Summary Title: Follow-up Binding Interest Arbitration

Title: Further Review and Discussion regarding Binding Interest Arbitration Provision in City Charter for Public Safety

From: City Manager

Lead Department: Human Resources

Further Review and Discussion regarding Binding Interest Arbitration Provision in City Charter for Public Safety

Background
On May 10, 2011, the Policy & Services Committee reviewed and discussed a variety of issues surrounding binding interest arbitration and requested staff to follow up on a number of subject areas. This report supplements the May 10th report with additional information that the Committee requested.

The primary question for the Committee, and ultimately the Council, is whether binding interest arbitration remains an acceptable process to resolve labor disputes that reach impasse with the public safety employee units. If the Committee and the Council determine that it is not, the alternatives are to eliminate the existing arbitration provision or modify it. A Charter amendment to eliminate or modify interest arbitration would need to be submitted to the voters for a majority approval.

To prepare this report, Human Resources and City Attorney staff researched written materials and interviewed subject matter experts—including labor relations professionals, attorneys and academics—with a particular focus on practitioners who have worked with jurisdictions that have made or are considering making changes to traditional interest arbitration provisions. The attached binder includes the following sections:

A. Arbitration Format
B. Mediation and Arbitration: Possible Uses and Interactions
C. Arbitrator Selection
D. Scope of Arbitration/Exclusions from Arbitration
E. Factors for Arbitrator
F. Other Possible Modifications: Timelines, Public Access, Judicial Review
Discussion and Analysis
This issue presents a number of decision points for the Committee. Staff recommends the Committee consider the threshold questions in the following order:

1. The Committee may first wish to determine if there is consensus on whether to retain the status quo.

2. If the Committee determines not to maintain status quo, the Committee could next consider whether there is consensus to repeal the charter provision for binding interest arbitration. If the Committee determines this is the appropriate recommendation, then consider which election and timeline would be appropriate for this ballot measure.

3. If the Committee does not find consensus with either of the options above, the next option for consideration is modification of the existing provision. If consensus is reached for this option, staff recommends the Committee identify the general subject areas for modification (as opposed to writing detailed charter amendment language at this time) and the appropriate election date.

Secondly, to help facilitate discussion at the full council meeting, staff could schedule a Study Session on interest arbitration, which could include expert testimony from practitioners and/or academics with a variety of viewpoints.

If consensus is reached by the full council to modify the City’s charter provision, the Council could return the item to Committee with an instruction to provide policy direction. The Committee would work with staff regarding the issues it wishes to see addressed in a modified arbitration procedure. The amendment would then be taken back to Council for final approval.

Election Options
Should the Committee, and then Council, determine to put a measure before the voters, there are several options for an election on this issue. The least costly elections would occur in November 2011 or November 2012 due to local elections already scheduled. The June 2012 election includes the presidential primary which spreads out the costs over all of the ballot items. There are also options for all mail elections on a different schedule than the local initiatives and political seats. Please see the chart attached for further detail on election options.
Recommendations
Based on staff’s research, several trends and proposals emerge as worthy of particular consideration if the Committee and Council decide to retain interest arbitration in a modified form. Detailed information regarding each of these items may be found in the attached binder.

1. **Establish Mandatory Timelines for Contract Negotiations.** A local agency may impose time requirements on the inception and conclusion of labor negotiations, as well as intermediate steps in the process. Several jurisdictions—including several that use interest arbitration and one that does not—have time requirements that align the labor contracts with the annual budget and help staff manage the negotiation process. Whether the Council favors retention, repeal or modification of interest arbitration, consideration should be given to establishing timelines in the Charter.

2. **Limit Arbitration to Certain Topics and Circumstances.** Because arbitration is an optional impasse-resolution procedure, the City can tailor its use to circumstances where policymakers determine it is most appropriate and useful. Several jurisdictions limit interest arbitration, for example, by allowing it only for mandatory subjects of bargaining, and/or only to resolve impasses during negotiation of labor contracts. Other matters, such as management rights and mid-contract negotiations, can be excluded from interest arbitration.

3. **Adjust the Factors that Guide the Arbitrator’s Decision Making—Focus on Financials and Service Levels.** Because arbitration is optional, the City can establish appropriate criteria to guide the arbitrator’s decision making. A number of jurisdictions either have refined or are considering refining the evidence and factors on which arbitrators must base their decisions. Some jurisdictions are also specifying the relative priority or weight that should be given to those factors. Jurisdictions are trending towards focusing the decision process on specific financial data, such as requiring arbitrators to compare the City’s cost to provide the total compensation package with the rate of increase or decrease in City revenues available to meet labor costs. Jurisdictions are also requiring arbitrators to consider the impact of contractual proposals on services to the public.

4. **Retain the Issue-by-Issue Format.** Staff found a rough consensus among our sources in favor of the issue-by-issue format.

5. **Continue to Use Conventional Labor Arbitrators.** Staff also found the weight of opinion favoring use of traditional labor arbitrators, although there is one significant exception. San Jose recently revised its arbitration procedure to require use of a retired judge.

6. **Encourage Voluntary Mediation Wherever Appropriate.** Most sources staff consulted favored use of voluntary mediation where the parties agree that it is appropriate and
useful under the particular circumstances. Mediation of this type does not require any particular Charter authorization.

7. Consider Opening Interest Arbitration to the Public. Finally, several jurisdictions that have amended their interest arbitration procedures have opened arbitration to the public.

cc: Tony Spitaleri, Firefighters’ Union Local 1319 and Fire Chiefs’ Association
Ron Watson, Police Managers’ Association
Wayne Benitez, Police Officers’ Association

Attachments:
- ATT A: Potential Options for Modifying Style of Arbitration (PDF)
- ATT B: Mediation and Arbitration Possible Uses and Interactions (DOC)
- ATT C: Arbitrator Selection (PDF)
- ATT D: Scope of Arbitration (DOC)
- ATT E: Factors, Including Weight, Priority and Burdens of Proof (DOC)
- ATT F: Other Possible Modifications (DOC)
- ATT G: Election Options (XLS)
- ATT H: Sample Arbitration Provisions pdf (PDF)
- ATT I: Academic Articles (PDF)

Prepared By: Elizabeth Egli, Administrative Assistant
Department Head: Sandra Blanch, Interim Director, Human Resources Department
City Manager Approval: James Keene, City Manager
# Potential Options for Modifying the Style of Arbitration

<table>
<thead>
<tr>
<th>Option</th>
<th>Analysis/Issues to consider</th>
</tr>
</thead>
</table>
| **Option A**: Modify arbitration provisions to "package final offer" format, choosing entire final offer of one party or the other | - "All or nothing" approach may encourage parties to reach negotiated settlement  
- "All or nothing" approach could create high risk for both parties, especially where parties take an extreme position or propose a large number of contract changes  
- May reward small or incremental change and preclude significant shifts  
- Risk that even small errors in a proposal would result in arbitrator choosing other package, even if flawed package is otherwise superior |
| **Option B**: Modify arbitration provisions to allow the arbitrator to exercise discretion, issue by issue, to select the proposal of either party or to craft an arbitrator’s alternative. | - May allow creative solutions that meet the interests of both parties  
- Loss of control and potential for unpredictable outcomes  
- May discourage parties from moving toward compromise |
| **Option C**: Modify arbitration provisions to allow "dual final offer" in which each party submits 2 final package offers and arbitrator picks one of four. | - Each party has opportunity to submit a package that is more or less aggressive in seeking changes to terms and conditions  
- Choice of 4 packages may give arbitrator greater flexibility to address real problems  
- Party may have the opportunity to send "signals" indicating importance of an issue between the 2 offers  
- Multiple options/packages may facilitate mediation  
- May increases uncertainty about likely outcome  
- Arbitrator will still end up picking entire proposal of one side  
Ex- Eugene OR
# Mediation and Arbitration: Possible Uses and Interactions

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
<th>Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal Arbitration</td>
<td>Arbitration through a formal trial-type proceeding. The arbitrator acts like a judge – taking evidence, deliberating away from the parties and issuing a formal written decision. Private or separate consultations with the parties are generally not allowed.</td>
<td>Anaheim, Gilroy, Napa, Palo Alto, Petaluma, Redwood City, Sacramento County, San Jose, Santa Cruz</td>
</tr>
<tr>
<td>Med/Arb</td>
<td>The arbitrator may act simultaneously as a mediator, including meeting privately with the parties to discuss and attempt to settle any or all issues. Mediation may occur any time before a final written decision is issued, including before, during or after the taking of evidence, or at all three phases.</td>
<td>San Francisco, Sacramento, Salinas, San Leandro</td>
</tr>
<tr>
<td>Arbitration with Mandatory Mediation</td>
<td>Mandatory mediation before formal interest arbitration begins. In contrast to Med/Arb, where a single person serves as both the mediator and arbitrator, here the 2 processes are completely separate. The mediator may not serve as the arbitrator. The parties are not bound to accept the results of the mediation. Ideally, the mediation phase either is time-limited (for example 14 days) or either party is authorized to conclude the mediation and invoke arbitration.</td>
<td></td>
</tr>
<tr>
<td>Arbitration with Voluntary Mediation</td>
<td>Parties mutually agree to mediate before moving into formal arbitration. The parties may design the mediation to suit their mutual wishes in the given situation. Specific Charter authorization is not typically required. The MMBA authorizes voluntary agreements to mediate and most local provisions do not preclude it.</td>
<td>Oakland</td>
</tr>
</tbody>
</table>
Arbitrator Selection

By far the standard selection process is to request a list of professional arbitrators from either a state or national agency, and the parties strike names until one name is left. In California, most public agencies use the State Mediation and Conciliation Service. Another well-known source is the American Arbitration Association.

San Francisco has the same process for arbitration selection as Palo Alto, but their experience differs in that the parties have been able to agree on the third, neutral arbitrator and have not had to strike names.

San Jose introduced a new approach in the California public sector by modifying their language to request the Santa Clara Superior Court appoint a retired judge.

Another option is to use a private firm offering arbitration services. The Judicial Arbitration and Mediation Services (JAMS) provides retired judges and attorneys for hire for alternative dispute resolution.
Welcome to the California
DEPARTMENT OF INDUSTRIAL RELATIONS

How to apply for a position as a state mediator

Eligible candidates must have four years of experience, one year of which must have been within the last five years, in the conciliation of labor disputes or work stoppages resulting from labor disputes, or in the negotiation, administration, and interpretation of collective bargaining agreements where these duties constituted the major element of the job. This experience shall have been comprehensive and shall have included major problems of management-labor relations such as wage levels, work hours, job security, health and welfare, working conditions, and related provisions of collective bargaining agreements. At least one year of this experience must have been in California. (One year of experience within the last five years performing the duties of an apprenticeship consultant, deputy labor commissioner, Fair Employment and Housing consultant, or an equivalent position in the Department of Industrial Relations involving comparable labor-management relationship duties may be substituted for one year of the required experience) and equivalent to graduation from college. (Additional qualifying experience may be substituted for the required education on a year-for-year basis). The pay range for state mediators is $6267 - $7619 per month, with a comprehensive benefit and retirement package.

For more information, or to be placed on a list of individuals to be notified of the next examination, contact SMCS at (510) 873-6465 or fax (510) 873-6475.

The California State Mediation and Conciliation Service, Department of Industrial Relations, is an affirmative action employer—equal opportunity to all regardless of race, color, creed, national origin, ancestry, sex, marital status, disability, religious or political affiliation, age or sexual orientation.
Welcome to the California
DEPARTMENT OF INDUSTRIAL RELATIONS

CSMCS arbitrator panel requirements

Section 001. Definitions.

b. Party. An employer, labor union, individual employee, or other bona fide party within the meaning of Labor Code section 65.
c. Panel. A list of names, mailing addresses and telephone numbers maintained by the Service, from which the Service provides lists of arbitrators upon request by parties.
d. Advocate. Any person who represents one or more employers, labor organizations, or individuals as an employee, attorney or consultant in matters of labor relations, including but not limited to the subjects of union representation and recognition, collective bargaining, arbitration, unfair labor practices, equal employment opportunity, personnel or civil service commission matters, and other areas generally recognized as constituting labor relations. This includes any individual representing employers or employees in individual cases or controversies involving workers' compensation, retirement benefits, occupational health and safety, or labor standards matters. This also includes a person who is directly associated with an advocate in a business or professional relationship as, for example, partners or employees of a law firm. Consultants engaged only in joint education or training or other non-adversarial activities will not be deemed advocates; nor will neutrals hired by employers solely to conduct investigations and make findings of fact in employment disputes.

Section 002. Arbitrator Panel.

a. As a service to the public, the Service shall maintain a panel or panels of arbitrators possessing demonstrated expertise in labor relations and broad experience in labor relations, collective bargaining, and dispute resolution. Such arbitrators shall not be employees, agents or contractors of the Service. The panel or panels shall not include any person who is currently an advocate as defined in section 001.
b. The Service may maintain one or more specialized panels of arbitrators possessing high levels of experience and expertise in particular types of cases, such as interest arbitration.
c. Lists of arbitrators from the panel or panels shall be available upon request to parties seeking arbitrators to hear labor and employment disputes, and such other types of disputes as may be determined by the Service. Panel arbitrators will be selected for placement on lists in a fair and equitable manner. Nothing in these regulations shall be construed as mandating that any party or parties select an arbitrator from such panel, or as prohibiting a party or parties from seeking arbitrators from any other source.

Section 003. Updated Panel.

a. The Service may update its arbitrator panel or panels as the need arises.
b. The Service may add qualified arbitrators to a panel, and may in its discretion defer such additions until it finds a need for additional listings. To be added to a panel, an arbitrator must have a minimum of ten (10) years' responsible, professional experience in labor relations.

Section 004. Removal from Panel.

The Service may remove from a panel any arbitrator who submits a written request for removal, or who is disqualified from further listing on the panel. Grounds for disqualification shall include:

a. repeated delinquency in submitting awards;
b. failure to provide requested information to the Service;
c. failure to comply with the Service's requirements and procedures, including but not limited to the Responsibilities of Panel Arbitrators (section 008);
d. a determination pursuant to a complaint investigation that the arbitrator engaged in unprofessional or unethical conduct or other misconduct in the role of arbitrator.
e. a determination that the arbitrator is not acceptable to the parties requesting lists, as indicated by records of listings by and selections maintained by the Service.

Section 005. Procedures for Removal from Panel.

An arbitrator shall be given thirty (30) days' written notice prior to proposed removal from a panel. Said notice shall specify the grounds for the proposed removal, and shall advise the arbitrator that he or she may, within the thirty (30) day period, file a written response disputing the grounds for removal and may submit information supporting continued listing. Upon the expiration of the thirty (30) day period, the Service shall issue and serve a written decision, and such decision shall be final.

Section 006. Particular Qualifications.

Parties may make joint requests for the Service to provide lists of arbitrators possessing experience in particular industries or sectors, possessing particular qualifications, or residing in the region of the dispute. The Service shall comply with such requests to the extent practicable.

Section 007. Publication on Web Site
a. The Service may publish on its web site the names, mailing addresses and telephone numbers of panel arbitrators, and may publish such other public information as it deems beneficial to parties seeking such information.

b. The Service may publish on its web site any arbitration awards submitted to it, unless a party-in-interest requests otherwise.

Section 008. Responsibilities of Panel Arbitrators.


b. An arbitrator selected from a Service list, and notified of such selection by a party other than the Service, shall be responsible for notifying the Service of the selection.

c. An arbitrator selected from a Service list shall submit to the Service a copy of the arbitration award for that case. Except in the case of a public sector interest arbitration award, the arbitrator may redact information as to the identity of the participants in the dispute.

d. No person shall serve as an arbitrator in any proceeding in which he or she has any financial or personal stake in the outcome.

e. Prior to accepting any appointment, an arbitrator must disclose any circumstances likely to create an appearance of bias or which might disqualify him or her as an impartial arbitrator for that case.

f. The Service shall establish three regions within the state (Northern, Central and Southern), and shall maintain a separate panel of arbitrators for each region. Arbitrators may elect to be listed on one or more of these regional panels. If the arbitrator elects to be listed in a region other than the one in which he or she resides, and is chosen from a Service list for a case in that region, he or she may charge travel expenses only from an address in that region. In the event the arbitrator has no address in that region, the address of the State office building in San Francisco, Fresno or Los Angeles may be used to calculate travel billing for Northern, Central and Southern region cases, respectively. However, in the event the arbitrator’s office outside the region is closer than the state office building within the region of the dispute, the arbitrator should bill from his or her office.

g. An award must be issued within sixty (60) days after the close of the hearing, or sixty (60) days after receipt of transcripts and submission of briefs, if applicable, unless an earlier deadline is required by the applicable collective bargaining agreement, or an extension is agreed to by the parties.

Section 009: Beginning July 1, 2010, each arbitrator will pay one hundred and fifty dollars ($150.00) per fiscal year (July 1 to June 30) to join and to remain listed on SMCS’s statewide panel of private arbitrators. An arbitrator will be removed from the panel if payment of the annual fee is not made within thirty (30) days of notice that it is past due.

⇒ Click here to make a payment to SMCS

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http://www.dir.ca.gov/csmcs/arb/ArbRequirementsDraft.htm 6/1/2011
Qualification Criteria for Admittance to the AAA National Roster of Arbitrators

The American Arbitration Association (AAA) is the nation's leading provider of alternative dispute resolution services. Openings on our Regional Roster of Neutrals are extremely limited, based primarily on caseload needs and user preferences. Consequently, even candidates with strong credentials may not be added to our roster.

Applicants for membership on the AAA National Roster of Arbitrators must meet or exceed the following requirements:

1. QUALIFICATIONS
   a. Minimum of 10 years of senior-level business or professional experience or legal practice.
   b. Educational degree(s) and/or professional license(s) appropriate to your field of expertise.
   c. Honors, awards and citations indicating leadership in your field.
   d. Training or experience in arbitration and/or other forms of dispute resolution.
   e. Membership in a professional association(s).
   f. Other relevant experience or accomplishments (e.g. published articles).

2. NEUTRALITY
   a. Freedom from bias and prejudice.
   b. Ability to evaluate and apply legal, business or trade principles.

3. JUDICIAL CAPACITY
   a. Ability to manage the hearing process.
   b. Thorough and impartial evaluation of testimony and other evidence.

4. REPUTATION
   a. Held in the highest regard by peers for integrity, fairness and good judgment.
   b. Dedicated to upholding the AAA Code of Ethics for Arbitrators and/or Standards of Conduct for Mediators.

5. COMMITMENT TO ADR PROCESS
   a. Willingness to devote time and effort when selected to serve.
   b. Willingness to support efforts of the AAA.
   c. Willingness to successfully complete training under the guidelines of the Commercial Arbitration Development Program.
6. LETTERS OF RECOMMENDATION*

When requested by the AAA to do so, furnish letters from at least three active professionals in your field, but outside of any firms or professional associations in which you are employed or on which you currently serve as an officer, director or trustee. Each letter must address the following:

a. Nature and duration of the relationship
b. Why the applicant would be qualified to serve

Recommended sources for letters:

1. Current AAA Panel member
2. Current or former state or federal judge**
3. An attorney who served as your opposing counsel**
4. Former employer or client

* Letters of recommendation must be sent directly to the AAA Vice President from the writers, in sealed envelopes.

** Suggested for attorney applicants.

7. PERSONAL LETTER

Submit a letter to your local AAA office explaining why you feel you would like to be included on AAA's Roster of Arbitrators along with a current copy of your personal resume or CV. Your letter should provide a detailed description of your willingness to commit yourself to serving and representing the Association. Also indicate in the letter whether or not you are currently a neutral with any other ADR agencies. Please feel free to contact your local AAA office should you have any questions.
About JAMS

Fast Facts

JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial.

Founded
1979

The Experts
More than 250 full-time neutrals, including retired judges and attorneys with proven track records. 165 employee associates.

ADR Options
Facilitative and evaluative mediation, binding arbitration, neutral case evaluation, settlement conference, mini trial, summary jury trial, neutral expert fact finding, special master, discovery referee, class action settlement adjudication, project neutral and dispute review board services.

Cases Handled
JAMS panelists primarily resolve multi-party, complex cases in virtually all areas of the law. JAMS handles an average of more than 10,000 cases per year in hearing locations throughout the world.

Resolution Rate
Based on past results, JAMS takes pride that almost all of the cases mediated, even the most complex ones, are successfully resolved.

Case Types

Educational Programs and MCLEs
JAMS offers select seminars, workshops and external educational programs that aid organizations and individuals in resolving their own disputes. JAMS also provides training in conflict prevention and dispute resolution.

JAMS conducts hundreds of complimentary ADR workshops and MCLE programs each year. Each program is tailored to meet the needs and experience level of the specific audience, and MCLE credit is provided where applicable.

International Alliances
In May 2009, JAMS and ADR Center in Italy announced an agreement to form what is now known as JAMS International to provide mediation and arbitration of cross-border disputes and training services worldwide. JAMS International is headquartered

http://www.jamsadr.com/aboutus_overview/
in New York and Milan with additional hearing locations in Geneva, London, Rome and Brussels. JAMS plans to establish a network of international centers to provide the same high quality services for which JAMS has become known.

In March 2007, JAMS announced a strategic alliance with the Hong Kong International Arbitration Centre (HKIAC). The mission of the alliance is to promote more effective resolution of international business disputes through arbitration and mediation in the United States and Asia. JAMS and HKIAC coordinate on the administration of arbitration and mediation cases and both organizations are jointly promoting ADR.

Community Service
In 2002, JAMS established the JAMS Foundation and the JAMS Society as a way of giving back to the local, national, and international communities, whose goodwill and loyalty have been instrumental in our success. The JAMS Foundation, funded entirely by generous contributions from JAMS neutrals and associates, provides grants for conflict resolution initiatives with national and international impact. The JAMS Foundation has provided more than $3.3 million in grant funding since its inception.

The JAMS Foundation established the Weinstein International Fellowship Program in 2008 to provide opportunities for individuals from outside the United States to visit the U.S. to learn more about dispute resolution processes and practices and to pursue a project of their own design that serves to advance the resolution of disputes in their home countries. The Foundation also established the annual Warren Knight Award and provides a $25,000 grant to an organization that promotes dispute prevention and conflict resolution.

The JAMS Society was created to recognize and support volunteer opportunities and community involvement for JAMS Associates at a local, "hands-on" level. All associates are encouraged to become members of their local Society to collaborate on outreach programs or to work individually on a project of their choice.

Headquarters
1920 Main Street • Suite 300 • Irvine, CA 92614 • Telephone 949.224.1810

Locations
Resolution Centers nationwide including Atlanta, Boston, Chicago, Dallas, Denver, Inland Empire, Las Vegas, Los Angeles, Minneapolis, New York, Orange, Philadelphia, Sacramento, San Diego, San Francisco, San Jose, Santa Monica, Santa Rosa, Seattle, Walnut Creek and Washington, DC.
Scope of Arbitration/Exclusions

A local agency may provide for interest arbitration only with respect to particular bargaining impasses. A local agency may also exclude certain topics or matters from interest arbitration.

Staff research identified the following limitations or exclusions that have been either used or discussed by practitioners and academics:

- **MOUs Only.** Limit interest arbitration to impasses in the negotiation of collective bargaining agreements. During the pendency of a closed contract, proposed changes are handled through the standard MMBA process: meet and confer, and where impasse occurs, the employer may unilaterally implement its proposal.

- **Mandatory Subjects Only.** Limit interest arbitration to mandatory subjects of bargaining. Exclude from interest arbitration all management rights and all permissive subjects of bargaining. Exclude these subjects even where the employer agrees to negotiate and enter into a contract provision covering a permissive subject. For example, this would make explicit that topics such as layoffs and citywide staffing levels may not be submitted to interest arbitration or ruled on by an arbitrator.

- **No Charter Amendments.** Clarify that interest arbitration may never be used to resolve an impasse associated with the City Council’s decision to place a Charter amendment before the voters.

- **No Vested Benefits.** Exclude any benefit that either vests or is capable of becoming vested.

- **Economic Provisions Only.** Tailor interest arbitration to apply only to economic provisions. Work rules would be handled through the standard MMBA process.

- **Other Potential Exclusions.** Exclude particular topics, such as:

  1. managerial, operational or staffing decisions
  2. rules or policies
  3. use of part-time employees
  4. scheduling
  5. retroactivity
Factors,
Including Weight, Priority and Burdens of Proof

Several jurisdictions require arbitrators to base their decisions on specific enumerated factors. Enumeration of factors—and priority or weight to be given to those factors—permits the electorate to guide the process in light of its overall policy goals. Language specifying burdens of proof can also be used to guide decision making in light of the jurisdiction’s policy goals.

The following is a list of potential decision factors either in use or in discussion as possible guidance for arbitrators, grouped by subject matter. One strong trend is to require arbitrators to consider and base their decisions on specific factors reflecting the jurisdiction’s ability to pay.

A. Factors relating to the City’s financial condition

1. Financial condition as measured by specific official accounting/financial reports

2. The financial resources of the City and ability to meet the costs of the contract and each individual modified/new economic item

3. Revenue projections

4. Limitations on the amount and use of revenues and expenditures

5. The power of the City to levy taxes, impose fees and raise revenues

6. The City’s budget reserves, provided that any award shall not use one-time funding for ongoing expenditures and shall maintain levels of reserves provided by City policy

7. Actuarial analysis of long-term costs of any proposal involving an unfunded liability as well as of the City’s existing long-term debt

8. Other demands on the City’s resources

B. Factors relating to the public’s interest and welfare

1. Impact on service levels within the particular service area

2. Impact on the city’s ability to provide services in other functional areas
C. **Factors making appropriate comparisons to other employee groups**

1. Cost of Living Increases measured by the appropriate Consumer Price Index in the San Francisco-Oakland-San Jose area or other authoritative source(s)

2. Internal comparables— wages, hours, benefits and terms and conditions of employment of other employees working for the city

3. External comparables—wages, hours, benefits and terms and conditions of employment of other employees performing similar services in other public agencies

4. Private sector comparables

D. **Factors requiring consideration of total compensation, including increases in the employer’s cost of maintaining existing benefit levels**

1. The overall compensation presently received by the employees – including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received – and including any increase or decrease in the employer’s cost to maintain and provide those benefits, regardless of whether such increases/decreases are specifically bargained for

2. Immediate and ongoing costs associated with each individual modified/new item within the contract

E. **Other factors**

1. Adherence to the City’s total compensation policies

2. Extent to which award effectuates the City’s stated goals and priorities

3. Impact on the city’s ability to efficiently provide public services

4. Best practices in the provision of services to the public
Other Possible Modifications

A. Timelines.

Staff reviewed a number of arbitration or bargaining provisions that contain specific timelines for action by the parties and progression through the steps of contract negotiation and impasse resolution. Staff also discussed time requirements with several practitioners.

Timelines may be used in conjunction with interest arbitration or, in jurisdictions without interest arbitration, timelines may be used to mandate inception and conclusion of contract negotiations. A local agency may set time requirements for any or all of the following:

- notice of intent to negotiate successor contract
- exchange of initial proposals
- selection of arbitrator
- impasse declaration
- final pre-arbitration offers
- final post-arbitration offers
- arbitration award
- final adoption of an MOA

Typically, timelines require negotiations to begin in the middle of the fiscal year and conclude before or concurrently with consideration of the annual budget.

Time requirements may have a number of positive impacts on the negotiation and arbitration process. Timelines prevent the negotiation and impasse resolution process from expanding over a significant period of time, such as months or even years. They allow both the employer and labor representatives to plan for both the inception and conclusion of negotiations on a predictable schedule. If adopted in conjunction with language requiring consideration of the agency’s fiscal circumstances, timelines can be used to focus the parties and the arbitrator on current fiscal data. In addition, by requiring the contracts to be approved prior to or during the budget, timelines enhance the employer’s ability to accurately identify and budget for future labor costs. Finally, by channeling all bargaining units into a common negotiation schedule, timelines may assist the local agency to pursue common provisions across units. This is sometimes called “pattern bargaining,” and can be beneficial to a local agency in areas where equity or uniformity is a desirable goal of the labor program.

Time requirements may also have disadvantages. Chief among them is the drain on resources when multiple bargaining tables must be staffed simultaneously. Jurisdictions that use timelines typically assemble bargaining teams from a broad group of staff, and then use a strategy of coordinating efforts through regular all-team meetings and communications.
B. Public Access

Several jurisdictions that have modified interest arbitration have mandated that arbitration proceedings be open to the public. A local agency could open the entire arbitration process to the public or require particular parts of the proceedings to be public. For example, in a Med/Arb system, the agency may require public access to the formal arbitration proceedings, including taking of evidence and submission of final offers. The agency may allow mediation to be closed to the public.

C. Standards of Judicial Review

If the Council modifies interest arbitration, an amended Charter provision should provide for judicial review by Writ of Mandate (Code of Civ. Proc. sections 1085, 1094.5), rather than review under the California Arbitration Act (Code of Civ. Proc. Section 1290 et seq.) The writ standard allows for court review to correct an abuse of discretion, which could include failure to consider required evidence or to properly apply the factors and priority or weight as mandated in the arbitration provision. The Arbitration Act, by contrast, provides for extremely narrow review to correct for corruption, fraud or undue influence.
**COUNTY OF SANTA CLARA REGISTRAR OF VOTERS**  
**ATTACHMENT G**  
**ESTIMATED COST OF ELECTIONS**  
**FOR THE CITY OF PALO ALTO**  
c/o Donna Grider; donna.grider@cityofpaloalto.org (650) 329-2571

**DATA**

Registration as of 5/12/11  
35,699  
Projected Registration (110% of actual registration)  
39,269

<table>
<thead>
<tr>
<th><strong>COMPUTATION</strong></th>
<th><strong>GENERAL ELECTION</strong></th>
<th><strong>ALL-MAIL BALLOT</strong></th>
<th><strong>STAND-ALONE</strong></th>
<th><strong>PRIMARY ELECTION</strong></th>
<th><strong>GENERAL ELECTION</strong></th>
</tr>
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<tr>
<td><strong>November 8, 2011</strong></td>
<td><strong>(avail. dates below)</strong></td>
<td><strong>April 10, 2012</strong></td>
<td><strong>June 5, 2012</strong></td>
<td><strong>Nov 6, 2012</strong></td>
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<tr>
<td><strong>(a) Base Charge</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
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<tr>
<td>City Council</td>
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<td>$0.45</td>
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<td>Measure</td>
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<td>$490,861</td>
<td>$0.30</td>
<td>$11,781</td>
<td>$0.30</td>
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<td><strong>(b) Absentee Charge</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
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<tr>
<td>Measure</td>
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<td>$29,452</td>
<td>$0.25</td>
<td>$9,817</td>
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<tr>
<td><strong>© Shared Printing Costs</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
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<tr>
<td>City Council</td>
<td>$0.50</td>
<td>$19,634</td>
<td>$0.25</td>
<td>$9,817</td>
<td></td>
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<tr>
<td>Measure</td>
<td>$0.75</td>
<td>$29,452</td>
<td>$0.25</td>
<td>$9,817</td>
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<td><strong>Total Est Cost of Election</strong></td>
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<td>$80,501</td>
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<td><strong>(d) Est Cost of Cand Statements</strong></td>
<td>$2,107</td>
<td>$16,855</td>
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<tr>
<td><strong>(e) Est Cost of Measure Pages</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
<td><strong>Total Cost</strong></td>
<td><strong>Unit Cost</strong></td>
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<tr>
<td>County estimated costs to add a second ballot measure:</td>
<td>$6,524</td>
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<td>$6,524</td>
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<td><strong>Est Costs of Election and Measure Pages due to County</strong></td>
<td>$71,800</td>
<td>$366,278</td>
<td>$562,622</td>
<td>$162,080</td>
<td>$97,356</td>
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<tr>
<td>Add City costs for Legal Noticing</td>
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<td>$50,000</td>
<td>$50,000</td>
<td>$50,000</td>
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<tr>
<td><strong>Total Estimated Costs</strong></td>
<td><strong>$121,800</strong></td>
<td><strong>$416,278</strong></td>
<td><strong>$612,622</strong></td>
<td><strong>$212,080</strong></td>
<td><strong>$147,356</strong></td>
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**ELECTION TIMELINES**

<table>
<thead>
<tr>
<th><strong>Language Deadline</strong></th>
<th><strong>Language Deadline</strong></th>
<th><strong>Language Deadline</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>8/1/11</td>
<td>5/16/11</td>
<td>1/13/12</td>
</tr>
<tr>
<td>5/16/11</td>
<td>8/30/11</td>
<td>3/9/12</td>
</tr>
<tr>
<td>12/5/11</td>
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<td>8/10/12</td>
</tr>
<tr>
<td>2/6/12</td>
<td>5/8/12</td>
<td></td>
</tr>
<tr>
<td>5/21/12</td>
<td>8/28/12</td>
<td></td>
</tr>
</tbody>
</table>

Pursuant to Elections Code section 10002, the jurisdiction is required to reimburse the County in full costs of the elections services for which it is inquiring. The full costs of the election will be available 60 days after the election. The costs reflected above are ESTIMATES ONLY and may change following the final calculation of the cost of the election.

Prepared by: Carolina Gomez  
Accountant III  
(408) 282-3012  
8/10/12

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6/2/2011 6:16 PM
City of Palo Alto
Charter Provision on Binding Interest Arbitration
(Palo Alto Municipal Code)

Article V. Compulsory Arbitration for Fire and Police Department Employee Disputes

Sec. 1. Declaration of policy.

It is hereby declared to be the policy of the city of Palo Alto that strikes by firefighters and police officers are not in the public interest and should be prohibited, and that a method should be adopted for peacefully and equitably resolving disputes that might otherwise lead to such strikes.

Sec. 2. Prohibition against strikes.

If any firefighter or peace officer employed by the city of Palo Alto wilfully engages in a strike against the city, said employee shall be dismissed from his or her employment and may not be reinstated or returned to city employment except as a new employee. No officer, board, council or commission shall have the power to grant amnesty to any employee charged with engaging in a strike against the city.

Sec. 3. Obligation to negotiate in good faith.

The city, through its duly authorized representatives, shall negotiate in good faith with the recognized fire and police department employee organizations on all matters relating to the wages, hours, and other terms and conditions of city employment, including the establishment of procedures for the resolution of grievances submitted by either employee organization over the interpretation or application of any negotiated agreement including a provision for binding arbitration of those grievances. Unless and until agreement is reached through negotiations between the city and the recognized employee organization for the fire or police department or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or condition of employment for the members of the fire department or police department bargaining unit shall be eliminated or changed.

Sec. 4. Impasse resolution procedures.

All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the city and either the fire or police department employee organization shall be submitted to a three-member board of arbitrators upon the declaration of an impasse by the city or by the recognized employee organization involved in the dispute.

Representatives designated by the city and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the board of arbitrators within three days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the
arbitration board shall be selected by agreement between the two arbitrators selected by the city and the employee organization, and shall serve as the neutral arbitrator and chairman of the board. In the event that the arbitrators selected by the city and the employee organization cannot agree upon the selection of the third arbitrator within ten days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the city and the employee organization cannot agree within three days after receipt of such list on one of seven to act as the third arbitrator, they shall alternately strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and chairman of the arbitration board.

Any arbitration convened pursuant to this article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure.

At the conclusion of the arbitration hearings, the arbitration board shall direct each of the parties to submit, within such time limit as the board may establish, a last offer of settlement on each of the issues in dispute. The arbitration board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the city and its ability to meet the cost of the award.

