

The Use of Alternative Dispute Resolution Techniques to Resolve Public Sector Bargaining Disputes

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I. INTRODUCTION

Labor organizations have existed in the United States for over two centuries. In the late 1700s and early 1800s craft guilds consisting of skilled artisans operated apprenticeship programs and maintained professional standards.¹ Such collective efforts were not confined to private sector personnel. During the 1830s, skilled craft workers employed at naval shipyards organized.² In 1881 skilled craft guilds formed the Federation of Organized Trades and Labor Unions, which was transformed into the American Federation of Labor (AFL) in 1886.³ During this same period, postal workers organized in a number of cities, and, in 1917, the AFL chartered the National Federation of Federal Employees.⁴

During this same period, state and local government personnel began to organize. The Chicago Teachers Federation was established in 1898, and in 1916, the AFL chartered the American Federation of Teachers.⁵ The International Association of Fire Fighters was chartered the following year.⁶ Even though no state law authorized collective bargaining by government personnel prior to 1959, the American Federation of State, County & Municipal Employees (AFSCME) was active throughout the 1930s and 1940s.⁷ During this period, the percentage of government workers who were members of labor organizations ranged from nine percent to thirteen percent.⁸

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¹ See PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 3-6 (1964).

² See MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 215 (West 2d ed. 2011).

³ See TAFT, *supra* note 1, at 93-94, 113-16.

⁴ See MALIN ET AL., *supra* note 2, at 215-16.

⁵ See *id.* at 216.

⁶ *Id.*

⁷ *Id.* at 217.

⁸ *Id.*

In 1959, Wisconsin became the first state to enact a law authorizing public sector bargaining.⁹ Federal employees were provided with limited bargaining rights by President Kennedy in 1962 under Executive Order 10,988.¹⁰ In the following years, many state legislatures enacted statutes enabling state and local government employees to organize and to bargain with their employers over their wages and working conditions. These bargaining laws enabled millions of government workers to join labor organizations. By the end of 2011, thirty-seven percent of government employees were union members.¹¹

Federal employees have enjoyed only limited bargaining rights, under Executive Orders 10,988 and 11,491 and Title VII of the Civil Service Reform Act,¹² with Congress determining their basic wages and fringe benefits and managers determining basic departmental policies. On the other hand, most state and local government personnel have the right to bargain over their wages, fringe benefits, and working conditions.¹³ Although a few states have authorized work stoppages by non-essential government employees, most state laws have banned such job actions. A number of state laws preclude bargaining over the basic missions of the departments involved or the manner in which they carry out their functions.¹⁴ Nevertheless, public sector labor organizations have been able to negotiate bargaining agreements covering many important topics.

⁹ *Id.* at 227.

¹⁰ See MALIN ET AL., *supra* note 2, at 228; Exec. Order No. 10,988, 3 C.F.R. 521 (1959–1963).

¹¹ See Larry Swisher, *Union Represented Workforce Stable in 2011, Ending Two-Year Slides*, BLS Says, DAILY LAB. REP. (BNA) No. 18, at D-1 (Jan. 27, 2012). It is interesting to note that during this half century of public sector union growth, private sector union membership declined from almost 35% in the late 1950s to 6.9% by the end of 2011. See *id.*; MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10, Table 1 (1987).

¹² 5 U.S.C. §§ 7101–7135 (2000).

¹³ See FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 1371–91 (Alan Miles Ruben ed., 6th ed. 2003) (summarizing the various state public sector bargaining laws and their impasse resolution procedures).

¹⁴ See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1384–90 (2009).

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II. IMPACT OF LABOR UNIONS ON WORKER RIGHTS

The collective action of labor organizations has generally enhanced the economic benefits obtained by represented employees. Through the so-called “monopoly face,” unions have used their control over the supply of labor to increase wages and fringe benefits.¹⁵ The compensation earned by unionized workers tends to be five to twenty percent higher than the compensation earned by their nonunion cohorts.¹⁶ This is especially true in industries where union density is high. Unions have even had an indirectly positive impact on the compensation earned by nonunion workers, due to the fact that their employers provide them with more generous wages to discourage them from unionizing.¹⁷

Representative labor organizations have also advanced the fringe benefits received by bargaining unit personnel.¹⁸ Unions have negotiated generous defined-benefit pension plans and expansive health care coverage for the persons they represent.¹⁹ Some have obtained employer-funded non-occupational disability coverage, paid family and personal leave programs, and other similar fringe benefits. Most nonunion employees now have only defined-contribution pension plans and health care, coverage for which they must contribute substantial premiums and which have elevated deductibles and co-payments.

