the broader consequences of the award⁵⁰ will be ignored. Whether a single or tripartite panel is used, the procedures for selecting neutral arbitrators and evaluating their qualifications are important policy issues.

The Michigan Supreme Court's decision in *Fire Fighters Union v. City of Dearborn*⁵¹ provides a useful point of departure for analysis of these issues. The Michigan statute provides for arbitration of police and fire department labor disputes by a tripartite panel consisting of one delegate selected by each party and an "arbitrator/chairman" selected by the two delegates. In the event the two partisans are unable to select the third member of the panel, the arbitrator/chairman is to be appointed by the chairman of the Michigan Employment Relations Commission (MERC).⁵² In *Dearborn*, the city declined to name a delegate to either of two arbitration panels established to resolve certain police and fire department disputes. As a result, the MERC chairman selected a neutral arbitrator for each panel and the proceedings were held on an ex parte basis. Upon the city's refusal to comply with the decisions, the unions initiated these actions.

The four participating justices divided evenly as to the constitutional validity of the delegation of power to the arbitrator, thus affirming the lower court's ruling that the delegation was valid.⁵³ Of the two justices who voted for affirmance, one did so on the narrow ground that the arbitrator/chairman had been designated by an official appointed by the governor rather than by the parties themselves. In his opinion, this fact

49. One method of "containing" the political impact of arbitration is, obviously, to limit its use. Such limits, however, may become increasingly difficult and, for reasons mentioned earlier, are arguably undesirable from the perspective of public employer-employee relations. See the text accompanying notes 7-9 *supra*. Moreover, political implications exist even when arbitration is used on a limited basis.

50. See note 15 *supra*, and Barr, *supra* note 11.

51. — Mich. —, 231 N.W.2d 226 (1975).

52. MICH. COMP. LAWS ANN. § 423.235 (Supp. 1975).

53. *Fire Fighters Union v. City of Dearborn*, 42 Mich. App. 51, 201 N.W.2d 650 (1972).

supplied the necessary ingredient of public responsibility.⁵⁴ The result, as the two justices voting for reversal noted in their opinion, is that the Michigan law may be constitutional only to the extent it does not function as planned.⁵⁵

The two justices voting for reversal found the law defective.

It is the unique method of appointment, requiring independent decision makers without accountability to a governmental appointing authority, and the unique dispersal of decision-making power among numerous *ad hoc* decision makers, only temporarily in office, precluding assessment of responsibility for the consequences of their decisions on the level of public services, the allocation of public resources, and the cost of government, which renders invalid this particular delegation of legislative power.⁵⁶

That defect was not cured, in their opinion, by the circumstance that the neutrals in the *Dearborn* disputes happened to have been appointed by the MERC chairman, since the chairman is not generally regarded as accountable for the decisions of the *ad hoc* arbitrator.⁵⁷ The statute would only be cured, according to the dissenters' strong suggestion, if it were amended to provide for arbitration by a person or tribunal with continuing political responsibility.

An attempt to make arbitrators more politically responsible by electing them, or by having them appointed by elected officials to serve on a continuing basis, poses a difficult dilemma. The problem of political responsibility arises initially from the fact that arbitrators may be called upon to determine policy issues otherwise subject to the local legislative process. But if the arbitrator is made politically responsible to the local electorate, which is in effect a party to the dispute, then arbitration loses its neutral character; and to the extent that the arbitrator's constituency is the same as that of the legislative body that would otherwise exercise authority over the policy questions posed, the process becomes redundant.

If, on the other hand, the arbitrator is made politically responsible to a larger electorate—for example, the electorate of the state as a

54. *Fire Fighters Union v. City of Dearborn*, ___ Mich. ___, 231 N.W.2d 226, 264 (1975).

55. *Id.* at 237.

56. *Id.* at 241.

