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BILATERALISM: THE DEVELOPMENTS IN FEDERAL STATE, AND LOCAL LABOR-MANAGEMENT RELATIONS

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BILATERALISM: THE DEVELOPMENTS IN FEDERAL STATE, AND LOCAL LABOR-MANAGEMENT RELATIONS

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TABLE OF CONTENTS

LIST OF TABLES

CHAPTER I

BILATERALISM IN GENERAL

Statement of Problem

This is a comparative study of the development of bilateralism within federal, state, and local labor-management relations during the period from the issuance of Executive Order 10988 by President Kennedy on January 12, 1962, to the Florida fire fighters statute effective January, 1973.[1] This research is of continuing interest to the author since my master's thesis was a case study of federal and local public employee unionization in San Antonio, Texas, during the summer of 1969.[2] This study is, therefore, an expansion of the thesis topic. Yet it is not a case study, but a study of the legal provisions establishing bilateralism covering such topics as the organizational structure established to handle bilateralism, recognition, the process of negotiations, the resolution of negotiation impasses, the strike, unfair labor practices, and last but not least the influence of bilateralism upon the merit system.

Now that the boundaries of this study have been established, three very important concepts must be established to further define the area of study, i.e., sovereignty, unilateralism, and bilateralism. Kurt L. Hanslow in his book The Emerging Law of Labor Relations in Public Employment describes sovereignty as "the King can do no wrong."[3] This common law concept can additionally be defined as the ultimate or absolute political authority in a particular unit of government. All other authority is subordinate to this sovereign authority in that the official acts and actions taken in the name of the government take precedence over other acts or actions. Sovereignty is also viewed as not being delegatable for to do so would reduce the power of the sovereign. Upon this base of sovereignty is built the concept of unilateralism or decision-making on personnel policy as the sole discretion of the sovereign employer. The employee is viewed in somewhat paternalistic terms in that the sovereign employer will take care of its employees. Along with this idea is that if the employee does not like the conditions of public employment, he or she is free to seek employment outside of the public sector. But unilateralism is in varying degrees being replaced by bilateralism or joint decision-making in the determination of the policies which will influence the worker. The sovereign

employer is waiving its unilateral decision-making position and taking a position of joint decision-making or bilateralism.[4]

Historically public employee union activity can be traced back to the naval ship yards in the Philadelphia area in the 1930's, to the postal unions in the early part of this century, and to the attempts to gain congressional approval during the 1950's of the Rhodes-Johnston bill (trying to establish a public employee's Wagner Act). But the recent activity of public employee unionization, particularly since the issuance of Executive Order 10988, greatly overshadows any of these past activities. The emphasis of this research, and much contemporary research, is no longer centered on the idea "can" sovereignty be waived to allow bilateralism but "how far" will bilateralism in the public sector develop to resemble bilateralism in the private sector. This is underscored by John Bloedorn's statement that "the question is not whether collective bargaining in the public sector should be authorized, but more specifically, what its structure, scope and procedures should be."[5]

Bilateralism is creating numerous questions which must, in some way, be answered as the evolutionary process moves away from unilateralism. The following questions, around

which the chapters are based, are only illustrative of the many questions which will confront the public administrator in this developing era of bilateralism.

1. What structure is provided to handle this new relationship?
2. What is an appropriate bargaining unit?
3. How is an employee organization to be designated as the representative of the employees?
4. What provisions are there for union security?
5. What is the scope of bilateralism?
6. What are the rights of management?
7. How does the process of collective bargaining work?
8. What provisions are there for the resolution of impasses?
9. Is arbitration the ultimate answer?
10. What provisions are there for the strike?
11. Is there a way to allow strikes?
12. What areas are regulated to prevent unfair labor practices?
13. How does bilateralism influence the merit system?

To illustrate the development of bilateralism in public personnel, Table 1-1 indicates the number of statutes passed and executive orders issued by the various jurisdictions which are used in this study.

Table 1-1.--The number of statutes passed and executive orders issued during period of study

Year	Number
1962	1
1964	1
1965	2
1966	1
1967	6
1968	3
1969	18
1970	9
1971	15
1972	18
1973	1

To further illustrate the extent of union activity in the public sector, Table 1-2 indicates the tremendous growth in government employee unions vis-a-vis the private sector unions. This table not only reveals the increased number of government employees in unions, but the absolute change and percentage change figures reveal the tremendous growth in the public sector as compared to the private sector. The absolute change for all union membership for 1956-1960 was a loss of 68,000, but this does not take into consideraion that for government employees there was a positive growth curve while in the private sector there was a negative growth curve. For the years 1960-1968 there was growth in both private and public

Table 1-2.--Union membership by sector, 1956-1968, in thousands

Year	Total	Manufacturing		Nonmanufacturing		Government	
		Number	Percent	Number	Percent	Number	Percent
1956	18,104	8839	48.8	8350	46.1	915	5.1
1958	17,968	8359	46.5	8574	47.7	1035	5.8
1960	18,036	8591	47.6	8375	46.4	1070	5.9
1962	17,564	8050	45.8	8289	47.2	1225	7.0
1964	17,920	8342	46.6	8125	45.3	1453	8.1
1966	19,126	8769	45.8	8640	45.2	1717	9.0
1968	20,210	9218	45.6	8837	43.7	2155	10.7
Absolute Change							
56-60	-68	-248		-25		155	
60-68	2174	627		462		1085	
56-68	2106	379		487		1240	
Percentage Change							
56-60	-.4		-2.8		-.4		16.9
60-68	12.1		7.4		5.5		101.4
56-68	11.6		4.3		5.8		135.5

Source: H. P. Cohany and L. M. Dewey, "Union Membership Growth Among Government Employees," Monthly Labor Review, XCIII (July, 1970), p. 16.

sectors, but with the public sector accounting for just a little under 50 percent. The absolute change for the overall time period of 1956-1968 is also positive, but with the public sector union membership growth accounting for 59 percent of the increase.

Even more telling about the growth of public employee unions are the percentage changes for the years 1956-1968. For the time period 1956-1960 the overall percentage change was -.4 percent, but this must be read in the light of the negative change in both private manufacturing and nonmanufacturing sectors with a positive growth change of 16.9 percent in the public sector. For the years 1960-1968 a positive percentage change is registered for both public and private sectors, but again they differ greatly. The manufacturing and nonmanufacturing percentages respectively are 7.4 and 5.5, but for the public sector the percentage change is 101.4. The overall time span of 1956-1968 also indicates a small percentage increase for total union membership of 11.6 with the manufacturing and nonmanufacturing percentages at 4.3 and 5.8 respectively. This is in light of the 135.5 percent growth in government union membership. These figures should help convince anyone that public employee unionism is serious and that

bilateralism is not going to decrease and fade away as many public administrators would like to believe.

Methodology, Theoretical Framework, and Hypothesis

Since this study is in the area of comparative administration (public personnel administration/public employee unions), how does it fit into the area? First comparative administration must be defined. Comparative public administration is the systematic study of the distinctive characteristics of administrative ecology, activity, and organizational arrangements both international and intranational. Comparative public administration, really coming into its own right only after World War II, has been slowly evolving away from "comparative" efforts to "developmental" efforts. This trend, largely based upon the impetus of a Ford Foundation grant, had an overall effect of directing scholarly efforts toward the developing countries.[6] The "development" trend is so pronounced that Lynton K. Caldwell cautions against such a narrowing of the interests of the area, in light of expressed fears of critics that the area is becoming a highly specialized esoteric effort with little practical value for understanding how administration really works.[7] Caldwell's statement is corroborated by Joseph A. Uveges when he states that

"typically comparative administration has been thought of as the study of comparable administrations among varieties of nations and cultures."[8] "However," Uveges continues, "the contemporary scope of comparative public administration realistically includes the study and analysis of cultural variations within nations on a comparative basis as well."[9]

Richard E. Holt and John E. Turner, in their book The Methodology of Comparative Research, contend that if political scientists are ever to generate a more general and valid body of theory, comparative cross-cultural research is absolutely essential. "In principle," they continue, "there is no difference between comparative cross-cultural research and research conducted within a single society."[10] They contend the only differences lie in such areas as the magnitude of language barriers in cross-cultural studies. Thus, this intranational study of the development of bilateralism fits well within the context of comparative research as set forth by Holt and Turner.

This effort also fits within one of the three classes of comparative public administration literature established by Ferrel Heady. His second class, modified traditional, contains personnel management as one of the standard traditional subtopics. Thus, an examination of the development of bilateralism

fits into the modified traditional class of literature according to Heady. The other two classes are general system model-building and middle range theory formulation.[11]

Since this examination is descriptive, justification for such efforts are found in Clare Selltiz's, et al., work Research Methods in Social Relations. They state that each study has its own purpose, but that research usually fails within the following four broad groupings.

> To gain familiarity with a phenomenon or to achieve new insights into it, often in order to formulate a more precise research problem or to develop hypotheses.
>
> To portray accurately the characteristics of a particular individual, situation, or group (with or without specific initial hypothesis about the nature of these characteristics).
>
> To determine the frequency with which something occurs or with which it is associated with something else (usually but not always with a specific initial hypothesis).
>
> To test a hypothesis of a causal relationship between variables.[12]

This study fits into the second and third groups of research, efforts labeled descriptive by Selltiz.

To this point it has been established that this research does fall within the boundaries of comparative research (comparative public administration in particular); that it is a standard traditional topic in one of Heady's three classes of

comparative public administration literature; and that a descriptive study is one of four broad groupings of research efforts. In furtherance of the first mentioned point, Keith Henderson's treatment of activity in the "U.S. culture" study of public administration is enlightening. He believes that comparative public administration can assume intellectual leadership with the "U.S. culture" by studying the "real and proper structure and functioning of government executive organizations." Such efforts, he contends, would assist the official in acquiring a better understanding of the problems confronting him, since the development of bilateralism is a very real problem area confronting the public official.[13]

Henderson, in an earlier article, states that the model building efforts of those engaged in cross-cultural studies (Fred Riggs in particular) have heuristic value for intranational study.[14] This idea is also presented by Riggs when he writes that although his fused and diffracted models cannot be found in the real world, these "constructed" or "ideal" types can serve a "heuristic purpose by helping us to describe real world situations."[15] Riggs adds that "we need a pretty complete descriptive and analytical understanding of what now exists before we can make useful judgments about what we ought to do, what changes should be made."[16] (Emphasis mine.)

Since the Riggsian prismatic model is used as the theoretical framework for this study, how will it be applied? His model was constructed to describe the movement of traditional societies (he calls them transitional) from being backward to being developed. This movement is set in a three stage prismatic model. The three stages are from a fused society through the prism of development into a diffracted society. Using a structural-functional framework for his prismatic model, the functions in a fused society are diffuse, while the functions in a diffracted society are specific. As a traditional society develops, the functions are differentiated within a developing structural complex.[17] Thus by analogy, the units of government still using unilateralism based upon sovereignty are fused, while those units of government having passed through the prism of bilateralism are differentiated in their approaches to bilateralism. Riggs states that differentiation cannot happen at equal rates of speed, the units of government implementing bilateralism are at different stages of differentiation.[18] (In this research diversification and differentiation will be used synonymously.)

But the development of bilateralism has the great disadvantage of creating too much differentiation. The research design is centered around studying the similarities and

dissimilarities of bilateralism, but the "insulated chambers" of Justice Brandeis with the resulting experimentation in each have created such diversification of approaches that comparison in many instances is difficult.[19] Therefore, to study this differentiation, the format must of necessity, at times, resemble a listing of the various approaches within the topic area of Chapters II through VI, i.e., New York is doing it this way while California, Michigan, etc., are doing it that way. This may seem to some to be less than adequate, but to study and show the diversification in bilateralism, the format must conform to the data instead of the data conforming to a better format.

Therefore, in this study of bilateral diversification, it is hypothesized that the concept of unilateralism based on sovereignty has been rendered obsolete and is not being adequately or sufficiently redefined to allow the bilateralism required by the increased strength of public employee unions and resulting differentiation. Furthermore, bilateralism (differentiation) in labor-management relations in government is now a fact of life, and it is only a matter of time before this development will resemble that labor-management relationship found in the private sector.

Nimrod Raphaeli, in using model and theory synonymously (and it is so used here), contends that a model or theory is not "right" or "wrong," but must be judged by the model's applicability, usefulness, and communicability. First, the prismatic model does have applicability to the study of the development of bilateralism since there is much differentiation within this area. The analogy fits. Second, the model is useful in helping both the layman and the professional grasp the diversity of bilateralism. Third, the model is communicable, being fairly easy to understand.[20]

Lynton K. Caldwell presents three conceptual problems of comparative public administration, i.e., comparability, commensurability, and relevance. The main question of comparability is: What factors are significant? In my estimation, since public bilateralism is still evolving and immature, one avenue of comparison is the legal foundation for such efforts. Caldwell contributes to this estimation by stating that comparative studies in public administration have made extensive use of legal data. Second, commensurability is really out of the question at present since the diversification of public bilateralism renders quantification of the data impossible. Perhaps as bilateralism matures and some of the diversification begins to coalesce, quantification might be

possible. Third, relevance is of major importance at this time in social research.[21] Henderson contributes by stating:

> In the final analysis, it would seem that Public Administration cannot survive unless it becomes relevant to current American problems, and cannot become relevant until its major academic strengths are brought into contact with the practitioner, especially the administrator.[22]

This study does deal with a very relevant current American problem, which is very relevant to the public administrator.

Thus, the use of Riggs' prismatic model as a theoretical foundation is applicable, useful, and communicable. There are factors in bilateralism that are comparable. The study is relevant, but commensurability is impossible at this time. In conclusion, Riggsian thought also contains the distinction between monothetic and ideographic approaches. The former is concerned with any approach seeking the formulation of general propositions and laws, while the latter is concerned with unique instances (a particular government, case, or organization). The ultimate goal established by Riggs is a synthesis of the two.[23] Although Riggs' research and resulting model is nomothetic, this research is basically ideographic. As more research is conducted in this area, nomothetic models can be formulated, but this is very futuristic.

The heart of the data for this study are the statutes, court orders, legal opinions, and executive orders issued by

the various units of government. These data were taken and separated into the various topics for examination and creation of similar and dissimilar classes. The main data sources are the Bureau of National Affairs' publication Government Employees Relations Report contained in their Reference File and the Labor Law Report by the Commerce Clearing House. These two publications have copies of all statutes, court orders, legal opinions, and executive orders used here.[24]

This work is unique in the developing literature of public bilateralism. No one has attempted such an in-depth examination of all units of government and the numerous statutes, legal opinions, court orders, and executive orders. The only work which approaches the task of this research is Felix Nigro's Management-Employee Relations in the Public Service,[25] but even it is limited in number of units of data considered. There are books written about specific topics of bilateralism and these will be considered in the respective chapters. Additionally, there are several periodicals which contain articles covering specific topic areas. Among these are the Industrial and Labor Relations Review, Labor Law Journal, Personnel, Personnel Administration, and Public Personnel Management.

Public or Private Bilateralism: Is There a Difference?

Only upon the resolution of this problem will the ultimate extent of development in bilateralism in the public sector toward that found in the private sector be resolved. The terms "public sector" and "private sector" are used to differentiate between industrial labor relations (the private sector), and the development of similar relations between government and its employees (the public sector). If there is no difference then it is only a matter of time before the two areas merge in approaches. But if there is a difference then how will the two differ? In summary form, the argument that there is a difference between the two revolves around the following ideas: the lack of a profit motive in governmental operations; the absence of competition in areas of service provided by government; the essential nature of governmental services; the responsibility of the public administrator to the public; and the lack of control over revenue or the tax schedules by the public administrator.[26] The counter argument follows the idea that although the above mentioned factors are important, it is still fundamental that government as an employer should and must deal with its employees in similar fashion as that mandated by government for private employers. For government to do otherwise would be to place its employees

in an inferior classification and overlook the needs of its employees for this type of job security.[27]

But it is this author's opinion that these lines of debate miss the essential main point of the problem. To resolve this problem it is necessary to understand that what is called for in bilateralism is competition between parties over both economic and noneconomic matters and that each party has a weapon that can be used to gain its objective. The employee has the strike, while the employer has the lockout. A strike is where the employee refuses to work, while a lock-out is where the employer does not allow the employee to enter the work area. That both weapons have been used in the private sector is beyond debate, but does the strike and lock-out also exist in the public sector? At this time only five jurisdictions are experimenting with allowing the strike,[28] but it is also apparent that some public employees have made liberal use of this economic weapon despite its general prohibition. The debate then comes down to this question: Does government have the lock-out to counter the strike? If government does then the analogy with private bilateralism is complete, but if government lacks the lock-out then there cannot be an analogy and there is a difference between public and private bilateralism.

Among the data studied the lock-out is considered an unfair labor practice in Kansas (PE), Montana (N), New Hampshire (P), Oklahoma (P-F-ME), and Oregon (N).[29] Therefore for at least these five jurisdictions the public authorities have no economic weapon to counter the strike and there is a difference. Now is it possible to generalize from the particular to the general that government, because of its very nature and creation, i.e., providing services for its citizens and created by its citizens, cannot legally lock-out its employees and therefore not perform services for its citizens?

This gets down to the distinction between governmental and proprietary functions. Governmental functions are those carried out by local units of government acting as agents of their states which they must perform. Therefore, if the local units of government must perform these services, do they not then lack the economic weapon of the lock-out and then is not there a difference? On the other hand, proprietary functions are those services which local units of government perform but for which there is no state mandating. To the extent that there is no state mandating of the performance of these functions the lock-out might be available, but the legal authority to perform these functions might also preclude the lock-out. Although governmental and proprietary functions are legal

characteristics of local government, the general idea may be applied to state and federal government, i.e., that there are services that must be performed even in the face of a strike.

Therefore, if the public administrator lacks the economic weapon of the lock-out it is quite impossible for both public and private approaches to bilateralism to be the same. It is only upon the resolution of the strike/lock-out problem that public and private can be alike, or stated differently, as long as there is fundamental differences in the weapons that are available to the parties involved then there will always be a difference between public and private bilateralism.

But the rejoinder to this idea is found in the Bureau of National Affairs' publication, Basic Patterns in Union Contracts, where a no-lock-out pledge appears in 81 percent of their 400 sample contracts in both manufacturing and non-manufacturing contracts and agreements. These pledges are qualified in various ways, i.e., the lock-out is available if an arbitration award is violated, if there is refusal to arbitrate, or after the exhaustion of grievance procedures, etc.[30] Yet there is enough difference still to warrant the contention that the bilateralism of the public sector is different since a private pledge is not absolute, while it can be contended that the public administrator's prohibition against the lock-out is absolute.

Why Is Government Entering Into Bilateralism

Arthur Thompson and Irvin Weinstock are correct in their contention that the "managerial attitudes toward employee organization may prove to be the most important factor influencing the factor of collective bargaining in the public service."[31] Furthermore, it is the author's contention that the reasoning behind the dropping of unilateralism and the taking up of bilateralism by public management will set the tone for future development in this area. If public management enters bilateralism on its own volition and understanding the positive aspects of it, then the probability of harmonious labor relations are better than in a situation where public management is forced into bilateralism. Furthermore, if public management enters bilateralism on its own volition but with a paternalistic attitude this attitude can preclude the development of mutual respect and equality of the parties necessary for mature bilateralism. All parties must enter bilateralism with such an attitude that permits a mature, positive procedure.[32]

More specifically: Why is government entering into bilateralism? From the study of the data five basic reasons and one qualification can be established. These five are, in summary form: first, joint decision making is the modern way;

second, exchange of ideas and information improves communication; third, bilateralism creates harmonious and cooperative relations between employer and employee; fourth, it is a reasonable way of resolving disputes; and fifth, strife can result from the denial of bilateralism. The qualification is that the listed reasons are subject to the health, education, safety, and welfare of the public.[33]

Joint decision making is the cornerstone of bilateralism. This allows a combining or compromising of ideas and desires from both management and labor in the setting of personal policies. Joint decision making permits the exchange of ideas and information by all parties with the resulting upgrading of communication. The aspect of communication is very important in bilateralism, for it is only with the clear transmission of ideas and information that the respective position of all parties can be made known and combining or compromising allowed to operate. Joint decision making and the exchange of ideas and information based upon a good communication system should permit a more harmonious and cooperative relationship between the employer and the employees. For bilateralism to operate in a satisfactory manner there is a necessity to have mature relations between the parties, for to have the opposite situation will assuredly lead to strife, although in some cases strife will result no matter what is attempted.[34]

Bilateralism also permits a reasonable way to resolve disputes. The employment relationship does lead to disagreement between the parties as to the particulars of what employment policies should be. But through bilateralism the parties can face each other, even in a conflict situation, and work out their differences to hopefully mutual satisfaction. For bilateralism to work satisfactorily there must be more than an equal volume of cooperation and conflict. Today, if bilateralism is denied, then public management can almost be guaranteed employment strife and the disruption of public services. The public employee unionization movement has seen the advantages gained by their counterparts in the private sector and will not rest until their employment relations closely resemble it.[35] Besides, it is the author's contention that the idea has come of age and any effort on the part of public management to retard its evolutionary development is only sowing the seeds of subsequent conflict.

These reasons are qualified to the extent that the parties must understand that beyond doubt or question the public must be taken into consideration in their relationship. Although the private sector relationship is at times alleged to have a third party (the public) taken into consideration, this seldom occurs. But public bilateralism cannot fail to take the

public into consideration. The services (fire, police, education, hospital) provided by government directly influence the public and any bilateralism in public employment must be considered in this light. Thus both principal parties would be ill advised to incur the rath or ill-feelings of the public. Besides, if bilateralism is to be both mature and positive, the interests of the public must be taken into consideration.[36]

Legal Points in Bilateralism

Two basic legal positions have developed around cases dealing with bilateralism. One position is based upon the idea that in the absence of specific legislative authorization public agencies lack the power or authority to engage in bilateral activities. The second legal position is based upon the idea that public agencies have an implied power, from their position of employer, to engage in bilateral activities. But before these two positions are discussed, two additional legal points need to be presented.

In Atkins v. City of Charlotte, a three-judge U.S. District Court declared the North Carolina statute of July 4, 1969, void as to its prohibition of union membership stating that such prohibition was a violation of First and Fourteenth Amendment rights of association. Additionally, the court voided

a section of the statute making such membership punishable by law.[37] In Beverly v. City of Dallas (1956) the Texas Court of Civil Appeals voided a city ordinance prohibiting their firemen from joining the international Association of Fire Fighters (IAFF) by stating:

> . . . that the ordinances of the City of Dallas here involved prohibiting employees of Dallas Fire Department from joining or remaining members of a labor union are invalid, and that the action of the City of Dallas in prohibiting its employees from so joining is invalid and void.[38]

In Wichita Public School Employee's Union v. Smith (1964) the Kansas courts held that legislation authorizing bilateral activities for private sector employees did not extent to governmental employees.[39] Therefore, from these examples two principles were established. One is that membership in public employee unions cannot be prohibited nor be made punishable. The second is that general legislation extending bilateralism to private sector employees does not extent to public sector employees.

Now to return to the two main legal positions, the first presenting the idea that in the absence of specific legislation bilateralism cannot be engaged. In Levasseru v. Wheeldon (1962) the South Dakota Supreme Court decided that in the absence of a statute public employees have no right to engage in

collective bargaining.[40] The same idea was expressed in Delaware River and Bay Authority v. International Organization of Masters, Mates and Pilots (1965) when the New Jersey Supreme Court held that the power to enter collective bargaining contracts would be contrary to established state policy and that a change in that policy requires action by the legislature.[41] The Attorney General of Indiana in his Opinion No. 21 dated July 8, 1969, stated:

> The state Legislature impliedly acknowledged that until it grants the power to state agencies to enter exclusive collective bargaining agreements, the Indiana General Assembly retains that power.[42]

The Arizona Court of Appeals ruled in Board of Education of the Scottsdale High School District v. Scottsdale Education Association in 1972, that:

> A school board exceeded its powers by negotiating a collective bargaining agreement with a teachers' union covering salaries and providing impasse procedures, since, absent any statutory authority to do so, a public school board may not delegate its powers to manage and control the school system to the employees or their representatives.[43]

But this court did present the point that the parties could meet and consult which would be more a form of communication than bargaining.[44] Lastly, in City of Fort Smith v. Arkansas State Council No. 38, AFSCME (1968) the Arkansas Supreme Court ruled that "in the absence of a statute to the contrary a municipality or other political subdivision is under no

legally enforceable duty to bargain collectively with its employees about wages, hours, or working conditions."[45] The court concluded that such matters were legislative and the responsibility cannot be delegated or bargained away. In summary, the first legal position, which will be called the majority position since more or most courts hold with its ideas, sets forth the point that bilateral relations can only be established upon specific legislative authorization. Now what about the statutes that have been passed? How have the courts ruled on them?

In State of Wyoming v. City of Laramie (1968) the Wyoming Supreme Court upheld the legislation permitting fire fighters of any city, town, or county to engage in bilateral activities. The court continued by referring to cities as creatures of the state and that "certainly the state can direct cities to submit labor disputes with firemen to arbitration, and the consent or lack of consent of the city would be immaterial."[46] The New York State Court of Appeals not only upheld the Taylor Act as being constitutional, but also the strike ban in City of New York v. DeLury (1968) during the sanitation workers strike of that year.[47] In State ex rel Missey v. City of Cabool the Missouri Supreme Court upheld the "meet, confer, and discuss" statute effective April 14, 1969. The court also stated that

this procedure was nothing more than a method of communication because the discretion of the legislative body as concerned approval or disapproval of the final agreement was untouched.[48] In Lullo v. International Association of Fire Fighters Local 1966 (1970) the New Jersey Supreme Court upheld the New Jersey Employer-Employee Relations Act effective April 1, 1969, in a case involving a challenge to the statutes' provisions on exclusive representation and collective negotiations.[49] In summary then, courts have held that bilateralism is constitutional or legal when it is established by the appropriate legislative body.

On the other hand, the second legal position contends that the employer has the implied power to engage in bilateral activities from its position of an employer. In Chicago Division of Illinois Education Association v. Board of Education of City of Chicago (1966) the Illinois Appelate Court held that the "Chicago Board of Education does not require statutory authority to enter into a collective bargaining agreement with a bargaining agency selected by its teachers."[50] This ruling was supported in 1970 when the Iowa Supreme Court held in the case of State Board of Regents, State of Iowa, v. United Packing House Food and Allied Workers, Local No. 1258 that:

> the Iowa Board of Regents, which operates state institutions of higher learning, has implied power

> to engage in "collective bargaining" with union, as constructed to mean that Board may voluntarily meet, confer, and consult with union in order to make its judgment as to wages and working conditions; however, Board does not have implied power to agree to exclusive representation by union; but Board may enter into written contract with union so long as its terms are within statutory authority of Board and contract contains no terms of employment that could not be included in standardized contract for individual employees.[51]

Therefore, from these two cases, the second position holds that public employers can engage in bilateralism, with the exception of exclusive representation, with the employees within the normal employment situation.

In summary, courts have presented four points of interpretation which influence bilateralism. First, that public employers cannot prevent their employees from joining unions, based on the First and Fourteenth Amendment's implied right of association. Second, any legislation passed by the state dealing with private bilateralism does not apply to public bilateralism except, of course, in those cases where the legislature sees fit to combine them. Third, public agencies do not have the right to engage in bilateral activities outside of legislative authorization (which is based upon the concept of sovereignty discussed earlier). Fourth, public agencies can engage in bilateral activities by implication of their position of employer; but this fourth point must be remembered as a very distinct minority position.

The author is supportive of the first legal position, since it is much more desirable, perhaps even necessary, to preclude ultra vires suits against bilateral activities taken or engaged in based only on implication.[52] Bilateralism by implication (second legal position) is also less desirable since the Iowa court upheld meeting and conferring but not exclusive representation which is a main support to union security. It is hoped that both public employers and public employee unions will work together in gaining passage of legislation since bilateralism has come of age, and such legislation will allow the parties to enter bilateralism without doubts of its limits, a result if bilateralism occurs by implication. Again it must be remembered that for bilateralism to work with the least threat of disruption of public services, all parties concerned must approach bilateralism from a mature, positive position. A mature, positive position is one based upon mutual respect, a desire to make the new relationship work, and each party accepting the other as equal. For to enter in any other stance will assuredly inject conflict into a relationship inherent with conflict, and unnecessary conflict will render the job of compromise all the more difficult.

State v. Federal Mandating

To continue the development of the line of thought in

the preceding section (the need for legislation to establish bilateralism), the question arises as to which unit of government should mandate bilateralism. Has bilateralism so developed nationally that the federal government should pass a national public employee Wagner Act, or should bilateralism be left to develop piecemeal in the respective states? Reference was made to this problem earlier, but now the question needs to be dealt with in detail and perhaps settled.

First, the problem is approached from the national perspective. When research was conducted for my master's thesis several union representatives made reference to proposed legislation awaiting a more favorable climate before Congress. Reference was made earlier to the Rhodes-Johnston bill before Contress during the 1950's, but the late 1960's and 1970's have witnessed quite a concerted effort to have such legislation passed. The American Federation of State, County, and Municipal Employees (AFSCME) had introduced before the 91st Congress by Representative Jacob H. Gilbert (D-NY) and before the 92nd Congress by Representative William Clay (D-Mo) their proposed "National Public Employee Relations Act."[53] The National Education Association (NEA) introduced their "Professional Negotiations Act for Public Education" by way of Senator Lee Metcalf (D-Mont.) on April 25, 1969.[54] Although such

legislation has not gained passage to date, as long as the effort is made it is only a matter of speculation when such legislation might gain passage. But perhaps more meaningful to the efforts in Congress is the Supreme Court case of Maryland v. Wirtz.[55] This case is important since such federal legislation mandating state and local personnel policy will assuredly result in a test of its legality. The question is: Can the federal government mandate public bilateralism for state and local government? Would such legislation violate the federal principle and sovereign position of the state and local units of government in respect to their employees?

The case of Maryland v. Wirtz was occasioned by the 1966 amendments to the Fair Labor Standards Act (1938) which redefined employer (as used in the Act) to cover such employment as hospitals, institutions, and schools of states and their subdivisions as to minimum wages and payment for overtime. Twenty-eight states joined in a suit contending that such federal legislation was an unconstitutional encroachment on the prerogatives of the states by the use of the commerce power. Justice Harlan delivered the opinion of the Court with Justices Douglas and Stewart dissenting.[56]

Justice Harlan supported the extension using the "enterprise concept" derived from the 1961 amendments to the original

act. The enterprise concept is based upon the 1961 definition of protected employees as being those "employed in an enterprise engaged in commerce or in the production of goods for commerce." To make the connection Justice Harlan then stated that there was substantial "effect" upon interstate commerce by such employees and that therefore coverage was constitutional. The effect was derived from the fact that such institutions are major users of goods handled in interstate commerce. He established a rational basis for extension by stating that strikes and work stoppages in such employment would interrupt and burden such interstate flow of goods. Justice Harlan contended that regardless of the governmental or proprietary character of the function, when Congress is acting constitutionally within a delegated power such legislation is superior to state claims to the contrary. He continued by stating that when states and local units of government engage in public activities connected to other activities validly regulated by Congress in the private sector that Congress may be forced to regulate such public activities. He concluded by contending that the Supreme Court would not carve up the commerce power to exempt state and local functions performed as a benefit to their citizens as long as a rational basis for such regulation can be established.[57]

Justice Douglas dissented (with Justice Stewart concurring) by contending that Justice Harlan failed to give proper weight to the fact that functions of sovereign entities were being dealt with and that he only relied upon a "rational basis" for extension and support. They contended that the immense scope thus given the "enterprise" concept in relation to governmental functions was such that:

> If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress commit the States to build super-highways criss-crossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid "disruptive effect(s) . . . on commercial intercourse?"[58]

The Advisory Commission on Intergovernmental Relations (ACIR) published in March, 1970, a year-long study on state and local labor-management relations, with Recommendation Sixteen dealing with federal mandating. This recommendation states:

> The Commission recommends that Congress desist from any further mandating or requirements affecting the working conditions of employees of state and local governments or the authority of such jurisdictions to deal freely or to refrain from dealing with their respective personnel.[59]

The ACIR recommendation is based upon the idea that federalism is dealt a crippling blow by such efforts. The report contends that the federal government can best serve this mutual area of interest, since it is also participating in bilateralism, by encouraging the adoption of bilateralism by state and local units of government. The Intergovernmental Personnel Act (1969) is now being used by all units of government to upgrade their personnel, so what better place than through this established procedure to advance bilateralism in all of government by training their personnel to handle such activities.[60]

Now for the state aspect of the mandating problem. The ACIR report contained five (of fifteen) recommendations for the states in establishing bilateralism. Recommendations One, Four, Five, Seven, and Fifteen urges the following action: that legislation be passed permitting employees to join or not to join organizations and permitting these organizations to then represent the employees; that a "bill of rights" be established to help insure democracy and financial soundness in such organizations; that a single piece of legislation is preferred over a fragmented approach of passing legislation for separate classes of public employees; that both state and local employees be treated uniformly and that the basics of the merit system be protected; and lastly, that the mandating of the

terms and conditions of bilateralism or the employment situation be kept to a minimum to allow proper discussion of mutual interests between the parties.[61]

The American Federation of Teachers and the AFSCME have both developed model laws which states can adopt to establish bilateralism around collective bargaining. Additionally, the ACIR has developed both "meet and confer" and "collective negotiations" model bills for adoption.[62] At this time thirty-five jurisdictions are in the process of implementing seventy-two statutes establishing bilateralism. This variety of approaches underscores the diversification in public bilateralism.

The author contends that such experimentation now being conducted by these units of government in bilateralism would be lost by federal mandating. It is believed that the value of national legislation is much less than the value of development by diversification even if this means confusion in the area for a while. How much better to have a period of confusion with experimentation in final offer arbitration in Michigan (F-P) and Minnesota (PE-T) or the limited strike in Alaska (PE), Hawaii (PE-T), Montana (N), Pennsylvania (PE-T), and Vermont (ME-F), for example, than a lock-step approach from federal mandating. This burden of confusion falls on employer and employee organization alike since both are now

"muddling through" bilateralism. It is through the confusion of diversification now that public bilateralism in the future will emerge eventually.

General Outline of Chapters

This study will be composed of eight chapters. In general reference, the first chapter introduced the reader to the subject matter, while the last chapter will draw the material together, reach conclusions, and examine the influence of bilateralism on the merit system. The intervening chapters cover the administrative machinery for implementing bilateralism, recognition, collective bargaining, resolution of impasses, the strike, and unfair labor practices and procedures for handling complaints.

Chapter II is an examination of the administrative machinery used by the respective jurisdictions to implement bilateralism. Seventeen jurisdictions have created new machinery to handle implementation while fourteen made use of existing state labor machinery. Although the main area of study is the powers and duties assigned these administrative agencies, other points of study will be the composition, qualifications, method of appointment, and term of office of these agencies' officials. This material will introduce the reader to the diversification of administrative machinery in public bilateralism.

Chapter III will study the recognition of employee organizations. One area examined here is the determination of the appropriate unit in which to recognize an employee organization. Provisions vary from the very simple to the very complex. The statute in Delaware (PE) contains a very short definition and a few criteria for determination, while the California (LA), Hawaii (PE-T), Kansas (PE), and Nevada (LE-T) statutes are detailed in definition and criteria.[63] A particularly vexing problem is in placing the dividing line between supervisory and non-supervisory personnel. The latter are covered by the statutes while the former are generally not covered. The prohibition of a supervisors' union does have some exceptions, with the Nixon Executive Order (11491) allowing them at the federal level while several states, among them Minnesota (PE-T) and Wisconsin (SE) and (ME-T), also allowing supervisory unions. Another point of analysis are the provisions for representation elections. What are the criteria for such elections? The chapter is concluded with an examination of three aspects of union security, i.e., the union shop, the agency shop, and the check-off of dues and other assessments.