Even though the economic benefits that unions obtain for represented employees are significant, it is important to recognize the critical non-economic privileges provided by such entities. Almost all bargaining agreements stipulate that employees may only be disciplined for “just cause.”²⁰ In the absence of such contractual limitations, private sector workers—and even some public sector personnel—are employed on an at-will basis, which means that they can be terminated at any time for almost any reason.²¹ Under other contractual provisions, layoffs, recalls, and promotions tend to be determined in a relatively objective manner. Least senior employees are laid off ahead of their more senior colleagues, and more senior individuals on layoff are recalled to work ahead of their less senior

¹⁵ See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 43–60 (1984).

¹⁶ *Id.*

¹⁷ See *id.* at 150–54.

¹⁸ See *id.* at 61–77.

¹⁹ See *id.* at 68–69.

²⁰ See ELKOURI & ELKOURI, *supra* note 13, at 930–32.

²¹ See *id.* at 925–30.

cohorts. When vacant positions are being filled, senior bidders often have priority ahead of equally qualified bidders with less seniority.

A critical factor in bargaining agreements concerns the inclusion of grievance-arbitration provisions, which allow unit employees to challenge employer decisions that may have violated contractual provisions.²² Such clauses require labor and management representatives to work together to resolve their disputes through the negotiation process.²³ In the rare instances in which mutual resolutions cannot be achieved, unions possess the right to invoke arbitration.²⁴ Outside neutrals conduct hearings and determine if the employers have engaged in practices inconsistent with bargaining agreement provisions.²⁵ Individuals without such contractual protections only have the “exit voice”—they either accept the decisions of their employers or look for work elsewhere.²⁶ It is this “voice face,”²⁷ which enables organized workers to meaningfully influence their basic employment conditions, that differentiates them from their nonunion cohorts.

III. PUBLIC SECTOR DISPUTE RESOLUTION PROCEDURES

The vast majority of public sector contracts have been achieved through collective bargaining. Labor and management representatives work together to achieve mutually acceptable contracts. When bargaining discussions between the parties do not generate new contracts, the participants generally obtain mediator assistance. The neutral facilitators meet with the disputing parties to help them look for areas of agreement and to search for ways to deal with their areas of disagreement. These mediators induce the negotiating parties to go behind their stated positions to enable them to explore their underlying interests. Why does the union wish to obtain a particular term? Is there some other way in which the governmental employer might be able to satisfy the union’s concerns in a manner more acceptable to the government entity involved?

When bargaining impasses occur, individuals employed in states authorizing work stoppages occasionally conduct strikes to advance their interests. As members of the general public become adversely affected by such job actions, they encourage their political leaders to seek appropriate

²² See *id.* at 197–276.

²³ See *id.* at 199–201.

²⁴ See *id.* at 240–49.

²⁵ See ELKOURI & ELKOURI, *supra* note 13, at 199–201.

²⁶ See FREEMAN & MEDOFF, *supra* note 15, at 7–11, 94–95.

²⁷ *Id.* at 94–95.

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resolutions. Even in states in which such work stoppages are unlawful, government employees may strike. Most of these stoppages do not go on for prolonged periods, and agreements are often achieved before courts are asked to enjoin the illegal job actions.

When work stoppages are illegal or not desired by the workers involved, and mediator intervention has not generated new accords, the parties often resort to fact-finding or interest arbitration.²⁸ Fact-finders conduct hearings and summarize the current positions of the parties.²⁹ In some cases, they are empowered to make non-binding recommendations with respect to the manner in which they believe the conflicting terms should be resolved.³⁰ The bargaining parties may accept these recommendations, but they frequently do not do so. They instead use the fact-finder's conclusions and recommendations as a basis for continued negotiations.³¹ These efforts usually lead to final agreements.