After reaching a decision, the arbitration board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the arbitration board shall not be publicly disclosed and shall not be binding until ten days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the arbitration board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the arbitration board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The city and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

The expense of any arbitration convened pursuant to this article, including the fee for the services of the chairman of the arbitration board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(Added by amendment filed with the city clerk, July 17, 1978)
That Section 1111 of the City Charter be amended to read as follows:

SECTION 1111. Compulsory Arbitration for Fire and Police Department Employee Disputes.

(a) It is hereby declared to be the policy of the City of San Jose that strikes by firefighting and peace officers are unlawful in the state of California and not in the public interest and should be prohibited, and that a method should be adopted for peacefully and equitably resolving disputes that might otherwise lead to such strikes.

If any firefighter or peace officer employed by the City of San Jose willfully engages in a strike against the City, said employee shall be dismissed from his or her employment and may not be reinstated or returned to City employment except as a new employee. No officer, board, council or commission shall have the power to grant amnesty to any employee charged with engaging in a strike against the City.

(b) The City, through its duly authorized representatives, shall negotiate in good faith with the recognized fire and police department employee organizations on all matters relating to the wages, hours, and other terms and conditions of City employment, including the establishment of procedures for the resolution of grievances submitted by either employee organization over the interpretation or application of any negotiated agreement including a provision for binding arbitration of those grievances. Unless and until agreement is reached through negotiations between the City and the recognized employee organization for the fire or police department or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or condition of employment for the members of the fire department or police department bargaining unit shall be eliminated or changed.

(c) All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and either the fire or police department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute. All issues concerning the scope of the Arbitration Board's authority, jurisdiction or powers shall, upon the request of either party, be resolved by petition to the Superior Court.

(d) Representatives designated by the City and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third
member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City and the employee organization cannot agree within three (3) days after receipt of such list on one of seven (7) to act as the third arbitrator, they shall alternatively strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and chairman of the Arbitration Board. the Superior Court of the County of Santa Clara to appoint an arbitrator who shall be a retired judge of the Superior Court.

Any arbitration convened pursuant to this section shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure to the extent that such procedures do not conflict with this Charter Section. Unless otherwise mandated by state or federal law, all arbitration hearings shall be open to the public and all documents submitted in arbitration shall be public records. Notwithstanding any other provision of this Charter to the contrary, the authority, jurisdiction and powers of the Board of Arbitrators are limited by the provisions of this Section.

(e) At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds, by the preponderance of the evidence submitted to the Arbitration Board satisfies section (f) below, is in the best interest and promotes the welfare of the public, and most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award.

(f) In all arbitration proceedings conducted pursuant to this section, the primary factors in decisions regarding compensation shall be the City's financial condition and, in addition, its ability to pay for employee compensation from on-going revenues without reducing City services. No arbitration award may be issued unless a majority of the Arbitration Board determines, based upon a fair and thorough review of the City's financial condition and a cost analysis of the parties' last offers, that the City can meet the cost of the award from on-going revenues without reducing City services. The arbitrators shall also consider and give substantial weight to the rate of increase or decrease of compensation approved by the City Council for other bargaining units.
“Compensation” shall mean all costs to the City, whether new or ongoing, for salary paid and benefits provided to employees, including but not limited to wages, special pay, premium pay, incentive pay, pension, retiree medical coverage, employee medical and dental coverage, other insurance provided by the City, vacation, holidays, and other paid time off.

(g) Additionally, the Board of Arbitrators shall not render a decision, or issue an award, that:

1. increases the projected cost of compensation for the bargaining units at a rate that exceeds the rate of increase in revenues from the sales tax, property tax, utility tax and telephone tax averaged over the prior five fiscal years; or
2. retroactively increases or decreases compensation, including, but not limited to, enhancements to pension and retiree health benefit for service already rendered, but excluding base wages; or
3. creates a new or additional unfunded liability for which the City would be obligated to pay; or
4. deprives or interferes with the discretion of the Police Chief or Fire Chief to make managerial, operational or staffing decisions, rules, orders and policies in the interest of the effective and efficient provision of police and fire services to the public.

(h) Compliance with the provisions of this Section shall be mandatory and enforceable pursuant to section 1085 of the Code of Civil Procedure; failure to comply with these provisions shall also constitute an act in excess of jurisdiction.

(i) After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The City and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

(j) The expenses of any arbitration convened pursuant to this section, including the fee for the services of the Chairman of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(k) This Section shall be effective immediately upon passage by the voters, and shall apply to any arbitration in which hearings commence after November 2, 2010.
(l) The voters declare that the provisions of this Section are not severable, and none would have been enacted without the others. Should any portion of this Section be enjoined or declared invalid, all provisions shall be deemed invalid and inoperative and there shall be no compulsory arbitration for fire and police department employee disputes.
Section 450: BINDING ARBITRATION.

(a) Declaration of Policy. It is the policy of the City of San Leandro that strikes by its firefighters and police officers pose an imminent threat to public health and safety and should be prohibited, and that alternate methods should be adopted for peacefully and equitably resolving disputes that might otherwise lead to such strikes.

(b) Prohibition Against Strikes. No City police officer or firefighter employee, employee union, association or organization shall strike, slow down, sickout or engage in such concerted economic activity against the City. Disputes unresolved by negotiations shall be resolved by the procedure set forth herein. Any such employee who fails to report for work without good cause during negotiations or who aids, abets or encourages strikes, slow downs or sickouts against the City during such time shall be subject to disciplinary action, including, but not limited to, termination from City employment, subject to the provisions of this Charter, the City's Personnel Rules and Regulations and lawful procedures.

(c) Obligation to Negotiate in Good Faith. The City, through its duly authorized representatives, shall negotiate in good faith with recognized fire and police employee organizations on wages, hours, and other terms and conditions of employment, including procedures for the resolution of grievances submitted by the employee organization over the interpretation or application of any negotiated agreement, including provisions for binding arbitration of grievances. Unless and until agreement is reached through negotiations between the City and the recognized employee organization or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or condition of employment for those employees shall be eliminated or changed.

(d) Both parties shall exchange their written demands at least 180 calendar days before the expiration of the then current agreement or arbitration award. Collective negotiations shall commence at least 150 calendar days before the expiration of the then current agreement or arbitration award.

(e) Agreements reached between City representatives and the representatives of the recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection. All phases of negotiations, mediation and arbitration including the final binding decision of the mediator/arbitrator shall be completed at least 25 calendar days before the expiration of the then current agreement or arbitration award.

(f) Both parties shall select and schedule a person to act as both mediator and arbitrator (hereafter "arbitrator") at least 200 calendar days before the expiration of the then current agreement or arbitration award. If they are unable to agree upon an arbitrator, they shall select such person from a list of seven names to be provided by an impartial third-party arbitration service mutually acceptable to the parties. The parties shall provide the arbitration service with sufficient notice to insure receipt of the list at least 190 calendar days before the expiration of the then current agreement or arbitration award. If at least 180 calendar days before the expiration of the then current agreement or arbitration award the parties still cannot agree upon an arbitrator, they shall immediately alternately strike names from the list, the choice of the first strike to be determined by lot. The last remaining unstruck name shall be selected and scheduled as arbitrator.

(g) If 90 calendar days before the expiration of the current agreement or arbitration award no agreement can be reached, or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to the employee organization, the parties shall commence mediation.

(h) If no agreement between the parties has been reached within 14 calendar days after the start of mediation, the arbitrator shall thereupon commence arbitration proceedings to deal with the issues still in dispute. Each
party shall put in writing its last best offer on each of the issues still in dispute within 14 calendar days after the start of arbitration proceedings, and these offers shall immediately be made public. The arbitrator shall choose one of the parties’ last best offer for each such issue still in dispute and shall have no power to modify or compromise the last best offers of either party. The arbitrator shall hear the evidence presented and consider all factors relevant to the issues from the standpoint of both employer and effected employees, including the interests and welfare of the public and the financial ability of the City to meet those costs. If one of the parties fails to submit its last best offer within the above allotted time, then the arbitrator shall be obligated to make an award incorporating the terms and conditions of the last best offer made by the party that has submitted its offer within the above allotted times. The decision of the arbitrator shall be final and binding on all parties.

(i) The costs of mediation and arbitration, including the scheduling of the arbitrator, shall be borne equally by all parties. Mediation and arbitration hearings shall be conducted within the City and closed to the public, unless otherwise mutually agreed upon by the parties with the concurrence of the arbitrator.

(j) The provisions of this Section shall not be construed as making any of the provisions of Section 923 of the Labor Code of the State of California applicable to City employees. The provisions of this Section pertaining to arbitration shall be construed as an “arbitration agreement” for the purpose of making applicable to the extent not in conflict herewith the provisions of Chapter 1 (commencing with Section 1280), Title IX, Part 3 of the Code of Civil Procedure of the State of California.

(k) The time limits set forth above may be waived by the mutual, written agreement of the parties and the arbitrator.
CITY OF SALINAS

Section 25-40

Impasse procedure.

The impasse procedure shall only be utilized when all reasonable attempts to reach an agreement through negotiations have been unsuccessful.

The parties may mutually agree to mediation of the impasse. If the parties agree to mediation but are unable to agree on a mediator, the parties shall request the services of the State Conciliation Service, or alternate agency, to provide a mediator. Cost will be borne equally between the city and the recognized employee organization. The mediator or mediator agency shall make no public recommendation nor take any public position concerning the issues, but shall work directly with the parties involved. If mediation is agreed upon but unsuccessful, either party may initiate the completion of the impasse procedure by filing with the other party affected a written request for an impasse meeting, together with a written statement of its position on all disputed issues. An impasse meeting shall then be scheduled by the designated council representative before the city council.

The purpose of such impasse meeting is twofold: (1) to permit a review of the positions of each party in a final effort to reach agreement from the disputed issues; and (2) if agreement is not concluded, the mediator, if any, shall prepare an advisory report with his/her recommendations for an agreement. Either party may then institute request for a meeting before the city council which shall be public. The city council decision and determination shall be final.

CITY OF STOCKTON

2.74.180 Impasse procedures.

SECTION 1607. Impartial Mediation for Employee Disputes.

(d) Impasse Resolution Procedures.

(1) All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations regarding a memorandum of understanding (MOU) between the City and a Fire Department employee organization should be submitted to impartial mediation upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.

(2) Within three (3) days after either party has notified the other, in writing, that it desires to proceed to mediation, representatives designated by the City and representatives of the recognized employee organization involved in the dispute shall request cost free mediation through the California State Mediation and Conciliation or other mutually agreeable organization. The parties may mutually agree on a private mediator or other impasse resolution process.
(3) Any mediation proceeding convened pursuant to this Article shall be conducted in conformance with State law. The parties may also adopt such other procedures that are designed to encourage an agreement between the parties, expedite the mediation process, or reduce the costs of the mediation.

(4) The cost of any mediation convened pursuant to this Article, including the fee for the services of the mediator, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

CITY OF SAN FRANCISCO

A8.409-4 - IMPASSE RESOLUTION PROCEDURES

(a) Subject to Section A8.409-4(g), disputes pertaining to wages, hours, benefits or other terms and conditions of employment which remain unresolved after good faith bargaining between the City and County of San Francisco, on behalf of its departments, boards and commissions, and a recognized employee organization representing classifications of employees covered under this part shall be submitted to a three-member Mediation/Arbitration Board ("the Board") upon the declaration of an impasse either by the authorized representative of the City and County of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute; provided, however, that the arbitration procedures set forth in this part shall not be available to any employee organization that engages in a strike unless the parties mutually agree to engage in arbitration under this Section. Should any employee organization engage in a strike either during or after the completion of negotiations and impasse procedures, the arbitration procedure shall cease immediately and no further impasse resolution procedures shall be required.

(b) Not later than January 20 of any year in which bargaining on an MOU takes place, representatives designated by the City and County of San Francisco and representatives of the recognized employee organization involved in bargaining pursuant to this part shall each select and appoint one person to the Board. The third member of the Board shall be selected by agreement between the City and County of San Francisco and the recognized employee organization, and shall serve as the neutral chairperson of the Board.

(c) Any proceeding convened pursuant to this Section shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure. The Board may hold public hearings, receive evidence from the parties and, at the request of either party, cause a transcript of the proceedings to be prepared. The Board, in the exercise of its discretion, may meet privately with the parties to mediate or mediate/arbitrate the dispute.
Board may also adopt other procedures designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the cost of the arbitration process.

In the event no agreement is reached prior to the conclusion of the arbitration hearings, the Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the remaining issues in dispute. The Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds by a preponderance of the evidence presented during the arbitration most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment, including, but not limited to: changes in the average consumer price index for goods and services; the wages, hours, benefits and terms and conditions of employment of employees performing similar services; the wages, hours, benefits and terms and conditions of employment of other employees in the City and County of San Francisco; health and safety of employees; the financial resources of the City and County of San Francisco; and a joint report to be issued annually on the City's financial condition for the next three fiscal years from the Controller, the Mayor's budget analyst, and the budget analyst for the Board of Supervisors.

Other demands on the City and County's resources including limitations on the amount and use of revenues and expenditures, revenue projections, the power to levy taxes and raise revenue by assessments or other means, budgetary reserves, and the City's ability to meet the costs of the decision of the Arbitration Board. In addition, the Board shall issue written findings on each and every one of the above factors as they may be applicable to each and every issue determined in the award. Compliance with the above provisions shall be mandatory.

After reaching a decision, the Board shall serve by certified mail or by hand delivery a true copy of its decision to the parties. The decision and findings of the Arbitration Board shall not be publicly disclosed until ten (10) days after it is delivered to the parties. During that ten (10) day period the parties shall meet privately, attempt to resolve their differences, and by mutual agreement amend or modify the decision and findings of the Arbitration Board. At the conclusion of the ten (10) day period which may be extended by mutual agreement between the parties, the decision and findings of the Arbitration Board, as it may be modified or amended by the parties, shall be publicly disclosed for a period of fourteen (14) days after which time the decision shall be final and binding. Except as otherwise provided by this part, the arbitration decision shall supersede any and all other relevant formulas, procedures and provisions of this Charter relating to wages, hours, benefits and terms and conditions of employment, and it shall be final and binding on the parties to the dispute. However, the decision of the Board may be judicially challenged by either party.

Thereafter, the City and County of San Francisco, its designated officers, employees and representatives and the recognized employees organization involved in the dispute shall take whatever action necessary to carry out and effectuate the final decision.

The expenses of any proceedings convened pursuant to this part, including the fees for the services of the Chairperson of the Board, the costs of preparation of the transcript of the proceedings and other costs related to the conduct of the proceedings, as determined by the Board, shall be borne equally by the parties. All other expenses which the parties may incur are to be borne by the party incurring such expenses.

The impasse resolution procedures set forth in Section A8 409-4, or any other provision of the Charter, ordinance or state law shall not apply to any rule, policy, procedure, order or practice which relates or pertains to the purpose, goals or requirements of a consent decree, or which is necessary to ensure compliance with Federal, State or local laws, ordinances or regulations. In the event the City acts on a matter it has determined relates to or pertains to a
SEC. 1004. Prohibitions.

Sec. 4. Impasse Resolution Procedure. All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and either the fire or police department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.
Representatives designated by the City and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City and the employee organization cannot agree within three (3) days after receipt of such list on one of seven (7) to act as the third arbitrator, they shall alternately strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and Chairman of the Arbitration Board.

Any arbitration convened pursuant to this article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure.

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award.

After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten day period, the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The City and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

The expense of any arbitration convened pursuant to this article, including the fee for the services of the Chairman of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses. (Section (C) Charter Amendment November 8, 1988.)
CITY OF SANTA CRUZ

SECTION 1119. COMPULSORY ARBITRATION FOR FIRE DEPARTMENT EMPLOYEE DISPUTES.

The City, through its duly authorized representatives, shall negotiate in good faith with the recognized fire department employee organization on all matters relating to the wages, hours, and other terms and conditions of City employment, including the establishment of procedures for the resolution of grievances submitted by either employee organization over the interpretation or application of any negotiated agreement including a provision for binding arbitration of those grievances. Unless and until agreement is reached through negotiations between the City and the recognized employee organization for the fire department or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or condition of employment for the members of the fire department bargaining unit shall be eliminated or changed.

All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and the fire department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.

Representatives designated by the City and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City and the employee organization cannot agree within three (3) days after receipt of such lists on one of seven (7) to act as the third arbitrator, they shall alternatively strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and chairman of the Arbitration Board.

Any arbitration convened pursuant to this Section shall be conducted in conformance with, subject, and governed by Title 9 of Part 3 of the California Code of Civil Procedure.

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in average consumer price index for goods and
services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award.

After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten-day period, which may be extended by mutual agreement between parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be disclosed and shall be binding upon the parties. The City and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

The expenses of any arbitration convened pursuant to this Section, including the fee for the services of the Chairman of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expense.

This section does not apply to members of the Fire Department’s Fire Management bargaining unit. (Added 3-26-96)

CITY OF ANAHEIM

Section 1053. IMPASSE RESOLUTION PROCEDURES

All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and the recognized employee organization involved in the dispute shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization. Representatives designated by the City and representatives of the recognized employee organization involved in the dispute shall each appoint one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairperson of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Mediation and Conciliation Service to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City and the employee organization cannot agree within three (3) days after receipt of such list on one of the seven (7) to act as the third arbitrator, they shall alternately strike names from the list of nominees until one name remains and that person shall then become the third arbitrator and chairperson of the Arbitration Board.
Any arbitration convened pursuant to this article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure. The Arbitration Board shall hold public hearings, receive evidence from the parties and cause a transcript of the proceedings to be prepared. The Arbitration Board, in the exercise of its discretion, may meet privately with the parties and mediate or mede-arb issues in dispute. The Arbitration Board may also adopt such other procedures that are designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the costs of the arbitration process.

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award. After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten (10) day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board, incorporating any amendments or modifications agreed to by the parties, shall be publicly disclosed and shall be binding upon the parties. The City and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the final Arbitration Board award (incorporating any amendments or modifications agreed to by the parties as provided above). The expenses of any arbitration convened pursuant to this article, including the fee for the services of the Chairperson of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

CITY OF NAPA

Section 80. Resolution of disputes regarding wages, salary or benefits between the City of Napa and Public Safety Employees.

D. Impasse Resolution Procedures. All disputes or controversies pertaining to wages, hours or terms and conditions of employment which remain unresolved after good faith negotiations between the City of Napa and any recognized employee organization for Public Safety Employees shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City of Napa or by the recognized employee organization involved in the dispute. Representatives designated by the City of Napa and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the
Board of Arbitrators within three days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City of Napa and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City of Napa and the employee organization cannot agree upon the selection of the third arbitrator within 10 days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City of Napa and the employee organization cannot agree within three days after the receipt of such list on one of seven to act as the third arbitrator, they shall alternatively strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and chairman of the Arbitration Board.

Any arbitration convened pursuant to this section shall be conducted in conformance with, subject to and governed by Title 9 of Part 3 of the California Code of Civil Procedure.

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City of Napa and its ability to meet the cost of the award.

After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until 10 days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The City of Napa and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

The expenses of any arbitration convened pursuant to this section, including the fee for the services of the Chairman of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

CITY OF SAN LUIS OBISPO

(D) Impasse Resolution Procedures.

(1) All disputes, controversies and grievances pertaining to wages, hours or terms and conditions of City employment which remain unresolved after good faith negotiations between the City and said employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by said employee organization. Upon declaration of impasse by either party, the City and employee organization shall each exchange a written last
offer of settlement on each of the issues remaining in dispute. Written last offer of settlement shall be exchanged between parties within two days of the declaration of impasse.

(2) Representatives designated by the City and representatives of the employee organization shall each select and appoint one arbitrator to the Board of Arbitrators within three (3) business days after either party has notified the other, in writing, of the declaration of impasse and the desire to proceed to arbitration. The third member of the Board of Arbitrators shall be selected by agreement between the City's and the employee's organization representative within ten (10) business days of the declaration of impasse. This third member shall serve as the neutral arbitrator and Chairperson of the Board. In the event that the City and the employee organization cannot agree upon the selection of the neutral arbitrator within ten (10) business days from the date that either party has notified the other that it has declared an impasse, either party may then request the State Mediation and Conciliation Service of the State of California Department of Industrial Relations to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the City and the employee organization cannot agree within three (3) days after receipt of such list on one of the seven (7) to act as the third arbitrator, they shall have five (5) business days to alternately strike names, with the City's arbitrator striking first, from the list of nominees until one name remains and that person shall then become the neutral arbitrator and Chairperson of the Board of Arbitrators.

(3) Any arbitration proceeding convened pursuant to this Article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure. The Board of Arbitrators shall hold public hearings, receive evidence from the parties and cause a transcript of the proceedings to be prepared. The Board of Arbitrators may adopt by unanimous consent such other procedures that are designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the costs of the arbitration process.

(4) In the event no agreement is reached prior to the conclusion of the arbitration hearings, the Board of Arbitrators shall direct each of the parties to submit, within such time limit as the Board of Arbitrators may establish, but not to exceed thirty (30) business days, a last offer of settlement on each of the remaining issues in dispute. The Board of Arbitrators shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment, including, but not limited to the following: changes in the average consumer price index for goods and services using the San Francisco-Oakland-San Jose index, as reported at the time impasse is declared for the preceding twelve (12) months, the wages, hours, benefits and terms and conditions of employment of employees performing similar services in comparable cities; and the financial condition of the City of San Luis Obispo and its ability to meet the costs of the decision of the Board of Arbitrators.

(5) After reaching a decision, the Board of Arbitrators shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Board of Arbitrators shall not be publicly disclosed.
and shall not be binding until ten (10) days after it is delivered to the parties. During that ten (10) day period the parties shall meet privately, attempt to resolve their differences, and by mutual agreement amend or modify the decision of the Board of Arbitrators. At the conclusion of the ten (10) day period, which may be extended by mutual agreement between the parties, the decision of Board of Arbitrators, as it may be modified or amended by the parties, shall be publicly disclosed and shall be binding on the parties. The City and the employee organization shall take whatever action is necessary to carry out and effectuate the arbitration award. No other actions by the City Council or by the electorate to conform or approve the decision of the Board of Arbitrators shall be permitted or required.

(6) The expenses of any arbitration proceeding convened pursuant to this Article, including the fee for the services of the chairperson of the Board of Arbitrators and the costs of preparation of the transcript of the proceedings shall be borne equally by the parties. The expenses of the arbitration, which the parties may incur individually, are to be borne by the party incurring such expenses. Such expenses include, but are not limited to, the expense of calling a party's witnesses, the costs incurred in gathering data and compiling reports, and any expenses incurred by the party's arbitrator. The parties may mutually agree to divide the costs in another manner.

(7) The proceedings described herein shall supersede the dispute resolution process for the San Luis Obispo Police Officers Association and the San Luis Obispo Firefighters Association which is set forth in Sections 13.2 and 14.1 of City of San Luis Obispo Resolution No. 6620, to the extent that such language is in conflict with this amendment. Furthermore, the proceedings described herein shall supersede any language within the Employer-Employee Resolution, the Personnel Rules and Regulations, any Memorandum of Agreement with the employee associations or any written policy or procedure relating to wages, hours or other terms and conditions of City employment, to the extent that such language is in conflict with this amendment. However, nothing in this section shall preclude the parties from mutually agreeing to use dispute resolution processes other than the binding arbitration process herein set forth. Nor, does it preclude the parties from negotiating, and submitting to the arbitration process set forth herein, a grievance process, which includes a form of binding arbitration that differs from the one, set forth herein.

CITY OF SAN LEANDRO

Section 450: BINDING ARBITRATION.

(e) Agreements reached between City representatives and the representatives of the recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection. All phases of negotiations, mediation and arbitration including the final binding decision of the mediator/arbitrator shall be completed at least 25 calendar days before the expiration of the then current agreement or arbitration award.

(f) Both parties shall select and schedule a person to act as both mediator and arbitrator (hereafter "arbitrator") at least 200 calendar days before the expiration of the then
current agreement or arbitration award. If they are unable to agree upon an arbitrator, they shall select such person from a list of seven names to be provided by an impartial third-party arbitration service mutually acceptable to the parties. The parties shall provide the arbitration service with sufficient notice to insure receipt of the list at least 190 calendar days before the expiration of the then current agreement or arbitration award. If at least 180 calendar days before the expiration of the then current agreement or arbitration award the parties still cannot agree upon an arbitrator, they shall immediately alternately strike names from the list, the choice of the first strike to be determined by lot. The last remaining unstruck name shall be selected and scheduled as arbitrator.

(g) If 90 calendar days before the expiration of the current agreement or arbitration award no agreement can be reached, or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to the employee organization, the parties shall commence mediation.

(h) If no agreement between the parties has been reached within 14 calendar days after the start of mediation, the arbitrator shall thereupon commence arbitration proceedings to deal with the issues still in dispute. Each party shall put in writing its last best offer on each of the issues still in dispute within 14 calendar days after the start of arbitration proceedings, and these offers shall immediately be made public. The arbitrator shall choose one of the parties' last best offer for each such issue still in dispute and shall have no power to modify or compromise the last best offers of either party. The arbitrator shall hear the evidence presented and consider all factors relevant to the issues from the standpoint of both employer and effected employees, including the interests and welfare of the public and the financial ability of the City to meet those costs. If one of the parties fails to submit its last best offer within the above allotted time, then the arbitrator shall be obligated to make an award incorporating the terms and conditions of the last best offer made by the party that has submitted its offer within the above allotted times. The decision of the arbitrator shall be final and binding on all parties.

(i) The costs of mediation and arbitration, including the scheduling of the arbitrator, shall be borne equally by all parties. Mediation and arbitration hearings shall be conducted within the City and closed to the public, unless otherwise mutually agreed upon by the parties with the concurrence of the arbitrator.

(j) The provisions of this Section shall not be construed as making any of the provisions of Section 923 of the Labor Code of the State of California applicable to City employees. The provisions of this Section pertaining to arbitration shall be construed as an "arbitration agreement" for the purpose of making applicable to the extent not in conflict herewith the provisions of Chapter 1 (commencing with Section 1280), Title IX, Part 3 of the Code of Civil Procedure of the State of California.

(k) The time limits set forth above may be waived by the mutual, written agreement of the parties and the arbitrator.
CITY OF PETALUMA

Article XV:

Arbitration

Sec. 82 Police and Fire Binding Arbitration.

D. Impasse Resolution Procedures. All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the city and either the fire or police department employee organization shall be submitted to a three-member board of arbitrators upon the declaration of an impasse by the city or by the recognized employee organization involved in the dispute.

Representatives designated by the city and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the board of arbitrators within three days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the arbitration board shall be selected by agreement between the two arbitrators selected by the city and the employee organization, and shall serve as the neutral arbitrator and chairman of the board. In the event that the arbitrators selected by the city and the employee organization cannot agree upon the selection of the third arbitrator within ten days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven persons who are qualified and experienced as labor arbitrators. If the arbitrators selected by the city and the employee organization cannot agree within three days after receipt of such list on one of seven to act as the third arbitrator, they shall alternately strike names from the list of nominees until only one name remains and that person shall then become the third arbitrator and chairman of the arbitration board.

Any arbitration convened pursuant to this article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure.

At the conclusion of the arbitration hearings, the arbitration board shall direct each of the parties to submit, within such time as the board may establish, a last offer of settlement on each of the issues in dispute. The arbitration board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the city and its ability to meet the cost of the award.

After reaching a decision, the arbitration board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the arbitration board shall not be publicly disclosed and shall not be binding until ten days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of
the arbitration board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the arbitration board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The city and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

The expense of any arbitration convened pursuant to this article, including the fee for the services of the chairman of the arbitration board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(11-6-90)

CITY OF OAKLAND

Section 910. Arbitration for Uniformed Members of the Police and Fire Departments. (sic)

(a) It is hereby declared to be the policy of the voters of the City to endeavor to establish and maintain, without labor strife and dissension, wages, hours, and other terms and conditions of employment for the uniformed members of the Police and Fire Departments which are fair and comparable to similar private and public employment. To such purpose, the voters of the City hereby recognize the efficiency of and adopt the principle of binding arbitration as an equitable alternative means to arrive at a fair resolution of terms of wages, hours, and other terms and conditions of employment for such employees when the parties have been unable to resolve these questions through negotiations.

(b) Pursuant to the public policy hereinafore declared, the City or the recognized employee organization for the uniformed members of the Police and Fire Departments may, as the result of an impasse after meeting and conferring in good faith on matters within the scope of representation as required by applicable State law, refer any such matters which are unresolved to binding arbitration under the provisions of this Section; except that the Charter provisions concerning the Police and Fire Retirement System and such other provisions of this Charter which specifically govern wages, hours and other terms and conditions of employment of uniformed members of the Police and Fire Departments shall not be subject to change by arbitration. In any such arbitration, the arbitrator is directed to take into consideration the City's purpose and policy to create and maintain wages, hours and other terms and conditions of employment which are fair and comparable to similar private and public employment and which are responsive to changing conditions and changing costs and standards of living. The arbitrator shall also consider: the interest and welfare of the public; the availability and sources of funds to defray the cost of any changes in wages; hours and conditions of employment; and all existing benefits and provisions relating to wages, hours and terms and conditions of employment of the uniformed members of the Police and Fire Departments, whether contained in this Charter or elsewhere.

(c) Any unresolved dispute or controversy arising under the provisions of this Section, or any unresolved dispute or controversy pertaining to the interpretation or application of any negotiated agreement covering uniformed members of the Police and Fire Departments shall be submitted to an impartial arbitrator. Representatives designated by the City and representatives of the recognized employee organization affected by the dispute or controversy shall select the arbitrator. In the event that said parties cannot agree upon the selection of the arbitrator within five days from the date of any impasse, then the California State Conciliation Service shall be requested to nominate five (5) persons, all of whom shall be qualified and experienced as labor arbitrators. If the representatives of the
recognized employee organization and the City cannot agree on one of the five to act as arbitrator, they shall strike names from the list of said nominees alternately until the name of one nominee remains who shall thereupon become the arbitrator. The first party to strike a name from the list shall be chosen by lot. Every effort shall be made to secure an award from the impartial arbitrator within thirty (30) calendar days after submission of all issues to him.

(d) The arbitration proceedings herein provided shall be governed by Sections 1280, et seq., of the California Code of Civil Procedure. The arbitrator's award shall be submitted in writing and shall be final and binding on all parties. The City and the affected employee organization shall take whatever action is necessary to carry out and effectuate the award. The expenses of arbitration, including the fee for the arbitrator's services, shall be borne equally by parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(e) Nothing herein shall be construed to prevent the parties from submitting controversies or disputes to mediation, fact-finding or other reasonable method to finally resolve the dispute should the City and the recognized employee organization in the controversy or dispute so agree. An impasse may be declared by either the City or the recognized employee organization in the event the parties fail to reach an agreement on matters within the scope of representation after meeting and conferring in good faith as required by applicable State law, or after other mutually agreed-upon settlement methods fail to result in agreement between the parties.

CITY OF SACRAMENTO

§ 503 Impasse Resolution Procedures.

(a) All disputes or controversies pertaining to wages, hours or terms and conditions of employment which remain unresolved after good faith negotiations between the City and a police department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.

(b) Representatives designated by the City and representatives of the recognized employee organization involved in the dispute shall each select and appoint one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the City and the employee organization, and shall serve as the neutral arbitrator and Chairperson of the Board. In the event that the City and the recognized employee organization involved in the dispute cannot agree upon the selection of the neutral arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, either party may then request the State Mediation and Conciliation Service of the State of California Department of Industrial Relations to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the City and the employee organization cannot agree within three (3) days after receipt of such list on one of seven (7) persons to act as the neutral arbitrator, they shall alternately strike names from the list of nominees until one name remains and that person shall then become the neutral arbitrator and Chairperson of the Arbitration Board.
(c) Any arbitration proceeding convened pursuant to this Article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure. The Arbitration Board shall hold public hearings, receive evidence from the parties and cause a transcript of the proceedings to be prepared. The Arbitration Board, in the exercise of its discretion, may meet privately with the parties and mediate or mede-arb issues in dispute. The Arbitration Board may also adopt such other procedures that are designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the costs of the arbitration process.

(d) In the event no agreement is reached prior to the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Arbitration Board may establish, a last offer of settlement on each of the remaining issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment, including, but not limited to the following: changes in the average consumer price index for goods and services; the wages, hours, benefits and terms and conditions of employment of employees performing similar services to the extent that such can be reasonably done, including comparable classifications in public employment in the Sacramento metropolitan area, and in the three California cities next larger and the three California cities next smaller in population than Sacramento; and the financial condition of the City of Sacramento its ability to meet the costs of the decision of the Arbitration Board.

(e) After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten (10) day period the parties shall meet privately, attempt to resolve their differences, and by mutual agreement amend or modify the decision of the Arbitration Board. At the conclusion of the ten (10) day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board as it may be modified or amended by the parties, shall be publicly disclosed and shall be binding on the parties. The City and the employee organization shall take whatever action is necessary to carry out and effectuate the arbitration award. No other actions by the City Council or by the electorate to confirm or approve the decision of the Arbitration Board shall be permitted or required.

(f) The expenses of any arbitration proceeding convened pursuant to this Article, including the fee for the services of the chairperson of the Arbitration Board and the costs of preparation of the transcript of the proceedings shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

COUNTY OF SACRAMENTO
Sec. 94. Impasse Resolution Procedures.

(a) All disputes or controversies pertaining to wages, hours or terms and conditions of employment which remain unresolved after good faith negotiations between the County and
the organization recognized as representing the (003) Non-Supervisory Law Enforcement Unit employees shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the County or by the (003) Non-Supervisory Law Enforcement Unit employee organization involved in the dispute.

(b) Representatives designated by the County and representatives of the organization recognized as representing the (003) Non-Supervisory Law Enforcement Unit and employees shall each select and appoint one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the County and the organization recognized as representing the (003) Non-Supervisory Law Enforcement Unit employees, and shall serve as the neutral arbitrator and Chairperson of the Board. In the event that the County and the organization recognized as representing the (003) Non-Supervisory Law Enforcement Unit employees cannot agree upon the selection of the neutral arbitrator within ten (10) days from the date that either party has notified the other that is has declared an impasse, either party may then request the State Mediation and Conciliation Service for the State of California Department of Industrial Relations to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the County and the organization recognized as representing the (003) Non-Supervisory Law Enforcement Unit employees cannot agree within three (3) days after receipt of such list on one of seven (7) persons to act as the neutral arbitrator, they shall alternately strike names from the list of nominees until one name remains and that person shall then become the neutral arbitrator and Chairperson of the Arbitration Board.

(c) Any arbitration proceeding convened pursuant to this Article shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure. The Arbitration Board shall hold public hearings, receive evidence from the parties and cause a transcript of the proceedings to be prepared. The Arbitration Board, in the exercise of its discretion, may meet privately with the parties and mediate or "mede-arb" issues in dispute. The Arbitration Board may also adopt such other procedures that are designed to encourage an agreement between the parties, expedite the arbitration hearing process, or reduce the costs of the arbitration process.