Chapter IV is an intense analysis of the heart of the public employee movement--collective negotiations. The descriptive term, collective negotiations, is used synonymously with

a multitude of other terms used to describe the heart of bilateralism in the various statutes. Some statutes simply call for negotiations or bargaining, others specifically provide for collective bargaining, meet and confer, professional negotiations, and meet and negotiate for example. One very important area of examination is the scope of negotiable items. Many statutes simply provide for negotiations over wages, salaries, and other terms and conditions of employment while other statutes are very specific. Another area of analysis will be the rights retained by management. What are these rights? Federal E.O. 11491 and many statutes at the state level are very specific as to the rights of management, while others are vague or silent. A developing point of controversy is the amount of publicity allowable in public negotiations. Decisions and opinions run both ways over providing either secrecy or public hearings (based on state laws precluding executive sessions). How is this problem to be handled? Lastly, the chapter analyzes the provisions for contract interpretation.

Impasse resolution is the subject area of Chapter V. From a preliminary analysis of the various sections setting forth impasse resolution procedures, the only statement that can be made is that they are extremely diverse. This

diversity is captured in fourteen classes presented in Table 5-1. These classes were established in an effort to group like procedures. Final-offer arbitration is Class 13, while binding arbitration is Class 12. The phased application of mediation, fact-finding, and arbitration is found in Classes 2, 3, and 4, while the non-phased application is found in Classes 5, through 9. The single application of mediation, fact-finding, and arbitration is found in Classes 1, 10, and 11. Class 14 contains four jurisdictions that do not specify any procedures other than contacting the appropriate administrative agency or board for assistance.

Chapter VI is devoted to the strike. A study of the data indicates thirty states and the federal government prohibit the strike. Analysis of fifty-two provisions will be made ranging from concise prohibiting statements to elaborate procedures for handling the strike. Five states at this time provide for the strike (all with certain qualifications). Alaska (PE) attempts to divide its employees into three categories: those that cannot strike, those that can strike for a limited time, and those that can strike for extended periods. Hawaii (PE-T) requires that several steps must be taken before a strike is allowed, i.e., all provisions for resolution of disputes and unfair practices must be exhausted, sixty days must have

elapsed after a fact-finding board makes its report public, and the exclusive representative has given ten-day notice. But the state can still proceed to enjoin a strike if the public's health, safety, and welfare is endangered. Montana (N) allows nurses to strike providing that no two strikes occur within 150 miles of each other and that thirty day written notice is given. Pennsylvania (PE-T) allows its public employees to strike after dispute procedures have been exhausted, with the exception that public health, safety, and welfare cannot be endangered. In Vermont (ME-F), municipal employees can strike, but again with the limitations that public health, safety, and welfare must be protected. There are twenty-one statutes which are silent on the strike.

Employer and employee unfair labor practices and the procedures for handling complaints is contained in Chapter VII. Unfair practice provisions are established to instruct all participants of activities which can be engaged in only under threat of exposure and sanction. Unfortunately, such specifications are needed to help maintain a certain degree of decorum in bilateralism. The analysis of specifications and procedures from twenty-two states, three cities, and the federal government forms the base for this chapter.

The influence upon the merit system is examined within the last chapter. One of the initial fears expressed when

public employee unions became more active was that the merit system would be thrown out for some type of negotiated testing, grading, placement, promotion, demotion, etc. This initial fear has not turned out to be the case. The general consensus is that the heart of the merit system must be retained, but the major problem is defining the heart of the merit system and then defending it against any union encroachment.

Footnotes

[1]See Appendix B for a listing of the thirty-six jurisdictions and the seventy-four items of data used as the primary data base for this dissertation. Appendix C can be referred to for the coverage of these data.

[2]Elbert T. Dubose, Jr., "Public Employee Unionization in San Antonio, Texas: A Case Study," (unpublished M.A. Thesis, Texas Technological College, 1969).

[3]Kurt L. Hanslowe, The Emerging Law of Labor Relations in Public Employment (Ithaca, New York: Cayuga Press, 1967), p. 11. (Hereafter referred to as Hanslowe, Emerging Law.)

[4]The extent of bilateral decision-making is highlighted by the presentation in Chapter IV on the scope of bargaining and the rights of management.

The extent of labor rejection of sovereignty and unilateralism can be seen in a statement made by Jerry Wurf, President of the American Federation of State, County, and Municipal Employees before a conference called by Secretary of Labor Wirtz on November 22, 1971. "When you strip it down, the concept of sovereignty means only one thing as far as labor relations are concerned, and that is that the boss will call the shots. The concept is unacceptable to the employee of government." Vital Speeches, XXXVIII (January 15, 1972), p. 221.

Felix Nigro also contributes to the idea of the change from unilateralism to bilateralism when he wrote: "Sovereignty is not being discarded; rather, it is rapidly being redefined in such a way as to make it compatible with the supreme power of the state to show the supreme wisdom of doing the right thing." "The Implications for Public Administration," Public Administration Review, XXVIII (March/April, 1968), p. 141.

[5]John Bloedorn, "The Strike and the Public Sector," Labor Law Journal, XX (March, 1968), p. 152.

[6]This trend is well stated in the following works: Lynton K. Caldwell, "Conjectures on Comparative Public Administration," in Public Administration and Democracy, ed. by Roscoe C. Martin (Syracuse: Syracuse University Press, 1965), pp. 230-234, and Keith M. Henderson, "Comparative Public Administration: The Identity Crisis," in The Dimensions of Public Administration: Introductory Readings, ed. by Joseph A. Uveges, Jr. (Boston: Holbrook Press, 1973), pp. 78-83. (Hereafter the Caldwell article is referred to as Coldwell, "Conjectures," while the Henderson article is referred to as Henderson, "The Identity Crisis.")

[7]Caldwell, "Conjectures," p. 240.

[8]Joseph A. Uveges, Jr., The Dimensions of Public Administration: Introductory Readings (Boston: Holbrook Press, 1973), p. 73.

[9]Ibid.

[10]Richard E. Holt and John E. Turner, The Methodology of Comparative Research (New York: The Free Press, 1970), pp. 5-6.

[11]Ferrell Heady, Public Administration: A Comparative Perspective (Englewood Cliffs, New Jersey: Prentice-Hall, 1966), p. 9.

[12]Claire Selltiz, et al., Research Methods in Social Relations (New York: Holt, Rinehart and Winston, 1965), p. 50.

[13]Henderson, "The Identity Crisis," pp. 88-89.

[14]Keith M. Henderson, "A New Comparative Public Administration," in Toward a New Public Administration: The Minnowbrook Perspective, ed. by Frank Marini (Scranton: Chandler Publishing Company, 1971), p. 247. (Hereafter referred to as Henderson, "A New Comparative Public Administration.")

[15]Fred W. Riggs, Administration in Developing Countries: The Theory of Prismatic Society (Boston: Houghton Mifflin, 1964), p. 24. (Hereafter referred to as Riggs, Prismatic Society.)

[16]Ibid., p. 11.

[17]Ibid., Chapter I.

[18]Ibid., p. 27.

[19]Truax v. Corrigan, 257 U.S. 312.

[20]Nimrod Raphaeli, Readings in Comparative Public Administration (Boston: Allyn and Bacon, 1967), p. 7.

[21]Caldwell, "Conjectures," pp. 235-238.

[22]Henderson, "A New Comparative Public Administration," p. 248.

[23]Riggs, Prismatic Society, pp. 403-404.

[24]Special attention is called to the type of footnoting that is used for these two sources. The footnoting will resemble that found in the professional literature. This form is: jurisdiction and coverage, publication, section, and page. Therefore, for the Bureau of National Affairs' publication Government Employee Relations Report found in their Reference File using Alaska for illustration is: Alaska (PE), RF-BNA-GERR, Section 23.40.010, 51:1111. The Commerce Clearing House's publication Labor Law Reporter used only for Connecticut and Pennsylvania is Connecticut (ME), CCH-LLR, Section 1, p. 53,165.

[25]Felix A. Nigro, Management-Employee Relations in the Public Service (Chicago: Public Personnel Administration, 1969). (Hereafter referred to as Nigro, Relations in the Public Service.)

[26]Ross E. Thoresen, "Public Employee Bargaining," Personnel News, XXXVII (January, 1971), p. 4.

[27]Advisory Commission on Intergovernmental Relations, Labor-Management Policies For State and Local Government (Washington, D.C.: Government Printing Office, 1970), p. 93. (Hereafter referred to as ACIR, Policies For State and Local Government.)

[28]Alaska (PE), RF-BNA-GERR, Section 23.40.200, 51:1113, Hawaii (PE-T), RF-BNA-GERR, Section 12, 51:2015-2016, Montana (N), RF-BNA-GERR, Section 9, 51:3512, Pennsylvania (PE-T), CCH-LLR, Sections 1001-1101, pp. 57,992-57,994, and Vermont (ME-F), RF-BNA-GERR, Section 1704, 51:5417.

Special Note: The reader is directed to Footnote No. 9 which helps explain the special footnoting used in this dissertation. The author is concerned that the reader understand the abbreviation following each jurisdiction, e.g., Alaska (PE). Alaska is the jurisdiction having a statute covering the public employees therein, i.e., the abbreviation (PE) stands for public employees. For greater explanation of other abbreviations used, the reader is directed to Appendix A. Once Appendix A is studied, the reader is then directed to Appendix C where all abbreviations for all jurisdictions are presented.

[29]Kansas (PE), RF-BNA-GERR, Section 13 (b) (8), 51:2515, Montana (N) RF-BNA-GERR, Section 3 (5), 51:3511, New Hampshire (P), RF-BNA-GERR, Section 105-B:11, II (i), 51:3814, Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.3.8 a (6), 51:4512, and Oregon (N), RF-BNA-GERR, Section 56 (5), 51:4615.

[30]Bureau of National Affairs, Basic Patterns in Union Contracts (Washington, D.C.: The Bureau of National Affairs,

1971), 77:1. (Hereafter referred to as Bureau of National Affairs, Basic Patterns.)

[31]Arthur Thompson and Irvin Weinstock, "White-Collar Employees and the Unions at TVA," Personnel Journal, XLVI (January, 1967), p. 21.

[32]Kenneth O. Warner and Mary L. Hennessey, Public Management at the Bargaining Table (Chicago: Public Personnel Association, 1967), p. 308, and Lew Fay, "The Middle Step Before Collective Bargaining Begins," Public Personnel Review, XXIV (October, 1963), p. 244. (The first source is hereafter referred to as Warner and Hennessey, Public Management.)

[33]See Alaska (PE), RF-BNA-GERR, Section 23.40.070, 51:1111, California (ME), RF-BNA-GERR, Section 3500, 51:1411, and Maryland (BLT), RF-BNA-GERR, Section 110, 51:2913. These three references are only illustrative of the many used to create the five items and one qualification.

[34]Ibid.

[35]Ibid.

[36]Ibid.

[37]70 LRRM 2732-2733. This is the Bureau of National Affairs' publication Labor Relations Reference Manual and is so noted in the professional literature.

[38]292 S.W. 2d 176.

[39]50 LC 51227. This is the Commerce Clearing House's publication Labor Cases and is so noted in the professional literature.

[40]44 LC 50455.

[41]52 LC 51371.

[42]Indiana, RF-BNA-GERR, 51:2314. The Attorney General of Colorado through his opinion No. 69-4382 of November 17, 1969, echoed similar thoughts.

[43]68 LC 52864.

[44]Ibid.

[45]59 LC 51981.

[46]68 LRRM 2043

[47]69 LRRM 2868.

[48]70 LRRM 3398.

[49]73 LRRM 2680. For other cases supportive of this line of thought see 68 LC 52864.

[50]54 LC 51620.

[51]Iowa, RF-BNA-GERR, 51:2411. For other cases supportive of this line of thought see 68 LC 52864.

[52]Ultra Vires suits are brought against an act or actions taken by a unit of government which are beyond the powers of that unit of government.

[53]RF-BNA-GERR, 51:201.

[54]RF-BNA-GERR, 51:223.

[55]392 U.S. 188.

[56]Ibid., p. 188.

[57]Ibid., pp. 193-199.

[58]392 U.S. 204, 205.

[59]ACIR, Policies for State and Local Government, p. 111.

[60]Intergovernmental Personnel Act, Statutes at Large, Vol. 84 (1969).

[61]Ibid., pp. 93, 98-99, 103, and 110.

[62]RF-BNA-GERR, 51:211, 241, 25, and 217.

[63]See Chapter Three.

CHAPTER II

ADMINISTRATIVE AGENCIES FOR IMPLEMENTING BILATERALISM

General Background

Decentralization was one very important aspect of Executive Order 10988 issued by President Kennedy on January 17, 1962. The Secretary of Labor was to aid in unit determination, the Civil Service Commission was to establish a training program, the two in combined efforts were to prepare the standards and code of employee conduct, while Section 13 (b) called for the establishment of a President's Temporary Committee on the Implementation of the Federal Employee-Management Relations Program. But despite all of this administrative machinery, Federal E.O. 10988 was essentially an agency head function with each agency in essence going its own way within the broad context of the Order. This lack of administrative supervision was a weakness of Federal E.O. 10988 and prompted many to raise the question about the establishment of a "NLRB" for public employees. This weakness of Federal E.O. 10988 was corrected by E.O. 11941 through its

establishment of the Federal Labor Relations Council (FLRC), the Federal Service Impasses Panel (FSIP), and providing a role for the Assistant Secretary of Labor for Labor-Management Relations. This administrative arrangement and other similar administrative arrangements are the topic of this chapter.

Recommendations Eight and Twelve of the ACIR Report called for the establishment of appropriate machinery to coordinate bilateralism and for the collection and exchange of data between and among both agencies and labor organizations. This machinery would aid in recognition, representation elections, impasse resolution, and other administrative matters for the proper and successful implementation of bilateralism.[1]

Thirty-eight administrative arrangements from thirty-three jurisdictions are analyzed to discuss their roles in the implementation of bilateralism. Of these thirty-eight arrangements, fourteen are newly created while nineteen made use of existing state labor machinery. Five jurisdictions, Kentucky (F), Maine (ME-T), Minnesota (PE-T), Oregon (N), and Federal E.O. 11491 use a combination of both existing machinery and new machinery. Table 2-1 indicates the administrative machinery both created and existing and the powers and duties of each. Again, before the reader gets further into the

Table 2-1.--Powers and duties of created and existing administrative arrangements for the implementation of bilateralism

Jurisdiction and Boards	Created x	Existing y	Powers and Duties: Determine Appropriate Unit a	Conduct Elections b	Unfair Practices c	Impasse Resolution d	Maintain List of Third Parties e	Hold Hearings f	Promulgate Rules and Regulations g
Alaska (PE)									
State Personnel Board (state personnel)		y	a	b	c	d		f	g
Department of Labor (all other personnel)		y	a	b	c	d		f	g

Table 2-1.--Continued

California (LE)								
Department of Conciliation in the Department of Industrial Relations	y	Used in absence of local procedure						
California (LA)								
Employee Relations Board	x	a	b	c	d	e	f	g
Connecticut (ME)								
State Board of Labor Relations	y	a	b	c			f	
State Board of Mediation and Arbitration	y				d			
Delaware (PE)								
Department of Labor and Industrial Relations	y	a	b					g
State Mediation Service	y				d			
Hawaii (PE-T)								
Public Employment Relations Board	x	a	b	c	d	e	f	g

Table 2-1.--Continued

Kansas (PE)								
Public Employee Relations Board	x		a	b	c	d	e	f	g
Kentucky (F)								
State Labor Relations Board	x		a	b	c			f	g
Commissioner of Labor		y				d			
Maine (ME-T)									
Public Employees Labor Relations Board	x		a	b	c			f	g
Board of Arbitration and Conciliation		y				d			
Panel of Mediators		y				d			
Maryland (Baltimore)									
Office of Labor Commissioner	x		a	b	c			f	g
Massachusetts (SE)									
Labor Relations Commission		y		b	c			f	

Table 2-1.--Continued

Director of Personnel and Standardization		y	a			d	f	g
Massachusetts (LE)								
Labor Relations Commission		y	a	b	c		f	
State Board of Conciliation and Arbitration		y				d		
Michigan (PE)								
State Labor Mediation Board		y	a	b	c		f	
Minnesota (PE-T)								
Public Employment Relations Board	x					d	e	g
Director of Mediation Services		y	a	b			f	
Missouri (PE)								
State Board of Mediation		y	a					
Montana (N)								
State Board of Health		y	a	b			f	g

Table 2-1.--Continued

Nebraska (PE)								
Court of Industrial Relations	x		a	b	c	d	e	f	g
Nevada (LE-T)								
Local Government Employee-Management Relations Board	x		a	b	c	d		f	g
New Hampshire (SE)								
Commission	x		a	b				f	
New Jersey (PE)								
Division of Public Employment Relations	x		a	b				f	
New Jersey Public Employment Relations Commission	x					d		f	g
New Mexico (SE)								
State Personnel Board		y	a	b	c	d		f	g
New York (PE-T)								
Public Employment Relations Board	x		a	b	c	d	e	f	g

Table 2-1.--Continued

New York (New York City)								
Office of Collective Bargaining	x				d	e		
Board of Collective Bargaining	x			c	d			g
Board of Certification	x		a	b			f	g
Oklahoma (P-F-ME)								
Public Employees Relations Board	x		a	b	c		f	g
Oregon (PE)								
Public Employee Relations Board	x		a	b		d	f	
Oregon (N)								
Commissioner of the Bureau of Labor		y	a	b	c			g
State Conciliation Service		y				d		
Public Employee Relations Board	x					d		

Table 2-1.--Continued

Pennsylvania (PE-T)								
Pennsylvania Labor Relations Board	y	a	b	c	d	e	f	g
Pennsylvania Bureau of Mediation	y				d			
Rhode Island (SE)								
State Labor Relations Board for Conciliation and Fact-Finding	y				d			
Rhode Island (ME)								
State Labor Relations Board	y	a	b		d			
South Dakota (PE)								
Labor Commissioner	y	a	b		d			
South Dakota (F-P)								
Labor Commissioner	y				d			
Vermont (SE)								
State Employees Labor Relations Board	x	a	b	c	d		f	g

Table 2-1.--Continued

Washington (LE)							
Department of Labor and Industries		y	a	b	c	f	g
Wisconsin (SE)							
Employment Relations Commission		y	a	b	c	d f	g
Wisconsin (ME-T)							
Employment Relations Commission		y	a	b	c	d f	g
United States (11491)							
Federal Labor Relations Council	x						g
Federal Service Impasses Panel	x					d f	g
Assistant Secretary of Labor for Labor-Management Relations		y	a	b	c	f	

Table 2-1.--Continued

United States (11636)								
Board of the Foreign Service	x						f	g
Employee-Management Relations Commission	x	a	b	c			f	g
Disputes Panel	x				d		f	

material, mention must be made of the Riggsian differentiation or diversification presented in the Chapter I section on methodology and hypothesis. With Chapter II being the first of seven chapters analyzing various points in bilateralism the reader is initially exposed to the reality of this diversification in bilateralism. The combination of new and created machinery and the various items examined well illustrate this major point of diversification which continually appears throughout this research.

The literature on administrative arrangements is practically nonexistent. Jean T. McKelvey has written perhaps the only article upon such arrangements in the January, 1967, issue of Industrial and Labor Relations Review.[2] She begins by stating the basic problem, i.e., "the extent to which public employment labor relations are or should be governed by the same agencies which regulate and help to adjust labor disputes in the private field."[3] She hypothesizes that the existing labor relations machinery will not be utilized as long as the differences between public and private bilateralism are emphasized. This hypothesis must be qualified in light of the research conducted here producing the fact that of the fifty-six separate boards performing some functions 55 percent or thirty-six of them are existing state labor

relations boards. Only 45 percent or twenty-five of the fifty-six would support her hypothesis which is almost no support at all.

A first corollary contends that if professional groups such as the National Education Association (NEA) or other similar groups of professionals not having affiliation with organized labor have a greater voice than private unions in public bilateralism, then new administrative machinery will be created rather than using existing machinery. The tendency to create new machinery is based on the professional groups' suspicion of labor unions in the private sector and of not wanting to be associated with craft or trade unions. Secondly, if the permissive legislation establishing bilateralism limits the scope of negotiable items, then a new breed of mediator is necessary to handle public bilateralism instead of similar individuals in private bilateralism accustomed to almost unlimited scope.[4]

She presents, in conclusion, four points which need to be taken into consideration before using either existing machinery or creating new administrative machinery. First, the experience and expertise of existing labor agencies could be easily transferred to public bilateralism, and, secondly, it should be more economical and efficient by not having a

duplication of functions. Third, since many of the unions operating in the public sector have association with private labor unions, they should be familiar with existing machinery and be able to work within that structure unless the existing machinery is held in contempt because of past decisions and practices. Fourth, the new activity may regenerate a staid agency grown old and antrophied.

Contrariwise, first, there is sufficient difference between public and private bilateralism to warrant separate administering agencies and, secondly, public employees and professional groups still hold private unions with some suspicion and would rather not be that close in association. Third, the existing agency may be understaffed and unable to handle an increase in bilateral activities. Fourth, a new agency may be the place to allow innovative thinking instead of an old line trade or craft union organization which may not have had a new idea in years.[5]

New or existing, the jurisdictions studied break about even between the two alternatives. Although this study does not get into why each jurisdiction made its selection (a good topic for subsequent research) it will examine the structure, method of appointment, qualifications, term of office, powers, and duties of these boards.

Analysis and Comparison

The differentiation and diversification mentioned in the first chapter is very evident in this analysis of the administrative machinery established in implementing bilateralism. Although there are a few common points, the differences are more evident. This can readily be illustrated by the composition of the created boards. Data from the statutes using existing administrative machinery are analyzed only in association with the powers and duties of the boards, since other data was absent in the statutes dealing with these boards.

Two jurisdictions, New Hampshire (SE) and Federal E.O. 11491 and E.O. 11636, specify the membership of their boards. In New Hampshire the three member Commission is composed of the Chairman of the State Personnel Commission, the Commissioner of Labor, and the Secretary of State. The three vote to determine the chairman of the Commission.[6] The Federal Labor Relations Council (FLRC) is composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget (OMB) with the first mentioned serving as chairman.[7] The Board of the Foreign Service is the foreign service's counterpart to the civil service's FLRC but with its membership not mentioned directly. Its membership is implied by the composition

of the Employee-Management Relations Commission (EMRC) composed of representatives from the Board representing the Civil Service Commission, the Department of Labor and the OMB.[8] This is in contrast to Federal E.O. 11491 specifying membership on the FLRC and allowing the President to nominate members and designate the chairman of the Federal Services Impasse Panel (FSIP).

Several jurisdictions have their chief executive appoint the membership of their boards. The Court of Industrial Relations handles implementation for Nebraska (PE) with the governor appointing the five judges with the advice and consent of the legislature.[9] The Los Angeles Employee Relations Board is composed of five public members appointed by the mayor with city council approval, while Kentucky (F), Nevada (LE-T), New Hampshire (SE), New York (PE-T), Oklahoma (P-F-ME), and Vermont (SE) all have three member boards appointed by their governors with New York and Vermont requiring legislative advise and consent.[10]

Of the remaining machinery, their distinction is multi-membership but on a different ratio, i.e., the 1+1+1 of Hawaii (PE-T) and Maine (ME-T) means one labor member, one management member, and one public member. The Kansas (PE) Public Employee Relations Board is 1+1+3, the Minnesota (PE-T)

Public Employee Relations Board is 2+2+1, while New Jersey (PE-T) and New York City are 2+2+3.[11] Generally the chairman is selected from among the public members or is the lone public member. Four jurisdictions, Kansas (PE), Nevada (LE-T), New York (PE-T), and Vermont (SE), specify that their boards are not to be composed of members from the same political party greater than two of three or three of five.[12]

The terms for such boards can be seen in Table 2-2. The Office of Labor Commissioner in the City of Baltimore has a term of office concurrent with the mayor, with the terms of office for those designated persons contingent upon any specified terms or continued approval of their appointing superiors.[13]

Table 2-2.--Terms of boards

3 Years	4 Years	5 Years	6 Years
New Jersey (PE)	Kentucky (F)	Los Angeles	Hawaii (PE-T)
New York City	Maine (ME-T)	Oklahoma	Kansas (PE)
	Minnesota (PE)	(P-F-ME)	Nebraska (PE)
	Nevada (LE-T)		New York (PE)
			Vermont (SE)

There are few specified qualifications for membership. Los Angeles specifies a broad experience in labor relations and impartiality to protect the public interest. Kentucky (F) requires its members to be an elector in the state one year

preceding appointment, while Vermont (SE) stipulates one year of residency with no connection with an employee organization or employment with the state for three years immediately preceding appointment. Nebraska (PE) requires experience in legal, financial, labor and industrial relations.[14]

The powers and duties of these boards and existing machinery can be grouped into the following seven general areas, i.e., determination of the appropriate unit, conducting representation elections which includes both certification and decertification, unfair practices procedures, impasse resolution procedures, maintaining a list of third parties and mediators, holding of required hearings, and promulgation of such rules and regulations necessary to carry out their duties. In situations with one board operating within one jurisdiction all these duties are handled by it, but in those jurisdictions with two or even three separate boards operating the duties become scattered with some performing review of others' activities. In Massachusetts (SE) and (ME-T), the Labor Relations Commission handles appropriate unit determination for local employees while the same function for state employees is performed by the Director of Personnel and Standardization. The Labor Relations Commission performs representation elections and unfair procedures for both state and local

employees. Impasse procedures for the state employees are handled by the Director of Personnel and Standardization, while the State Board of Conciliation and Arbitration handles impasse procedures for local employees.[15]

The New York City arrangement is headed by the Director of the Office of Collective Bargaining, who is the Chairman of the Board of Collective Bargaining. The Board of Collective Bargaining is composed of two city members appointed by the Mayor to serve at his pleasure, two labor members designated by the Municipal Labor Committee, and three impartial members determined by vote of the other four members. The Board of Certification located within the Board of Collective Bargaining is composed of the three impartial members of the Board of Collective Bargaining. The Board of Collective Bargaining has the power and duty to interpret the application of the New York City statute, make final determination on scope, handle unfair labor practice complaints, determine if a dispute is a proper subject for an arbitration procedure, and review rejected recommendations of an impasses panel as well as other things. The Board of Certification (see above) is charged with appropriate unit determination and conducting of representation elections. The Director of the Office of Collective Bargaining is to oversee the provision of the

statute, administer provisions of the Board of Certification, facilitate collective bargaining, and engage in impasse procedures when necessary.[16]

At the national level, Federal E.O. 11491 established the Federal Labor Relations Council (FLRC) composed of the three persons mentioned earlier and has the powers and duty to administer and interpret the Order, consider appeals from decisions of the Assistant Secretary of Labor, consider appeals on negotiability issues, consider exceptions to arbitration awards, and handle other matters deemed appropriate to carry out the Order. The Federal Service Impasses Panel (FSIP) is composed of three persons appointed by the President to consider negotiation impasses. The Assistant Secretary of Labor for Labor-Management Relations shall decide questions on appropriate units, supervise representation elections, decide questions as to national consultation rights, handle unfair labor practices complaints, and decide whether grievances shall be subject to negotiated procedures or subject to arbitration under an agreement.[17] Federal E.O. 11636 also prescribes a three unit organization for the foreign service, with the Board of the Foreign Service as a counterpart to the FLRC, the Employee-Management Relations Commission as a counterpart to the Assistant Secretary of Labor, and a

Dispute Panel as a counterpart to the FSIP. The big difference is in the composition of the Dispute Panel. The Chairman of the Board of the Foreign Service shall establish a panel composed of two members of the Foreign Service (neither of whom are considered management), a confidential employee or an organizational official, one public member, and one representative each from the Department of Labor and the FSIP. The chairman of the Panel is designated by the Board Chairman. The Panel then makes a finding of fact and recommendations which is reported to the Board for its consideration.[18]

These four examples are only illustrative of the machinery established to implement bilateralism. It may sound confusing and in many cases it is. But how does it correlate with the administrative machinery established to handle industrial labor-management relations. For purposes of illustration the administrative machinery of the federal government is used, i.e., the National Labor Relations Board (NLRB) and the Federal Mediation and Conciliation Service (FMCS). If these two organizations had been placed on Table 2-1 the NLRB would perform all powers and duties except impasse resolution and maintaining a list of third parties.[19] How does this split responsibility compare with the public sector? Referring to the data in Table 2-1, eleven jurisdictions having thirteen

statutes provide for a similar split in responsibilities, while fourteen jurisdictions having sixteen statutes provide for a combining of these functions and responsibilities. Both federal provisions are in the split responsibility category. It is of interest that seven jurisdictions having a like number of statutes do not provide for the resolution of impasses, but do provide other means discussed in Chapter V.

In conclusion, the Riggsian prism of bilateralism has produced many and varied administrative arrangements for the implementation of bilateralism. All one need do is refer to Table 2-1 for confirmation of the above observation. What does this congeries of administrative arrangements mean to the future of bilateralism? The data are still incomplete since for many jurisdictions the advent of bilateralism is a fairly recent phenomena, e.g., the federal administrative arrangements have been operating only since 1971. But since the NLRB and the FMCS have been successful in implementing the federal government's part in private bilateralism, the author can foresee no great difficulties for similar public arrangements.

One major responsibility of the boards established to implement bilateralism is the determination of an appropriate bargaining unit and conducting elections or similar procedures for determining which employee organization will represent the

unit or if the employees in the unit desire representation at all. Also, the aspect of unit security, i.e., union shop, agency shop, check-off, and exclusive representative, are analyzed in the next chapter.

Footnotes

[1]ACIR, Policies for State and Local Government, pp. 104 and 108.

[2]Jean T. McKelvey, "The Role of State Agencies in Public Employee Labor Relations," Industrial and Labor Relations Review, XX, No. 2 (January, 1967), pp. 179-197.

[3]Ibid., p. 197.

[4]Ibid., p. 182.

[5]Ibid., pp. 182 and 195-196.

[6]New Hampshire (SE), RF-BNA-GERR, Section 98-C:1,III, 51:3811.

[7]Federal (11491), RF-BNA-GERR, Section 4, 21:2.

[8]U.S. General Services Administration, National Archives and Records Service, Office of Federal Register, Weekly Compilation of Presidential Documents, Vol. 7, No. 52, December 25, 1971, Sections 4 and 5. (Hereafter referred to as Federal (11636), Weekly Compilation.)

[9]Nebraska (PE), RF-BNA-GERR, Section 48-804, 51:3611-3612.

[10]California (LA), RF-BNA-GERR, Section 4:810.a, 51:1418, Kentucky (F), RF-BNA-GERR, Section 13 (1), 51:2614, Nevada (LE-T), RF-BNA-GERR, Section 18, 51:3713, New Hampshire (SE), RF-BNA-GERR, Section 98-C1,III, 51:3811, New York (PE-T), RF-BNA-GERR, Section 205, 51:4113-4114, Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.4A, 51:4513, and Vermont (SE), RF-BNA-GERR, Section 921, 51:5412.

[11]Hawaii (PE-T), RF-BNA-GERR, Section 5 (a), 51:2021, Maine (ME-T), RF-BNA-GERR, Section 968.1, 51:2813-2814, Kansas (PE), RF-BNA-GERR, Section 3 (a) (b) (c), 51:2512, Minnesota (PE-T), RF-BNA-GERR, Section 12 (1) (2), 51:3216, New Jersey (PE-T), RF-BNA-GERR, Section 34.13A-5 (2) (a) (b), 51:3912, and New York (NYC), RF-BNA-GERR, Section 1170-1172, 51:4161.

[12]Kansas (PE), RF-BNA-GERR, Section 3 (a), 51:2512, Nevada (LE-T), RF-BNA-GERR, Section 18.1, 51:3713, New York

(PE-T), RF-BNA-GERR, Section 205.1, 51:4113, and Vermont (SE), RF-BNA-GERR, Section 921 (a), 51:5412.

[13]Maryland (BLT), RF-BNA-GERR, Section 112, 51:2913.

[14]California (LA), RF-BNA-GERR, Section 4.810 (b), 51:1418, Kentucky (F), RF-BNA-GERR, Section 13 (2), 51:2614, Vermont (SE), RF-BNA-GERR, Section 921 (a), 51:5412, and Nebraska (PE), RF-BNA-GERR, Section 48-805, 51:3612.

[15]The duties and powers are not specified in one section but are scattered throughout the statutes. Refer to Massachusetts (SE) and (ME-T), RF-BNA-GERR, 51:3011-3015.

[16]New York (NYC), RF-BNA-GERR, Sections 1170-1174, 1173-5.0-1173-6.0, and 1173-8.0 (a), 51:4161, 4164-4165, and 4167.

[17]Federal (11491), RF-BNA-GERR, Sections 4-6, pp. 1689-1690.

[18]Federal (11636), Weekly Compilation, Sections 4-6, pp. 1689-1690.

[19]Labor-Management Relations Act of 1947, U.S. Code, Vol. 7, Title 29, Sections 153-156, 159-162, 164, and 172 (1970). (Hereafter referred to as Labor-Management Act of 1947.)

CHAPTER III

RECOGNITION

General Background

Recognition is a multifaceted process. Based upon the employee's right to organize, the employees approach the employer to establish a formal bilateral relationship. This formal relationship is based upon the determination of the appropriate unit, the conducting of a representation election to determine the organization to represent the unit, and the granting of union security.

The determination of the appropriate unit is quite important, for through this process it is determined how the employees will be grouped or how the public organization will be divided for purposes of collective negotiations. This procedure will determine how many separate groups public management will have to deal with, how many separate contracts will have to be implemented, and how many separate chances there are for something to go wrong. The problem is further complicated when supervisory, professional, managerial, confidential, and

essential employees are brought into the picture. Caution and much consideration will need to be applied in the handling of these variables.

After the unit is delineated comes the process of determining the organization that will represent the employees therein. Although this would seem to be an easy process of election or other means of determination, strife will assuredly result unless all parties concerned respect the system used. Representation selection carries with it the idea that the employees can select the organization of their own choosing or select not to be represented by any organization. Along with unit determination and representative selection comes the important aspect of union security. Items within the scope of union security are exclusive representative status, union and agency shop, and check-off. If the organization selected is granted exclusive status, its position cannot be challenged for a specified period and is secure to deal with its counterpart without having to protect its existence. The union shop provides the organization greater membership security by requiring membership in the organization as a condition for keeping the position, while the agency shop provides the organization greater financial security by requiring the payment of a service fee to the organization for the administration of the

contract and any benefits derived but with membership not required. Check-off allows dues or other specified deductions to be taken from the employee's paycheck upon proper authorization and paid directly to the organization.

The preceding topics are the substance of this chapter. Expressed in question form: What is an appropriate unit? How is the unit determined? How is the representative selected? What provisions are there for union security?

Appropriate Unit

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate . . ." begins Section 159 (b) of the Taft-Hartley Act.[1] In much the same way the administrative machinery established or existing for the implementation of bilateralism is also deeply involved in the determination of appropriate units for collective negotiations. About the only exceptions to this are in those statutes dealing with teachers or firemen that specify the units, leaving nothing for further determination. The Kansas (T) statute provides that "a unit including classroom teachers shall not be appropriate unless it includes all such teachers employed by the board of education, except administrative employees. A unit including administrative employees shall

include all administrative employees employed by the board of education."[2] The Idaho (F) statute states the appropriate unit means "the paid members of any regularly constituted fire department in any city, county, fire district, or political subdivision within the state."[3]

But specifically, what is an appropriate unit? The New Mexico (SE) provisions state that it is "the unit determined by an agency management together with the requesting employee organization and approved, rejected, or modified by the Board to be appropriately representative of a group of employees for the purposes of consultation or collective bargaining."[4] This may seem straightforward enough, but behind this definition lies a tremendous challenge. For not only does this problem area include the preceding data, but the information contained in the sections on supervisory, professional, confidential and managerial, and essential employees.

