

**COMPULSORY INTEREST ARBITRATION FOR PUBLIC SAFETY PERSONNEL:**

**AN INTERSTATE COMPARATIVE STUDY OF  
STATUTES, EXECUTION, AND RESOLUTION.**

by

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Presented to the Public Administration Faculty  
at the University of Michigan-Flint  
in partial fulfillment of the requirements for the  
Master of Public Administration Degree

December 1990

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## **ABSTRACT**

Public Act 312 which provides compulsory arbitration legislation for police, fire and other related employees in Michigan has been in place since 1969. The purpose of this research is to examine the effects of this legislation on collective bargaining, and offer alternative procedures that might improve this legislation. To facilitate in examining alternative procedures, other state's resolution procedures are analyzed, and opinions by practitioners in the various states are utilized.

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## INTRODUCTION

Compulsory arbitration in labor disputes involving essential services in the State of Michigan has been in effect since the passage of Public Act 312 in 1969. This legislation was passed because the public and legislature agreed that the continuance of these essential services was imperative. Unfortunately, a majority of participants involved in the procedure feel that the act that governs compulsory arbitration in Michigan for Public Safety personnel, Public Act 312, could at the very least be improved upon. This research examines possible statutory changes that could be implemented to improve this legislation and examines the issues associated with these changes.

The majority of the public is against strikes in the public sector, especially in the areas of police and fire services, and is in favor of some form of mandatory dispute resolution which is fair to both parties.[1]

Some would lift the no strike provision for police and fire personnel, and are opposed to compulsory arbitration to settle the dispute. They favor repeal or revising Public Act 312 as it now exists. Louis Beer stated this in his case for change:

"The major problem is that the Michigan public employee unions have rather artfully structured themselves to get the best of both worlds: they strike and demand all of the rights of private employee unions, yet they seek the job protection of civil service, and systems like civil service, the availability of binding arbitration, and the right to organize employees and bargain about issues that were granted only on the assumption they would not strike. All of this is done under

the regulation of an agency, the Michigan Employment Relations Commission (MERC), which for a variety of reasons has found it necessary to beat several substantial retreats from the field. The problems are many, the issues sharply divide managers and unions, and the solutions in many cases are imperfect, at best. However, it is clear there is room for improvement." [2]

Mr. Beer proposes some interesting solutions to these problems. He would limit access to arbitration where it is not now provided, and in most of those situations in which the public employer requests and receives a court order terminating a strike. Where Public Act 312 is in effect, state law would provide a right for a municipality to "opt out" by vote of the people into the use of Michigan's Public Employment Relations Act (PERA), provide for a fairer selection of arbitrators, and require that unions, in fact, engage in good faith bargaining prior to 312 arbitrations being convened. [3]

While these possible solutions are interesting, they are not nor will they in the foreseeable future be politically viable. The problem is that the public and the legislature will simply not accept a system in which there is no guaranteed resolution of public safety employee strikes. However, according to Beer, guaranteeing third party arbitration inherently inflates the settlements, and tends to destroy bargaining, thereby greatly inflating the cost of government. [4]

The inherent differences between the private and public sectors manifest themselves when trying to implement what is basically a private sector collective bargaining model into

the public sector. In the private sector, the application of the law of supply and demand is more obvious; there are many examples of companies that have gone out of business or experienced extreme financial duress because they entered into labor agreements they could not afford. In Michigan, the migration of factories with traditional union positions to right-to-work states which have a lower paid work force is an example of this economic principle. The steel industry went through a major financial upheaval because of high union wages and inability to accumulate resources to accommodate changing markets forces and world competition. Public employers can contract for some services, but generally do not have this option as a weapon at the bargaining table with regards to the essential services of Public Safety employees. Also, they face the fact that bargaining in the public sector is to some extent always public, influenced by the politics of the community and the legitimate concerns and feelings and the interest of the citizens and taxpayers.

However, there exists the widespread belief that the problem can be wished away through the "magic" of arbitration. Many people seem to feel that if a public employee negotiation becomes troublesome, with emotions running high and tempers getting out of control, the automatic availability of arbitration will resolve the problem. Unfortunately, the execution of Public Act 312 arbitration in the State of Michigan may make the procedure even more untenable.

In a negotiation in which the availability of arbitration is a previously known factor, one side or the other

usually will tend to view it to its advantage to arbitrate. This is because either party may believe that its ability to persuade a third party is greater than its power, persuasive or otherwise, at the bargaining table. The result is to make arbitration an issue in the negotiation and/or to reduce the bargaining to a meaningless exchange of formalities.

The significance of this controversy is as prominent presently as it was when the legislation was first enacted. If one accepts the premise that there is no public approval for work stoppages or slowdowns by police and fire personnel, then some mechanism must be in place to resolve the dispute.

What are the attributes of a mechanism that would be considered to be fair, workable, successful and efficient? The following will examine desirable characteristics of legislation that would possibly produce these favorable characteristics. A comparison of different states' statutes and data regarding each state's impasse procedure will be analyzed.

The research centers around the states of Michigan, Iowa, Wisconsin and Illinois. These states' arbitration award data are examined and compared. The length of time from the expiration of the contract until the arbitrators award is the main focus. Additionally, other variables such as the total number of issues that were awarded, as well as the number of awards per year, and the states' statute differences are highlighted. The significance of these variables is explained in detail in further sections.

After these analyses are complete, conclusions can be drawn as to whether Michigan's P.A. 312 could benefit from adopting provisions that appear to benefit those other states. But, first I will outline the history and provisions of PERA and P.A. 312 as well as the power of the governing board in Michigan and examine the differing views of how strike alternative procedures are working in the United States.

#### SOURCES OF DATA AND METHODS OF COLLECTION

Principal sources of data for this research are statistics compiled by the Michigan Municipal League, Arbitration Journal, literature from Michigan Public Employment Labor Relations Association, (MPELRA) and the Michigan Employment Relations Commission (MERC), and like organizations in the states compared in the research. Other sources include primary arbitration information secured from those same state organizations and an interview and articles from Dr. Peter Feuille of the University of Illinois. Interviews were also arranged at a conference concerning interest arbitration with other experts in the field. In addition, notes taken at that conference, during June of 1990, as well as seminars about the subject of compulsory arbitration that I attended, are a source of information.



## BACKGROUND OF PERA AND ACT 312

### Michigan Employment Relations Commission

The enabling legislation of the Michigan Employment Relations Commission (MERC) is the Public Employment Relations Act (PERA), Act 336 of Public Acts of 1947, or the Hutchinson Act. The responsibility and reason for the existence of this independent agency of the government is to uphold and enforce the provisions of the Act 336, and its amendments. It was modeled on New York's Condon-Wadlin Act which prohibited employees from striking and imposed a penalty of automatic termination for any employee who engaged in a strike. Its model was the National Labor Relations Board (NLRB), formed as a result of the National Labor Relations Act of 1935, which regulated bargaining in the private sector.

The Commission is composed of three members, appointed by the Governor, with the advice and consent of the State Senate, for staggered three-year terms. Members are classified under the State's Civil Service System. (See Exhibit 1, in Appendix.) The Commission's activities are administered through two separate divisions. In general, the Labor Relations Division conducts representation and decertification elections and administers the unfair labor practice provisions of the Act, while the Mediation Division helps management and labor reach mutually agreeable settlements of disputes through the process of collective bargaining and mediation. Because of this dual function, the Commission performs

both a regulatory and beneficiary role.

In 1965 Governor George Romney signed into law Act 379, which amended PERA to give public employees, primarily local employees, the rights of organization and of collective bargaining. The Act eliminated automatic penalties for striking employees, to the extent of discharge, with the employees having the right of appeal to circuit court. This amendment retained the prohibition against strikes by public employees which Governor Romney supported wholeheartedly "in the interest of retaining always and without interruption the services to which the public is entitled." [5] It also better equipped MERC to prevent situations from reaching a crisis stage, which they had in the preceding months before this legislation.

#### **PROVISIONS OF THE ACT**

PERA covers public employees in any branch of public service, including political subdivisions of the state, the public schools, public or special districts, or any authority, commission, or board. State employees within the jurisdiction of the State Civil Service Commission are not covered by the provisions of the Act.

#### **RIGHT TO ORGANIZE**

The Act states that public employees may lawfully organize, form, join or assist in labor organizations and engage in lawful concerted activities for the purpose of collective bargaining.

## SELECTION OF COLLECTIVE BARGAINING REPRESENTATIVES

Section 15 of the Act provides that a public employer must bargain collectively with representatives of its employees who have been designated or selected by a majority of the employees in the appropriate unit.

## VOLUNTARY RECOGNITION

Typically, the labor organization obtains signatures of a majority of the employees in the unit by membership cards or petitions that state the employees wish a particular labor organization to represent them for the purposes of collective bargaining. The labor organization then notifies the employer that it represents a majority of its employees. The employer may ask for an opportunity to examine the cards or petitions against their own records. If satisfied the employer may grant voluntary recognition of the labor organization as representative of an appropriate unit.

## **COMMISSION ACTION**

### ELECTION OF A REPRESENTATIVE

When these procedures are in dispute, such as the employer not granting recognition voluntarily, MERC can authorize the selection of a representative by means of a consent election or a Commission-ordered election. The labor organization presents to the Commission documentary evidence establishing that at least 30 percent of the employees in the unit wish to be represented for collective bargaining purposes by the petitioner. The Commission ordinarily will not accept cards or documents dated after the date of the peti-

tion. Furthermore once a showing of interest has been established, the Commission will not allow employees to revoke or withdraw their designation of the labor organization. The Commission will permit a rival organization to intervene in an election if it establishes that 10 percent of the employees wish to be represented by it, and the organization will gain the right to be included on the ballot.