(d) In the event no agreement is reached prior to the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Arbitration Board may establish, a last offer of settlement on each of the remaining issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms to those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment, including but not limited to the following: changes in the average consumer price index for goods and services; the wages, hours, benefits and terms and conditions of employment of employees performing similar services to the extent that such can be reasonably done; and the financial condition of the County of Sacramento and its ability to meet the costs of the decision of the Arbitration Board.

(e) After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly
disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten (10) day period the parties shall meet privately, attempt to resolve their differences, and by mutual agreement amend or modify the decision of the Arbitration Board. At the conclusion of the ten (10) day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board, as it may be modified or amended by the parties, shall be publicly disclosed and shall be binding on the parties. The County and the organization recognized as representing the Non-Supervisory Law Enforcement Unit employees shall take whatever action is necessary to carry out and effectuate the arbitration award. No other actions by the County Board of Supervisors or by the electorate to confirm or approve the decision of the Arbitration Board shall be required or permitted.

(f) The expenses of any arbitration proceeding convened pursuant to the Article, including the fee for the services of the chairperson of the Arbitration Board and the costs of preparation of the transcript of the proceedings, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

REDWOOD CITY

Section 96. IMPARTIAL AND BINDING ARBITRATION FOR FIRE DEPARTMENT EMPLOYEE DISPUTES.

d. Impasse Resolution Procedures. All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and the fire department employee organization shall be submitted to a three-member board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.

Representatives designated by the City and representatives of the recognized employee organization involved in the dispute, shall each select one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the State of California Conciliation Service to provide a list of seven (7) persons who are qualified and experienced as labor arbitrators. If the arbitrator selected by the City and the employee organization cannot agree within three (3) days after receipt of such list on one of seven (7) to act as the third arbitrator, they shall alternately strike names from the list of nominees until one name remains and that person shall then become the third arbitrator and chairman of the Arbitration Board.

Any arbitration convened pursuant to this article shall be conducted in conformance with, subject, and governed by Title 9 of Part 3 of the California Code of Civil Procedure.
At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of
the parties to submit, within such time limit as the Board may establish, a last offer of
settlement on each of the issues in dispute. The Arbitration Board shall decide each
issue by majority vote by selecting whichever last offer of settlement on that issue it
finds most nearly conforms with those factors traditionally taken into consideration in the
determination of wages, hours, and other terms and conditions of public and private
employment, including, but not limited to, changes in the average consumer price index
for goods and services, the wages, hours, and other terms and conditions of
employment of other employees performing similar services, and the financial condition
of the City and its ability to meet the cost of the award.

After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true
copy of its decision to the parties. The decision of the Arbitration Board shall not be
publicly disclosed and shall not be binding until ten (10) days after it is delivered to the
parties. During that ten day period the parties may meet privately, attempt to resolve
their differences, and by mutual agreement amend or modify any of the decisions of the
Arbitration Board. At the conclusion of the ten (10) day period, which may be extended
by mutual agreement between the parties, the decision of the Arbitration Board together
with any amendments or modifications agreed to by the parties shall be publicly
disclosed and shall be binding upon the parties. The City and the recognized employee
organization shall take whatever action is necessary to carry out and effectuate the
award.

The expenses of any arbitration convened pursuant to this article, including the fee for
the services of the Chairman of the Arbitration Board, shall be borne equally by the
parties. All other expenses which the parties may incur individually are to be borne by
the party incurring such expenses. (As amended by legislative initiative November 3,
1987, certified by Secretary of State December 23, 1987)
**Proposition G**

Transit Operator Wages
County of San Francisco
Charter Amendment - Majority Approval Required

**Pass:** 164,234 / 64.94% **Yes** votes ...... 88,671 / 35.06% **No** votes

See Also: Index of all Propositions

Information shown below: Summary | Fiscal Impact | Arguments |

**Summary Prepared by The Ballot Simplification Committee:**

The Way It Is Now: The San Francisco Municipal Transportation Agency (MTA) oversees the City's Municipal Railway transit system (MUNI) and other City transportation functions. The MTA employs transit employees such as MUNI operators and mechanics, and non-transit employees such as parking control officers and traffic engineers.

The Charter requires the MTA to pay MUNI operators at least as much as the average salary of transit operators at the two highest paying similar transit systems in the country. When benefits paid to MUNI operators are worth less than the benefits provided to operators at similar transit systems, the difference is placed in a trust fund and paid to MUNI operators.

The Charter also requires the MTA to pay most managers and employees incentive bonuses if MUNI achieves certain service standards.

For most City employees, if the City and employee unions are unable to agree in collective bargaining, disputes are subject to binding arbitration. The MTA's negotiations with MUNI operators are not subject to binding arbitration. In some instances, the MTA has followed informal agreements about...
terms of employment even when they have not been approved by the MTA Executive Director or Board or included in any collective bargaining agreement. These informal agreements may be reflected in "side-letters" or past practices.

The Proposal: Proposition G would eliminate the formula for setting minimum MUNI operator wages. Instead, it would allow the MTA to set MUNI operator wages and benefits through collective bargaining and binding arbitration. It would also establish rules for arbitration proceedings regarding MTA's transit employees, and make other changes to terms of employment.

In particular, Proposition G would:

- eliminate the requirement that MUNI operator wages be at least as high as the average for transit operators in the two highest paying similar transit systems;
- eliminate the trust fund that provides additional payments or benefits to MUNI operators;
- require the MTA contribution for MUNI operators' health coverage to be at least equivalent to the City contribution for the majority of other City employees. This requirement applies only to the first collective bargaining agreement approved after adoption of this measure;
- require binding arbitration when the MTA and MUNI operator unions are unable to agree in collective bargaining. It also requires arbitrators considering disputes between the MTA and its transit employees to consider the impact of disputed proposals on MUNI fares and service;
- make incentive bonuses for MTA managers and employees optional instead of required; and
- provide that informal agreements reflected in past practices or "side-letters" be binding only if approved in writing by the MTA Executive Director or Board and included in the affected employees' collective bargaining agreements.

Fiscal Impact from The Controller of San Francisco:

City Controller Ben Rosenfield has issued the following statement on the fiscal impact of Proposition G:

Should the proposed Charter amendment be approved by the voters, in my opinion, it could either increase or decrease the cost of government depending on the outcome of collective bargaining and labor arbitration processes.

http://www.smartvoter.org/2010/11/02/ca/sf/prop/G/
The amendment provides for changes to the method by which wages are set for Municipal Transportation Agency (MTA) transit operators. Currently, these wages are set through a national survey of the hourly wage in comparable transit agencies, averaging the two highest wage levels and setting that amount as a minimum. In addition, if fringe benefits for the comparable agencies surveyed exceed the value of those provided by the City, a payment is made to a transit operators benefit trust fund. Using the survey method, as of July 2010, MTA transit operators' highest wage rate is $27.92 per hour, and for the last five years the City has been required to make deposits averaging $5.0 to $7.0 million annually to the transit operators benefit trust fund. Finally, the amendment makes incentive pay optional that is now mandated for certain MTA employees--as of fiscal year 2009-2010, the amount of such incentive pay that would be made optional is approximately $3.0 million.

The proposed charter amendment would provide that transit operator wage levels be set through collective bargaining and labor arbitration processes as are used with other City employee unions. The amendment would eliminate the benefits trust fund and provide instead for health benefits at the same levels as are provided for the majority of other City employees.

Overall, collective bargaining and labor arbitration processes could result in either a decrease or an increase to drivers' wage and benefit levels.

**Arguments For Proposition G**

MUNI is a critical part of San Francisco's infrastructure. San Franciscans depend on Muni for transportation to work, doctor appointments, school, and recreation.

Unfortunately, route cuts and decreased service have made Muni inefficient and unreliable. Real Muni reform is needed to improve service and increase reliability.

PROP G WILL IMPROVE MUNI SERVICE

Prop G will allow the MTA to allocate limited resources to services for riders rather than automatic, annual raises for drivers.

Currently, the Charter guarantees Muni drivers

**Arguments Against Proposition G**

PROP G TARGETS WORKERS INSTEAD OF WASTE + VOTE NO ON G

For more than 40 years, Muni driver salaries have been determined by a formula that has made San Francisco one of the only cities in America not to experience a transit strike during that time, and a model for worker-management relations in transit.

Prop G will allow the MTA to allocate limited resources to services for riders rather than automatic, annual raises for drivers.

Currently, salaries for transit operators are set by a formula approved by voters instead of leaving union contracts up to politicians to cut backroom deals.

The principle of workers and City Hall bargaining across a table to find resolution has
the second highest salary in the country. This year, Muni drivers received a $9 million raise while the MTA balanced a $50 million deficit on the backs of riders. All other city workers offered concessions to help balance the City budget, but Muni drivers refused. The result was reduced services and increased fares for Muni riders.

Prop G will eliminate the salary guarantee, so that drivers' salaries do not automatically increase. Prop G will allow drivers to negotiate salaries through collective bargaining - just like all other city employees.

PROP G WILL MAKE MUNI MORE RELIABLE

Prop G will allow the MTA to negotiate new work rules, so that service is more reliable and more responsive to riders' needs.

Current work rules restrict the ability of the MTA to schedule, deploy, and assign Muni drivers. Proposition G would "press the reset button" on existing work rules, which create inefficient and unreliable service for riders.

For example, Muni operators are allowed to be absent without notice, missing runs and contributing to poor service.

The MTA should operate based on best practices, not past practices.

PROP G IS REAL REFORM

San Francisco is a world class City that deserves a world class transit agency.

Join Me in Voting YES on Prop G.

Supervisor Sean Elsbernd
http://www.fixmuninow.com

Rebuttal to Arguments For
If Prop G Wins... Riders Lose!

Prop G doesn't fix MUNI now... or later. Nothing in this ballot proposal will restore service cuts, worked well for our City for decades. Proposition G destroys that collaboration by changing a structure that has been in the charter for 40 years.

While our Muni system has its problems, Proposition G unfairly targets drivers as the only problem at the multi-million-dollar agency that runs our transit system. Like Muni riders, drivers tolerate a system that has been neglected for decades.

Drivers work hard to improve the system and get San Franciscans where they're going on time, but City Hall has consistently cut funds for transit while raising salaries for Muni executives. As budget deficits forced 10% service cuts this year, the head of the agency took home a paycheck of more than $300,000.

Proposition G does nothing to address the bloated bureaucracy that has siphoned funding from our bus and rail system for decades, it unfairly targets drivers and changes a voter-approved process that has worked for decades.

Muni drivers share riders' frustration and we are committed to improving the system for all San Franciscans that rely on it to get to school and work every day. Propostion G unfairly targets drivers while neglecting the real challenges facing Muni.

PLEASE VOTE NO ON G

Transport Workers Union Local 250-A

Rebuttal to Arguments Against

Muni needs this change.

There are many things that need fixing at Muni, but we can no longer avoid the central issue of workplace culture.

Imagine trying to run a transit agency when you don't know who will show up to work each day.

Imagine trying to provide rush-hour service when you can't hire extra drivers to cover the busiest shifts. Everyone wants drivers to be paid well,
Proposition G: Transit Operator Wages - San Francisco County, CA

improve on-time performance, or make MUNI busses cleaner. The issues that matter to MUNI riders are NOT covered by this proposal.

Prop G is confusing, costly and will lead to serious labor problems. Muni has a record of more than a quarter century without a major labor dispute. Unlike most other transit systems, including BART and AC Transit, MUNI has enjoyed labor peace. If Prop G passes, labor issues will regularly be in dispute or arbitration. That means uncertainty and instability -- the last thing we need for a critical service like MUNI.

What does Proposition G accomplish?

Good question -- Prop G's supporters, big business interests and career politicians, have never answered it. What is clear, Prop G seeks to punish MUNI's frontline workers by making wages and other labor issues subject to dispute rather than the current formula that has served MUNI well for 40 years. Prop G also will do nothing to restore the $62 million in MUNI funds siphoned by other city departments this year on top of $60 million in state cuts to MUNI in each of the last three years.

Vote NO on G. MUNI is our public transportation system -- what MUNI needs is accountability starting at the top, not attacks on its workforce

Transport Workers Local 250 + A
CHARTER AMENDMENT

Note: Additions are *italics, Times New Roman, single underlined.*

Deletions are *strikethrough italics, Times New Roman.*

Section 1: FINDINGS

Whereas, an effective, efficient, and reliable public transit system is essential to the quality of life, public health, social justice, economic growth, and the environment of the City and County of San Francisco; and

Whereas, effective, efficient, and reliable public transit depends on having labor agreements that are supportive of providing high quality, efficient service to riders; and

Whereas, labor costs are the most significant portion of the Municipal Transportation Agency's (Agency) budget; and

Whereas, the present system for establishing wages for Municipal Railway (MUNI) operators is based on a "formula" that guarantees transit operator wages are at least the second-highest in the country, without requiring that operators bargain for this high level of compensation; and

Whereas, higher labor costs inevitably undercut the Agency's ability to preserve and enhance services; and

Whereas, the voters find that the most appropriate way to establish wages, benefits, and working conditions is through collective bargaining between labor and management; and
Whereas, the City relies upon collective bargaining to achieve labor agreements with other City employees, with bargaining disputes resolved by a neutral arbitrator; and

Whereas, that system is fair to both the public and employees, and bars strikes by public employees; and

Whereas, the current system for setting transit operator wages prevents effective collective bargaining; and

Whereas, the voters find that transit operator wages should be set by a collective bargaining process that is similar to the process generally used to determine wages for other City employees and other transit systems nationwide; and

Whereas, the voters find and declare that some provisions of existing labor agreements also restrict the ability of the Agency to schedule, deploy, and assign employees in a manner that reflects service and ridership needs, and are therefore an impediment to effective, efficient, and reliable transit operations; and

Whereas, antiquated and inflexible rules contained in labor agreements undercut the City’s “Transit First” Policy set forth in Charter section 8A.115 by failing to ensure that employees have their primary work hours scheduled at the times when their services are most needed; and

Whereas, so called “past practices” and side-letters that are not spelled out in a Memorandum of Understanding (“MOU”) preserve antiquated and inflexible practices that impair transit operations; and
Whereas, some past practices and side-letters have not been subjected to public scrutiny because they have not been approved by the Agency; and

Whereas, the voters of San Francisco believe the Agency should operate based on best practices, not past practices; and

Whereas, the taxpayers of San Francisco and those who rely on the Agency for service require a system of labor relations that is transparent, and enables them to understand the terms of labor agreements with the public sector workforce; and

Whereas, the voters reiterate the "Transit First" policy and further find that to achieve this policy, labor relations at the Agency must be guided by the principle of "Service First," giving first priority to the needs of the people of San Francisco who rely on the Agency; and

Whereas, the voters find that a broad overhaul of the compensation structure and labor rules and practices is necessary to preserve and expand transit services to the public;

Now, therefore, the qualified electors of the City and County of San Francisco amend their charter as set forth below.

Section 2. The San Francisco Charter is hereby amended by amending Sections 8A.104 and 8A.404, relating to the wages, hours, benefits, and terms and conditions of employment of employees of the Municipal Transportation Agency, to read as follows:

SEC. 8A.104. PERSONNEL AND MERIT SYSTEM.
(a) The Agency shall establish its own personnel/labor relations office. The Director of Transportation shall appoint a personnel/labor relations manager, who shall serve at the pleasure of the Director of Transportation and shall establish regular meetings with labor to discuss issues within the scope of representation on terms to be determined through collective bargaining.

(b) Except as otherwise provided in this Section, the Agency shall be governed by the rules of the civil service system administered by the City and appeals provided in civil service rules shall be heard by the City's Civil Service Commission. Unless otherwise agreed by the Agency and affected employee organizations, appeals to the Civil Service Commission shall include only those matters within the jurisdiction of the Civil Service Commission which establish, implement, and regulate the civil service merit system as listed in Section A8.409-3.

(c) Effective July 1, 2000, except for the administration of health services, the Agency shall assume all powers and duties vested in the Department of Human Resources and the Director of Human Resources under Articles X and XI of this Charter in connection with job classifications within the Agency performing "service-critical" functions. Except for the matters set forth in subsection (f), the Department of Human Resources and the Director of Human Resources shall maintain all powers and duties under Articles X and XI as to all other Agency employees.

(d) On or before April 15, 2000, the Agency shall designate "service-critical" classifications and functions for all existing classifications used by the
Municipal Railway; provided, however, that employees in classifications designated as "service-critical" shall continue to be covered by any Citywide collective bargaining agreement covering their classifications until the expiration of that agreement.

(e) For purposes of this Article, "service-critical" functions are:

1. Operating a transit vehicle, whether or not in revenue service;
2. Controlling dispatch of, or movement of, or access to, a transit vehicle;
3. Maintaining a transit vehicle or equipment used in transit service, including both preventive maintenance and overhaul of equipment and systems, including system-related infrastructure;
4. Regularly providing information services to the public or handling complaints; and
5. Supervising or managing employees performing functions enumerated above.

The Agency shall consult with affected employee organizations before designating particular job classifications as performing "service-critical" functions. If an employee organization disagrees with the Agency's designation of a particular job classification as "service-critical" pursuant to the above standards, the organization may, within seven days of the Agency's decision, request immediate arbitration. The arbitrator shall be chosen pursuant to the procedures for the selection of arbitrators contained in the memorandum of understanding of the affected employee organization. The arbitrator shall determine only whether
the Agency's designation is reasonable based on the above standards. The arbitrator's decision shall be final and binding.

The Agency may designate functions other than those listed above, and the job classifications performing those additional functions, as "service-critical," subject to the consultation and arbitration provisions of this Section. In deciding a dispute over such a designation, the arbitrator shall decide whether the job functions of the designated classes relate directly to achievement of the goals and milestones adopted pursuant to Section 8A.103 and are comparable to the above categories in the extent to which they are critical to service.

(f) In addition, the Agency shall, with respect to all Agency employees, succeed to the powers and duties of the Director of Human Resources under Article X to review and resolve allegations of discrimination, as defined in Article XVII, against employees or job applicants, or allegations of nepotism or other prohibited forms of favoritism. To the extent resolution of a discrimination complaint or request for accommodation involves matters or employees beyond the Agency's jurisdiction, the Agency shall coordinate with and be subject to applicable determinations of the Director of Human Resources.

(g) The Agency shall be responsible for creating and, as appropriate, modifying Agency bargaining units for classifications designated by the Agency as "service-critical" and shall establish policies and procedures pursuant to Government Code sections 3507 and 3507.1 for creation and modification of such bargaining units. When the Agency creates or modifies a bargaining unit,
employees in existing classifications placed in such bargaining unit shall continue
to be represented by their current employee organizations.

(h) The Agency may create new classifications of Agency employees.
Such classifications shall be subject to the civil service provisions of the Charter
unless exempted pursuant to Section 10.104, or subsection (i).

(i) The Agency may create new classifications and positions in those
classifications exempt from the civil service system for managerial employees in
MTA bargaining units M and EM in addition to those exempt positions provided in
Section 10.104; provided, however, that the total number of such exempt
managerial positions within the Agency shall not exceed 2.75 percent of the
Agency's total workforce, exclusive of the exempt positions provided in Section
10.104. This provision shall not be utilized to eliminate personnel holding existing
permanent civil service managerial positions on November 2, 1999.

Persons serving in exempt managerial positions shall serve at the
pleasure of the Director of Transportation. Such exempt management
employees, to the extent they request placement in a bargaining unit, shall not be
placed in the same bargaining units as non-exempt employees of the Agency.

(j) The Civil Service Commission shall annually review both exempt and
non-exempt classifications of the Agency to ensure compliance with the
provisions of subsections (h) and (i).

(k) Upon the expiration of labor contracts negotiated by the Department of
Human Resources and approved by the Board of Supervisors, and except for
retirement benefits, the wages, hours, working conditions, and benefits of the
employees in classifications within the Municipal Railway designated by the Agency as "service-critical" shall be fixed by the Agency after meeting and conferring as required by the laws of the State of California and this Charter, including Sections A8.346, A8.404 and A8.409. These agreements shall utilize, and shall not alter or interfere with, the health plans established by the City's Health Service Board; provided, however, that the Agency may contribute toward defraying the cost of employees' health premiums. For any job classification that exists both as a "service-critical" classification in the Agency and elsewhere in City service, the base wage rate negotiated by the Agency for that classification shall not be less than the wage rate set in the Citywide memorandum of understanding for that classification.

(I) Notwithstanding subsection (k), the Agency may, in its sole discretion, utilize the City's collective bargaining agreements with any employee organization representing less than 10 percent of the Agency's workforce.

(m) Notwithstanding any limitations on compensation contained in Section A8.404, and in addition to the base pay established in collective bargaining agreements, all agreements negotiated by the Agency relating to compensation for Agency managers and employees in classifications designated by the Agency as "service-critical" shall may provide incentive bonuses based upon the achievement of the service standards in Section 8A.103(c) and other standards and milestones adopted pursuant to Section 8A.103. Such agreements may also provide for additional incentives based on other standards established by the Board of Directors, including incentives to improve attendance. The Board of
Directors shall may also establish a program under which a component of the compensation paid to the Director of Transportation and all exempt managers shall be is based upon the achievement of service standards adopted by the Board of Directors. *Notwithstanding any other provision of Article 8A, all such incentive programs shall be at the sole discretion of the Agency Board of Directors, subject to any bargaining obligation imposed by state law.*

(n) For employees whose wages, hours and terms and conditions of employment are set by the Agency, pursuant to Sections A8.404 or A8.409 et seq., the Agency shall exercise all powers of the City and County, the Board of Supervisors, the Mayor, and the Director of Human Resources under those sections, Sections A8.404 and A8.409. For employees covered by Section A8.409 et seq., the mediation/arbitration board set forth in Section A8.409-4 shall consider the following additional factors when making a determination in any impasse proceeding involving the Agency: the interests and welfare of transit riders, residents, and other members of the public; and the Agency's ability to meet the costs of the decision of the arbitration board without materially reducing service or requiring that the Agency raise fares in a manner inconsistent with Section 8A.108(b); and the Agency's ability to efficiently and effectively tailor work hours and schedules for transit system employees to the public demand for transit service. Notwithstanding the timelines described in Section A8.409-4, to be effective the beginning of the next succeeding fiscal year, all collective bargaining agreements must be submitted to the Board of Directors no later than June 15 for final adoption on or before June 30. For employees whose wages, hours and terms and conditions of employment are set
by the Agency pursuant to Sections A8.404, the Agency shall perform the functions of the
Civil Service Commission with respect to certification of the average of the two highest
wage schedules for transit operators in comparable jurisdictions pursuant to Section
A8.404(a), and conduct any actuarial study necessary to implement Section A8.404(f).

(o) The voters find that for transit system employees whose wages, hours and
terms and conditions of employment are set by the Agency, the Agency's discretion in
establishing and adjusting scheduling, deployment, assignment, staffing, sign ups, and
the use and number of part-time transit system personnel based upon service needs is
essential to the effective, efficient, and reliable operation of the transit system. In any
mediation/arbitration proceeding under Section 8.409-4 with an employee organization
representing transit system employees, the employee organization shall have the burden
of proving that any restrictions proposed on the Agency's ability to exercise broad
discretion with respect to these matters are justified. To meet this burden, the employee
organization must prove by clear and convincing evidence that the justification for such
restrictions outweighs the public's interest in effective, efficient, and reliable transit
service and is consistent with best practices. The mediation/arbitration board shall not
treat the provisions of MOUs for transit system employees adopted prior to the effective
date of this provision as precedential in establishing the terms of a successor agreement.

The mediation/arbitration board's jurisdiction shall be limited to matters within the
mandatory scope of bargaining under state law.

(e)(p) The voters find that unscheduled employee absences adversely
affect customer service. Accordingly, not later than January 1, 2001, the agency
shall create a comprehensive plan for the reduction of unscheduled absences. In
addition, the Agency shall take all legally permitted steps to eliminate unexcused absences. *Neither the Agency nor an arbitrator* shall have no authority to approve or award any memorandum of understanding or other binding agreement which restricts the authority of the Agency to administer appropriate discipline for unexcused absences.

(q) In addition, the voters find that Agency service has been impaired by the existence of side-letters and reliance on “past practices” that have been treated as binding or precedential but have not been expressly authorized by the Board of Directors or the Director of Transportation, and have not been and are not subject to public scrutiny. Accordingly, for employees whose wages, hours and terms and conditions of employment are set by the Agency, no side-letter or practice within the scope of bargaining may be deemed binding or precedential by the Agency or any arbitrator unless the side-letter or practice has been approved in writing by the Director of Transportation or, where appropriate, by the Board of Directors upon the recommendation of the Director of Transportation and appended to the MOU of the affected employee organization or organizations subject to the procedures set out in this charter. No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU. All side-letters shall expire no later than the expiration date of the MOU.

(p) Before adopting any collective-bargaining-tentative agreement with an employee organization covering matters within the scope of representation, the Agency
shall, no later than June 15, at a duly noticed public meeting, disclose in writing the contents of such collective-bargaining tentative agreement, a detailed analysis of the proposed agreement, a comparison of the differences between the agreement reached and the prior agreement, and an analysis of all costs for each year of the term of such agreement, and whether funds are available to cover these costs. Such tentative agreement between the Agency and employee organization shall not be approved by the Agency until 15 calendar days after the above disclosures have been made.

A8.404 SALARIES AND BENEFITS OF CARMEN

(a) The wages, conditions and benefits of employment as provided for in this section of the various classifications of employment of platform employees and coach or bus operators of the municipal railway as compensation, shall be determined and fixed annually as follows: pursuant to Charter section A8.409 et seq. as modified by Charter section 8A.104.

(b) In the first MOU negotiated or awarded through arbitration pertaining to transit operators covered by this section after the November 2010 general election, the Agency's contribution for active employee health coverage shall not be less than the City contribution for the majority of other employees covered by section A8.409 et seq. for the employee only, and at each level of dependent coverage provided under the Health Service System. This subsection may be waived upon the mutual consent of the Agency and the employee organization representing transit operators.

(c) On or before the first Monday of August of each year, the civil service commission shall certify to the Board of Supervisors for each classification of
employment—the average of the two highest wage schedules in effect on July 1st of that year for comparable platform employees and coach or bus operators of other surface street-railway and bus systems in the United States operated primarily within the municipalities having each a population of not less than 500,000 as determined by the then most recent census taken and published by the director of the census of the United States, and each such system normally employing not less than 400 platform employees or coach or bus operators, or platform employees; coach and bus operators.

(b) The Board of Supervisors shall thereupon fix a wage schedule for each classification of platform employees and coach and bus operators of the municipal railway which shall not be less than the average of the two highest wage schedules so certified by the civil service commission for each such classification.

(c) When, in addition to their usual duties, such employees are assigned duties as instructors of platform employees or coach or bus operators they shall receive additional compensation that shall be subject to negotiation in addition to the rate of pay to which they are otherwise entitled under the wage schedule as herein provided.

(d) The rates of pay fixed for platform employees and coach and bus operators as herein provided shall be effective from July 1st of the year in which such rates of pay are certified by the civil service commission.

(e) The terms "wage schedule" and "wage schedules" wherever used in this section are hereby defined and intended to include only the maximum rate of pay provided in each such wage schedule.

(f) At the time the Board of Supervisors fixes the wage schedule as provided in (b) above, the Board of Supervisors may fix as conditions and benefits of employment other
than wages as compensation for platform employees and coach or bus operators of the municipal railway, conditions and benefits not to exceed those conditions and benefits granted by collective-bargaining agreements to the comparable platform employees and coach or bus operators of the two systems used for certification of the average of the two highest wage schedules by the civil service commission. The Board of Supervisors may establish such conditions and benefits notwithstanding other provisions or limitations of this Charter, with the exception that such conditions and benefits shall not involve any change in the administration of, or benefits of the Retirement System, health-service system or vacation allowances as provided elsewhere in this Charter. For all purposes of the Retirement System as related to this section, the word "compensation" as used in Section 8.509 of this Charter shall mean the "wage schedules" as fixed in accordance with paragraphs (a) and (b) above, including those differentials established and paid as part of wages to platform employees and coach and bus operators of the municipal railway, but shall not include the value of those benefits paid into the fund established as herein provided. Provided that when in the two systems used for certification as provided above, vacation, retirement and health-service benefits are greater than such similar benefits provided by this Charter for platform employees, coach or bus operators of the municipal railway, then an amount not to exceed the difference of such benefits may be converted to dollar values and the amount equivalent to these dollar values shall be paid into a fund. The fund shall be established to receive and to administer said amounts representing the differences in values of the vacation, retirement and health service benefits, and to pay out benefits that shall be jointly determined by representatives of the City and County government and the representatives of the organized platform employees
and coach and bus operators of the municipal railway. The civil service commission shall
adopt rules for the establishment and general administration of the fund as herein
provided. Such rules shall provide for a joint administration of the fund by
representatives of the City and County government, which shall include representatives
of the administrator of the agency responsible for the municipal railway and
representatives of the organized platform employees, coach and bus operators of the
municipal railway. Such rules may provide a procedure for final and binding arbitration
of disputes which may arise between representatives of the City and County government
and the representatives of the organized platform employees and coach and bus
operators of the municipal railway. Such rules shall provide that all investments of the
fund shall be of the character legal for insurance companies in California. Such rules
and any amendments thereto shall be effective upon approval by the Board of
Supervisors by ordinance.

(g) Notwithstanding any provisions of this Charter, including other subparts of
this section, the Board of Supervisors may, after meeting and conferring with and
reaching agreement with the employee organization certified as the representative for
municipal railway operators, fix wages and benefits of employment other than wages for
platform employees and coach and bus operators of the municipal railway under this
section for periods in excess of one year. Any ordinance fixing wages and benefits of
employment other than wages adopted pursuant to this section for a period of more than
one year shall contain a provision to the effect that during said period of time it shall be
unlawful for the employees receiving the compensation so fixed to engage in a strike;
work stoppage or conduct delaying or interfering with work at City and County facilities.
Wages and benefits of employment other than wages established under this section shall not in any year exceed the limits established under paragraphs (b) and (f) of this section.

(h) Not later than the 25th day of August, the Board of Supervisors shall have the power and it shall be its duty, subject to the fiscal provisions of the Charter but, without reference or amendment to the annual budget, to amend the annual appropriation ordinance and the annual salary ordinance as necessary to include the provisions for paying the rates of compensation and conditions and benefits other than wages fixed by the Board of Supervisors as in this section provided for platform employees and coach or bus operators for the then-current fiscal year.

On recommendation of the civil-service commission the Board of Supervisors shall establish a rate of pay for trainee platform men and bus or coach operators at a level reflecting the current labor-market but below the basic hourly rate for motorman, conductor and bus operator.

Section 3: Severability. This Charter Amendment shall be interpreted so as to be consistent with all federal and state laws, rules, and regulations. If any section, sub-section, sentence, or clause ("portion") of this Amendment is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this Amendment. The voters hereby declare that this Amendment, and each portion, would have been adopted irrespective of whether any one or more portions of the Amendment are found invalid. If any portion of this Amendment is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Amendment which can be given effect. This Amendment shall be broadly
construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Amendment be interpreted or implemented by the City and County, Agency, courts, and others in a manner that facilitates the purposes set forth herein.

Section 4: Effective date. This Charter Amendment shall be effective upon its acceptance and filing by the California Secretary of State under California Government Code sections 34450.
TO ALL INTERESTED PARTIES:

Attached is the City Attorney's summary and title for a proposed local initiative measure. In preparing this title, the City Attorney makes no representation regarding the merits or legality of the proposed legislation. Nor does the City Attorney verify or confirm any factual or legal assertion made in the proposal. The title is presented as a "true and impartial statement of the purpose of the proposed measure." Elections Code § 9203.

Very truly yours,

DENNIS J. HERRERA
City Attorney

JON GIVNER
Deputy City Attorney
SETTING TRANSIT OPERATOR WAGES THROUGH COLLECTIVE BARGAINING

The San Francisco Municipal Transportation Agency (MTA) oversees operation of the City's Municipal Railway transit system (Muni) and other transportation functions. The MTA employs transit employees such as Muni operators and mechanics, and non-transit employees such as parking control officers and traffic engineers.

Under the City Charter, the MTA Board of Directors (Board) sets wages for Muni operators each year by reviewing the wages paid to comparable employees working for similar transit systems in the United States. The MTA Board must set Muni operator wages at a rate at least as high as the average wage rate of the two highest paying comparable transit systems in the country. Also, if the value of the vacation, retirement and health benefits provided by the two highest paying comparable transit systems exceeds the value of the benefits provided to Muni operators, the City pays the difference into a trust fund. The trust fund makes annual payments to Muni operators.

The Charter also requires that contracts with the MTA Director and MTA managers and employees whose positions are "service critical" provide incentive bonuses based on Muni's achievement of certain service standards.

Other than these requirements, the terms of employment for MTA employees are set through collective bargaining. If the City and employee unions are unable to agree in collective bargaining, disputes involving some employees — but not Muni operators — are subject to binding arbitration before a neutral arbitration panel.

In some instances, MTA's past practices and "side letters" with employee unions have affected terms of employment without being approved by the MTA Director or Board or included in any collective bargaining agreement.