One major fear concerning appropriate unit determination is over-fragmentation or, as Wellington and Winter call it, "balkanization." This means that as a consequence of unit determination the units have so fragmented the employees that collective negotiations and the general implementation of bi-lateralism is exacerbated. Wellington and Winter contend that balkanization unnecessarily increases bargaining costs, and

creating or maintaining a rational and comprehensive compensation plan is threatened. If balkanization can be avoided, then hopefully excessive competition between competing employee organizations can be avoided or reduced to tolerable levels. They recommend that functional departments should not be broken into occupational units, but that departments having some autonomy with the organizational structure can be treated separately with justification.[5] This will require a management that is prepared for bilateralism and that has done its homework to prevent over-fragmentation. Vermont (SE), Wisconsin (ME-T) and (SE), Kansas (PE), Alaska (PE), and Pennsylvania (PE-T) specifically state in their statutes that over-fragmentation is to be avoided in unit determination.[6]

By definition an appropriate unit is that group of employees or a section of the organization which engages in bilateral activities. But how is the determination made? From an analysis of forty-nine statutes from thirty-three jurisdictions, the following nine general criteria have been established with each jurisdiction using and emphasizing them in a variety of ways. The most mentioned factor is a community of interest. Although this is quite general, Wellington and Winter present three ways of describing or defining a community of interest. First, look for employees working within a unified compensation

plan, or secondly, look for employees having a common set of procedures for such things as hiring, firing, and the handling of grievances. Lastly, determine if there are great occupation differences based upon such criteria as function, education, trade, craft, or little movement into another occupation.[7] Beyond these items the literature is quite skimpy with other criteria to aid understanding of the community of interest idea.

The second most mentioned criterion for unit determination which can be assessed in various ways is the desires of the employees and employer. Beyond these two main criteria, there is the history of collective bargaining or organization and the efficiency of the organization. New Mexico (SE) stipulates that the efficiency of the organization is the key criteria.[8] The wages, hours, duties, skills, and other working conditions plus the geographic location of the job can also be used. The level of supervisory activity and the preparation, qualification, and licensure for nurses are determinants. Maryland (BLT) stipulates that the position classification or group of classifications is prima facie support of an appropriate unit.[9] Most of these nine criteria can be seen in the California (LA) statute Section 4.822 (a), which is used as an illustration. The Employment Relations Board is to use the following and other criteria in determining the appropriate unit:

1. The community of interest of employees.

2. The history of employee representation in the unit, among other employees of the city, and in similar employment.

3. The effect of the unit on the efficient operation of the City and sound employee relations.

4. The extent to which employees have common skills, working conditions, job duties, or similar education requirements.

5. The effect on the City's classification structure of dividing a single classification among two or more units.

6. The right of professional employees to be represented separately from nonprofessional employees.

7. Management or confidential employees shall not be included in the same unit with other employees.[10]

Beyond these nine general criteria and the California (LA) provision for illustrative purposes, the Hawaii (PE-T) and Wisconsin (SE) statutes are specific as to the units which can be established.

Section 6 (a) of the Hawaii (PE-T) statute establishes thirteen categories which constitute appropriate units. These categories are:

1. Nonsupervisory employees in blue collar positions;

2. Supervisory employees in blue collar positions;

3. Nonsupervisory employees in white collar positions;

4. Supervisory employees in white collar positions;

5. Teachers and other personnel of the department of education under the same salary schedule;

6. Educational officers and other personnel of the department of education under the same salary schedule;

7. Faculty of the University of Hawaii and the community college system;

8. Personnel of the University of Hawaii and the community college system, other than faculty;

9. Registered professional nurses;

10. Nonprofessional hospital and institutional workers;

11. Firemen;

12. Policemen;

13. Professional and scientific employees, other than registered professional nurses.[11]

Categories nine through thirteen are designated optional appropriate units because of the nature of the work and the essentiality of these occupations. If employees in these categories desire, they can be included within categories one through four. By mutual agreement supervisory and nonsupervisory personnel can be combined in categories nine through thirteen, but if the supervisory employees are excluded, they

will fit into a unit based on categories one through four. The compensation plans and the appointment and classification of faculty existing on the effective date of the Hawaii (PE-T) statute (July, 1970) shall be "the basis for differentiating blue collar from white collar employees, professional from nonprofessional employees, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty."[12] The Hawaii Employment Relations Board has the final determination on appropriate units.

The Wisconsin (SE) statute provides that it is the legislative intent to avoid excessive fragmentation and, in accordance with this desire, statewide units are established among the following occupational groups:

1. Clerical and related;
2. Blue collar and nonbuilding trades;
3. Building trades crafts;
4. Security and public safety;
5. Technical;
6. Professional
    a. Fiscal and staff services;
    b. Research, statistics and analysis;
    c. Legal;
    d. Patient treatment;

e. Patient care;

f. Social services;

g. Education;

h. Engineering;

i. Science.[13]

The statute also provides that after July 1, 1974, the above units can be changed by petitioning the Employment Relations Commission, which must keep before it the legislative desire to avoid fragmentation but take into consideration the community of interests.[14]

In bringing this discussion to a conclusion before material is presented on supervisory, professional, confidential and managerial, and essential employees, four other generalizations are common among the data. Professional employees are to be separated from nonprofessional with inclusion only upon vote of the former. Craft employees are to be separated from noncraft employees, but again by vote they can be combined. Firemen, policemen, and guards are to be in separate units with special emphasis upon the policemen and guards, since security personnel could have a conflict of interest if combined with employees they must oversee. Generally, supervisory employees are to be in a separate unit, but as illustrated by the Hawaii (PE-T) statute, they can be combined.

Supervisory Employees

A supervisory employee means "any individual having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[15] This is the definition of a supervisory employee as found in the Hawaii (PE-T) statute, Taft-Hartley Section 152 (11), and eleven other statutes using the Hawaii (PE-T) statute definition as a model. Taft-Hartley Section 152 (3) excludes from the definition of covered employees supervisory employees, and this is echoed in Kansas (PE), Connecticut (ME), Rhode Island (ME), and Wisconsin (SE).[16] Although the definition of supervisory employees is fairly common when used, only four statutes specify in any detail other criteria to be used in making such a determination.

The Connecticut (ME) statute provides that the State Board of Labor Relations is to determine if a supervisory position is covered by the statute in the event of a dispute between the municipal employer and an employee organization.

In determining whether a supervisory position is excluded from coverage, the Board is to take the following criteria into consideration. The position must be characterized by principal functions of not less than two of these criteria. First, examine to see if the position requires the performance of such management control duties as "scheduling, assigning, overseeing, and reviewing the work of subordinate employees." Second, analyze the position to see if the duties performed are "distinct and dissimilar from those performed by the employees supervised." Third, determine if the position requires the exercise of judgment in adjusting grievances, the application of other established personnel policies and procedures, and enforcing provisions of a collective bargaining agreement. Fourth, determine if the position calls for establishing or participating in the establishment of performance standards and the implementation of such standards. The one qualifying provision is that the criteria shall not necessarily apply to police or fire departments.[17] The Executive Director of the Public Employee Labor Relations Board is to use the same criteria in implementing the Maine (ME-T) statute.[18]

The Hawaii (PE-T) statute stipulates that in differentiating supervisory from nonsupervisory personnel, job titles alone shall not be the basis for decision. Additionally, the

Public Employment Relations Board, having responsibility for unit determination, will also consider "the nature of the work, and whether a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees."[19]

The Michigan (PE) statute, in referring to firemen, states that "no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor."[20]

Not only are there few provisions for determining the first level of supervision, but few statutes provide any measure of supervisory bilateralism. Kansas (PE) Section 5, which is very similar to Taft-Hartley Section 164 (a), provides:

> Nothing herein shall prohibit any individual employed as a supervisory employee from becoming or remaining a member of an employee organization, but no public employer subject to this act shall be compelled to deem individuals defined herein as supervisory employees as public employees for the purposes of this act.[21]

Although these provisions allow supervisory employees to belong to such employee organizations, in both cases they are exempted from coverage of the act. But the supervisory employee provisions in the Minnesota (PE-T) statute stipulate they may join or participate in an employee organization or form their own organization, but are not authorized to be included in an

appropriate bargaining unit. A public employer shall not, and shall not be required to by the Director of Mediation Services, extend exclusive recognition to such an organization, but may "consult and otherwise communicate with such an organization on appropriate matters."[22]

Under the Pennsylvania (PE-T) statute, first level supervisors cannot require their public employers to negotiate with them or their representatives, but their employers shall be required to meet and discuss with them "on matters deemed to be bargainable for other public employers covered by this act."[23]

The Wisconsin (ME-T) statute carries the provision that until January 1, 1974, supervisors can remain members of labor organizations which contain nonsupervisors, but shall not participate in determining collective bargaining policies or the resolution of employees' grievances. After January 1, 1974, the supervisors shall not remain members of these organizations.[24]

The statute covering state employees in Wisconsin sets forth the provision that the Employment Relations Commission may consider a petition for a statewide unit of professional and nonprofessional supervisory employees. These organizations are not to be affiliated with other employee organizations, and their representatives are limited to bargaining over wages and fringe benefits.[25]

Federal E.O. 11491 provides for the renewal, continuation, or initial according of recognition to organizations of supervisors which have historically represented them and for the extension of exclusive representative status. Section 7 (e) provides for the establishment of a system of intramanagement communications with supervisors which has as its purpose "the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness, and the establishment of policies that best serve the public interest in accomplishing the mission of the agency."[26]

Charles T. Schmidt contends that supervisory employees need to organize and be represented to protect themselves from the pressures both above and below resulting from bilateralism. Perhaps, he continues, through their own negotiations any fear of bilateralism will be lessened. This author heartedly concurs with these ideas.[27]

Professional Employees

A professional employee is defined by eleven different jurisdictions and Taft-Hartley Section 152 (12) as meaning:

A. Any employee engaged in work:

1. Predominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical or physical work.

2. Involving the consistent exercise of discretion and judgment in its performance.

3. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given time period.

4. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

B. Any employee who:

1. Has completed the courses or specialized intellectual instruction and study described in Number Four of A.

2. Is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in A.[28]

Professional employees are generally covered by the statutes except in those cases where these employees fall in the supervisory category. Generally, as was shown in the material on appropriate units, professional can be joined with nonprofessional employees only if they so declare by vote.

The only statute to provide separate treatment for professional employees is the Minnesota (PE) statute. Section 13 thereof states:

> The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under Section 3, subdivision 18 of this act.[29]

Section 3, subdivision 18 provides that the term "terms and conditions of employment" means the compensation and economic aspects of employment, but not the educational policies of school districts. The scope of this professional negotiation is further limited by the management rights found in Section 6.[30]

The professionals are to select a representative to meet and confer at least once every four months in facilities provided and at a time set by the employer. The Public Employment Relations Board, upon petition by the parties, is to submit a list of qualified consultants in the areas taken under consideration by the parties. Either party can select its own consultant, or both parties can select by mutual efforts one consultant which provides advisory opinions to the parties. These consultants are to be compensated equally by the parties at a rate not to exceed $100 per day plus necessary expenses agreed to by the parties.[31]

Confidential Employees

A confidential employee, using the Kansas (PE) statute as a model, means:

> . . . any employee whose unrestricted access to confidential personnel files or other information concerning the administrative operations of a public agency, or whose functional responsibilities or knowledge in connection with the issues involved in the meet and confer process, would make his membership in the same employee organization as other employees incompatible with his official duties.[32]

Confidential employees, and in this section managerial employees are generally included, are to be determined by the Personnel Department of Los Angeles with any dispute over such determination taken to the Employee Relations Board.[33] The relationship between confidential and managerial employees is further highlighted in the New York (PE-T) statute by providing that confidential employees are those "who assist and act in a confidential capacity to managerial employees" described in the statute.[34]

The New York (NYC) statute provides that confidential and managerial personnel do not constitute a bargaining unit for negotiations.[35] But the Minnesota (PE-T) statute allows their confidential employees the right to form their own organizations and be recognized. The Minnesota (PE-T) statute also has similar provisions for supervisory personnel.

Although such recognition shall not be exclusive, their employer is required to "consult and otherwise communicate" on appropriate matters.[36]

Essential Employees

The Minnesota (PE-T) statute also establishes a class of employees called essential. The essentiality of employees in the public sector is the main reason why the strike is generally prohibited, but more on this is included in Chapter VI. Section 3 (11) defines essential employee as "any person within the definition of subdivision 7 of this section whose employment duties involve work or services essential to the health or safety of the public and the withholding of such services would create a clear and present danger to the health or safety of the public."[37] Subdivision 7 is a general definition of employees covered by the statute. Although essential employees enjoy full privileges of the statute, the major difference is in the method of impasse resolution.

The Director of Mediation Services certifies the final bargaining position of the parties to the Public Employment Relations Board, thereupon, the Board establishes an aribtration panel with participation of the parties. The arbitration panel is restricted to the final positions of the parties and its decision shall be binding. The decision of an arbitration

panel, outside of essential employees, is binding only upon mutual agreement of the parties, but it is binding upon the parties involving essential employees regardless of desires.[38]

Representation Election

Representation elections are conducted to determine the employee organization that will represent the employees in an appropriate unit. Representation elections are held to certify, decertify, or change organizational representation. Generally speaking, the procedure is identical for all three types of elections. Additionally, it is very common for the recognition extended to the organization to be exclusive, i.e., the organization is protected as part of union security from having to defend its position for at least one year. The organization challenging the exclusive status must then follow the specified procedure to unseat. Federal E.O. 10988 did provide for exclusive, formal, and informal recognition, but formal and informal recognition was removed from the amended Federal E.O. 11491.

From an analysis of data from thirty-two jurisdictions having forty-eight separate statutes, the following general outline of steps in gaining recognition has been developed. In most procedures the board established to implement bilateralism is petitioned by either the employee organization or the

employer that a question concerning representation exists. In most cases the petition must be signed by not less than 30 percent of the employees in the unit, although Vermont (ME) is low at 20 percent and Oregon (T) and (SP) are high at 40 percent.[39] New Hampshire (SE) requires a petition of 25 percent or 100 members whichever is less.[40] Other organizations can also gain places on the ballot generally with a showing of 10 percent, with Vermont (ME-F) requiring 15 percent and Kansas (T) requiring 30 percent.[41]

Now for a momentary digression into an alternative route to gaining recognition. If the organization can validly claim majority support of the employees in a unit, Vermont (T), Delaware (T), Maine (ME-T), Massachusetts (SE), Montana (T), Nevada (LE-T), New York (NYC), and North Dakota (T) permit the employer to recognize the organization so claiming unless another organization challenges the claim, which then generally results in an investigation and election to determine representation. This procedure is also called a mutual consent election which is available in Kentucky (F), California (LA), Maryland (T), and Minnesota (PE-T). While the Vermont (ME-F) statute prohibits such procedures, the Vermont (T) statute does permit mutual consent elections but an objection by 10 percent of the involved employees will cause an election.[42]

Returning to the main line of thought, a board in receipt of a petition with generally at least 30 percent support of the employees in a unit will then call for an investigation to determine if a question as to representation does in fact exist. If the investigation establishes the question of representation in the affirmative, an election is called for by secret ballot with the petitioning organization, other organizations having at least 10 percent support, and in many cases an option of "no representation" being placed on the ballot. Massachusetts (ME-T), Michigan (PE), and Alaska (PE) allow in their statutes for a consent election.[43] For such an election to take place the parties waive formal hearing to determine if a question of representation exists, agree on the details of the election, and conduct the election.

In most statutes a majority of votes cast will determine the victor in an election, with Vermont (SE) and Delaware (T) requiring an absolute majority of the employees in the unit.[44] The 60 percent rule was in operation under Federal E.O. 10988. This rule required that either 60 percent of the eligibles in a unit vote of which a majority would select an organization to represent them or reject any representation, or with less than 60 percent participation, but an absolute majority voting, select an organization to represent them or reject any

representation. The organization securing the required vote is then certified by the board as the representative of the employees, and collective negotiations can begin. In most instances, if one alternative on the ballot does not receive the required vote, a runoff election is conducted. In New Hampshire (P) and Wisconsin (SE) the runoff election is conducted only upon request of the parties.[45] The top two vote-getting choices are placed in the runoff even if one of them is the "no representative" choice. The validity of the election is generally good for at least twelve months. Some provisions allow the recognition to run the duration of the negotiated agreement, but such duration cannot be longer than three years.[46] Several statutes provide for year-to-year or continual recognition until challenged. Only two jurisdictions, Vermont (T) and New Mexico (SE), stipulate that the costs of such activities shall be borne equally by the parties.[47] In many statutes involving teachers, firemen, or policemen, the representation procedures are quite short with representation being based on majority support shown by election or designation.

To challenge the recognition or exclusive status of an organization, the challenge must be brought generally within thirty days of the expiration of the agreement or within ninety

but not less than sixty days of the expiration of the agreement. The decertification or change procedure is basically the same as for certification.[48]

One of the duties of the boards is to establish the rules and regulations covering the designation of unit representation, and the New Mexico (SE) provisions are quite specific on these requirements. These provisions are used here to illustrate the rules and regulations that could be established:

a. The agency will post notice of the election not later than 20 days before the date of the election.

b. Questions of eligibility of employees to vote in an election will be resolved by the Board.

c. Ballots will allow eligible voters to choose between participating employee organizations or to choose, if they desire, not to be represented by any employee organization.

d. Positions on the ballot will be determined by chance.

e. If sample ballots are distributed, they will be of a conspicuously different color than official ballots and clearly marked as samples.

f. The official ballots in all cases are to be furnished by the agency. Before, during, or after an election no one will be permitted to handle any ballot except an election official and the individual who votes the ballot.

g. The agency and each participating employee organization will be allowed an equal number of observers at each polling place.

h. Polling places will be at or near the work place of the eligible voting member of the bargaining unit, as determined by the officials conducting the election.

i. Polling places will be open during working hours determined by the officials conducting the election. Employees will be given adequate time, during working hours, to vote.

j. Ballot boxes will be opened and votes counted in the presence of only the following:

   1. Judges, clerks, or recorders designated by the officials conducting the election.

   2. One observer from each participating employee organization and the agency.

k. The agency and the employee organization shall agree upon, in the preelection agreement, the acts and conduct that will be reasons for setting the results of the election aside. Where agreement is not possible, the Board shall establish the election ground rules. Complaints shall be made to the Board by either the agency or the employee organization within five calendar days following the election, and the Board's decision on the matter shall be final. Such decision shall be announced within 30 calendar days.

l. An election is valid only if at least 60% of the eligible employees vote.

m. An employee organization which receives a majority of the votes cast will be certified as the winner of the election.

n. Officials conducting the election will notify the agency director and the State Personnel Director of the results of the election by telephone not later than one work day after polling places are closed to voting. A written report of the results will be mailed not later than three days after the date of

the election. Recognition shall not be granted or denied until the five-day complaint period expires.

o. In the event more than one employee organization participates and no choice receives a majority vote in a valid election, a run-off election, to decide between the two choices receiving the highest vote, will be held not earlier than 10 days nor later than 30 days after the indecisive election.

p. No representation election shall be held in any unit within which, in the preceding twelve-month period, a valid representation election has been held. This requirement does not preclude a consultation relationship during this period.[49]

Union Security

Union and Agency Shop

The union and agency shop is one aspect of bilateralism which has given some concerned parties great difficulty.[50] This is based upon the idea that public employment based upon the merit principle should not and could not adhere to the union or agency shop concept. The union shop agreement stipulates that continued employment is contingent upon joining the union and remaining a member thereof, while the agency shop requires an employee to pay a certain sum to the union, regardless of membership, for any benefits derived or for the administration of any contract. The contention is that such provisions in public employment are antithetical to the merit

principle of job continuation based only upon merit and competence. Furthermore, job democracy is violated if an employee is required to pay a sum to an organization to which he or she does not belong.

There are only two illustrations of union shop provisions among the statutes. These are the Kentucky (F) and Alaska (PE) statutes. The Kentucky (F) statute states "that nothing in this Act, or in any other statute of this state, shall preclude a public employer from making an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or on the effective date of such agreement, whichever is the later."[51] The Alaska (PE) statute also allows the union shop by providing that the public employer can agree with an organization to require, as a condition of employment, membership in the organization on or after the thirtieth day following the beginning of employment or on the effective date of the agreement.[52]

Six jurisdictions make provisions for the agency shop or for the payment of a service fee to the exclusive representative of the unit. These six jurisdictions, which are presented below, are Alaska (PE), Hawaii (PE-T), Massachusetts (SE), Rhode Island (SE), New York (NYC), and Wisconsin (SE).[53]

Alaska (PE) is unique in providing for both the union and agency shops. The public employer in Alaska can by agreement with the exclusive representative, require as a condition of employment a service fee to reimburse the bargaining agent for the expense of representing the unit. Hawaii (PE-T), although not mentioning the agency shop, also provides that the employees in a unit be required to pay a service fee approved by the Public Employment Relations Board to defray the costs of negotiation and contract administration.

On June 26, 1969, Massachusetts passed separate legislation allowing the agency shop initially in the city of Boston and Suffolk County. On June 24, 1970, additional legislation was passed which allowed any other city, county, town, or district to institute the agency shop by local option. The amount of the agency service fee is determined by negotiation. The Rhode Island (SE) statute also provides for the payment of a service charge for nonmembers in an amount equal to the regular monthly dues of members. The New York (NYC) statute also allows an agreement where the required payment of nonmembers of a sum is equal to the uniform regular monthly dues required of members.

The Wisconsin (SE) statute is unique in providing for a "fair-share agreement," which is a type of agency shop. Once the appropriate unit and exclusive representative have been

determined, a petition signed by not less than 30 percent of the employees in the unit can be sent to the Employment Relations Commission requesting a referendum vote. The Commission conducts the referendum vote with approval by two-thirds of the eligible voters in the unit required. If the vote is in the affirmative, the fair-share agreement takes effect sixty days later with the amount equal to the uniformly required dues of the organization.

The only maintenance of membership provision is found in the Pennsylvania (PE-T) statute. This provision requires employee organization membership for the duration of the contract for members who have joined or will join in the future. The provision also states that membership can be terminated during a fifteen day period prior to the termination of the agreement.[54]

It is somewhat strange that with all the fear of both the union and agency shop only six provisions specifically disallowing required membership can be found among the data. These are: Connecticut (ME), Delaware (T), Maryland (BLT), Vermont (T), and Federal E.O. 11491 and E.O. 11636.[55] These provisions can be illustrated by the Connecticut (ME) statute which states:

> When an employee organization has been designated in accordance with the provisions of this act as the exclusive representative of employees in an appropriate unit, it shall have the right to act for and to negotiate agreements covering all employees in the unit and shall be responsible

> for representing the interests of all such employees without discrimination and without regard to employee organization membership.[56]

This strange silence on prohibiting the union and agency shop is perhaps ameliorated by the provision found in thirty statutes representing nineteen jurisdictions which state that public employees shall have the right to form or join in such organizations or shall have the right to refuse to join or participate in such organizations or activities. Even this is somewhat diluted by Hawaii (PE-T), Massachusetts (SE), New York (NYC), and Wisconsin (SE), which have either an agency shop or a service fee requirement and are also among those jurisdictions providing the above. The two jurisdictions providing for the union shop only specify that employees may or shall have the right to form and join such organizations and participate in such activities.

The cases dealing with either the union or agency shop seem to be quite scarce and divided between support and rejection. In City of Warren v. International Association of Fire Fighters, Local No. 1383 (1968), a Michigan Circuit Court (Macomb County) held that Article 16 of the contract was superior to a provision of the Civil Service Act. The two provisions state:

> Any employee who is not a union member and who does not make application for membership shall

> as a condition of employment pay to the union an amount equal to the union's regular and usual initiation fee and a monthly service charge as a contribution toward the administration of this agreement in an amount equal to the regular monthly dues. Employees who fail to comply with this requirement within thirty days shall be discharged by the employer.
>
> It shall be unlawful for a public employer or an officer or agent of a public employer to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization.[57]

The court contended that the civil service legislation was general legislation, while the Public Employment Relations Act was special legislation and therefore must be preferred. In this situation a majority of employees had decided to participate with only twenty-five employees not joining and refusing to pay.[58]

The Michigan Court of Appeals upheld an agency shop provision in a 1970 case involving the Southgate Education Association and the Southgate Community School District. The court held the nonmembers' fee was to be equivalent to "a nonmember's proportionate share of the cost of negotiating and administering the contract involved." Continuing, the court stated: "It would be inequitable not to require nonunion members to pay their proportionate share of the cost of obtaining and administering . . . benefits."[59]

A county court invalidated Toledo, Ohio's 1971 labor agreement which contained a union shop agreement requiring compulsory union membership, mandatory check-off, and payment for an employee engaged in full-time union work. These provisions were held to be in violation of state civil service laws, the state constitution, and the rule-making powers of the local civil service commission.[60]

With such few cases, it is difficult to establish any meaningful guidelines of future court interpretation. But that the problem will assuredly appear many times is all but guaranteed. The Bureau of National Affairs' publication, Basic Patterns in Union Contracts, contributes the data that of their 400 sample contracts, the provision for a union shop was found in 62 percent, the modified union shop in 11 percent, the agency shop in 9 percent, and the maintenance-of-membership in 7 percent.[61] A publication of the Bureau of Labor Statistics in the Department of Labor entitled the Characteristics of Agreements Covering 1000 Workers or More, indicates that out of 1,300 agreements 1,085 contain the union or modified union shop provision, while only sixty-five provide for the agency shop and thirty-eight for maintenance-of-membership.[62]

From these data, therefore, the union and agency shop provisions are very prevalent in the private sector, while

their development in public bilateralism is of unknown quantities now. It is the author's opinion that the agency shop and maintenance-of-membership provisions are not so strange or antithetical to the merit principle that their development would be damaging. But the union shop is another question. Conditions such as proved or established competency can be stipulated before employment is secured, but requiring union membership or the gaining of union membership to continue employment is believed to be outside of merit principles. Merit principles may in some way have to bend in bilateralism, but it is the author's opinion that the union shop contributes nothing to job competency and is simply a method of securing members where the union's appeal or work situation appeal cannot gain members. If the union is so good, then the employees out of intelligence should join, but if a public employee declares against union membership, job continuance should not be made contingent upon union membership.

Check-Off

Another aspect of union security is the check-off of union dues and other fees. Of the thirty-six jurisdictions and seventy-four separate statutes and executive orders, only sixteen jurisdictions and nineteen separate statutes or executive orders specifically provide for it. Recommendation

Thirteen of the ACIR report states that such arrangements should be based upon written authorizations of employees in appropriate units represented by organizations having majority status.[63]

The aspect of dues check-off is considered much less challenging than either the union or agency shop or designating a representative as the exclusive representative of the employees in an appropriate unit. The Bureau of National Affairs' data indicate that of their 400 contract samples 86 percent contain check-off provisions, with manufacturing enterprises accounting for 95 percent and nonmanufacturing enterprises for 66 percent (based on the lack of such arrangements in the construction industries).[64] Data from the Bureau of Labor Statistics indicates that of their 1300 contract samples 1,050 contain check-off provisions, with the construction industry having 115 out of 250 agreements making no reference to the check-off provisions.[65]

It is the author's opinion that dues check-off is very fundamental to union security and in no way challenges the merit principle. In a vast majority of statutes this can be initiated or terminated only upon the presentation of written authorization by the employee.

The Delaware (PE), Hawaii (PE-T), and Pennsylvania (PE-T) check-off provisions are used for illustrative purposes. These respectively are:

> Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues as certified by the secretary of the exclusive bargaining representative and shall deliver the same to the treasurer or the exclusive bargaining representative.[66]

> In addition to any deduction made to the exclusive representative under subsection (a) (agency shop), the employer shall, upon written authorization by an employee, deduct from the payroll of the employee the amount of membership dues, initiation fees, group insurance premiums, and other association benefits and shall remit the amount to the employee organization designated by the employee.[67]

> Membership dues deductions and maintenance of membership are proper subjects of bargaining with the provision that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.[68]

Summary

This chapter should well illustrate the diversification within bilateralism. Although some commonality does surface, there is still the aspect of each jurisdiction doing its own thing. The following major points are examined in this chapter: appropriate unit, representation election, and union security.

By definition an appropriate unit is that group of employees or section of an organization engaging in bilateral activities. The most common criterion for determining an appropriate unit is the community of interests. Other factors to be considered are the desires of the employees, the history of collective bargaining, and the efficiency of the organization. But the problem of determination is complicated when supervisory, professional, essential, and confidential employees are considered. Bilateralism is still fairly young and all the attendant problems are still to be resolved.

A representation election is the process of determining the employee organization that is to represent the employees in an appropriate unit. The process of selecting a representative is called certification, while the reverse process is called decertification. If allowed, the employees can opt for "no representative" in either process. Generally, 30 percent of the employees must sign a petition to initiate either process with competing groups generally needing only 10 percent for participation. The selection process is by secret ballot, but consent elections (no voting) are permitted wherein the organization claims majority support and is certified if no opposition is registered. Usually only a majority of those voting is required for victory, but in some instances an absolute majority is needed.

Union security refers to that aspect of bilateralism in which the employee organization is assured in various ways of its continuity. Exclusive representation, union shop, agency shop, and check-off are elements of union security. Exclusive representative status, gained through certification, assures the organization that its status cannot be challenged for a specified period. The period is usually one year. Only Kentucky (F) and Alaska (PE) allow the union shop which requires the joining of the organization to retain employment, while six jurisdictions provide for the agency shop which requires the payment of a service fee for negotiating and administrating the agreement but does not require membership. While the agency shop is not that foreign to the merit principle, it is my opinion that the union shop does damage the merit principle. The check-off of dues and other organization assessments is the last aspect of union security examined. In my opinion, check-off is a very benign aspect of bilateralism and should not be rejected by management. Rejection will only engender hard feelings. Since bilateralism is loaded with other areas that can produce conflict, it would be very inadvisable to create the situation here.

The purpose of all this activity is aimed toward the topic of the next chapter--collective negotiations. Chapter IV

examines the heart of bilateralism by analyzing the scope of negotiations, management's rights, publicity, official time, and contract interpretation. These are the key aspects of collective negotiations.

Footnotes

[1]Labor-Management Act of 1947, Section 159 (b).

[2]Kansas (T), RF-BNA-GERR, Section 8, 51:2517.

[3]Idaho (F), RF-BNA-GERR, Section 1 (a), 51:2111.

[4]New Mexico (SE), RF-BNA-GERR, Section 1-E-16, 51:4012.

[5]Harry H. Wellington and Ralph K. Winter, Jr., The Unions and the City (Washington, D.C.: The Brookings Institution, 1971), pp. 108-109. (Hereafter referred to as Wellington and Winter, The Unions and the City.)

[6]Alaska (PE), RF-BNA-GERR, Section 23.40.101, 51:1111, Kansas (PE), RF-BNA-GERR, Section 7 (e) (5), 51:2513, Pennsylvania (PE-T), CCH-LLR, Section 604 (1), p. 57,988, Vermont (SE), RF-BNA-GERR, Section 941 (f) (3), 51:5413, and Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (4) (d) 2.a, 51:5819.

[7]Wellington and Winter, The Unions and the City, pp. 110-111.

[8]New Mexico (SE), RF-BNA-GERR, Section IV-C, 51:4014.

[9]Maryland (BLT), RF-BNA-GERR, Section 116 (b), 51:2914.

[10]California (LA), RF-BNA-GERR, Section 4.822 (a), 51:1420.

[11]Hawaii (PE-T), RF-BNA-GERR, Section 6, 51:2013.

[12]Ibid., 51:2013.

[13]Wisconsin (SE), RF-BNA-GERR, Section 111.81 (3) (a), 51:5811.

[14]Ibid., Section 111.81 (3) (am), 51:5811.

[15]Labor-Management Act of 1947, Section 152 (11).

[16]Labor-Management Act of 1947, Section 152 (3), Connecticut (ME) CCH-LLR, Section 1 (2), p. 53,165, Kansas (PE), RF-BNA-GERR, Section 2 (a), 51:2511, Rhode Island (ME), RF-BNA-GERR, Section 28-9.4-2, 51:4812, and Wisconsin (SE), RF-BNA-GERR, Section 111.81 (15), 51:5812.

[17]Connecticut (ME), CCH-LLR, Section 5 (2), pp. 55,166-55,167.

[18]Maine (ME-T), RF-BNA-GERR, Section 966, 51:2813.

[19]Hawaii (PE-T), RF-BNA-GERR, Section 6 (a), 51:2013.

[20]Michigan (PE), RF-BNA-GERR, Section 423.213, 51:3112.

[21]Kansas (PE), RF-BNA-GERR, Section 5, 51:2513, and Labor-Management Act of 1947, Section 164 (a).

[22]Minnesota (PE-T), RF-BNA-GERR, Section 5 (6), 51:3213.

[23]Pennsylvania (PE-T), CCH-LLR, Section 704, p. 57,990.

[24]Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (3) (a) 2, 51:5817.

[25]Wisconsin (SE), RF-BNA-GERR, Section 111.81 (3) (d), 51:5812.

[26]Federal (11491), RF-BNA-GERR, Section 24 (2) and 7 (e), 21:6 and 21:3.

[27]Charles T. Schmidt, "The Question of the Recognition of Principles and the Supervisory Units in Public Education Collective Bargaining," Labor Law Journal, XIX (May, 1968), p. 283.

[28]Labor-Management Act of 1947, Section 152 (12), and Connecticut (ME), CCH-LLR, Section 5 (3), p. 53,167 as illustration for the other ten statutes.

[29]Minnesota (PE-T), RF-BNA-GERR, Section 13, 51:3218.

[30]Ibid., Sections 3 (18) and 6, 51:3212 and 3213.

[31]Ibid., Section 13 (4) (5), 51:3218.

[32]Kansas (PE), RF-BNA-GERR, Section 2 (c), 51:2511.

[33]California (LA), RF-BNA-GERR, Section 4.830 (d), 51:1412.

[34]New York (PE-T), RF-BNA-GERR, Section 201 (7), 51:4111-4112.

[35]New York (NYC), RF-BNA-GERR, Section 1173-4.1, 51:4163.

[36]Minnesota (PE-T), RF-BNA-GERR, Section 5 (6), 51:3213.

[37]Ibid., Section 3 (11), 51:3211-3212.

[38]Ibid., Sections 9 (3) and 12 (6) (11), 51:3215 and 3217.

[39]Vermont (ME), RF-BNA-GERR, Section 28-9.4-6, 51:4812, Oregon (T), RF-BNA-GERR, Section 342.460 (4), 51:4613, and Oregon (SP), RF-BNA-GERR, Section 4, 51:4614.

[40]New Hampshire (SE), RF-BNA-GERR, Section 98-C:3,III, 51:3811.

[41]Vermont (ME-F), RF-BNA-GERR, Section 28-9.4-6, 51:4813, and Kansas (T), RF-BNA-GERR, Section 6 (a), 51:2517.

[42]California (LA), RF-BNA-GERR, Section 4.822 (b), 51:1420, Delaware (T), RF-BNA-GERR, Section 4004 (b), 51:1712, Maine (ME-T), RF-BNA-GERR, Section 967.1, 51:2813, Maryland (T), RF-BNA-GERR, Section 160 (e) (4), 51:2911, Massachusetts (SE), RF-BNA-GERR, Section 178F (4), 51:3011, Minnesota (PE-T), RF-BNA-GERR, Section 7 (3), 51:3213, Montana (T), RF-BNA-GERR, Section 7, 51:3513, Nevada (LE-T), RF-BNA-GERR, Section 11 (2), 51:4164, New York (NYC), RF-BNA-GERR, Section 1173-5.0.b (2), 51:4164, North Dakota (T), RF-BNA-GERR, Section 11.1, 51:4312-4313, Vermont (ME-F), RF-BNA-GERR, Section 28-9.4-8, 51:4813, and Vermont (T), RF-BNA-GERR, Section 1992 (a), 51:5418.

[43]Alaska (PE), RF-BNA-GERR, Section 23.40.100 (b), 51:1111, Massachusetts (ME-T), RF-BNA-GERR, Section 178G (5), 51:3013, and Michigan (PE), RF-BNA-GERR, Section 423.212 (b), 51:3112.

[44]Delaware (T), RF-BNA-GERR, Section 4005 (c), 51:1712, and Vermont (SE), RF-BNA-GERR, Section 941 (c) (1), 51:5413.

[45]New Hampshire (P), RF-BNA-GERR, Section 105-B:5, V, 51:3813, and Wisconsin (SE), RF-BNA-GERR, Section 111.83 (4), 51:5813.