If the parties cannot agree to a consent election to determine whether the employees wish to have a union, the informal conference will be concluded, and the parties will be notified that the matter will be referred to the Commission's Administrative Law Judges. The Administrative Law Judge assigned to the case will issue to all the interested parties a notice advising them of the time, date and place of the hearing. These hearings are public unless otherwise ordered by the Administrative Law Judge. The parties have the right to appear in person or be represented by counsel and to examine and cross-examine witnesses, introduce documentary evidence and records and both parties may enter stipulations of fact, which can expedite the hearing. The Administrative Law Judge has authority to issue subpoenas, to administer oaths, to take testimony, to hold pretrial conferences, to examine witnesses, and to regulate the entire course of the hearing.

#### DECERTIFICATION

The employees or someone acting on their behalf may file a decertification petition to withdraw the authority of the

certified organization to act as their bargaining representative. This requires that at least 30 percent of the employees have signed a petition or document stating that they no longer wish to be represented for the purposes of collective bargaining by the bargaining representative. The procedures are the same as those for certification. The Commission may then conduct a decertification election, and a rival bargaining organization may get on the ballot.

#### BARGAINING UNITS

The Act requires that the appropriate bargaining unit give public employees full rights to organize, to bargain collectively, and to effectuate the policies of the Act. The Commission decides each case individually, on its own particular facts. The Commission looks for a community of interest among the affected employees.

The Commission encourages the parties to reach a mutual agreement on definition of the appropriate bargaining unit. The public employer and the representatives of the public employees may be in the best position to determine which individuals have a sufficient community of interest to be included in the same unit. The Commission will conduct an election in a designated bargaining unit, provided that the unit, as defined, does not violate the provisions of the Act. For example, a unit that includes both supervisory and non-supervisory employees is clearly not appropriate, and a unit that includes professional and non-professional employees, such as teachers and janitors is not appropriate and does not uphold the mandates of the Act. When the parties disagree as

to the inclusion or exclusion of a certain classification of employees, the Commission may determine the appropriate unit by holding a formal hearing, following which a decision is made.

#### AGENCY SHOP PROVISIONS

In 1972, the Michigan Supreme Court held that an agency shop clause which requires the payment of fees by non-union members in an amount equivalent to the union dues and assessments for union members is prohibited by Section 10 of PERA on the grounds that it has the effect of either encouraging or discouraging union membership.

In 1973, Section 10 was changed, requiring "as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." As a result of the amendment, agency shop provisions are now permissible under the state law.

A 1977 U.S. Supreme Court decision, *Abood vs. Detroit Board of Education*, upheld the use of agency shop in public employment but found that free speech and free association guarantees required that non-union members objecting to a union's ideological expenditures need pay only that portion of the fee used to finance the cost of negotiating and administering the agreement.

## UNFAIR LABOR PRACTICES

The legislation in Michigan mirrored the national legislation of the Taft-Hartley Act and the previous Wagner Act. Unfair labor practices initially applied only to the public employer, but were later amended to hold unions accountable for unfair labor practice as well.

If the charge alleges a violation of the Act, the case is docketed and assigned to an Administrative Law Judge (ALJ). These are formal hearings with a court recorder, oral arguments and the filing of briefs by the parties involved.

After the conclusion of the hearing, the ALJ issues a recommended order that contains the findings of fact, conclusions of law, and reasons for such conclusions. The order may dismiss the charges if they have not been supported by evidence, or require that a party cease and desist from certain unfair labor practices or take action to rectify past actions. If exceptions are filed by either party, the case is reviewed by the Commission.

If the party against whom the charges were filed refuses to comply with the order issued by the Commission, the Court of Appeals may enforce the order upon request of the other party, or the aggrieved party may file an appeal for review of the Court of Appeals, subject to final review by the Michigan Supreme Court. The statute provides that the findings of the Commission on questions of fact are generally conclusive if supported by competent evidence.

## MEDIATION

Section 7 of P.A. 336 authorizes the bargaining representative of the public employer to request that the Commission intervene and mediate matters in dispute. Both sides must, to the satisfaction of the Commission, bargain to impasse to resolve as many issues as possible before mediation may be requested. The Commission, on its own initiative, may intervene in the public interest in appropriate cases, even in the absence of a request for mediation.

The nature of the mediation process is such that it places the burden of resolving outstanding differences on the parties themselves. The parties are given a complete opportunity to discuss the issues, and the mediator, by virtue of his objectivity and experience, can make valuable contributions to the discussions, which are not open to the public.

Mediators appointed by the Commission are classified civil service employees who have received appointments as a result of competitive examinations.

## FACT-FINDING PROCEDURE

In the event mediation has failed to resolve the dispute, either party may ask the Commission to initiate fact-finding proceedings. The Commission may also initiate the process. Unless the request is withdrawn, the Commission will appoint a fact-finder. The parties will have an opportunity to present evidence and witnesses in support of their positions. At the conclusion of the hearing, the fact-finder will issue recommendations regarding the issues in dispute.



Copies of the report will be served on the parties and the Commission.

#### **COMPULSORY ARBITRATION FOR POLICE AND FIRE DEPARTMENTS**

Michigan Act 312 of Public Acts of 1969, as amended, provides for compulsory arbitration for police and fire departments, by a tripartite panel (consisting of a union delegate, a management delegate and an independent arbitrator), following mediation, of collective bargaining disputes between public employers and collective bargaining agents representing police and firefighters. This was meant to be an experiment and after a period of time, an assessment of its virtues and deficiencies as a method of dispute would be undertaken.

This Bill was passed by both the House and Senate and was signed into law by Governor William G. Milliken. It became effective on October 1, 1969 and was scheduled to expire on June 30, 1972. This Act can be viewed as a defensive gesture by the state legislature to mitigate the problem of strikes by police and fire personnel. After the adoption of PERA in 1965, strikes in Michigan became more common and blue flu became alarmingly more prevalent in police departments.[6] The services performed by police officers and fire fighters were viewed by members of the state legislatures as essential.[7]

The 1972 amendments introduced a new provision which allowed the Chairperson of the Arbitration panel (the Arbitrator) to remand the dispute to the parties for further

collective bargaining for a period not to exceed three weeks. This in most cases is an opportunity for the mediator to once again become involved. This amendment also introduced the processes by which the Arbitration Panel is to identify the economic issues in dispute and direct the parties to submit their last offer of settlement on each such issue. The Arbitration Panel must adopt the last offer on each issue which, in its opinion, more nearly complies with the applicable factors set forth in the statute. Later amendments broadened the coverage of the Act to apply to emergency medical service personnel and emergency telephone operators employed by a police or fire department. These were the last changes implemented in the statute.

The Act applies to public police and fire departments operated by a city, county, village or township. Under the terms of the Act either the employees or public employer may initiate binding arbitration by a request within 30 days after the submission of the dispute to mediation. The Commission then selects five persons from its panel of arbitrators. Each of the parties may strike two of those five persons. The Commission then designates one of the remaining nominees as the impartial member or chairman of the tripartite panel.

Act 312 creates interest arbitration which involves the making of an employment contract that may cover both economic and noneconomic issues, but not the resolution of a dispute arising under an existing contract. Act 312 is both compul-

sory in the sense that participation is mandatory, and binding in the sense that the decision automatically becomes effective unless overturned on the limited basis of appeal set forth in the statute.

#### LAST BEST OFFER PROVISION

Another 1972 amendment required that the panel identify economic issues that are in dispute. This is done because the amendment mandates that the panel determine whether the public employer's or the labor organization's last best offer of settlement on each economic issue shall be awarded. Previously, the panel could compromise or split down the middle economic issues.

Act 312 hearings are formal with voir dire of exhibits and cross examination of witnesses. Despite hearings being formal, the application of the rules and procedures has been liberal, for example, both parties may waive time limitations or may allow any evidence into the proceeding. It can be determined at a later date, perhaps as late as the date of the award, whether or not evidence may be considered.

#### **APPEAL PROCESS**

By statute any party aggrieved by a final order of the Commission may file a petition for review in the Court of Appeals within twenty days of the Commission's order. The findings of the Commission with respect to issues of fact are deemed conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. If

the losing party does not appeal the Commission's decision by a timely petition for review, there is a conclusive presumption that MERC's order is supported by competent, material and substantial evidence. It was related to me that substantial evidence could be described as "more than a scintilla but less than a preponderance."

Either the prevailing party or MERC itself may petition the Court of Appeals for enforcement of a Commission order and for appropriate temporary relief. (Section 16(d) of PERA). Where the losing party has failed to file a petition for review within the twenty day period specified in 16(e) of the Act, the enforcement process is expedited; and the Court of Appeals may summarily grant temporary or permanent relief and enforce MERC's order. If no petition for review is filed in a timely fashion, it is to be conclusively presumed that the MERC order is supported by competent, material and substantial evidence of record. In answer to a petition for enforcement, the losing party is effectively limited to presenting only nonevidentiary errors of law to the Court of Appeals. Unlike petitions for review, an enforcement petition may be brought at any time.

#### PRACTICAL CONSIDERATION IN APPEALING MERC

Where the Commission's factual conclusions are supported by competent, material and substantial evidence, a reviewing court will affirm MERC's ruling even if the court might have reached a different conclusion if it had tried the case. In general, courts defer to administrative expertise and will not invade the province of exclusive administrative fact-

finding by displacing the agency's choice between two reasonably differing views. Judicial reviews of a MERC determination is limited to the record. If there is no dispute as to underlying facts, questions presented on appeal are to be treated as matters of law. Accordingly, overturning a Commission's decision is no easy task.[8]

In assessing whether a particular case is a good candidate for reversal on appeal, the following factors should be considered.

(a) Has MERC reversed the Decision and Recommended Order of the Administrative Law Judge? In particular, has the Commission ignored or disregarded the Administrative Law Judge's findings where credibility determinations and conflicting testimony were at issue? Where MERC reverses the Administrative Law Judge, and the Administrative Law Judge's opinion is consistent with the law and supported by the record, the case is ripe candidate for appeal.