The proposed Charter amendment would:

- Allow the City to set Muni operator wages and benefits through collective bargaining, and eliminate the requirement that Muni operator wages be at least as high as the average wage rate for transit operators in the two highest paying comparable transit systems.
- Eliminate the transit operator trust fund and any City payments into it.
- Make incentive bonuses for the MTA Director and "service critical" MTA managers and employees optional instead of required.
- Require binding arbitration when the MTA and employee unions representing Muni operators are unable to agree in collective bargaining.
- Set rules for arbitration proceedings regarding MTA employees. The arbitrators would consider the impact of disputed proposals on Muni fares and service and on the ability of MTA management to schedule and assign transit employees according to riders' service needs. And employee unions representing transit employees would have to justify any proposal that would restrict the MTA's flexibility in deciding schedules, staffing, assignments or the number of part-time personnel.
• Provide that past practices and "side letters" would not bind the City regarding terms of employment for MTA employees, unless the MTA Board or Director has approved them in writing and included them in the affected employees' collective bargaining agreements.
# Cities on the Cutting Edge: Public Sector Labor Law

## Interest Arbitration: Comparison of Selected State Statutes

### Table 1: Mandatory Arbitration Statutes

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<tr>
<th>State/Statute</th>
<th>Statutory Requirements</th>
<th>Key Cases</th>
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<tr>
<td><strong>Alaska:</strong> AS 23.40.200 (2000)</td>
<td>Mandatory interest arbitration for all public employees; different trigger for arbitration for each of 3 classes of employees</td>
<td>Anchorage v. Anchorage Police Dept. Employees' Assoc., 839 P.2d 1080 (Alas. 1992). Municipal charter provisions for binding interest arbitration for limited number of public sector employees was valid delegation of legislative authority, where ordinance contained sufficient standards to limit arbitrator's discretion.</td>
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<td><strong>Colorado:</strong> C.R.S. 8-3-112, 8-3-113 (2000)</td>
<td>Mandatory interest arbitration for employees of government &quot;authorities&quot; if collective bargaining reaches an impasse and the Director of Colorado Department of Labor denies the employee group a right to strike</td>
<td>FOP v. City of Commerce City, 996 P. 2d 133 (Colo. 2000). City charter provision creating permanent panel of arbitrators for binding interest arbitration to resolve impasses in collective bargaining with police officers contained the political accountability required by constitutional prohibition against delegation of legislative power, where the elected city council appointed the panel and retained continuing authority to add or remove arbitrators.</td>
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<td><strong>Iowa:</strong> Iowa Code § 20.17, 20.19</td>
<td>Mandatory interest arbitration for public employees</td>
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<td>17.455(31), § 17.455(33) [MCL § 423.231] (2000)</td>
<td>interest arbitration for firefighters and police officers upon request by one party to the negotiations</td>
<td>providing for compulsory interest arbitration of municipal police and fire department disputes as amended did not impermissibly usurp constitutionally vested home rule powers. Statute providing for compulsory interest arbitration of municipal police and fire department disputes did not represent unconstitutional delegation of power where statute provided reasonably precise standards to guide exercise of delegated authority.</td>
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<tr>
<td>New Jersey: N.J. Stat. § 34:13A-16 (2000)</td>
<td>Mandatory binding interest arbitration for firefighters and police officers when initiated by one of the negotiating parties and approved by the labor commission</td>
<td>Metropolitan Council No. 23 &amp; Local 1277 v. Center Line, 414 Mich. 642 (1982). The statute, which provides for compulsory arbitration in labor disputes involving municipal police and fire departments, is clearly constitutional. The standards provided are as reasonably precise as the subject matter requires or permits, and there is adequate provision for political accountability. However, the Legislature did not intend to give an arbitration panel unbridled authority to compel agreement on permissive subjects of bargaining for which parties have no duty to bargain under PERA. The compulsory arbitration panel exceeded its authority in awarding the inclusion of a layoff clause. A municipal employer's initial decision to lay off employees is not a mandatory subject of bargaining, although the effect of such a decision is a mandatory subject.</td>
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Amalgamated Transit Union v. Mercer County Improvement Authority, 386 A.2d 1290 (N.J. S.Ct. 1978). Statute providing for compulsory grievance and interest arbitration of labor disputes in public sector is constitutional, given explicit statutory standards including arbitrable procedures and
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<td>New York</td>
<td>NY CLS Civ. S § 209 (2000)</td>
<td>Mandatory binding interest arbitration at the request of either party or the public employee relations board</td>
<td><em>Amsterdam v. Helsby</em>, 27 NY 2d 19, 371 NYS 2d 404 (1975). A statute requiring binding arbitration of disputes between cities and their organized fire and police forces was held not to be an unconstitutional delegation of legislative discretion or lawmaking authority. Without engaging in extensive discussion, the court pointed out that there was no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment. In this case, the court said, the legislature had delegated to a public employment relations board, and through it to ad hoc arbitration panels, its constitutional authority to regulate the compensation and working conditions of public safety employees, in the limited situation where an impasse occurs, and also established specific standards which such a panel must follow. Such delegation was both proper and reasonable, the court concluded.</td>
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<td>Oregon</td>
<td>ORS § 243 et seq (1999)</td>
<td>Mandatory binding arbitration for public employees at declaration of impasse by either party</td>
<td><em>Medford Firefighters Assoc. v. Medford</em>, 40 Or App 519 (1979). Statute providing for compulsory interest-arbitration in public sector does not violate &quot;home rule&quot; provisions of state constitution, given predominance of substantive state policy of requiring arbitration as <em>quid pro quo</em> for</td>
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<tr>
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<td>Pennsylvania: 43 P.S. § 217.4 (1999)</td>
<td>Mandatory binding arbitration for firefighters and police officers upon request by either of the negotiating parties</td>
<td><em>Amalgamated Transit Union v. Port Authority of Allegheny County</em>, 417 Pa. 299 (1965). Where a statute provided for arbitration of labor disputes between a transit authority and its employees in the event of a failure to reach agreement on contract issues by collective bargaining, the wording of the statute being that in the event of failure to agree, the authority &quot;shall&quot; offer to submit such dispute to arbitration, it was held that the word &quot;shall&quot; in the statutory provision was imperative, and required the authority to submit to arbitration.</td>
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</table>
| Wisconsin: W.S.A. 111.70 et seq. (1999) | Mandatory interest arbitration for firefighters and police officers upon request of either of the negotiating parties | *Brennan v. Employment Relations Comm.*, 112 Wis 2d 38 (1983). Statutes requiring binding interest arbitration for police and firemen in "cities of the 1st class" did not constitute violation of equal protection, even though City of Milwaukee was only city in Wisconsin in that class, where it was within legislature's power to classify cities into classes and enact legislation applicable only to various of those classes, and particularly where statutory scheme for cities such as Milwaukee was not significantly different from that applicable to municipalities not of first class.  
*La Crosse Professional Police Assoc. v. City of La Crosse*, 212 Wis. 2d 90 (1997). In interest arbitration, arbitrator exceeded his statutory authority to select final offer of one of parties and then issue award incorporating offer without modification, by accepting city employer's final offer but awarding health insurance provisions that clearly differed from wording of final offer, such that modifications went beyond mere interpretation of offer. |
Table 3: Permissive Interest Arbitration Statutes

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<tr>
<td>Hawaii: HRS § 89-2, § 89-11 (2000)</td>
<td>Permissive binding interest arbitration for public employees upon procedure agreed to by the parties or by requested decision of the employment board</td>
<td><em>Board of Educ. v. Hawaii Pub. Employment Relations Bd.</em>, 56 Haw. 85, 528 P.2d 809 (1974). The board, on its own motion, can declare that an impasse exists only after it reaches a determination that the party contending that an impasse exists has been bargaining in good faith.</td>
</tr>
<tr>
<td>Massachusetts: Mass. Ann. Laws ch. 150E, § 9 (2000)</td>
<td>Permissive binding interest arbitration for public employees upon mutual request of the parties</td>
<td><em>Town of Arlington v. Board of Conciliation and Arbitration</em>, 370 Mass 769, 352 NE 2d 914 (1976). Statute providing for binding arbitration of police and firefighter job demands does not constitute unconstitutional delegation of legislative power, does not violate home rule provisions of state constitution respecting powers of municipalities, and does not contravene &quot;one-man, one-vote&quot; principle applicable to units of local government with general responsibility and power for local affairs; arbitration awards relating to wages and benefits may be enforced through mandatory special appropriations by municipal finance committees and town meetings to meet arbitration awards.</td>
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Binding Interest Arbitration Review- Scholarly Articles

The three articles attached represent the most comprehensive discussions of binding interest arbitration of the scholarly articles reviewed by staff. Although the articles are somewhat old and it should be noted that laws discussed may not be current, the analysis and conceptual ideas discussed in the articles may be useful to Council members as they begin to evaluate key issues related to binding arbitration.


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November, 2003

Notes

*245 BINDING INTEREST ARBITRATION IN THE PUBLIC SECTOR: A "NEW" PROPOSAL FOR CALIFORNIA AND BEYOND

Brian J. Malloy

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Introduction

Binding interest arbitration has provided a sensible solution to public employee strikes, particularly by police and firefighters, for states and localities over the past thirty-five years. In April 2003, the California Supreme Court reopened the debate on the wisdom of binding interest arbitration for public employees. In County of Riverside v. Superior Court, [FN 1] the court reversed a twenty-year trend and struck down a binding interest arbitration statute.

Interest arbitration "refers to the arbitration of disputes arising from negotiations for new contract terms." [FN2] This is different from grievance arbitration, which "arise[s] from the interpretation or application of an existing agreement." [FN3] "Binding" designates that the arbitrator's decision results in a legally binding contract. [FN4] Most binding interest arbitration statutes require "final offer" arbitration, whereby the arbitrator must select the last offer submitted by one of the parties, usually on an issue-by-issue basis. [FN5] Thus, binding interest arbitration takes the final policy decisions out of the hands of the elected representatives and gives them to a neutral third party.

*246 Currently, about thirty states (or localities therein) have some sort of interest arbitration statute. [FN6] There are several rationales for allowing interest arbitration in the public sector. For example, it can protect the public against harmful strikes, while at the same time provide bargaining leverage to unions incapable of striking effectively. [FN7] However, cities and counties have argued against binding interest arbitration. [FN8] The public employers' argument is that, as opposed to grievance arbitration in which the arbitrator performs a judicial function by merely interpreting and applying an existing agreement, in interest arbitration the arbitrator is setting the terms, working conditions, and wages of public employees, thereby making a policy determination usually entrusted to politically accountable representatives. [FN9] Public employers also argue that binding interest arbitration inevitably leads to inflationary wages that have a harmful impact on their budgets. [FN10]

Although many state courts have traditionally upheld binding interest arbitration, a notable minority has held it to be an unconstitutional delegation of legislative authority to a private third party. [FN11] In the past twenty years, there has been a trend toward endorsing binding interest arbitration wholeheartedly. [FN12] The County of Riverside v. Superior Court decision was the first decision since 1981 to strike down a binding interest arbitration statute, thus ending this trend of total acceptance.

Provided that certain safeguards are in place, the trend of upholding binding interest arbitration statutes was appropriate. Part I of this Note will compare cases from the 1990s and 2000s to cases from the 1960s and *247
I. State Courts' Interpretation of the Non-Delegation Doctrine as Applied to Binding Arbitration

A. Constitutional Provisions

The most successful challenges to the constitutionality of binding interest arbitration statutes have been under the non-delegation doctrine of many state constitutions. The states that have addressed this issue generally have a similar provision in their constitution, that the state legislature "shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." There are also other constitutional provisions that courts have relied upon. While the text of the particular constitutional provisions are important, the overriding concern, regardless of the text, is that any binding arbitration framework allows a private party to make what is in reality a legislative policy decision. Regardless of the constitutional provision, it is the details of the statute that have tended to play the determinative role of whether a court will uphold or strike down binding interest arbitration under a non-delegation theory.

B. The Early Cases

In the late 1960s and 1970s, state courts routinely upheld constitutional challenges to binding interest arbitration. Two early and often-cited cases are State ex rel. Fire Fighters Local No. 946 v. City of Laramie and Warwick Regular Firemen's Ass'n, which both upheld binding arbitration statutes. In Fire Fighters Local, the firefighter's union sought to compel Laramie to comply with the procedures of a binding interest arbitration statute. The city defended on the ground that the statute was unconstitutional. The Wyoming Supreme Court, while not even discussing the specifics of the statute, upheld it, reasoning that performance of arbitration is not "performance of a municipal function" within the meaning of the state constitution. Declaring the board to be a "public agency" led the court to conclude that there was not a delegation to a private person, and therefore no constitutional non-delegation problems. This circular reasoning has received severe criticism, even by proponents of binding arbitration. Other courts around this era also routinely upheld binding arbitration statutes. While many courts upheld these statutes, there were several courts that invalidated binding arbitration schemes.
based entirely on non-delegation grounds. [FN30] In 1962, the Pennsylvania Supreme Court held that a binding arbitration act ("the Act of June 30, 1947") involving police and firefighters was not binding on the public, and alternatively, that if it was binding, it would violate the Pennsylvania Constitution. [FN31] In Greeley Police Union v. City Council of Greeley, the Colorado Supreme Court invalidated a binding arbitration provision in a city charter amendment that applied to police officers. [FN32] The court noted that the charter amendment provided that the American Arbitration Association select a single person who is granted authority to resolve all disputed issues. [FN33] The court held that the Colorado Constitution prohibited "delegating legislative power to politically unaccountable persons." [FN34] The court concluded that the charter amendment unconstitutionally delegated this legislative power. [FN35]

*250 The South Dakota Supreme Court, in City of Sioux Falls v. Sioux Falls Firefighters, Local 814, held that the South Dakota Firemen's and Policemen's Arbitration Act, a state statute providing for binding arbitration for police and firefighters, was a "clearly unconstitutional" delegation of legislative authority. [FN36] The court specifically rejected the reasoning provided by the Wyoming and Rhode Island Supreme Courts. [FN37] The Utah Supreme Court also invalidated the Firefighter Negotiation Act that applied only to firefighters. [FN38] The court was concerned that no statutory standards were in place to control the arbitrator: "Although it is not dispositive of the delegation issue, in this case the legislature failed to provide any statutory standards in the act or any protection against arbitrariness, such as, hearings with procedural safeguards, legislative supervision, and judicial review." [FN39] Finally, in 1981 the Supreme Court of Kentucky, in a brief opinion, struck down a city's binding arbitration ordinance on non-delegation grounds in City of Covington v. Covington Lodge No. 1, Fraternal Order of Police. [FN40]

These early cases provide a good preview of what was to happen in the next two decades. While the majority of the courts were upholding binding arbitration statutes, there was a significant minority that took a hard look at the statute and invalidated those statutes that simply gave too much unfettered power to the arbitrator. The concerns over political accountability and especially lack of standards would not dissipate. As more and more states and localities experimented with binding interest arbitration, more courts faced the political accountability and standards issues. Until recently, state courts had unanimously upheld binding arbitration statutes over the past twenty years. However, the opinions suggest that the political accountability and standards concerns did not get lost on either the courts or on the legislatures who were drafting the statutes.

C. A Trend Towards Acceptance

While most recent state court decisions have overwhelmingly upheld binding arbitration statutes, this section will begin with an examination *251 of three state courts that had previously found binding arbitration unconstitutional but, in a subsequent decision, upheld the rewritten provisions. Each of these state courts took a different approach.

In the late 1980s, the Ohio Supreme Court flip-flopped on the constitutionality of binding interest arbitration. In 1988, in City of Rocky River v. State Employment Relations Board (Rocky River I), the court struck down portions of Ohio's Public Employees' Collective Bargaining Act as unlawfully delegating legislative authority to an arbitrator. [FN41] After several motions for reconsideration, a year later in City of Rocky River v. State Employment Relations Board (Rocky River IV) the court upheld the same statute as a constitutional delegation of legislative power. [FN42] The Ohio Supreme Court noted that the statute provides "the conciliator with detailed guidelines under which to proceed," and that these standards were sufficient for delegation purposes. [FN43] These standards included consideration of past collectively bargained agreements, the interests and welfare of the public, and the ability of the public employer to finance and administer the agreement. [FN44] This case has "at least temporarily, settled a constitutional debate among the justices of the Ohio Supreme Court." [FN45] It is interesting to note that this decision, while making mention of the non-delegation issue, did not really address it in full detail, and has been criticized for that important omission. [FN46] But the court did address another important factor: standards to control the arbitrator.
Pennsylvania, whose Supreme Court had invalidated a binding interest arbitration statute in Erie Firefighters, approached the non-delegation problem another way. Rather than a change of justices or re-drafting the statute, the state adopted a constitutional amendment [FN47] that permitted binding interest arbitration. The amendment immediately followed the constitutional delegation article that the Pennsylvania Supreme Court relied upon in invalidating the statute in Erie Firefighters. Nonetheless, a city council challenged the Act of June 24, 1968, which provided for compulsory arbitration to resolve disputes between police and firefighters and the public employers. [FN48] The city argued that the statute did not contain sufficient standards required by the court in other instances of delegated authority. [FN49] The Pennsylvania Supreme Court rejected this argument, reasoning that "to hold that the statute before us is invalid because it does not contain the standards necessary under our decisions interpreting Article II [section] 1 would be to directly contradict the language of the Amendment to Article III [section] 31, and would violate its obvious intendment as well." [FN50] Thus, the placement of authorization for binding arbitration directly into a state constitution virtually eliminates any successful challenges to the statute.

Colorado, whose Supreme Court rejected a binding arbitration statute in Greeley Police Union, was once again faced with the issue in Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City. [FN51] This case exemplifies the modern trend with a well-reasoned and analyzed opinion that addressed the political accountability issue. Commerce City challenged a charter amendment that established a detailed binding arbitration framework. [FN52] The amendment required the City Council to create a permanent panel of at least three arbitrators. [FN53] The Council was allowed to add and remove arbitrators from the panel at any time. [FN54] In addition, the amendment required the arbitrator to consider seven enumerated factors and issue a written decision. [FN55] The seven factors, which are typical of the standards set out by many state and local legislatures and demanded by some courts, are: (1) the interests and welfare of the public and the financial ability of the City to bear the costs involved; (2) the lawful authority of the City; (3) stipulations of the parties; (4) comparison of the compensation, benefits, hours, and other terms or conditions of employment of the members of the police department involved with other police department members performing similar services in public employment in comparable communities; (5) the cost of living; (6) any claims of failure of a party to bargain in good faith pursuant to section 21.7(c); and (7) other similar standards recognized in the resolution of interest disputes. [FN57] Finally, the amendment provided for limited judicial review of the arbitrator's award. [FN58]

The Colorado Supreme Court upheld the charter amendment, stating that the case was consistent with Greeley Police Union. [FN59] The court reasoned that in Greeley Police Union, the court made clear that the Colorado Constitution prohibited delegation of legislative power to "politically unaccountable" persons. [FN60] Here, the court held that, by requiring the City Council to create the arbitration panel and by allowing the City Council to remove persons from the arbitration panel, the panel was politically accountable. [FN61] Furthermore, the court held that the amendment provided sufficient standards and safeguards to guide the arbitrator's decision. [FN62]

Over the past decade, other states have also dealt with constitutional non-delegation challenges to binding interest arbitration statutes. The cases of Oklahoma and Alaska are illustrative of the new approach legislatures are taking. Instead of unaccountable arbitrators with absolute discretion, these statutes address political accountability concerns and constrain arbitrator discretion.

In 1971, the Oklahoma Legislature passed the Fire and Police Arbitration Act (the "Act"), where the right of police and firefighters to strike was withheld. [FN63] However, the Act only provided for non-binding interest arbitration. [FN64] The Act was amended in 1985 and 1995 to provide for binding interest arbitration. [FN65] The 1995 amendment also provided a unique process: If the arbitrators did not choose the city council's best offer, the city council could call a special election and submit the two proposals to a vote of the people. [FN66] The citizens of the affected municipality could, in essence, have the final say as to whether to ratify or reject the collective bargaining agreement. [FN67]

In 1996, the Oklahoma Supreme Court upheld the Act despite numerous constitutional challenges, including
non-delegation, in Fraternal Order of Police, Lodge No. 165 v. City of Choctaw. [FN68] The court compared the Oklahoma statute to other state binding arbitration statutes that were held constitutional. The Oklahoma court found the reasoning of the other state courts persuasive that the “delegation of authority to an arbitrator was permissible because there were sufficient guidelines and standards set forth in the legislation.” [FN69] The court pointed out that here, the Act “requires that the arbitrators give weight to factors such as a comparison of wages and benefits with prevailing wage rates, interest and welfare of the public and revenues available to the municipality.” [FN70] The court reasoned that similar “guidelines were noted by the Alaska Court in approving their statute for binding interest arbitration.” [FN71] (This case is discussed immediately below.) Therefore, the Oklahoma Supreme Court upheld the Act against the political accountability challenge because the “delegation of power is accompanied by sufficient guidelines.” [FN72]

Surprisingly, the Oklahoma Supreme Court did not analyze the political accountability aspect of the municipality allowing the submission of final offers to the voters if the municipality's offer is not chosen. The court merely stated that “the ultimate decision resides with either the city council or the people themselves.” [FN73] This lack of analysis may be because direct voter approval of the offer makes the arbitration offer per se politically accountable; but it is more likely because the court never reached this issue, since it held that the statute contained sufficient standards and guidelines. In fact, the municipalities in Fraternal Order of Police, Lodge No. 165 v. City of Choctaw argued against the direct vote provision, stating that it took away the city's power to tax and that it was an illegal use of the initiative and referendum process. [FN74] The court rejected all of these contentions. [FN75]

In 1975, Anchorage, Alaska enacted a comprehensive labor ordinance that included a binding arbitration provision for police, fire personnel,*255 and emergency medical service workers. [FN76] In 1989, Anchorage, while in contract talks with local police and firefighters, filed suit claiming that the binding arbitration provision was unconstitutional. [FN77] Three years later, the Supreme Court of Alaska in Anchorage Police Department heard the case and addressed both the issues of political accountability and sufficient standards. [FN79] The court upheld the ordinance under both challenges. [FN80]

Unlike Colorado's case in Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, where the City Council chose the list of arbitrators, here the American Arbitration Association supplied the list. [FN81] That was not determinative for the Alaska high court. First, the court, citing language used by the Supreme Judicial Court of Massachusetts stated that “we are less concerned with the labels placed on arbitrators as public or private, as politically accountable or independent, than we are with the totality of the protection against arbitrariness provided in the statutory scheme.” [FN82] Unlike the South Dakota and Utah courts, the Alaska Supreme Court held that the delegation of legislative power to an arbitrator was not per se unconstitutional. [FN83]

Here, the court held that the statute contained sufficient protections against arbitrariness. First, the court pointed out that the arbitration must be conducted according to published rules by the American Arbitration Association. [FN84] Second, while the American Arbitration Association provides the list of arbitrators, the choice of the arbitrator must be mutually agreed to by the parties. [FN85] Third, the arbitrator must conduct a hearing and produce a written decision with findings of fact concerning the specific issues in question. [FN86] Finally, the written decision is “subject to *256 judicial review for abuse of discretion, fraud, or misconduct on the part of the arbitrator.” [FN87]

Another important factor was the list of standards that has become common in modern binding interest arbitration statutes. The statute provided that the fact-finder is to consider “workload, productivity, economic feasibility, cost of living, the parties' bargaining history, relevant market comparisons in the public sector, and relevant market comparisons in the private sector.” [FN88] After an exhaustive analysis of the statute, the court concluded that “[i]n light of the elaborate and detailed structure which guides the arbitrator's decisions and guards against arbitrary action we conclude that the Code's delegation of legislative authority is constitutional.” [FN89]

D. The Trend Ends in California

The trend of courts upholding binding arbitration statutes involving public employees and public entities ended in April 2003, when the California Supreme Court invalidated the state's binding interest arbitration statute. [FN90] Until 2001, California had been without a state-wide binding interest arbitration statute. Twenty-one California localities, however, had implemented various forms of binding arbitration. [FN91] During the 1999-2000 session, the California Legislature enacted into law Senate Bill 402, entitled “Arbitration of Firefighter and Law Enforcement Officer Labor Disputes,” which added sections 1299 et seq. to the California Code of Civil Procedure. [FN92] Under Senate Bill 402, a labor union representing public safety employees can declare an impasse in the negotiations and require a local agency to submit unresolved economic issues to binding arbitration. [FN93] Each party then chooses an arbitrator, who together choose a third arbitrator. [FN94] The arbitration panel then chooses between each side's last best offer, based on an enumerated list of factors. [FN95] Interestingly, Senate Bill 402 only applied to any local agency or any entity acting as an agent of a local agency, but did not apply to the State of California even acting as such an agent. [FN96] Therefore, the California Highway Patrol, among others, were not covered by this statute.

The California Supreme Court invalidated Senate Bill 402 as violating the California Constitution. The court, however, invalidated the law on “home rule” grounds, not under the non-delegation doctrine. [FN97] The court held that the legislature did not have power to legislate in this area because compensation of county public employees is not a statewide concern, and therefore the power to compensate county employees is within the sole powers of counties (and presumably cities for city employees). [FN98] The court specifically did not address whether a county (or city or the state for its own employees) could enact a binding arbitration statute on matters it controlled:

At the outset, we emphasize that the issue is not whether a county may voluntarily submit compensation issues to arbitration, i.e., whether the county may delegate its own authority, but whether the Legislature may compel a county to submit to arbitration involuntarily. The issues involves the division of authority between the state and county, not what the county may itself do. [FN99]

This is an important distinction, because it leaves open the possibility that cities, counties, and the state may enact binding arbitration procedures involving public employees whose compensation they control. For example, cities, counties, and even the state could enact the proposal below for the workers they each employ.

Although the court's opinion can be read as forbidding any state legislative requirement of binding arbitration onto localities as an impermissible infringement on “home rule,” the State could attempt a state-wide system based on a direct accountability system, where the locality has the ultimate choice of sending the decision to the voters. The court stated that the reason Senate Bill 402 fails to pass constitutional muster was because “the county's governing body does not retain ultimate power.” [FN100] The State could argue that an arbitration statute (as proposed below) that allows the locality to take to the voters any adverse arbitration award does provide that locality's governing body with the “ultimate power” over the decision. Drafting a statute with more political accountability on the local level may be a way to overcome County of Riverside v. Superior Court's concerns.

As this section demonstrates, for almost twenty years state courts routinely upheld binding interest arbitration statutes as an appropriate constitutional means for resolving public labor disputes. However, legislatures have also been drafting more careful statutes, which may be the reason why the trend has been towards complete acceptance. The next Part will address whether this trend is appropriate in light of the still lingering constitutional issues.

II. Analysis of the Current State of the Law

The prior trend in favor of binding interest arbitration in certain parts of the public sector was appropriate, provided that certain requirements are met. First, there are several positive aspects that should continue to play a role in future binding interest arbitration statutes. The most important aspects are the acknowledgment of the unique “no strike” rules that apply to police and firefighters, the provisions that address political accountability, and the demand
for sufficient standards. However, the trend was not without faults. Some state courts have upheld binding arbitration statutes with insufficient protections, while others have struck down adequate statutes. This Part will examine the current state of the law, looking at both the positive aspects of the last thirty-five years and the flaws in some statutes and court decisions.

A. Positive Aspects of the Trend

As an initial matter, many of the state and local statutes apply only to police and fire services. This is because most states outlaw strikes by police and firefighters, [FN101] otherwise known as essential services, because of the detrimental impact a strike of that nature would have on the communities. [FN102] On the other hand, the right of public employees to collectively bargain has increased substantially over the past forty years. [FN103] Some commentators have suggested that “the right to bargain collectively has been so connected with the right to strike in this country that legitimate questions arise as to whether genuine collective bargaining can occur without the right to strike.” [FN104] This creates a problem for police and firefighter unions: Without binding interest arbitration, they have the right to bargain collectively, but do not have direct striking pressure to place on the public employer.

The courts have not been oblivious to this problem. The Oklahoma Supreme Court in Fraternal Order of Police, Lodge No. 165 v. City of Choctaw noted this dilemma in quoting the Oregon Supreme Court, which stated that “binding arbitration is essentially a quid pro quo for the prohibition of strikes by firemen. Together, these statutes protect the public from interruption of essential health and safety services while recognizing the employees' right to engage in meaningful collective bargaining.” [FN105]

Indeed, in the absence of the right to strike, interest arbitration is a strong substitute to make collective bargaining effective. [FN106] The courts are correct to note this unique feature of binding interest arbitration. It provides the police and firefighters unions with a pressure similar to that of a strike on the public employer, while at the same time protecting the health and safety of the community. [FN107]

Another positive aspect has been the discussion of the need for political accountability. [FN108] What separates interest arbitration with other private forms of arbitration is the fact that the arbitrator, never an elected representative, is making legislative policy decisions. [FN109] In order to be truly accountable to the citizens, arbitrators who are making these legislative decisions need to have some connection to the elected representatives.

However, having an arbitrator who is politically accountable raises certain issues if the arbitrator is accountable to the local entity and other issues if the arbitrator is accountable to the state. For example, an arbitrator may be made “politically accountable” to the local city or county by appointment by the city council, as was the case in Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City. If an arbitrator is made politically accountable to the local electorate, which can be considered a “party” in the arbitration proceeding, then the arbitrator may not be seen as neutral. [FN110] In addition, “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.” [FN111]

On the other hand, the state legislature may form a statewide arbitration panel, so that the arbitrators are politically accountable to elected representatives, albeit at the state level. This poses a problem of the state infringing on local autonomy. [FN112] The state is in essence indirectly dictating to the localities how to set police and firefighter wages. This is what doomed the California statute, as there were specific constitutional provisions that protected cities and counties “home rule” in this area. [FN113] Statewide legislation, therefore, may run into two problems. First, the state constitution may not permit it. Second, even if statewide binding interest arbitration that applies to cities and counties is constitutionally acceptable, it ultimately removes the decisions from the citizens of the localities and places those decisions with the representatives of the state. This could anger citizens who would in effect be told by the state how much the locality needs to budget for its police and fire protection.
Legislatures have begun to recognize the concerns raised by scholars and the courts about political accountability. It is important to point out that not every court that has upheld a binding interest arbitration statute has done so on political accountability grounds. For example, the statute upheld in Anchorage Police Department called for the American Arbitration Association to provide a list of arbitrators. [FN114] The Colorado Supreme Court in Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, on the other hand, stated that a previous statute that had been struck down suffered from a lack of political accountability due to the fact that the American Arbitration Association, "an independent organization with no political accountability," submitted the list. [FN115]

One state court may see a political accountability problem where another court does not. The point is, however, that courts are properly considering this aspect of the non-delegation doctrine. Instead of the bright-line rules of Sioux Falls Firefighters, where no delegation to an arbitrator is proper, no matter the form, today there is Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, where the court will examine the statute in actual application to determine if there are sufficient legislative safeguards.

The legislatures and courts are addressing the need for some political accountability, in two distinct ways. The first way is to make the arbitrator politically accountable, while the other alternative is to make the arbitrator's award politically accountable.

Legislative bodies in Colorado and Nebraska, for example, seek political accountability through the arbitrator. In Colorado, the city charter amendment sought to have the arbitrator directly accountable to the city council. The city council creates a permanent panel of arbitrators, and has the authority to add and remove arbitrators from the panel at any time. [FN116] This is to ensure that the arbitrators themselves are subject to direct control from elected representatives. Nebraska, on the other hand, has a "politically accountable" administrative agency to resolve bargaining impasses. [FN117] This is similar to other states whose arbitrators, rather than supplied by a list from the American Arbitration Association, are supplied by an administrative agency. [FN118] These statutes, have direct political control over the arbitrator, but not necessarily the award. If the award is upsetting to the elected body, then it will be the arbitrator who is subject to dismissal.

On the other hand, Oklahoma's Fire and Police Arbitration Act represents an attempt to get political accountability over the award itself. The concern is not who is actually arbitrating, but what is the end result. If the city's offer is not selected, the city can request a direct voter approval of the award. [FN119] In this way, the legislature seeks to give control over the policy decision to the citizens. While this new type of political accountability has not been extensively addressed by commentators, in Part IV this Note will argue that this is a more effective response to the political accountability issue.

The third positive aspect has been the demand of courts to require enumerated standards on which the arbitrator is to base his or her decision. To begin with, even some of public employers acknowledge that binding interest arbitration is not per se unconstitutional. [FN120] Rather, they argue that without standards and guidelines binding interest arbitration is an invalid delegation of authority. For example, in Anchorage Police Department, the city argued that "our problem is not with binding interest arbitration as a concept . . . Our problem is with the way it has been done with this ordinance. The ordinance simply does not provide the necessary standards and safeguards to make that delegation of authority valid." [FN121]

An excellent example of the courts requiring standards was the decision by the Supreme Judicial Court of Maine in City of Biddeford v. Biddeford Teacher's Ass'n. [FN122] The case involved the validity of the binding arbitration provision of the Municipal Employees Labor Relations Law, which applied to all public employees, but in this case was being invoked by teachers. [FN123] The court first held that binding interest arbitration was not a per se violation of the non-delegation doctrine of the state constitution. [FN124] However, the court closely scrutinized the statute and found that adequate standards did not exist. [FN125] The court noted that "[t]his Act—unlike
those in some other states—does not provide that the arbitrators’ award is to be subject to existing statutory restrictions.” [FN 126]

Although an earlier case, Biddeford Teacher’s Ass’n provides an excellent analysis of the need for standards. Standards parallel political accountability, as the Maine court noted that the “arbitrators are not public officials and are not required to answer to the electorate or to the elected representatives of the electorate.” [FN 127] In the last decade, the necessity of standards have been an important factor for courts in upholding these statutes.

*263 B. Critique of Decisions

While the more recent decisions have demonstrated a positive step taken by legislatures and the courts in drafting and interpreting binding interest arbitration statutes, there have been problematic decisions over the years. The purpose of this analysis is to show that the means are important in achieving the end of a constitutionally acceptable statutory framework.

My first critique is addressed to state legislatures. Generally, binding interest arbitration statutes are tailored to a narrow sector of public employees, usually police and firefighters. [FN 128] However, some states have provided binding interest arbitration to all public employees, regardless of whether they perform “essential services” or not. [FN 129] This is a mistake, for it broadens the use of this unique procedure to public employees who have other re­courses.

As discussed above, courts and commentators view binding interest arbitration as a replacement for the right to strike and to make collective bargaining rights effective. [FN 130] While strikes are certainly disruptive, the bargaining is still between public employees and the politically accountable public employer. Binding interest arbitration, which involves a private individual making legislative decisions, should only be used for those service providers, such as police and firefighters, that the community simply cannot afford to go on strike. It should not be used to enable the public employer to abdicate completely its role determining the compensation of most of its employees. [FN 131] Although it is tempting to use binding interest arbitration for all public employee labor disputes, it should not be a substitute for groups of employees who have the option to strike.

My second critique is addressed to state judiciaries. It is imperative that courts analyze the statutes to make sure the arbitrators are politically*264 accountable and are guided by enumerated standards. The Rhode Island Supreme Court’s decision in Warwick Regular Fireman’s Ass’n, is an example of an opinion that lacks proper analysis. Rather than critique this opinion, which has been done by many commentators, [FN 132] I will point out the danger in this type of decision. The court held that arbitrators when acting in their binding interest capacity were in reality public officials. [FN 133]

This type of semantic manipulation does not justify the end result of a constitutionally acceptable statutory framework. Courts that engage in this type of ends-justifying reasoning simply do not examine the statute at all, nor do they determine if the arbitrators are constrained by any political accountability or enumerated standards. This type of poor judicial review allows legislatures to draft broad proposals that could leave arbitrators unchecked. Fortunately, Warwick Regular Fireman’s Ass’n is an aberration, rather than a trend. It is important that courts engage in meaningful judicial review, so not as to let wholly unaccountable private parties make legislative policy decisions.

III. “Model Statute” Proposal

While a binding interest arbitration statute may seem like a complex way to resolve labor disputes, it is the best solution for dealing with police and firefighter labor impasses. The State of California and its cities and counties should do likewise. The alternatives are not desirable. Public employers will argue that binding interest arbitration is not necessary, that police and firefighters already have been given a “fair shake” by the public employer and that
they do not need this unnecessary weapon. [FN134] However, considering that so many states and localities have
opted to create such a system, clearly there is a feeling that police and firefighters are not given a “fair shake.”
Without this system, police and firefighters would have to accept whatever the public employer offered.

California now stands at a crossroads. For over thirty-five years, public entities have experimented with binding
interest arbitration. California attempted to join this group, but a statewide attempt to impose binding interest arbi-
tration on cities and counties has failed. The easiest solution would be to follow Pennsylvania's lead and enact a con-
stitutional amendment that allows for binding interest arbitration. [FN135] However, that would not address the fun-
damental problems and concerns about the role of the arbitrator. California and its cities and counties *265 have a
great opportunity to pass statutes that are not just constitutionally acceptable but that also address political account-
ability and arbitration standards in an ideal manner. Having examined the positive and negative aspects of binding
interest arbitration, I propose a statute that the State, cities, and counties of California can adopt toward employees
whom they control that includes the best practices of the last thirty-five years. The statute I propose should only ap-
ply to essential services such as police and firefighters, should include direct political accountability, and should
contain sufficient standards to constrain the arbitrator. This proposal could be adopted statewide or on a local basis.

A. Only for "Essential Employees"

The binding interest arbitration statute or ordinance should only be for essential employees, which are typically
police and firefighter personnel. As discussed above, this is because of the unique nature of their work: they perform
services that are absolutely essential to health and safety, but at the same time they are not allowed to strike. Other
employees may be found to be essential also. [FN136] Whatever the classification, it should not be a blanket right to
binding interest arbitration for every public employee.