[46]Kentucky (F), RF-BNA-GERR, Section 7 (5), 51:2612, Nebraska (PE), RF-BNA-GERR, Section 48-816 (1), 51:3613, New York (PE-T), RF-BNA-GERR, Section 208.2, 51:4114, and Washington (LE), RF-BNA-GERR, Section 41.56-070, 51:5611.

[47]New Mexico (SE), RF-BNA-GERR, Section V, 51:4014, and Vermont (T), RF-BNA-GERR, Section 1992 (e), 51:5419.

[48]For examples of the preceding general procedures for representation elections see Alaska (PE), RF-BNA-GERR, Section 23.40.100, 51:1111-1112, and California (LA), RF-BNA-GERR, Section 4.822, 51:1420-1421.

[49]New Mexico (SE), RF-BNA-GERR, Section V, 51:4014-4015.

[50]Merrill M. Morse, "Shall We Bargain Away the Merit System," Public Personnel Review, XXIV (October, 1963), p. 241.

[51]Kentucky (F), RF-BNA-GERR, Section 6 (1) (c), 51:2611.

[52]Alaska (PE), RF-BNA-GERR, Section 23.50.110 (b), 51:1112.

[53]Alaska (PE), RF-BNA-GERR, Section 23.40.110 (b), 51:1112, Hawaii (PE-T), RF-BNA-GERR, Section 4 (a), 51:2012, Massachusetts (SE), RF-BNA-GERR, Agency Shop, 51:3016, New York (NYC), RF-BNA-GERR, Section 1173-4.2.d, 51:4163, Rhode Island (SE), RF-BNA-GERR, Section 36-11-2, 51:4811, and Wisconsin (SE), RF-BNA-GERR, Section 111.81 (6), 51:5812.

[54]Pennsylvania (PE-T), CCH-LLR, Section 301 (18), pp. 57,986-57,987.

[55]Connecticut (ME), RF-BNA-GERR, Section 2 (c),p. 53,165, Delaware (T), RF-BNA-GERR, Section 4003 (a), 51:1712, Maryland (BLT), RF-BNA-GERR, Section 115 (b), 51:2914, Vermont (t), RF-BNA-GERR, Section 1991 (c), 51:5418, Federal (11491), RF-BNA-GERR, Section 10 (c), 21:3, and Federal (11636), Weekly Compilation, Section 7 (d), p. 1690.

[56]Connecticut (ME), CCH-LLR, Section 2 (c), p. 53,165.

[57]68 LRRM 2997.

[58]68 LRRM 2978.

[59]Personnel News, XXXVI (November, 1970), pp. 49 and 52.

[60]Personnel News, XXXVII (August, 1971), p. 56.

[61]Bureau of National Affairs, Basic Patterns, 87:1.

[62]U.S. Department of Labor, Bureau of Labor Statistics, Characteristics of Agreements Covering 1,000 Worders or More (Washington, D.C.: Government Printing Office, 1973), p. 12. (Hereafter referred to as Bureau of Labor Statistics, Characteristics of Agreements.)

[63]ACIR, Policies for State and Local Government, p. 108.

[64]Bureau of National Affairs, Basic Patterns, 87:3.

[65]Bureau of Labor Statistics, Characteristics of Agreements, p. 13.

[66]Delaware (PE), RF-BNA-GERR, Section 1311, 51:1711-1712.

[67]Hawaii (PE-T), RF-BNA-GERR, Section 4 (b)(c), 51:2012.

[68]Pennsylvania (PE-T), CCH-LLR, Section 705, p. 57,990.

CHAPTER IV

COLLECTIVE NEGOTIATIONS

Background Material

This chapter does not tell how to collectively negotiate; that is an art which must be learned through experience and not read from a book. Perhaps the best book on how to prepare for collective negotiations in public bilateralism is Warner and Hennessy's Public Management at the Bargaining Table.[1] (Although this book was written in 1967, it still contains valuable insights.)

This chapter does examine the scope of negotiations, the rights of management, official time, contract interpretation, and publicity in connection with both negotiations and the resulting agreement. These topics will follow an analysis of the statutory provisions on collective negotiations dealing with monetary terms, the term of the agreements, negotiation teams, and when negotiations are to begin. But before this material is presented, collective negotiations needs to be

discussed in general to better establish what it is and what it is not.

Vernon Jensen states that "collective bargaining is not an instrument for resolving all problems in the industrial universe, let alone society as a whole."[2] Although his statement concerns private bilateralism specifically, the same idea is applicable to public bilateralism. He continues by stating that although collective bargaining is concerned with the immediate and particular, the parties also operate within certain restraints which the parties ignore at their peril.[3] One such restraing found in the Declaration of Policy section of the Wisconsin (SE) statute states:

> It recognizes that there are three major interests involved: that of the public, that of the state employee and that of the state as an employer. These three interests are to a considerable extent interrelated. It is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others . . . . neither party has any right to engage in acts or practices which jeopardize the public safety and interest and interferes with the effective conduct of public business.[4]

Therefore, one definite restraing of public bilateralism which cannot be ignored by either party is the public's safety, interest, and business.

Harold W. Davey contributes the idea that "there is no true substitute for good-faith negotiation to finality as the

best way to resolve labor relations disputes." He continues by saying that "bilateralism no matter how tough it is will come to be regarded as preferable to trilateralism in any shape or form."[5] Thus, a second restraint is the possible injection of outside parties into the negotiation procedures to make the final decisions occasioned by the inability of the parties to do so. If public management and public officials are worried about bilateralism, the spectre of third party intrusion should cause even greater concern. So, echoing the initial statement of Davey, "there is no true substitute for good-faith negotiation to finality as the best way. . . ."[6]

Leland B. Cross states that "the collective bargaining agreement which sets forth the basis for that relationship must be somewhat unique in each instance."[7] Each agreement is unique, each provision is unique, each relationship is unique. A third restraint, then, is the uniqueness of each agreement, provisions, and relationship. Although there is a need for consistency, inflexibility of either agreements, provisions, or relationships would be undesirable.

A fourth restraint is based around the statement of Pat Greathouse: "We have learned . . . that it is much better to solve issues that arise during the life of the agreement as they arise and not wait for the expiration of the agreement."[8]

Collective negotiations is not a one-time affair; there is a contract or memorandum of understanding and the everyday employer-employee relationship to implement. William Simkin, in his book Mediation and the Dynamics of Collective Bargaining, contributes the idea of "noncrisis" mediation which deals with the settling of controversial issues as they arise and not letting them collect until the next negotiation season.[9] Bilateralism is an on-going relationship requiring constant attention by all concerned. It should not allow conflict or other points of friction to accumulate which could result in strife at the negotiation table, possibly culminating in a strike. The public, good-faith negotiations, uniqueness, and noncrisis settlement of conflict during the life of the agreement are four restraints on collective negotiations.

Another approach to the restraints upon collective negotiations in bilateralism is the examination of three court cases dealing with the wording of the statutes. Allowing bilateralism, in Los Angeles Transit Authority v. Brotherhood of Railroad Trainmen (1960), the California Supreme Court ruled that without legislative authorization public employees in general do not have the right to strike, but that the use of certain language in legislation establishing bilateralism carries with it certain interpretations from private

bilateralism. Quoting from the case, the court stated:

> Language identical with the italicized words (engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection) . . . courts have uniformly interpreted these words as including the right to strike peacefully to enforce union demands with respect to wages, hours, and working conditions. . . . Terms such as "concerted activities" are commonly used by courts as well as legislative bodies to refer to strikes.[10] (Italics mine.)

It is not surprising to find similar wording in Taft-Hartley Section 157. This section states:

> Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .[11] (Italics mine.)

This is acceptable since the right to strike is insured by Taft-Hartley, but it is quite strange to find similar wording in ten state statutes.[12] The statutes from Kentucky (P) and Pennsylvania (PE-T) provide respectively:

> In any county in the Commonwealth of Kentucky which has a population of 300,000 or more and, which has adopted the merit system, the county employees in the classified service as policy may organize, form, join or participate in organizations in order to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to bargain collectively through representatives of their own free choice.[13] (Italics mine.)

> It shall be lawful for public employees to organize, form, join or assist in employee organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice. . . .[14] (Italics mine.)

The Kentucky (P) statute also prohibits the strike, while Pennsylvania (PE-T), Alaska (PE), and Hawaii (PE-T) are three of the five states having a limited right to strike. Therefore, the legislatures need to exercise caution in the wording used to establish the right of collective negotiations and to engage in activities in pursuit of such activities. A jurisdiction may be implying something it has no intention to, namely the right to strike along with the right to collectively negotiate.

Now attention needs to be directed to the use of the term "collective negotiations" which is used in this research instead of the term "collective bargaining." This is done in light of the material presented in Chapter I on the difference between public and private bilateralism, plus the case of Lullo v. International Association of Fire Fighters. This 1970 New Jersey case is very important in recalling that in the past the California Supreme Court had ruled that the term "collective bargaining" implied the right to strike. This is why the New Jersey (PE-T) statute uses the term "collective

negotiations." The New Jersey Supreme Court stated:

> The New Jersey Legislature was aware of the possible implications of an authorization of "collective bargaining". . . . suggested that public employees be . . . the choice of the term was conscious and deliberate . . . they clearly intended to avoid the problem experienced by the California Legislature when "collective bargaining" was . . . construed by the Supreme Court to confer the right to strike.
>
> It is crystal clear that in using the term "collective negotiations" the Legislature intended to recognize inherent limitations on the bargaining power of public employer and public employee.
>
> In our judgment, therefore, the authorization for "collective negotiations" in the 1968 Act was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector. Finally, it signified an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public sector.[15]

The California Legislature, in response to its Supreme Court decision, replaced its collective bargaining statutes with meet and confer provisions which do not carry the implications of the former terminology. In light of this material, it is somewhat strange to find seventeen statutes calling for collective bargaining.

The Missouri Supreme Court ruled in State ex rel Missey v. City of Cabool (1969) that the Missouri Legislature was

deliberative in motive in using the term "meet, confer, and discuss" in its statute. The Court stated:

> The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body, and therefore does no violence . . . because the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched. The public employer is not required to agree but is required only to "meet, confer, and discuss," a duty already enjoined upon such employer prior to the enactment of this legislation. The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached.[16]

In summary, these three cases indicate that the legislation establishing bilateralism must be carefully worded or the legislature could implying something, mainly the strike, which it has no intention of doing. This is why the statutes establishing bilateralism use as synonymous terms to collective negotiations: meet and discuss,[17] meet and confer,[18] meet and negotiate,[19] confer, consult, and discuss,[20] professional negotiations,[21] and some still use collective bargaining.[22]

General Provisions

As a general rule collective negotiations are to begin within ten days after receipt of a written request from the employee organization. Alaska (T) provides for a twenty day period, while Georgia (F) provides for a thirty day period.[23]

Exceptions to the rule would be that the Oklahoma (T) negotiations are to begin within sixty days after the employee organization has been determined, while Kansas (PE) provides that negotiations are not to occur within a thirty day period both prior to and after the budget submission date.[24] Negotiations are to begin not later than 120 days prior to the annual school district meeting according to the Vermont (T) statute.[25] The Nebraska (T) provisions call on the teacher's organization to specify the item or items it desires to meet and confer over with the school district. The district then has thirty days to decide whether to honor or reject the request. Negotiations are to begin within twenty-one days if the request is honored.[26]

Several statutes have provisions concerning the composition of the negotiation team. The negotiation teams for Alaska (T) are not to be larger than five members for either side.[27] The provisions in California (T) set forth that when more than one organization represents teachers in a district, a council of such organizations is to be formed with each organization having proportional representation. The teacher-council team is to have at least five but not more than nine members.[28] The California (LA) ordinance provides that the chief administrative officer or his designate is the official

representative of the city.[29] The chief executive officer, whether appointed or elected or his designate, is to represent the city in negotiations by the Connecticut (ME) statute.[30] The Idaho (T) statute stipulates that the employee representative shall be a professional employee of the district.[31] The teams in Maryland (T) shall not be less than two members each, while the Maryland (BLT) statute calls upon the mayor to name both members to and chairman of the city team, which shall include the labor commissioner. The employee team shall have two or more members.[32]

The Massachusetts (ME-T) statute calls for the chief executive officer or his designate to represent the city, and the school committee or its designate to meet with the teachers. The employer is not to designate an attorney unless authorized by the city council or town meeting.[33] In Minnesota (PE-T), the state is to be represented by the Commissioner of Administration, the Director of Civil Service, and the Attorney General. The agency of the state which is being represented shall provide personnel and resources to enable the team to negotiate effectively.[34] The Nevada (LE-T) provision reads:

> Where any officer of a local government employer, other than a member of the governing body, is elected by the people and directs the work of any local government employee, such officer is the proper person to negotiate, directly or through a representative or representatives of

> his own choosing, in the first instance concerning any employee whose work is directed by him, but may refer to the governing body or its chosen representative or representatives any matter beyond the scope of his authority.[35]

The State of Nevada is to be represented by the Director of the Department of Health, Welfare and Rehabilitation or his representative when negotiating with nurses employed by the state.[36] (The Nevada statute is unique in covering nurses employed by the state, since the legislation is entitled Local Government Employee-Management Relations Act.)

Although the monetary aspect of negotiations is also discussed in some detail in the section on Scope, the most repeated provision is for the employee representative to serve by written notice the desire to negotiate over monetary terms at least 120 days before the last day to appropriate money. Idaho (F) and New Hampshire (P) call for 90 day prior notice.[37] Notification of desire to negotiate monetary terms must be made on or before December 1 according to Nevada (LE-T).[38] Minnesota (PE-T) requires notification not later than 90 days prior to the last day for budget submission or September 1, whichever is earlier.[39]

The terms of the contracts or memoranda of understanding are varied. The most repeated phrases are "not more than" or "not to exceed," with the quantity being either one, two,

three or five years. (Not more than three years is used the most.) Nebraska (PE) stipulates the contract is to coincide with the biennial budget, while Florida (F) provides that the contract is to coincide with the fiscal year but not to exceed two years.[40] Wisconsin (SE) establishes the fiscal year or biennium as the term for its contracts.[41]

Scope of Negotiations

The heart of collective negotiations, or perhaps even of bilateralism, is the scope of negotiable items, i.e., the items or policies which the parties can negotiate over and place in an agreement or contract form. The entire bilateral relationship evolves around scope. The recognition process is aimed toward the time that labor and management face each other across the bargaining table to negotiate items within the acceptable limits. Scope, therefore, cannot be over emphasized, for if bilateralism is to be more than a mere formality, the area that can be negotiated must be such that the employees can have an impact upon their environment and feel that unilateralism has vanished and that bilateralism has emerged. But this thought is qualified by the next section analyzing managements' rights. The scope of bilateralism is thus somewhat circumscribed.

The most straightforward definition of allowable limits of scope is "wages, hours, and other terms and conditions of

employment." This definition is found in Taft-Hartley Section 158 (d), and in forty-two statutes from twenty-six jurisdictions under examination.[42] The main difficulty with this definition of scope is that in many jurisdictions wages and hours are established by legislation and, therefore, are not subject to negotiations. Note that Federal E.O. 11491 requires meeting and conferring in good faith in respect "to personnel policies and practices and matters affecting working conditions."[43] Wages and hours are not mentioned because Section 12 provides that any agreement is subject to the following requirements:

> [I]n the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by terms of a controlling agreement at a higher agency level.[44]

Thus, to a great extent, but with exceptions to be examined later, wages and hours are outside the limits of scope.

What then are terms and conditions of employment? This seems to be a major opening for bilateral negotiations. Research of the data revealed only five definitions of the term

in Alaska (PE), Delaware (T), Kansas (PE), Minnesota (PE-T), and New Mexico (SE). These are, respectively:

> . . . means the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of employees; but does not mean the general policies describing the function and purposes of a public employer.[45]

> . . . are defined as physical conditions of facilities in the school district building such as, but not limited to heat, lighting, sanitation, and food processing.[46]

> . . . means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state.[47]

> . . . means the hours of employment, the compensation therefor including fringe benefits, and the employer's personnel policies affecting the working conditions of employees. In the case of professional employees the terms mean the hours of employment, the compensation therefor, and economic aspects relating to employment, but does not mean educational policies of a school district. The terms in both cases are subject to the provisions of section 6 of this act regarding the rights of public employers and the scope of negotiations.[48]

> . . . refers to subjects of interest to employees which are not specifically covered by statute, executive order, Board rules or management rights, and are within the discretionary power of the negotiating official.[49]

These five provisions go a long way in defining this difficult term. An unsettling thought, contributed by Wellington and Winters, is that without further legislative guidance, agencies and courts are "unsuited" to their assigned task of interpretation. They continue by stating that this innocuous phrase will require the resolution of issues "politically, socially, and ideologically among the more explosive in our society; ones that adjudicatory tribunals are institutionally ill suited to resolve."[50] To further the reader's understanding of "other terms and conditions of employment," Appendix D contains the contents of Article VIII from the 1967 contract between the New York City Department of Social Services and the Social Service Employees Union.[51]

Now the examination of scope turns from "wages, hours, and other terms and conditions of employment" to the specific provisions in several jurisdictions. Federal E.O. 10988, which established three levels of recognition (informal, formal, and exclusive), defined scope in each instance a little differently. Employee organizations having informal recognition shall "to the extent consistent with the efficient and orderly conduct of the public business, be permitted to present to appropriate officials its views on <u>matters of concern</u> to its members." (Emphasis mine.) The agency was under no

requirement to consult about the formulation of personnel or other policies. Units having formal recognition shall consult over "the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members." (Emphasis mine.) A unit having exclusive recognition shall be given the opportunity to discuss "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (Emphasis mine.) The main difference was probably the method of conducting negotiations, i.e., informal simply meeting while exclusive units could meet and confer. But each level of recognition did spell out in greater detail the scope of negotiable items.[52]

The scope under Federal E.O. 11491 is different since there is only one type of recognition (exclusive). Sections 11 and 12 have specified in more detail the scope of negotiable items. Section 11(a) of Federal E.O. 11491 stipulates that "personnel policies and practices and matters affecting working conditions" shall be the scope of negotiable items. This is then restricted by management's rights and other areas exempted in Sections 11(b) and 12(a).[53] (This material is analyzed in more detail in the next section on Management's Rights.) If there is a disagreement as to scope, Federal E.O. 11491 provides the following procedure for settlement:

1. An issue arising at the local level is referred to the head of the agency for determination.

2. The agency head's determination is final in respect to interpreting agency regulations.

3. The employee organization can appeal to the FLRC the decision made in No. 2.[54]

The scope of Federal E.O. 11636 dealing with the foreign service covers consulting in good faith "regularly and prior to the adoption of proposed or revised personnel policies and procedures, including grievance procedures, which affect working conditions of employees."[55]

The New York (NYC) statute is detailed in Section 1173-4.3 as to the scope of collective bargaining. Final determination of conflict over scope resides in the Board of Collective Bargaining. The requirement to bargain in good faith covers:

> . . . wages (including but not limited to wage rates, rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions. . . .[56]

This scope is then qualified by the following exceptions. First, the employees whose wages are determined by Section 220 of the labor law shall not be subject to bargaining. Second, matters subject to the career and salary plan which require uniform application shall only be negotiated with an employee organization or council of such organizations that

represent over 50 percent of such employees. But this stipulation shall not prevent the negotiation of unique provisions where circumstances demand it. Third, department matters which require uniform application shall be negotiated only with an employee organization or council of such organizations which represent more than 50 percent of such employees. Fourth, all subjects, such as pension, overtime, and leave rules, affecting uniformed police, fire, sanitation and correction services shall be negotiated with the representative of such employees. Fifth, matters involving pensions for uniformed forces other than those referred to above shall be conducted with an employee organization or council of organizations which represents more than 50 percent of such employees.[57]

The exceptions to the general rule mentioned earlier that wages are outside the limits of public bilateralism are now analyzed using Connecticut (ME), Hawaii (PE-T), and Alaska (PE). The Connecticut (ME) statute is unique in providing that where monetary terms are involved "the budget-appropriating authority of any municipal employer shall appropriate whatever funds are required to comply with a collective bargaining agreement. . . ." The agreement is to be submitted to the legislative body of the municipality within fourteen days after negotiations are completed. If the municipal legislative body

rejects the agreement, it is returned for further negotiations; if the legislative body accepts, then the monetary terms shall be complied with by appropriation. If the legislative body does not act within thirty days after the fourteen day period mentioned above, the agreement stands approved and the funds must be appropriated.[58]

The Hawaii (PE-T) statute provides that the subjects excluded from negotiations include "the salary ranges and the number of incremental and longevity steps," but the amount of wages to be paid in each range and the length of service for the incremental and longevity steps shall be negotiable. The appropriate legislative body can reject the agreement, causing its return for further negotiations, or accept it but subject to appropriation.[59] In much the same language, the Alaska (PE) statute stipulates that any monetary terms of an agreement are subject to funding through appropriations.[60]

Thus, from these three illustrations the scope of negotiations can include monetary terms and can be handled in a variety of methods. The Connecticut (ME) provisions require the appropriation of funds, while Alaska (PE) and Hawaii (PE-T) simply provide for funding through the appropriate legislative body, but without requirement to do so.

Three jurisdictions allow discussion over items outside of the established limits of scope. These are Nevada (LE-T), New Mexico (SE), and Oregon (T). The Nevada (LE-T) statute provides that discussion over topics outside of scope are not precluded nor are they required. But when they do occur, the meeting is informal and exempt from all requirements of notice or time schedule.[61] An employee organization and agency head can discuss items outside of the scope and develop a memorandum of agreement according to Section X of New Mexico's (SE) provisions. The agreement is sent to the appropriate higher authorities as recommendations from the parties over the subjects covered.[62] The school boards in Oregon (T) can provide procedures for determining the teachers' or administrators' views over items not subject to negotiations specified elsewhere in the statute.[63]

In summary, most jurisdictions define scope as meaning "wages, hours, and other terms and conditions of employment." Other jurisdictions delineate their scope differently, but either way the big problem with scope in public bilateralism is that so many negotiable items are subject to law or regulation and thus are outside of scope, with the three exceptions of Alaska (PE), Hawaii (PE-T), and Connecticut (ME) noted above. To the extent that the scope of bilateralism is

limited by statute and managements' rights, the character of joint decision-making (bilateralism) is qualified. For public scope to resemble private scope would require the repeal of many statutes and the determination of public policy outside of legislative halls which in contemporary times is under attack.

Management's Rights

This topic is a potential problem area because it returns to the very basis of public bilateralism, i.e., the waiving of the sovereign position of the public employer to allow bilateralism. In waiving unilateralism, the public sector then allows their employees to participate in the decision-making process by establishing the scope of negotiations discussed in the preceding section. But in many statutes the scope of negotiations is restricted by rights retained by management. These items remain within the area of sovereign prerogative which public management will not, cannot, or perhaps should not give up. Various spokesmen for the employee organizations contend that the scope of negotiations should be opened as wide as the private sector,[64] but the BNA's publication Basic Patterns in Union Contracts reports that 68 percent of their 400 sample contracts contain a general statement on management rights, while the Bureau of Labor Statistic's publication

Characteristics of Agreements reports 60 percent of their 1300 sample contracts contain management rights provisions.[65] So the concept of management rights is not as foreign to the general labor movement as one might be led to believe.

One source of management rights not found to the same extent in the private sector is the large number of laws governing wage scales and hours of work. This is supported by using New Hampshire (SE) as an example where Section 98-C:4 II provides that the agreement "shall at all times be subject to existing or future laws and all valid regulations adopted pursuant thereto."[66] In similar terms Federal E.O. 11491 provides in Section 12(a) that each agreement is subject to the following requirements:

> [I]n the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.[67]

Thus, it is again asserted by the author that there is a difference between public and private bilateralism, not only based upon the lack or absence of the strike and lock-out, as presented in Chapter I, but also on the grounds that the scope

of negotiations is restricted or bound by regulating law much more so than in the private sector. For example, there is a minimum wage which covers private employers, but in the federal civil service the employees in Schedule B (the commonly known GS ratings) have eighteen separate grades with ten pay steps in each grade (some exceptions in the higher grades) with the pay for each step set by statute. The public employer simply lacks the ability to negotiate in countless situations.[68]

Now for an analysis of the management rights provisions contained in fourteen statutes from twelve jurisdictions. It seems somewhat strange that more provisions were not found since public management was so up-tight about bilateralism. Perhaps the restricted scope occasioned by the numerous controlling laws might account for some silence, but the deafening silence in this area causes the author to wonder about all the fuss over management rights. Is public management all that worried about its rights? But, as Husain Mustafa, writing in the Public Personnel Review, stated, "Only a short step separates the desire to cooperate from compromising one's prerogatives."[69]

Section 7 (2) of Federal E.O. 10988 contains what I call the basic list of management rights, also found in Federal E.O. 11491 and E.O. 11636, Kansas (PE), New Hampshire (SE),

and Nevada (LE-T). These rights are:

1. To direct employees of the agency.

2. To hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees.

3. To relieve employees from duties because of lack of work or for other legitimate reasons.

4. To maintain the efficiency of the Government operations entrusted to them.

5. To determine the methods, means, and personnel by which such operations are to be conducted.

6. To take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.[70]

Additionally, Federal E.O. 11491 and E.O. 11636 expanded upon the provisions of Federal E.O. 10988 found in Section 6 (b) dealing with the mission of the agency, its budget, and its organization, etc. The provisions of Federal E.O. 11491 (which are identical in Federal E.O. 11636) are:

> In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements

> providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.[71]

Therefore, at least in federal bilateralism the scope of negotiations is restricted by provisions of Sections 11(b) and 12(a)(b) using Federal E.O. 11491 as the example. There is one qualification found in the above quote, that dealing with negotiations over the impact of realignment of work forces or technological change. Similar provisions are found in the management rights provisions of California (LA) and New York (NYC).[72] The New Mexico (SE) provisions and the Maryland (BLT) statute provide that the negotiated agreement contain within it a section on management rights, while other provisions stipulate that the bilateral relationship is subject to management rights without requiring inclusion in the agreement.[73]

In conclusion, the report of the ACIR contains the recommendation that management rights be included in any statute establishing bilateralism.[74] The specific wording of the specified management rights is very similar to Section 12 (b) of Federal E.O. 11491. This discussion on management rights tends to break down into two schools of thought. The first school holds that these rights should not be spelled out, based upon the fear that other rights not so stipulated might be taken as being within the scope of negotiation. The second

school holds that the rights need to be stipulated, for failure to do so might lead the opposition to consider that they are within the scope of negotiation.[75] This author holds with the second school, believing that the provisions contained in Federal E.O. 11491 and discussed in the preceding material are a minimum for management's rights provisions. Why? Public agencies in all units of government are delegated authority to carry out responsibilities in a defined area. This delegation of authority is determined in legislative assemblies where all political forces concerned should have access. Such items as the mission of the agency, its budget, the technology of performing its work, and basic principles of the merit system, among a list of many, should not be determined in negotiation sessions conducted in an executive session. Although there is much room for improvement in gaining access and procedures in legislative assemblies, since negotiation sessions are open only to the two concerned parties, what access would other interested parties have? It is the author's opinion that if you think the legislative process is discriminatory, wait until public policy is determined in the atmosphere of the smoke-filled negotiation room.

Publicity

The publicity problem simply stated is: Can the

negotiation sessions be conducted in executive session if such activity is prohibited by law? In all the literature on bilateralism little attention, in my opinion, is directed toward this very important aspect of bilateralism. Many jurisdictions prohibit executive sessions of their governing bodies, and since the negotiation team is an extension of these bodies, any open proceeding restrictions would seem to apply. Besides, it is a fundamental tenet of democracy that public business be conducted in the open to prevent or at least retard secret dealings. In gathering data on this subject, it was discovered that little has been written and few statutes deal with publicity.

Three examples were found involving the states of Connecticut, Florida, and New York. The Connecticut State Board of Labor Relations held that a 1971 Stamford, Connecticut, ordinance requiring the town manager to report the initial and subsequent management proposals was a violation of prohibited labor practices. The city contended that such an ordinance was in line with the state's "right-to-know" law. The Board decided that the ground rules of negotiations, which included the terms and publicity surrounding the negotiation process, were mandatory subjects of negotiations under the state's Municipal Employee Relations Act, effective

June 16, 1967. Although the Board did rule that the process of negotiations was negotiable, it stopped short of determining that negotiations must be confidential.[76]

Former Governor Rockefeller requested the State's Public Employment Relations Board to study the problem of the public's right to know about agreements reached involving large sums of public funds, but at the same time protecting against interference in the negotiation process. The Board reported no disclosure laws were needed in the state's Taylor Act, based on the fact that such agreements were made public after negotiations had ended. The Board concluded that disclosure would deny the needed flexibility necessary to the "diversity of negotiating situations among the 1,100 public employers and 2,500 negotiating units."[77]

The Florida Supreme Court held that despite the state's "sunshine law" requiring public employers to conduct official business in public, meaningful collective bargaining would be destroyed if full publicity was given during negotiations. Not only could negotiation sessions be conducted in executive session, but the initial planning of management's position could also be conducted in executive session.[78]

There are only fourteen statutes which deal in any way with publicity, either prior, during, or after the negotiation

process. Of these fourteen, ten call for the negotiated agreement to be passed by the legislative body in the form of a resolution or ordinance.[79] This process would then insure at least some public light upon this public business of negotiation. Of the other provisions, Connecticut (ME) and Kentucky (F) simply provide that "no publication thereof shall be required to make the agreement effective." But both jurisdictions do require the passage of an ordinance or resolution for the agreement to become effective, thus to some extent shedding light upon the proceedings.[80]

The Alaska (T) statute provides that the negotiations may be held in executive session upon mutual consent of the parties, but that the final agreement shall "be made at a public meeting of the school board."[81] The Director of Mediation Services has the discretion under the Minnesota (PE-T) statutes to determine if negotiations, mediation sessions, and hearings shall be public or private. Section 9 (2) states:

> All negotiations, mediation sessions, and hearings between public employers and public employees or their respective representatives shall be public meetings except when otherwise provided by the director.[82]

Professional negotiations between teachers and school boards under the Montana (T) statute may be open to the public, but meetings of the school board prior to negotiations shall be closed to the public.[83] The Wisconsin (SE)

provisions call for the final agreement to be submitted to the Joint Committee on Employment Relations after ratification by the employee organization, at which time the Committee shall "hold a public hearing before determining its approval or disapproval."[84]

In drawing this discussion on publicity to a conclusion, in Heisel and Hallihan's Questions and Answers on Public Employee Negotiation, their responses to two questions on publicity, took the line of thought that confidentiality should pervade the initial stage and negotiation process to preclude public posturing by either side. They contend that positions publicized as being hard and fast would preclude good faith negotiations. How could the parties back away from their public positions without losing face? They conclude by proposing a public hearing over the final agreement, thus giving all interested parties, including public spirited groups, the democratic right of knowing what their government is doing.[85]

The author is of the opinion that confidentiality is needed in the initial planning stages of the negotiation process and during the actual negotiations. This is supported by a general principle of administrative law that hearings and proceedings in which public notice is not given so as to allow pleadings by interested parties does not render the proceedings

reversible providing the safeguard of a hearing before a reviewing body is conducted prior to implementation of any decision made. In like terms, if the initial stages and actual negotiations are executive session in nature and fact, the safeguard of requiring the agreement to be implemented by ordinance or resolution thus provides the necessary safeguard and requirement of conducting public business in the open.

Official Time

Official time means the duty hours of the employer and employee which can be used for conducting bilateral relations. Only five statutes from three jurisdictions mention that the solicitation of members and the conducting of organization business is to be on non-duty time. These three jurisdictions are Maryland (BLT), New Mexico (SE), and Federal E.O. 10988, E.O. 11491, and E.O. 11636.[86] The administrative machinery handling bilateral implementation in the other jurisdictions may be able to promulgate similar rules, but this author believes the use of official time is important enough to warrant wider coverage among the statutes.

Outside of the solicitation of members and the conducting of organization business, official time for the conducting of negotiations has developed from the provision of Section 9 of Federal E.O. 10988 and Section 20 of Federal E.O. 11491. These

sections provide respectively:

> Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.[87]

> Employees who represent a recognized labor organization shall not be on official time when negotiating an Agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.[88]

Federal E.O. 11636 allows the Secretary of State to establish by regulation reasonable limitations on the use of official time for consultation and conferral.[89]

Beyond these federal regulations, California (ME) states public agencies shall, for recognized employee organizations, allow a reasonable number of public employees time off for meeting and conferring on matters within the scope of representation without loss of compensation or other benefits.[90] The California (LA) statute provides that the city shall grant reasonable time off for those employees necessary for meeting and conferring with the number based upon a ration of one per

each 100 employees in the recognized unit, but such number shall not be less than two nor more than seven.[91]

Exclusively recognized employee organizations shall be permitted to bargain collectively during working hours without loss of salary or wages, with the number of such employees being at least five based on a ratio of one employee per 500 employees in an organization over 2,500 members, and units of less than 2,500 members getting the minimum number of five. This is the provision found in the Hawaii (PE-T) statute.[92]

Maryland (BLT) requires that negotiations with representatives of employee organizations shall, whenever practicable, be conducted on official time, but if the employee negotiators are employees of the city government, negotiations are to be conducted during non-duty hours.[93] New Mexico (SE) provisions are very similar to Federal E.O. 11491 in providing that negotiations shall be conducted during non-duty hours except to the extent agreed to by the parties to allow for the use of official time up to forty hours or one-half the time spent in negotiations during the regular working hours. The number of employees is not to exceed five.[94]

The statutes in Michigan (PE) and Wisconsin (SE) and (ME-T) provide that the payment of wages for employees engaged in negotiations is not an unfair employer practice.[95]

In conclusion, this author is of the opinion that reasonable use of official time for negotiations, without any loss of service provided by those employees negotiating, is not a heavy burden for public management to bear. To require non-duty hours negotiations works a hardship on both employer and employee. Bilateralism is a normal item of business in a jurisdiction allowing such activity, and therefore, negotiations should be conducted during duty hours.

Contract Interpretation

Contract interpretation refers to the activity around the determination of the application or interpretation of some provision of a negotiated agreement. The data for this analysis comes from twenty-two statutes covering twenty jurisdictions. In condensed form, contract interpretation is considered a grievance in seventeen of the twenty-two statutes.[96] Twelve statutes provide for arbitration with ten of these calling for binding arbitration.[97] Five statutes stipulate the equal sharing of the cost involved in the established procedure.[98]

North Dakota (T) and Oregon (PE) define such a conflict an impasse. The former stipulates negotiations over the conflict, which if not resolved would proceed to impasse resolution procedures, while the later procedure requires the

immediate implementation of impasse procedures.[99] This application of impasse procedures in contract interpretation is strange since generally impasse resolution, or the procedures for handling impasses, are restricted by definition to negotiation impasses. These are the only two exceptions to this general rule located in this author's research in bilateralism.