(b) Even accepting all of the Commission's material findings of fact as supported by the record evidence, is MERC's ruling premised upon an error of law? The Court of Appeals may review the law regardless of the factual findings of the Commission.

(c) Does MERC's decision produce an unreasonable result? where the losing party files a timely petition for review, the Court of Appeals will conduct a qualitative and quantitative evaluation of all of the evidence and determine whether it was such as a reasonable mind would accept as adequate to justify the conclusion reached. Where MERC's decision is based upon a chain of inferences and suppositions, the Court may determine that the findings are too tenuous to be enforced. [9]

In appellate review of Commission decisions in representation cases, the Michigan Court of Appeals held that MERC has greater discretion to determine whether a question concerning representation exists and whether to hold a hearing on that question, than the courts. Judicial deference to

MERC's rulings in representation cases will be greater than in unfair labor practice cases.[10]

These examples show the trends of decisions and limitations that the courts allow MERC in various appeal proceedings. Virtually all appeals of arbitrator's decisions associated with labor relations involve MERC's administration of PERA, not P.A. 312. In the history of Public Act 312, appeals that lead to a reversal of the arbitrator's decision are very rare. Because of the complexity of the proceeding, the latitude given by the statute to the arbitrator, and the immense record generated in the hearings, the courts generally will avoid undertaking the effort to review the record for an appeal. [11]

## STRATEGY FOR IMPASSE PROCEDURE STATUTES

When determining the legislative provisions that govern a public sector collective bargaining agreement by the parties to the agreement, it is necessary to maintain representative democracy. Formal impasse procedures tend to take important decisions about government expenditures out of the hands of elected officials. In order to maintain representative democracy such decisions must remain in the hands of those who are publicly and politically accountable. Therefore, the statute ought to promote the settlement of disputes by the parties wherever possible.

Another important aspect of all collective bargaining agreements is that they establish rules that govern the relationship between parties over a long period of time. An amicable compromise of a dispute will promote an amicable relationship between the parties over the period of the contract. It is best for practical reasons that both parties feel the agreement is not imposed upon them against their will.

These considerations necessitate a balancing, or an equalizing to end the dispute and create an amicable compromise. In order to discourage their use and consequently increase the incentive to settle, impasse procedures must possess elements of uncertainty and high cost similar to strikes. At the same time, however, the procedures adopted must be perceived by the parties as fair in order to maintain an amicable relationship. Determining the appropriate procedures requires balancing these interests.

Other major considerations for a public sector collective bargaining statute include reductions in strike activity and time delays. Strikes are of particular concern in the public sector because employers are often the sole supplier of essential services to the public. Also these strikes may have devastating consequences on the public, so legislation should be aimed at reducing the possibility of strike activity.

Finally, Michigan's statute has been widely criticized by legislators, elected officials and practitioners of the Act, because it is believed the procedures have created time delays. Unlike private sector budgeting which is based on the microeconomic principles of profit maximization and management decision making prerogatives, public sector budgeting is grounded in the political process controlled in part by the calendar. For this reason, timing of negotiations is very important.

Both the need to address timing and a general preference for policies that maximize the pressure to settle will decrease the time from contract expiration to impasse resolution. Use of fact-finders as a step in the impasse resolution procedure has been shown to have an effect on the length of time until impasse resolution. Fact-finding allows for review of the situation from the facts formally presented by the parties. Fact-finders make recommendations based upon these facts. While the fact-finder's recommendations are only advisory, they would provide the parties with percep-



tions and options not previously considered. This may have an ameliorative impact. Furthermore, if either party makes the recommendations public, as should be allowed by the statute, public pressure may be imposed on a recalcitrant party. Fact finding would also keep the decision making in the hands of those who are politically accountable.

Voluntary fact finding may be a source of time delays, if the case proceeds to arbitration. However, only cases that go to arbitration would be delayed, and the number of cases going to arbitration would be reduced. Goldberg and Brett found, at least in the context of grievance arbitration, that 86% of grievances which would otherwise go to arbitration were resolved through fact finding.[12] Therefore, the argument that fact finding would result in time delays may not be well founded and the process of settlement may ultimately be expedited.

The fact-finder's recommendation should only be advisory, and not used as in Iowa, as a third alternative to final offers of the parties in arbitration. First, by allowing the fact-finder's recommendation to become an alternative in arbitration, the parties consent to further intervention in the bargaining process by those not accountable to the public. Second, the potential exists for arbitrators to consistently choose the fact-finder's recommendations. This reduces the uncertainty of the arbitration process. Parties who believe the arbitrator will choose the fact-finder's recommendation may have less incentive to move closer to resolution in the bargaining process and in their final

offers to the arbitrator.[13] Further views on fact finding are discussed in the sections following.

In Police and Fire contract disputes in the State of Michigan, fact finding is almost always waived by both parties. After the mediator certifies impasse in the bargaining process, the next step will usually be P.A. 312 arbitration. In other states examined here, except in Iowa where the fact-finder's opinion is a choice in the arbitration process, this also holds true.

## EFFECTS OF ARBITRATION ON COLLECTIVE BARGAINING

The following examines two diverse views concerning the role of interest arbitration as it has come to be used in the United States and gives a background analysis regarding the purpose for which it came in to existence. One view is that interest arbitration, after an initial period of adjustment, has facilitated collective bargaining. The other view, which is widely held, is that interest arbitration has done a disservice to collective bargaining.

One of the early concerns was that employees and their unions would somehow compromise or usurp the policy process and that arbitrators would be substituting their judgment for that of elected officials in resolving contract disputes. This concern regarding the potential adverse impact is expressed in this manner by Horton in the following quote, "By placing final decision-making authority in the hands of persons not accountable to the public, interest arbitration weakens political democracy." [14] Continuing passage of legislation involving compulsory arbitration would suggest that not many think that it weakens the democratic process or even collective bargaining. In 1977, 18 states statutes had compulsory arbitration provisions. In 1986, there were 38 laws in 23 states having compulsory arbitration provisions. [15]

It is difficult to measure the impact of interest arbitration in impasse resolution because of the different forms it has from state to state. As parties have adapted and acquired more knowledge and experience regarding the applica-

ble statutes and procedures of their particular jurisdiction, some would say interest arbitration has benefited and become a much improved method of resolution. Lester makes this point in the following statements.

"Over time, the parties and their advocates learn how to operate intelligently and skillfully under the particular statute and its administration. Mediators and arbitrators also learn how to function more effectively under the provisions of the law. The parties and the neutrals get to know and understand one another better through experience, so that there are fewer misjudgments or surprises and more cooperation among them." [16]

He later asserts that this new found cooperation enhances the bargaining process and arbitration awards tend to reflect what would have been agreed upon by the negotiating parties. Essentially they are collectively bargained contracts, and the arbitrator taking the blame for the results can be politically beneficial for both negotiating parties. Over an extended period of time in many jurisdictions more and more of the arbitration awards have actually been agreed upon by the negotiating parties. He cites New York City, for whom it has been estimated that, "one-half to two-thirds of all impasse-panel awards have represented, in whole or in part, voluntarily bargained agreements that are confirmed by the written award." [17]

"In addition to decisions officially designated as consent awards, many conventional arbitration awards have been negotiated or are so close to being negotiated, so that the parties are willing to put their understandings into an award." [18] One or both of these parties may want negotiated

terms in an award, because in an award parties do not need issues to be submitted for ratification by union members or to be approved by a legislative body. The award is legally enforceable, and is technically the arbitrator's responsibility. Using Lester's logic this mechanism would promote better and more constructive labor/management relations.

While Lester sees interest arbitration as a catalyst towards better labor relations, and a maturing, useful tool in negotiation, Arnold Zack believes interest arbitration hinders and actually countermands the goals of collective bargaining.

Zack makes a good case against the use of interest arbitration. First, that interest arbitration in the public sector evolved as a means of bringing final settlement to negotiable disputes that would have been settled by strikes in the private sector. Despite the threat, strikes have resulted in less than 2% loss of available work hours, "a figure less than the work hours lost in coffee breaks." [19] Yet the threat of strike remains a powerful weapon for settlement. In the public sector the increasing use of interest arbitration has caused it to become a goal rather than a failsafe for new contract negotiations, and it is not performing the task for which it was intended.

When collective bargaining first came into the public sector, legislators tried to pass legislation that pretty much copied the private sector. Instead of a strike, mediation and fact-finding would be used as substitutes, and a

neutral third party would be utilized to resolve those few issues that remained at impasse. Negotiation and mediation would narrow the issues to a few, and at least it was expected that public pressure following the publishing of the fact-finders report, or the parties fear of the publication of the report, would force the sides to settle.

Fact-finding in the public sector was to substitute for the strike. But the fact-finder only offers an opinion which is (1) lacking the effectiveness of finality, and (2) does not provide the security of protection against strikes and essential service interruption. The protection against strikes and continuance of essential services were the areas that the employer and the public were concerned with and fact-finding does not alleviate those concerns. Zack asserts that even the procedures may be misordered.

"The logic of the structure and the recognition that the fact-finder's recommendations might not be accepted by both sides should have reversed the steps, with the finding of facts coming first and with mediation of the report and the parties position following." [20]

As fact-finding failed to supply final resolution for disputes and as the public sector sought other methods of resolution, legislation for arbitration of interest disputes was passed. Police and fire bargaining units were addressed first, then legislation for other bargaining units in the public sector was passed. Different variations evolved and have had different effects on arbitrator's awards.

Interest arbitration came into widespread use in the late 70's, a time when the economy and inflation were expand-

ing, along with union public employee membership. Taxpayer acquiescence and catch-up wage demands made interest arbitration apparently acceptable in an attempt to maintain impasse resolution. The arbitrator was the impartial neutral who had the public's interest in mind. He/she could replace the lack of bargaining by each side of the dispute, and assure the continuity of public services.