B. Direct Political Accountability

The statute or ordinance should address the political accountability problem through a direct voter approval of
the arbitration awards.

If direct voter approval is not desired, then other political accountability measures must be enacted. The arbitra-
tors themselves could be made accountable to elected representatives. On the political accountability side, statutes
such as that involved in Fraternal Order of Police, Colorado Lodge No. 165 v. City of Commerce City [FN137] are
much more appealing than the statute involved in Anchorage Police Department. [FN138] It is important that the
elected representatives play a role in who will be on the arbitration board. Therefore, if a state or locality does not
adopt the direct elections approach, there are a number of alternatives to place political accountability on the arbitra-
tor. For example, a state or locality can devise a public arbitration agency similar to Nebraska. [FN139] Or, a state
*266 or locality can allow the legislature or city council to play a direct oversight role, such as the city charter in
Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City. Either way, the elected body is placing
some political restraints on the arbitrators themselves.

The real issue that concerns citizens is what the arbitrator is actually awarding. It is the award of compensation
that will directly affect the citizens, possibly either through cuts in other services, decrease in overall spending, or
increased taxes. Cities and counties of California should look to Oklahoma's unique solution to this problem. If the
city's final offer is not chosen by the arbitrator, the city council can request the arbitration award to be voted on by
the citizens. [FN140] In that way, direct political accountability is realized.

As discussed above, commentators have pointed out some of the problems with political accountability of the
arbitrator. [FN141] The arbitrator, if responsive to the elected officials, is in effect responsive to one of the parties
who cannot resolve the labor dispute. Conceptually, the same argument can be applied to the citizens who vote, who
are supposed to be represented by the elected officials.
On the other hand, when the citizens get to directly vote on the arbitration award, that provides direct political accountability. There may be factors that are skewing the bargaining process, such as elected representatives holding a grudge against the bargaining agents or other factors that may come into play during negotiations. But it is the citizens' checkbook that the parties are negotiating over. If the citizens want to give the police and firefighters a substantial raise, then they can voice themselves at the polls. Therefore, California and its cities and counties should adopt a statutory scheme similar to Oklahoma. [FN142]

C. Sufficient Standards

The statute or ordinance should contain sufficient standards to regulate arbitrator discretion. The legislatures and the courts have handled these safeguards convincingly and thoroughly. Many courts that have upheld binding interest arbitration statutes have discussed the standards §267 that are in place to constrain the arbitrator's discretion. [FN143] "Standards" encompasses three distinct areas: requirement of a written decision by the arbitrator, enumerated criteria in the statute, and judicial review of the award.

First, the cities, counties, or State of California should require the arbitrator to issue a written opinion addressing each issue. [FN144] It is important to note that this is related to judicial review in that, for the court to have meaningful judicial review, it needs to have some evidence of what and how the arbitrator came to his or her decision.

This written decision will be just as important in areas that have a referendum on the award as those that do not. Where there is a referendum, the written decision will provide voters with reasons why the award was made. Where there is no referendum, a written decision is an essential part of the restraint on arbitrator discretion (see judicial review discussion below). Therefore, a written decision on each issue needs to be a part of any statute. [FN145]

Second, the statute or ordinance needs to contain a list of standards that the arbitrator must consider. [FN146] There are a variety of standards that legislatures have drafted, [FN147] but California should adopt the comprehensive list of factors provided by the Michigan statute:

(a) The lawful authority of the employer.
(b) Stipulations of the parties.
(c) The interest and welfare of the public and the financial ability of the unit of government to meet those costs.
(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, *268 hours and conditions of employment of other employees performing similar services and with other employees generally:
   (i) In public employment in comparable communities.
   (ii) In private employment in comparable communities.
(e) The average consumer prices for goods and services, commonly known as the cost of living.
(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment. [FN148] By following these statutory criteria, courts have held that this comprehensive list of factors "provides the necessary standards" required for the exercise of legislative power." [FN149] Finally, the last required safeguard is judicial review of the arbitration award. If California's cities and counties adopt the proposed voter approval system, then judicial review will not be required. The voters, not the arbitrator,
will have the ultimate review. However, in other forms of binding arbitration statutes, where voters do not “review” the decision, judicial review is essential. Typically, the arbitrator’s award, which should be in writing, is subject to judicial review for “abuse of discretion, fraud, or misconduct on the part of the arbitrator.” [FN150] This judicial review, while limited, ensures that the arbitrator is acting in accordance with the law and in accordance with the enumerated criteria. [FN151] The standard of judicial review of interest arbitration awards is much stricter than most arbitration awards, including grievance arbitration. [FN152]

*269 As stated earlier, written decisions, enumerated standards, and judicial review are important, but, with direct political accountability, they become less so. That is because the citizens of the community have the final “review.” Therefore, while these standards are important in constraining arbitrator discretion, direct political accountability provides an additional safeguard against any troublesome delegation problem.

Conclusion

Binding interest arbitration has become a popular tool in many states and localities for resolving potentially debilitating strikes. [FN153] Although California’s statewide venture into binding interest arbitration has failed, there remain several avenues by which California public entities can enact binding interest arbitration legislation. Many legislatures on the state and local level have drafted comprehensive statutes not only to resolve the labor dispute problem, but to ensure that the delegation of this legislative authority is constitutionally permissible. Until recently, state courts had unanimously upheld these statutes. The upholding of these provisions was a positive trend, in light of the carefully crafted statutes.

The State of California and its cities and counties should adopt a statute or ordinance that the limits binding arbitration to “essential” employees and provides a list of enumerated statutory standards that an arbitrator is to consider. The best way to obtain political accountability is through a direct election by the voters on whether to approve or reject the arbitration award. That way, the arbitration award is truly politically accountable and is the message of the citizens who will have to pay, directly or indirectly, for the new labor contracts.

[FN1]. 66 P.3d 718 (Cal. 2003).


[FN3]. Id.

[FN4]. Id.

[FN5]. See Senator Robert J. Martin, Fixing the Fiscal Police and Firetrap: A Critique of New Jersey's Compulsory Interest Arbitration Act, 18 Seton Hall Legis. J. 59, 60 (1993). Because it is beyond this Note's scope, I will not be discussing the benefits and disadvantages of final offer arbitration to other more discretionary forms.


[FN7]. See Grodin, supra note 2, at 679-80.

[FN8]. Cities and counties have also argued against grievance arbitration procedures as well, but courts have been more concerned over interest arbitration and more likely to hold interest arbitration unconstitutional.

[FN10]. See Sloan, supra note 6, at 620.


[FN13]. See Salt Lake City v. Int'l Ass'n of Firefighters, 563 P.2d at 791; Sioux Falls Firefighters, 234 N.W.2d at 38.

[FN14]. Sioux Falls Firefighters, 234 N.W.2d at 36 n.1 (quoting Pa. Const. art. III, §31) See, e.g., Salt Lake City v. Int'l Ass'n of Firefighters, 563 P.2d at 788 n.1; Harney v. Russo, 255 A.2d 560, 562 (Pa. 1969); Fire Fighters Local, 437 P.2d at 299. Importantly, the California Supreme Court in County of Riverside v. Superior Court based its decision in large part on home rule, rather than simply non-delegation grounds. While both involve delegation, home rule refers to the power of the state to compel a locality to delegate the locality's power, while non-delegation refers to the power of a public entity to delegate its power. Most of the successful challenges have been on strictly non-delegation, rather than home rule, grounds. See cases cited supra note 12.

[FN15]. See, e.g., Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 135, "Every person having authority to exercise or exercising any public or government duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers....") Id. (quoting Colo. Const. art. XXI, §4).


[FN17]. 437 P.2d at 301 (Wyo. 1968).

[FN18]. 256 A.2d at 212.

[FN19]. Fire Fighters Local, 437 P.2d at 298.

[FN20]. Id.

[FN21]. Id. at 300.

[FN22]. Warwick Regular Fireman's Ass'n, 256 A.2d at 212.
[FN23]. The constitutional provision at issue in Warwick Regular Fireman's Ass'n was Article VI, Section 2 of the Rhode Island Constitution, which read: “The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws.” R.I. Const. art. VI, §2.

[FN24]. Warwick Regular Fireman's Ass'n, 256 A.2d at 208.

[FN25]. Id.

[FN26]. Id. at 211.

[FN27]. Id.


[FN31]. Erie Firefighters Local No. 293, 178 A.2d at 695. The constitutional provision at issue here was typical: “The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes or perform any municipal function whatever.” Pa. Const. art. III, §31 (1994).

[FN32]. 553 P.2d at 792-93.

[FN33]. Id. at 791.

[FN34]. Id. at 792.

[FN35]. Id.


[FN37]. Id. at 36-38.


[FN39]. Id. at 789.
In this case, the previous employment contract between the police and the city stated that when this contract expired, in the event of a bargaining impasse, binding arbitration would take place. *Id.* at 221. The city had passed this previous contract as part of an ordinance. *Id.* This case was unique in that unlike a blanket city ordinance that applied across the board to all police and/or firefighter negotiations, this ordinance applied only to this particular situation.

*FN41.* *City of Rocky River v. State Employment Relations Bd.*, 530 N.E.2d 1, 9 (Ohio 1988) (Rocky River I).

*FN42.* *City of Rocky River v. State Employment Relations Bd.*, 539 N.E.2d 103, 119 (Ohio 1989) (Rocky River IV). One commentator has noted that in this intervening year, one justice had replaced another justice, and the court agreed to reconsider the motion for rehearing. See Cataland, supra note 16, at 83 n.3.

*FN43.* Rocky River IV, 539 N.E.2d at 112.

*FN44.* *Id.*

*FN45.* *Id.* at 83.

*FN46.* See Cataland, supra note 16, at 83-84.

*FN47.* The constitutional amendment reads:

> Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen and firemen and their public employers shall be binding upon all parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivisions or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings.


*FN49.* *Id.* at 562-63.

*FN50.* *Id.* at 563.


*FN52.* *Id.* at 135.

*FN53.* *Id.* at 134.

*FN54.* *Id.*

*FN55.* *Id.* at 134-35.
[FN57]. Id. at 135 n.5.

[FN58]. Id. at 135.

[FN59]. Id. at 136.

[FN60]. Id.

[FN61]. Id. at 137.

[FN62]. Id. at 138-39.


[FN64]. Id.

[FN65]. Id.

[FN66]. Id.

[FN67]. Id. at 269.

[FN68]. Id. at 263.

[FN69]. Id. at 267.

[FN70]. Id.

[FN71]. Id. at 268.

[FN72]. Id.

[FN73]. Id.

[FN74]. Id. at 268-69.

[FN75]. Id.


[FN77]. Id. at 1083.

[FN79]. The court framed the challenges this way: "The Municipality argues that the Code's binding interest arbitration provisions, delegating legislative authority to a politically unaccountable arbitrator, violate the Alaska Constitution. Alternatively, the Municipality contends that the Code is unconstitutional because its provisions fail to provide
standards to guide the arbitrator.” Id.

[FN80]. Id. at 1085, 1089.

[FN81]. Id. at 1082 n.5.

[FN82]. Id. at 1084 (quoting Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914, 920 (Mass. 1976)).

[FN83]. Id. at 1085.

[FN84]. Id. at 1088.

[FN85]. Id. at 1086.

[FN86]. Id.

[FN87]. Id. at 1088.

[FN88]. Id. at 1082 n.5.

[FN89]. Id. at 1089.


[FN91]. Sloan, supra note 6, at 605.

[FN92]. County of Riverside v. Superior Court, 66 P.3d at 721.

[FN93]. Id. at 722. For a discussion on the distinction between economic and noneconomic issues, see infra note 143.

[FN94]. Id. (citing Cal. Civ. Proc. Code §§1299.4 to .6 (West 1982)).

[FN95]. Id. The factors included: the interest and welfare of the public; the financial condition of the employer and its ability to meet the costs of the award; the availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration; comparison of wages, hours, and other terms and condition of employment of other employees performing similar services in similar employment; the average consumer prices for goods and services; particular requirements of employment, including, but not limited to, mental, physical, and educational qualifications, job training and skills, and hazards of employment; and changes in any of the foregoing that are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. See Cal. Civ. Proc. Code. §1299.6(c).

[FN96]. County of Riverside v. Superior Court, 66 P.3d at 722 (citing Cal. Civ. Proc. Code §1299.3(c) (West 1982)).

[FN97]. See id. at 723-27. See also cases cited supra note 14 for distinction between home rule and non-delegation.
[FN98]. See id. at 725-26. It is interesting to note that in Salt Lake City v. Int'l Ass'n of Firefighters, the Utah Supreme Court, which involved a similar constitutional provision at issue in County of Riverside v. Superior Court, held that binding arbitration was not an infringement on home rule; it did not impermissibly interfere with a municipal function because police and firefighter compensation was a statewide concern. Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1654, 593, 1654, & 2064, 563 P.2d at 789. Rather, the Utah Supreme Court held that the statute, as written, violated the non-delegation doctrine. Id. at 789-90.

[FN99]. County of Riverside v. Superior Court, 66 P.3d at 722. See also id. at 726 ("Whether the county may delegate its own authority is irrelevant here.... As noted, the issue involves the distribution of authority between county and state, not what the county itself may do.").

[FN100]. Id. at 725.


[FN103]. See Marcus R. Widenor, Public Sector Bargaining in Oregon: The Enactment of the PECBA, 8 LERC Monograph Ser. 1, 6 (1989).

[FN104]. Anderson & Krause, supra note 100, at 153.

[FN105]. Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d at 267 (quoting Medford Firefighters Ass'n v. City of Medford, 595 P.2d 1268, 1271 (Or. 1979)).

[FN106]. Anderson & Krause, supra note 100, at 155.

[FN107]. Id. at 156.


[FN109]. See Grodin, supra note 2, at 681.

[FN110]. Id. at 693.

[FN111]. Id.

[FN112]. Id. at 694.

[FN113]. In County of Riverside v. Superior Court, the California Supreme Court held that the binding interest arbitration statute violated two home rule provisions of the California Constitution. 66 P.3d 718, 730-31 (Cal. 2003). Article XI, Section 1(b) stated that a county's "governing body shall provide for the...compensation...of employees." Cal. Const. art. XI, §1(b). Article XI, Section 11(a) provides: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." Id. at 11(a).

[FN115]. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 135-36.

[FN116]. Id. at 134.


[FN118]. See Cataland, supra note 16, at 99 n.87.


[FN121]. Id.


[FN123]. Id. at 389-90.

[FN124]. Id. at 398.

[FN125]. Id. at 402-03.

[FN126]. Id. at 402.

[FN127]. Id.


[FN130]. See supra notes 99-08 and accompanying text.

[FN131]. Conceivably, the arbitrator under an “all public employee” scheme could end up setting most of the public employees’ salaries. For example, if bargaining units of police, firefighters, administrative workers, parks and recreation workers, etc., all cannot come to an agreement, then the arbitrator would have to decide the compensation for each of the employee groups. While this may be considered a “worse case scenario,” under an all employee system, the possibility grows that an arbitrator will have to decide a disproportionate amount of compensation levels. While binding interest arbitration laws are positive when drafted in a particular manner, they should not become a substitute for the elected representatives in every case.

[FN132]. See, e.g., Craver, supra note 28, at 565.


[FN136]. See Grodin, supra note 2, at 679 n.4 (noting that some states have classified prison guards, hospital employees, public transportation workers, and port authority employees as under this umbrella).


[FN139]. See Cataland, supra note 16, at 99 n.87.


[FN141]. See supra notes 107-13 and accompanying text.

[FN142]. Oklahoma Statutes, title 11, section 51-108 reads in pertinent part:

Each arbitration statement shall also include a final offer on each unresolved issue.... Within seven (7) days after the conclusion of the hearing, a majority of the arbitration board members shall select one of the two last best offers as the contract of the parties.... If the city's last best offer is not selected by the arbitration board, that party may submit the offers which the parties submitted to the arbitration board to the voters of the municipality for their selection by requesting a special election for that purpose.


[FN143]. See Anderson & Krause, supra note 100, at 158-59.


[FN145]. “Issue” refers to the bargaining issues being decided by the arbitrator. These fall into two categories: economic and non-economic issues. For example, wage increases is an economic “issue,” while working conditions would be a “non-economic” issue. See Sloan, supra note 6, at 603-04. Therefore, under my proposal, and under many current state statutes, the arbitrator would make a separate written finding on his or her award of wages, a separate written decision on his or her decision on working conditions, and thereon.

[FN146]. This Note will not address the debate on what factors should be considered and what factors should not be considered. For example, one critique is that factors such as the public employer’s ability to pay should be given more weight than others. See Martin, supra note 5, at 63. Even though there is an agreement on standards, there is disagreement and a lot of commentary on what should be included and what weight these factors should be given. Id.

[FN147]. The most significant and controversial factor is “comparability,” which requires a “comparison of the overall compensation of the employees involved in the dispute with the overall compensation of comparable employees performing similar work in both private and public employment in a particular community or like communities.” See Anderson & Krause, supra note 100, at 161.

[FN149]. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 129.


[FN151]. For an excellent analysis of the role of judicial review in both pre- and post- interest arbitration award enforcement, see Craver, supra note 28, at 568-77. See also Grodin, supra note 2, at 697-700.

[FN152]. See Craver, supra note 28, at 571.

INTEREST ARBITRATION: THE ALTERNATIVE TO THE STRIKE

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INTRODUCTION

The right to bargain collectively has been so connected with the right to strike in this country that legitimate questions arise as to whether genuine collective bargaining can occur without the right to strike. The thesis of this Article is that an alternative to the right to strike exists and that that alternative is final and binding interest arbitration. This Article will demonstrate the viability of interest arbitration as an alternative to the strike by examining its implementation in the public sector.

Interest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel. [FN1] It differs from grievance arbitration, which involves the interpretation of the employment contract to determine whether the conditions of employment have been breached. [FN2] Thus, interest arbitration essentially is a legislative process, while grievance arbitration essentially is a judicial process. The following anecdote is a useful starting point for understanding the significance of interest arbitration.

The Transport Workers Union ('TWU') of New York City used to cry 'no contract, no work.' [FN3] The TWU struck effectively in 1966 and again in 1980, imposing great financial hardship on the city. [FN4] The 1980 strike resulted in the imposition of a $1,000,000 fine on the Union and cost each worker two days' pay for each day of the eleven day strike. [FN5] The strike hurt all of the parties involved, including the eleven day strike. [FN5]

As a result of these experiences, the Metropolitan Transportation Authority ('MTA') and the TWU jointly requested that the state legislature enact short-term legislation authorizing the state Public Employment Relations Board ('PERB') to appoint an arbitration panel to resolve any impasses that might arise in the 1982 contract negotiations. [FN6] The enacted legislation provided that PERB, upon the joint request of the MTA, the Manhattan and Bronx Surface Transit Operating Authority, and the Union representing their employees, would appoint a panel consisting of the three impartial members of the New York City Office of Collective Bargaining's Board of Collective Bargaining, with the Chairman of the Board serving as the panel's Chairman. [FN7] The Act further provided that the determination of the panel would be final and binding, except that any provision thereof that would require the enactment of a law for its implementation would not be binding until such law were enacted. [FN8]

Pursuant to its statutory authority, the panel commenced hearings when the 1982 new contract negotiations reached an impasse—only three days after the statute was enacted. [FN9] The dispute, therefore, was settled without
resorting to another burdensome strike. In 1985 the legislation was renewed in anticipation of the next round of TWU contract negotiations, but on that occasion the parties reached agreement and avoided the need to invoke arbitration. In 1986, the New York legislature amended the Taylor Law, which regulates labor disputes between state and local government employers and employees, to require that the MTA and the unions representing its employees who are subject to the Taylor Law submit collective bargaining impasses to final and binding arbitration. The amendment applies to approximately 45,000 employees who operate subways and buses. This statutory interest arbitration provision alleviates the threat of further crippling strikes by the TWU.

It is our view that either the right to strike or interest arbitration is needed to make collective bargaining work. The success of collective bargaining requires only one of these alternatives. The fact that the right to strike is banned in all cases where interest arbitration is required by statute bears out this point. In those states that have adopted interest arbitration, illegal strikes are virtually nonexistent.

Undeniably, in some cases the strike weapon can be extremely effective in obtaining bargaining rights for employees as well as in achieving contract gains. Unfortunately, however, a strike can result in the self-immolation of those employees without the power to strike effectively. Moreover, even states that have sanctioned the right to strike for some public employees have not done so for police, firefighters and other categories of employees who have the power to threaten seriously the health and safety of the community if they strike. We submit that interest arbitration enables all employees to achieve favorable employment contract terms by offering an alternative to the strike that similarly stimulates bargaining.

This Article demonstrates the effectiveness of interest arbitration as an alternative to the strike. Part I discusses the various types of interest arbitration procedures adopted by states and the statutory standards that guide arbitrators in reaching decisions. Drawing on our experience as arbitrators, we then propose guidelines for an effective presentation to an interest arbitration panel. Part II examines judicial treatment of interest arbitration awards and statutes, including the general failure of constitutional challenges to the statutes and the limited judicial review of interest arbitration awards. Finally, New York City's experience with interest arbitration, discussed in Part III, clinches our view favoring interest arbitration.

I. INTEREST ARBITRATION DEFINED

A. Types of Interest Arbitration Procedures: State Laws

At least twenty states have enacted laws providing for interest arbitration to resolve disputes over the terms of new collective bargaining agreements with their public employees. Most of the statutes apply to essential service employees, particularly police and firefighters, but some are more general. Some state statutes provide for conventional arbitration, which gives the arbitrator the discretion to decide the issues in dispute based upon the parties' evidence and arguments as measured against the relevant statutory criteria. Other state statutes utilize final offer arbitration, which requires that the arbitrator pick either the employer's or the employee organization's final offer on the issues in dispute. In some instances the statutes include provisions that permit the parties to agree voluntarily on the type of interest arbitration procedure to be used.

Some statutes adopt a combination of conventional arbitration and final offer arbitration, treating economic and non-economic issues differently. Michigan's police and firefighters statute, for example, provides for final offer arbitration on an issue-by-issue basis on economic issues and for conventional arbitration on non-economic issues. Wisconsin's municipal arbitration law adopts a variation that allows the arbitrator to choose between the
total package, both economic and non-economic, of *158 the employer's or union's final offer. [FN27] New Jersey's law embodies yet another variation, requiring the arbitrator to choose either the employer's or the union's last offer as a total economic package, but allowing the arbitrator to resolve non-economic issues on a final offer, issue-by-issue basis. [FN28] Finally, Iowa provides for final offer determination of both economic and non-economic issues on an issue-by-issue basis. [FN29] Utilizing a unique tri-option procedure the Iowa framework permits the arbitrator to select either the employer's last offer, the union's last offer, or the fact finder's recommendations on each issue. [FN30] Observers credit this procedure with encouraging voluntary settlements. [FN31] As a result, Iowa has reported a comparatively low percentage of collective bargaining negotiations requiring use of its interest arbitration procedures. [FN32]

Each of the above noted procedures has strengths and weaknesses. Only one state, however, that has adopted a particular type of interest arbitration procedure has subsequently altered its approach. [FN33] This seems to indicate that parties have accommodated to the available scheme of interest arbitration. Our preference is for conventional arbitration, [FN34] because it gives the arbitrator the greatest latitude in deciding the issues in dispute.

B. Statutory Standards

Virtually all interest arbitration statutes either expressly or implicitly provide standards to guide the arbitrator's evaluation of the evidence and arguments presented. [FN35] They do so by requiring the arbitrator to focus *159 on particular facts in reaching his decision. Statutory standards that arbitrators must address usually include 'the lawful authority of the employer,' 'the interests and welfare of the public,' the comparability of *160 the wages, hours and working conditions of similarly situated employees, and the cost of living. [FN36] In addition, arbitrators may be required to consider the peculiarities of a particular trade or profession, [FN37] past agreements of the parties, [FN38] the ability of the employer to finance economic adjustments, [FN39] and the effect of an award on the standard of services provided. [FN40]

The type of interest arbitration procedure mandated by the statute, or agreed to by the parties, will have an impact on the arbitrator's application of the statutory criteria and the rationale for his decisions. When, for example, the statute requires arbitrators to use final offer arbitration, [FN41] arbitrators exercise much more limited discretion than they do when the statute or agreement provides for conventional arbitration of both economic and non-economic issues. Indeed, in a final offer, total package scheme, [FN42] the arbitrators must choose one or the other offer regardless of their views on the merits of individual economic and non-economic issues.

The most significant statutory standard for arbitration in the public sector is comparability. Because the profit motive is absent in the public sector, and therefore the full range of market forces generally governing the value of jobs is lacking, comparability provides an acceptable substitute measure of job worth. Comparability establishes the market value of public sector labor by analyzing, among other things, the effects of inflation and cost of living increases on compensation of comparable employees. [FN43] The arbitrators therefore must answer the question of with which employers and employees the comparison should be made.

Typically, the statute requires a comparison of the overall compensation of the employees involved in the dispute with the overall compensation of comparable employees performing similar work in both private and public employment in a particular community or like communities. [FN44] The overall compensation of employees includes not only the basic wages and benefits, but overtime and premium pay, health insurance, life insurance, pension programs and other benefits, such as food, clothing and transportation allowances. [FN45] But what constitutes 'like work' and what is a 'comparable employee'? Exact public sector and private sector parallels often exist. For example, a comparison of the compensation of private hospital employees with their public counterparts seems appropriate. The same is true of many other occupations. But, the comparison fails when applied to, for example, police and firefighters with private employees. [FN46]
The general term 'interest and welfare of the public,' included in a number of state laws, is subject to different interpretations because it is not self-defining. In New York City, for example, the term 'interest and welfare of the public' requires consideration of the employer's 'ability to pay.' [FN47] The same phrase also has *162 been used in New York City to refer to bargaining patterns—the practice whereby once an agreement has been entered into by the employer and a union, the standards of the first agreement will affect the contracts of all other similar situated unions. [FN49]

Bargaining patterns assume particular importance in the public sector, where the employer is required to bargain with a number of different labor organizations. The economic settlements for uniformed employees, for example, influence settlements for non-uniformed employees and vice versa. The wages paid by the state also may be relevant in determining the wages that should be paid by a county or a city for persons performing similar work, such as law enforcement or clerical duties. In addition, historic parity relationships may exist, particularly among uniformed forces, police officers and firefighters. [FN50] Such patterns are considered under the general standard of interest and welfare of the public.

The criterion of the interest and welfare of the public determines, in part, the priority to be given to the wages and economic benefits of public sector employees. Obviously, the decision to increase wages and improve economic benefits will affect the overall allocation of the employer's resources. Should more money be spent to raise the salaries of the existing workforce, to increase the number of workers, or for capital improvements and increased services? One commentator has suggested that arbitrators should be prepared to justify their choice of priorities, [FN51] and some statutes require arbitrators to set forth the specific bases for their decisions. [FN52]

The employer's ability to pay constitutes another major factor in collective bargaining negotiations and interest arbitration. [FN53] Indeed, the *163 economic circumstances of a given jurisdiction may make it the decisive factor in negotiations or in arbitration. [FN54]

Factors other than the size of the municipal fisc, however, often impact the ability to pay. Iowa's statute, for example, limits the authority of an arbitration panel by imposing budgetary constraints that narrow the scope of the employer's ability to pay. [FN55] In some jurisdictions, such as New York City, the statute imposes a general limitation on the authority of arbitration panels by providing that any part of an award that requires the enactment of a law in order to implement the award cannot be implemented until such law is enacted. [FN56] Finally, the question of ability to pay becomes particularly complex when the funding of a specific service, such as welfare, health care or education, requires substantial funding from various levels of government—local, state and federal. [FN57]

In addition to explicit statutory standards, a number of jurisdictions use a catch-all standard that refers to '[s]uch other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment.' [FN58] A provision like this enables the arbitrator to choose those criteria that he deems most important in a particular case as long as he discusses the other statutory factors that were also considered in the opinion.

In considering and applying any of the listed criteria of a particular state, the arbitrator must consider whether the issues submitted to him for decision fall within the employer's lawful scope of bargaining. [FN59] The scope of bargaining generally encompasses wages, hours, and working conditions, but the laws of a particular jurisdiction may require a more limited scope of bargaining once interest arbitration proceedings commence. In Maine and Rhode Island, for example, the award is merely advisory on economic matters, while it is final and binding on non-economic *164 matters. [FN60] Consideration of pensions as a subject for collective bargaining is forbidden in some states and, consequently, may not be subjected to interest arbitration. [FN61] In addition, the determinations of applicable public employment relations boards and courts may establish other limitations on the scope of bargaining. [FN62]

Last, the stipulations of the parties as to the scope of the arbitration and the standards to be applied in a particular case must be considered by the arbitrator and may affect the outcome of the arbitration. For example, in 1985, the New York City Board of Education, the City of New York, and the United Federation of Teachers entered into a voluntary agreement providing for total package, last offer binding arbitration of a contract dispute involving New York City teachers. [FN63] The parties included in their agreement the statutory standards applicable to other New York City employees. [FN64]

C. Presentation of Interest Arbitration Cases

Traditional trial procedures are less than efficient in an interest arbitration proceeding because, unlike a trial, interest arbitration is essentially a legislative process. Based on our experience as interest arbitrators and as administrators of an interest arbitration statute, we propose the following guidelines for successful presentation before an interest arbitration panel.

It is our view that the most satisfactory procedure for presenting an interest arbitration case is to address the issue or issues initially by prehearing statements of position. The submission of pre-hearing statements enables the arbitrator to focus clearly on the positions of the parties and on the questions to be decided. This method also permits consideration of complex issues in a relatively short period of time. [FN65]

*165 The parties should use narration rather than the question and answer method of presentation at the hearing. The interest arbitration process is also facilitated by using the principal witnesses to explain the parties' proposals and contract demands and eliminating cross-examination except for the limited purpose of clarification. The parties are thus able to create a clear record of their positions in a relatively short period of time. [FN66] The parties can then rely on rebuttal to refute or to answer the opposing side's position. [FN67] The parties should also agree in advance how they will allot the time available for the presentation of their respective cases and the time available for rebuttal. [FN68]

In making their presentation, the parties need not be overly concerned about rules of evidence. Some attorneys excel in their ability to conduct voir dire and in the making of objections to the admission of documents based upon either the best evidence rule or the manner in which a document was prepared. Such objections can be significant, but they are not nearly as important as arguing or explaining the relevance, or lack thereof, of a particular document submitted in support of a party's position.

II. INTEREST ARBITRATION AND THE COURTS

A. Judicial Review of Interest Arbitration Awards

The inclusion of statutory standards in interest arbitration statutes provides the arbitration panel with guidelines for fashioning its award. To facilitate judicial review of interest arbitration awards, some statutes explicitly require that the arbitration panel specify the basis for its award. [FN69] Moreover, some courts have held that it is not enough for the arbitration panel to state that it considered the statutory standards. *166 Rather, the arbitration panel must make detailed findings of fact that support its conclusions. [FN70] Because the New York courts have had an opportunity to construe interest arbitration statutes and awards, New York caselaw is the focal point of the following discussion of such judicial treatment.

The grounds for vacating interest arbitration award in New York state are broader than the grounds for vacating grievance arbitration awards. A party to a grievance arbitration can successfully challenge an award if the award was procured by fraud or undue means, if there was a lack of due process, or if the award was in excess of the authority of the arbitration panel. [FN71] In contrast, interest arbitration awards can be vacated if the award is not based on objective and impartial consideration of the entire record, if the statutory criteria were not considered in good faith,
or if there is no plausible basis for the award. [FN72]

When the New York Court of Appeals was confronted with the need to formulate a standard of review for interest arbitration awards, it sought guidance from the standard used for grievance arbitration awards. A reviewing court will not vacate a grievance arbitration award even if there has been a patent error of fact or law. [FN73] Similarly, the standard for interest arbitration review, first enunciated by the Court of Appeals in Caso v. Coffey, [FN74] measures interest arbitration awards ‘according to whether they are rational or arbitrary and capricious.’ [FN75]

At the New York City level, the Board of Collective Bargaining *167 adopted standards of review for impasse panel determinations comparable to those applied by the courts in reviewing an administrative agency decision under Article 78 of the Civil Practice Law and Rules. [FN76] Courts have the statutory authority to review administrative agency decisions essentially for abuses of discretion and lack of substantial evidence. [FN77] Similarly, the Board’s policy is to defer to the impasse panel’s determination unless the appellant can show that the arbitration was unfair or biased, or that the determination is patently lacking in factual support. [FN78]

Although the substantial evidence test applied to impasse panel reports under the New York City Collective Bargaining Law differs from the standard of review adopted in Coffey, experience with the two standards of review reveals very little substantive difference between them. Both the courts and the Board of Collective Bargaining focus on procedural fairness and the existence of record evidence to support the conclusions of the interest arbitration panel. Neither reviewing forum will substitute its judgment for that of the panel if it appears that the panel considered the statutory criteria.

To facilitate review, New York amended its Taylor Law in 1977 to require that ‘the public arbitration panel shall . . . specify the basis for its findings, taking into consideration . . . the [enumerated statutory standards].’ [FN79] Prior to this amendment, the statute required only that the arbitration panel consider the statutory standards ‘so far as it deem ed them applicable.’ [FN80] The amendment came in response to criticism that this was an overly broad delegation of municipal authority to the arbitration panels. [FN81] The state legislature intended the newly required specificity and thoroughness to facilitate stringent judicial review of interest arbitration awards. [FN82]

Three New York State Supreme Court decisions, which have set aside or remanded awards because of their failure to specify the basis of their decision, have given meaning to the 1977 amendment. [FN83] In Buffalo Police Benevolent Association v. City of Buffalo, [FN84] the court held that a statement in the award that ‘all economic issues were considered’ fails to meet the explicit statutory requirement of a specific basis for findings.” [FN85] The court in City of Yonkers v. Mutual Aid Association of Paid Fire Department, [FN86] explained that factual specificity with regard to two of the four factors listed in the amended section was inadequate. [FN87] Most recently, in City of Batavia v. Local 896, Batavia Firefighters Association, [FN88] the court opined that ‘boiler plate statutory language recited in the background portion of the award alone fails to meet the explicit statutory requirement for a specific basis for the findings.’ [FN89] It added that the ‘arbitration panel has some obligation to explore each criterion, not simply as an arbiter, but also as a quasi-legislative body delegated with a similar factfinding mission, and that the results of that analysis must be clearly and completely specified in its award.’ [FN90] Furthermore, the court held that ‘to the extent the criterion are not controverted, i.e., ‘put in issue,’ the panel should nevertheless elicit the position of the parties and/or pertinent facts and consider the significance of such in its decision.’ [FN91]

The New York City Collective Bargaining Law requires similar specificity by the impasse panel, the city’s equivalent to an interest arbitration panel, in its application of the statutory standards. [FN92] To facilitate review by the Board of Collective Bargaining, the statute further provides that the party appealing to the Board from the recommendations of an impasse panel must specify the recommendations from which it is appealing and the reasons therefor. [FN93]
The limited number of appeals from interest arbitration awards, we suggest, serves as evidence that carefully drafted statutory standards are faithfully adhered to by arbitration panels in their determination of the matters in dispute and that misgivings about delegating legislative authority to ‘unaccountable’ arbitrators [FN94] are largely unfounded. 