In some jurisdictions, binding interest arbitration procedures are used to resolve bargaining disputes.³² The management and labor representatives present their claims to an arbitral panel, which is empowered to determine the terms of the new bargaining agreement.³³ Although some arbitral panels are authorized to determine the manner in which they think the disputed terms should be resolved, most laws compel the arbitrators to select either the final proposals of the government employer or the representative labor organization. This may be done on a whole package basis or on an item-by-item basis. The panel is instructed to decide which party's positions are more reasonable.

IV. IMPACT OF LABOR IMPASSE RESOLUTION PROCEDURES ON ALTERNATIVE DISPUTE RESOLUTION MOVEMENT

In the late 1960s, before I went to law school, I earned a master's degree in labor law and collective bargaining. In the collective bargaining course we read *A Behavioral Theory of Labor Negotiations*, which described how labor and management representatives should employ integrative bargaining

²⁸ See MALIN ET AL., *supra* note 2, at 614–15.

²⁹ See *id.*

³⁰ See *id.* at 614.

³¹ See *id.*

³² See *id.* at 615–43.

³³ See *id.* at 615.

techniques to further their respective objectives.³⁴ This innovative approach to negotiating had been developed in the early part of the last century by a business consultant named Mary Parker Follett.³⁵

To generate mutually efficient bargaining agreements, labor and management representatives must go behind their stated positions and explore their underlying interests. Which terms do union leaders desire that are not that significant to employers (e.g., union security clause), and which items do management officials value that are not that important to bargaining unit members (e.g., no-strike provision)? By ensuring that these terms end up on the appropriate side of the bargaining table, labor and management negotiators can generate the largest joint surplus and ensure the attainment of optimal accords.³⁶ With respect to the items that are valued by both sides (e.g., wages and fringe benefits)—the so-called “distributive” terms—bargainers are likely to employ more competitive tactics to enable them to claim a greater share of the surplus for their own side.³⁷

In the Collective Bargaining course, we also explored the use of mediation to help parties achieve accords. We considered what the parties and the neutral facilitator did during the joint bargaining sessions, and what was done during the separate caucus sessions conducted by the mediator with each party alone. In the separate Labor Arbitration course, we considered both grievance arbitration, which concerns disputes arising during existing agreements claiming violations of specific contractual terms, and interest arbitration, which is used to resolve ongoing bargaining disputes over new contracts.

When I became a law professor thirty-five years ago, I taught separate courses in negotiation, labor law, and collective bargaining and labor arbitration. In my Negotiation course, I incorporated the integrative and distributive bargaining concepts I had learned in graduate school. When *Getting to Yes*³⁸ was published, I was surprised to discover how many of the concepts described by Walton and McKersie were adopted by Fisher and Ury.

³⁴ See generally RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

³⁵ See generally, JOAN C. TONN, MARY P. FOLLETT: CREATING DEMOCRACY, TRANSFORMING MANAGEMENT 266–71 (2003).

³⁶ See WALTON & MCKERSIE, *supra* note 34, at 52–53.

³⁷ See *id.* at 11–125.

³⁸ ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

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One of the first books I worked on was the third edition of *Collective Bargaining and Labor Arbitration*.³⁹ We described the bargaining process and the use of grievance-arbitration procedures to resolve disputes arising during the terms of collective contracts.⁴⁰ The concepts covered were all based upon the practices that had been employed by labor and management representatives for many decades. When Russell Smith, Donald Rothschild, and Leroy Merrifield had created the first edition of that book in 1970, they had merely described how effectively these established dispute resolution practices functioned.