In the current environment, with a more controlled economy, Professional Air Traffic Controller Organization (PATCO) firings, declining union membership, and union decertifications, views have changed in regards to impasse resolution.

Fact-finding followed by interest arbitration used to be a safeguard for the employer and the public against a much feared strike of public employees. Now the unions are at least as likely to value these strike-alternatives as a hedge against trying to muster support for picketing. Interest arbitration was intended to be utilized for resolving a few remaining issues that remained at impasse after hard, good-faith bargaining; instead, it has been transformed into a substitute for collective bargaining. From Zack:

"More and more, one hears union negotiators deploring the strike while the public employer negotiators yearn for collective bargaining modeled on the private sector, including elimination of the strike ban they so ardently espoused." [21]

This attitude by unions has openly manifested itself in those states that allow strikes for nonessential services. The parties tend to lean on the fact-finder or invoke arbi-

tration. This is done to "salvage their rhetoric and provide a recommendation or award that will protect them from the outrage of the rank and file, taxpayers, or board members and save them the embarrassment of having to 'bite the bullet' by calling or forcing a strike." [22]

This effect has been shown in a study by Feuille and Delaney analyzing the impact of interest arbitration on police salaries. This study analyzes a sample of 1971-81 data that provide measures of three variables, 1) collective bargaining, 2) the availability of arbitration, and 3) the use of arbitration, and the effect of these variables on police salaries in over 900 American cities that have populations over 25,000.

The results of the study show that salaries of police officers that are set by arbitrators have no long-run advantage over those who have access to arbitration but negotiate their salary at the bargaining table, but do have a slight advantage over those officers who do not have access to interest arbitration. [23]

So, it can be reasonably concluded that the threat of arbitration is more effective than arbitration itself, and if there is no arbitration alternative, the only alternative being strike, the union's advantage is mitigated.

A point against fact finding and interest arbitration is that fact-finding and interest arbitration do not motivate or induce either side to take issues off the table or compromise at earlier stages of bargaining. Special interests on both



sides put political pressure on their respective advocates not to give up or compromise their favorite positions. Why bargain away a position if that position can be secured in a later impasse procedure? As a result, there are very few issues taken off the table in direct negotiations when fact-finding and particularly arbitration are on the horizon. It is much easier for an advocate to tell these special interest groups that their proposal will be resolved by the arbitrator, rather than risk antagonizing them by saying their proposal lacks merit and should be dropped. This is particularly true if the advocate needs their support on other issues or against other special interest groups. [24]

Given that so few issues are taken off the table the large number submitted to fact-finding and interest arbitration results in extended and costly hearings. Those high priority issues such as wages and fringe benefits usually receive adequate time for presentation, while others may receive only a quick once over due to time constraints and economic pressures for a rapid hearing and a timely award.

The number of disputed issues places a substantial burden on the neutral arbitrator. In the case of the arbitrator, he or she may have to hand down binding rulings with little supportive evidence. This problem is complicated by the inability of the arbitrator to weigh the importance of the issues for each side, whether a particular issue is one that is a legitimate cause for the impasse dispute or a throwaway issue designed to be used as a bargaining chip. Where a tripartite format is used, as in Michigan, the panel

delegate for each side performs an essential function in signaling which issues are of great import for their respective parties. Zack contends, "In the tripartite format the parties entrust to others, usually outside counsel or representative, a decision-making process that might bring results unwanted by both sides." [25]

By surrendering a position too early in the impasse procedure, at the mediation step, a party is deprived of the opportunity to surrender that position for a higher price when the fact-finder or arbitrator decides to mediate an issue or issues, at a later impasse procedure.

An early perception in bargaining in the public sector was that arbitrators would either rule favorably for the union or would structure an award which would split the difference between the disputing parties. Most public officials opposed arbitration for the same reason as their private sector counterparts, because it is a poor substitute for collective bargaining.

The incorporation of interest arbitration in statutory law was intended to substitute for or reduce the possibility of strike. [26] Evidence seems to indicate that arbitration has reduced strikes. Research also indicates that public sector strikes are affected by business cycles. [27]

Studies of managers in the public sector show a negative response to interest arbitration, and that managers would prefer the strike option, in order to preserve decision-making authority, as opposed to handing that authority over

to an independent neutral.[28] As Feuille and Delaney note, arbitrator impact is slight if not insignificant in the final award, but the threat of arbitration can have an impact. Logically, the attitude of public officials is unfounded, given the preponderance of evidence.

In the private sector, at least in theory, wages lost by employees during a strike are matched by the employer's loss of profit. These pressures tend to motivate parties toward settlement. In the public sector, there is no competition generally, nor a profit motive. In the early days of public bargaining, a public manager's main concern was that the public would find strikes and the accompanying loss of services unacceptable, and there would be a willingness to resolve strikes at any cost. The public has become more tolerant of management's resolve to wait out a strike, and the problems and inefficiencies incumbent upon arbitration and arbitrators are such that the Act has not accomplished what it originally created to do, and has become a detriment and deterrent to collective bargaining. While the literature points out the lack of harm done by interest arbitration, (awards being the same as could be negotiated), the benefits do not, I believe, justify the costs intrinsic in the present system.

Ideally, as Lester proposed, arbitration should have the same result as if the parties had bargained the contract to its conclusion and not had an arbitrator's intervention. Unfortunately, because arbitration exists and is an element in negotiations, it will have an effect on bargaining.

## **PURPOSE, IMPORTANCE AND CONCEPTS OF THE RESEARCH**

The criticisms of MERC and the oversight of the mechanics of 312 arbitration in Michigan, broadly stated, are that the Act infringes upon the sovereignty or home rule powers of local government, especially with respect to budgetary matters; that the Act surrenders the power to tax in violation of the State Constitution; and that arbitrators are not accountable to the public and therefore the power they exercise constitutes an unlawful delegation. Outside of a fundamental change, such as repealing Act 312 or extending its provisions to all local employees, the following suggestions were made by a Citizens Research Council of Michigan in consideration of alternative approaches to the Michigan compulsory arbitration procedures:

1. The Michigan Employment Relations Commission is overburdened and requires additional staff to compile statistics, file cases, and analyze issues and their costs, and publish 312 awards.
2. Arbitrators may be poorly trained. Specific performance criteria need to be established as well as training programs.
3. The arbitrator needs to be made more accountable in the management of the Act. For example, MERC could restrict the power of the arbitrator to grant time waivers. This would provide some adherence to the time provisions of the Act.
4. There are not enough incentives to settle. Other states have initiated such innovations as (1) requiring the last best offer to be up front, (2) limiting the number of issues that the parties may submit to arbitration, (3) requiring the decision by total package, (4) require payment of interest on arbitration awards, (5) limit the state sharing in the cost of the arbitration cases.

5. The cost of awards is not immediately apparent. Arbitrators would include cost estimates on each issue arbitrated as well as the total package cost based on a standard cost estimating method adopted by the state commission. [29]

The above suggestions were made because of the overall discontent with the implementation of the Michigan statute, and its negative impact upon the collective bargaining process.

My understanding of the literature leads me to believe that because some states have undertaken some of the above changes, or have different statutes that enable them to better utilize the collective bargaining process and depend less upon compulsory arbitration, they will take less time to resolve arbitration disputes and/or will have fewer disputes that result in arbitration. Therefore, an objective of this research is to examine the other state's impasse resolution statutes and demonstrate that Michigan's impasse resolution statutes could be made more efficient by implementing change.

The Citizens Research Council appointed by the Governor of the State of Michigan in 1986 in confirming the timeliness problem stated the following:

"Despite specific time provisions in the statute, the arbitration process takes longer than the law contemplates. The time to appoint an arbitrator is well beyond the statutory limit to appoint an arbitrator of thirty (30) days within receipt by MERC of the petition requesting arbitration. Arbitration panels have been taking an increasing amount of time to complete their work, and the typical Act 312 arbitration case required about a year to complete in 1982 through 1985. Also, that the Act does not address how effectively or ineffectively the Act may function." [30]

Despite the content of this report, nothing has been done to correct this problem.

Why is the length of time from contract expiration until resolution important? The length of time from certification of impasse by the mediator to an award by an arbitrator is important to the extent that it represents costs, both direct (legal and staff) and indirect (the opportunity cost of allocating personnel for other activities in the governing process). These are costs above and beyond the cost of normal collective bargaining. In a negotiation in which the availability of arbitration is a previously known quantity, one side or the other will tend to view it as to its advantage to go to arbitration. Either or both of the parties may believe its ability to influence an arbitrator is greater than its power at the bargaining table. The result is to make arbitration an issue in the negotiation which can reduce the bargaining to a senseless ritual. Michigan procedures do little to promote settlement before arbitration in this situation. Once arbitration becomes a foregone conclusion, all efforts should be made to wind up the proceedings as quickly as possible, to lessen the effect arbitration has on the collective bargaining process. The amount of time utilized until the dispute is resolved is directly associated with cost and for the purposes of this model I have equated cost to the length of time required for dispute resolution.

#### VARIABLES AND OPERATIONAL DEFINITIONS

To mitigate this effect on bargaining, I would propose the following be implemented:

- 1) The scope of the arbitrator's decision should be limited. That is to say, the arbitrator should not have the latitude

to fashion his own decision. The content of the award should be either party's Last Best Offer. The choice would be by package only.

2) The Last Best Offer should be unchangeable and submitted at the beginning of the arbitration hearing.

3) A time restriction should apply such as is now implemented in Iowa, where arbitration must be filed by a certain date and completed by a certain date within that same fiscal year in which the contract expired. This procedure would eliminate retroactive pay beyond that year.