B. Constitutional Challenges to Interest Arbitration Statutes

The constitutionality of public sector interest arbitration has been challenged in many of the jurisdictions that have adopted interest arbitration statutes. Constitutional challenges to interest arbitration statutes generally fall within one of two categories: (1) unlawful delegation of legislative authority; [FN95] or (2) unlawful intrusion into and divestment of the local government's autonomy and control which includes claims that interest arbitration statutes impair the local government’s home rule powers, [FN96] interfere with the local government's power to tax, [FN97] and deny equal protection by violating the one-man, one-vote principle. [FN98] Although most of the challenges have either failed on the merits [FN99] or been dismissed on procedural grounds, [FN100] a few have succeeded. [FN101]

Interest arbitration statutes have been challenged most often on the *170 ground that they unconstitutionally delegate legislative authority to unaccountable arbitrators. [FN102] Courts generally have rejected this argument when the interest arbitration statute sets forth criteria to govern the arbitration proceeding and limits the scope of arbitration. [FN103] In those instances, interest arbitration panels are a reasonable method for the legislature to deal with the wide variety of issues that may arise in a labor dispute. [FN104] This avenue of attack, however, has met with some success *171 where the statutes were lacking the necessary standards to guide the arbitrators. [FN105]

Interest arbitration statutes also have been challenged on the ground that the powers given to interest arbitrators infringe upon the home rule powers reserved to local governments. [FN106] Home rule provisions permit local governments to adopt charters or ordinances pertaining to issues of local concern. [FN107] The courts, however, have held that the local government's power to act applies only if its action is not inconsistent with the state constitution or any general law. [FN108] Since interest arbitration statutes constitute general laws, the courts have determined that they do not violate the home rule provision. [FN109]

Another basis upon which the constitutionality of interest arbitration statutes has been challenged concerns the power to tax. [FN110] Opponents of interest arbitration argue that, since an arbitration panel may issue an award which raises the cost of municipal services, the enabling statute is an inappropriate delegation of taxing power. [FN111] Courts have rejected this argument, finding that a tax does not derive from an act merely because it ‘may result in the need for ... taxation.’ [FN112] Judge Fuchsberg of the New York Court of Appeals clarified this distinction by observing that, *172 although arbitration awards may impact on the cost of municipal services, the municipality remains free to choose the method of meeting these costs. [FN113]

This observation accords with the obvious fact that, in the public sector, neither arbitration awards nor collective bargaining agreements are self-implementing. If legislative authorization to finance a contract or an arbitration award does not already exist, the executive must secure funding from the legislature, reduce services, decline to fill vacancies, or take other management action to implement the agreement. The important point remains that the legislature must, either before or after contract negotiations, determine the appropriate level for government operations and provide the required funding.

Last, interest arbitration statutes have been challenged on the ground that arbitrators are not selected in a manner consistent with the one-man, one-vote principle, [FN114] thereby denying equal protection of the law. [FN115] The courts consistently have rejected this argument, finding that because the power of the arbitration panel is administrative, not legislative, the one-man, one-vote principle does not apply. [FN116]
In sum, constitutional challenges to interest arbitration statutes largely have been unsuccessful. A claim that the statute is an impermissible delegation of legislative authority is the only assertion that has met with any success. Where, however, the statute limits the arbitrator's discretion and authority, the courts uniformly deem the statute constitutional.

III. EXPERIENCE WITH THE LAW: NEW YORK CITY

Interest arbitration has proven an effective method of avoiding and resolving employment disputes. The following discussion considers the operation of interest arbitration in New York City, one jurisdiction in which it has been successfully utilized.

Two statutes regulate labor disputes between the City of New York and its employees: the New York State Taylor Law [FN117] and its local *173 complement, the New York City Collective Bargaining Law ('NYCCBL'). [FN118] Where local law is silent, or contrary, the Taylor Law governs. [FN119] For example, the NYCCBL contains no strike prohibition per se, but the Taylor Law, which applies to New York City, bans strikes by public employees. [FN120]

The NYCCBL is administered by the Board of Collective Bargaining, a body composed of three neutral members, two labor members, and two City of New York members. [FN121] The two labor members and the two city members choose the chairman of the Board from among the neutral members. [FN122] The Chairman, who must be elected by unanimous vote, also functions as the director of the Office of Collective Bargaining. [FN123]

The NYCCBL provides procedures, including mediation and the issuance of a final and binding report by an impasse panel for the resolution of bargaining impasses. [FN124] Impasse panels are endowed with the broad power to resolve collective bargaining negotiation disputes. [FN125] Impasse panel determinations are equivalent to compulsory interest arbitration awards. [FN126] The NYCCBL also specifies certain standards that an *174 passe panel is to 'consider wherever relevant in making its recommendations for terms of settlement.' [FN127] These standards are similar to those set forth in the Taylor Law. [FN128]

The report of the impasse panel must be published within seven days of its submission to the parties. [FN129] The time may be extended, to no more than thirty days, to permit the parties to conclude a negotiated agreement*175 prior to publication. [FN130] If a contract is negotiated during this time, the panel will not release the report, except upon consent of the parties. [FN131] If the parties fail to negotiate a contract during this time, they must indicate acceptance or rejection of the panel recommendations. [FN132] A party that rejects the recommendations may appeal to the Board of Collective Bargaining for review. [FN133]

The statute provides strict time limits for filing an appeal of the panel's report and for issuance of the Board's decision. [FN134] The Board normally decides appeals upon the papers filed by the parties, but it occasionally will hear oral argument. The Board will issue a decision within thirty days after the notice of appeal has been filed. [FN135] The Board bases its review on the record and evidence before the impasse panel and is guided by the statutory criteria that the panel must consider. [FN136]

The Board of Collective Bargaining may 'affirm or modify the panel recommendations in whole or in part.' [FN137] It may also set aside the recommendations if it finds that the rights of a party have been prejudiced. [FN138] If the Board takes no action within the statutory time periods, the recommendations are deemed adopted. [FN139] The NYCCBL provides that a final determination of the Board of Collective Bargaining 'shall be binding upon the parties' and 'shall constitute an award within the meaning of article seventy-five of the civil practice law and rules.' [FN140] The binding effect of a Board determination is qualified by the proviso that it is subject to legislative action when a law must be amended or enacted. [FN141]
If both parties accept the panel's recommendations or if neither party petitions the Board of Collective Bargaining for review, the recommendations 'shall be final and binding.' [FN142] The recommendations of an impasse panel, like the Board's determinations, are subject to legislative approval, however, in those instances where they require the enactment of a law. [FN143]

The preceding description of finality under the NYCCBL reveals that the procedure and substance of impasse resolution in New York City differs in certain respects from the binding finality procedures provided by the Taylor Law. Although impasse panels have the authority to mediate and are strongly encouraged by the statute to do so, the appointment of a mediator is not mandatory under the NYCCBL and mediation is undertaken only when circumstances indicate that it might be productive. [FN144] Under the Taylor Law, interest arbitration awards are directly appealable to the courts by an article 75 proceeding, [FN145] whereas, under the NYCCBL, impasse panel recommendations are appealable first to the Board of Collective Bargaining. [FN146] Last, unless the parties stipulate otherwise, New York City impasse panels are composed of neutrals, [FN147] whereas the Taylor Law panels have a tripartite structure. [FN148]

When New York City's final and binding impasse procedures were first introduced, critics claimed that the procedures would encourage the use of third parties in fashioning contract settlements to the detriment of concerted efforts at the bargaining table. [FN150] The experience to date, however, refutes this contention. [FN151] In the fifteen years since the adoption of finality in impasse procedures, only 63 of the 761 reported contract settlements—or 8.3%—used the process. [FN152] Of these 63 impasse cases, the parties accepted the panel's recommendations in 49. [FN153] In the remaining 14 cases, a party appealed to the Board for final determination. [FN154] In 12 of those cases, the Board affirmed the report and recommendations of the impasse panel, while the Board acted in the remaining two cases to reduce the award to conform the recommendations to the city's fiscal plan. [FN155]

Another indicator of success of a public sector bargaining law, like New York's Taylor Law, which provides for arbitration and outlaws the strike, is whether strikes have occurred. Since the enactment of the New York City interest arbitration provisions in 1972, only three strikes have occurred over new contract terms in the course of negotiations of 750 separate municipal contracts. [FN156] In contrast, in the four years prior to the amendment there were ten strikes in the course of negotiations of over 517 separate municipal contracts. [FN157] These figures support the viability of interest arbitration as an effective alternative to the strike.

Comparison of arbitration awards with negotiated settlements also demonstrates the effectiveness of the process. The New York State Public Employment Relations Board 1986-87 Annual Report [FN158] states that the arbitrated salary increases statewide for police averaged 6.45%, just slightly below that of negotiated salary increases which averaged 6.52%. [FN159] For firefighters, the arbitrated awards averaged 5.78%, while negotiated increases averaged 5.81%. [FN160] This report indicates that the negotiated settlements and awards closely parallel each other. [FN161] As noted previously, during the fifteen-year history of final and binding arbitration in New York City, there have been only two cases where the Board found awards to be inconsistent with negotiated settlements. [FN162]

On appeal, the tripartite Board of Collective Bargaining, by unanimous decision, reduced those awards to conform to the city's basic wage pattern. [FN163]

CONCLUSION

After nearly two decades of interest arbitration, it is clear that the practice of interest arbitration is here to stay. It has become a significant adjunct to the public sector collective bargaining process where the parties reach an impasse in their negotiations. The acceptance of the constitutionality of interest arbitration by the courts and the acceptance of the process by the parties demonstrates that this important means of dispute settlement has been developed.
oped in accordance with our democratic principles.

The task of interest arbitration is analogous to that of legislation—to establish the conditions of employment. Each party must try to persuade the arbitrator why a particular position is, or is not, supported by the evidence produced under the governing statutory standards. Because the task is to legislate the terms of employment, not to prove or disprove a particular set of facts, an interest arbitration should not be presented to an arbitrator as a trial lawyer would present a civil case to a judge or jury.

Interest arbitration enables the labor participants to retain the leverage necessary to bargain effectively in negotiating a contract. At the same time, the harmful effects of a strike are avoided. Experience shows that the ends achieved with interest arbitration are analogous to those achieved in jurisdictions that do not prohibit the strike. In short, the experiences during the past two decades of the various jurisdictions that have adopted interest arbitration demonstrate that interest arbitration is a better way to surmount collective bargaining impasses than the trial by combat method of the strike.

[FN1] This Article is based on an Address delivered at the Pacific Coast Labor Law Conference, Seattle, Washington, May 7, 1987. Portions of this Article will appear in substantially similar form in a forthcoming treatise to be published by Matthew Bender & Company Inc.

[FN1a]. President, National Academy of Arbitrators; Former Chairman, New York City Office of Collective Bargaining (retired as of Jan. 1, 1988); B.A. 1946; L.L.B. 1948, University of Wisconsin.

[FN1a1]. Trial Examiner, New York City Office of Collective Bargaining; B.S. 1977, Cornell University, New York State School of Industrial and Labor Relations; J.D. 1983, Yeshiva University—Cardozo School of Law.


[FN2]. See id. at 110-11 (Grievance arbitration is synonymous for what Elkouri and Elkouri refer to as ‘rights arbitration’).

[FN3]. See 23 Gov't Empl. Rel. Rep. (BNA) 521 (Apr. 8, 1985) (‘Local 100, which represents workers in the New York City bus and subway system, has never worked without a contract since being organized in 1948.’).


[FN13]. Id.

[FN14]. Act of Dec. 31, 1986, ch. 929, § 33.5(a), 1986 N.Y. Laws 2339, 2369-70. In making the award, the law requires the arbitration panel to consider the impact of the award on the MTA's financial condition and on commuter fares; the wages, benefits, and conditions of other New York City employees; changes in the Consumer Price Index; and other conditions. Id. at § 33.5(d). The law was modeled after provisions of the Taylor Law that apply to police and firefighters—the only other public employees under PERB's jurisdiction whose contract negotiations are subject to binding interest arbitration. see N.Y. Civ. Serv. Law § 209(5) (McKinney Supp. 1988).


Where the statute is silent as to the right to strike, it is unclear whether or not the right exists at all. Compare, e.g., County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 38 Cal. 3d 564, 586-92, 699 P.2d 835, 850-54, 214 Cal. Rptr. 424, 439-43 (in the absence of a statute prohibiting strikes by public employees, such as in the case of police and firefighters, legislative grant of the right to organize and engage in concerted activities impliedly conferred the right to strike but empowered the courts to enjoin strikes that threatened community safety and health), cert. denied, 106 S. Ct. 408 (1985) with, e.g., Compton Unified School Dist. v. Compton Educ. Ass'n, Case No. LACO-396, PERB Order No. 1R-50 (Calif. Mar. 17, 1987) (available in the files of the Fordham Law Review) (California Public Employment Relations Board reversed earlier decision and ruled a series of strikes by Compton Education Association illegal under State's Educational Employment Relations Act because law does not explicitly or implicitly grant teachers right to strike). For a general discussion of the public employee's right to strike, see G. Sterrett & A. Aboud, The Right to Strike in Public Employment (New York State School of Industrial & Labor Relations Key Issues Series No. 15, 1982).

[FN20]. For example, New York police and firefighters have achieved arbitrated salary increases that compare favorably with negotiated increases. See infra notes 158-65 and accompanying text. But see Fueille, Delaney & Hendricks, The Impact of Interest Arbitration on Police Contracts, 24 Ind. Rel. 161 (1985) (study suggests that though availability of interest arbitration is related to favorable police contracts, there is 'almost no support for the belief that actually using arbitration will yield better contracts for the unions').

[FN21]. See supra note 17.

[FN22]. Id.


[FN30]. Id.


[FN32]. Id. at 156.


[FN34]. See supra note 23 and accompanying text.

[FN35]. The following jurisdictions have enacted interest arbitration statutes that require the arbitrator to consider the indicated statutory standards in his determination of the matters in dispute: Connecticut—Conn. Gen. Stat. Ann. § 5-276a(e)(5) (West Supp. 1987) (history of negotiations between the parties; conditions of similar groups of employees; prevailing wages; and the employer's ability to pay); Conn. Gen. Stat. Ann. §§ 7-473c, 10-153c(c)(4) (West 1986 & Supp. 1987) (prior negotiations between the parties; public interest and financial capability of the municipal employer; interest and welfare of employee group; changes in the cost of living; conditions of employment of employee group and similar groups; the salaries, fringe benefits; and other conditions of employment in the state labor market). District of Columbia—D.C. Code Ann. § 1-618.22(d) (1987) (all relevant laws, rules and regulations; the District's ability to comply; the public health, safety and welfare; and the need for reasonable and consistent personnel policies). Hawaii—Hawaii Rev. Stat. § 89-11(d) (1985) (lawful authority of the employer; stipulations of the parties; public welfare; fiscal condition of the state, county and employer; prevailing wages of similar groups of employees; cost of living; and employee's current compensation package). Illinois—Ill. Ann. Stat. ch. 28, para. 1614(h) (Smith-Hurd 1984) (lawful authority of the employer; stipulations of the parties; interest and welfare of the public; financial ability of the employer; cost of living; conditions of employment of comparable employees in the public and private sectors; and current overall compensation). Iowa—Iowa Code Ann. 20.22(9) (West 1978) (past collective bargaining contracts between the parties; prevailing compensation of comparable employees; employer's ability to pay). Maine—Me. Rev. Stat. Ann. tit. 26, §§ 97-9D.4-C, 1026(4)(C), 1285(4)(B) (1964 & Supp. 1987) (interest and welfare of the public; the financial ability of the government; working conditions of other employees in the same labor market; overall compensation employees presently receive and other factors normally taken into account). Michigan—Mich. Comp. Laws Ann. §§ 423.29, 423.280 (West 1978 & Supp. 1987) (lawful authority of employer; stipulations of the parties; interest and welfare of the public; employer's ability to pay; comparison of similar groups of both public and private employees; and cost of living and current compensation of the employees). Minnesota—Minn. Stat. Ann. § 179A.16(7) (West Supp. 1988) ("statutory rights and obligations of public employers to manage efficiently and conduct their operations within the legal limitations surrounding the financing of these operations"). Montana—Mont. Code Ann. § 59-34-103(5) (1987) (compensation and working conditions of employees performing similar services; interest and welfare of the public; employer's
ability to pay; cost of living; and any other relevant circumstances). Nevada—Nev. Rev. Stat. § 288.200(7)(b) (1985) (financial ability of the local government and 'normal criteria for interest disputes'). New Jersey—N.J. Stat. Ann. § 34:13A-16(g) (West Supp. 1987) (interest and welfare of the public; conditions of employees performing similar services; current compensation of the employees; stipulations of the parties; lawful authority of the employer; financial impact on the employer; and cost of living). New York—N.Y. Civ. Serv. Law § 209.4(e)(v), 209.5(d) (McKinney 1983 & Supp. 1988) (wages and conditions of public employees performing similar work; current compensation of the employees; cost of living; and the interest and welfare of the public); N.Y.C. Admin. Code § 12-311c.3(b)(i)-(v) (1986) (wages and conditions of employment of public and private employees performing similar work; current compensation of employees; cost of living; interest and welfare of the public; and other factors normally taken into consideration). Ohio—Ohio Rev. Code Ann. § 4117.14(G)(7) (Anderson Supp. 1986) (past agreements between the parties; conditions of other public and private employees doing comparable work; interest and welfare of the public; financial ability of the employer; authority of the public employer; stipulations of the parties; and other factors normally taken into consideration). Oregon—Or. Rev. Stat. § 243.746(4) (1985) (employer's lawful authority; stipulations of the parties; public welfare; employer's ability to pay; comparison of wages of public and private employees providing similar services; cost of living; conditions of employment; and other normal considerations). Rhode Island—R.I. Gen. Laws §§ 28-9.1-10, 28-9.2-10 (1986) (wages and working conditions of employees performing similar services; interest and welfare of the public; pecuniaries of the job; and employer's ability to pay); R.I. Gen. Laws § 36-11-10 (1984) (same). Vermont—Vt. Stat. Ann. tit. 21, §§ 1732(d), 1733(c) (1978) (authority of the employer; stipulations of the parties; interest and welfare of the public; financial ability of the municipal employer; conditions of employees performing similar work; cost of living; and overall compensation presently received by the employees). Washington—Wash. Rev. Code Ann. § 41.56.460 (Supp. 1987) (employer's authority; stipulations of the parties; comparison of wages of employees providing similar services; cost of living; and other traditional factors). Wisconsin—Wis. Stat. Ann. § 111.76(6) (West 1974) (employer's lawful authority and ability to meet costs; stipulations of the parties; public welfare; comparison of wages of public and private employees providing similar services; cost of living; overall present compensation; and other traditional factors).

[FN36]. See, e.g., Mich. Comp. Laws Ann. § 423.229(a) to (h) (West 1978). The statutory criteria listed in the Michigan statute comprise perhaps the most comprehensive list of the statutory standards. They are as follows:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into con-
sideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Id. [FN37]. New York's Taylor Law, for example, requires the arbitration panel to consider:

(1) hazards of employment;

(2) physical qualifications;

(3) educational qualifications;

(4) mental qualifications; and

(5) job training and skills.

N.Y. Civ. Serv. Law § 209.4(c)(v)c (McKinney 1983).


[FN39]. Id. at § 20.22(9)c.

[FN40]. Id. at § 20.22(9)b.

[FN41]. See supra note 24 and accompanying text.

[FN42]. See supra note 27 and accompanying text.


[FN44]. New York's Taylor Law, for example, directs the arbitrator to consider the following criteria: 'comparison of . . . the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities.' N.Y. Civ. Serv. Law § 209.4(c)(v)a (McKinney 1983).


[FN47]. See Fox, supra note 43, at 114. On September 15, 1976, the City Council Committee on Civil Service and Labor turned down a proposal to amend the New York City Collective Bargaining Law to add the ability to pay criterion on the ground that such action would be superfluous. See, N.Y. Times, Sept. 16, 1976, at 24, col. 2. Nonetheless, a 1978 amendment to the Financial Emergency Act, in effect through 1986, expressly required the Board to consider the employer's ability to pay. see N.Y. Unconsol. Laws § 5408.3 (McKinney 1979 & Supp. 1988).

[FN48]. See infra notes 53-57 and accompanying text.
[FN49]. For example, in United Federation of Teachers, Local 2 v. Board of Education, Case No. IA-1-85 (OCB Sept. 16, 1985) (Garrett, Gill and Schienman, Arb.) (available in the files of the Fordham Law Review) the arbitration panel stated:

Each labor organization and each negotiation has its own issues and problems which need to be addressed. Often these concerns may require deviating from the general pattern. On the other hand, we are persuaded that the relationship or linkage between the major municipal unions is an important factor which cannot be ignored or minimized. The Union has long been compared to and has in fact been a participant in the municipal coalition. This relationship surely represents one of the important factors "normally and customarily considered in the determination of wages, hours, fringe benefits . . ." and is an important component in considering the "interest and welfare of the public."

_Id._ at 33 (footnote omitted).


[FN52]. _See infra_ notes 69-93 and accompanying text.

[FN53]. _See generally_ Fox, _supra_ note 43, at 102-04 (ability to pay criterion analyzes the effects of inflation and cost of living increases on the employer's ability to meet compensation gains). The ability to pay criterion also analyzes the competing needs for increased services and capital improvements versus the need for reasonable and responsible compensation of employees.

[FN54]. During the New York City fiscal crisis, ability to pay was statutorily defined as whether or not the requested wage increase could be paid without increasing the level of city taxes over and above that which prevailed when the dispute arose. N.Y. Unconsol. Laws, § 5408.3(h) (McKinney 1979). This definition, which the parties and arbitrators were required to consider during the fiscal crisis, had an inhibiting effect on the size of the municipal unions' wage demands. _See generally_ Fox, _supra_ note 43, at 120-25.


[FN57]. For example, in the most recent round of negotiations between the United Federation of Teachers, Local 2 and the New York City Board of Education, the employer was able to grant teachers a significant increase in wages because of money available from the state under its Excellence in Teaching program. The New York City Board of Education's share of the state money was $31 million in the first year and $42 million in the second year of the three year contract. _See_ 25 Gov't Empl. Rel. Rep. (BNA) 1285 (Sept. 14, 1987).


[FN62]. For example, the New York City Collective Bargaining Law provides: ‘The report of an impasse panel shall be confined to matters within the scope of collective bargaining. Unless the mayor agrees otherwise, an impasse panel shall make no report concerning the basic salary and increment structure and pay plan rules of the city’s career and salary plan.’ N.Y.C. Admin. Code § 12-311c(3)(c) (1986).


[FN66]. These procedures enabled presentation of ten witnesses' testimony in four days in the UFT arbitration, United Fed’n of Teachers, at 4-5, and sixteen witnesses' testimony in five days in the transit workers arbitration. New York City Transit Auth., at 3. The postal arbitration produced ‘over 2,000 pages of expert testimony, ... just under 300 exhibits and over 4,000 pages of documentation’ in only seven days of public hearings. United States Postal Service, at 16.

[FN67]. For example, in the UFT arbitration one day was allotted for rebuttal. United Fed’n of Teachers, at 5.

[FN68]. The arbitration panel typically will determine the duration of the arbitration after meeting with the parties at a pre-hearing conference. The parties must then divide the time amongst themselves. It has been our experience that the parties usually will construct a plan themselves rather than be subject to a plan set by the panel.

[FN69]. See, e.g., N.Y. Civ. Serv. Law § 209.4(c)(v) (McKinney 1983) (‘panel shall specify the basis for its findings’); Conn. Gen. Stat. Ann. § 5-276a(c)(4)(B) (West Supp. 1988) (‘arbitrator ... shall state with particularity the basis for such decision as to each disputed issue and the manner in which the factors enumerated ... were considered in arriving at such decision’).

[FN70]. See, e.g., Buffalo Police Benevolent Ass’n v. City of Buffalo, 82 A.D.2d 635, 638, 443 N.Y.S.2d 107, 109 (1981) (arbitration panel must set forth with specificity the comparisons used in reaching their decision); Detroit v. Detroit Police Officers Ass’n, 408 Mich. 410, 482, 294 N.W.2d 68, 96 (1980) (arbitration panel must consider only the applicable statutory standards and its opinion must disclose the reasons for considering the various standards and explain its result).


(b) Grounds for vacating.
I. The award shall be vacated on the application of a party who either participated in the arbitration or was
served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
(i) corruption, fraud or misconduct in procuring the award; or
(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it
that a final and definite award upon the subject matter submitted was not made; or
(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued
with the arbitration with notice of the defect and without objection.


[FN75]. Id. at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91.

[FN76]. N.Y. Civ. Prac. L. & R. 7803 (McKinney 1981) provides that an article 78 proceeding may determine only
whether there has been a failure to perform a legal duty, the official body is acting or is prepared to act beyond its
jurisdiction, a decision is the result of procedural violations or an abuse of discretion, or a decision reached after a
legally prescribed hearing is supported by substantial evidence.

[FN77]. Id.

[FN78]. See City of New York v. Podiatry Soc'y, No. BCB 1-1-72, Decision No. B-23-72, slip. op. at 8-9 (Board of
Collective Bargaining Dec. 11, 1972) (available in the files of the Fordham Law Review). The Board has stated its
policy as follows:
If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence
relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not
based upon objective and impartial consideration of the entire record; and unless clear evidence is presented
on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations
are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors
of fact and/or law, the Report and the Recommendations must be upheld.

Id.

accompanying text for discussion of the Taylor Law.


[FN82]. City of Batavia v. Local 896, Batavia Firefighters Ass'n, 19 PERB ¶ 7510, 7520 (Sup. Ct. 1986).

[FN83]. see Buffalo Police Benevolent Ass'n v. City of Buffalo, 13 PERB ¶ 7539 (Sup. Ct. 1980), aff'd and modified,
82 A.D.2d 635, 443 N.Y.S.2d 107 (1981); City of Yonkers v. Mutual Aid Ass'n of Paid Fire Dep't, Local 628, 80
A.D.2d 597, 436 N.Y.S.2d 1009 (1981); City of Batavia v. Local 896, Batavia Firefighters Ass'n, 19 PERB ¶ 7510
(Sup. Ct. 1986).

[FN85]. Id. at 639, 443 N.Y.S.2d at 110.


[FN87]. Id. at 597, 436 N.Y.S.2d at 1010.


[FN89]. City of Batavia, 19 PERB at 7520.

[FN90]. Id. at 7522.

[FN91]. Id. at 7521-22.


[FN93]. N.Y.C. Admin. Code § 12-311c(4) (1986) provides:

(4) Review of impasse panel recommendations: (a) A party who rejects in whole or in part the recommendation of an impasse panel . . . may appeal to the board of collective bargaining for review of the recommendations of the impasse panel by filing a notice of appeal with said board within ten days of such rejection. . . . (b) The notice of appeal shall specify the grounds upon which the appeal is taken, the alleged errors of the panel, and the modifications requested.

Id.

[FN94]. See infra notes 102-05 and accompanying text.

[FN95]. See infra notes 102-05 and accompanying text.

[FN96]. See infra notes 106-09 and accompanying text.

[FN97]. See infra notes 110-13 and accompanying text.

[FN98]. See infra notes 114-16 and accompanying text. The one-man, one-vote principle seeks to ensure that each person has an equal voice in government. See generally L. Tribe, American Constitutional Law §§ 13-1 to 13-7 (1978).


[FN101]. See, e.g., City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 400 (Me. 1973) (statute failed to provide standards necessary to protect parties from arbitrator's 'possible arbitrary and irresponsible exercise of this delegated power'); Maryland Classified Employees Ass'n, Inc. v. Anderson, 2 Pub. Bargaining Cas. (CCH) ¶20,414 at 21,384-85 (Md. Cir. Ct. 1976) (because statute failed to include standards to guide arbitrators, it constituted an unlawful delegation of power); City of Sioux Falls v. Sioux Falls Firefighters Local 814, 89 S.D. 455, 460, 234 N.W.2d 39, 37-38 (1975) (court perceived compulsory arbitration to be unconstitutional interference with municipal functions); Salt Lake City v. International Ass'n of Firefighters, Local 1645, 95 LRRM (BNA) 2383, 2385 (Utah 1977) (act failed to provide any protection against arbitrariness nor did it provide for the accountability necessary for constitutional exercise of political power in a representative democracy).

In Pennsylvania, after the state's highest court had found a previous arbitration statute unconstitutional, see Erie Firefighters Local No. 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962) (per curiam), it was necessary to amend the constitution to allow compulsory arbitration. see Pa. Const. art. Ill, § 31.


there is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment. . . . Here, the Legislature has delegated to PERB [the Public Employment Relations Board], and through PERB to ad hoc arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen in the limited situation where an impasse occurs. It has also established specific standards which must be followed by such a panel. . . . We conclude that the delegation here is both proper and reasonable.

Id. at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408 (citations omitted). Also relevant are the comments of Judge Fuchsberg in a concurring opinion:

It is settled law that a delegation of power by the Legislature to a subordinate body is constitutional, provided it is accompanied by sufficiently specific standards for its use and provided that the delegation is of power to carry out law, not power to make law.

. . .

In several . . . cases, the courts have held that the delegation is of legislative power but that it is, nevertheless, permissible because the arbitration panel, in performing a public function, becomes a public body. . . .

I do not find it useful to try to determine with precision whether the particular delegation of power made here is most accurately classified as legislative, judicial, or administrative . . . [W]hen courts in the past have upheld or invalidated delegations of power, they have most frequently done so by first determining whether the delegation had a rational purpose and adequate safeguards, and only then have they applied the labels 'legislative' or 'administrative'—and we might add 'judicial'—to the results of their assessments.

Id. at 34-35, 332 N.E.2d at 297-98, 371 N.Y.S.2d at 414-15 (Fuchsberg, J., concurring) (emphasis and citations omitted).

[FN104]. One judge has explained the rationale succinctly:

Disputes between cities and their uniformed services generate an infinity of special circumstances and facts. No Legislature could devise a law which would deal fairly with every issue which could arise in a specific dispute. Instead, the Legislature has chosen to create a new way to handle such disputes by delegating powers which may be partly legislative, partly judicial, and partly administrative; they may even be described as sui generis.

Id. at 35, 332 N.E.2d at 298, 371 N.Y.S.2d at 415 (Fuchsberg, J., concurring).

[FN105]. See cases cited supra note 101.


[FN108]. See, e.g., Carofano, 196 Conn. at 629-31, 495 A.2d at 1014-15; Town of Arlington, 370 Mass. at 773-74, 352 N.E.2d at 918; Dearborn Fire Fighters Union, 394 Mich. at 244-45, 231 N.W.2d at 229-30; City of Amsterdam, 37 N.Y.2d at 26-27, 332 N.E.2d at 292-93, 371 N.Y.S.2d at 407-08; City of Roseburg, 292 Or. at 274-78, 639 P.2d at 95-97.

[FN109]. See, e.g., Carofano, 196 Conn. at 629-31, 495 A.2d at 1014-15; Town of Arlington, 370 Mass. at 773-74, 352 N.E.2d at 918-19; Dearborn Fire Fighters Union, 394 Mich. at 243-46, 231 N.W.2d at 229-30; City of Amsterdam, 37 N.Y.2d at 26-27, 332 N.E.2d at 292-93, 371 N.Y.S.2d at 407-08; City of Roseburg, 292 Or. at 274-78, 639 P.2d at 95-97.


[FN111]. See, e.g., Dearborn Fire Fighters Union, 394 Mich. at 245-46, 231 N.W.2d at 230; City of Amsterdam, 37 N.Y.2d at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408; City of Spokane, 87 Wash. 2d at 461, 553 P.2d at 1318.

[FN112]. City of Spokane, 87 Wash. 2d at 461, 553 P.2d at 1319; accord Dearborn Fire Fighters Union, 394 Mich. at 245-46, 231 N.W.2d at 230; City of Amsterdam, 37 N.Y.2d at 41, 332 N.E.2d at 302, 371 N.Y.S.2d at 420 (Fuchsberg, J., concurring).

[FN113]. See City of Amsterdam, 37 N.Y.2d at 41, 332 N.E.2d at 307, 371 N.Y.S.2d at 420 (Fuchsberg, J., concurring); see also Dearborn Fire Fighters Union, 394 Mich. at 245-46, 231 N.W.2d at 230 (arbitration awards may be implemented by an increase in taxes or a decrease in municipal expenditures); City of Spokane, 87 Wash. 2d at 461, 553 P.2d at 1319 (that an award "may result in the need for local taxation, does not itself impose any "burden or charge".

[FN114]. See supra note 98.

[FN116]. See, e.g., Town of Arlington, 370 Mass. at 777-78, 352 N.E.2d at 920-21; accord City of Amsterdam, 37 N.Y.2d at 42, 332 N.E.2d at 303, 371 N.Y.S.2d at 421 (Fuchsberg, J., concurring).


[FN119]. See N.Y. Civ. Serv. Law § 212 (McKinney 1983). The Taylor Law permits local governments to enact 'provisions and procedures' for the regulation of public employees relations which are 'substantially equivalent' to the Taylor Law. Id.


[FN121]. N.Y. City Charter Ch. 54, § 1171 (1986) states:

The mayor shall have the power to appoint the city members of the board to serve at his pleasure, and the labor members of the board from designations by the municipal labor committee. Each labor and city member shall have an alternate, who shall be appointed and removed in the same manner as the member for whom he is the alternate. The chairman and other impartial members shall be elected by the unanimous vote of the city and labor members, and shall serve for three year terms. . . .

[FN122]. Id. at §§ 1170-1171.

[FN123]. Id.


[FN125]. The NYCCBL grants impasse panels power to:

mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary to resolve the impasse. If an impasse panel is unable to resolve an impasse within a reasonable period of time, as determined by the director, it shall, within such period of time as the director prescribes, render a written report containing findings of fact, conclusions, and recommendations for terms of settlement.

N.Y.C. Admin. Code § 12-311c(3)(a) (1986). The language of this section indicates that impasse panels are encouraged to settle bargaining disputes through mediation. Experience has shown that even if the parties do not reach formal agreement through the panel's mediatory efforts, and a report and recommendations are issued, very often the report reflects what the parties informed the panel regarding certain informal agreements existing between them. See Anderson, The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger, 1973 Wis. L. Rev. 986, 1011-15. See also Grodin, Political Aspects of Public Sector Interest Arbitration, 1 Indus. Rel. L.J. 1, 14 (1976) (the arbitral process as viewed as an extension of the negotiating process).

[FN126]. As originally enacted in 1967, the NYCCBL contained provisions for factfinding, but the recommendations that resulted were only advisory and there was no statutory finality procedure. See 1967 N.Y. Local Laws 449 (amending N.Y.C.C.B.L. Ch. 54, § 1173-7.0(c)). Nonetheless, the City of New York maintained a policy of voluntary compliance with impasse panel recommendations. In 1969, the Taylor Law was amended to require the Mayor
of the City of New York to submit a plan dealing with the need for a specified final step in the impasse procedures. 1969 N.Y. Laws Ch. 24, § 11, 79-80.

To develop proposed finality procedures for submission to the state legislature, representatives of New York City, the Municipal Labor Committee, and the Office of Collective Bargaining conducted a series of meetings. Representatives of the mayor's office, the Municipal Labor Committee, and the City Council rejected proposals to conform New York City procedures to the Taylor Law as it then stood—that is, to require legislative action in bargaining impasses. The city council leadership did not wish to play the part of referee in labor disputes between the Mayor and the public employee unions. The unions, so long as they were denied the right to strike, preferred a finality method where the ultimate decision would be made by neutral third parties. See Lindsay, Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices Into Substantial Equivalence With the Public Employees' Fair Employment Act 6.