57. The dissenters made the following observations:

The chairman of the MERC and his superior, the Governor, properly do not regard themselves to be and are not generally regarded by the citizenry as responsible or accountable for the decisions of the *ad hoc*, outside arbitrator/chairman. The statutory duty of the chairman of the MERC is to appoint an 'impartial' person as arbitrator/chairman. He is not expected to appoint an arbitrator/chairman who will render a decision which will have the support of the electorate or of their elected representatives.

Id. at 238.

whole—problems of lack of neutrality and redundancy give way to problems concerning local autonomy and the role of collective bargaining. What was once a local issue, determinable ultimately through the local political process, becomes a state issue, determinable by state officials. An argument can be made in favor of centralizing decision-making with respect to issues of public employee wages and working conditions, and with respect to the larger questions of budgetary policy which those issues entail. Indeed, in many states local government decisions, particularly those involving fiscal policy, are already largely controlled by state law,⁵⁸ and more control may be inevitable if not desirable. Centralization of decisionmaking seems hardly an appropriate response to the concerns of the local electorate over the loss of their right to control local policy issues, however. Moreover, such a process is inevitably antithetical to collective bargaining, for it assumes the existence of a state policy for determination of wages and conditions of employment.

Here is the heart of the dilemma. Those who favor the use of arbitration to resolve interest disputes in the public sector see it primarily as an extension of the negotiating process⁵⁹ and evaluate it on the basis primarily of its effectiveness in adapting to that process. Thus, emphasis is placed, under existing systems, upon allowing the parties to choose their own arbitrators rather than upon having them elected or appointed by some state official or agency; and it is on that basis that arbitration is defended against the criticism that it may chill negotiations. There is an obvious tension between that perspective and one which views arbitration as part of an administrative mechanism for implementing governmental policy regarding wages and conditions of employment. One perspective sees the arbitrator as an essentially private person who happens to be involved in resolving a dispute concerning a public entity; the other sees the arbitrator as an agent of government involved primarily in implementing public policy.

There may be room for accommodation between these competing views. One need not accept the model of arbitrator as administrator to recognize that there is a difference between the role an arbitrator plays in public sector interest disputes and the traditional role of the arbitrator in private sector labor relations. Even on the basis of the prevailing practice—which permits the parties to select their own arbitrator, by agreement or by striking names from a list if they fail to agree⁶⁰—the partly public nature of the process can be reflected in the makeup of lists

58. *E.g.*, CAL. GOV'T CODE §§ 53732, 53734 (West 1966); MICH. COMP. LAWS ANN. § 141.1-919 (Supp. 1975).

59. *See* note 15 *supra*.

60. *E.g.*, N.Y. CIVIL SERVICE LAWS § 209(4)(c)(ii) (McKinney Supp. 1974).

from which the arbitrators are selected. Although experience in private sector labor relations should be recognized as extremely valuable, for example, it should not ipso facto qualify someone for public sector interest arbitration. The public sector arbitrator should have an understanding of public finance and a sensitivity to the policy issues that may be involved. Ultimately, of course, the arbitrator's qualifications are a matter for the parties to judge. Nevertheless, governmental agencies, educational institutions, and organizations of arbitrators could establish training programs to provide aspiring public sector arbitrators with relevant information and exposure. Governmental or private organizations that submit lists of arbitrators' names for selection by the parties could develop separate public sector arbitration lists. The certification of arbitrators as being qualified for public sector interest disputes, while not of itself imposing political responsibility, may serve to make the arbitrator more responsible in fact.

Because salary and other cost determinations involve political decisions, the statute governing public sector interest arbitration should attempt to control arbitral discretion by incorporating explicit decisional criteria. Specifically, the statute should require arbitrators to consider the employer's ability to pay in fixing awards. Although precision is difficult, and a degree of ambiguity may arguably even be desirable, the statute should require that both the arbitrator and the parties be informed as to both how much weight ability to pay is to be given and whether the arbitrator is authorized to consider factors such as possible tax increases, financial aid from other sources (such as the state or federal government), and readjustments to the budget in making the determination.