These actions would: increase risk, so both sides would be motivated to settle; place accountability in the hands of the parties; cause the parties to limit the number of issues so as to present the most reasonable package to the arbitrator and enumerate those issues that were truly significant to each side; and expedite proceedings by a forcing each side to observe a deadline, instead of extensions and delays that run up costs and cause the economic stakes to increase further.

A successful impasse procedure would create a result equal to a democratic bargained outcome, would be expeditious, and would be economical.

The period of time required to resolve the dispute is operationally defined as the number of months from the expiration of the contract to the date of the award of the arbitrator. As stated previously, this time period is directly related to cost, which is an unwanted but necessary attribute of negotiation. The State of Michigan is compared with the

surrounding states and all measurement of variables are be stated in terms of averages on a yearly basis. Those states compared with Michigan are Wisconsin, Illinois and Iowa. These are states in the same region as Michigan that have instituted some alternative impasse resolution procedures for comparison, and have similar labor influences and labor histories.[31]

A variable for comparison, that I feel is important, is the timing of the last best offers. This is important because if the last best offers are required by statute to be up front and unchangeable, this would indicate that all substantive negotiation had been exhausted and arbitration could not be used as a negotiating tool. If last best offers are made up front, this would lead to a substantial decrease in arbitration time because either side is relieved of establishing a position during the proceedings and must only prove through facts that their already established position is justified. As the statute is applied in Michigan, the petition for arbitration need only contain a preliminary final offer which can be altered. Because they are not held to this first offer, parties may not seriously consider this a final offer. This variable would have an inverse relationship to the length of time until the dispute is resolved.

**Hypothesis 1: When Last Best Offers are unchangeable and required to be submitted at the beginning of the arbitration process, the length of time until the impasse is resolved will decrease.**

The number of issues submitted to arbitration would



obviously affect the length of time until the dispute is resolved. Michigan currently has no limit, although the number is usually between 1 and 40, and these issues can be bargained until the arbitrator submits the award to the Michigan Employment Relations Commission. A large number of issues usually indicate either a large gap in the bargaining process or the building of bargaining chips for issues to be traded later in the bargaining process. Unchangeable Last Best Offers (LBO's) up front would stop this bargaining ploy. Limiting the number of issues before the arbitrator would presumably lead to sincere bargaining beforehand, and yield the most divisive issues to be arbitrated. This variable would be measured in the number of issues economic and noneconomic, submitted to arbitration. Hypothesis 2: The greater the number of issues submitted to arbitration the greater the length of time until the dispute is resolved.

A third variable to be utilized is having the arbitration panel decide by total package. That is, the arbitrators find for either the union or management position on all issues submitted. Institution of this procedure would undoubtedly lessen the length of time until dispute settlement and promote settlement. Furthermore, it has been documented that parties move closer to agreement in states that require final offer by package arbitration.[32] This tactic has been found to decrease the number of issues brought to arbitration and maximize the pressure to settle. It is also favored because it brings bargaining power closer to parity by forc-

ing a stronger party to bargain seriously over issues or run the risk of losing at arbitration. It is also found to decrease the number of cases brought to arbitration.[33] This would lead to the recommendation of the removal of the option to withdraw issues after arbitration has been initiated in an effort to bring parties closer together before the arbitration option can be exercised, increasing inducements to settle. Therefore, Last Best Offers cannot be changeable by degree, number or content. The risk for both sides is substantial, so to make their respective positions seem the most reasonable each side would bargain and reach agreement or take off the table those issues which would make their offer seem less attractive. This would have the effect of decreasing the number of issues submitted to arbitration. However, I might expect this variable to affect the time required to resolve the dispute, more than merely limiting issues because of the direct incentive to settle. Whether the state used a total package procedure would be associated with a decreased length of time until the dispute is resolved. **Hypothesis 3: If the state requires decision by total package, the length of time until the dispute is resolved would be less.**

As stated previously, impasse procedures must possess high risk similar to that of strikes. Several states have statutes that provide for a window of opportunity for strikes. For example, Wisconsin law allows strikes when the parties voluntarily agree to them in their collective bargaining agreement or when both parties withdraw their final

offers. The latter has never occurred under the statute. The voluntary right to strike promotes good industrial relations. It provides common ground for agreement that will facilitate collective bargaining.

Under the Wisconsin Municipal Employees Relations Act (MERA), all strikes not within the above limitations are illegal. Prohibiting strikes by public employees is generally good public policy because public employees are the sole providers of services that are not supplied in the private sector. Because MERA provides for alternative impasse resolution, unions do not lose the bargaining chip. Its potential to provide bargaining power is, nevertheless, reduced. This provision basically exists to create the illusion of the right to strike and is of little substance in negotiations. Differences in this provision from state to state have a negligible affect on the length of time until impasse resolution, as the states studied have statutes that effectively prohibit strikes in the public sector. Provisions such as these exist only to be able to make the statement that "You have the right to strike," and are never actuated. Because of this fact, this variable will not be examined. Risk must come from the uncertainty of the arbitration process, if the strike is not a factor in negotiation.

#### TYPES OF DATA ANALYSIS AND COMPARISON

A thorough examination of the data confirms that arbitration proceedings in Michigan are more lengthy than in other states being compared.

The main thrust of this research is to discover an association between specific variables, enumerated previously, and the period of time from contract expiration to arbitration award and/or the actual number of awards. It is suggested that differences in statutes are related to differences among states in the length of time required to resolve impasses, and to the number of decisions requiring arbitration. In other words, relating statute difference with difference in length of time until the impasse is resolved, and/or the number of arbitration decisions is the main objective. A comparison of data from the different states would isolate those variables that would explain a variance in amount of time required to resolve the dispute or the amount of disputes that proceed to compulsory arbitration, and point to those provisions that if instituted in Michigan are likely to increase efficiency in impasse resolution.

## **ANALYSIS OF STATES' STATUTES AND DATA**

### **MICHIGAN**

An analysis of interest arbitration data in the state of Michigan for employees that fall under Public Act 312 is listed in Appendix A. These data consist of arbitrators' awards from January 1986 through December 1988. The data compiled by the Michigan Municipal League indicate that 23% of the awards were stipulated awards. This would give some credibility to Lester's assertion that because the parties have become more comfortable with the arbitration process, the parties will stipulate or bargain to an agreement worked out between themselves.

The averages disclose that number of months from an expiration of the contract until the date of the award is lower when the time periods of the stipulated awards are included. The stipulated awards for this two-year period take on the average 35% less time to settle in comparison to the contracts that are concluded by the arbitrator's award. This might indicate that the parties, prior to the conclusion of the arbitration process, are perceiving the inevitable result and are cutting their losses. That is, they are reducing the legal representation costs, arbitrator's fees and other fees, as well as the opportunity costs of not having staff at their appointed positions in the administration of the municipality.

Another consideration is that if the two parties have a good idea before the end as to the outcome, the parties can take the final decision out of the hands of the arbitrator

and eliminate any uncertainty there may be regarding the final decision by stipulating. This is the last opportunity for either party to barter issues or economic considerations in exchange for stipulating to an agreement and consequently an early termination of the hearings.

Not including stipulated awards, the average length of time from contract termination to award by the arbitrator for this two year period is approximately twenty months. (See Table 1, next page). The data indicate that the average number of months from the expiration of a collective bargaining agreement for Public Safety employees in the State of Michigan is 47% higher than the average of the all the states examined. Iowa has the lowest average in settlement time among the four states.

**TABLE 1**

STATE	AVERAGE # MONTHS FROM EXPIRATION OF CONTRACT UNTIL ARBITRATOR'S AWARD	PERCENTILE RELATION TO AVE. AT 100%
Michigan	20.38	147%
Wisconsin	14.11	101%
Illinois	12.62	91%
Iowa	8.50	61%
Average	13.90	100%

Sources:

Michigan: Michigan Municipal League: Compulsory Arbitration Awards Tabulation.

Wisconsin: Digest and Reports of Arbitration Awards Issued Under the Municipal Interest Arbitration Law and Wisconsin Statutes during Fiscal Years 1987-88 and 1988-89.

Illinois: Arbitration Use Under Section 14, 1986 - 1990 as compiled by the Illinois Public Employment Labor Relations Association.

Iowa: Fact-finding Reports and Arbitration Awards Issued during Fiscal Years 1987-88 and 1988-89 as compiled by the Iowa Public Employment Labor Relations Association.

It is acknowledged by practitioners in the field of compulsory arbitration that twenty-plus months is far too long to resolve a dispute, and that the manner in which the Michigan statute is implemented and the manner in which the law is practiced do nothing to resolve this problem.

The Chairman of the Michigan Employment Relations Council, Sol Sperka, in an interview, contended that these statutes were not likely to change, that the parties are used to

working with them, and that the current government in Lansing was not likely to even take up the issue in the foreseeable future. This is the official position in the face of a procedure which does little to foster labor peace, and makes the process of labor negotiations more costly and time consuming than it need be.

Mr. Sperka also pointed out that the Michigan statute at one time provided for retroactive compensation only in the fiscal year in which the award furnished. This provision, though promoting expediency, was seen as too restrictive. Mr. Sperka when pointing out the inadequacies of the Michigan statute stated that, "There is no formal standard as to the quality or quantity of mediation. In the collective bargaining process for police and fire departments the mediator's main function is to certify impasse. In arbitration, in recess and in side bars, the mediation function is truly performed and MERC promotes and encourages the arbitrators to function as mediators." He further stated that, "Michigan's statute allows for a wide scope for the basis of the arbitrator's decision making process, the only real limitation being mandatory and permissive subject of bargaining."

These issues, enumerated by Mr. Sperka, lengthen the arbitration and greatly increase costs. Another reason for the increased cost is that legal representation usually is not present during mediation, but is present during hearings.



## IOWA

The Iowa statute provides for a unique three part impasse resolution procedure, mediation, fact finding, and interest arbitration. It was intentionally modeled upon suggestions by Robert Helsby, who as Chairman of the New York Public Employment Relations board in the 1970's had advocated these concepts.