The provisions for contract interpretation found in California (LA), Minnesota (PE-T), and Federal E.O. 10988 and E.O. 11491 are used for an in-depth illustration of the process. The California (LA) statute defines a contract interpretation as a grievance, with the grievance procedure found in Section 4.865. The parties involved in the meet-and-confer process shall develop a grievance procedure to be placed in the memorandum of understanding. Any grievance (contract interpretation or application conflict) not settled by the negotiated process shall go to final and binding arbitration. Such procedures shall conform to the following standards.[100]

Initially the employee having a contract interpretation grievance shall discuss the conflict with the employee's immediate supervisor on an informal basis. Secondly, provision is made for the filing of a written grievance and for processing through at least four levels of review but not less than

two levels of review. At each stage of review a written notice of the results is sent to the employee and his representative if any. Thirdly, if the grievance is not settled in the above procedure, either party may submit the grievance to arbitration by written notice to the other party of such desire. The Employee Relations Board is to submit a list of seven arbitrators from which the parties are to alternately strike (mark-out) one name until a single name remains. The arbitrator is to hear the case, his decision being final and binding. If this arbitrator is unable to hear the case, the parties will repeat the striking process mentioned above to determine another arbitrator. The total expense of arbitration shall be shared equally by the parties. The employee may be represented by a representative of his own choice throughout the entire process.[101]

The Minnesota (PE-T) statute also defines contract interpretation as a grievance. All agreements shall provide a grievance procedure which shall include compulsory binding arbitration. If the parties to the agreement are unable to establish such a procedure, they shall be subject to the grievance procedure established by the Director of Mediation Services. Although the Director of Mediation Services is to promulgate grievance procedures for handling contract

interpretation, the process shall not provide for the services of the Bureau of Mediation Services. If the parties are unable to agree upon an arbitrator, the Public Employment Relations Board is to provide a list of five with the parties striking (mark-out) names until one remains. The arbitrator's decision is binding upon the parties with all costs being equally shared by the parties.[102]

Federal E.O. 10988 provides in Section 8 that exclusive representatives can negotiate procedures for handling grievances in accordance with Civil Service standards and which does not in any way diminish or impair any rights of employees which would otherwise be available in the absence of the negotiated procedures. The procedure may include the arbitration of grievances, which shall be advisory in nature, and restricted to the interpretation or application of the agreement. The process must be initiated by an employee.[103]

The procedures in Section 13 of Federal E.O. 11491 are very similar to those found in Section 8 of Federal E.O. 10988. An agreement entered into under Federal E.O. 11491 shall contain provisions for the handling of grievances over the interpretation or application of the agreement, and these provisions establish the only procedures available to the employees of the unit covered by the agreement. An employee

can proceed in initiating this grievance procedure without the intervention of the exclusive representative, but any decision shall not be inconsistent with the controlling agreement. The negotiated procedure may include arbitration, but arbitration can only be invoked by either the agency or the exclusive representative. An appeal can be taken to the Council (FLRC) under Council rules concerning exceptions to an arbitrator's decision. Questions as to the subject matter of a grievance can be taken to the Assistant Secretary for Labor-Management Relations for his decision.[104]

Summing up this material, contract interpretation or application is generally classified as a grievance with barely a majority providing for arbitration of the conflict. Although these common points do emerge, once again the Riggsian diversification produces a melange of approaches. It is also noteworthy that twenty of the thirty-six different jurisdictions forming the body of data for this analysis of bilateralism contain such provisions, but these twenty jurisdictions account for only twenty-two of the seventy-four statutes.

Summary

Since this chapter is fairly lengthy, perhaps it would be best to outline the major sections. These were: Background

Material, General Provisions, Scope, Management's Rights, Official Time, Contract Interpretation, and Publicity.

The Background Material examines both the restraints of collective negotiations and court cases dealing with the wording of bilateral statutes. The four restraints presented on collective negotiations are: respect for the public's interest, good-faith negotiations, uniqueness of each situation, and noncrisis settlement of conflicts. The cases held that in using statutory phraseology from private bilateralism, public bilateral statutes carry with them the meaning and interpretation from private bilateralism. For example, the California allowance of "concerted activities" to further the goals of collective bargaining was interpreted as permitting the strike. California subsequently repealed the collective bargaining provisions and substituted meet and confer.

The General Provisions section examined when collective negotiations are to begin, which is generally ten days after the employee organization files a written request with the unit of government. The composition of the negotiating teams was analyzed with many variations discovered. If the employee organization desires to negotiate over monetary items, there is generally a deadline for notification. The most used stipulation is that notification must be made at least 120 days

prior to the last day appropriations can be made. The terms of either a contract or memorandum of understanding vary greatly, but however stated a maximum limit of usually three years.

The next two sections, Scope and Management's Rights, are very closely related but are handled separately to reduce the confusion to manageable limits. The most commonly used terminology for Scope, which refers to the area of items which negotiation covers, is "wages, hours, and other terms and conditions of employment." This term plus other provisions on Scope are examined. Management's Rights are important to study since they would preclude negotiation to some extent. The rights set forth in Federal E.O. 10988 are generally used as a guide.

Official Time refers to the provisions which allow negotiations to be conducted during duty hours. Generally, negotiations can be conducted during working hours, but other union business must be non-duty time activities. The provisions for official time from Federal E.O. 10988 and E.O. 11491, Maryland (BLT), New Mexico (SE), Hawaii (PE-T), California (ME) (LA), Wisconsin (SE) (ME-T), and Michigan (PE) are analyzed.

Contract Interpretation refers to the activity around the interpretation and application of the contract or agreement.

In most provisions contract interpretation is called a grievance, with binding arbitration being used in barely a majority of these instances to settle the conflict. Less than one-third of the statutes provide for contract interpretation.

Publicity is examined because of the "open meeting" requirement of many jurisdictions. Can negotiation sessions, which is the conducting of public business, be conducted in executive session (in private)? Generally it is held that negotiations can be held in executive sessions, providing the agreement be presented to the legislative body in public session to allow public scrutiny before implementation.

In conclusion, Riggsian diversification is well illustrated by the many and varied approaches to collective negotiations. This diversification is even more apparent in the next chapter on Impasse Resolution. Impasse resolution refers to the procedure established to handle deadlocks in negotiations. Mediation, fact-finding, and arbitration, used either in some combination or by themselves, are used in impasse resolution.

Footnotes

[1]Kenneth O. Warner and Mary L. Hennessy, Public Management at the Bargaining Table (Chicago: Public Personnel Association, 1967).

[2]Vernon H. Jensen, "The Process of Collective Bargaining and the Question of Its Obsolescence," Industrial and Labor Relations Review, XVI (July, 1963), pp. 548-549.

[3]Ibid.

[4]Wisconsin (SE), RF-BNA-GERR, Section 111.80 (1). 51:5811.

[5]Harold W. Davey, "The Use of Neutrals in the Public Service," Labor Law Journal, XX (August, 1969), p. 538.

[6]Ibid.

[7]Leland B. Cross, Jr., "A Collective Bargaining Agreement Checklist," Labor Law Journal, XIX (January, 1968), p. 67.

[8]Pat Greathouse, "Changing Trends and Concepts in Collective Bargaining," Labor Law Journal, XVII (December, 1960), p. 723.

[9]William E. Simkin, Mediation and the Dynamics of Collective Bargaining (Washington, D.C.: Bureau of National Affairs, 1971), p. 314. (Hereafter referred to as Simkin, Mediation.)

[10]46 LRRM 3065-3066.

[11]Labor-Management Act of 1947, Section 157.

[12]Alaska (PE), RF-BNA-GERR, Section 23.40.080, 51:1111, Connecticut (ME), CCH-LLR, Section 2 (A), p. 53,165, Hawaii (PE-T), RF-BNA-GERR, Section 3, 51:2012, Kentucky (P), RF-BNA-GERR, Section 2, 51:2164, Massachusetts (ME-T), RF-BNA-GERR, Section 178H (1), 51:3013, Michigan (PE), RF-BNA-GERR, Section 423.209, 51:3112, and Pennsylvania (PE-T), CCH-LLR, Section 401, p. 57,987.

[13]Kentucky (P), RF-BNA-GERR, Section 2, 51:2614.

[14]Pennsylvania (PE-T), CCH-LLR, Section 401, p. 57,987.

[15]73 LRRM 2692-2693.

[16]70 LRRM 3397-3398.

[17]Pennsylvania (PE-T), CCH-LLR. Section 301 (17), p. 57,986.

[18]California (ME), (T), and (LA), Kansas (PE), New Hampshire (P), Minnesota (PE - professional employees), and Federal (11491) and (11636).

[19]Minnesota (PE - nonprofessional employees), and Connecticut (T).

[20]Oregon (T) and (SP).

[21]Kansas (T), and Vermont (T).

[22]Kentucky (F) and (P), Pennsylvania (P-F), Massachusetts (SE) and (ME-T), and Michigan (PE).

[23]Alaska (T), RF-BNA-GERR, Section 14.20.560, 51:1114, and Georgia (F), RF-BNA-GERR, Section 6, 51:1911.

[24]Oklahoma (T), RF-BNA-GERR, Section 6, 51:4515, and Kansas (PE), RF-BNA-GERR, Section 7 (g), 51:2514.

[25]Vermont (T), RF-BNA-GERR, Section 2003, 51:5419.

[26]Nebraska (T), RF-BNA-GERR, Section 79-1292, 51:3615.

[27]Alaska (T), RF-BNA-GERR, Section 14.20.560 (d), 51:1114.

[28]California (T), RF-BNA-GERR, Section 13085, 51:1415.

[29]California (LA), RF-BNA-GERR, Section 4.870 (1), 51:1422.

[30]Connecticut (ME), CCH-LLR, Section 8 (a), p. 53,169.

[31]Idaho (T), RF-BNA-GERR, Section 3, 51:2112.

[32]Maryland (T), RF-BNA-GERR, Section 160 (h), 51:2912, and Maryland (BLT), RF-BNA-GERR, Section 118, 51:2915.

[33]Massachusetts (ME-T), RF-BNA-GERR, Section 1781, 51:3013.

[34]Minnesota (PE-T), RF-BNA-GERR, Section 14 (3), 51:3218.

[35]Nevada (LE-T), RF-BNA-GERR, Section 10.1, 51:3711.

[36]Ibid.

[37]Idaho (F), RF-BNA-GERR, Section 8, 51:2111, and New Hampshire (P), RF-BNA-GERR, Section 105-B:7 I, 51:3813.

[38]Nevada (LE-T), RF-BNA-GERR, Section 13 (1), 51:3712.

[39]Minnesota (PE-T), RF-BNA-GERR, Section 9 (4), 51:3215.

[40]Nebraska (PE), RF-BNA-GERR, Section 48-837, 51:3614, and Florida (F), RF-BNA-GERR, Section 7, 51:1813.

[41]Wisconsin (SE), RF-BNA-GERR, Section 111.92 (3), 51:5816.

[42]Labor-Management Act of 1947, Section 158 (d), and used as an example for the forty-two statutes see Connecticut (ME), CCH-LLR, Section 2 (a), p. 53,165.

[43]Federal (11491), RF-BNA-GERR, Section 11 (a), 21:3.

[44]Federal (11491), RF-BNA-GERR, Section 12 (a), 21:4.

[45]Alaska (PE), RF-BNA-GERR, Section 23.40.250 (7), 51:1114.

[46]Delaware (t), RF-BNA-GERR, Section 4006 (a-1), 51:1713.

[47]Kansas (PE), RF-BNA-GERR, Section 2 (s), 51:2512.

[48]Minnesota (PE-T), RF-BNA-GERR, Section 3 (18), 51:3212.

[49]New Mexico (SE), RF-BNA-GERR, Section 1.E.12, 51:4012.

[50]Wellington and Winters, The Union and the Cities, p. 148.

[51]See Appendix D.

[52]Federal (10988), RF-BNA-GERR, Sections 4-6, 21:1052-1053.

[53]Federal (11491), RF-BNA-GERR, Sections 11 and 12, 21:3-4.

[54]Federal (11491), RF-BNA-GERR, Section 11 (c), 21:4.

[55]Federal (11636), Weekly Compilation, Section 8 (a), p. 1690.

[56]New York (NYC), RF-BNA-GERR, Section 1173-4.3a, 51:4163.

[57]New York (NYC), RF-BNA-GERR, Section 1173-4.3a (1) (2) (3) (4) (5), 51:4163.

[58]Connecticut (ME), CCH-LLR, Section 8 (b) (c), p. 53,169.

[59]Hawaii (PE-T), RF-BNA-GERR, Section 9 (d), 51:2014.

[60]Alaska (PE), RF-BNA-GERR, Section 23.40.215, 51:1113.

[61]Nevada (LE-T), RF-BNA-GERR, Section 13 (2), 51:3712.

[62]New Mexico (SE), RF-BNA-GERR, Section X, 51:4016.

[63]Oregon (T), RF-BNA-GERR, Section 342.460 (7), 51:4013.

[64]Nigro, Relations in the Public Service, pp. 182-185.

[65]Bureau of National Affairs, Basic Patterns, 65:1, and Bureau of Labor Statistics, Characteristics of Agreements, p. 15.

[66]New Hampshire (SE), RF-BNA-GERR, Section 98-C:4 II, 51:3812.

[67]Federal (11491), RF-BNA-GERR, Section 12 (a), 21:4.

[68]Fair Labor Standards Act of 1938 (amended), U.S. Code, Vol. 7, Title 29, Chapter 8 (1970). Also see Maryland (BLT), RF-BNA-GERR, Section 114, 51:2914, and Minnesota (PE-T), RF-BNA-GERR, Section 6 (6), 51:3213.

[69]Husain Mustafa, "Can Management Negotiate Aspects of Its Rights," Public Personnel Review, XXIX (July, 1968), p. 147.

[70]Federal (10988), RF-BNA-GERR, Section 7 (2), 21:1053, Federal (11491), RF-BNA-GERR, Section 12 (b), 21:4, Federal (11636), Weekly Compilation, Section 8 (b), pp. 1690-1691, Kansas (PE), RF-BNA-GERR, Section 6, 51:2513, New Hampshire (SE), RF-BNA-GERR, Section 98-C:7, 51:3812, and Nevada (LE-T), RF-BNA-GERR, Section 10 (2), 51:3711.

[71]Federal (11491), RF-BNA-GERR, Section 11 (b), 21:5, Federal (10988), RF-BNA-GERR, Section 6 (b), 21:1952, and Federal (11636), Weekly Compilation, Section 8 (c), p. 1691.

[72]California (LA), RF-BNA-GERR, Section 4.859, 51:1422, and New York (NYC), RF-BNA-GERR, Section 1173-4.3 (5), 51:4163.

[73]New Mexico (SE), RF-BNA-GERR, Section VIII.E, 51:4015, and Maryland (BLT), RF-BNA-GERR, Section 14, 51:2913-2914.

[74]ACIR, Policies for State and Local Government, p. 102.

[75]Warner and Hennessey, Public Management, p. 259.

[76]Personnel News, XXXVIII, No. 9 (September, 1972), p. 74.

[77]Ibid.

[78]Ibid.

[79]California (LA), RF-BNA-GERR, Section 4.870 (c), 51:1423, Connecticut (ME), CCH-LLR, Section 8 (b), p. 53,169, Connecticut (T), CCH-LLR, Section 10-153 (d), p. 53,189, Kansas (PE), RF-BNA-GERR, Section 11, 51:2514, Kansas (T), RF-BNA-GERR, Section 9, 51:2517, Missouri (PE), RF-BNA-GERR, Section 105.250, 51:3411, Montana (T), RF-BNA-GERR, Section 8, 51:3513-3514, Nebraska (PE), RF-BNA-GERR, Section 48-837, 51:3614, Pennsylvania (PE-T), CCH-LLR, Section 901, p. 57,992, and Wisconsin (SE), RF-BNA-GERR, Section 111.92 (1), 51:5815-5816.

[80]Connecticut (ME), CCH-LLR, Section 8 (e), p. 53,170, and Kentucky (F), RF-BNA-GERR, Section 11 (2), 51:2613.

[81]Alaska (T), RF-BNA-GERR, Section 14.20.560 (e), 51:1114.

[82]Minnesota (PE-T), RF-BNA-GERR, Section 9 (2), 51:3215.

[83]Montana (T), RF-BNA-GERR, Section 13, 51:3514.

[84]Wisconsin (SE), RF-BNA-GERR, Section 111.92 (1), 51:5815.

[85]W. D. Heisel and J. D. Hallihan, Questions and Answers on Public Employee Negotiations (Chicago: Public Personnel Association, 1967), pp. 95-97.

[86]Maryland (BLT), RF-BNA-GERR, Section 123, 51:2916, New Mexico (SE), RF-BNA-GERR, Section II.b, 51:4013, Federal (10988), RF-BNA-GERR, Section 9, 51:1053, Federal (11491), RF-BNA-GERR, Section 20, 21:5, and Federal (11636), Weekly Compilation, Section 14, p. 1692.

[87]Federal (10988), RF-BNA-GERR, Section 9, 21:1053.

[88]Federal (11491), RF-BNA-GERR, Section 20, 21:5.

[89]Federal (11636), Weekly Compilation, Section 14, p. 1692.

[90]California (ME), RF-BNA-GERR, Section 3505.3, 51:1412.

[91]California (LA), RF-BNA-GERR, Section 4.845, 51:1421.

[92]Hawaii (PE-T), RF-BNA-GERR, Section 8 (c), 51:2014.

[93]Maryland (BLT), RF-BNA-GERR, Section 123, 51:2916.

[94]New Mexico (SE), RF-BNA-GERR, Section VIII.L, 51:4016.

[95]Michigan (PE), RF-BNA-GERR, Section 423.210 (b), 51:3112, Wisconsin (SE), RF-BNA-GERR, Section 111.84 (1) (b), 51:5813, and Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (3) (a), 51:5817.

[96]Alaska (PE), RF-BNA-GERR, Section 23.40.200, 51:1113, California (LA), RF-BNA-GERR, Section 4.801, 51:1418, Hawaii (PE-T), RF-BNA-GERR, Section 11 (a), 51:2015, Kansas (PE), RF-BNA-GERR, Section 10 (b), 51:2514, Kansas (T), RF-BNA-GERR, Section 12 (a), 51:2517, Maine (LE-T), RF-BNA-GERR, Section 970, 51:2815, Maryland (BLT), RF-BNA-GERR, Section 111 (f) (1), 51:2913, Minnesota (PE-T), RF-BNA-GERR, Section 10 (60), 51:3216, New Jersey (PE-T), RF-BNA-GERR, Section 34.13A-5 (3), 51:3913, New Mexico (SE), RF-BNA-GERR, Section 1.E.22, 51:4012,

New York (NYC), RF-BNA-GERR, Section 1173.3.o, 51:4162, Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.12, 51:4514, Pennsylvania (PE-T), RF-BNA-GERR, Section 3-18-1.1, 51:5011, Wisconsin (SE), RF-BNA-GERR, Section 111.86, 51:5814, Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (4) (c) (2), 51:5818, and Federal (11491), RF-BNA-GERR, Section 13 (a), 21:4.

[97]Connecticut (ME), CCH-LLR, Section 6, p. 53,168, Hawaii (PE-T), RF-BNA-GERR, Section 11 (a), 51:2015, Kansas (PE), RF-BNA-GERR, Section 10 (b), 51:2514, Kansas (T), RF-BNA-GERR, Section 12 (b), 51:2517, Maine (LE-T), RF-BNA-GERR, Section 970, 51:2815, Maryland (BLT), RF-BNA-GERR, Section 122, 51:2916, Massachusetts (ME-T), RF-BNA-GERR, Section 178K, 51:3014, Minnesota (PE-T), RF-BNA-GERR, Section 10 (1), 51:3215, New Hampshire (P), RF-BNA-GERR, Section 34.13A-5 (3), 51:3913, New Mexico (SE), RF-BNA-GERR, Section VIII.J, 51:4015, and New York (NYC), RF-BNA-GERR, Section 1173-8.0, 51:4167.

[98]California (LA), RF-BNA-GERR, Section 4.865 (5), 51:1422, Hawaii (PE-T), RF-BNA-GERR, Section 11 (b), 51:2015, Massachusetts (ME-T), RF-BNA-GERR, Section 178K, 51:3014, Minnesota (PE-T), RF-BNA-GERR, Section 10 (4), 51:3215, and Pennsylvania (PE-T), CCH-LLR, Section 903 (2), p. 57,992.

[99]North Dakota (T), RF-BNA-GERR, Section 13, 51:4313, and Oregon (PE), RF-BNA-GERR, Section 7, 51:4612.

[100]California (LA), RF-BNA-GERR, Section 4.865, 51:1422.

[101]Ibid.

[102]Minnesota (PE-T), RF-BNA-GERR, Sections 10 (1) (4) (6) and 11 (5) (i), 51:3215-3216.

[103]Federal (10988), RF-BNA-GERR, Section 8, 21:1053.

[104]Federal (11491), RF-BNA-GERR, Section 13, 21:4.

CHAPTER V

IMPASSE RESOLUTION

Background Material

"Conflict can be devastating; it can also be creative," states William E. Simkin, former head of the Federal Mediation and Conciliation Service.[1] A negotiation impasse is just that--conflict--for the term refers to a deadlock in negotiations which can result in a strike if not averted by the timely and proper method of resolving the conflict. This chapter examines the many avenues established to resolve negotiation deadlocks in bilateralism.

The methods used and examined in impasse resolution are mediation, fact-finding with and without recommendations, advisory, binding, and final-offer arbitration. Mix these variables with the thirty-three jurisdictions having fifty-nine statutes and the result is Riggsian diversification. To aid in understanding this diversification, fourteen classes have been established, each illustrating a different approach in the use of mediation, fact-finding, and arbitration. Table 5-1 is a summary presentation of the classes and the diversification in the use of mediation, fact-finding, and arbitration in impasse resolution.

Table 5-1.--Diversification in the use of mediation, fact-finding, and arbitration in impasse procedures

Class	Number Using	Mediation	Fact-Finding	Arbitration
1	5	M		A
2	11	M ⟶	FF	
3	5	M ⟶	FF	A
4	4	M ⟶		A
5	3	M,	FF	
6	2	M,	FF,	A
7	1	M,		A
8	1	M,		A
9	2	M	(FF,	A)
10	11		FF	
11	4			A
12	5			BA
13	2			FOA
14	3	Do not specify either M, FF, or A		

A word of explanation is needed to understand Table 5-1. Classes 1, 10, 11, 12, and 13 are established upon the single use of the three major approaches to impasse resolution or a hybrid variety of a major approach. The main approaches are mediation, fact-finding, and arbitration--while a hybrid approach is final-offer arbitration. Classes 2, 3, and 4 indicate by the use of arrows that the method used moves from mediation to fact-finding, or mediation to fact-finding to arbitration, or mediation to arbitration. Classes 5, 6, and 7 involve the use of the three major approaches but not

in sequence like form as Classes 2, 3, and 4. Generally, in classes 5, 6, and 7 the approach used depends upon the request of the parties or the type of employees involved. The comma indicates the lack of sequence. Class 8 is established around the Alaska (PE) statute which provides mediation for employees in category 3, but arbitration for employees in categories 1 and 2. The diagonal is used to indicate this arrangement. Class 9 is established to handle the process of Federal E.O. 11491 and New Mexico (SE) where the primary approach is mediation, but where the Federal Services Impasse Panel and the New Mexico State Personnel Board may allow the use of either fact-finding or arbitration. Class 14 contains three jurisdictions which indicate the impasse should be taken to the appropriate administrative board for handling but do not specify any approach.

There are several common points among Classes 1 through 11. Whenever a board is established to handle an approach, it is generally tripartite, i.e., one management member, one employee organization member, and one public member who is usually the chairman. Alaska (T) provides for two management and employee organization members with the fifth member serving as chairman, while Kansas (PE) specifies three public members.[2] If there is any need for outside help in selecting the public member of these panels, both the American Arbitration Association and the Federal Mediation and Conciliation Service are used in several instances. When costs are

mentioned, the general rule is that they are to be shared equally, or with each party paying its own costs and dividing the other costs equally being second most common. Hawaii (PE-T) and Kansas (PE) provide that their respective boards will finance mediation and fact-finding, but the parties share equally all other costs.[3] Pennsylvania (PE-T) stipulates that the state pays the entire cost of arbitration.[4] The most frequently used terminology for when the impasse procedures become available is within and including thirty days of negotiations or after a reasonable period of time. Montana (T) and New Hampshire (P) provide for impasse resolution after 50 and 40 days respectively, while New York (PE-T) stipulates at least 120 days before the end of the fiscal year.[5] Oregon (T) specifies 60 days prior to budget submission, while Pennsylvania (PE-T) specifies after 21 days of negotiations but no more than 150 days before budget submission time.[6] Classes 12 and 13 are analyzed in detail in subsequent sections and are therefore not included here.

Classes One Through Eleven and Fouteen

Class 1: Alaska (T), California (ME), Georgia (F), Maryland (T), and North Dakota (PE)

The most common point among the five jurisdictions in Class 1, which is somewhat perplexing to the author, is that in all but California (ME) the process sounds very much like fact-finding with recommendations. In reading William Simkin's book on mediation, escalation or the addition of

other mediators is possible but, as he indicates, this must be done with caution.[7] But four of the jurisdictions provide for tripartite boards with Alaska (T) providing for two representatives from both labor and management.[8]

Using the Georgia (F) statute as a representative model, the mediation process becomes available when the parties are unable to reach agreement within thirty days of their first meeting. Within five days of the thirty day period each side is to select one representative, and the two are to select the third member (chairman) within another five day period. If the parties are unable to select the third member, the American Arbitration Association is to select the person. The board is to call a hearing within ten days of the appointment of the third member, with the parties given seven days notice. The hearing shall be concluded within twenty days and the board "shall make written findings and a written opinion upon the issues presented." A majority decision of the mediators is advisory only. The cost of the third member is shared equally, with each side bearing its own costs.[9]

When class 10 is examined later, I believe that the reader will then better understand the opening statement about these mediation procedures sounding like fact-finding. Mediation is usually a solo performance with very infrequent use of recommendations and findings. The function of the mediator is to act as a conduit of communication in reconciling differences. The Georgia (F) procedure even

contains a list of factors to be used by the mediation panel. (These are further discussed in the Section, Factors in Arbitration.) This latter point would also add greater weight to the idea that the straight application of mediation in public bilateralism, excepting California (ME), does not resemble that practiced in private bilateralism.

Class 2: Idaho (T), Kansas (PE), Maryland (BLT), North Dakota (T), Oregon (T), Oregon (SP), Oregon (N), Vermont (T), Vermont (ME-F), Wisconsin (SE), Wisconsin (ME-T)

The dominant characteristic of Class 2 is the two-phased approach to impasse resolutions. The first phase is mediation, and if this fails or is not used, the second phase of fact-finding is used. Kansas (PE) provides that the impasse goes to fact-finding if the conflict persists seven days after appointment of the mediator, while Oregon (T) (SP) (N) stipulate within ten days of appointment.[10] In Vermont (ME-F) phase two becomes active after not less than fifteen days of mediation, while Wisconsin (SE) and (ME-T) statutes simply state after a reasonable period of time.[11]

The Kansas (PE) statute allows the parties to establish an impasse procedure through negotiation or, in the event of failure or absence of such provisions, to approach the Public Employees Relations Board for assistance. The parties may request or the Board may on its own motion assist in settling the impasse by appointing a mediator or mediators representative of the public from a list maintained by the

Board. If the mediation effort fails to resolve the impasse within seven days after appointment, the Board shall appoint a fact-finding board to be composed of not more than three public members. Not later than twenty-one days from the date of appointment, the fact-finders shall issue their findings and recommendations. The Board may make the report public seven days after submission to the parties, but if the impasse continues fourteen days after submission to the parties, the report shall be made public.

If the impasse persists after fact-finding efforts, the Kansas (PE) provisions allow a third phase to become operative. If the dispute continues after a forty day period but not later than fourteen days prior to budget submission time, both parties shall submit their positions to the controlling governing body. This body shall take such action as will protect the public interest and the interests of the public employees.[12]

The (ME) part of Vermont (ME-F), since (F) is analyzed as binding arbitration, provides that after a reasonable period, but not less than sixty days, the parties may petition the Commission of Labor and Industry to appoint a mediator who is not actively connected with labor or industry. If mediation efforts fail, but after not less than fifteen days, either party may petition the other and require all unresolved issues to go to a fact-finding board. This tripartite board shall conduct a hearing upon proper notice

and shall issue its report of findings of fact and recommendations within thirty days after concluding the hearing. A majority decision is sufficient, and the report will be published in a newspaper having circulation in the municipality. An appeal on questions of law can be taken to the supreme court.[13]

Class 3: Hawaii (PE-T), Maine (ME-T), Nevada (LE-T), New Jersey (PE-T), New York (PE-T)

The distinguishing feature of Class 3 impasse resolution is the full use of mediation, fact-finding, and arbitration in a phased application. The parties to the dispute, usually with the assistance of their administrative board, will first use mediation but if unsuccessful then use fact-finding, and if still unresolved the impasse goes to arbitration. For illustration the Hawaii (PE-T), Maine (ME-T), and the Nevada (LE-T) statutes are used.

The Hawaii (PE-T) provisions allow the parties to negotiate their own impasse procedures, ending in a final and binding decision. In the absence of such provisions or on the motion of the Public Employment Relations Board, the Board shall render assistance to the parties. The Board shall appoint a mediator or mediators to assist in resolving the dispute, selecting the individuals from a list maintained by the Board within three days of receiving notification of an impasse. If the dispute continues for fifteen days after the date of the impasse, the Board shall appoint a

fact-finding board of not more than three public members. The fact-finding board is to report within ten days of its establishment, with the parties having five days to study the findings and recommendations and reach a settlement. If the parties are unable to reach a settlement and have not referred the dispute to final and binding arbitration, the Board shall publish the findings and recommendations for public information.

The arbitration procedure is activated if the impasse continues past thirty days, with a hearing before a tripartite Board. The Board shall appoint any member to the panel where the parties fail to do so, even to the extent of appointing an arbitrator for one or both of the principal parties. If the impasse remains unresolved for fifty days, the arbitration board shall send its decision to both parties for implementation, but any part of the decision dealing with money is subject to appropriation. If the parties have not submitted their impasse to arbitration, either party shall be free to take whatever action deemed necessary to settle the dispute short of disruption or interruption of services within sixty days after the fact-finding report was made public. On all cost items the employer and employee organization are to submit their positions to the appropriate legislative body for settlement. This procedure is similar to New York (PE-T) of this class and Kansas (PE) of Class 2.[14]

The Maine (ME-T) three phase procedure begins with mediation if the parties agree to use this approach. But if

the parties are unable to reach a settlement with or without a mediator, they can use a mutually acceptable fact-finding procedure. If the parties do not select an outside fact-finding procedure, they may approach the Executive Director of the Maine Board of Arbitration and Conciliation to establish a three member board from a list maintained by the Board. If the dispute still remains unresolved thirty days after receipt of the board's findings and recommendations, either party can make the report public, but not earlier than the thirty day period unless upon agreement of both parties.

The parties shall have an additional fifteen day period in which to settle their differences before arbitration is started. At the end of this forty-five day period, they may jointly agree to proceed to arbitration, but at the end of a ten day period after the forty-five day period either party may request arbitration. The arbitration board is tripartite, and if the parties cannot agree to the third member, the services of the American Arbitration Association will be used to determine the third member. The board can proceed even if one party does not select its representative, which is the only instance of such provision found. Any decision of the board on salaries, pensions and insurance is advisory with the parties having ten days in which to accept. If the decision is not accepted, the board or either party may make the decision public. On all other issues in dispute, the decision is binding by majority decisions but subject to

review by the Superior Court. This binding decision may also be made public.[15]

The Nevada (LE-T) procedure is initiated by requesting the Local Government Employee-Management Relations Board to appoint a mediator if the parties negotiate up until the date for completion of the tentative budget without agreement. The mediator has forty-five days in which to effect a settlement, but if he is unable, he is discharged from his responsibilities. Either party may submit the impasse to a tripartite fact-finding board with its report being issued within forty-five days of its selection. The report shall be made public if the parties have not resolved the dispute within five days of receipt of the report. Prior to the submission of the issues, the parties may stipulate that any or all items contained in the board's report are binding.

The arbitration procedure is before a single arbitrator whose decision is advisory unless the parties, by mutual consent, agree that all or any part of the decision is binding. If the arbitration procedure fails to effect an agreement and the continuing dispute threatens or endangers public safety, the Board shall conduct upon notice a public hearing for a review of the arbitrator's decision. The Board can modify the arbitrator's decision or make any part binding.[16]

Class 4: Connecticut (T), Rhode Island (SE), Rhode Island (ME), and Rhode Island (T)

Class 4 impasse procedures are based upon the phasing from mediation into arbitration bypassing fact-finding as

examined in Class 3. Since there are only four statutes in this class and Rhode Island (ME) and (T) are identical, all four procedures are examined.

The Connecticut (T) procedures begin with the parties submitting the dispute to the Secretary of the State Board of Education or with the Secretary initiating action when it is determined the conflict is jeopardizing the education of the children. The parties will meet with the Secretary, his agent, or a mediator and provide any information as directed by the Secretary. If such mediation efforts fail, the Secretary may order the parties to meet with him four days later with a settlement or their choice of arbitrators. The representatives will select a third member, but if all this effort fails, the Secretary shall designate an arbitrator. An advisory decision will be issued within fifteen days.[17]

If the parties are unable to reach an agreement within thirty days after negotiations begin, the Rhode Island (SE) statute directs the parties to submit within three days any and all unresolved issues to the State Labor Relations Board for conciliation and fact-finding. Within ten days of appointment the conciliator shall issue his report (findings and recommendations) with the parties having five days in which to consider the report. Any unresolved issues shall be referred to arbitration. An arbitrator, who shall be a Rhode Island resident, shall conduct a hearing within ten days upon proper notice and issue his decision within ten

days after a maximum hearing limit of twenty days. The decision shall be binding for all issues except those involving wages, in which case the decision is advisory.[18]

The procedure for Rhode Island (ME) and (T) again is initiated after thirty days of negotiations with either party requesting mediation by the Director of Labor or any other source. If mediation fails or is not requested after the thirty-day period, any and all unresolved issues shall be submitted to arbitration. The arbitration panel is tripartite with the American Arbitration Association aiding in selecting the third member, if necessary. A hearing shall be conducted within ten days, upon seven days notice. It will be concluded within twenty days with the report issued within ten days after conclusion. The decision of the arbitrators shall be made public and shall be binding on all matters not involving expenditures of money. Appeal can only be based on fraud or a decision violating law.[19]

Class 5: California (LA), Delaware (T), and New Hampshire (SE)

The common point for Class 5 is the choice of using either mediation or fact-finding. The California (LA) procedure is handled by its Employee Relations Board, while the New Hampshire (SE) statute allows the chief executive officer to negotiate impasse procedure steps for mediation or fact-finding.[20] The Delaware (T) mediation step can be either tripartite or a single individual.[21] The particulars of each

statute are not discussed since they are basically the same as mediationor fact-finding in Classes 1 through 4.

Class 6: New York (NYC) and Pennsylvania (PE-T)

The basic feature of these two statues is that either mediation, fact-finding, or advisory arbitration can be used. The Pennsylvania (PE-T) statute specifies that impasse involving guards at prisons and mental hospitals or employees involved in the functioning of the courts shall go to advisory arbitration.[22] The main distinguishing feature of the New York (NYC) process is the review of a fact-finding report by the Board of Collective Bargaining. If either party fails to appeal the fact-finding report within a stipulated thirty day period, the recommendations become final and binding. If the Board reviews the report, it can confirm or modify the recommendations. But if the Board fails to review within thirty days of appeal or within forty days after notification of rejection (with review upon its own initiative), the recommendations are accepted and become binding.[23]

Class 7: Delaware (PE)

This single jurisdiction class can easily be handled by quoting from the sole provision:

> Upon the failure of the public employer and the exclusive bargaining representative to conclude a collective bargaining agreement, any matter in dispute except matters of wages and salaries may be submitted by either party to the State Mediation Service or by agreement of the parties to arbitration under Chapter 1 of this title.[24]

Thus, Class 7 is different in using either mediation or arbitration as compared to Class 5 using either mediation or fact-finding or Class 6 using either mediation, fact-finding, or arbitration.