Finally, there is no reason the wage disputes of various groups of employees of the same employer cannot be arbitrated concurrently. To the extent ability to pay is a factor for one group of employees it will be a factor for all. Each group wants a piece of the same limited pie. By consolidating arbitral proceedings involving more than one group of employees, the potential for conflicting awards may be reduced.⁶¹

B. *Scope of the Arbitration*

Most binding arbitration legislation assumes that the scope of arbitration includes or is actually congruent with the scope of bargaining and, therefore, that any mandatory bargaining issue should be subject to arbitral determination.⁶² There are grounds, however, for questioning

61. See Bible, *The Governor's Power in Public Sector Labor Disputes*, INTER ALIA (a publication of the Nevada State Bar) July 1973, at 38.

62. Most statutes contain no description of the scope of arbitration, simply employing such phrases as "the issues in dispute" or "the dispute." *E.g.*, MASS. GEN. LAWS

such an assumption. Some states exclude wages from binding determination,⁶³ although this seems counterproductive given the function of arbitration. The wage issue lies at the core of the bargaining process. Matters such as the residency of police officers may well be considered appropriate for bargaining but inappropriate for resolution through arbitration. Experience from the private sector suggests that attempts to limit the scope of matters discussed at the bargaining table are likely to be artificial and ineffective.⁶⁴ But it does not follow that if agreement is not reached on such an issue during negotiations it should therefore be subject to binding determination by an arbitrator.

On the other hand, there are two strong arguments against making the scope of arbitration more narrow than that of bargaining. First, if arbitration is to be a substitute for the right to strike, a union should be allowed binding arbitration for any issue over which it might strike in the absence of arbitration. This argument loses some of its force if all public employees are prevented from striking, although strike deterrence may still be a factor. If strikes are allowed, except those that imperil public health or safety or those that are limited to particular groups of public employees, the argument for similar scope remains. Perhaps the assumption that the right to strike, where granted by law, entails the right to strike over any issue subject to bargaining needs to be reconsidered.⁶⁵

The second argument against making either the scope of arbitration or the right to strike more narrow than the scope of bargaining rests

ANN. ch. 150E, § 9 (Supp. 1975) ("issues in dispute"); N.Y. CIVIL SERVICE LAW § 209 (4)(c)(v) (McKinney Supp. 1971-72) ("matters in dispute"); OKLA. STAT. ANN. tit. 11, § 548.7 (Supp. 1974) ("unresolved issues"). Some, such as the Iowa Public Employment Relations Act, IOWA CODE ANN. § 20.22 (Supp. 1975), and the Minnesota Public Employee Labor Relations Act of 1971, MINN. STAT. ANN. § 179.69 (Supp. 1975), make specific reference to the scope of bargaining. Wisconsin is unique in listing the matters subject to determination by the arbitrator. WIS. STAT. ANN. § 111.70 (1974). Also see *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974) (rejecting, on the basis of clear charter language, the city's argument that the scope of arbitration should be narrower than the scope of bargaining).

63. E.g., Maine, ME. REV. STAT. ANN. § 979-D (1974) (salaries, pensions and insurance); Rhode Island, R.I. GEN. LAWS ANN. § 36-11-9 (Supp. 1974) (matters involving expenditure of money).

64. Wollett, *The Bargaining Process in the Public Sector: What is Bargainable*, 51 OREGON L.R. 177 (1971).

65. One of the considerations to be used in drawing the line between mandatory and nonmandatory subjects is the appropriateness of submitting the subject to the arbiter of economic force. In the public sector where the strike is prohibited entirely this consideration is absent. To the extent that strikes are legalized in the public sector, then the subjects for which the union can strike should be limited to those for which the use of the strike as a political pressure device is appropriate. The union might, therefore, not be allowed to strike for some objectives for which it would be allowed to bargain without recourse to the strike.