Mediation is provided by full-time staff, part-time ad-hoc mediators, and commissioners of the Federal Mediation and Conciliation Service (FMCS). The expenses incurred in impasse services other than mediation are shared by the parties. The Public Employment Relations Board (PERB) selects individuals that serve on the fact-finding and arbitration panels. Lists of these individuals are provided the parties, from which a selection is made by each side striking names.

In Iowa, there is final offer arbitration on an issue by issue basis for all categories of employees, not just police and fire.

Following a request for arbitration, the parties are required to exchange their final offers on each issue at which they are at impasse. The parties may opt to have one arbitrator or a tripartite arbitration panel hear the dispute. If the parties cannot agree upon a neutral arbitrator, PERB supplies a list of names from which to make the selection.

The arbitrator is required by statute to consider certain criteria in making his or her award. The criteria that arbitrators utilize in constructing an award are virtually

identical for the states examined in this research. Included among these criteria are a comparison of the wages, hours and conditions of employment of the involved public employees with other public employee doing comparable work; past contracts between the parties; the employer's power to levy taxes; and the ability of the employer to finance economic adjustments.

The arbitrator must select the most reasonable among the final offers. The arbitrator may elect the fact-finder's recommendations on a given issue. In practice a party adopting the fact-finder recommendations as its final offers has a significant likelihood of prevailing in arbitration.

The award must be issued within fifteen days of the hearing, unless the parties have otherwise agreed. The arbitrator is prohibited by statute from mediating the dispute. An arbitrator's award is subject to judicial review as agency action.

Court decisions have construed the statutory time limits requiring statutory impasse resolution to be completed by March 15 as mandatory time limits, not discretionary. Thus all impasse services must be completed in the 120 day period between November 15 and March 15.

In this model, there is more risk involved, time limits are clear and enforced, and there is less expectation of arbitration being the end result. When arbitration does take place, the arbitrator is a legislator, not a mediator as in Michigan's model.

## ILLINOIS

Illinois's statute for compulsory arbitration in this area was enacted in 1984. Clair Manning, of the Illinois State Labor Relations Board, stated that, "Illinois' impasse resolutions procedures aren't perfect, but are working very, very well. Hundreds of contracts have been successfully negotiated without resort to a lock out, strike, or interest arbitration award. Only one or two non-teacher strikes in five plus years shows how well the process is working. Only a small fraction of police, fire and security negotiations have resulted in an interest arbitration award."

Mediation is generally optional, but is required for disputes involving security employees of a public employer, peace officer units, fire fighters or paramedics and for other disputes where a strike would cause a clear and present danger such that a court would order employees to return to work.

For existing collective bargaining agreements, mediation must commence 30 days prior to the expiration of the agreement, or within such time as mediators services can be provided. As in Iowa, Illinois uses the FMCS and not a state sponsored mediation service.

The parties may by mutual consent, choose fact finding if the parties have not resolved a dispute after the expiration of an existing collective bargaining agreement. The fact-finder is selected by the parties from a list of seven names from the Illinois public employment mediation roster. The fact-finder determines the issues in dispute and makes

written findings of fact and recommendations for resolution of the dispute. The fact-finder must serve the findings on the parties and publicize such findings by mailing them to all newspapers of general circulation in the community.

Arbitration is triggered after mediation for 15 days or within such mutually agreed upon time. If the dispute is still unresolved after that time, either party can request arbitration by petitioning to the board. Arbitration is not a requirement. The parties may choose an alternative form of impasse resolution.

Final offers are issue by issue, and decision is by package for economics and conventional arbitration for all others. The arbitrator's decision is not final in the sense that all of the terms decided by the arbitration panel must be submitted to the public employers governing body for ratification. If 60% of the governing body rejects the arbitrator's award, then the decision goes back to the arbitrator for supplemental hearings, with the employer paying all costs of the hearings.

According to Mr. Manning, because the statute forces an arbitration award before the end of the fiscal year, the process is expeditious. As in most states, the arbitrators will not pose any "breakthrough" decisions. Because of the predictability of knowing how a case is going to come out, both sides tend to settle rather than going through the arbitration process.

According to Jim Baird, attorney for the Illinois Public

Employment Labor Relations Association Counsel, a major reason for the low numbers of interest arbitration cases is uncertainty about the statute because of the newness the legislation and the concern of the parties as to its interpretation.

Compulsory arbitration for police, fire, and county employees (deputy sheriffs; corrections) in Illinois is called Section 14 after the section in the statute it falls under.

According to the data in Appendix B, about 21% of the eligible units filed a Section 14 arbitration request in fiscal years 1988 and 1989, yet only 5% received awards.

In a conversation with Peter Feuille, from the Industrial and Labor Relations School at the University of Illinois, Champaign-Urbana, he stated that, "Most negotiating parties under Section 14 have not filed an arbitration request, and upon implementation of this statute there has not been a rush to arbitrate. Only a very small percentage of Section 14 negotiations are resolved with an award." He stated further that, " In my own experience during this time period 1986-1990, having been selected in 18 arbitration cases, leaving aside one pending case, 16 cases were resolved with the parties' negotiated settlement, and only one case resulted in an award. In some of these cases, I functioned as a de facto mediator, and in others the parties settled on their own." The results are illustrated in the Table 2. Illinois averages 56% fewer arbitration awards than the average among the states, while Michigan averages 55% greater arbitration

awards than the average among the four states. (Table 2, below).

TABLE 2

STATE	AVERAGE # OF ARBITRATOR'S AWARDS PER YEAR	PERCENTILE IN RELATION TO AVE. AT 100%
Michigan	33.3	155%
Wisconsin	20.5	95%
Illinois	9.5	44%
Iowa	22.5	105%
Average	21.5	100%

Sources:

Michigan: Michigan Municipal League: Compulsory Arbitration Awards Tabulation.

Wisconsin: Digest and Reports of Arbitration Awards Issued Under the Municipal Interest Arbitration Law and Wisconsin Statutes during Fiscal Years 1987-88 and 1988-89.

Illinois: Arbitration Use Under Section 14, 1986 - 1990 as compiled by the Illinois Public Employment Labor Relations Association.

Iowa: Fact-finding Reports and Arbitration Awards Issued during Fiscal Years 1987-88 and 1988-89 as compiled by the Iowa Public Employment Labor Relations Association.

In the 30 awards issued under the auspices of the Illinois State Labor Relations Board (ILSLRB), the number of arbitrated issues ranges from one to 19, the median number of issues is three, and the average is 4.3.[34]

Section 14 (n) of the Illinois Public Labor Relations Act (IPLRA) gives the arbitrating public employer the authority to reject parts or all of the arbitrator's award, subject

to the onerous procedural constraints alluded to earlier. This employer rejection option has been used sparingly, I could only find one case where the employer exercised this option.

## **WISCONSIN**

Wisconsin's arbitration procedure is very similar to Michigan's, with a few important exceptions.

According to A. Henry Hemp, Chairman of the Wisconsin Employment Relations Commission, because the Wisconsin legislature had statutes regarding public employment and collective bargaining since 1958, they could formulate a procedure that had the best chance of performing in a desired manner. In 1972, they passed legislation for interest arbitration for police and fire personnel, excepting the city of Milwaukee. This legislation was based on the Med/Arb model, as in Michigan. In 1978, the mediation requirement was dropped, and mediation now occurs only at the request of the parties. After a contract has expired, there are 145 days to certify impasse.

Another difference is that for fire and law enforcement personnel, arbitration is by a single arbitrator only. The commission submits a list of seven names and the parties alternately strike names until one name is left.

The final offer of the parties is by total package, not issue by issue. At the time of petition for interest arbitration, the petitioning party submits to the other side and

to the Commission a preliminary final offer containing its latest proposal on all issues in dispute (the other side does the same within 14 calendar days).

Then, prior to the close of the Commission's investigation, each party submits a single offer in writing that contains its final proposals on all issues in dispute to the Commission. The final offers may include only mandatory subjects of bargaining, except that a permissive subject of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject. The standard for determining mandatory subjects is whether a particular decision is primarily related to the wages, hours, and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. In other words, mandatory subjects of bargaining are those related to wages, hours and conditions of employment and those issues that both sides mutually agree to bargain.

The final offers are transmitted by the Commission to the arbitrator. At any time prior to the arbitration hearing, either party with the consent of the other party, may modify its offer in writing. All collective bargaining agreements are by statute limited to two years in duration.

Although generally the offers are total package, there is a special option for law enforcement personnel and fire fighters where the parties can select "Form 1" arbitration which gives the arbitrator free reign to decide the issues as he/she deems appropriate, in other words, deciding issue by



issue.

Mr. Hemp stated that, "Final package arbitration results in more serious collective bargaining by restricting the arbitrator's power and giving the parties control over the content of the contract. A negative point is that legislation may decrease collective bargaining skills."

Mr. Hemp in arguing the positive attributes of the Wisconsin statutes, makes the point that the average length of time that the arbitrations take is lengthy, but very few cases will reach the final arbitration award. During the fiscal year, 1988-89, only nineteen arbitration awards were handed down and in 1987-88 twenty-two, involving police, fire and county law enforcement personnel. (See Table 2 and Appendix C). In each year, seven of the awards were consent decrees or stipulated awards. Consent decree awards are settlements arrived at by the parties, usually in the presence of an arbitrator, which are then reduced to writing and issued as awards.

Due to the Last Best Offer requirement of being unchangeable and submitted before the first arbitration hearing, the number of issues to be arbitrated is low. As Table 3 on the next page illustrates, less than an average of 3.5 issues are arbitrated for those cases that receive a non-consent decree award, which is 39% less than the average among the states.