Class 8: Alaska (PE)

The distinguishing feature of the Alaska (PE) impasse procedure is based around the three categories of employees examined in Chapter III's section on Appropriate Units and Chapter VI's section on Limited Right to Strike. Remember that Alaska established three categories of employees determined by their essentiality. For those employees in the most essential category, if mediation fails then the dispute goes to arbitration. In the least essential category, apparently mediation can be used before the employees vote to go on strike. The employees in the middle category can engage in a strike after failure of mediation, but upon issuance of an injunction to protect the health, welfare, or safety of the public, the dispute shall be submitted to arbitration. The parties to any agreement can negotiate and agree upon the use of arbitration according to the state's Uniform Arbitration Act.[25]

Class 9: New Mexico (SE) and Federal (11491)

The distinction in Class 9 is that both jurisdictions provide mediation as a prime method of resolving impasses, but upon authorization by their respective agencies, i.e.,

the Federal Service Impasse Panel and the State Personnel Board, either fact-finding or arbitration can be used.[26]

Class 10: Connecticut (ME), Idaho (F), Kentucky (F), Massachusetts (SE) and (ME-T), Montana (T), Nebraska (T), New Hampshire (P), Oklahoma (T), Oregon (PE), and Vermont (SE)

The common characteristics of these eleven statutes is the single use of fact-finding as an impasse procedure. Since the procedures in fact-finding have been described in past classes, only one illustration will be given here. The Idaho (F) statute provides that if within the first thirty days of negotiations no agreement has been reached, any and all unresolved issues shall be submitted to a fact-finding commission. The two sides each select a member to a tripartite board with the third member selected by the two representatives or by the State Labor Commissioner when the two representatives are unable to do so. This selection process will be completed within fifteen days. No member of the commission shall be an elected official or employee of the city, county, fire district, or political subdivision affected. The commission shall conduct a hearing upon proper notice with all interested parties entitled to be heard. If a member shall cease to participate, the remaining members shall continue with a majority determining the facts and recommendations.[27]

Class 11: Florida (F), Florida (T), Oklahoma (P-F-ME), and Wyoming (F)

These four statutes have advisory arbitration in common. Since all four procedures are all but identical, the procedures will be described in general terms with minor reflection on exceptions. If the parties are unable to effect a settlement within thirty days of beginning negotiations, any and all unresolved issues shall be submitted to advisory arbitration. The two sides are to select their member of a tripartite board within five days, and within ten days after the five day period select the third member. The two Florida statutes provide for the use of the American Arbitration Association, the Oklahoma (P-F-ME) statute provides for the Federal Mediation and Conciliation Service, while the Wyoming (F) statute provides for the district judge of the judicial district to aid in selection of the third member if the two other members are unable to select the third member.[28] The hearing is conducted within ten days after the appointment of the third member with seven days notice. The hearing is to be concluded within twenty days of the appointment of the third member, and the report issued within ten days of conclusion of the hearing. Florida (T) allows twenty days after conclusion for its reporting period.[29] The procedures for Wyoming (F) are set forth in the Uniform Arbitration Act of the state.[30]

Classes 12 and 13 are discussed in detail in the next sections.

Class 14: Nebraska (PE), South Dakota (PE-T), and Washington (T)

The last class is composed of the provisions that do not specify either mediation, fact-finding, or arbitration. The Nebraska (PE) statute requires the parties to take the impasse to the Court of Industrial Relations for settlement, while South Dakota (PE-T) provides for requesting the Commissioner of Labor to intervene. Washington (T) provides that the parties take their dispute to a committee composed of educators and school directors appointed by the State Superintendent of Public Instruction for recommendations which are advisory.[31]

In summary, this section has examined the impasse procedures of Classes 1 through 11 and 14. These various classes were established based upon the variation in the use of either mediation, fact-finding, or arbitration. Classes 12 and 13 are analyzed in greater detail in the following sections.

Binding Arbitration

Class 12: Pennsylvania (P-F), Rhode Island (P) and (F), South Dakota (P-F), and Vermont (ME-F)

Conventional binding arbitration, whether voluntary or compulsory, was thought for a long time to be the ultimate in bilateral impasse resolution. The hope expressed was that since the strike is generally prohibited (see Chapter VI), this means of resolving negotiation disputes should be used. The employer and employees would trade-off the strike and binding arbitration. But to this point in the development

of bilateralism, only four jurisdictions having five statutes provide exclusively for binding arbitration. Other jurisdictions have provisions that either allow arbitration to be negotiated or that permit other impasse procedures to become binding.[32]

Although binding arbitration was thought the panacea for bilateral impasse resolution, upon deeper reflection the "chilling" effect it can have upon collective negotiations seems to far outweigh any advantage. The chilling effect refers to the possibility that the parties will not negotiate in good faith, but force the negotiations into a deadlock and thus into arbitration. The strategy involved here is the hope that the arbitrator will compromise between the divergent points, thus granting advantages which one party could not normally get in the regular negotiation process.

This opposition to binding arbitration is reflected in Herbert R. Northrup's work on compulsory arbitration and the Railway Labor Act as arbitration is administered through the National Mediation Board. Northrup is very critical of any government intrusion--especially compulsory arbitration--and sets forth a four point evaluation of it. First, compulsory arbitration "does not insure industrial peace, but rather can breed strikes especially short ones." Second, it "does not necessarily further the economic or social policies of government, but in fact may work against such policies." Third, it "enhances union power and growth, especially through political

action." Fourth, compulsory arbitration "discourages collective bargaining."[33]

The fourth point is more meaningful to this research, although the other three are also important. Compulsory binding arbitration can and does discourage negotiations as contended above, but although it gets the parties a decision, it does not settle issues. Pat Greathouse believes that issues can only be settled through negotiations leading to agreement instead of through parties spending time in disagreement trying to bolster some preconceived position.[34]

But this line of thought, i.e., that binding arbitration has a chilling effect upon collective negotiations, can be qualified to some extent by Joseph Loewenberg's study of compulsory arbitration in Pennsylvania (P-F). He believes that the availability of compulsory arbitration did not adversely influence bilateralism since fully two-thirds (132 of 198) of the negotiation settings were terminated without impasse. He contends that instead of compulsory arbitration acting like a court of last resort, it was used as a tactical weapon, i.e., the threat of going to arbitration might force concessions not otherwise made, plus the administrators could blame the arbitrators for higher salaries and any resulting increase in needed revenues.[35]

But now to the specifics of the various statutes providing binding arbitration. Rhode Island (P) and (F) have the same procedures starting with the inability of the parties to

reach agreement within thirty days from and including the date of their first meeting. In this case any and all unresolved issues shall be submitted to arbitration. Within five days of the thirty day period, the parties shall each select a representative, and these representatives shall within ten days after the five day period select a third member to be chairman. If the parties are unable to select the third member, the Chief Justice of the Rhode Island Supreme Court shall select a resident of the state to fill the post. A hearing is to be held within ten days of the appointment of the third member with seven days notice of the hearing. The hearing is to be concluded within twenty days of commencement, and the majority report filed within ten days of the closing of the hearing.[36]

The South Dakota (F-P) statute provides that the decision of a Board of Arbitration is binding unless it is appealed within thirty days. Any decision concerning money will be provided in the next fiscal year. Whenever a dispute arises, either party may file a petition with the State Labor Commissioner and the other party for a fair hearing before an arbitration board. Within ten days of filing the request, each party is to select its representative, and within five days following their selection the two shall select a third member as chairman. The Commissioner shall select the third member if the parties are unable to do so. The hearing is to be held within ten days with seven days notice of it. The hearing

shall be open to the public, with completion within twenty days unless the Commissioner grants an extension. The report is to be filed within five days of completion and published in at least one newspaper in the city or town in which the dispute arose with the cost being equally borne. The costs of the entire process are also to be borne equally.[37]

The firefighters covered by the Vermont (ME-F) statute can also take an impasse to arbitration before a tripartite board with ten days notice of the hearing. The hearing is to be conducted within thirty days of the naming of the third member, and the report issued within forty-five days of the naming of the third member. Court review of the decision can be based on fraud, arbitrator misconduct, or an error of law. The cost of the arbitration is shared equally.[38]

The Pennsylvania (P-F) statute defines an impasse as the inability to conclude negotiations within thirty days of initiating them. Negotiations are to begin at least six months before the start of the fiscal year, and any request for arbitration is to be made at least 110 days before the start of the fiscal year. Either party may initiate the action with a second cause for initiation being the lack of approval of an agreement by a local unit of government within one month of submission and by the state legislature within six months of submission. Each party within five days appoints its representative, and within ten days both will select the third member. If the parties are unable to select the third member,

the American Arbitration Association will submit a list of three Pennsylvania residents, with the employer striking one name first and then the employee representative, thus producing one name. A hearing is to be conducted within ten days, and a report is to be issued within thirty days of the appointment of the third member. The majority decision is binding upon all parties, accompanied by the unusual provisions that no appeal to court is allowed. The firemen and policemen are to bear their own costs with the state or political subdivision paying for all other costs.[39]

In summary, of the thirty-six jurisdictions having seventy-four statutes, only seven of the thirty-six (representing eight statutes) provide for binding arbitration either mandatory or by negotiation. Thus, at this point in the development of bilateralism, binding arbitration has not gained a large group of practitioners. Probably the main reason is that most negotiations seldom become impasses, but those that do receive a great deal of attention. Therefore, impasse procedures such as binding arbitration will only be used in the minority of cases, but these exceptions must still be provided for. Also, it is interesting to note that all five statutes mandating binding arbitration deal with policemen and firemen. The other statutes deal with public employees outside this classification. Thus, at this time only firemen, policemen and their public employers are engaged in binding arbitration.

Final-Offer Arbitration

Class 13: Michigan (F-P) and Minnesota (PE-T)

Final-offer arbitration is another technique, of fairly recent origin, for dealing with a negotiation impasse. Final-offer arbitration is an impasse resolution technique in which the arbitrators are limited in selecting in entirety one of the final positions for their decision. Its use in public bilateralism can be dated from President Nixon's proposal for dealing with the railroad dispute in the late 1960's. Senator Griffin (R-Michigan) introduced on February 2, 1970, a bill (S. 3526) designed to deal effectively with emergency disputes in the transportation industry while protecting the public interest. The procedure established by the Railway Labor Act had failed to handle the conflict since, as stated in Section 2 (a) (1), it tends "to encourage resort to governmental intervention in such disputes rather than utilization of the collective bargaining processes to solve labor-management disputes."[40]

Section 219 of S. 3526 sets forth the procedure to be followed in final-offer arbitration. The President may direct each party to submit a final offer to the Secretary of Labor within three days with each party also able to submit one alternative plan. The Secretary of Labor is to transmit the proposals to the other parties simultaneously. If one party refuses to submit a final offer, its last offer of previous bargaining shall be deemed its final offer. The proposals are

to constitute a complete collective bargaining agreement. After receipt of the proposals, the parties are to continue to bargain for five more days with the Secretary of Labor helping by offering mediation services.

If there is no settlement within the five day period, the parties are to select a three member panel, and if unable to perform this function, the President is to appoint the panel. No member of the panel is to have a conflict of interest with the matter of its concern, and it is to disband if settlement is reached before starting its work. The hearing is to be informal, with completion within thirty days of the date the President directed the parties to submit their final offers.

The federal government is not to participate, and the panel is not to attempt to mediate. The panel is not to have any third party communication, while the parties are not to change the terms and conditions of employment after the submission of their final offers. The panel is not to change any offer, but must select the most reasonable. Factors which the panel are to follow are the past history of collective bargaining contracts, a comparison of wages, hours, and conditions of comparable positions, a similar comparison with industries in general, the security and tenure of employment, and the public interest. The final offer selected by the panel shall be deemed the contract between the parties unless found arbitrary and capricious by a district court granting an injunction under Section 208 of the Act.[41]

Now with the general idea of final-offer arbitration in mind, the specifics of the provisions in Michigan (F-P) and Minnesota (PE-T) are examined. The Michigan Policemen's and Firemen's Arbitration Act, which became effective May 4, 1972, provides that whenever agreement is not reached within thirty days of the submission of the dispute to mediation and fact-finding, the parties may initiate binding arbitration by written request to the State Labor Mediation Board. Within ten days the parties are to select their representatives, and within another five days the two representatives are to select a third member as chairman. If the parties are unable to select the third member, the Chairman of the State Labor Mediation Board shall do so in not more than seven days. Upon appointment of the third member as chairman, the hearing shall begin within fifteen days, upon proper notice to the parties. The hearing shall be concluded within thirty days of its commencement, with a majority decision constituting the action of the arbitration panel. At any time before making their decision, the panel may remand the dispute to the parties for further bargaining.

At or before the conclusion of the hearing, the panel shall identify the economic issues in dispute, and the parties are to submit their last offer of settlement. The panel shall adopt the final offer of the party which more nearly complies with the factors presented in Section 9. These factors are:

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, and 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.

The decision of the arbitration panel is enforceable in the circuit court for the county in which the dispute arose, providing that it is supported by competent, material, and substantial evidence. Any monetary award is applicable in the

next fiscal year, except a retroactive award may be made in the case where the fiscal year started after initiation of arbitration. The parties at any time, by stipulation, may amend or modify the arbitration award.[42]

The Minnesota (PE-T) final offer procedure begins by either party filing a petition with the Director of Mediation Services stating briefly the nature of their disagreement. The Director shall fix a time and place to confer with the parties at which time mediation or other aids can be extended. If mediation does not resolve the dispute, the Director shall certify to the Public Employment Relations Board that either party has petitioned for arbitration and that further mediation efforts are fruitless. Upon certification, the parties shall submit their respective final positions on the issues in dispute. If the procedure through the Director is not used, Section 9 (5) provides that the parties are to submit their respective final positions at least seventy-five days before the last date for submission of the budget and tax levy to the Public Employment Relations Board. The parties may stipulate those items that they have agreed upon.

The Chairman of the Board is to establish an arbitration panel by supplying a list of seven names from which the parties alternately strike (mark-out) names until only three remain. If the parties desire, they may select a single arbitrator. The panel shall issue its decision by majority vote (if the panel is three member), and the cost of the panel is shared

equally by the parties. The employer shall have ten days in which to decide to accept or reject. Silence means acceptance, while rejection renders the decision of no force or effect. If the dispute involves non-essential employees, the parties may request that the decision be binding, but if the dispute involves essential employees, the Board shall consider only the final offers and the decision shall be binding. The parties are free to settle any time prior to or after the rendering of the decision regardless of the terms and conditions of the decision.[43]

Eugene, Oregon, in 1971 passed a final-offer ordinance with Gary Long and Peter Feuille analyzing the first six experiences. But before their conclusions are presented, it is important to study the Eugene procedures. If agreement is not reached within twenty-five days of beginning negotiations, the parties are to submit a final offer and may also submit one alternative. (This is similar to S. 3526.) The final positions are filed with the city recorder and preserved for the arbitration board. The parties are to continue negotiation for five more days (also like S. 3526), but if unable to reach agreement, a tripartite board is to be selected within ten days. The board is to convene within ten days and report its decision within another ten days. The board then operates within a time period of thirty days and since negotiations are to begin around January 15, the final offer procedure should terminate around March 15. The panel is to select the most reasonable

final offer using as criteria the bargaining history of the parties, the relevant market comparisons in both public and private sectors, and the city's ability to pay. The city pays all the panel's expense, which is quite different since in almost all impasse provisions mentioning costs they are shared equally. Long and Feuille therefore conclude that from their examination final offer arbitration is an incentive to bargaining primarily because of the sudden death nature of the alternative. Either party may "lose the entire ball game" if the arbitrator selects the opposition's position as most reasonable.[44] But before their other concluding observations are discussed, the final offer experience of Indianapolis examined by Fred Witney must be presented.

Fred Witney, one member of a two member arbitration panel established when the AFSCME and Indianapolis could not reach agreement, analyzes his experience. Although Indiana lacks either specific or general bilateral legislation, the Indiana Senate passed such legislation on February 2, 1972, but it failed to gain House passage. Since the bill contained a final offer arbitration provision, the parties decided to use the procedure. The procedure calls for the selection of the most reasonable offer, no alteration of any offer, and the award is not to place the city in deficit financing. Witney concludes that final offer arbitration, although a way to resolve bilateral impasse problems, may not function to "meet the needs of the parties or conform to the tests of equity and

desirability." Furthermore, he chides the opponents of final offer in not seeing the loss of flexibility and the increasing likelihood of inferior decisions.[45]

Joseph R. Grodin's article in the May, 1972, issue of Industrial Relations supports Witney (with Long and Feuille in opposition).[46] Grodin contends that final offer requires a level of sophistication which bilateralism presently lacks. Long and Feuille counter by stating that "experience does not necessarily support the contention that sophisticated and experienced practitioners are needed to make the final-offer mechanism function properly. Furthermore, we believe the Eugene experience suggests that actual immersion in the final-offer process facilitates sophistication in the most rapid manner possible."[47] Grodin's second criticism centers around the lack of face-saving qualities, i.e., the ability in conventional arbitration to insert certain positions which are known to be totally beyond reason for political or ideological reasons.[48] Long and Feuille counter that such happenings have no place in collective negotiations or impasse procedures by stating:

> Unacceptable demands really have no place, but could provide some psychological reinforcement by loading one proposal with goodies and then forget about them, but then you lose one alternative.[49]

They, of course, are referring to that aspect of both S. 3526 and the Eugene ordinance allowing submission of two final positions. One side could simply waste one position for

psychological purposes, but then, as Long and Feuille contend, the party is down to one usable final position.

Fred Witney additionally does not like final offer to follow a strict time table. But Lone and Feuille counter by showing that the fairly strict time table of the Eugene ordinance did not hinder the process. The parties simply know that the procedure will terminate by March 15 and act accordingly. Witney also takes exception to the arbitrators being tied to some time frame, but Long and Feuille's countering argument above seems to allay such opposition. Witney further questions the aspect of final offer in not allowing the arbitrators the ability to pick and choose among the alternatives presented. (Remember, Witney was on the Indianapolis arbitration panel.) Again, Long and Feuille contend that this is the very nature of final-offer arbitration. The very heart of final-offer is removing the ability to pick and choose, which carries with it the often presented idea that conventional arbitration has a chilling effect on bargaining, i.e., the parties or party simply negate the negotiation phase hoping to get a better deal in arbitration. But final-offer removes the chilling effect by requiring each side to present its best final offer, for to do otherwise is suicide. The parties or party cannot hope the arbitrator compromises in their behalf, for in final-offer the panel can only select the most reasonable offer.

In conclusion, perhaps it would be best to recapitulate the preceding material. This examination of final-offer

arbitration began with an analysis of Senate Bill 3526 introduced in 1970. This was President Nixon's proposal to handle the then current disputes in the railroad industry and future disputes. Then the examination turned to the specifics of the Michigan (F-P) and Minnesota (PE-T) provisions. From there articles by Grodin, Witney, and Long and Feuille were presented and discussed which covered final-offer experiences in Eugene, Oregon, and Indianapolis, Indiana.

Where does this material leave us? Final-offer arbitration is such a new aspect of the diversification of bilateralism that available data is still inconclusive. Experimentation is taking place and at first glance the results seem favorable. If the strike is to be prohibited in the public sector, then the negotiations process must function next to perfection, and when it does not, then impasse procedures take over. Final-offer arbitration, wherein the parties must put their best foot forward, seems to answer the question as to the nature of an acceptable impasse procedure. The parties must negotiate in good faith because getting something out of conventional arbitration is gone. Final-offer requires that the parties negotiate responsibly for it is in their best interests to do so. I heartedly support such efforts.

The factors to be used by the arbitrators in making their decisions are the next item for examination.

Factors in Arbitration

This section of impasse resolution examines the factors

to be taken into consideration by the arbitrators in making their decision, and strangely enough by the mediation board provided in Georgia (F). The data are taken from seven jurisdictions having eight statutes. In only three cases, Nevada (LE-T), Rhode Island (SE), and Oklahoma (F-P-ME), do the factors apply to other than firemen and policemen. (This last statement of course applies only to the municipal employees covered by the Oklahoma statute,) Thus one generalization is that binding arbitration, final-offer arbitration, and the factors used in guiding the decision apply with few exceptions to only firemen and policemen.

One basic feature of the factors is a listing of several items specifically to be used for comparison. These items are: hazards of employment, physical qualifications, mental qualifications, educational qualifications, job training and skills, retirement plans, sick leave, and job security. All but the last three mentioned are unanimous in the four statutes having such a listing with the last three coming from the Florida (F) statute.[50] The interest and welfare of the public and the financial ability of the unit of government are to be considered. Nevada (LE-T) requires the consideration of the impact on and the consistency of the treatment of other employees in the unit of government.[51] Michigan (P-F) specifies the overall compensation, taking into consideration wages, vacations, holidays, insurance, pensions, medical and hospitalization, and the continuity and stability of employment. Additionally

the Michigan (P-F) statute lists the cost of living index, the lawful authority of the employer, and any stipulations of the parties.[52]

The last major area of consideration is the comparison of wages, hours, and conditions of employment with other similar occupations in public employment, private employment, and same or similar skills under the same or similar working conditions; Oklahoma (P-F-ME) even specifies the building and trades industry in the local operating area.[53] Thus, if some contend that impasse resolution by arbitration is an illegal delegation of authority, at least in these instances the legislators have seen fit to provide guidelines by which the arbitrators are to operate. At least in these cases the arbitrators are precluded from using any other items in making their decision.

Summary

This chapter examined the diverse methods used in impasse resolution. The prismatic effect of bilateralism was captured within the fourteen classes presented in Table 5-1. These classes were then used to examine the approaches of the classes in using mediation, fact-finding, and arbitration. Of the fifty-nine items listed, thirty-four begin with the use of mediation, eleven use fact-finding exclusively, eleven use arbitration exclusively, and three did not specify any particular method. Thus, it can generally be stated that bilateral

impasse resolution begins with mediation and then either phases into fact-finding or arbitration (Classes 2, 3, and 4), or fact-finding and arbitration can be used in addition to mediation (Classes 5, 6, 7, 8, and 9).

It is of interest also that only five statutes use binding arbitration. This is somewhat surprising since this approach to impasse resolution was considered to be the ultimate in light of the general prohibition of the strike. This idea followed the line of reasoning that since the economic sanction of striking was not available (albeit the strike has been used), then binding arbitration was an equitable substitute. But from the meager showing, few jurisdictions have accepted and followed the idea. In the five usages the employees involved were all firemen and policemen.

Another variety of arbitration--final-offer--seems to be catching the eye of many people. Final-offer arbitration is the method whereby the parties submit their final positions and the arbitrator is limited in selecting only one position in its entirety, using reasonableness as the main criterion for selection. Only two jurisdictions' statutes, Michigan (F-P) and Minnesota (PE-T), were available for examination, but the use of final-offer in Eugene, Oregon, and Indianapolis, Indiana, was also examined by way of articles written about them.

Another device or technique needs to be mentioned--the joint committee. This, in my opinion, could go a long way in aiding both negotiations and impasse resolution. The joint

committee is composed of representatives from both sides that study issues and problems generated by the bilateral relationship. These committees, as Thomas M. Love describes them, are the qualitative side of a decision, while negotiations are the quantitative side. The parties are under no deadline, there is more freedom of discussion and study, and hopefully negotiations may go a little easier with this background support.[54] Thus, if negotiations are aided, then perhaps the impasse procedures will be used less often. This is another fertile area of future research since little has been written about the joint committee and its impact upon negotiations specifically or bilateral relations generally.[55]

The entire purpose of the material examined in this chapter is designed to eliminate or at least lessen the likelihood of the subject of the next chapter--the strike.

Footnotes

[1]Simkin, Mediation, P. 356.

[2]Alaska (T), RF-BNA-GERR, Section 14.20.570, 51:1115, and Kansas (PE), RF-BNA-GERR, Section 12 (c), 51:2515.

[3]Hawaii (PE-T), RF-BNA-GERR, Section 11 (b) (4), 51:2015, and Kansas (PE), RF-BNA-GERR, Section 12(e), 51:2515.

[4]Pennsylvania (PE-T), CCH-LLR, Section 807, p. 57,992.

[5]Montana (T), RF-BNA-GERR, Section 9, 51:3514, New Hampshire (P), RF-BNA-GERR, Section 105-B:8.I, 51:3814, and New York (PE-T), RF-BNA-GERR, Section 209.1, 51:4115.

[6]Oregon (T), RF-BNA-GERR, Section 342.470 (1), 51:4613, and Pennsylvania (PE-T), CCH-LLR, Section 801, p. 57,990.

[7]Simkin, Mediation, pp. 127-132.

[8]Alaska (T), RF-BNA-GERR, Section 14.20.570 (a), 51:1115, Georgia (F), RF-BNA-GERR, Section 8, 51:1911, North Dakota (PE), RF-BNA-GERR, Section 34-11-02, 51:4311, and Maryland (T), RF-BNA-GERR, Section 160 (3) (i), 51:2912.

[9]Georgia (F), RF-BNA-GERR, Sections 7-11, 51:1911-1912.

[10]Kansas (PE), RF-BNA-GERR, Section 12 (c), 51:2515, Oregon (T), RF-BNA-GERR, Section 342.470 (2), 51:4613, Oregon (SP), RF-BNA-GERR, Section 8 (2), 51:4615, and Oregon (N), RF-BNA-GERR, Section 61 (2), 51:4616.

[11]Vermont (ME-F), RF-BNA-GERR, Section 1707 (b), 51:5417, Wisconsin (SE), RF-BNA-GERR, Section 111.88 (1), 51:5814, and Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (4) (c) 3, 51:5818.

[12]Kansas (PE), RF-BNA-GERR, Section 12, 51:2514-2515.

[13]Vermont (ME-F), RF-BNA-GERR, Section 1707, 51:5417.

[14]Hawaii (PE-T), RF-BNA-GERR, Section 11, 51:2015. Also see New York (PE-T), RF-BNA-GERR, Section 209.3 (e), 51:4115, and Kansas (PE), RF-BNA-GERR, Section 12 (d), 51:2515.

[15]Maine (ME-T), RF-BNA-GERR, Section 965.E, 51:2812-2813.

[16]Nevada (LE-T), RF-BNA-GERR, Sections 14 and 15, 51:3712-3713.

[17]Connecticut (T), CCH-LLR, Section 10-153 f, pp. 53,190-53,191.

[18]Rhode Island (SE), RF-BNA-GERR, Sections 36-11-8 and 36-11-9, 51:4811-4812.

[19]Rhode Island (ME), RF-BNA-GERR, Sections 28-9.4-10 through 28-9.4-13, 51:4813-4814, and Rhode Island (T), RF-BNA-GERR, Sections 28-9.3-9 through 28-9.3-14, 51:4815.

[20]California (LA), RF-BNA-GERR, Section 4.840, 51:1421, and New Hampshire (SE), RF-BNA-GERR, Section 98-C:4.I, 51:3812.

[21]Delaware (T), RF-BNA-GERR, Section 4010, 51:1713.

[22]Pennsylvania (PE-T), CCH-LLR, Section 805, p. 57,991.

[23]New York (NYC), RF-BNA-GERR, Section 1173-7.0.b (4), 51:4156.

[24]Delaware (PE), RF-BNA-GERR, Section 1310, 51:1711.

[25]Alaska (PE), RF-BNA-GERR, Sections 23.40.190-200 and 23.40.215, 51:1113.

[26]New Mexico (SE), RF-BNA-GERR, Section 11, 51:4016, and Federal (11491), RF-BNA-GERR, Sections 16 and 17, 21:4-5.

[27]Idaho (F), RF-BNA-GERR, Sections 5-7 and 9-10, 51:2111.

[28]Florida (T), RF-BNA-GERR, Section 9, 51:1815, Florida (F), RF-BNA-GERR, Section 10, 51:1814, Oklahoma (P-F-ME), RF-BNA-GERR, Sections 548.7-9, 51:4513-4514, and Wyoming (F), RF-BNA-GERR, Section 27-270, 51:5911.

[29]Florida (T), RF-BNA-GERR, Section 10, 51:1815.

[30]Wyoming (F), RF-BNA-GERR, Section 27-271, 51:5911.

[31]Nebraska (PE), RF-BNA-GERR, Section 48-816, 51:3613, South Dakota (PE-T),RF-BNA-GERR, Section 3-18-8.1, 51:5012, and Washington (T), RF-BNA-GERR, Section 28.72.060, 51:5614.

[32]Maine (ME-T), RF-BNA-GERR, Section 965.E.4, 51:2812, North Dakota (T), RF-BNA-GERR, Section 12, 51:4313, Rhode Island (SE), RF-BNA-GERR, Section 36-11-9, 51:4811-4812, and Rhode Island (ME), RF-BNA-GERR, Section 28-9.4-13, 51:4813-4814.

[33]Herbert R. Northrup, Compulsory Arbirtation and Government Intervention In Labor Disputes (Washington, D.C.: Labor Policy Association, 1966), p. 207.

[34]Pat Greathouse, "Changing Trends and Concepts in Collective Bargaining," Labor Law Journal, XVII (December, 1966), p. 724.

[35]J. Joseph Loewenberg, "Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968," Industrial and Labor Relations Review, XXIII (April, 1970), pp. 367-379.

[36]Rhode Island (F), RF-BNA-GERR, Sections 28-9.1-7 through 28-9.1-11, 51:4816-4817, and Rhode Island (P), RF-BNA-GERR, Sections 28-9.2-7 through 28-9.2-11, 51:4817-4818.

[37]South Dakota (F-P), RF-BNA-GERR, Sections 2-12, 51: 5013-5014.

[38]Vermont (ME-F), RF-BNA-GERR, Sections 1708-1709, 51: 5417-5418.

[39]Pennsylvania (F-P), CCH-LLR, Sections 3-8, pp. 58,023-58,025.

[40]U.S., Congress, Senate, A Bill to Provide More Effective Means for Protecting the Public Interest in National Emergency Disputes Involving the Transportation Industry and for Other Purposes, S.3526, 91st Congress, 2d Session, 1970, pp. 1-2.

[41]Ibid., pp. 10-13.

[42]Michigan (P-F), RF-BNA-GERR, Sections 3-10, 51:3114-3115.

[43]Minnesota (PE-T), RF-BNA-GERR, Sections 9 and 12, 51:3215 and 3217.

[44]Gary Long and Peter Feuille, "Final-Offer Arbitration: 'Sudden-Death' in Eugene," Industrial and Labor Relations Review, XXXVII (January, 1974), pp. 186-203. (Hereafter referred to as Long and Feuille, "Final-Offer Arbitration.")

[45]Fred Witney, "Final-Offer Arbitration: The Indianapolis Experience," Monthly Labor Review, XCVI (May, 1973), pp. 20-25.

[46]Joseph R. Grodin, "Either-Or Arbitration for Public Employee Disputes," Industrial Relations, XI (May, 1972), pp. 260-266. (Hereafter referred to as Grodin, "Either-Or Arbitration.")

[47]Long and Feuille, "Final-Offer Arbitration," p. 291.

[48]Grodin, "Either-Or Arbitration," p. 264.

[49]Long and Feuille, "Final-Offer Arbitration," p. 201.

[50]Florida (F), RF-BNA-GERR, Sections 11 (4), 51:1814, Oklahoma (P-F-ME), Section 548.10 (5), 51:4514, Rhode Island (SE), RF-BNA-GERR, Section 36-11-10 (c), 51:4812, and Georgia (F), RF-BNA-GERR, Section 10 (c), 51:1912.

[51]Nevada (LE-T), RF-BNA-GERR, Section 14.9 (b), 51:3713.

[52]Michigan (P-F), RF-BNA-GERR, Section 9 (e) (f), 51:3115.

[53]Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.10 (1) (2) (3), 51:4514.

[54]Thomas M. Love, "Joint Committees: Their Role in the Development of Teacher Bargaining," Labor Law Journal, XX (March, 1969), pp. 174-181.

[55]For another article on joint committees see Richard P. McLaughlin, "Collective Bargaining Suggestions for the Public Service," Labor Law Journal, XX (March, 1969), pp. 131-137.

CHAPTER VI

STRIKES

Background Material

The diversification found in the other chapters of this research on bilateralism is missing when it comes to the strike. Why? Thirty-one of the thirty-six jurisdictions examined prohibit the strike. The other five jurisdictions permit the strike in varying circumstances. A strike means:

> . . . by concerted action, the failure to report for duty, the willful absence from one's position, the whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing, coercing, or preventing a change in compensation or rights, privileges, obligations or other terms and conditions of employment. . . .[1]

Just how extensive have public employee strikes been? Sheila C. White in her article in Monthly Labor Review reports that strikes have increased from 15 in 1958 to 181 in 1967. The number of workers involved in the 1967 strikes was only 132,000 out of a public labor force of many millions. Table 6-1, which indicates the number of stoppages from 1958-1967, is taken from her article.[2]

Although there are many cases of public employee strikes to date, just a few of them will get the legal point across.

The often referred to 1951 Connecticut Supreme Court decision in Norwalk Teachers Association v. Board of Education stated well the case upholding the strike prohibition:

> In the American system, sovereignty is inherent in the people. They can delegate to a government which they create and operate by law. They can give to the government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its tasks. Those people are agents of the government. They exercise some part of a sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.[3] (Emphasis mine.)

Table 6-1.--Work stoppages in government, 1958-1967

Year	Stoppages	Workers Involved	Man Days Idle
1958	15	1,720	7,510
1959	26	2,240	11,500
1960	38	28,600	58,400
1961	28	6,610	15,300
1962	28	31,100	79,100
1963	29	4,840	15,400
1964	41	22,700	70,800
1965	42	11,900	146,000
1966	142	105,000	455,000
1967	181	132,000	1,250,000
1968	254	202,000	2,550,000
1969	411	160,000	745,700
1970	412	333,500	2,023,300
1971	329	152,600	901,400

In the New York City school teachers strike of 1968, the New York Court of Appeals concluded in Rankin v. Shanker "that a legislative classification which differentiates between strikes by public employees and employees in private industry is reasonable and does not offend against the constitutional guarantee of equal protection of the law."[4] The New York Court of Appeals in City of New York v. DeLury (1968) stated there was "no provision of either the Federal or State Constitution [that] prevented the state from outlawing strikes by public employees." The Court concluded that the "statutory prohibition against strikes by public employees is reasonably designed to effectuate a valid state policy."[5]

Thus, the courts are supportive of the prohibition of the strike. This is much different from the two legal positions presented in Chapter I concerning whether bilateralism needed a statutory basis or whether the position of the public employer, by implication, permitted bilateralism.[6] In this chapter the courts are in unanimous support. Again the Florida Supreme Court in Dade County Classroom Teachers' Association Inc. v. Ryan (1969) held "that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees" in interpreting the state constitutional provisions allowing public employees to organize and bargain collectively.[7]

But reference must be made to the cases discussed in Chapter IV concerning the wording used in some statutes.

Remember that California, by mistaken use of the phraseology "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," allowed their Supreme Court to interpret this as permitting the strike. (Such wording had been so interpreted in private bilateralism.) So again, it must be stressed that the wording used in public bilateralism is very important.[8]

Although the prohibition of strikes is upheld by the courts, they still occur. The strike entailing the disruption of public services receives much attention, but this detracts from the millions of workers that do not strike. One reason for the prohibition is the essential nature of public services. Sewer plant operators strike and tons of untreated sewage flow into San Francisco Bay. Teachers strike and the schools close. These events do generate fear about the development of bilateralism. For anyone to contend that these services are non-essential and that their disruption can be tolerated, in my opinion, is indeed on very shaky ground. The position can be taken that if the service is non-essential government should not be performing it and should focus its energies on other functions. The Committee on Public Employee Relations created by Governor Rockefeller in January, 1966, analyzed this problem area of essentiality. They concluded that "a differentiation between essential and non-essential governmental services would be the subject of such intense and never-ending controversy as to be administratively impossible."[9]

Alaska is the only jurisdiction attempting to deal with the essentiality problem. The Alaska (PE) statute establishes three classes of employees with the first class not allowed to strike, the second class allowed to strike so long as the public's health or safety is not endangered, and the third class permitted to strike for extended periods without serious effect on the public. (These provisions are examined in greater length in the third section of this chapter.)

What is the answer to the strike problem? The preceding chapter analyzed the impasse resolution provisions which are held to be the answer, i.e., mainly arbitration. But after an examination of the provisions both allowing and prohibiting strikes, I will present my own conclusions.