I taught the Collective Bargaining and Labor Arbitration course for a number of years, until the decline in union membership shifted the pedagogical focus from collective labor relations law to individual employment rights. By that same time, academics not associated with labor and employment law had begun to appreciate the ways in which traditional labor-management dispute resolution procedures could be extended to other areas. They developed what has become known as alternative dispute resolution, primarily by building upon the procedures that had been employed for many decades in the labor-management field. When Edward Brunet and I developed our own alternative dispute resolution book in 1997,⁴¹ we did not think of this as an entirely new area. We had both served as mediators and arbitrators, and appreciated the fact that conventional labor-management dispute resolution techniques were being incorporated in many other areas of legal practice. We thus find it interesting when alternative dispute resolution experts behave as if they have developed wholly original ways to resolve disputes, ignoring the procedures borrowed from well-established labor-management practices.⁴²

V. THE POLITICAL NATURE OF PUBLIC SECTOR COLLECTIVE BARGAINING

For several decades, especially during the late 1980s and 1990s, the United States economy grew expansively. Wages and fringe benefits for both

³⁹ DONALD P. ROTHSCHILD, ETAL., *COLLECTIVE BARGAINING AND LABOR ARBITRATION* (3d ed. 1988).

⁴⁰ *Id.* at 757.

⁴¹ EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* (1997).

⁴² See Charles B. Craver, *The Impact of Labor Unions on Worker Rights and Other Social Movements*, 26 J. LAB. & EMPL. L. 267, 276–78 (2011) (describing the impact of labor movement on ADR procedures).

private and public sector workers increased—especially for union-represented employees. These developments made unionized private sector employers less able to compete with nonunion firms, and caused many companies to export jobs to low-wage countries⁴³ and to work diligently to induce their employees to decertify their representative labor organizations. Since government employers did not face such competitive issues, due to the monopoly aspect of most government-provided services, state and local government employers did not seek to eliminate representative unions.

Many political leaders and their appointed administrators worked hard to court the support of public sector union leaders and their members. This was especially true in major union states like California, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Politicians realized that they could not agree to excessive salary levels, both because of the immediate impact on government budgets and the fact that private sector workers would complain about such elevated public employee wages. They instead agreed to generous defined-benefit pension plans they thought would not become visible for many years in the future, and to expansive health care programs, which did not have elevated premiums when they were initially implemented in the 1980s.⁴⁴

As the post-war baby boom generation moves into retirement over the next three decades, state and local governments will have to deal with the fact they have not set aside sufficient funds to cover the expensive pension costs that will be involved. Many of the bargaining agreements covering such persons continue to provide retirees and their dependents with supplemental Medicare coverage that will increasingly drain government coffers.

Over the past four years, many unionized private sector unions have had to agree to wage freezes and, in some cases, even wage reductions. Many have accepted employer demands that future employees receive only defined-contribution pension payments instead of more generous defined-benefit plan coverage. To retain meaningful health care protection, many labor organizations have had to accept increased deductibles and co-payments, and elevated worker premium contributions. As a result of the dire economic situations facing many state and local governments due to rising

⁴³ See generally, STEVEN GREENHOUSE, *THE BIG SQUEEZE* (2008); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

⁴⁴ Some of these pension and health care plans were achieved through traditional collective bargaining. In states in which such fringe benefits are set by state legislators and are not subject to regular bargaining, union representatives used their negotiating skills to achieve such programs by way of lobbying efforts.

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costs and decreasing revenues, most government employers are going to have to address these same issues in the coming years.

Several states have sought to avoid the need to address these critical issues at the collective bargaining table by reducing the scope of their bargaining statutes or through the complete repeal of such laws. These approaches are contrary to the basic principles of industrial democracy, and are entirely unnecessary. Public officials need to respect the right of government workers to have a collective voice, but must use the bargaining process to address these economic matters.

Private sector concession bargaining is complicated by the fact that union leaders are political persons who do not wish to be voted out of office. Employers seeking wage and benefit curtailments have to allow the union negotiators to put on public performances, which can occasionally become offensive. They portray corporate leaders as greedy, and engage in aggressive bargaining tactics designed to convince their members that they are fighting hard to protect their interests. They may even have to generate short-term work stoppages that will remind their members how difficult it is to live with no income. In the end, they almost always acknowledge the economic realities and reluctantly accept the required reductions.

Public sector bargaining is more complicated than private sector negotiating for two principal reasons. First, the absence of any profit motive makes it hard for employer representatives to demonstrate the true need for labor cost reductions. Most persons think that government entities can simply raise taxes to cover increased labor costs, unlike their private sector counterparts, which may be facing the real possibility of bankruptcy. The second factor concerns the fact that political leaders are on both sides of the bargaining table. Not only are the union leaders concerned about their reelection, but so are the government officials involved. If they do not achieve agreements minimizing increased labor costs, they may be forced to increase taxes, which is difficult to defend in a negative economic environment. On the other hand, if they demand too much from the union leadership, they may forfeit substantial labor contributions to their reelection funds and induce their workers to support other candidates in future elections.