The report also sought a consolidation of jurisdiction over New York City public employment relations. It suggested giving the Office of Collective Bargaining mandatory jurisdiction over non-mayoral as well as mayoral agencies. Id. at 3-5. In addition, it urged a continuation of the policy excluding the city from the Taylor Law requirement that collective bargaining agreements be concluded prior to budget submission dates. Id. at 7-8. A discussion of other minor problem areas also was included. Id. at 8-10. A form of compulsory interest arbitration, therefore, was agreed upon and enacted by the New York City Council in 1972. 1972 N.Y. Local Laws 158-60 (codified at N.Y.C. Admin. Code §§ 12-309a(8), 12-311c(3)(e), 12-311c(4), 12-311f(1986)).

[FN127]. N.Y.C. Admin. Code § 12-311c(3)(b) (1986) provides:
(b) An impasse panel... shall consider wherever relevant the following standards in making its recommendations for terms of settlement:
(i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;
(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
(iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;
(iv) the interest and welfare of the public;
(v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.


[FN130]. Id.

[FN131]. See id.

[FN132]. See id. at § 12-311c(3)(e).

[FN133]. See id. at § 12-311c(4)(a).

[FN134]. See id.

[FN135]. See id. at § 12-311c(4)(d). Notice of appeal must be filed and served upon the other party within ten days after receipt of the impasse panel's recommendations. See id. at § 12-311c(4)(a). If there is no final determination by
the Board within thirty days of the filing of the notice of appeal or within forty days of a rejection notice which the board reviews upon its own initiative, the panel's recommendation is deemed adopted. See id. at § 12-311c(4)(d). The director may extend these periods for an additional period not to exceed thirty days. See id.

[FN136]. See id. at § 12-311c(4)(b).

[FN137]. See id. at § 12-311c(4)(c).

[FN138]. See id.

[FN139]. See id. at § 12-311c(4)(d).

[FN140]. Id. at § 12-311c(4)(f).

[FN141]. See id. at § 12-311c(4)(e).

[FN142]. Id. at § 12-311c(4)(a). This section also provides that the Board of Collective Bargaining 'may review recommendations which have been rejected' but not appealed. Id. This action has never been taken.

[FN143]. See id. at § 12-311c(3)(e).

[FN144]. See id. at § 12-311c(3)(a).

[FN145]. See id. at § 12-311b(2).


[FN150]. Generally, critics of interest arbitration have claimed that its use will have a 'chilling' or deterrent effect on the parties' incentive to bargain in good faith. See, e.g., McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 Colum. L. Rev. 1192, 1209-10 (1972).

[FN151]. The experience of other states, such as New Jersey, similarly rebut this contention. The Chairman of the New Jersey Public Employment Relations Commission recently reported that state's ten year experience with an interest arbitration statute that combines final offer package arbitration for economic issues and final offer, issue-by-issue arbitration for non-economic issues. See J. Mastriani, Interest Arbitration in State and Local Government, Remarks at Arbitration Day Meeting of the American Arbitration Association (May 7, 1987). First, he reported that strikes and job actions were virtually non-existent, whereas they had been commonplace prior to the act. Id. at 2-3. He also reported that the arbitration deadline—the employer's budget submission date—had been a major stimulus to bargained results aided by mediation. Id. at 4. The Chairman, however, was more critical of the quality of arbitration awards and called attention to the need for arbitrators to address the statutory criteria. Id. at 5-6. Lastly, he observed that arbitration has been a stabilizing and moderating factor in salary determinations. Id. at 6.


[FN153] Id.

[FN154] Id.

[FN155] Id.; see infra note 162.


[FN157] The source of this data is the Division of Research and Statistics, New York State Department of Labor (as reported in the 1973 OCB Annual Report at 27) (available in the files of the Fordham Law Review).


[FN159] Id. at 9. The report also revealed that, out of a universe of 219 contracts, only 39 were submitted to interest arbitration in the period 1986-87, of that number, 21 were settled by interest arbitration. Id.

[FN160] Id.

[FN161] The report is also consistent with non-PERB studies. Peter Feuille and John T. Delaney conducted a detailed study of collective bargaining interest arbitration and police salaries. P. Feuille & J. Delaney, Collective Bargaining, Interest Arbitration and Police Salaries, 39 Indus. & Lab. Rel. Rev. 228 (Jan. 1986). They surveyed 900 cities during the 1971-81 period and, based upon their survey, concluded that ‘bargaining and arbitration's availability have very strong associations with high police salaries, but our results also indicate that, in general, arbitration's availability has done relatively little to cause these high salaries.’ Id. at 238 (footnote omitted). The authors added that ‘availability of arbitration has had a positive but modest impact on police salaries.’ Id. at 238.


Interest arbitration awards have not been used primarily to determine the basic wage pattern of the city and its major unions. Of course, wage disputes can go to interest arbitration and some awards concern attempts to increase the basic wage pattern of the city because of special conditions of employment. See, e.g., United Fed'n of Teachers, Local 2 v. Board of Educ., Case No. IA-1-85 at 3-4 (OCB Sept. 16, 1985) (Garrett, Gill and Scheinman, Arbs.) (available in the files of the Fordham Law Review) (award determined what the minimum and maximum salary rate should be for teachers in the New York City school system, which was plagued by recruitment and retention problems). The award of the arbitrators in determining what the proper rate of compensation should be for two-men sanitation crews assigned to do the work previously performed by three-men crews is a good example. See City of New York v. Uniformed Sanitationmen's Ass'n, Local 831, Case No. I-157-80 (OCB Dec. 10, 1980) (Kelley, Arb.) (available in the files of the Fordham Law Review). A dispute arose over the city's decision to utilize side loading collection trucks operated by two-men crews in some sanitation districts instead of rear loading trucks operated by three-men crews. Id. at 5. The Union argued that since 'the City would save $13,000 per man operating the side loading trucks; that they 'expected a fifty-fifty split ... a differential of $6,500’ per annum per man working on the side loaders.' Id. at 9. The Union claimed that the employees 'are entitled to their just due and should be compensated and paid a differential for their extra effort, added responsibilities and improved productivity.' Id. The City, on the other hand, believed no differential was due. Id. The arbitrator carefully examined the evidence which showed that 'cities operating such equipment have without exception provided a salary differential to the Driver/Loaders of the side loader when reducing crew size. None, however, provide a differential of the magnitude proposed by the Union in these proceedings. . . .’ Id. at 10. Taking into consideration the estimated increases in productivity resulting from the implementation of the side loaders and the differentials awarded in other jurisdictions under similar circumstances, the arbitrator awarded a salary differential of $11 per shift per employee. Id.
INTRODUCTION

This Article argues that existing techniques for resolving public-sector collective bargaining impasses such as mediation, fact-finding, arbitration and strikes all have substantial weaknesses. After examining the policy problems inherent in each of these methods, the authors propose a new model for resolution of impasses. Their proposed model combines mediation, fact-finding, strikes and public referendums to avoid the deficiencies inherent in any one technique.

The growth of public-sector unionism in the past two decades has been a significant feature of public employment. [FN1] As public employees have sought and obtained rights to bargain at the federal, state, and local levels, numerous issues have arisen in connection with the bargaining process. While the National Labor Relations Act (NLRA), which covers employees in the private sector [FN2] provides a frequent analogy for public-sector legislation, [FN4] differences between public and private-sector employment prevent the NLRA from serving as a complete model for public employment. One of the most important differences [*482] involves the right to strike. [FN4]

Historically, common law has not afforded workers in the United States an absolute right to withhold their services from their employer. Such action may be subject to judicial restriction. [FN6] The NLRA, however, expressly protects this right, [FN7] and prohibits an employer from discriminating against private employees engaged in strike activity. [FN8] In contrast, the majority of public employees do not have a statutory right to undertake economic sanctions as a means of resolving bargaining impasses, [FN9] and constitutional protections do not extend to legitimate such conduct. [FN10]

Various legislative schemes other than the strike method have been adopted to resolve disputes arising out of public negotiations. None of these procedures, however, has been universally accepted as a satisfactory method of impasse resolution. [FN11] In each instance, the permitting of intervention by a third person not a party to the agreement impedes the original parties' resolution of the labor contract. [FN12] Further, several jurisdictions have declared one common method of impasse *483 resolution unconstitutional as a matter of state law. [FN13]

The strike model utilized in private-sector bargaining has the primary advantage of imposing significant hardship on recalcitrant parties. A strike is an undertaking of such magnitude that it is rarely employed as a means of settling disputes in negotiations; the threat of a strike itself is usually an adequate incentive to settle differences.
Common methods of public-sector impasse resolution are, in contrast, relatively inexpensive and readily available. Both features detract substantially from the effectiveness of the methods.

This article proposes a new procedure for dispute resolution. The suggested procedure combines legislative approaches currently in effect, including the strike option, with a novel alternative used by several municipalities in Colorado: the submission of impasses to a vote of the electorate. Such a submission was successfully utilized to resolve an impasse in negotiations between Denver and the International Association of Firefighters, Local 858. The proposed procedure will encourage realistic, meaningful bargaining and will avoid the lack of political accountability inherent in other impasse-resolution techniques.

To provide a framework for the proposed 'Referendum Model,' this article first describes current methods of dispute resolution. It then discusses a critical distinction between public-sector and private-sector collective bargaining, the inherently political nature of public negotiations, and explores this distinction in the context of both judicial decisions and theory. Next, the feasibility of dispute resolution by public election is demonstrated through an examination of the Denver and Local 858 experience. Finally, a legislative model is proposed, incorporating third-party intervention, strikes, and elections.

*484 II

IMPASSE RESOLUTION TECHNIQUES AND ATTENDANT PROBLEMS

A. Third-Party Intervention

The most common forms of dispute resolution involving intervention by a party outside the bargaining process are mediation, factfinding, and arbitration. Each method has its distinctive features and particular disadvantages.

1. Mediation

Mediation is based upon the theory that the injection of a neutral, but knowledgeable, third party into the negotiation process will assist the employer and the union in reaching a voluntary settlement. The mediator, who may be either a private citizen or a professional government employee, performs a variety of functions designed to facilitate a harmonious resolution of the dispute. Those functions have been categorized as procedural, communicative, and substantive. The procedural function includes activities such as scheduling and conducting meetings, developing agendas, and arranging deadlines. The communicative function involves maintaining a flow of information between parties who are unable or unwilling to exchange information directly.

It is the substantive function which lies at the heart of mediation. Acting as a catalyst, the mediator encourages settlement through strategies such as discerning priorities, offering specific-proposals for consideration, realistically evaluating respective positions, and helping to formulate bargaining 'packages.' The end result is the parties' attainment of mutually beneficial understandings which would have been unattainable without the mediator's assistance.

Mediation is the most frequently used method of dispute resolution. It is most effective when an impasse derives from procedural rather than substantive elements of bargaining. Among the variables conducive to successful mediation are inexperienced negotiators, overcommitment to a given position, few sources of impasse, parties motivated to reach settlement, and an aggressive, experienced mediator. Conversely, mediation is least effective where impasse results from an employer's inability to pay, where the parties habitually rely on the impasse procedure, and where impasse occurs in large jurisdictions.
Factfinding is predicated on the utility of rational persuasion rather than the exercise of power. It shares formal characteristics with both mediation and arbitration.

A factfinder or factfinding panel gathers information through a hearing process. Parties to the hearing introduce evidence and argue the merits of their respective proposals. The factfinder subsequently issues an advisory award. Each impasse is tentatively resolved and supported by an appropriate rationale. Theoretically, the award is sufficiently fair and reasonable to form the basis for voluntary settlement.

The assumption of the factfinding process is that once an award is put before the parties and the public, it will be clothed with sufficient authority to force the parties to acquiesce in its conclusions. The public will regard the award as a just settlement and bring pressure on the parties to accept it. But as one commentator observes,

Every study of factfinding in the public sector has concluded . . . that it has not had this result. In most cases the interest and concern of the public is not aroused sufficiently to activate the pressure needed to produce a settlement. Public interest is apparently aroused only when a strike threatens or actually imposes direct hardship. [FN26]

Moreover, the effectiveness of factfinding has declined over time in regard to several important objectives, including the ability to avoid strikes, to induce settlements, and to attain increased acceptability. [FN27]

Nevertheless, factfinding remains a popular component of dispute resolution. It may be used in conjunction with mediation or as a prelude to arbitration. [FN28] When an impasse poses a significant risk to the parties, such as a strike, factfinding can become a viable intermediate stage in the resolution process.

*486 3. Arbitration

The most formalized of dispute-resolution procedures, arbitration conclusively determines all impasses subject only to limited judicial review. [FN29] As a result of its conclusive nature, arbitration achieves the highest level of avoidance of strikes. [FN30]

As with factfinding, arbitration operates by means of a hearing before an arbitrator or panel of arbitrators. Evidence and argument are presented, after which the arbitrator makes a final and binding disposition of each impasse. A popular modification known as "final-offer" arbitration limits the arbitrator to a choice of one of the final negotiating packages of the parties. [FN31]

The arbitrator's role in dispute resolution is to formulate an agreement which approximates as nearly as possible the settlement which the parties themselves would have reached. As one eminent arbitrator explained:

Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon considerations of policy, fairness, and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations—they have left it to this board to determine what they should, by negotiations, have agreed upon. We take it that the fundamental issue is: What should the parties themselves, as reasonable men, have voluntarily agreed to? [FN32]

In order to arrive at reasonable settlements, arbitrators rely on standards developed through prior adjudications. Those standards, as one authority points out, 'are not pulled out of the air—nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations.' [FN33] Such standards include prevailing practices within an industry or area, the nature of the work under consideration, the employer's ability to pay, productivity, and general economic conditions. [FN34] In some instances, standards are provided by the enabling legislation. [FN35]

As a means of resolving disputes, arbitration is typically viewed as the most effective substitute for public-sector work stoppages. There is substantial empirical evidence to support the conclusion that far fewer strikes occur where arbitration is mandated. \[\text{FN36}\] In addition, arbitration may serve to redress inequalities in bargaining power and to provide social and political stability. \[\text{FN37}\] This feature, however, is antithetical to the established concept under the NLRA that bargaining outcomes are determined by the economic strength of the parties. \[\text{FN38}\]

One frequent criticism of arbitration is that it tends to inhibit genuine bargaining. \[\text{FN39}\] Rather than engage in realistic negotiations, parties select the less painful alternative of arbitration. According to Feuille, arbitration will be invoked because one or both sides believe that an arbitration award may be more favorable than a negotiated agreement and because one or both believe the costs of using arbitration are comparatively low (none of the trauma and costs of a work stoppage and none of the uncertainty of using other forms of political influence). As a result of this cost-benefit calculus, the availability of arbitration may have a 'chilling effect' upon the parties' efforts to negotiate an agreement, and over time there may be a 'narcotic effect' as the parties become arbitration addicts who habitually rely on arbitrators to write their labor contracts. \[\text{FN40}\]

A more fundamental attack on arbitration derives from the structure of our democratic society. The perceived weakness of interest arbitration is that it is 'inimical to a basic precept of political democracy, namely that authoritative political decisions should be reached by governmental officials who are accountable to the public. Arbitrators are not accountable to the public.' \[\text{FN41}\] This lack of political accountability has led some courts to reject arbitration, finding it to be an unconstitutional delegation of legislative power. \[\text{FN42}\]

**B. Constitutional Analysis and Policy Issues**

The majority of courts have upheld statutes that provide for binding interest arbitration for public employees. \[\text{FN43}\] Nevertheless, such statutes have been attacked on various constitutional grounds, including the violation of the fourteenth amendment. \[\text{FN44}\] The most compelling argument, however, challenges these statutes as unconstitutional delegations of legislative authority. This argument is significant for purposes of this article because it focuses attention on the relations between the arbitrator and the processes of public decision-making.

_Greeley Police Union v. City Council of Greeley_ \[\text{FN45}\] illustrates the minority position. In that case, the Colorado Supreme Court invalidated a city charter amendment that provided for binding arbitration of unresolved police union disputes. The court held that delegation of legislative power to politically unaccountable persons is unconstitutional. The court observed that certain basic principles of representative government cannot be contravened:

Fundamental among them is the precept that officials engaged in governmental decision-making (e.g., setting budgets, salaries, and other terms and conditions of public employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public. \[\text{FN46}\]

The court's chief concern was to preserve the process mandated by the state's constitution, which provided that '[e]very person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers.' \[\text{FN47}\] The court found that binding arbitration would unacceptably attenuate the link between the electorate and the decision-makers. \[\text{FN48}\]

In another case typical of this trend, the Utah Supreme Court reached a similar conclusion regarding binding interest arbitration for firefighters. \[\text{FN49}\] According to the Utah court,

The power conferred on the panel of arbitrators is not consonant with the concept of representative de-
mocracy. The political power, which the people possess under Article I, Sec. 2, and which they confer on
their elected representatives is to be exercised by persons responsible and accountable to the people—not in-
dependent of them. The act is designed to insulate the decision-making process and the results from account-
ability within the political process; therefore, it is not an appropriate means of resolving legislative-political
issues. [FN50]

Once again, the perceived threat to the representative government motivates the court to invalidate the binding
arbitration provisions. [FN51]

Conversely, a majority of courts have held that lack of political accountability does not ipso facto invalidate
binding interest arbitration statutes. For example, in Milwaukee County v. District Council 48, [FN52] the Wisconsin
Supreme Court upheld the constitutionality of a statute that mandated the appointment of a mediator-arbitrator by
the Wisconsin Employment Relations Commission (WERC) after a reasonable period of negotiation, if settlement
procedures fail to break a deadlock. [FN53] Under the statute, parties to the deadlock submit their final offers to the
mediator-arbitrator, who arranges a public meeting if so petitioned by at least five citizens. This meeting allows the
parties to explain and justify their positions, and affords the public the opportunity to offer comments and sugges-
tions. Following this, the mediator-arbitrator attempts to mediate the dispute for a reasonable time; if unsuccessful,
the mediator-arbitrator notifies the parties that the dispute will be resolved through binding arbitration. If both par-
ties then withdraw their final offers, the labor organization may strike. Otherwise, binding arbitration would apply.

In finding the statute constitutional, the court outlined three requirements for a valid delegation of legislative
authority. First, the legislative purpose of the statute must be ascertainable. Second, specific standards must limit the
exercise of the arbitrator's statutory power. And third, judicial and procedural safeguards must exist to ensure that
the legislative purpose is satisfied.

The Wisconsin court conceded that the statutory system does not provide for the mediator-arbitrator's direct
accountability to the electorate. It concluded, however, it must defer to the legislature:

*490 In this case the legislature struggled with the difficult problem of arriving at a fair dispute resolu-
tion system for both the public employer and the public employees. It determined that the unilateral determi-
nation of employment matters by the employer gave little weight to the rights of employees. It also deter-
mined that the right to strike, a traditional employee right, posed too great a threat to the smooth operation of
essential public services. It was in this context that the legislature devised a system for binding arbitration
through an impartial arbitrator.

The underlying premise of public employer-employee arbitration is that communities will forego the
consequences of embittered economic warfare if there is a process to resolve disputes under fair and neutral
principles. Consequently, the legislature must be allowed some flexibility in formulating a procedure to re-
solve the conflict between direct electoral accountability and the independence afforded through insulation
from the political process. [FN54]

Thus, the court recognizes that some degree of political accountability may need to be sacrificed in order to at-
tain the legislative ends sought. That determination is arrived at by legislative balancing.

Other courts have reached similar conclusions. In City of Detroit v. Detroit Police Officers, [FN55] the Michi-
gan Supreme Court found that an amended statute which provided for binding interest arbitration was constitutional
despite limited accountability of the decision-maker. After an extended discussion of the problems of accountability,
the court suggested that the elected officials who devised the scheme provided a sufficient link between the elector-
ate and the decision-maker. In the court's view: 'Should the people be dissatisfied with the accountability aspect of
the engineered scheme which must necessarily transcend local boundaries, the onus is upon the state's electorate,
including the locally affected voting population, to exercise its political will.' [FN56] The accountability of the
elected officials thus adequately safeguards representative democracy. Although it recognizes that particular deci-
sions by individual arbitrators remain insulated from the political process, the Michigan court's view minimizes the
political consequences of that fact. [FN57] Further, it tends to obscure the substantial policy issues implicit in the
matter of accountability.

Dissenting in Detroit Police Officers, Judge Levin forcefully delineates the theoretical basis of the delegation doctrine. Judge Levin *491 states that the policy matter at stake is not simply the degree of control imposed on the decision-maker, but rather the integrity of the mechanism through which power is apportioned. He writes,

A court reviewing a challenged delegation of legislative power should, we agree, examine whether adequate checks have been provided against arbitrary or uncontrolled official action. Such an inquiry cannot, however, supplant the basic inquiry whether the legislatively devised framework for official action—considered in its application—secures the fundamental goal of the delegation doctrine: preserving legislative responsibility for the determination of public policy. [FN58]

Thus, Judge Levin finds that accountability is a necessary element of any delegation, serving not so much to correct occasional aberrational rulings as to ensure that the legislature and the electorate maintain control over the formulation of coherent policies. Regarding the statute under consideration, Judge Levin concludes that 'Act 312 arbitration is novel in that the policy-making power is dispersed among ad hoc arbitrators, which prevents the emergence of visible and intelligible principles.' [FN59]

In the earlier case of Dearborn Fire Fighters, [FN60] Judge Levin rejected the contention that accountability could be sacrificed in order to attain finality and efficiency in dispute resolution. He asserted that maintenance of governmental processes should be the focal point of judicial inquiry and that no substantial diminution of electoral power should be tolerated. He concluded,

While delegation of authority to resolve the dispute to an independent outsider may resolve the immediate crisis and relieves the public employer and union officials of the need to justify the result, this approach to legislative decision-making, precisely because it is designed to insulate the decision-making process and the results from accountability within the political process, is not consonant with proper governance and is not an appropriate method for resolving legislative-political issues in a representative democracy. [FN61]

Although Judge Levin's view reflects the minority judicial trend, it adumbrates concerns which are central to the theoretical framework of public negotiations and which must be addressed in a system of dispute resolution.

Binding interest arbitration necessarily invokes questions concerning democratic values. Even though a majority of jurisdictions have upheld binding arbitration, judicial opinions have shown considerable *492 sensitivity to the proper functioning of the political process. [FN62] In a system of dispute resolution that compromises the framework of democratic decision-making, the problem of inadequate accountability will remain intractable for both legislatures and courts. Similar problems may also arise in the resolution of disputes through strikes.

C. Public Strikes and the Public Interest

I. Theoretical Considerations

One of the most significant distinctions between private and public sector bargaining systems is the use of strikes as a means of impasse resolution. In the private sector, employees may freely apply economic sanctions against the employer in order to extract concessions. [FN63] A weak employer will be forced to grant the concessions. On the other hand, a strong employer may permanently replace the striking employees, [FN64] thereby forcing employees who desire to keep their jobs to accept the employer's terms. Regardless of the outcome, the terms and conditions of the contract are reached on a strictly voluntary basis.

In the public sector, employee and employer interests are not sharply delineated in an economic context. Public employers are primarily responsible for the delivery of services which are often not readily obtainable outside the public sector, as in the case of police and fire protection. These services are evaluated in terms of intangibles such as

quality of service and public image rather than on profit-generation. As a ‘servant’ of the public, the public employee is held to a different standard of conduct than that applied to the private sector worker. Consequently, in work stoppages, the economic consequences to both the public employer and employee may be secondary to the political consequences involved.

The topic of public sector work stoppages has generated a substantial body of commentary exploring the relationship between strike activity and the political process. The commentary is inconclusive on the issue of whether public employees should be allowed to strike. Nevertheless, academic discussion has illuminated one major difference between private and public bargaining: the political implications of public negotiations and impasse resolution.

In the influential The Unions and the Cities, Professors Wellington and Winter propose the thesis that public sector strikes distort the normal political process by focusing disproportionate pressure on public officials. The Wellington-Winter argument holds that

because strikes in public employment disrupt important services, a large part of a mayor's political constituency will, in many cases, press for a quick end to the strike with little concern for the cost of settlement. This is particularly so where the cost of settlement is borne by a different and larger political constituency, the citizens of the state or nation. Since interest groups other than public employees, with conflicting claims on municipal government, do not, as a general proposition, have anything approaching the effectiveness of the strike—or at least cannot maintain that relative degree of power over the long run—they may be put at a significant competitive disadvantage in the political process.

Thus, the argument continues, public sector unions do not suffer the same constraints as their private sector counterparts, in that the public strike will be promptly settled with no significant economic sanctions against the union membership. The strike weapon in public employment, therefore, is qualitatively distinct from its function in the private sector.

The Wellington-Winter theory has been challenged on a number of grounds. An empirical study by Professors Burton and Krider suggests that effective market restraints on public employees do exist, such as the loss of wages, the threat of replacement, and public concern over possible tax increases. Moreover, it is clear that not all governmental services are unavailable outside of the public sector. Sanitation services, for example, are frequently provided by private contractors. A further argument in favor of economic resolution of impasses is that forcing labor unions to rely on traditional political strategies such as lobbying can distort the political process by leading to corruption and patronage. Accordingly, Burton and Krider conclude that

[our field work suggests that unions which have actually helped their members either have made the strike threat a viable weapon despite its illegality or have intertwined patronage-political support arrangements. If this assessment is correct, choice of the No-Strike Model is likely to lead to patterns of decision making which will subvert, if not the ‘normal’ American political process, at least the political process which the Taylor Committee and Wellington and Winter meant to embrace. We would not argue that the misuse of political power will be eliminated by legalizing the strike; on balance, however, we believe that, in regard to most governmental functions, the Strike Model has more virtues than the No-Strike Model.

The above discussion suggests two propositions essential to a theoretical analysis of public sector strikes. First, the inherent nature of public employment requires that focus be placed on the political consequences of strikes. Second, no conclusive argument has been offered which would justify prohibiting all public sector strikes under all circumstances. Indeed, justifications advanced in the past were, in many instances, dogmatic assertions aimed at preventing any form of public collective bargaining. As one scholar notes,

[The predominant view during the first half of the century was that strikes were a form of organized anarchy and, therefore, represented a direct assault on the sovereignty of government. Since strikes were viewed as a necessary component of any collective bargaining system, it followed that the collective bargaining process was inappropriate for public employees.]
In contrast, contemporary scholarship tends to regard strikes as a viable option among the mechanisms for public sector dispute resolution. \[\text{[FN71]}\] In one recent study, for example, the author concludes that "the impact of strikes in the public sector has not been sufficiently detrimental to the interests of the public to justify the current presumption against their legality." \[\text{[FN72]}\] He continues,

"Both labor and management would benefit from the right to strike because it yields the bilateral determination of terms and conditions of employment. The importance of this outcome cannot be understated. Despite the high costs of strikes relative to the direct costs of hiring an arbitrator to resolve interest disputes, few parties in the private sector voluntarily agree to substitute interest arbitration for the right to strike, which indicates that the parties derive tremendous benefit from being able to determine their own future free from the unpredictable decisions of an arbitrator. Assuming that labor and management in the public sector have similar preferences, each side would benefit from the right to strike because the outcome under a strike threat is a bilateral settlement that reflects the preferences and bargaining power of the parties.\[\text{[FN73]}\]

The desirability of voluntary agreement as the product of negotiation has also been emphasized by other authorities in the field.\[\text{[FN74]}\]

In sum, public sector strikes involve a political component which distinguishes public sector bargaining from the private sector. The arguments advanced both by Wellington and Winter and by Burton and Krider clarify the relationship between public employee strike activity and the political system. Certainly every public sector strike does not result in immediate capitulation by the public employer, even when the strike involves an important service such as mass transportation.\[\text{[FN75]}\] At the same time, an impasse-resolution mechanism ideally should accommodate the potentially disproportionate application of political power described by Wellington and Winter. Some states have chosen to allow designated public employees to strike.\[\text{[FN76]}\] The strike model adopted by Pennsylvania is considered as a viable example of the means by which public sector strikes can be authorized and regulated.

2. A Legislative Experiment

In 1970, the Commonwealth of Pennsylvania enacted the Public Employee Relations Act (Act 195)\[\text{[FN77]}\] which permits strikes by certain groups of public sector workers. The amendment illustrates a reasoned and balanced treatment of employee, employer, and public interests. Moreover, a number of public sector strikes have proven that the system is workable.\[\text{[FN78]}\]

Impasse resolution under Act 195 is based upon a series of mandatory steps, followed by several voluntary options. The statute also incorporates explicit safeguards to prevent undue danger to the public welfare.\[\text{[FN79]}\]

The first step in impasse resolution is mediation, which the parties must invoke if an agreement has not been reached within a specified period.\[\text{[FN80]}\] Mediation is initiated by written notice to the Pennsylvania Bureau of Mediation.\[\text{[FN81]}\] Once commenced, mediation continues as long as the parties are in disagreement. After twenty days,\[\text{[FN82]}\] however, the Bureau of Mediation is required to notify the Pennsylvania Labor Relations Board\[\text{[FN83]}\] of the impasse. The Board may thereupon, in its discretion, appoint a factfinding panel empowered to conduct hearings and issue subpoenas.\[\text{[FN84]}\]

If the parties have not reached agreement during the factfinding process, the factfinding panel will make recommendations for resolution of the impasse. The parties must accept or reject the recommendations within ten days, and must promptly notify the board and each other of their choice.\[\text{[FN85]}\] If the panel's recommendations are rejected, the panel "shall publicize its findings of fact and recommendations."\[\text{[FN86]}\] The parties are then given an additional ten-day period to reconsider the recommendations.\[\text{[FN87]}\] The failure of a party to submit to mediation or factfinding procedures "shall be deemed a refusal to bargain in good faith," and is grounds for issuance of an unfair-practice complaint.\[\text{[FN88]}\] Nothing in the mandatory procedures precludes an agreement to submit the impasse to voluntary binding arbitration.\[\text{[FN89]}\]
Following exhaustion of the mandatory procedures, disputes are governed by the strike clause. While generally permitting strikes, it prohibits strikes by guards at prisons or mental hospitals or by employees "directly involved with and necessary to the functioning of the courts," and prescribes appropriate actions in the event of such strikes. [FN91] Police and fire personnel, not specifically covered by Act 195, are granted collective bargaining rights by a separate statute. [FN92] These workers are afforded a right to arbitrate bargaining impasses. [FN93]

Provided that it is not explicitly prohibited and that mediation and factfinding have taken place, a strike 'shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.' [FN94] A public employer who believes that this level has been reached may initiate an action for appropriate relief in the jurisdiction's court of common pleas. [FN95] An injunction, however, will not issue simply because routine procedures have been disrupted [FN96] or because services cannot be furnished by the employer. [FN97] Furthermore, the strike must actually be in progress before an injunction will be issued. [FN98] The court typically will consider a number of factors in determining the merits of the action, including the population percentage affected by the strike, the strike's interference with other statutorily mandated objectives, nonstriker loss of wages, and potential and actual violence. [FN99] If the strike is enjoined, the public employee's or the labor organization's refusal to comply with the injunction may result in a variety of sanctions for contempt. The employee may be subject to discharge, a fine, or imprisonment, [FN100] and the organization may be fined for each day it is in contempt. [FN101]

In general, Act 195 serves to accommodate the several interests that are affected by public negotiations. The Pennsylvania experience demonstrates that public sector strikes within the scope of municipal governance can be adequately regulated and can function effectively to resolve bargaining impasses. Nevertheless, the overwhelming majority of states that permit public bargaining have rejected the strike as a means of impasse resolution. [FN102] To the legislators in such states public-employee work stoppages are simply unacceptable. Accordingly, the strike weapon in public negotiations must be appropriately circumscribed in order to attain any significant measure of support.

D. Evaluation and Summary

As the foregoing analysis indicates, public-sector dispute resolution techniques exhibit certain obvious shortcomings. While some procedures may perform more effectively in particular respects than do others, no single system has been widely adopted in bargaining legislation. Ideally, a resolution mechanism should avoid undue disruption of and interference with necessary community services. It should also protect against any 'chilling' or 'narcotic' effects. [FN103] Finally, the mechanism should move parties toward realistic bargaining and voluntary settlements.

Mediation to a certain degree satisfies the final criterion, assisting the parties to reach a voluntary settlement. Also, because mediation is not binding, chilling and narcotic effects are minimal. Mediation, however, has not proved to be a workable substitute for the strike weapon. [FN104] Further, mediation is most frequently successful in those situations where the parties are not in disagreement regarding substantive contract issues. [FN105]

Like mediation, factfinding does not impose a binding decision on the parties, and therefore is not significant in preventing strikes. It may tend, however, to persuade parties of the essential correctness of a given recommendation. Factfinding appears to have declined in popularity, thus indicating its undesirable quality as an impasse-resolution mechanism. [FN106]

Arbitration has a better record of avoiding strikes than do other resolution procedures. [FN107] Yet the features of arbitration which so effectively remove the strike incentive—availability, relative low cost, and finality—make arbitration an attractive diversion from genuine bargaining over difficult issues. There is a discernible tendency for
arbitration to chill bargaining and to induce a soporific bargaining environment. [FN108] Consequently, arbitration does little to motivate parties to reach a voluntary settlement; in fact, it severely detracts from that dimension of the bargaining process. Although final-offer arbitration may minimize these attributes, it does not remove them. [FN109]

*499* Arbitration is also unacceptable in terms of legal and political theory: its delegation of legislative authority may be constitutionally invalid. Even if this hurdle is overcome, arbitration nevertheless removes important decisional processes from the direct control of the electorate. [FN110] That consequence is in important respects incompatible with the notion of a pluralistic democracy. [FN111]

The option of sanctioning public sector strikes as a means of dispute resolution has been utilized in a minority of jurisdictions and has attracted increasing support from commentators. [FN112] As in the private sector, the strike threat constitutes the most viable incentive to bargaining. [FN113] Practical experience in one state, at least, suggests that the strike option is feasible.

It must be recognized that public employment differs significantly from private-sector employment. Most importantly, determinations as to the appropriate terms and conditions of employment are ultimately made by the electorate. Those determinations, involving such intangibles as the quality of community life, differentiate the individual as a participant in the democratic process from the individual as a consumer of goods or services. Consequently, work stoppages by public employees evoke a response more complex than the economic self-interest which dominates individuals affected by a private sector strike. Accordingly, public sector impasse resolution procedures should accommodate the political implications of strikes as well as their economic impact. The model proposed in the next section does so.