Summers, *supra* note 13, at 1193-94 n.69.

on the fact that it is exceedingly difficult to establish workable criteria for determining those matters which, while affecting working conditions, nevertheless involve political elements and therefore make strike or arbitration inappropriate. The difficulty is not prohibitive, however. The Wisconsin statute, for example, expressly lists those matters that are to be subject to arbitral determination.⁶⁶ Alternatively, the legislative history of a general language statute might give examples of the kinds of issues considered inappropriate.

Although it is desirable that the scope of arbitration include all issues of mandatory bargaining, it seems clear that the parties should not be forced to arbitrate non-mandatory bargaining issues. Whether they should be *permitted* to do so is another matter. In part, the answer depends upon the public employer's authority to enter into a binding agreement on subjects that are not mandatory. If the public employer lacks such authority (on the theory that it is contrary to the public interest to subject non-mandatory issues to bargaining's bilateral determination),⁶⁷ then it lacks the authority to agree to an arbitration which would produce the same result. On the other hand, even if the public employer has the authority to conclude an agreement on a non-mandatory issue, it need not follow that an arbitrator's authority should also extend that far.⁶⁸ If anything, the closed nature of the arbitral process suggests that it might be wiser if such issues were not open to arbitration.

C. *Review of the Arbitral Award*

In general, the judicial role in arbitration is extremely limited, and properly so. Where arbitration is based on voluntary agreement, the arbitrator is applying norms established, or at least incorporated, by the parties themselves. Subject to overriding considerations of public policy, the parties ought to be free to establish or incorporate whatever norms they like and to agree that the arbitrator's application of the norms is not subject to review. Thus, in the absence of fraud or misconduct, the courts will not disturb an arbitrator's determination of those factual or "legal" issues that the parties have authorized for arbitral decision.⁶⁹ This is the general rule despite the broad leeway

66. WIS. STAT. ANN. § 111.77(6) (1974).

67. *Cf.* Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972). *See* Summers, *supra* note 13, at 1194.

68. With the exception of Wisconsin's statute, no statute expressly adopts this view. WIS. STAT. ANN. § 111.77(6)(h) (1974). Minnesota provides that the arbitrator will have no jurisdiction to entertain any matter or issue not within the scope of bargaining *unless* it is contained in the employer's final offer. MINN. STAT. ANN. § 179.69(3) (Supp. 1975).

69. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 365 U.S. 593 (1960).

given arbitrators to interpret the language of the agreement governing what they are authorized to decide. As a result, the issue of arbitrability, though ultimately a basis for judicial review, is often inextricable from the underlying substantive issues.

These principles of judicial restraint are equally applicable, on policy grounds, to grievance arbitration in the public sector. It is questionable, however, whether these same conclusions are relevant in the case of interest arbitration, particularly interest arbitration that is legislatively mandated.⁷⁰ If the applicable statute contains decisional criteria and limitations on the scope of matters subject to arbitral determination, it is presumably because the legislature considers that these constraints serve some overriding public interest. From this it follows that even where the public employer consents to arbitrate, it does not have the power to authorize the arbitrator to disregard the legislature's constraints. Some form of meaningful review needs to be provided to ensure these bounds are not overstepped. Where there is no bargain, and the arbitration is conducted because the law requires it, the argument for review becomes even more substantial. In both cases, the arbitrator is performing a public, rather than a private, function, and the traditional standards of review should be adjusted accordingly.