Despite the political risks associated with public sector bargaining during difficult times, states and municipalities should not restrict or eliminate their bargaining laws. They should instead use the procedures set forth in those statutes to achieve the results they require. In many cases, they should be able to accomplish their objectives through the normal bargaining process. In those situations where bargaining impasses are reached, they should employ

modified alternative dispute resolution procedures to assist the bargaining parties.

VI. USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES TO RESOLVE PUBLIC SECTOR BARGAINING DISPUTES

The fundamental form of dispute resolution involves interparty negotiations. The two sides come to the bargaining table and work together to achieve mutually acceptable terms. Public employers often rush this process because they naively think that agreements should be generated expeditiously. They fail to appreciate the political nature of these interactions. Most public sector labor organizations lack significant bargaining power due to the no-strike provisions included in most state bargaining laws. As a result, much of what occurs is more akin to *collective begging* instead of collective bargaining. The union representatives state their demands and hope that politically friendly employer representatives will provide their members with decent employment terms. They recognize that if employer concessions are not forthcoming, there is little they can do at the bargaining table to compel position modifications.

Public sector employers need to be patient and persevering. They should allow the bargaining process to develop in a deliberate manner. Most unions bring a number of national, regional, and local officials to bargaining sessions, and the primary spokespersons must put on shows for those individuals—and for the interested bargaining unit personnel. The more of a show put on by the labor representatives, the more likely it is that those persons recognize the fact they will have to give in to the employer positions. Studies show that when people negotiate, they are more satisfied with objectively less beneficial terms when they think the bargaining process has been fair and they have been treated respectfully than when they are dissatisfied with the overall process.⁴⁵ This is why government representatives must tolerate occasional union negotiator outbursts and allow the discussions to go on for prolonged periods.

Rarely does a continuation of the status quo favor the workers. In most cases, a continuation of existing policies actually favors management. When government employers require minimal salary increases—or occasionally compensation reductions—changes in pension plans and increased employee

⁴⁵ Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 412–20 (2010); Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 473 (2008).

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contributions to health care coverage, the workers desire other non-monetary changes. Even when pension plans and health care coverage are not formally subject to bargaining resolution, government representatives should negotiate with union leaders about the political needs for the requested changes and endeavor to determine what they can provide to workers in exchange for the cost reductions being sought. Patient government negotiators should be able to trade the cost reduction terms they require for the non-monetary issues of interest to the other side.

Government negotiators who need cost reductions must prepare thoroughly for their bargaining interactions. They must appreciate the fact that individuals are more negatively affected by losses than they are positively affected by gains.⁴⁶ It is thus beneficial for government entities seeking reduced labor costs to emphasize the gains workers will obtain through these reductions—continued employment among them. If public employers propose layoffs if costs are not curtailed, most workers will be more amenable to the less disastrous reductions in wages or fringe benefits. Even persons who feel that their own positions are safe are likely to accept reasonable reductions that will protect the jobs of their colleagues.

Government bargaining representatives must articulate their needs in a clear manner and demonstrate objectively why they require the terms they are seeking. They must listen carefully to union counteroffers and explore the underlying interests of the parties. A perfect example concerns the need to reduce expanding health care costs. Many employers initially seek an increase in worker premiums, unaware of the politically negative impact of such increases on union officials. Healthy employees dislike premium increases because such deductions decrease their take-home pay. On the other hand, union leaders are often willing to accomplish the requisite cost savings through increases in worker deductibles and co-payments. When individuals require expensive medical treatment, they are relieved to have health care coverage. They generally accept the relatively minimal amounts they have to contribute to their total costs more readily than healthy persons accept increased premiums. Government employers may similarly work to replace expensive defined-benefit pension plans with less costly defined-contribution plans by demonstrating to both workers and their representative unions the fact that they lack the financial resources to continue the defined-benefit programs.