Prohibition of the Strike

The prohibition of the strike by public employees is all but universal. As stated several times and examined in greater detail in the next section, only five jurisdictions are allowing or permitting a limited right to strike. In contrast, thirty-one jurisdictions representing forty-nine statutes prohibit the strike. In twelve statutes the strike is an unfair labor practice.[10] The provisions prohibiting the strike range from the concise to the complex. The concise nature of many statutes can be well illustrated by the Georgia (F) provision which states:

> The protection of the public health, safety and welfare demands that the permanent members of

> any paid fire department of a municipality should not be accorded the right to strike or engage in any work stoppage or slowdown.[11]

The Florida (T) statute, covering Hillsborough County, also prohibits the strike with the "consideration for such provisions being the right to a resolution of disputed questions."[12]

For an in-depth analysis of the procedures established to handle a strike situation, Michigan (PE) (P-F), Minnesota (PE-T), New Mexico (SE), New York (PE-T), Oklahoma (P-F-ME), South Dakota (PE-T), and Federal E.O. 11491 and E.O. 11636 are used. The Michigan (PE) statute provides that an employee can request a hearing by filing a written petition with the officer in charge of the employee within ten days after compensation is suspended or other disciplinary action is imposed for striking. The hearing will be conducted within ten days of the request and in accordance with the laws and regulations appropriate to the removal of the employee. The decision of the hearing will be made within ten days, and if against the employee, an appeal can be taken to the circuit court having jurisdiction within thirty days of the decision. No penalties are provided for other than the loss of salary and dismissal.[13]

The Michigan (P-F) statute, which provides for final offer arbitration, stipulates that the aribtration award can be enforced by the circuit court having jurisdiction. If the employee organization willfully disobeys the court's order by striking or otherwise, punishment shall be a fine not to exceed

$250 per day that such violation continues.[14]

The New Mexico (SE) regulations define a strike as an unfair practice, with the State Personnel Board handling complaints and assessing penalties. The following provision must be included in all agreements.

> No strike, work stoppage, slowdown, sick out or picketing in a labor management dispute, or similar action will be engaged in or encouraged by the employee organization; the leadership of the employee organization has the obligation to make every effort to discourage such action and to direct employees to cease any such activities. Participation by any incumbent in any of these activities, in any way, will be cause for immediate disciplinary action including dismissal under Board Rules.[15]

By the Minnesota (PE-T) statute any employee knowingly violating the no-strike provision or being absent or abstaining from work on the date or dates of a strike without permission (absent or abstaining on date or dates of a strike is prima facie evidence of striking) can be terminated. An employee charged with striking can petition, in writing within ten days of notice of removal, to the individual having power to so remove. A hearing shall be conducted within ten days (all analogous cases can be combined), with court review available of any adverse decision against the employee.

An employee finally charged with striking can regain employment, but will be on probation for a two year period and is not entitled to any pay, wage, or per diem for the days on strike. An employee organization found to have violated the no-strike provisions shall lose its exclusive representative

status, may not be certified for a period of two years, and may lose its check-off rights for two years. An employer unfair labor violation is no defense to a strike, but can be used as a mitigating circumstance in determining the penalties.[16]

The New York (PE-T) no-strike provisions state that an employee knowingly striking or being absent or abstaining from work (absent or abstaining is a presumption of striking) without permission is subject to removal, disciplinary action, probation for one year's service without tenure, and loss of pay during the strike period. If a strike occurs, the chief executive officer of the government involved shall determine the names of the strikers and shall immediately notify each employee. He shall also notify the chief fiscal officer and chief legal officer.

The affected employees can petition the chief executive officer within twenty days of notice of striking and the officer shall take the petition into consideration. If the chief executive officer decides a question exists, he shall appoint a hearing officer to conduct the proper proceedings. If the hearing officer rules in favor of the employee, all rights shall be restored and monetary deductions returned, but if the chief executive officer is sustained, the employee's only recourse is a court review.

The chief legal officer shall, before the Public Employment Relations Board, institute proceedings against the

employee organization concerned. If the Board decides in favor of the chief legal officer, the employee organization loses the rights of check-off and is subject to fine. The Board shall take into consideration, before fixing the fine, the extent of willful defiance of the no-strike provision, the impact upon the health, safety, and welfare of the public, the financial resources of the employee organization, the refusal of either party to engage in impasse procedures, and the improper acts of the employer. The rights of the organization can be restored upon affirmation that the organization does not assert, assist, or participate in a strike.[17]

The Oklahoma (P-F-ME) provisions are similar to those discussed earlier for Minnesota (PE-T). An employee covered by the statute shall be deemed to be on strike if he willfully absents himself or abstains in whole or part from his work without permission. Penalties for striking can be either suspension of regular compensation or other disciplinary action. A hearing shall be conducted to determine if such action is justified upon written request by the employee to the officer or body having the power to revoke or discipline. The hearing is to be held within ten days of the request, and the decision made within ten days after the conclusion of the hearing. If the employer is upheld, the discipline or termination is implemented, but an appeal can be taken within thirty days to the district court having jurisdiction.[18]

The South Dakota (PE-T) statute provides for a review of action taken against an employee by allowing the filing of a petition within ten days after such action is taken. The hearing is to be conducted within ten days of the request, and the decision rendered within ten days after conclusion of the hearing. An appeal can be taken by the employee to the circuit court having jurisdiction within twenty days of the decision. If the employee is found in violation, a fine not exceeding $1000 or imprisonment not to exceed one year or both shall be assessed, while an employee organization shall be assessed a fine not to exceed $50,000. Both employee and employee organization would be guilty of a misdemeanor.[19]

Federal E.O. 11491 and E.O. 11636 have a no-strike provision in their unfair practices section, but the federal law prohibiting the strike is found in the U.S. Code. Section 7311 of Title 5 U.S. Code provides:

> An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.[20]

The penalty for violation of Section 7311 is found in Section 1918 of Title 18 of the U.S. Code which calls for a fine of not more than $1000 or imprisonment of not more than one year and one day or both.[21]

Three other states provide punishment for striking, but do not specify any procedures as presented in the preceding material. For both Maryland (T) and (BLT), the employee organization loses its exclusive status, is ineligible for two years to be certified as an exclusive representative or participate in an election, and is denied the check-off for one year.[22] The Nevada (LE-T) statute provides that court punishment for the employee organization is a fine of not more than $50,000 each day of the strike per organization involved; the officers of the organization can be fined not more than $1000 for each day of the strike or can be imprisoned; and, any participating employee can be dismissed or suspended. The employing agency may, in the face of continued strike activity, dismiss, suspend, or demote any employee, cancel the contracts of employment for any employee, or withhold all or part of the salaries or wages due the employee. The punishments by either court or employing agency can be applied either alternatively or cumulatively.[23]

The Wisconsin (SE) penalties allow for the imposition of discipline, which includes discharge or suspension without pay and the cancelling of reinstatement eligibility. The employer can also request monetary fines against the labor organization or the employee or can sue for damages occasioned by the strike.[24]

Limited Right to Strike: Alaska, Hawaii, Montana, Pennsylvania, Vermont

These five jurisdictions are an elite vanguard among the

jurisdictions entering bilateralism since they allow their employees (depending upon the coverage of the statute) a limited right to strike. Striking is limited in bilateralism because in all five cases there are qualifying factors.

The Alaska (PE) statute divides its employees into three classes. The first class of employees covers occupations composed of "police and fire protection employees, jail, prison and other correctional institution employees, and hospital employees." These services are considered so essential that they may not be disrupted for even the shortest period of time. Upon the threat of a strike or the occurrence of a strike, the authorities shall approach a court of competence and jurisdiction to gain an injunction, restraining order, or other order that may be appropriate. If the dispute centers around an impasse which has not been resolved by mediation, "the parties shall submit to arbitration to be carried out under AS 09.43.030."[25]

The occupations in the second class are those in public utility, snow removal, sanitation, public school, and other educational institution employees. These services may be disrupted for a limited period, but not for an indefinite period. They may strike after failure of impasse mediation and a strike vote taken by secret ballot. If a strike occurs, the public employer or labor relations board shall petition the superior court for the judicial district in which the strike is occurring for an injunction. An injunction can be

gained upon the proper showing that the strike "has begun to threaten the health, safety or welfare of the public." The court shall also consider in making its judgment the total equities in the particular situation, not only "the impact of a strike on the public, but also the extent to which employee organization and public employers have met their statutory obligations." If, after the injunction is issued, an impasse or deadlock exists, the parties to the conflict shall submit the controversy to arbitration.[26]

The third class of employees is undefined since they are all others not included in the first and second classes. The services performed by these employees can be interrupted for "extended periods without serious effects on the public." If the employees so desire, they can strike upon approval of a secret ballot vote in the bargaining unit.[27]

The Hawaii (PE-T) statute stipulates the strike as unlawful for employees not included in an appropriate bargaining unit having a certified exclusive representative or included in an appropriate bargaining unit having final and binding arbitration for resolution of disputes. Therefore, for employees in an appropriate bargaining unit having an exclusive representative and not having final and binding arbitration for the resolution of disputes, they shall have the right to strike, after complying with the following steps. First, the requirement for the resolution of disputes set forth in Section 11 must be complied with in good faith. Section 11

provided for the resolution of impasses using either mediation, fact-finding, or arbitration. Second, the procedures for prohibiting unfair practices must be exhausted. Third, a sixty day period must have elapsed since the public disclosure of a fact-finding board's report and recommendations. Fourth, the exclusive representative must have given a ten-day notice to the Public Employment Relations Board and the employer.[28]

Even with compliance of the above four steps, if the employer is concerned about the potential danger to the public's health and safety due to a possible strike or an occurring strike, the employer may petition the Public Employment Relations Board to conduct an investigation. If the Board determines there is a present or imminent danger to the public's health or safety, it shall establish requirements which must be met to remove the imminent or present danger. The employer can also petition the Board for a decision on whether a strike is in violation of the appropriate rules and regulations. The employee organization will also be given opportunity to present its viewpoint before the Board. If the employer's petition is sustained, the Board shall approach a court of competency and jurisdiction for enforcement of its decision.[29]

The Montana (N) statute allows registered professional nurses or licensed practical nurses to strike providing there is no other strike in effect at another health care facility within a radius of 150 miles. Health care facilities means

"a hospital or nursing home, or other agency or establishment . . . whether operated publicly or privately, having as one of its principal purposes the preservation of health or the care of sick or infirm individuals or both." The employees or their representative must give the health care facility a thirty day written notice of any strike specifying the day the strike is to begin.[30]

The guards at prisons or mental hospitals, or employees necessary for the functioning of the courts of the Commonwealth, shall not strike at any time, but other employees covered by the Pennsylvania (PE-T) statute can strike if in compliance with the following statutory requirements. Employees are also prohibited from striking during impasse procedures set forth in Sections 801 and 802. When the impasse procedures are exhausted, the employees shall not be prohibited from striking unless the strike presents a clear and present danger to the health, safety or welfare of the public. Before the strike can be terminated on such grounds, an appropriate court hearing must be held.[31]

If the decision of the hearing upholds the employer's contention of the strike being dangerous to the public and the employees do not comply, the employer is then able to suspend, demote or discharge at his discretion those employees striking. Furthermore, the employee shall not receive any compensation for the period during which he was engaged in any strike. The employee organization willfully disobeying a court

order injoining a strike can be punished by a fine fixed at the discretion of the court. The court shall consider as mitigating circumstances: "any unfair practices committed by the public employer during the collective bargaining processes; the extent of the willful defiance or resistance to the court's order; the impact of the strike on the health, safety or welfare of the public; and, the ability of the employee organization or the employee to pay the fine imposed."[32] In line with the first mentioned mitigating circumstance, an employer unfair practice is not a defense to a prohibited strike. The parties to a strike can approach the court and request a diminution or suspension of any fines or penalties imposed. Lastly, any employee refusing to cross a picket line of an illegal strike is also considered to be on strike and subject to the appropriate measures presented above.[33]

The Vermont (ME-F) statute simply provides that no public employee may strike or recognize a picket line if doing so will endanger the health, welfare or safety of the public. Should this happen, the public employer is to approach the Court of Chancery within the county wherein the strike is occurring for an injunction.[34]

In summary, five jurisdictions are now experimenting with a limited right to strike. The Montana (N) and Vermont (ME-F) are considerably shorter than the Alaska (PE), Hawaii (PE-T), and Pennsylvania (PE-T) provisions, but the intent

is still there. The right to strike is limited mainly by stipulations protecting the health, welfare, and safety of the citizens affected. Additionally, the provisions specify certain steps that must be complied with before the employees can strike, e.g., the exhaustion of impasse procedures. At this time, research data on the impact and administration of these provisions are not available. This is one of many areas of bilateralism requiring further study.

Summary and Conclusion

In summary, an overwhelming majority of jurisdictions prohibit the strike, with the five states now permitting a limited right to strike being a distinct minority. But one definite generalization can be made, i.e., despite the general prohibition strikes still occur. Whenever the employees feel that their demands are justified, they will strike regardless of the possible consequences. Therefore, is there an answer to the strike problem? I do not believe there is. The strike is something in bilateralism which must be kept to a minimum because of possible health and safety factors, but which will probably be tolerated in isolated instances. The best possible way to prevent strikes is to provide the parties with the proper instruments to permit compromise. But at times, the conflict in negotiations is just too great to allow compromise and then a strike occurs. It is somewhat of a utopian hope of the author that the parties involved will

respect their responsibilities to the public and not force bilateralism to the brink. Besides, even without bilateralism, the employees can still strike.

When the public employees strike and termination of employment is available, does the administrator fire all the sanitation workers in a city, all the teachers in a school district, or all the postal workers? The results of such termination could be worse than the effects of the strike. Strikes are the manifestation of conflict, so a partial answer would be to provide the machinery to promote compromise and hope like hell the parties act responsibly.

The next chapter examines the unfair labor practices designed to inform the parties in bilateral activities of actions which, if engaged in, can result in the placement of sanctions.

Footnotes

[1]Maryland (BLT), RF-BNA-GERR, Section III (i), 51:2913.

[2]Sheila C. White, "Work Stoppages of Government Employees," Monthly Labor Review, XCII (December, 1969), p. 30. The figures for 1968-1971 are from U.S. Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, 1973 (Washington, D.C.: Government Printing Office, 1973), p. 363.

[3]28 LRRM 2410-2411.

[4]69 LRRM 2866.

[5]69 LRRM 2865 and 2868.

[6]See Chapter I.

[7]Florida, RF-BNA-GERR, 51:1812.

[8]See Chapter IV.

[9]Taken from Hanslowe, Emerging Law, p. 31, and Nigro, Relations in the Public Service, p. 110.

[10]See Chapter VII.

[11]Georgia (F), RF-BNA-GERR, Section 2, 51:1911.

[12]Florida (T), RF-BNA-GERR, Section 13, 51:1815.

[13]Michigan (PE), RF-BNA-GERR, Sections 423.202, 203, and 206, 51:3111.

[14]Michigan (P-F), RF-BNA-GERR, Section 11, 51:3115.

[15]New Mexico (SE), RF-BNA-GERR, Section VIII.G, 51:4015.

[16]Minnesota (PE-T), RF-BNA-GERR, Section 4, 51:3212.

[17]New York (PE-T), RF-BNA-GERR, Sections 210 and 211, 51:4116-4118.

[18]Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.2, 51:4511.

[19]South Dakota (PE-T), RF-BNA-GERR, Sections 3-18-10 through 3-18-17, 51:5012-5013.

[20]U.S. Code, Loyalty and Striking, Vol. 1, Title 5, Section 7311 (1970).

[21]U.S. Code, Disloyalty and Asserting the Right to Strike Against the Government, Vol. 4, Title 18, Section 1918 (1970).

[22]Maryland (T), RF-BNA-GERR, Section 160 (1), 51:2912, and Maryland (BLT), RF-BNA-GERR, Section 124, 51:2916.

[23]Nevada (LE-T), RF-BNA-GERR, Sections 26-27, 51:3714-3715.

[24]Wisconsin (SE), RF-BNA-GERR, Section 111.89, 51:5815.

[25]Alaska (PE), RF-BNA-GERR, Section 23.40.200 (a) (1), 51:1113.

[26]Ibid., Section 23.40.200 (a) (2), 51:1113.

[27]Ibid., Section 23.40.200 (a) (3), 51:1113.

[28]Hawaii (PE-T), RF-BNA-GERR, Section 12 (a) (b), 51:2015.

[29]Ibid., Section 12 (c) (d) (e), 51:2015-2016.

[30]Montana (N), RF-BNA-GERR, Section 9, 51:3512. The attendants, nurses, and other workers used this provision in striking the Warm Springs State Hospital for the mentally ill. Only supervisory and staff personnel were available to cover the 1150 inmates. The normal hospital staff is 608. San Angelo Standard Times, "State Hospital Workers Strike," March 13, 1974, p. 1B.

[31]Pennsylvania (PE-T), CCH-LLR, Sections 1001-1003 and 1005-1008, pp. 57,992-57,994.

[32]Ibid., Section 1009, p. 57,994.

[33]Ibid., Sections 1004, 1010, and 1101, pp. 57,993-57,994.

[34]Vermont (ME-F), RF-BNA-GERR, Section 1704, 51:5417.

CHAPTER VII

UNFAIR LABOR PRACTICES

General Background

This chapter covers the unfair labor practice provisions and the procedures for handling complaints as found in the statutes under examination. Unfair labor practice provisions are provided to aid bilateralism by informing the participants of activities which carry the threat of exposure and sanction if they are engaged in. It is a sad reflection upon bilateralism, both public and private, that such provisions are needed to help maintain a degree of decorum. The ACIR report recommends that when states, and this is extended to all jurisdictions, do enact labor relations legislation that it contain unfair labor provisions which, among other things, obligates the parties to negotiate in good faith.[1]

This chapter is divided into three parts. The first and second sections are an examination of employer and employee unfair labor practices respectively. This analysis of twenty-two jurisdictions' data is made by comparing the respective

provisions and constructing commonality tables. Table 7-1 is a summary of employer unfair labor practices, while Table 7-2 is a summary of employee unfair labor practices.[2] (See Tables below.) There are fifteen common and unique items listed as employer unfair practices, and twenty-two listed as employee unfair practices. The employee table is made longer by the provisions of the Minnesota (PE-T) statute on picketing and related matters. These provisions (Items thirteen through twenty) are not found in any other statutes but with the three exceptions noted on items thirteen, fourteen, and fifteen. The only comparable provision in Taft-Hartley is Section 158 (b) (7).[3] The third section is a discussion of the procedures established to handle complaints. Here again, the differentiation and diversification of the data allows for some commonality, but the uniqueness is very much present.

Special mention must be made of six jurisdictions that do not contain a full unfair labor practices section (employer and employee practices plus the procedures) but still make reference to such practices. The Alabama (F), California (ME) and (SE), Delaware (PE), Maryland (T), Missouri (PE), and New Hampshire (SE) statutes contain the following similar statement:

> No such employee shall be discharged or discriminated against becuase of his exercise of such

Table 7-1.--Summary of employer unfair practices

Provisions	Jurisdiction																									
	Alaska--PE	City of Los Angeles	Connecticut--ME	Hawaii--PE	Kansas--PE	Kentucky--F	Maine--ME	City of Baltimore	Massachusetts--SE	Massachusetts--ME	Michigan--PE	Minnesota--PE	Montana--N	Montana--T	Nevada--LE	New Hampshire--P	New Mexico--SE	New York--PE	Oklahoma--F-P-PE	Pennsylvania--PE	Vermont--SE	Washington--LE	Wisconsin--SE	Wisconsin--Me-T	11491 and 11636
	a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y
1. Interfere, restrain or coerce an employee in the exercise of his guaranteed rights.	a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y
2. Refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.	a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y

Table 7-1.--Continued

3. Dominate or interfere with the formation, existence or administration of an organization.	a b c d e f g h i j k l m n o p r t u v w x y
4. Discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization.	a b d e f g h i k l m o p q r t u w x y
5. Discharge or discriminate against an employee because he has signed or filed an affidavit, petition or complaint or given testimony under this act.	a c d e f g i j k l m o p q s t u v y
6. To fail or refuse to cooperate in impasse procedures involved under the provisions of this chapter.	b d e l n o p t
7. Violating any of the rules and regulations established by the director regulating the conduct of representation elections or other orders relating to certification of an exclusive representative.	l p q s t v y

Table 7-1.--Continued

8. Violating the terms of a collective bargaining agreement.	d i n o w x
9. Refusing to discuss grievances with the representative of an employee organization designated as the exclusive representative in an appropriate unit in accordance with the provisions of this act.	c j l s
10. Unilaterally exclude from work or prevent from working, or discharge any one or more employees, when the purpose of such action is in whole or in part, to interfere with or coerce or intimidate an em ployee in the exercise of rights assured in this law.	e m p s
11. Refuse or fail to comply with any provision of this chapter.	d e o
12. Blacklisting of any employee organization or its members for purpose of denying them employment.	g l p

Table 7-1.--Continued

13. To deduct labor organization dues from an employee's earnings unless authorized.	w x
14. Violating or refusing to comply with any lawful order or decision issued by the director of the board.	1
15. Refusing to reduce a collective bargaining agreement to writing and sign such agreement.	t

Table 7-2.--Summary of employee unfair practices

Provisions	Jurisdiction																									
	Alaska--PE	City of Los Angeles	Connecticut--ME	Hawaii--PE	Kansas--PE	Kentucky--F	Maine--ME	City of Baltimore	Massachusetts--SE	Massachusetts--ME	Minnesota--PE	Montana--T	Nevada--LE	New Hampshire--P	New Mexico--SE	New York--PE	Oklahoma--F-P-PE	Pennsylvania--PE	Vermont--SE	Washington--LE	Wisconsin--SE	Wisconsin--ME-T	11491 and 11636
	a	b	c	d	e	f	g	h	i	j	l	n	o	p	q	r	s	t	u	v	w	x	y
1. Restrain or coerce:																							
a. an employee in the exercise of rights guaranteed	a	b	c	d	e	f	g	h	i		l	n	o	p	q	r	s	t	u	v	w	x	y
b. a public employer in the selection of his representative for purposes of collective bargaining or the adjustment of grievances	a		c		e	f	g		i	j	l			p	q		s	t	u				
2. Refuse to bargain collectively in good faith with a public																							

Table 7-2.--Continued

employer, if it has been designated in accordance with the provisions (of this act) as the exclusive representative of employees in an appropriate unit	a b c d e f g h i j l n o p q r s t u w x y
3. Engage in a strike, slowdown, or work stoppage.	e g i l n p q t u w x y
4. Fail to cooperate in impasse procedures	b d e l o p t
5. To discriminate against any employee because of race, religious creed, color, sex, national origin, or ancestry or any person with regard to the terms and conditions of membership in an employee organization	b i q u y
6. Violate the terms of a collective bargaining agreement	d i o w x
7. Violating any of the rules and regulations established by the director regulating the conduct of representative elections	l n p t

Table 7-2.--Continued

8. Coerce or restrain any person to:	
a. force or require employer to cease dealing with another person	
b. force or require a public employer to recognize for representation purposes an employee organization not certified by the director	l n t u
c. refuse to handle goods or perform services	
d. preventing an employee from providing services to the employer	
9. Refuse or fail to comply with any provision of this chapter	d o t
10. Inducing the employer or its representatives to commit any unfair labor practice	h v y

Table 7-2.--Continued

11. Seek modification of the status of supervisory employees as set forth in this chapter except as part of good faith meet and confer proceedings		p		w x
12. Attempt to induce agency management to coerce an employee in the exercise of his rights under this Order				w x y
13. Forcing or requiring any employer to assign particular work to employees in a particular employee organization or a particular trade, craft, or class rather than to employees in another employee organization or in another trade, craft or class		l	u	
14. Causing or attempting to cause a public employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of exaction for services which are not performed or not to be performed		l	u	

Table 7-2.--Continued

15. Any picketing which results in a refusal by any person to deliver goods or perform services	1	n
16. Committing any act designed to damage or actually damaging physical property or endangering the safety of persons while engaging in a strike	1	
17. Picketing which has an unlawful purpose such as, but not limited to, the furthering of a strike	1	
18. Picketing which unreasonably interferes with the ingress and egress to facilities of the public employer	1	
19. Seizing or occupying or destroying property of the employer	1	
20. Violating or refusing to comply with any lawful order or decision issued by the director of the board as authorized by this act	1	

Table 7-2.--Continued

21. Sole representative shall not refuse membership except for cause	q
22. Refusing to reduce a collective bargaining agreement to writing and sign such agreement	t

> right, nor shall any person or group of persons, directly or indirectly by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization.[4]

This may seem inadequate, but the silence of many statutes seems worse.

Referring to Tables 7-1 and 7-2, the horizontal axis shows the jurisdictions providing for unfair labor practices. They are placed in alphabetical order by state (the City of Los Angeles occupies the position of California and the City of Baltimore occupies the place of Maryland) with the two federal executive orders listed last. The Alaska (PE) statute was used as a base, i.e., the unfair employer and employee practices contained therein were listed first and each other statute compared for commonality or unique provisions. A word of caution is required in that the wording used in the tables comes from the first statute having such a provision and such wording is at times added to or revised by necessity when the subsequent provisions vary. But it is assured that such wording does accurately reflect the common meaning from the data used.

Each jurisdiction was given a letter placed on the horizontal axis below a jurisdictional listing. Both tables have the same letter for respective jurisdictions. In order

to accommodate the jurisdictions to the limits of the alphabet some limitations were imposed. The listing for New York (PE-T) also contains the New York (NYC) unfair practices since both are similar enough for combining the two. Likewise the two federal executive orders are listed together for the same reason.

Unfair Labor Practices--Employer

Table 7-1 then is a summary of the fifteen common and unique employer unfair labor practices. Of the fifteen items, only items one through five can be found in a majority of the jurisdictions, while the remaining ten items can be found in eight or less jurisdictions.

Items one and two have unanimous support among the practices listed. Employers cannot interfere, restrain or coerce an employee in the exercise of rights guaranteed under the labor relations regulations (item one). Item two stipulates that the employer cannot refuse to negotiate in good faith with an exclusively recognized employee organization in an appropriate unit. This requirement is not limited to discussing grievances. Employees are assured by item three that the employer is not to dominate or interfere with the formation, existence, or administration of their organization. Items four and five assure the employee that there is to be no

discrimination in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage organization membership, and that signing or filing an affidavit, petition or complaint under the provisions of the regulations will not be grounds for discharge or discrimination. These five items would then form the heart of employee protection. In summary, all rights are guaranteed, the employee's organization is protected, and the employer is required to negotiate in good faith.[5]

The employer, under item six, is not to fail or refuse to cooperate in impasse procedures provided by the regulations found in eight jurisdictions. Item seven requires that the rules and regulations established for regulating the conduct of representation elections or other words relating to certification of an exclusive representative shall not be violated. Five jurisdictions list the violating of the terms of a collective bargaining agreement as an unfair practice.[6]

Item nine is very similar in wording to item two in providing that the employer is not to refuse to discuss grievances with the exclusive representative in an appropriate unit in accordance with the regulations. Four jurisdictions, Kansas (PE), Montana (N), New Hampshire (P), and Oklahoma (P-F-ME), are prohibited from unilaterally excluding from work or

preventing from working, or discharging one or more employees when the purpose of such action in any way is aimed at interfering with or coercing or intimidating an employee in the exercise of rights assured by the regulations (item ten). This regulation in these five jurisdictions was used in Chapter I in support of the contention that the lock-out is not available to the public employer to counter the employee strike.[7]

The employer is not to refuse, or fail to comply, with any provision of their labor relations regulations, nor blacklist any employee organization or its members for purposes of denying them employment (items eleven and twelve). The Wisconsin (SE) and (ME-T) statutes state that deduction of labor organization dues from the employee's earnings without proper authorization is an unfair practice.[8] The Minnesota (PE-T) statute declares that violating or refusing to comply with any lawful order or decision issued by the Director of their Bureau of Mediation Services is an unfair practice.[9] The Pennsylvania (PE-T) statute extends the provisions of item two by providing that the employer is not to refuse to reduce a collective bargaining agreement to writing and sign such agreement.[10]

It is noteworthy that the first five practices listed are almost identical to the wording used in the Taft-Hartley unfair labor practices section. It is interesting that the public statutes total fifteen separate listings while Taft-Hartley lists only five. Upon comparison, item one is Section 158 (a) (1), item two is Section 158 (a) (5), item three is Section 158 (a) (2), item four is Section 158 (a) (3), and item five is Section 158 (a) (4).[11] The other ten listed practices have probably developed throughout bilateralism, both public and private, with their origin shrouded.

Unfair Labor Practices--Employees

Table 7-2 is a summary of employee (employee organization) unfair practices which is identical in form to the employer unfair practices table. Special note should be taken of the absence of Michigan (PE) and Montana (N) from the jurisdictional listing since their statutes listed only employer unfair practices. This harkens back to the Wagner Act which also listed only employer unfair practices, but is somewhat strange since the intervening Taft-Hartley Act lists both employer and employee unfair practices.[12] It is also interesting to note that the high degree of similarity between the Taft-Hartley employer unfair practices and those having majority commonality in public employment shown above does not hold true for the

employee unfair practices. Items one (a) and two are the items having unanimous support, while item three is listed in twelve of the twenty-one jurisdictions. These three items correspond to similar employee unfair practices in Taft-Hartley, specifically Section 158 (b) (1) (2) (3).[13] There are seven items in the employee organization unfair practices section of Taft-Hartley, while the bilateral statutes produce twenty-two separate items.

Item one of employee unfair practices restricts employee organizations from restraining or coercing an employee in the exercise of rights guaranteed by the regulations, and of restraining the employer in the selection of his representative for the purposes of negotiation or settlement of grievances. Item two prohibits the employee from refusing to bargain collectively in good faith with the employer if the organization has been designated as the exclusive representative of the employees in an appropriate unit. Items one and two of both employer and employee unfair practices are very similar in meaning. Item three is a prohibition against striking or conducting a slowdown or work stoppage. In all jurisdictions except five, Alaska (PE), Hawaii (PE-T), Montana (N), Pennsylvania (PE-T), and Vermont (ME-F), the strike is prohibited in separate sections of the regulations, although

within the five mentioned jurisdictions the right to strike is not absolute.[14] Item four corresponds to item six of the employer table in requiring the employee organization not to fail to cooperate in impasse procedures.[15]

Items five through twenty-two have from five listings or less among the twenty-one jurisdictions. In fact, seven have only a single jurisdictional listing. Since there is such narrow coverage of these items among the jurisdictions the reader is encouraged to turn to Table 7-2 and study these items instead of having them presented in narrative form here. It should be noted that eight of these items are found in the Minnesota (PE-T) statute with item fifteen the only exception.[16]

It is somewhat strange that the employee unfair practices would show so little unanimity among so few items, only two, while the employer unfair practices have five such unanimous items. Likewise, Taft-Hartley has listed only five employer unfair practices while public bilateralism examined here produces fifteen listings. Continuing in this line of thought, Taft-Hartley lists seven employee unfair practices while public bilateralism examined here produces twenty-two. This lack of unanimity is strange since the development of bilateralism is seen by the public administrator and official as a threat of employee intrusion into their area of discretion. Doesn't it

seem likely that the employee unfair practices would be much more restrictive with more jurisdictions having common listings instead of indicating this in the employer unfair practices? Besides, the Michigan (PE) and Montana (N) statutes cover only employer unfair practices and not employee unfair practices. This is an intriguing difference on which, at this time, available research material sheds little light. But it is tentatively hypothesized that the political pulling and hauling within each jurisdiction as it developed its bilateral legislation precipitated such diversity.

Procedures for Handling Complaints

The data for this section are taken from the jurisdictions having listings under either (or both) employer and employee unfair practices. To begin with, of the twenty-seven statutes, eleven have provisions for handling complaints which simply state that the board established to regulate bilateral activities should be approached and will handle any complaint under rules and regulations so established by the board or that a court of competence and jurisdiction should be approached.[17] Of the remaining sixteen statutes, fifteen stipulate that the complaint should be filed with the board so established to handle complaints. The Maryland (BLT) statute provides for the

filing of a complaint with a third party agency designated by the Office of Labor Commissioner.[18]

After the complaint is filed, the Connecticut (ME) procedure calls for its agent (an undesignated person or persons acting on behalf of the Board) to investigate and report so that the State Board of Labor Relations can either dismiss the complaint or call a hearing.[19] The procedures in Kentucky (F), Maine (ME-T), Vermont (SE), and Michigan (PE) will not accept a complaint covering an alleged violation occurring over six months prior to its filing (except for cause such as military service).[20] Upon receipt of the complaints all procedures call for the notification of the accused of the charges. Upon notification the accused has generally five to seven days to respond to the charges.

Generally the hearing is to be conducted within five to seven days after the issuance of the complaint. Any hearing ordered or held in response to a complaint is informal with judicial rules of evidence inapplicable. Informal procedures and the inapplicability of judicial rules of evidence are also main features of the Administrative Procedures Act of 1946, cited in Section 156 of Taft-Hartley. This section allows the NLRB to make, amend, and rescind rules and regulations necessary to carry out its responsibilities.[21] The Pennsylvania

(PE-T) statute allows either the Pennsylvania Labor Relations Board, a member of the Board, or an agent of the Board to conduct the hearing.[22] In Wisconsin (SE) a tribunal of three can be established by the Employment Relations Commission or the Commission can let the parties each strike (mark-out) two names from a list of seven to establish a tribunal to conduct the hearing.[23] The Michigan (PE) hearing can be conducted by an agent required to report within twenty days.[24] Under Federal E.O. 11491 the Assistant Secretary of Labor for Labor-Management Relations and the Employee-Management Relations Commission under Federal E.O. 11636 shall decide complaints of alleged violations.[25]

Upon the evidence taken during the hearing, in which a transcript is usually taken, the complaint will be either dismissed or a cease and desist order issued with affirmative action to correct the unjustice. Affirmative action can be either withdrawal of certification, reinstatement of an employee with or without back pay, or the ordering of fact-finding upon refusal to bargain with the charged party paying full costs, is provided for in both Connecticut (ME) and Massachusetts (ME-T).[26] Court review is available in all jurisdictions having administrative proceedings with the Michigan (PE) and Pennsylvania (PE-T) statutes providing length specifications for review.[27]

Summary and Conclusions

This chapter has been an analysis of the employer and employee unfair labor practices and the procedures for handling complaints. These unfair practices are provided to inform all concerned parties of what action, if engaged in, carries the threat of exposure and sanction. Why are unfair practices needed? Unfortunately they are needed to maintain a degree of order and decorum within the environment of bilateralism. Bilateral relations produce conflict situations, but without these restrictions the conflict could become unmanageable. Unfair practices provisions are analogous to a line drawn in the dirt separating legal from illegal labor-management activities.

In the analysis and comparison of the data, more items are listed under employee unfair practices than employer unfair practices (twenty-two as compared to fifteen). But there is more commonality in employer unfair practices than employee unfair practices, with commonality here meaning that an individual item is found in at least a majority of the jurisdictions.

The employer unfair practices with some commonality prohibit any interference in the employee's exercise of the rights granted and state that the employer is not to tamper in any way with the existence or organization of an employee organization.

The employer is not to discriminate against an employee in any way to encourage or discourage membership in an employee organization, nor discharge or discriminate against an employee filing an affidavit, petition or complaint or giving testimony under the authority of the legislation. Lastly, the employer is not to refuse to negotiate collectively with an exclusively recognized employee organization.

The employee unfair practices having some degree of commonality restrict an employee organization from restraining or coercing an employee in the exercise of rights granted, and from restraining or coercing an employer in the selection of his representative in collective negotiations or grievance proceedings. The employee organization is not to refuse to negotiate collectively with the organization designated as the exclusive representative of the employees in an appropriate unit. Lastly, the employees are not to engage in a strike, slowdown, or other work stoppage.

Now comes the intriguing point of analysis that ten of fifteen employer unfair practices do not have commonality, while nineteen of twenty-two employee unfair practices do not have commonality. Originally I thought that the employee unfair provisions would be both extensive and high in commonality. While the employee unfair practices provisions are extensive,

they are not high in commonality. Why? No research material sheds any light upon the difference, but now that the difference is uncovered future research should be conducted to fill this data gap.

Chapter VIII concludes this examination of bilateralism by a recapitulation of the data covered and resulting conclusions and an analysis of the influence of bilateralism upon the merit system. Along with the strike, the intrusion into the merit system of bilateralism is most feared. The main question for this section of the chapter is to define the "merit system," since a merit system must be delineated before bilateral influences can be gauged. This author is of the opinion, now, that the merit system and bilateralism can exist in the same environment without irreparable harm to either.

Footnotes

[1]ACIR, Policies for State and Local Government, p. 107.