With regard to questions of fact, and more broadly with regard to the application of decisional criteria to determined facts, the nature of the process dictates that the arbitrator have broad discretion. The "substantial evidence" rule, which some arbitration statutes have borrowed from administrative law,⁷¹ may be a workable standard if it is applied with recognition of the quasi-legislative, quasi-negotiating func-

70. A majority of statutes are silent on the question of appeal from an award. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1204 (1972). The Maine statute provides that the award is binding on questions of fact in the absence of fraud, but subject to affirmation, reversal, or modification "based upon an erroneous ruling or finding of law." ME. REV. STAT. ANN. tit. 26, § 972 (1974). In Michigan, an award is binding "if supported by competent, material, and substantial evidence on the whole record." MICH. COMP. LAWS ANN. § 423.242 (Supp. 1975). Oregon uses the same terminology, but adds the qualification that the award be "based upon the factors" set forth in the statute as criteria for decision. ORE. REV. STAT. § 243.752 (1974). South Dakota provides for appeal de novo. S.D. COMP. LAWS ANN. § 9-14A-19 (Supp. 1975). Washington provides for review solely upon the question whether the decision was "arbitrary or capricious." REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974). The Pennsylvania Supreme Court has held that review of the arbitrator's jurisdiction may be had through extraordinary writ, even though the legislature precluded appeal. *In re City of Washington*, 436 Pa. 168, 259 A.2d 437 (1969). Cf. *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970) (holding that due process requires limited judicial review of awards rendered pursuant to a statute providing for compulsory arbitration of disputes between nonprofit hospitals and their employees).

71. Michigan and Oregon statutes so provide. See note 46 *supra*.

tion performed by the arbitrator. An "arbitrary or unreasonable" test might be equally adequate for resolving these issues.⁷² But questions that involve a determination of the meaning of the decisional criteria contained in the governing statute or of the arbitrator's scope of authority are questions of law and cannot be resolved in terms of the arbitrator's view of the legislative intent. In such cases, the private sector rule that the arbitrator's decision is binding on issues of law as well as on issues of fact is inapplicable. The reason for this is that the legal norms involved are operable, not because they have been incorporated as standards into the agreement of the parties, but because the legislature has considered them to be appropriate limitations upon the process in which the parties are engaged.⁷³

The principle argument against an expanded scope of review is that it might invite litigation over each award and thus prolong what should be a speedy method for settlement of disputes.⁷⁴ Although this is a formidable argument, on balance it is not persuasive for two reasons. First, the review in question is to occur after the arbitration has been completed. Courts should not entertain attempts by either party to block arbitration on the ground that the issue in the dispute is not arbitrable except in the most extreme circumstances. The need for pre-arbitral judicial restraint is even greater in the case of interest arbitration than in the case of grievance arbitration, since there is more likely to be modification in the positions of the parties in the course of the proceeding before the interest arbitrator, which in turn, will change the issues to be decided.⁷⁵

Second, post-arbitral review may be structured in non-traditional ways so as to minimize disruption of the parties' relationship. This review could be conducted by the state public employee relations board rather than by the courts to allow for expertise, uniformity of judgment,

72. REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974) ("arbitrary or capricious").

73. The cases are in accord. *E.g.*, *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 615, 526 P.2d 971, 975-76, 116 Cal. Rptr. 507, 511-12 (1974) ("[T]he city council *after* the rendition of the award may reject any award that invades its authority over matters involving 'merits, necessity or organization' since the charter itself limits the scope of the arbitration decision to that which is 'consistent with applicable law.'"); *Cheltenham Township v. Police Department*, 11 Pa. Commonwealth 348, 312 A.2d 835 (1973) (declaring invalid an arbitration award which required the township to pick up and deliver policemen at their homes when going on and off duty); *North Kingston v. Teachers Ass'n*, 110 R.I. 698, 297 A.2d 342 (1972) (undertaking independent statutory interpretation to uphold award against attack that arbitrators exceeded their authority).

74. *Cf.* Concurring opinion of Judge Fuld in *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 511-20, 260 N.E.2d 508, 518-24, 311 N.Y.S.2d 863, 877-84 (1970).

75. *See Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

and savings of time. Unfounded attempts at review could be deterred by requiring the unsuccessful appellant to pay not only the costs of the proceeding, but the attorney's fees of the successful respondent as well.