When bargaining talks have continued for prolonged periods with minimal progress, the assistance of skilled mediators can be especially beneficial. If the parties have the opportunity to select their own neutral

⁴⁶ See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 304–305 (2011).

facilitator, they should look for someone who is a skilled and empathetic communicator and who understands the unique nature of public sector collective bargaining interactions. In other cases, the neutral participants will be selected by state mediation services.

Mediation sessions are usually attended by the more significant party representatives, and they are conducted in private, which diminishes the need for either side to put on shows for their constituencies. During joint sessions, mediators ask many questions designed to explore the articulated issues and their underlying interests. They want to be sure that each side fully understands the reasons for the positions taken by the opposing party. When neither side seems amenable to compromise, they explore the underlying interests and try to induce brainstorming discussions that may generate options not contemplated by the bargaining parties. They hope to engender further bargaining discussions that may lead to mutual accords. The two factors which provide mediators with bargaining power include the fact that they have no authority to tell either side what to do and their complete neutrality.

When joint sessions are not moving toward an agreement, either the mediator or the parties may suggest separate caucus sessions.⁴⁷ The information each party receives during such discussions may not be communicated to the other side without the express consent of the speakers. In these separate sessions, mediators often ask each side what they should know that they have not already been told. This inquiry is designed to induce each side to let the mediators know what they are really concerned about. Sometimes labor or management representatives raise concerns that can easily be addressed, while at other times significant issues are brought up. In the latter situations, the neutral facilitators must work with that party to look for options that would have the least negative consequences.

In many bargaining circumstances, neither side is willing to modify its stated positions for fear the other party will not reciprocate its changes. Mediators can be of significant assistance in this regard. They can work to induce simultaneous position changes. When both sides seem hesitant to move in this manner, mediators can occasionally accomplish the desired result through conditional concessions.⁴⁸ In separate caucus sessions, the neutrals ask the employer if it would increase its offer by specific amounts with respect to particular terms if the labor organization would agree to reciprocal reductions in its demands with respect to the same terms. The

⁴⁷ See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 378–80 (7th ed. 2012).

⁴⁸ *Id.* at 380–81.

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labor organization is then asked if it would decrease its demands if the employer would increase its offers. In this face-saving manner, mediators can slowly bring the parties together. This is why proficient mediators frequently help bargaining parties reach agreements they thought could not be achieved.

When mediation efforts do not generate accords, fact-finding sessions can be helpful. These may be conducted by the persons who had already been serving as mediators due to their familiarity with the issues in dispute, or they may be conducted by different individuals who can only consider the information the parties decide to provide in formal hearings. The different sides explain their positions and the reasons supporting those proposals. The fact-finder then describes the party positions and determines the operative economic and factual circumstances. Even if the fact-finder is not empowered to issue any recommendations, his or her report can be helpful since it is likely to induce the parties to reexamine the validity of their underlying positions.

In most cases where fact-finding is employed, the fact-finder is empowered to issue nonbinding recommendations indicating the way in which he or she believes the different terms should be resolved. This can be especially beneficial where the fact-finder's report will be made public, because those recommendations can provide government and union negotiators "with the political cover they need to resolve their dispute."⁴⁹ If some reductions in services or tax increases, or both, are necessitated, the government representatives can blame the fact-finder, as can the union representatives when they have to explain to their constituents why they could not obtain more beneficial terms.⁵⁰ The most significant drawback to fact-finding concerns the fact that the neutral person's recommendations are not binding. One or both sides can reject those suggestions and continue to fight for their own positions.

In the relatively rare cases in which the bargaining parties are unable to achieve final accords with or without the assistance of mediators or fact-finders, binding interest arbitration may be employed.⁵¹ Usually a panel of three arbitrators is created.⁵² The disputing parties present their final

⁴⁹ MALIN ET AL., *supra* note 2, at 614.

⁵⁰ In some cases, fact-finders are actually asked to make recommendations which reflect positions already tentatively agreed upon by the negotiating parties, but which they are hesitant to announce themselves—fearing political repercussions if they must take personal responsibility for those terms.

⁵¹ See MALIN ET AL., *supra* note 2, at 615–74.