[2]Alaska (PE), RF-BNA-GERR, Section 23.40.110, 51:1112, California (LA), RF-BNA-GERR, Section 4.860 (a) (b), 51:1422, Connecticut (ME), CCH-LLR, Section 4 (a) (b), p. 53,166, Hawaii (PE-T), RF-BNA-GERR, Section 13 (a) (b), 51:2016, Kansas (PE), RF-BNA-GERR, Section 13 (b) (c), 51:2515, Kentucky (F), RF-BNA-GERR, Section 6 (1) (2), 51:2611-2612, Maine (ME-T), RF-BNA-GERR, Section 946 (1) (2), 51:2811, Maryland (BLT), RF-BNA-GERR, Section 121, 51:2916, Massachusetts (SE), RF-BNA-GERR, Section 178F (8) (9), 51:3012, Massachusetts (ME-T), RF-BNA-GERR, Section 178L, 51:3014, Michigan (PE), RF-BNA-GERR, Section 423.210, 51:3112, Minnesota (PE-T), RF-BNA-GERR, Section 8 (2) (3), 51:3214-3215, Montana (N), RF-BNA-GERR, Section 3, 51:3511, Montana (T), RF-BNA-GERR, Section 6 (1) (2), 51:3513, Nevada (LE-T), RF-BNA-GERR, Section 28 (1) (2), 51:3714, New Hampshire (P), RF-BNA-GERR, Section 105-B:11, II, III, 51:3814-3815, New Mexico (SE), RF-BNA-GERR, Section XII (a) (b), 51:4016, New York (PE-T), RF-BNA-GERR, Section 209 a (1) (2), 51:4115-4116, New York (NYC), RF-BNA-GERR, Section 1173-4.2 (a) (b), 51:4163, Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.3.8 (a) (b), 51:4512, Pennsylvania (PE-T), CCH-LLR, Section 1201 (a) (b), pp. 57,995-57,995, Vermont (SE), RF-BNA-GERR, Sections 961-962, 51:5414-5415, Washington (LE), RF-BNA-GERR, Sections 41.56.140-150, 51:5612, Wisconsin (SE), RF-BNA-GERR, Section 111.84 (1) (2), 51:5813-5814, Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (3) (a) (b), 51:5817-5818, Federal (11491), RF-BNA-GERR, Section 19 (a) (b), 21:5, and Federal (11636), Weekly Compilation, Section 13 (a) (b), p. 1692.

[3]Labor-Management Act of 1947, Section 158.

[4]Missouri (PE), RF-BNA-GERR, Section 105-510, 51:3411. Also see Alabama (F), RF-BNA-GERR, Section 450 (3), 51:1011, California (ME), RF-BNA-GERR, Section 3500, 51:1412, California (SE), RF-BNA-GERR, 51:3531, 51:1413, Delaware (PE), RF-BNA-GERR, Section 1303, 51:1711, New Hampshire (SE), RF-BNA-GERR, Section 98-C:2, 51:3811, and Maryland (T), RF-BNA-GERR, Section 160 (J), 51:2912.

[5]Refer to Table 7-1.

[6]Refer to Table 7-1.

[7]Refer to Table 7-1.

[8]Wisconsin (SE), RF-BNA-GERR, Section 111.84 (1) (d), 51:5813, and Wisconsin (ME-T), RF-BNA-GERR, Section 111.70 (3) (a) (b), 51:5818.

[9]Minnesota (PE-T), RF-BNA-GERR, Section 8 (2) (10), 51:3214.

[10]Pennsylvania (PE-T), CCH-LLR, Section 1201 (a) (6), p. 57,994.

[11]Labor-Management Act of 1947, Section 158 (a).

[12]Nigro, Relations in the Public Service, p. 136.

[13]Labor-Management Act of 1947, Section 158 (b).

[14]Alaska (PE), RF-BNA-GERR, Section 23.40.200 (a) (1) (2) (3), 51:1113, Hawaii (PE-T), RF-BNA-GERR, Section 12, 51:2014-2016, Montana (N), RF-BNA-GERR, Section 9, 51:2512, Pennsylvania (PE-T), CCH-LLR, Section 1003, p. 57,993, and Vermont (ME-F), RF-BNA-GERR, Section 1704, 51:5417.

[15]Refer to Table 7-2.

[16]Refer to Table 7-2.

[17]California (LA), RF-BNA-GERR, Section 4.860 (c), 51:1422, Hawaii (PE-T), RF-BNA-GERR, Section 14, 51:2016, Minnesota (PE-T), RF-BNA-GERR, Section 8, 51:3214, Montana (N), RF-BNA-GERR, Section 8, 51:3512, Montana (T), RF-BNA-GERR, Section 11, 51:3514, Nevada (LE-T), RF-BNA-GERR, Section 29, 51:3714, New Hampshire (P), RF-BNA-GERR, Section XIII (k), 51:4017, New York (PE-T), RF-BNA-GERR, Section 205, 51:4113, New York (NYC), RF-BNA-GERR, Section 1173.5.0.a (4), 51:4164, and Oklahoma (P-F-ME), RF-BNA-GERR, Section 548.4.D, 51:4513.

[18]Maryland (BLT), RF-BNA-GERR, Section 121, 51:2916.

[19]Connecticut (ME), CCH-LLR, Section 5 (4), p. 53,167.

[20]Kentucky (F), RF-BNA-GERR, Section 8 (2), 51:2612, Maine (ME-T), RF-BNA-GERR, Section 968.5B, 51:2814, Vermont (SE), RF-BNA-GERR, Section 965, 51:5415, and Michigan (PE), RF-BNA-GERR, Section 423.216, 51:3113.

[21]Labor-Management Act of 1947, Section 156.

[22]Pennsylvania (PE-T), CCH-LLR, Section 1302, p. 57,995.

[23]Wisconsin (SE), RF-BNA-GERR, Section 111.84 (4), 51: 5814.

[24]Michigan (PE), RF-BNA-GERR, Section 423,216, 51:3113.

[25]Federal (11491), RF-BNA-GERR, Section 6 (a) (4), 21:2, and Federal (11636), Weekly Compilation, Section 5 (b) (3), p. 1689.

[26]Connecticut (ME), CCH-LLR, Section 5 (4), p. 53,167, and Massachusetts (ME-T), RF-BNA-GERR, Section 178L, 51:3014-3015.

[27]Michigan (PE), RF-BNA-GERR, Section 423,216, (c) (1), 51:3113, and Pennsylvania (PE-T), CCH-LLR, Sections 1304-1601, pp. 57,996-57,998.

CHAPTER VIII

QUOD ERAT DEMONSTRANDUM

Bilateralism and the Merit System

One of the pervasive fears of public bilateralism as it appeared on the public personnel horizon and throughout its development has been the destruction of the classical merit principle and its replacement by an industrial type of seniority system. Tentatively it can be reported that the merit principle has survived the first ten years of bilateralism and shows few signs of atrophy.

Initially one great distinction must be made, i.e., the distinction between the merit principle and a merit system. The former refers to the basic concepts, while the latter refers to the method of application. Robert E. Hampton, Chairman of the U.S. Civil Service Commission, supported this distinction when he stated: "Compounding the problem and confusing the picture are some misguided defenders of merit systems, and I emphasize here systems rather than principles because some systems in their administration have lost sight of the principles

we advocate."[1] Therefore, if the merit principle is to survive in an environment of public bilateralism, which I contend it will, the principles or heart of the merit concept must be defined and defended. If this is not accomplished, then perhaps the merit principle will be lost when bilateralism overwhelms the merit system, which I believe it could. The main question is: What are the principles upon which the merit system is established?

David T. Stanley differentiates between a merit system and merit principles by distinguishing the principles as political neutrality, equal opportunity, and competition based upon merit and competency for recruitment, selection, and advancement.[2] The political neutrality of the civil service can be illustrated by the Hatch Act; the equal opportunity of the civil service can be illustrated by the efforts of the Equal Employment Opportunity Commission; and the competition of the civil service can be seen in the Federal Service Entrance Examination. O. Glenn Stahl defines the merit principle in its broadest terms as a "system in which comparative merit or achievement governs each individual's selection and progress in the service and in which the conditions and rewards of performance contribute to the competency and continuity of the service."[3] Also, he contends that a merit system is based upon "what a person knows rather than who a person knows."[4]

The Intergovernmental Personnel Act of 1970 sets forth six merit principles which should form the foundation for an improved quality in personnel systems in all units of government. These six merit principles are:

1. Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

2. Providing equitable and adequate compensation.

3. Training employees, as needed, to assure high quality performance.

4. Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

5. Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens.

6. Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.[5]

In capsulated form, the merit principle, regardless of the area of application (training, staffing, compensation, etc.) is a "balanced and fair way," "true competition," and "equality of opportunity." But what of its alleged counterpart

or replacement--seniority. What is seniority? Seniority is defined "as the measure of an employee's right to a particular job or to employment, in relation to other employees."[6] The measure used is usually longevity.

Yet Stahl contends that if the clumsy application of the merit system deserves approbation, condemnation should be placed upon seniority regardless of its application. The question for Stahl is:

> . . . which produces the more serious and longer range ill effects? The employee's wounds of being passed over (even unjustifiably) in favor of a younger or newer candidate may be severe, but they usually heal in time, and, what's more, he usually has another chance; in contrast, the dead hand of disincentive, the downright stagnation so often observed in seniority-ridden organizations leave shortcomings in the performance and spirit of an enterprise that are almost impossible to eradicate.[7]

Felix A. Nigro believes, along similar lines, that a distinction should be made between resentments and disappointments. Resentments refer to the frame of mind an employee generates under unfair treatment, i.e., in the absence of merit principles, while disappointments refer to an employee's or prospective employee's frame of mind when unsuccessful.[8] Resentment should be eliminated, but Rosaline Levenson asserts that if seniority is the criterion, will the young, ambitious employee in public employment wait for promotion until the

senior person retires or dies, thus creating a vacancy?[9]

Quoting from Stahl again:

> If the manpower assessment and recruitment program does not reach out and attract the best minds and skill to apply for employment, then the rest of the staffing process consists merely of a sorting out among the mediocre and the ill-qualified.[10]

It may come as quite a surprise (it did to the author) that only eleven jurisdictions mentioned the merit system in thirteen statutes. (Remember the data came from thirty-six jurisdictions having seventy-four statutes.) Of the thirteen statutes, ten contain simply a short section or subsection of only, at times, a few sentences. California (SE) Section 3525, used as illustrative of these ten provisions, states:

> Nothing contained herein shall be deemed to supersede the provisions of existing state law which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the state.[11]

Although this section does not mention merit principles specifically, which should perhaps be corrected, this flaw is not fatal. Remember that many people use system and principle synonymously and more than likely this is the case with the above. Research needs to be conducted into the applicable state laws before condemning this absence of a statement

directed toward the principles of the merit system. To perhaps ease this poor showing for the merit system, the management's rights provisions add eight jurisdictions and nine statutes, since these rights generally cover applicable laws and regulations dealing with hiring, promotion, and transfer, among other items.

The Connecticut (ME) statute, although supportive of the merit principle, does provide that negotiated hours of work for policemen and firemen and methods of covering or removing employees from coverage under the Connecticut municipal employees retirement system shall be superior to governing statutes.[12] The Maine (ME-T) statute is also supportive of the merit principle for entrance, but negotiated provisions for binding arbitration for demotion, lay-off, reinstatement, suspension, removal, discharge or discipline shall be controlling in case of conflict with any authority or power.[13] The Wisconsin (SE) provisions prohibit bargaining over policies, practices and procedures relating to original appointment and promotions and the job evaluation system. (Each general class is defined by a listing of specific items.) But the employer may bargain and reach agreement providing for an impartial hearing officer to review decisions of the personnel board in these two general areas, with power to affirm, modify or

reverse only upon showing of arbitrary and capricious action.[14]

But an interesting aspect, similar to Maryland v. Wirtz, is the "Standards for a Merit System of Personnel Administration" issued on March 6, 1971, by the Departments of Labor, Defense, and Health, Education, and Welfare. These Standards are designed to implement statutory and regulatory provisions of grant-in-aid programs requiring the establishing and maintenance of personnel standards on a merit basis. Specifically Section 70.1 (d) states:

> Laws, rules, regulations, and policy statements to effectuate a merit system in accordance with these standards are a necessary part of the approved State plans required as a condition of Federal grants. Such laws, rules, regulations, policy statements, and amendments thereto, will be reviewed for substantial conformity to these standards. The administration of the merit system will likewise be subject to review for compliance in operation.[15]

With these requirements for certain grant-in-aid programs, can the states bargain away or infringe upon the merit system, even if permitted to do so in their legislation? It would seem the federal requirement is superior to state law. Thus the merit system (principle) is reinforced from another vantage point.

In conclusion, Stanley studied the relationship between the merit system and bilateralism in fifteen cities and four

urban counties. Analyzing this relationship on such points as hiring, promotions, transfers, training, grievances and disciplinary appeals, classification, pay, and fringe benefits, he concludes that "the relationship is dynamic and immature."[16] He did find, for example, the expected effort toward using seniority in promotions, toward upgrading some positions and creating new positions thus influencing the classification plan, and toward replacing aptitude tests with performance tests. (These same ideas are elaborated somewhat in his book Managing Local Government Under Union Pressure.)[17]

Seniority simply has a hard time finding a place in public service for one major reason. If seniority is applied in promotions then doesn't this destroy lateral entry into the civil service. If lateral entry is eliminated then hiring can only be at the lowest level for any particular career. I contend that such a turn of events would breed more evil than good. The superior person wanting to take or find a government job might very likely be prevented since the senior person would get the job.

Although the merit principle is now well established in public personnel administration, at least in the federal government and some states and local units of government, the Stanley study documents that complacency on the part of public

officials could place the merit principle in trouble. The merit system needs to be both defended and revitalized for it to continue, but merit principles must not be compromised. Although seldom mentioned in the bilateral statutes, this oversight needs correction.

Summary and Conclusions

The diversification created by the prism of bilateralism is the recurring theme throughout this comparative study of the development of bilateralism in federal, state, and local units of government. This conceptual idea is founded upon the work of Fred W. Riggs. His ideas (using a structural-functional framework) are grounded upon the diversification or differentiation produced within societies as they develop. Riggs' structural-functional framework, based on Talcott Parson's work, is applied in his prismatic model. Development is from a fused society through the prism of development into a diffracted society. The functions in a diffracted society are more specific as compared to the diffuse functions in a fused society. In like terms, the units of government not yet involved in bilateralism are analogous to Riggs' fused society because they use unilateralism based on sovereignty, but the prism of bilateralism (joint decision-making) produces diversification or differentiation in public labor-management

relations in those governmental units involved in public bilateralism.

This diversification was seen throughout Chapters II through VII. The amount of diversification varied, with the least amount produced in Chapter VI with most jurisdictions prohibiting the strike and the greatest amount being spread equally among the other chapters. One disturbing element of this examination is that bilateralism is immature with its full impact yet to be determined. Conclusions drawn today will very likely be outdated tomorrow. Bilateralism is still developing so that any arrangement or procedure examined in this research is unfortunately quite susceptible to change.

The lack of conclusions in the following material is by no means an attempt on the author's part to resist any efforts to draw specific conclusions. The low level of generalization would render such efforts suspect. Public bilateralism is still so young and evolving that trying to grab hold of it is like grabbing mercury--now you have it but now you don't. Public bilateralism today is very dynamic, diversified, complex, and confused. Thus, based on these elements and the political milieu of each unit of government entering bilateralism it will be some time before meaningful generalizations and conclusions can be developed.

With this background of diversification and evolution, Chapter II examined the administrative machinery for implementing bilateralism. The congeries of such arrangements can well be seen by examining Table 2-1. There are twenty-nine jurisdictions listed and forty-six separate administrative boards or agencies having a variety of duties and powers. These boards or agencies were either already in existence handling industrial labor-management relations or have been created to handle public bilateralism. The reason for the variety of usages are yet to be fully explored, but tentatively, as Jean T. McKelvey sets forth, the diversification probably depends upon the employees covered, i.e., if the employees are associated with the general labor movement or are exclusively public in nature and not wanting to associate with the general labor movement. Those employee organizations associated with the general labor movement will generally use existing labor machinery, while those employee organizations not in association with the general labor movement will use newly created machinery. These latter employees want little to do with "labor unions" or existing labor agencies.

Chapter III analyzes the many faceted topic of recognition. Recognition refers basically to three different processes, i.e., the determination of the appropriate unit, the

determination of the representative for the appropriate unit, and the determination of the extent of union security. An appropriate unit is that group of employees or part of an organization that is organized or grouped together to engage in bilateral activities. Representation elections are conducted to certify, decertify, or change representatives of the employees. Certification refers to the process of being elected to represent the employees, while decertification means the opposite. Decertification is bifurcated in that another representative can be selected or the employees can choose not to be represented by any organization. Union security refers to the application of the union or agency shops, exclusive status, and the check-off. The union shop requires all employees, after a specified period, to join the union, while an agency shop requires the payment of a fee by the employee to the organization regardless of membership in order to defray the cost of representation. Only Kentucky (F) and Alaska (PE) provide for the union shop, while six jurisdictions allow the agency shop. Exclusive status means that the employee organization is the recognized representative, and this position cannot be challenged for a specified time, usually one year. Check-off refers to the deduction of employee organization fees from the employee's paycheck upon written authorization.

Really the only solid conclusion that can be drawn from all this material is that each governmental unit is handling the problem differently. The diversification is so great and the area is evolving so rapidly that any conclusions are nothing more than mere speculation.

Nevertheless, it is probable at this time that supervisors are generally excluded from such activity, but there are a few exceptions to this. Public management is still having some trouble in drawing the line between supervisory and non-supervisory employees. The union shop will find little support within bilateralism, but the agency shop will expand slowly. The check-off of dues and other assessments is not a threat to management's position and should be granted where requested.

The diversification found in Chapter IV, the longest chapter, is indicative of the prismatic effect of bilateralism. The chapter is build upon an examination of scope of negotiations, management's rights, publicity, official time, contract interpretation, and the beginning background material and general provisions. The scope of negotiations refers to areas of labor-management relations that can be negotiated. Management's rights refer to those rights retained and are therefore outside the scope of negotiation. Publicity refers to the

aspect of public exposure in the negotiation of an agreement. Official time refers to the ability to negotiate during duty hours. Contract interpretation refers to the process of settling disagreements over items in the agreement.

Although speculative at this time, it appears that the scope of negotiations outside of "wages and hours" will continue to expand. The "working conditions" are more open to negotiation since wages and hours are generally set by law, not contract. With the expanding scope of negotiation the right of management could shrink some, but it is contended that after further development a core of rights will emerge which will not be negotiated. Publicity is a knotty problem but it is my contention that executive sessions will be allowed for preparation and negotiation sessions but that the resulting contract will need public exposure sometime. More and more official time (duty hours) will be used to conduct bilateral business since the work area is the normal meeting place for employer and employee.

The diversity in impasse resolution methods is well depicted in the fourteen classes presented in Table 5-1. If the negotiations become deadlocked, then the issue or issues are processed through either mediation, fact-finding, or arbitration. Mediation is simply the process of maintaining

communication between the parties and trying to settle the dispute through gentle persuasion. Fact-finding is the process of trying to settle an impasse through studying the conflict and issuing a statement of facts and perhaps recommendations that the parties may have overlooked--usually caused by the blindness generated by the conflict. Arbitration is the settlement of the conflict by a third party. But again the way the three approaches are used in public bilateralism is extremely diverse. At times mediation is used like fact-finding, and at times fact-finding resembles advisory arbitration. At least final-offer arbitration is distinctive enough to stand out as something new and different. Except that police and firemen are the only public employees covered by binding arbitration, conclusions are at best speculative. The essential nature of these employees probably accounts for the use of binding arbitration. Final impasse procedures will gain greater support in light of the need to find a replacement for the strike. The essentiality of public services necessitates final procedures.

Chapter VI examines the strike in bilateralism. This material allows the conclusion that with very few exceptions the strike by public employees is still prohibited. But Hawaii, Alaska, Montana, Vermont, and Pennsylvania are

experimenting with a limited right to strike with the results yet to be determined. Although there are only these five jurisdictions permitting a limited right to strike, the expanded use of the strike is doubtful. With the advent of final-offer arbitration the likelihood of expansion has contracted.

Unfair labor practices (Chapter VII) are analogous to a line drawn in the dirt separating legal from illegal labor-management activities. Although there are more unfair employee practices listed than employer unfair practices, the employer practices have more commonality, i.e., they are found in more jurisdictions than are employee unfair practices. (See Tables 7-1 and 7-2.) This difference is puzzling. Probably when the bilateral statutes were written there was more overall understanding of what management should not do than what the employee organization should not do. This difference will probably decrease with further development and with more experience in the area.

It is quite easy to examine this bilateral diversification and rush to Washington for passage of some standardization so that everyone will be doing the same thing. In my estimation nothing could be more foolhardy. I contend that eventually, and hopefully not in the distant future, this diversification or experimentation will begin to yield some

methods of implementing bilateralism which seem "better" than other methods. This is illustrated by the as yet miniscule use of final-offer arbitration. Perhaps when more data is compiled and analyzed, the limited right to strike could spread beyond the five states now permitting it, but final-offer arbitration could retard such expansion. Unless the federal legislation is drawn in very loose terms, thus permitting experimentation (which if done this way it would perhaps be better to have none at all), the federal conformity might impede experimentation. Let's not bind the feet of bilateralism within the restrictions of federal legislation, but allow full growth and development of this diversification. In terms similar to John S. Mill's marketplace of ideas, let there be a full expression of ideas, for who knows in which area will lie a meaningful development for bilateralism.

Footnotes

[1]Robert E. Hampton, "Rededicating Ourselves to Merit Principles," Personnel Administration and Public Personnel Review, I (July/August, 1972), p. 58.

[2]David T. Stanley, "What Are Unions Doing to Merit Systems," Civil Service Journal, XII (January/March, 1972), p. 10. (Hereafter referred to as Stanley, "Merit Systems.")

[3]O. Glenn Stahl, Public Personnel Administration (New York: Harper and Row, 1971), p. 31. (Hereafter referred to as Stahl, Public Personnel.)

[4]Ibid., p. 36.

[5]Intergovernmental Personnel Act, Section 2.

[6]Labor Relations Guide (Englewood Cliffs, New Jersey: Prentice-Hall, 1970), p. 54,411.

[7]Stahl, Public Personnel, pp. 146-147.

[8]Nigro, Relations in the Public Service, p. 52.

[9]Rosaline Leverson, "The Merit Principle in Municipalities--Strengthened or Eroded?" Personnel Administration and Public Personnel Review, I (July/August, 1972), p. 49.

[10]Stahl, Public Personnel, p. 113.

[11]California (SE), RF-BNA-GERR, Section 3525, 51:1413.

[12]Connecticut (ME), CCH-LLR, Section 8 (f) (g), p. 53,170.

[13]Maine (ME-T), RF-BNA-GERR, Section 969, 51:2815.

[14]Wisconsin (SE), RF-BNA-GERR, Sections 111.91 (2) and 111.93 (3), 51:5815-5816.

[15]U.S., Departments of Health, Education, and Welfare, Labor, and Defense, "Standards for a Merit System of Personnel Administration," Code of Federal Regulations, Title 45, Part 70 (Washington, D.C.: Office of the Federal Register, National Archives and Records Service, October 1, 1973).

[16]Stanley, Merit Systems, p. 14.

[17]David T. Stanley, Managing Local Government Under Union Pressure (Washington, D.C.: The Brookings Institution, 1972), Chapters 3 and 4.

GLOSSARY

1. AFSCME: American Federal of County, Municipal, and State Employees (AFL-CIO) one of the largest unions.

2. Agency shop: An element of union security in which the employee is not required to jion the employee organization but is required to pay some amount to defray the cost of negotiating and administering the agreement.

3. Arbitration: A third party process of resolving an impasse in which the arbitrator examines the issues in conflict and determines the solution. The process can be either voluntary, compulsory, binding, or advisory, but advisory arbitration closely resembles fact-finding with recommendations.

4. Bilateralism: The emerging labor-management relationship in the public sector based on joint-decision making. This relationship closely resembles industrial labor relations.

5. Certification: Refers to that aspect of representation elections in which an amployee organization is designated as the representative for a unit.

6. Check-off: Refers to the process of taking employee organization dues and other assessments out of the employee's pay check upon written authorization by the employee.

7. Decertification: Refers to that aspect of representation elections in which one employee organization is replaced by another organization or where the employees reject the present representative and do not desire another.

8. Exclusive representation: An element of union security meaning that the employee organization representing an appropriate unit is the only organization entitled to do so for some unchallengeable period.

9. Fact-finding: Refers to the third party process of resolving an impasse whereby issues in conflict are analyzed to provide the parties with data; fact-finding with recommendations closely resembles advisory arbitration.

10. Final-offer arbirtation: A third party process of resolving an impasse in which the arbitrator is limited to the offers submitted by the parties in determining the resolution.

11. Impasse: Refers to a negotiation deadlock; see mediation, fact-finding, arbitration, final-offer arbitration.

12. Mediation: A third party process of resolving an impasse through advising or assisting the parties.

13. Representation election: Refers to the process of determining whether the employees desire representation; see certification, decertification.

14. Sovereignty: Ultimate political power in a unit of government; used as a support for unilateralism but now being waived to permit bilateralism.

15. Unilateralism: A decision-making process used prior to bilateralism in which the public employer made all policy decisions based on its sovereign position.

16. Union security: Refers to various items which provide a measure of security to the employee organization in bilateralism; see exclusive representation, union shop, agency shop, check-off.

17. Union shop: An element of union security in which employees are required to join the employee organization within a specified period to retain employment.

18. Unit or Appropriate bargaining unit: Means a group of employees, however determined, that is the negotiating counterpart of public management.

APPENDIX A

ABBREVIATIONS

The employee coverage of the data is repeatedly referred to, e.g., Alaska (PE). This is necessary to indicate the statute used since several jurisdictions have more than one statute each with different employee coverage. For illustration, Executive Orders 11491 and 11636 have different employee coverage, i.e., 11491 covers the general civil service with some qualifications while 11636 covers the Department of State. Therefore, to facilitate handling the data in the narrative, tables, and footnotes, the jurisdictions' name (state or federal) is presented and then the coverage, e.g., Nebraska (T) or Federal E.O. 11636. Appendix C can be referred to for a more detailed presentation on coverage. The following abbreviations are used throughout this study.

PE--public employees
SE--state employees
LE--local employees
T--teachers
P--policemen
F--firemen
N--nurse

SP--school personnel, Oregon
AE--academic employees, Washington
SU--state university, Washington
PDE--port district employees, Washington
LA--Los Angeles
NYC--New York City
BLT--Baltimore
PLT--Portland

APPENDIX B

STATUTES AND EXECUTIVE ORDERS USED IN THE STUDY AND THE DATE OF THEIR EFFECTIVENESS

Jurisdiction	Date of Effectiveness
Alabama	
Firefighters	8-16-1967
Alaska	
Public Employees Relations Act	5-5-1972
Teachers	8-16-1972
California	
Meyers-Milias-Brown Act	12-1-1971
State Employees	12-1-1971
Winton Act (teachers)	
Firefighters	
Los Angeles	2-1971
Connecticut	
Municipal Employee Relations Act	6-16-1967
Teachers	1964
Delaware	
Right of Public Employees to Organize	6-15-1965
Teachers	10-31-1969

Florida	
Fire Fighters Bargaining Act	1-1-1973
Teachers Professional Negotiations Law (Hillsborough County)	7-3-1971
Georgia	
Firefighters Mediation Act	4-5-1971
Hawaii	
Public Employees	7-1-1970
Idaho	
Firefighters	1970
Teachers	7-1-1971
Kansas	
Public Employees	3-1-1972
Teachers	3-23-1970
Kentucky	
Fire Fighters Collective Bargaining Act	7-1-1972
Policemen	6-16-1972
Maine	
Municipal Public Employees Labor Relations Act	6-9-1972
Maryland	
Teachers	7-1-1969
Baltimore	9-30-1969
Massachusetts	
State Employees	6-6-1972
Local Employees	6-6-1972

Michigan	
Public Employment Relations Act	7-23-1965
Policemen's and Firemen's Arbitration	5-4-1972
Minnesota	
Public Employment Labor Relations Act	7-1-1972
Missouri	
Public Employees	10-13-1969
Montana	
Nurses in Health-Care Facilities	7-1-1969
Professional Negotiations Act for Teachers	7-1-1971
Nebraska	
Public Employees	7-6-1972
Nebraska Teachers' Professional Negotiations Act	10-23-1967
Nevada	
Local Government Employee-Management Relations Act	4-28-1969
New Hampshire	
Public Employees	8-26-1969
Policemen	5-27-1972
New Jersey	
New Jersey Employer-Employee Relations Act	4-1-1969
New Mexico	
Public Employee-Management Relations Regulations issued by State Personnel Board	7-1-1971

New York	
Taylor Act	9-29-1972
New York City	9-29-1972
North Dakota	
Public Employee Mediation Teachers	7-1-1969
Oklahoma	
Firefighter's and Policemen's Arbitration Law	4-6-1972
Teachers	1971
Oregon	
Public Employees	7-1-1969
Teachers	9-9-1971
School Personnel	1971
Nurses	7-1-1969
Portland	11-14-1968
Pennsylvania	
Public Employee Relations Act	10-21-1970
Policemen and Firemen	6-24-1968
Rhode Island	
State Employees Labor Relations Act	5-8-1972
Municipal Employees' Arbitration Act	5-8-1972
School Teachers' Arbitration Act	5-11-1966
Firemen	4-20-1970
Policemen	4-20-1970
South Dakota	
Public Employees	7-1-1970
Firemen and Policemen	3-19-1971
Texas	
Teachers	1967

Vermont	
State Employees Labor Relations Act	4-24-1969
Public Employees and Firefighters	7-1-1970
Teachers	9-1-1969
Washington	
Public Employees Collective Bargaining Act	7-1-1967
Teachers	
Community College Academic Employees	8-9-1971
State University System Educators	7-1-1969
Port District Employees	3-21-1967
Wisconsin	
State Employment Labor Relations Act	5-1-1972
Municipal Employment Relations Act	11-11-1971
Wyoming	
Firefighters	1968
Federal Government	
Executive Order 10988	1-17-1962
Executive Order 11491	10-29-1969
Executive Order 11636	12-17-1971

APPENDIX C

EMPLOYEE COVERAGE OF THE STATUTES
AND EXECUTIVE ORDERS

Jurisdiction and Employee Coverage	State Employees	Political Subdivision of State (without limitation)	Political Subdivision of State (with limitation)	Teachers	Firemen	Policemen	Nurse	Higher Education	Federal
	a	b	c	d	e	f	g	h	i
Alabama									
F					e				
Alaska									
PE	a	b							
T				d					
California									
SE	a								
ME			c						
T				d					
F					e				
LA			c						

Connecticut

ME			c				
T				d			

Delaware

PE			c				
T				d			

Florida

F					e		
T				d			

Georgia

F					e		

Hawaii

PE-T	a	b		d		g	h

Idaho

F					e		
T				d			

Kansas

PE	a		c				
T				d			

Kentucky

F					e		
P						f	

Maine

ME-T		b		d			

Maryland

BLT			c				
T				d			

Massachusetts

SE	a						
ME-T		b		d			

Michigan

PE	a	b					
P-F					e	f	

Minnesota

PE-T	a	b		d			h

Missouri

PE	a		c				

Montana

N						g	
T				d			

Nebraska

PE	a	b					
T				d			

Nevada

LE-T		b		d		g	

New Hampshire

SE	a						
P					f		

New Jersey

PE-T	a	b		d			

New Mexico

SE	a						

New York

PE-T	a	b		d			h
NYC			c				

North Dakota

T				d			

Oklahoma

F-P-ME			c			f	
T				d			

Oregon

PE	a		c				
T				d			
SP				d			
N							g
PTL		b					

Pennsylvania

PE-T	a	b		d			
F-P					e	f	

Rhode Island

SE	a						
ME			c				
T				d			
F					e		
P						f	

South Dakota

PE-T	a	b		d			
F-P					e	f	

Texas

T				d			

Vermont								
	SE	a						
	ME-F			c		e		
	T				d			
Washington								
	LE			c				
	T				d			
	AE						h	
	SU						h	
	PDE	a						
Wisconsin								
	SE	a						
	ME-T		b		d			
Wyoming								
	F					e		
Federal								
	10988							i
	11491							i
	11636							i

APPENDIX D

WORKING CONDITIONS PROVISIONS OF THE 1967 CONTRACT BETWEEN THE SOCIAL SERVICE EMPLOYEES UNION AND THE NEW YORK DEPARTMENT OF SOCIAL SERVICES

1. The City agrees to provide adequate, clean, well-ventilated, safe and sanitary office space, in full compliance with all applicable law and the rules and regulations of the Departments of Health, Buildings, Fire, Labor, and Water Supply, Gas and Electricity, for each employee covered by this contract.

2. The City shall provide each employee covered by this contract with supplies, equipment and telephone services, adequate to perform his duties and responsibilities.

3. All new Social Service Centers shall be air-conditioned. All old Social Service Centers, not yet air-conditioned, shall be converted to air-conditioned status as soon as possible.

4. The City shall permit operation of a vending machine by a concessionaire to make available lunch, coffee and soft drinks on the premises, subject to approval of the Board of Extimate, and to rules and regulations governing use of such machines.

5. New Locations--The City agrees to acquire space and open new work locations necessary to comply with all provisions of this contract. The City further agrees to continue to expand the staff of the Bureau of Plant Management on an as-needed basis during the term of this contract. If sufficient qualified staff cannot be recruited, the City agrees to contract out necessary work functions to reduce delays in the establishment of new work locations and additional work space.

6. Painting--The City agrees to paint each work location at least once every five (5) years.

7. Lounges--A lounge area which is usable as a lounge shall be made available in each work location, unless by agreement of the parties such space is temporarily utilized for caseload contract compliance.

8. Desks and Chairs--Each Caseworker and Home Economist shall be provided with a desk and chair.

9. Dictating Machines--The Department will provide two dictating machines to each three case units plus a 10% reserve of dictating machines in each Social Service Center and Bureau of Child Welfare. These machines shall be kept in good working order. Each dictating machine shall be placed in a sound proof booth. The Division of Day Care shall be provided with a minimum of fifteen (15) new machines. Field Caseworkers in the Division of Day Care shall be permitted to use dictating machines in Social Service Centers, provided the transcription is done at the Division of Day Care.

10. Adding Machines--Each Home Economist shall be provided with an adding machine.

11. Duplicating Machine--A duplicating machine shall be made available in each Social Service Center, Bureau of Child Welfare location, and the Homemaking Center.

12. Manuals and Handbooks--Upon appointment to staff, each employee shall be supplied with a current copy of the appropriate Department of Social Service manual, handbook, and if assigned to field work, a field book.

13. Coat Racks--Coat and hat racks for hanging such garments shall be provided on each floor in each work location.

14. Thermometers--A thermometer shall be installed on each floor in each work location.

15. Water Fountains--Adequate water fountains shall be provided on each floor in each work location, provided that no fountain need be placed on a floor where less than twenty (20) employees are assigned.

16. Homemaker's Equipment--Homemakers shall be supplied with the equipment necessary to the performance of their duties including rubber gloves, a sewing kit and a utility bag.

17. Conference Rooms--A conference room shall be provided in each Social Service Center, Bureau of Child Welfare location and Homemaking Center; unless by agreement of the parties, such space is temporarily utilized for caseload contract compliance.

18. Children's Counselors Office Space--Sufficient office space with desks and chairs shall be provided for Children's Counselors to do required office work.

19. Centrex--All new Social Service Centers shall be equipped with a centrex telephone system, and all old Social Service Centers, not yet equipped with centrex shall be converted, in accordance with schedules to be worked out with the New York Telephone Company. Where centrex cannot be installed in 1967, additional telephones as needed will be provided.

20. Lockers--In the planning of new or renovated Children's Centers, lockable clothing lockers shall be provided for Children's Counselors on the basis of one locker per Children's Counselor.

Pending the provision of clothing lockers, the Department agrees to provide a small "valuables" locker for each Children's Counselor.

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