D. Options Available to the Governing Body

If mandatory arbitration is premised on the need for protecting the public against harmful strikes, the option to arbitrate or incur a strike might be left to the public employer for its case-by-case evaluation of the comparative risks. This reform would not have much impact in those cases where statutory schemes confine mandatory arbitration to police officers and firefighters. At least it is less likely that a governing body would consider a police or fire department strike to be preferable to arbitration.⁷⁶ But where the touchstone for arbitration is phrased more broadly in terms of the "essentiality" of the particular service, or the danger to public health or safety, it may make sense to let the governing body determine how the public interest would best be served.

One counterargument is that it would be unfair to grant such an option to the governing body while withholding it from the union. This would be persuasive if public employee arbitration were mandated for reasons other than the protection of the public. But if, as is true in most states, mandatory arbitration is limited to particular employees because of the public impact of particular kinds of strikes, it is no more unfair to tell those employees that the public employer does not want to arbitrate and that they may go ahead and strike than it is to tell the same thing to any group of less crucial public employees, such as librarians or custodians, or for that matter to employees of private employers. On the contrary, the employees in question are presumably in a position to strike more effectively than are those whose strikes are not considered especially critical.

Another, and somewhat conflicting argument against giving the public employer the option to reject arbitration is that it may be influenced either by the political pressures of a union that wants to strike, or it may allow a strike because of the fiscal savings that may temporarily be involved. In both cases the need to take adequate account of the impact of the strike upon the public will be overlooked. Although these dangers exist, a legislative mandate that denies an option to the governing body discounts the disadvantages of arbitration by creating, in effect, an irrebuttable presumption that arbitration is always preferable

76. Such a situation arose recently in Berkeley, California, however. The city council chose to endure a 25-day strike by firefighters rather than submit to arbitration as the firefighters suggested. The strike culminated in an agreement on terms closer to the city's bargaining position than that of the firefighters. *See Berkeley Firefighters' 25-Day Strike*, CALIF. PUB. EMPLOYEE RELATIONS, December 1975, at 43.

to strikes by certain employees. Only if the strikes allowable are defined in a very limited way is the presumption justified. The broader the definition, however, the more questionable is the presumption until it can be defended only on the premise that the political process cannot be counted upon to hold the governing body to reasonable limits in making its choice. That premise invites studied inquiry; hopefully, we may one day have more than isolated experiences on which to base our judgment as to its validity. Meanwhile, it is no less reasonable to presume that if the strike is indeed one that imperils public health or safety, public pressures are likely to make it dangerous for the governing body explicitly to opt for a strike without adequate explanation. If and as the scope of mandated arbitration is broadened beyond narrowly defined categories of employees, the argument for leaving the strike-arbitration decision to the local political process becomes stronger.

CONCLUSION

We are currently at an important crossroad in public policy. The old system, in which public employees were told they could not strike and at the same time were told that they must live with whatever determinations were made by the governing body of their public employer, has proved to be both impractical and, in the judgment of many, unfair. While numerous variations are possible, the basic policy choice is either to allow the right to strike or to determine the wages and conditions of employment through the use of some "neutral" method of arbitration. Evaluation of that choice depends on a number of factors outside the scope of this Article, including principally the still undetermined impact of arbitration upon the collective bargaining process and the ability of arbitration to deter strikes over extended periods of time.

But even if it is assumed that arbitration generally deters strikes and that its impact on collective bargaining is benign or can be made benign, considerations of political responsibility remain. These considerations do not necessarily argue against a system of arbitration, but they do suggest that it be structured and limited in such a way as to preserve both the appearance and the reality of the democratic process in relation to important aspects of social planning. The problem of evaluation is complicated by the fact that the limitations on the arbitral process indicated by considerations of political responsibility may tend to make that process less attractive to unions, and consequently less effective in deterring strikes. The balance is a difficult one, but it needs to be made.