**TABLE 3**

STATE	AVERAGE # OF ISSUES DECIDED BY AN ARBITRATOR PER YEAR	PERCENTILE IN RELATION TO AVE. AT 100%
Michigan	8.42	149%
Wisconsin	3.42	61%
Illinois	4.30	76%
Iowa	6.45	114%
Average	5.64	100%

Sources:

Michigan: Michigan Municipal League: Compulsory Arbitration Awards Tabulation.

Wisconsin: Digest and Reports of Arbitration Awards Issued Under the Municipal Interest Arbitration Law and Wisconsin Statutes during Fiscal Years 1987-88 and 1988-89.

Illinois: Arbitration Use Under Section 14, 1986 - 1990 as compiled by the Illinois Public Employment Labor Relations Association.

Iowa: Fact-finding Reports and Arbitration Awards Issued during Fiscal Years 1987-88 and 1988-89 as compiled by the Iowa Public Employment Labor Relations Association.

OTHER REASONS FOR LEGISLATIVE CHANGE

A major objective of the Act is to foster labor peace and good faith bargaining. The complexity of the Act and its implementation has led to an antithetical result. The Act assumes there is a correct answer, but as any labor negotiator can attest, the result of the settlement is psychological. If satisfaction is based upon the psychological responses of the parties, there are no solid criteria for basis

of an award. The Act states that the criteria that the arbitrator uses for the basis for the award can be given whatever weight he/she deems appropriate. Therefore, there can be no dispositive result of an arbitration. For example, an advocate for a municipality effectively and completely proves the City can afford only their last best offer through an "ability to pay" argument. The arbitrator may put whatever weight he/she feels is appropriate upon the City's argument. In other words, the arbitrator may deem that pay raises given to employees in comparable cities should be weighted higher than the city's ability to pay the cost of those pay raises. There are no proofs that when completely argued and confirmed, will obligate the arbitrator to rule in accord of that proven point. The effect of the suggested changes would narrow the scope of power of the arbitrator, and therefore ameliorate this effect arbitration has upon the bargaining process.

When interpreting the law, PERA and Act 312 must be read and implemented together. Act 312 is specifically supplementary to, and does not amend or repeal any of PERA as Section 14 of Act 312 makes clear. While PERA says that both sides must bargain in good faith, it has been ruled in the courts, that the only prerequisite for Act 312 is mediation, and that lack of good faith bargaining does not preclude 312 arbitration. *Manistique Fire Fighters vs City of Manistique*. This ruling is contradictory to the purposes of the Act, and is, I believe, reason enough for a total reexamination of the legislation.

## CONCLUSION

The analysis shows that impasse resolution in Michigan could be improved upon by instituting some of the procedures used in other states. The main fault in the Michigan legislation, as I see it, is that it makes a noble effort to institute procedures that would produce a result that would occur if the parties involved were to collectively bargain to an agreement themselves. The flaw is that the statute effectively makes arbitration part of the bargaining process when it should be a last resort after all efforts have been made to come to an agreement, and the bargaining process is over. Other states have divorced arbitration from bargaining and have implemented incentives not to use arbitration, or to motivate parties to bargain to an agreement. Tables 1 through 3 establish that there are elements in compulsory arbitration legislation for the other states that result in more efficient implementation of impasse resolution procedures than in Michigan.

I think these methods used in the comparative states that effectively separate arbitration from bargaining would lead to more efficiency in resolving disputes in Michigan.

The parties involved would agree that the best long term solution would be a process that never had to be invoked, a process by which the parties would bargain expeditiously to settlement. But the statutes have obviously been put in place because there is a need for them. Extended arbitrations with many issues to be decided is the norm in the State

of Michigan and the manner in which interest arbitration is implemented in Michigan does not impose enough risk for the parties. A simple alteration of the statute to require that last best offers be submitted before the first hearing and be unalterable, as in Wisconsin, would do much to clarify the positions of the parties and make the parties have more control and be more responsible toward the results. This would be a first step in making the parties more accountable and reestablishing true good faith bargaining. Other suggested steps could be implemented incrementally.

**END NOTES**

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## STATUTES

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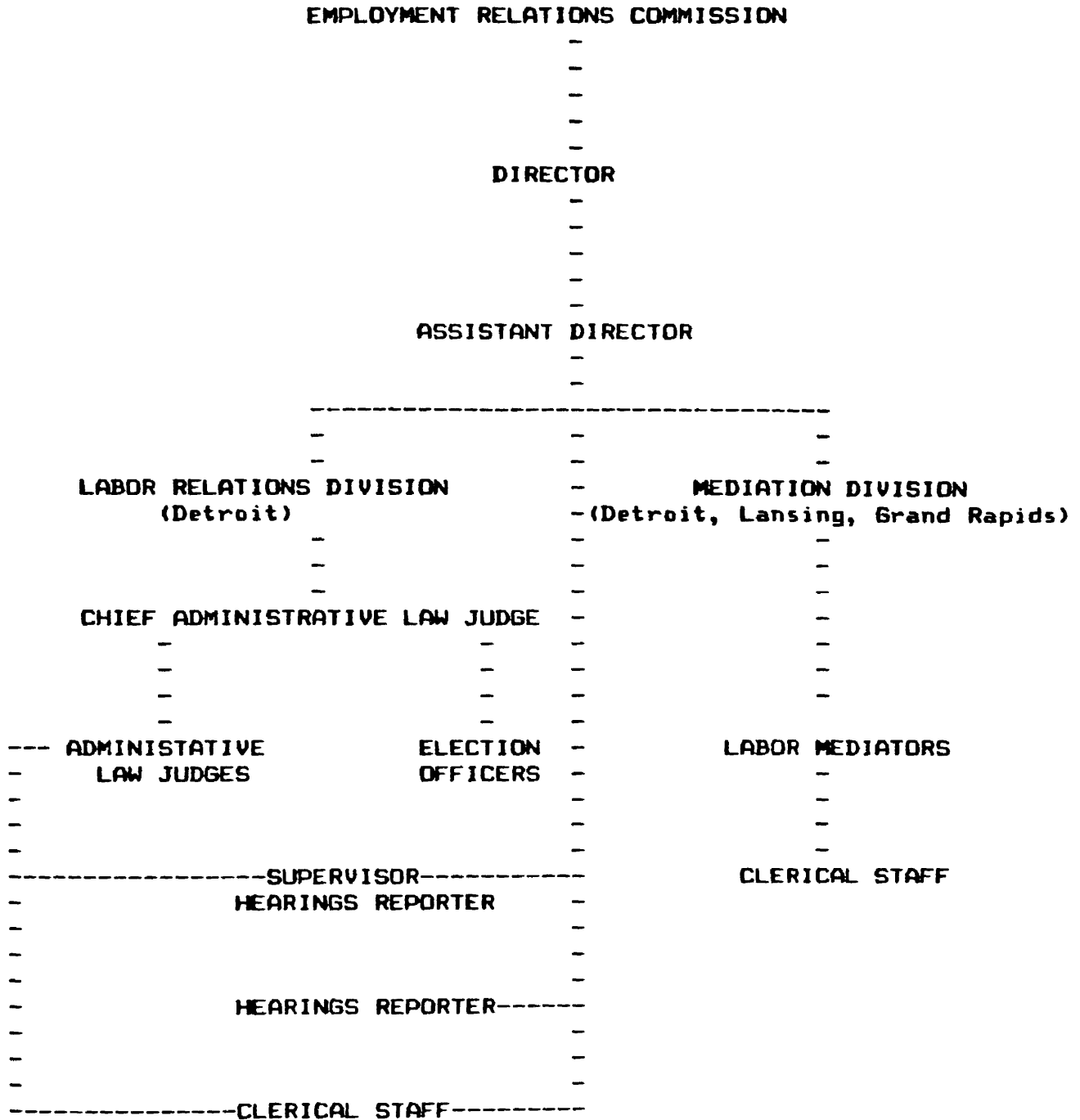
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HIERARCHY OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Exhibit 1