⁵² In some cases, the person who served as the mediator is either designated as the lone interest arbitrator or as the head of the arbitration panel. Such a mediation/arbitration

positions and the rationales supporting those positions. At the conclusion of the hearings, the arbitrators decide the final terms of the new contract. They may be authorized to resolve the controverted issues in any manner they think appropriate, based upon factors set forth in the applicable bargaining statute,⁵³ but in many instances they are required to determine which party's submitted positions are more reasonable. Providing arbitrators with broad discretion to determine the new contract terms often results in compromise awards, which provide the public employers with some issues and the representative unions with other items.⁵⁴

In some cases, the arbitrators must compare the final party offers on a complete package basis. They examine all of the proposed terms and decide which total package is more reasonable. The fact that the arbitrators must select the entire package of either the employer or the labor organization deprives them of any way to split the different terms. On the other hand, this all-or-nothing approach may result in the imposition of individually unreasonable terms that are included within the more reasonable total package of one party.

To avoid this difficulty, many state bargaining laws authorize the arbitrators to determine the reasonableness of the respective party final offers on an issue-by-issue basis. The neutrals examine each proposed term separately and decide which one is more reasonable. This approach enables the arbitrators to reject particular proposals they do not consider appropriate. On the other hand, it encourages arbitration panels to award some terms to the public employer and others to the representative union in an effort to satisfy both sides. It also encourages the bargaining parties to include some unimportant—and often unreasonable—items in their final offers they hope arbitrators will reject in favor of other terms they really desire.⁵⁵

Issue-by-issue arbitration tends to achieve results similar to those the parties should have been able to generate through collective bargaining procedures. By rejecting the less reasonable terms in favor of the more reasonable terms and by effectively trading some terms for other issues, arbitrators do exactly what disputing parties do when they resolve conflicting positions through conventional bargaining. As a result, it does not seem unreasonable for arbitrators to possess the authority to divide the different items in such a compromising fashion.

procedure can be beneficial due to the fact that the principal decisionmaker is thoroughly familiar with the underlying circumstances and the actual positions of the parties.

⁵³ See *id.* at 625–43.

⁵⁴ See *id.* at 643.

⁵⁵ See *id.* at 649.

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Economically weak labor organizations have a strong incentive to resort to binding interest arbitration to resolve their bargaining controversies. This is based on the fact that the worst they could do is end up with the final offers articulated by the public employers. On the other hand, since many arbitration panels try to accommodate both sides when they are authorized to determine the different items on an issue-by-issue basis, the unions generally obtain more than they were able to claim at the bargaining table. Rational union leaders would be irrational if they did not take advantage of this aspect of the interest arbitration process.

To offset the fact that unions cannot lose under current interest arbitration procedures by going to arbitration, states might consider changes in their statutes that would encourage both parties to work out their differences at the bargaining table. They could provide that when arbitral panels determine under issue-by-issue procedures that the public employer's final proposals are more reasonable than those articulated by the labor organization, they could subtract the difference—or perhaps one-half or one-quarter the distance—between the final offers of the union and the final offers of the government employer from their awards with respect to those issues. The legislature could similarly provide that when the final offers of the representative union are found to be more reasonable than those of the public entity, the panel must add that difference—or one-half or one-quarter that distance—to the awards pertaining to those terms.

This approach would have two significant benefits. First, it would negate the no-loss incentive of representative labor organizations to invoke arbitration on a regular basis, since they cannot presently do worse than what they have already been offered. They would have to carefully weigh the possibility they could end up with less generous final terms through arbitration than they are being offered at the bargaining table. Second, such an approach would greatly encourage labor and management representatives to make final offers that are truly rational given the current economic circumstances affecting the negotiating parties. This would bring the parties closer together and enhance the likelihood they would achieve mutually acceptable terms through their own bargaining efforts.

The most significant criticism of public sector interest arbitration concerns the fact that politically unaccountable outsiders make determinations that affect both city and state budgets and the manner in which important government services are to be provided.⁵⁶ Unlike grievance arbitration proceedings, which only involve the interpretation of contractual

⁵⁶ See Malin, *supra* note 14, at 1370–74 (discussing argument that public sector bargaining laws have anti-democratic impact).

terms agreed upon by the parties themselves, interest arbitration proceedings enable external neutrals to decide what the actual terms of future contracts will be. This provides these arbitrators with significant authority. On the other hand, such arbitral determinations are almost always constrained by the final proposals submitted by the bargaining parties. The arbitrators are not authorized to impose conditions not explored by the parties themselves.