*500* III

IMPASSE RESOLUTION THROUGH A REFERENDUM OR A STRIKE

A. Submitting the Impasse to the Electorate: A Case Study of Local 858, International Association of Firefighters and the City of Denver, Colorado

In 1971, an amendment to the city charter gave Denver firefighters the right to bargain collectively. The amended charter provided that employment bargaining impasses would be resolved through binding arbitration. This method was successfully used in 1975 to resolve a wage dispute between the City of Denver and Local 858, International Association of Firefighters. The arbitration panel in that case awarded the firefighters a 9.5% pay increase, this validating the Union's belief in the fairness and efficiency of the arbitration process. [FN114]

The following year, the Colorado Supreme Court declared that a binding arbitration ordinance in Greeley, Colorado, was unconstitutional. [FN115] Accordingly, Local 858 and the City of Denver discussed methods of impasse resolution to replace their own invalid contractual provision. Among the alternatives was a union proposal [FN116] to submit impasses to a referendum of the electorate. The City of Englewood, Colorado, had approved such a method in 1972, [FN117] although it never used the procedure to resolve an impasse. [FN118]

The union's proposal was adopted. Following negotiations concerning election timing and procedures, the parties agreed that the referendum would be through special election. The specifics of the agreement provided that

[u]pon the request of the employer or the sole and exclusive agent of the firefighters, after publication of the advisory fact-finder's report, and after the employer and the sole and exclusive agent of the *501* firefighters have had five (5) days to further negotiate the disputed issues, the final offers of the employer and of the sole and exclusive agent of the firefighters on the issues remaining unresolved shall each be submitted as al-
ternative single measures to a vote of the qualified electors of the City and County of Denver at a special election. The special election shall be held no later than August 31. The qualified electors shall select either the final offer of the employer or the final offer of the sole and exclusive agent of the firefighters, as presented to the advisory fact-finder. Issues agreed to during the five-day period shall not be included in the final offer of the employer or of the sole and exclusive agent of the firefighters. The cost of such special elections shall be borne by either the employer or the sole and exclusive agent of the firefighters, which ever refuses to accept the recommendations of the advisory fact-finder. If both refuse, the costs shall be borne equally by the employer and the sole and exclusive agent of the firefighters. [FN 119]

In March 1981, the parties commenced negotiations for a labor agreement to become effective January 1, 1982. A number of issues resulted in impasse, including the length of the firefighters' workweek. At the time, firefighters were scheduled on a 48-hour week with 'Kelly' days. The city proposed to extend the workweek to 56 hours under the so-called 'Berkeley' system. [FN 120] The union viewed the city's position as a retrenchment which was totally unacceptable. [FN 121]

The impasses proceeded to factfinding under the jurisdiction of a single impartial factfinder who had been selected by agreement. After five days of hearing, the factfinder issued an award containing recommended resolutions of various issues. Regarding the workweek issue, he ruled that the city's proposal should be adopted. The asserted justification for his ruling was that 'the hard core matters of management of the fire suppression forces and the airport subdivision trend heavily in favor of the Berkeley [sic] plan.' [FN 122]

The union's president said he was shocked and outraged at the hours ruling. [FN 123] He reportedly indicated 'little willingness to accept the recommendations,' [FN 124] and indicated that it was 'highly probable' that the matter would be submitted to the electorate; the expense of this to the union was estimated at $175,000. [FN 125] In contrast, the city was 'surprised and delighted with the recommendations,' [FN 126] and believed that the city would have an advantage if the issue were placed before the electorate. [FN 127] The city publicly stated its intention to accept every recommendation of the factfinder. [FN 128]

Local 858's membership voted 'overwhelmingly' to reject two recommendations made by the factfinder, including the ruling concerning hours of work, and to exercise its right to an election. [FN 129] Subsequently the election was scheduled for August 15, 1981. Framing the language to appear on the ballot regarding hours of work proved to be difficult. The union accused the city of misrepresenting facts and of drafting submissions that were so complicated voters won't understand them. [FN 130] The final form of the official ballot asked voters to select either the union's or the city's proposals. The work hours proposals appeared on the ballot as follows, as drafted by the union and the city, respectively:

Firefighters in the fire suppression force shall work a work schedule consisting of twenty-four (24) hour shifts for an average work week of forty-eight (48) hours. This will be implemented by the use of a three (3) platoon system with each firefighter working one (1) twenty-four (24) hour shift followed by two (2) days off, with a 'Kelly' day to be taken within each twenty-one (21) calendar day cycle. A 'Kelly' day shall not be counted as a working shift for any purpose.

Firefighters in the Suppression Force and Airport Subdivision shall be on duty based on a scheduling system commonly known as the Berkeley System. The Berkeley System consists of a nine (9) day duty cycle in which the first twenty-four (24) hour day (shift) is on duty, the second day is off duty, the third day is on duty, the fourth day is off duty, the fifth day is on duty and the remaining sixth through ninth days are off duty. This schedule is implemented by the use of a three (3) platoon system. Thus, the firefighter is on duty for three (3) days of each nine (9) day cycle or none (9) days in each twenty-seven (27) day period. [FN 131]

The substantive issues of the dispute received considerable publicity during the campaign period, and public officials expressed their positions vigorously. The Mayor of Denver, for example, warned that the union's contract...
demands would cost the taxpayers $2.5 million annually, and urged voters to support the city’s contract plan. [FN132] One Denver *503 newspaper supporting the city’s position observed that Local 858 ‘appears to be stretching Denverites a bit too thin’; the editorial concluded, ‘The outside arbiter’s recommendations were sound and should have been adopted by both sides in the first place.’ [FN133] And a group calling itself ‘Citizens for Fiscal Responsibility’ sponsored advertisements attacking the union, characterizing the union’s bargaining demands as ‘an unfair and unreasonable burden on the city and Denver taxpayers.’ [FN134]

Local 858’s campaign consisted primarily of telephone contacts and door-to-door canvassing. Approximately 350 members actively participated in the campaign, each devoting approximately three or four days to campaign work. On election day, some 200 firefighters participated in a final campaign effort. [FN135]

The electorate voted to approve the final offer of Local 858. The concluding tally showed 22,519 votes in favor of the union’s proposal and 22,403 in favor of the city’s proposal. [FN136]

According to Local 858’s president, the cost of the election was defrayed through a two-year membership assessment of $15 per month. [FN137] The assessment replaced $160,000 taken from the Local treasury to pay for the election. [FN138] Thus, the total cost of the election amounted to $360 per union member. In the Local’s opinion, however, the benefit of retaining the shorter workweek clearly outweighed the effort and expense of the election. [FN139]

Besides fulfilling the Local’s substantive goals, the election gave the union a sense of strength and purpose. The election victory generated an increase in union participation and improved morale among union members. [FN140] Conversely, an election loss would have had a deleterious effect on the union and on the union’s bargaining power relative to that of the city. [FN141] Thus, the election alternative imposed substantial costs on and posed significant risks to the union. But, as the Local 858 example shows, the referendum election was a viable option among impasse resolution techniques.

*504 B. The Referendum Model: A Specific Proposal

The legislative framework for a proposed dispute resolution process (to be referred to as the ‘Referendum Model’) is discussed below. The proposal incorporates various features of different impasse resolution processes, including the right to strike. For purposes of convenience, the existence of an administrative body (‘Board’) is postulated.

Step 1. Notification of Impasse. The parties engaged in public sector labor agreement negotiations are required to notify the Board of a bargaining impasse. Notification is in the form of a summary statement of the issues and the respective positions of the parties. If the parties cannot agree on the contents of the notification, each party may submit its own statement. Either party may declare an impasse. [FN142]

Step 2. Mediation. Within ten days, the Board will appoint an official to mediate the dispute at no cost to the parties. Alternatively, the parties may select and compensate their own mediator, upon the Board’s approval. The parties and the mediator have ten days in which to resolve the impasse. Following this period, the mediator will issue a written report to the Board. In its discretion, the Board may make the mediator’s report public. [FN143]

Step 3. Factfinding. If mediation is unsuccessful, the Board will direct the parties to engage in factfinding. The Board will appoint a factfinder who shall be compensated by the parties; the Board may, in its discretion, appoint a factfinder jointly requested by the parties. The factfinding process will include a hearing with the introduction of evidence, examination of witnesses, and argument. At the conclusion of the hearing, the factfinder will issue a written report resolving each area of impasse, supported by a statement of reasoning. The report shall be made public. [FN144] On a designated date no later than ten days following issuance of the report, the parties shall simultane-
ously serve notice on the Board indicating acceptance or rejection of any or all of the findings. [FN145] Following this, the parties shall have an additional five day period in which to engage in bargaining.

Step 4. Referendum. If the employees' collective bargaining representative rejects and or all of the factfinder's recommendations, the |505 representative may submit the impasse to a referendum of the electorate. The choices on the ballot shall be the factfinder's recommendation on the issue and the proposal which the representative submitted. The cost of the election shall be borne by the representative, and the election commission may require adequate funds to be placed in escrow.

Where both parties reject any or all of the factfinder's recommendations, the ballot choices shall be the positions of the parties prior to factfinding, as contained in the mediator's report. Alternatively, the parties may mutually agree to the specific language of the ballot. [FN146] In the event of a joint referendum, the cost of the election shall be shared equally between the employees' representative and the employer.

Step 5. Strike. If the employer rejects any of the factfinder's recommendations, the labor organization shall be permitted to undertake a strike, provided it furnishes notice of its intent to do so at least ten days prior to the commencement of the action. Once the strike is in progress, the employer may petition the Board for an order declaring the strike to be an immediate and significant hazard to the public welfare, and enjoining the employees from further strike activity. If the employer obtains such an order, the factfinder's disposition of the impasse shall be implemented as the terms of the labor agreement. [FN147]

C. A Critical Evaluation of the Referendum Model

On preliminary appraisal, certain objections might be directed toward the Referendum Model. First, it might be contended that the cost of an election renders the Model impractical in many instances, particularly in a large city such as New York or Los Angeles or where the bargaining unit is statewide. [FN148] Second, the Model might allow public officials to manipulate the referendum process for purposes of political aggrandizement, rather than employ it for a legitimate collective-bargaining objective. Third, the Model ostensibly may not be conducive to the formulation of sound public policy, inasmuch as the electorate is |506 not capable of understanding and choosing among complex issues of contract negotiations. Each of these points is considered below.

1. Election Costs and Union Incentives to Bargain

The Referendum Model forces a union which rejects a factfinder's award to make a substantial investment in the resolution process. For example, the cost of the Local 858 election was $160,000; the direct cost to each member was $360. In addition to monetary costs, the average union member donated approximately three to four days to campaign activity. [FN149] These costs are not insurmountable in a large state. A union could conceivably afford an election in California. [FN150]

Moreover, while the cost of an election can be predicted, the outcome of the election can not. The instrumentality of the Model is highly attenuated. In the case of Local 858, for example, 117 votes out of 44,922 total votes cast would have reversed the election outcome. [FN151] Further, the consequences of losing an election entail the risk of severe loss of morale and commitment within the bargaining unit. In view of the calculable immediate costs and the in calculable but important long-term ones, a small local union in a large city might, as a practical matter, be precluded from seeking an election. However, this is more properly regarded as a strength of the Model than a weakness.

Under the private sector strike model, union power is a function of such variables as the union's willingness to strike, the degree of unionization within the industry, the percentage of union members within the enterprise, and the size of the particular operation. [FN152] A union which lacks a sufficient measure of power will be deterred from

undertaking a strike.

One of the salient deficiencies of the public sector arbitration process as a means of impasse resolution is that it imposes no meaningful costs on the participants, and thereby treats dissimilar unions alike. The only expense involved in arbitration is payment of the arbitrator's fee and any incidental costs of the hearing. Legal representation may be an additional cost, but it is not a requisite of arbitration. The most serious risk incurred by either party is that its position will be rejected. Thus, it can be said with some justification that a union loses nothing when it opts for arbitration, and that a small, weak local stands to gain to the same extent as a large, strong one. [FN153]

The Referendum Model corrects the distortion of power inherent in the arbitration method. The union's ability to fund an election and the willingness of its members to do so are fairly comparable to the indicia of union strength that are significant in private-sector strike decisions. [FN154] The public sector union is faced with a direct economic hardship in the expense of holding an election, and that hardship will be exacerbated if the election ends in defeat. Labor organizations in the private sector necessarily engage in a similar analysis of the costs and benefits of the strike weapon. Therefore, the public sector union operating under the Referendum Model will have the same incentives to engage in genuine bargaining as does its private sector counterpart under the pure strike model. [FN155] Thus, the Referendum Model will reflect the economic strength of a local union in an accurate fashion. That effect in and of itself renders the Model superior to other impasse resolution methods now in existence.

2. The Public Official's Perspective

It can also be argued that the Referendum Model will lead to the abusive exercise of power by public officials. For example, an officeholder might refuse to bargain meaningfully with a weak local and thus provoke it into impasse and mediation. The official could then reject the mediator's award, regardless of whether or not it was equitable, and force the union either to strike or to yield to the employer's demands. In either event, the official's political fortunes would be enhanced through a putative solicitude for the public fisc.

One response is that a private sector union, if it is the significantly weaker party, is routinely subjected to such indignities by the employer. It is well established that under the NLRA an employer's duty to bargain does not require the making of concessions. [FN156] Provided the employer bargains in good faith, [FN157] its legal obligation is satisfied, and a weak union must either accept the employer's offer or suffer the consequences of an unavailing strike. Public-sector unions logically should have no greater protection or advantages.

Furthermore, the Referendum Model militates against arbitrary employer conduct by means of political accountability. The union will presumably have an opportunity to present its version of the dispute to the media. If it persuasively demonstrates that the responsible public official is acting in a capricious, demeaning and patently unjust manner toward public workers, the official can be punished through the Model's election process or through general elections. Conversely, if it appears that the official has in fact acted in the best interests of the public, the official can be rewarded through public approbation. The Referendum Model assures a maximum of political accountability and thus avoids a severe policy shortcoming of the arbitration method.

3. Public Policy and the Electorate

Collective negotiations frequently involve issues of a sophisticated and complex nature, as the Denver Firefighters work hours issue demonstrates. In public presentation, a difficult issue can be distorted to the advantage of a particular party or reduced to a simplistic and inaccurate level. [FN158] Arguably, therefore, the public's choice might not be effective in terms of important policy objectives.

However, the Referendum Model does not significantly detract from the authority or responsibility of the bargaining parties to engage in meaningful decision-making. The structure of the Model assures that policy options will
in the first instance be selected by the appropriate official. Only when there is a dispute of sufficient magnitude as to lead to impasse will the public take part in the process. Accordingly, the election device serves primarily as a final check on decision-making, and not as a substitute for the myriad of functions performed by officials in shaping and directing policy during the formative stages.

Second, on a more theoretical level, one essential premise of our political process is that “an active and legitimate group in the population *509 can make itself heard effectively at some crucial stage in the process of decision.” [FN159] Conceding Wellington and Winters’ point that an organization of public workers ought not to wield a ‘disproportionate’ amount of power by means of strikes, [FN160] there is nevertheless a political value in permitting workers to assert their claims in the democratic process. [FN161] That process, in fact, remains viable only through the reconciliation of conflicting interests. [FN162]

The Referendum Model adjusts the unsatisfactory allocations of political power that inhere in the arbitration model and the pure strike model. Impasse resolution through arbitration shields the public official from the power of the electorate. Similarly, a union potentially exercises an inordinate degree of political power where it is permitted to strike without substantial checks. Under the Referendum Model, the possibility of a strike can be controlled in significant measure by the public employer. Thus, when a strike would be unduly harmful, the public official can choose to accept the factfinder’s award as the least destructive alternative, thereby preventing a powerful union from pursuing and attaining extreme demands by striking the relatively vulnerable employer. [FN163]

Finally, the Referendum Model will reinvigorate the democratic system on the state and local level. Although an election campaign under the Model will necessarily focus only on a limited number of issues, the broader implications of public employment will probably be addressed in public debate. Citizens will be motivated to participate by reason of political and economic self-interest. The Referendum Model will serve to educate the electorate concerning public employment and will structure the relationship between the citizen and the public servant on a more intimate basis, a consequence that will inure to the larger public good. [FN164]

*510 IV

CONCLUSION

The Referendum Model avoids the major obstacles confronting other impasse resolution procedures currently in effect. It has, further, two positive attributes of importance to public-sector bargaining. First, it insures that negotiations will be conducted in a pragmatic, realistic environment where the parties have a genuine incentive to reach agreement and where the risks of failing to do so are too substantial to be disregarded. Second, the procedure motivates citizens to take an active interest in matters of public employment, including a broad range of issues beyond the merely economic. It thus will enhance productivity and the quality of work in the public sector. Ultimately, of course, the efficacy of the Referendum Model can be established only through practical experimentation. But experience has already proved the weaknesses of present methods, and legislative innovation is necessary to develop more viable strategies.

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[FN1]. For a study of union penetration in the public sector, see Burton, The Extent of Collective Bargaining in the Public Sector, in PUBLIC-SECTOR BARGAINING 1-43 (B. Aaron, J. Grodin & J. Stern eds. 1979) [hereinafter cited as PUBLIC-SECTOR BARGAINING].

The development of protective legislation is reviewed in Schneider, "Public-Sector Labor Legislation—An Evolutionary Analysis," in PUBLIC-SECTOR BARGAINING, supra note 1, at 191.


See, e.g., Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974) (state provision pertaining to scope of bargaining is patterned after federal law; federal interpretations are persuasive precedents).

Compare, e.g., 29 U.S.C. § 163 (1976) ('Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitation or qualifications on that right') with IOWA CODE § 20.12 (1977) ('It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike against any public employer.').


Schneider, supra note 2, at 203 n.32, concludes that eight states provide legislative protection for strikes (Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont and Wisconsin). Effective in April, 1984, Ohio will provide bargaining rights for broad categories of public workers. The statute also affords employees right to strike, with the exception of certain designated groups. The text of the statute is reprinted in 51 GOVT Empl. Rel. REP. (BNA) 441 (August 15, 1983). Illinois, in addition, has adopted legislation effective in 1984 allowing public employee bargaining. The legislation consists of two separate acts, one covering teachers and the other covering general groups of public workers. Each act is to be administered by its particular agency. With the exception of security personnel and workers in essential services, employees have a right to strike. See 51 GOVT Empl. Rel. REP. (BNA) 1954 (Oct. 3, 1983).


For a review of impasse procedures on a state-by-state basis, see Morris, The Role of Interest Arbitration in a Collective Bargaining System, 1 INDUS. REL. LJ. 427, 456-78 (1976).

In the private sector, negotiation impasses are rarely submitted to arbitration. Where the procedure is utilized, 'it functions within fairly narrow parameters.' Grodin, Political Aspects of Public Sector Interest Arbitration, 1 INDUS. REL. LJ. 1, 6-7 (1976). Thus, the preferred method of private-sector bargaining is based on consent rather than on the mandate of a disinterested individual.

E.g., Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976) (invalidating a provision of a city charter providing for final and binding arbitration as a means of impasse resolution, on the basis
that the ordinance results in an unconstitutional delegation of legislative power). The case is discussed infra notes 45-48 and accompanying text.

[FN14] One measurement of strike activity is the loss of working time. According to one authority, 'The total working time lost due to strikes . . . continues to range well below one half of one percent; the range in recent years has been between 0.14 and 0.37 percent.' T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 249 (1980).


[FN16] Without the threatened hardship of the strike, neither party will have much incentive to give anything away in negotiations. And if one assumes that the arbitrator will split the difference between opposing positions, the process will reward the obdurate, rather than those who modify their positions during negotiations. Thus, while compulsory arbitration can settle disputes, it can also undermine and supplant the bargaining process. Feigenbaum, Final Offer Arbitration: Better Theory Than Practice, 14 INDUS. REL. 311, 312 (1975).

[FN17] See Kochan, Dynamics of Dispute Resolution in the Public Sector, in PUBLIC SECTOR BARGAINING, supra note 1, at 177-182.

[FN18] For example, Congress created the Federal Mediation and Conciliation Service (FMCS), an independent federal agency, under Title II of the Labor Management Relations Act, 29 U.S.C. § 171 (1976). Through mediation, the agency aids in preventing and minimizing labor disputes affecting commerce, and will provide the services of a mediator to parties upon request. State agencies may offer similar services. See, e.g., PA. STAT. ANN. tit. 43. § 1101.801 (Purdon 1977-78).


[FN20] See id. at 77-94.

[FN21] Id. at 98-106.


[FN23] Id. at 283-84.


[FN25] Id.

[FN26] T. KOCHAN, supra note 14, at 293.

[FN27] Id.

[FN28] The experience in New York State indicates that fact-finding, as a preliminary to arbitration, may result in substantial duplication of effort. Kochan, Dynamics of Dispute Resolution, in PUBLIC-SECTOR BARGAINING, supra note 1, at 183-85.

[FN29] The extent to which a court will examine the merits of an interest arbitration award is discussed in Grodin,

[FN30]. T. KOCHAN, supra note 14, at 295.

[FN31]. Final-offer arbitration is based upon the assumption that it will encourage realistic bargaining and limit the discretion of the arbitrator. For a detailed study of the systems in Pennsylvania, Michigan and Wisconsin, see J. STERN, FINAL-OFFER ARBITRATION: THE EFFECTS ON PUBLIC SAFETY EMPLOYEE BARGAINING (1975).


[FN34]. See id. at 749-96.

[FN35]. E.g., MICH. COMP. LAWS § 423.239 (1976).

[FN36]. Feuille, supra note 15, at 65.

[FN37]. Id. at 68-71.


[FN40]. Feuille, supra note 15, at 73.


[FN46]. Id. at 422, 553 P.2d at 793.


[FN48]. In City of Denver v. Denver Firefighters Local No. 858, AFL-CIO, No. 81SC70, slip op. (Colo. May 9, 1983), the Colorado Supreme Court recently reaffirmed that Greeley Police Union stands for the proposition that 'the ultimate responsibility for the establishment of . . . terms and conditions of public employment . . . are legislative matters, and the ultimate responsibility for the establishment of such terms must rest with elected officials.'


[FN50]. Id. at 790.


[FN52]. 102 Wis.2d 14, 325 N.W.2d 350 (1982).

[FN53]. Id. at 20-29, 325 N.W.2d at 354-58.

[FN54]. Id. at 30-31, 325 N.W.2d at 357-58.


[FN56]. Id. at 477, 294 N.W.2d at 94.

[FN57]. The opinion suggests that such insulation may actually be a virtue. It quotes approvingly from Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979), to the effect that the legislature may have deliberately isolated the arbitrators from public pressure to protect their decisions from undue influence. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 473 n.55, 294 N.W.2d 68, 91 n.55 (1980).

[FN58]. Detroit Police Officers, 408 Mich. at 520, 294 N.W.2d at 113 (Levin J., dissenting).

[FN59]. Id. at 522, 294 N.W.2d at 114.


[FN61]. Id. at 258, 231 N.W.2d at 236.

[FN62]. For a discussion of some of the political concerns which may arise from the arbitration process, see Grodin, supra note 12.


[FN64]. Id. at 345.


[FN68]. Id. at 432.

[FN69]. Burton and Krider point out that 'any scheme which differentiates economic power from political power faces a perplexing definitional task.' Id. at 429. That assertion may have some degree of validity insofar as it pertains to the exertion of pressure by a labor organization. Nevertheless, a functional distinction can be drawn between the individual as a consumer of goods and services and as a citizen of the municipality. As demonstrated by the case study discussed, citizens may in fact place civic concerns above their own economic self-interest. See infra notes 127-41 and accompanying text.

[FN70]. Kochan, Dynamics of Dispute Resolution in the Public Sector, PUBLIC-SECTOR BARGAINING, supra note I, at 151.

[FN71]. See id. at 157-69.


[FN73]. Id. at 501 (emphasis in original).

[FN74]. See, e.g., Clark, A Discussion in INDUS. REL. RESEARCH ASSOC., PROCEEDINGS OF THE 1982 SPRING MEETING 508 (B. Dennis ed. 1982) 'If I were faced with the task of selecting one of [the] alternatives, I would unequivocally favor granting all non-essential public employees the right to strike in lieu of mandating compulsory arbitration as the terminal step of the bargaining process.'


[FN76]. See supra note 9 and accompanying text.


[FN79]. Any strike may be enjoined if it threatens the public health, safety or welfare. See infra text accompanying notes 94-101.

[FN80]. PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1977-78). Impasse procedures are triggered by the 'budget submission date.' Mediation must commence if an agreement has not been reached 150 days prior to that date.

[FN81]. Id.

[FN82]. Id. at § 1101.802.
The Board is an administrative body legislatively authorized to implement Act 195 with the power to issue rules and regulations. \textit{Id.} §§ 1101.501-1101.503.

\[\textbf{FN84}\]. \textit{Id.} § 1101.802.

\[\textbf{FN85}\]. \textit{Id.} § 1101.802(2).

\[\textbf{FN86}\]. \textit{Id.} § 1101.802(2).

\[\textbf{FN87}\]. \textit{Id.} § 1101.803(3).

\[\textbf{FN88}\]. \textit{Id.} § 1101.803.

\[\textbf{FN89}\]. \textit{Id.} § 1101.804.

\[\textbf{FN90}\]. Exhaustion is a necessary condition to a legally protected strike. If the condition is not satisfied, sanctions may be imposed against the labor organization and striking employees. \textit{United Transp. Union v. Southeastern Pennsylvania Transp. Auth.}, 22 Pa.Commw. 25, 347 A.2d 509 (1975).

\[\textbf{FN91}\]. \textit{PA. STAT. ANN. tit. 43, § 1101.1001} (Purdon Supp. 1977-78). The public employer is required to initiate an action 'for appropriate equitable relief including but not limited to injunctions.'

\[\textbf{FN92}\]. \textit{Id.} §§ 217.1-217.10.

\[\textbf{FN93}\]. \textit{Id.} § 1101.805.

\[\textbf{FN94}\]. \textit{Id.} § 1101.1003.

\[\textbf{FN95}\]. \textit{Id.}


\[\textbf{FN99}\]. Decker, \textit{supra} note 78, at 766-67, and cases cited.


\[\textbf{FN101}\]. \textit{Id.} at § 1101.1008.

\[\textbf{FN102}\]. \textit{See supra} note 9 and accompanying text.

\[\textbf{FN103}\]. T. KOCCHAN, \textit{supra} note 14, at 291-92, Kochan advances five criteria for the evaluation of dispute resolution procedures, including the avoidance of strikes. \textit{Id.} The procedure proposed here would permit strikes which do
not involve substantial harm to the community.

[FN104]. In one study, for example, the author contends that a mediator's effectiveness derives in significant part from the mediator's ability to 'bluff' the parties into a belief that their adversaries are desirous of a strike. Byrnes, Mediator-Generated Pressure Tactics, 7 J. OF COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 103 (1978).

[FN105]. See supra note 24 and accompanying text.

[FN106]. 'Although the majority of states that have enacted bargaining legislation still have factfinding as an important part of their impasse procedures for nonuniformed services, the bulk of the evidence suggests that its effectiveness, both in avoiding strikes and in achieving settlements, has atrophied over time.' Kochan, Dynamics of Dispute Resolution in the Public Sector, in PUBLIC-SECTOR BARGAINING, supra note 1, at 183.

[FN107]. T. KOCHAN, supra note 14, at 295.

[FN108]. See supra text accompanying note 40.

[FN109]. Another approach which has some popularity is to limit the arbitrator to the full endorsement of either party's last offer. Although this would appear to stimulate the parties to set forth their true final demands, it need not in fact elicit such honesty. Each side is bound to frame its last offer in the light of what it believes will be forthcoming from the other side. And indeed, the 'last offers' from both might be little different from their initial positions, placing the arbitrator in an untenable position if he wishes to issue an award which is most likely to provide the greatest assurance of the parties continuing in a good ongoing relationship. Additionally, the number of issues which traditionally constitute an impasse make a simple choice of one side's last offer by the arbitrator not only weighty but, more importantly, conducive to destruction rather than improvement in the parties' relationship. Such an approach might more easily work if the choice were between positions presented on one issue, but too few impasses are so simple.


[FN110]. See cases cited supra notes 44-62 and accompanying text.

[FN111]. See supra text accompanying note 41.

[FN112]. See supra note 71 and accompanying text.

[FN113]. 'While strikes occur in only about two to three percent of all private sector negotiations, many of the remaining peacefully negotiated contracts would not be reached in a timely fashion if it were not for the threat of a strike.' Olson, supra note 72, at 494 (footnote omitted).

[FN114]. Interview with Ron Moeder, current President of Local 858, International Ass'n of Firefighters, and member of the union's negotiating team at pertinent times, in Denver, Colorado (June 14, 1983) (hereinafter cited as Moeder Interview).

[FN115]. See supra note 13 and accompanying text.

[FN116]. Moeder Interview, supra note 114. The language of the proposal was framed by the attorneys representing Local 858.
[FN117]. The referendum process appears to have originated in Englewood as an amendment to the city charter. It was proposed by the city and adopted by the voters. City Manager Andy McCowan stated that the referendum is an effective method of avoiding strikes and is preferable to arbitration as a means of impasse resolution. McCowan observed, 'The most damaging aspects of binding arbitration I believe are twofold: one, it often makes for unrealistic bargaining on the part of the unions since they have absolutely nothing to lose; and secondly, decisions often go far past wages and fringe benefits and get into areas preferably reserved for management.' Andy McCowan, Referendum Impasse Plan Works in Englewood, Colo., 8 LAB.MGMT.REL. SERVICE NEWSLETTER 2-3 (June 1977).

[FN118]. According to McCowan, two impasses have been resolved under the procedure without resort to an election. Id. at 2.


[FN120]. For explanations of the ‘Kelly’ and ‘Berkeley’ Systems see infra text accompanying note 132.

[FN121]. Moeder Interview, supra note 114.


[FN123]. Denver Post, June 24, 1981, at 21, col. 5.


[FN125]. Denver Post, June 24, 1981, at 21, col. 5.


[FN127]. Id. While the basis for the city's belief is not elaborated, the context of the article indicates that the city felt the factfinder's award would carry significant weight relative to public opinion.


[FN130]. Denver Post, July 21, 1981, at 11, col. 1. Local President Moeder reportedly said, 'As a final insult ... the city's proposed ballot language was written without consulting the firefighters, despite the fact we are paying for the Aug. 25 election.' Id.


[FN135]. Moeder Interview, supra note 114.


[FN137]. Moeder Interview, supra note 114.

[FN138]. Prior to the election, the Denver Election Commission had required Local 858 to put up a $160,000 surety bond or establish a cash escrow account. Denver Post, July 25, 1981, at 3, col. 1.

[FN139]. Moeder Interview, supra note 114.

[FN140]. Id. Moeder pointed out that the Local also had gained and demonstrated substantial expertise in political campaigning, a fact which appeared to have made some impression on Council members.

[FN141]. Id.

[FN142]. By allowing either party to declare an impasse and invoke the next stage of the process, the Model will enhance genuine bargaining prior to impasse. Once that threshold is passed, only mutual agreement will prevent one party from progressing to the final stage.

[FN143]. If the Board determines that disclosure would lead to a positive result, it may make the report public. The threat of disclosure might itself encourage meaningful bargaining.

[FN144]. At this stage of the procedure, public opinion will prove valuable to the parties in evaluating further strategies.

[FN145]. The Model will generate maximum pressure on the parties by forcing both sides to reach a decision without knowledge of the adversary's decision. Rejection of the award by only one party automatically results in grave risk or subsequent capitulation for that party.

[FN146]. By requiring a ballot submission consisting of respective positions as of impasse, the parties will be encouraged to moderate their demands so as to gain some strategic advantage in the event of a joint referendum. Likewise, a mutual formulation of the ballot language might conceivably lead to resolution of the dispute.

[FN147]. If the employer could successfully halt a work stoppage with no effective sanctions for doing so, the strike weapon would be significantly vitiated. Consequently, the Model provides a substantial disincentive for the employer to seek an injunction.

[FN148]. See, e.g., HAWAII REV. STAT. § 89-6 (Repl. Vol. 1976 & Supp. 1982), which states, 'All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit,' and then continues to list thirteen occupational groups. Likewise, there may be unique circumstances obtaining in the federal sector. Where the bargaining unit is nationwide, however, the Model could apply to it as feasibly as to a state-wide model. See infra note 150. Moreover, in a situation such as the Air Traffic Controller's dispute, the Model arguably would have provided a result superior to that reached in the actual case.

[FN149]. Moeder Interview, supra note 114.

[FN150]. The administrative cost of a statewide referendum in California is $15,000,000. Legislature v. Deukmejian, 34 Cal.3d 658, 194 Cal.Rptr. 781, 659 P.2d 17 (1983). There are 31,989 employees in California's largest
bargaining unit. 3 CAL. PUB. EMP. REL. SPECIAL REPORTING SERIES NO. 17 (July 10, 1981). Each employee would thus have to pay $467. Alternatively, if the union, California State Employees Association (CSEA), created an ‘election fund’ similar to a ‘strike fund’ in the private sector, and the entire union membership contributed, the cost would be only about $163 for each of the union’s 91,792 members. This membership figure was obtained in a telephone interview with Larry Bauman, Communications Specialist, California State Employees Association, Sacramento, California.

[FN151]. See supra text accompanying note 138.


[FN153]. Clark, supra note 74, at 508, observes of the arbitration process that ‘its very availability tends to result in its over-usage.’ He continues that arbitration awards necessarily have a broader impact than their effect on the immediate parties.

[FN154]. For a general discussion of strike costs to a union, see D. DILTS & C. DEITSCH, LABOR RELATIONS 140-142 (1983).

[FN155]. Wellington and Winter argue than an important difference between private and public-sector strikes is duration. Because the latter interrupt services to the community, they will be settled more quickly than the former. Thus, public sector strikes are not restrained by the ‘unemployment trade-off.’ See H. WELLINGTON & R. WINTER, JR., supra note 65, at 25-26. The cost of an election to each member of a labor organization under the Referendum Model will vary according to the total membership. In some cases, the election option will fairly approximate the economic losses incurred in a protracted work stoppage.

[FN156]. Section 8(d) of the NLRA specifically provides that the obligation to bargain collectively ‘does not compel either a party to agree to a proposal or require the making of a concession. . . .’ 29 U.S.C. § 158(d) (1976). See generally 1 THE DEVELOPING LABOR LAW 553-58 (C. Morris, ed. 1983).

[FN157]. See 1 THE DEVELOPING LABOR LAW, supra note 156, at 570-606.

[FN158]. For example, the newspaper advertisement of the ‘Citizens for Fiscal Responsibility’ (CFR) characterized the dispute strictly in terms of economics. With no explanation of its data, the CFR concluded that the cost of the Union’s plan to the taxpayer would amount to $2.5 million per year. It urged the citizen ‘to vote to save $2.5 million annually.’ There was no discussion of the unique working conditions in firefighting. Rocky Mountain News, supra note 136, page 1.

[FN159]. R. DAHL. A PREFACE TO DEMOCRATIC THEORY 145 (1956).

[FN160]. The political theory relied upon by Wellington and Winter is that expressed by Dahl, id., transposed to the collective bargaining context. Their assertion that public sector strikes provide unions with a ‘disproportionate share of effective power in the process of decision’ is an inference drawn from Dahl’s framework. See H. WELLINGTON & R. WINTER, JR., supra note 65, at 24-29.

[FN161]. Dahl observes, ‘The fundamental axiom in the theory and practice of American pluralism is, I believe, this: Instead of a single center of sovereign power there must be multiple centers of power, none of which is or can be wholly sovereign.’ R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 24 (1967).
[FN162]. Id. Dahl contends that ‘constant negotiations among different centers of power are necessary refine and perfect methods of conflict resolution.’

[FN163]. Arguably, the employer may be afforded some tactical advantage by retaining control over the strike weapon. See Gallagher, The Use of Interest Arbitration in the Public Sector, INDUS. REL. RESEARCH ASSOC., PROCEEDINGS OF THE 1982 SPRING MEETING, supra note 72, at 501, 506-507. However, under the Referendum Model, the union is afforded the choice of an election, thereby minimizing any power accruing to the employer by virtue of its strike/no-strike option.