MICHIGAN'S ARBITRATOR AWARDS FOR POLICE AND FIRE PERSONNEL FROM  
 JANUARY 1986 THROUGH DECEMBER 1988

APPENDIX A  
 =====

MUNICIPALITY	DEPT.	DATE OF AWARD	* 1ST YR * * OF CON. *	# OF MONTHS	# OF ISSUES
EAST LANSING	FIRE	12 88	* 7 87 *	17	10
FARMINGTON HILLS	POLICE	12 88	* 7 87 *	17	15
HOLLAND	FIRE	12 88	* 7 87 *	17	5
SOUTHFIELD	COMMAND	12 88	* 7 86 *	29	8
DETROIT	COMMAND	11 88	* 7 86 *	28	1
FRASER	PUB SAF	11 88	* 7 86 *	28	1
GROSSE PTE.	PUB SAF	11 88	* 7 87 *	16	10
TRAVERSE CITY	POLICE	11 88	* 1 88 *	10	STIPULATED
BLOOMFIELD TWP.	POLICE	9 88	* 4 87 *	17	11
GLADSTONE	PUB SAF	9 88	* 7 86 *	26	1
MUSKEGON	FIRE	9 88	* 1 87 *	20	9
KINGSFORD	PUB SAF	8 88	* 7 87 *	13	4
ISABELLA CO	POLICE	7 88	* 6 87 *	13	14
SAULT STE MARIE	COMMAND	7 88	* 6 87 *	13	3
TROY	POLICE	7 88	* 7 86 *	24	1
E. GRAND RAPIDS	PUB SAF	6 88	* 7 87 *	11	5
FARMINGTON	COMMAND	6 88	* 7 87 *	11	STIPULATED
GARDEN CITY	COMMAND	6 88	* 7 85 *	35	14
LINCOLN PARK	COMMAND	6 88	* 7 86 *	23	10
LIVINGSTON CO.	COMMAND	6 88	* 1 87 *	17	11
BENTON HARBOR	POLICE	5 88	* 7 86 *	22	3
BRONSON	POLICE	4 88	* 7 87 *	9	STIPULATED
CEDAR SPRINGS	POLICE	4 88	* 7 86 *	21	7
ROMULUS	COMMAND	4 88	* 7 87 *	9	19
NILES TWP.	POLICE	3 88	* 4 86 *	23	4
KALAMAZOO CITY	SHERIFF	2 88	* 4 87 *	10	8
STERLING HTS.	FIRE	2 88	* 7 87 *	7	1
SOUTH HAVEN	POLICE	1 88	* 7 86 *	18	1
SWARTZ CREEK	POLICE	1 88	* 7 85 *	30	4
WEXFORD CO.	SHERIFF	1 88	* 1 86 *	24	2
NILES	FIRE	12 87	* 10 85 *	26	14
ANN ARBOR	COMMAND	11 87	* 7 84 *	40	5
BERRIEN CO.	SHERIFF	11 87	* 1 87 *	10	2
GREENVILLE	POLICE	11 87	* 7 86 *	16	STIPULATED
ANN ARBOR	POL TELE	10 87	* 7 85 *	27	STIPULATED
MONROE	COMMAND	10 87	* 7 86 *	15	1
G. PTE. PARK	PUB SAF	9 87	* 7 86 *	14	8
GARDEN CITY	FIRE	9 87	* 7 85 *	26	1
MUSKEGON	POLICE	9 87	* 1 86 *	20	1
PORT HURON	POLICE	9 87	* 7 86 *	14	STIPULATED
ALGONAC	POLICE	8 87	* 7 86 *	13	4
LEONI TWP.	FIRE	8 87	* 7 86 *	13	13
MANISTEE	POLICE	8 87	* 7 86 *	13	STIPULATED
MELVINDALE	FIRE	8 87	* 1 84 *	43	STIPULATED
PORT HURON	FIRE	8 87	* 7 86 *	13	3
RIVERVIEW	POLICE	8 87	* 7 85 *	25	2
ST. CLAIR SHORES	POLICE	8 87	* 7 85 *	25	13
WATERFORD TWP.	FIRE	8 87	* 1 86 *	19	9
HOLLAND	FIRE	7 87	* 7 85 *	24	7
INKSTER	DISPATCH	7 87	* 7 85 *	24	4

MACOMB CO.	DEPUTIES	7	87	*	1	86	*	18	15
MANISTEE	FIRE	7	87	*	7	85	*	24	21
SAGINAW	POLICE	7	87	*	7	86	*	12	4
SALINE	POLICE	7	87	*	7	86	*	12	STIPULATED
ST. CLAIR SHORES	FIRE	7	87	*	7	85	*	24	16
BRANCH CO.	SHERIFF	6	87	*	1	86	*	17	9
CHARLEVOIX	POLICE	6	87	*	4	86	*	14	STIPULATED
MUSKEGON HTS	COMMAND	6	87	*	7	86	*	11	STIPULATED
ROMULUS	POLICE	6	87	*	7	86	*	11	STIPULATED
ST. JOSEPH	POLICE	6	87	*	1	86	*	17	3
ALPENA CO.	POLICE	4	87	*	1	86	*	15	7
HIGHLAND PARK	POLICE	4	87	*	3	85	*	25	10
MASON	POLICE	4	87	*	7	86	*	9	10
INGHAM CO.	COMMAND	3	87	*	5	85	*	22	1
MECOSTA CO.	SHERIFF	3	87	*	1	86	*	14	STIPULATED
DETROIT	COMMAND	3	87	*	1	86	*	14	31
MONROE	POLICE	2	87	*	7	86	*	7	STIPULATED
CHEBOYGAN CO.	DEPUTIES	2	87	*	1	86	*	13	9
JACKSON	FIRE	1	87	*	7	85	*	18	18
PRESQUE ISLE	SHERIFF	12	86	*	7	85	*	17	STIPULATED
FERNDALE	COMMAND	12	86	*	7	85	*	17	STIPULATED
PRESQUE	POLICE	12	86	*	7	85	*	17	STIPULATED
STERLING HTS.	DISPATCH	12	86	*	7	85	*	17	STIPULATED
BIRMINGHAM	FIRE	11	86	*	7	84	*	28	18
SALINE	POL SGT.	10	86	*	7	85	*	15	STIPULATED
OTTAWA CO.	LT/SGT	10	86	*	1	86	*	9	6
LIVINGSTON CO.	COMMAND	9	86	*	1	85	*	20	17
SAGINAW	FIRE	9	86	*	7	85	*	14	19
PORT HURON	POLICE	9	86	*	7	85	*	14	6
IOSCO CO.	POLICE	9	86	*	1	85	*	20	8
LIVINGSTON CO.	POLICE	8	86	*	1	85	*	19	4
HAMTRAMCK	FIRE	8	86	*	7	82	*	49	11
MARINE CITY	POLICE	8	86	*	7	85	*	13	11
LANSING	POLICE	7	86	*	7	83	*	36	2
WOODHAVEN	POLICE	7	86	*	7	85	*	12	6
ANTRIM CO.	SHERIFF	6	86	*	7	85	*	11	1
FLINT	POLICE	6	86	*	7	85	*	11	STIPULATED
CANTON TWP.	FIRE	6	86	*	7	85	*	11	STIPULATED
SOUTHFIELD	FIRE	5	86	*	7	84	*	22	22
CADILLAC	FIRE	5	86	*	7	85	*	10	STIPULATED
GARDEN CITY	COMMAND	5	86	*	7	84	*	22	10
EAST LANSING	COMMAND	4	86	*	7	83	*	33	1
EAST LANSING	COMMAND	4	86	*	7	83	*	33	1
WAYNE COUNTY	FIRE	4	86	*	7	84	*	21	15
RICHMOND	DISPATCH	4	86	*	7	84	*	21	1
CRAWFORD CO.	SHERIFF	3	86	*	7	84	*	20	STIPULATED
FLINT	FIRE	2	86	*	7	84	*	19	1
DETROIT	COMMAND	1	86	*	7	83	*	30	1
DETROIT	COMMAND	1	86	*	7	83	*	30	27
DETROIT	POLICE	1	86	*	7	83	*	30	37

AVERAGES 19.16 6.48

AVERAGES NOT INCLUDING STIPULATED AWARDS 20.38 8.42

AVERAGE MONTHS FOR STIPULATED AWARDS 15.09

SOURCE: MICHIGAN MUNICIPAL LEAGUE; COMPULSORY ARBITRATION AWARDS  
TABULATION

ILLINOIS ARBITRATION AWARDS FOR POLICE AND FIRE PERSONNEL  
FROM 1986-87 TO 1989-90

APPENDIX B  
=====

ARBITRATION USE UNDER SECTION 14, 1986 THROUGH 1990

Approximate number of units: 500

Number that come up for  
negotiation at one time: 250

Fiscal Yr.	1986	1987	1988	1989	1990
REQUESTS	16	26	53	34	182 <sup>*</sup>
AWARDS	7	9	1	14	33 <sup>**</sup>

Awards by employee group:

Police	11
Fire	13
County employees (deputy sheriffs; corrections)	9

\*  
Of total Section 14 arbitration requests filed, 174 were under the Illinois State Labor Relations Board (ISLRB) which governs outstate Chicago area, and eight were under the Illinois Local Labor Relations Board (ILLRB) which governs the Chicago area.

\*\*  
Number of Section 14 arbitration awards issued, 30 under ISLRB, one under ILLRB, and two under the City of Chicago's contractual procedures.

Source: Arbitration Use Under Section 14, 1986-1990 as compiled by the Illinois Public Employment Labor Relations Association

WISCONSIN'S ARBITRATOR AWARDS FOR POLICE AND FIRE PERSONNEL FOR 1988-89

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APPENDIX C  
 =====

MUNICIPALITY	DEPT.	DATE OF AWARD	* 1ST YR. * OF CON. *	* * *	# OF MONTHS	# OF ISSUES
APPLETON	FIRE	11 89	* 1 88	*	22	3
CRAWFORD COUNTY	SHERIFF	6 89	* 1 88	*	17	CONSENT
DODGE COUNTY	SHERIFF	6 89	* 1 88	*	17	CONSENT
DOOR COUNTY	SHERIFF	6 89	* 1 88	*	17	3
MOSINEE	POLICE	5 89	* 1 89	*	4	CONSENT
PLOVER	POLICE	5 89	* 1 89	*	4	CONSENT
ROCK COUNTY	SHERIFF	5 89	* 1 88	*	16	2
CALEDONIA	FIRE	4 89	* 1 88	*	15	CONSENT
KENOSHA COUNTY	SHERIFF	4 89	* 1 88	*	15	3
DANE COUNTY	SHERIFF	2 89	* 1 88	*	13	1
DOUGLAS COUNTY	PARAMEDICS	2 89	* 1 88	*	13	7
GREEN BAY	POLICE	2 89	* 7 87	*	19	3
ST. CROIS COUNTY	SHERIFF	2 89	* 1 87	*	25	3
FOREST COUNTY	SHERIFF	11 88	* 1 88	*	10	CONSENT
MILWAUKEE	POLICE	11 88	* 7 87	*	16	11
STURGEON BAY	POLICE	11 88	* 1 87	*	22	3
GREENDALE	FIRE	10 88	* 1 88	*	9	1
APPLETON	POLICE	8 88	* 1 88	*	7	1
MINOCQUA	POLICE	8 88	* 1 88	*	7	CONSENT
AVERAGES					14.11	2.16
AVERAGES NOT INCLUDING CONSENT DECREES					16.17	3.42
AVERAGES MONTHS FOR CONSENT DECREES					10.57	

SOURCE: DIGEST AND REPORT OF ARBITRATION AWARDS ISSUED UNDER THE MUNICIPAL INTEREST ARBITRATION LAW AND WISCONSIN STATUTES DURING FISCAL YEAR 1988-1989.