States have two ways to avoid interest arbitration. They could repeal or limit public sector bargaining laws in a way that deprives outside neutrals of authority over basic terms of employment. A perfect example is provided by the federal government, which severely limits the scope of bargaining to items not related to wages and fringe benefits and which do not concern the basic mission of the agencies involved. While this approach might be politically popular during difficult economic times, it is contrary to the notion of industrial democracy. Most of the problems currently affecting government employers with bargaining laws are not due to the statutes themselves, but to the tendency of political leaders to curry favor with union officials. If they had the courage to stand up to labor negotiators when necessary to advance government interests, these problems could be minimized.

At the other extreme, states could authorize public sector work stoppages—at least for non-essential personnel. Most strikes would not continue for prolonged periods due to the fact that most persons today lack the finances to support themselves for more than brief periods without defaulting on their economic obligations. In addition, if members of the public thought the union demands were excessive, they could encourage their government employers to hold the line at the bargaining table. On the other hand, if they were unwilling to withstand longer shutdowns or thought the workers deserved enhanced employment conditions, they could encourage their political leaders to grant the workers the increases being sought.

VII. CONCLUSION

Labor organizations have existed in the United States for many decades. Private sector unions have used collective bargaining procedures and occasional work stoppages to enhance the wages and fringe benefits of bargaining unit personnel and to protect such persons from unfair treatment. As states have enacted public sector bargaining statutes enabling their own employees to unionize and bargain collectively, government personnel have improved their employment conditions.

For over one hundred years, private sector employers and representative labor organizations have used the bargaining process to achieve collective

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agreements. When negotiation difficulties have been encountered, the two sides have employed mediation assistance to assist them. To resolve issues that have developed during the terms of existing contracts, disputants have employed grievance-arbitration procedures to initially negotiate with each other. In the relatively few cases in which mutual resolutions could not be achieved, arbitration hearings have been conducted. Over the past three decades, individuals have developed the alternative dispute resolution movement, which borrowed most of its procedures from these well-established labor-management practices.

Deteriorating economic conditions have forced government employers to look for ways to slow the growth of—or even reduce—the high cost of labor. Generous defined-benefit pension plans are not adequately funded, and the cost of expansive health care coverage has risen much faster than the Consumer Price Index. Politically accountable government representatives do not dare to raise taxes very much, nor do they wish to offend powerful public sector labor organizations by demanding cost reductions at the bargaining table. As a result, several state legislatures have reduced the scope of public sector bargaining laws, or repealed them entirely. Instead of resorting to such drastic measures, government entities should employ alternative dispute resolution techniques to deal with their bargaining problems.

They should initially use the traditional bargaining process to obtain the changes they require. They must appreciate the political nature of labor leaders and allow union representatives to prolong bargaining talks in a manner that would enable them to put on shows for their members. When interparty negotiations begin to falter, mediation assistance would be beneficial. If agreements still cannot be generated, fact-finders can help to determine the underlying economic issues and recommend solutions they think appropriate.

When government employers and labor leaders are still unable to reach accords, many states employ binding interest arbitration. Arbitration panels conduct hearings and determine how the different terms should be resolved. Most often, arbitral panels must select the more reasonable final proposals set forth by the two sides—either on a total package basis or on an issue-by-issue basis. Since labor unions have nothing to lose by undermining the bargaining process and waiting until they can invoke interest arbitration, legislatures could direct the panels to reduce their awards to the extent, or partial extent, that less reasonable union demands exceed the more reasonable employer offers. Arbitration panels could similarly be directed to increase their awards to the extent, or partial extent, that the less generous employer positions fall below the more reasonable union positions.

It is ironic that the alternative dispute resolution procedures being suggested to resolve current public sector bargaining impasses are the equivalent of the procedures which labor and management representatives have employed for many decades. This truly demonstrates that the more things change, the more they remain the same.