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Binding Interest Arbitration in the Public Sector: Is It Constitutional?

BINDING INTEREST ARBITRATION IN THE PUBLIC SECTOR: IS IT CONSTITUTIONAL?

Strikes by firemen, policemen, and other public employees in New York State in 1975 increased 100 percent in one year; the number of public employees involved in these work stoppages swelled 1800 percent.[1] Similar illegal[2] behavior, resulting in disruption of public services, is increasing rapidly throughout the United States.[3]

In an effort to reverse the trend of work stoppages following deadlocked negotiations,[4] at least thirty-four states[5] and a number of

1. [1976] GOV'T EMPL. REL. REP. (BNA) No. 670 D-3, *citing* New York Public Employment Relations Board 1975 Annual Report. In 1974 there were 16 strikes involving 4,100 public employees; in 1975 there were 32 strikes involving 77,745 public employees. *Id.*

2. Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, and Vermont permit some public employees to strike under specified circumstances. ALASKA STAT. § 23.40.200 (1972); HAWAII REV. STAT. § 89-12 (Supp. 1975); MINN. STAT. ANN. § 179.64 (West Cum. Supp. 1976); MONT. REV. CODES ANN. § 41-2209 (Cum. Supp. 1975); ORE. REV. STAT. § 243.726 (1975); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Cum. Supp. 1976-1977); VT. STAT. ANN. tit. 21, § 1730 (Cum. Supp. 1976).

3. [1976] GOV'T EMPL. REL. REP. (BNA) No. 676, F-1-7, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

4. McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1192 (1972).

5. The following 34 states have enacted 50 binding interest arbitration statutes covering some or all public employees: Alabama, Alaska, Connecticut, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. 1971 ALA. ACTS ch. 993, § 21(b) (mass transit); ALASKA STAT. § 23.40.200 (1972) (policemen, firemen, jail and correctional institution employees, and hospital employees); CONN. GEN. STAT. ANN. § 7-473 (West 1958 & Cum. Supp. 1976) (local); DEL. CODE tit. 2, § 1613 (1974) (mass transit); HAWAII REV. STAT. § 89-11 (Supp. 1975) (state and local); IND. CODE ANN. § 22-6-4-12 (Burns Cum. Supp. 1976) (state and local); IOWA CODE ANN. § 90.15 (West 1972) (firemen); LA. REV. STAT. ANN. § 23:890 (West Cum. Supp. 1976) (mass transit); ME. REV. STAT. tit. 26, § 965(4) (Cum. Supp. 1976-1977) (local); ME. REV. STAT., tit. 26, § 979-D(4) (1964) (state); ME. REV. STAT. tit. 26, § 1026(4) (Cum. Supp. 1976-1977) (university employees); MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Cum. Supp. 1976-1977) (state and local); MICH. COMP. LAWS ANN. §§ 423.231-.240 (Cum. Supp. 1976-1977) (police and firemen); MINN. STAT. ANN. § 179.38 (West Cum. Supp. 1976) (hospital employees); MINN. STAT. ANN. § 179.72 (West Cum. Supp. 1976) (essential employees); MONT. REV. CODES ANN. § 59-1614(9) (Cum. Supp. 1975) (state and local); NEB. REV. STAT. § 48-810 to 819 (Supp. 1974) (state and local); NEV. REV. STAT. § 288.200 (1973) (local); N.H. REV. STAT. ANN. § 273-A:12 (Supp. 1975) (state and local); N.J. STAT. ANN. § 34:13A-7 (West 1965) (state and local); N.J. STAT. ANN. § 40:37A-96 (West Cum. Supp. 1976-1977) (mass transit); N.M. STAT. ANN. § 14-53-15 (1976) (mass transit); N.Y. CIV. SERV. LAW § 205.3 (McKinney Cum. Supp. 1975-1976) (police and firemen); OHIO REV. CODE ANN. § 306.12 (Page Supp. 1975) (mass transit); OKLA. STAT. ANN. tit. 11, § 548.1 (West Supp. 1976-1977) (police and firemen); ORE. REV. STAT. § 243.712(2)(c) (1975) (state and local); ORE. REV. STAT. § 243.742 (1975)

local governments[6] have enacted binding interest arbitration statutes, giving a neutral arbitrator power to settle unresolved public sector labor disputes arising during the negotiation of the terms of a collective bargaining agreement. An arbitrator's decision is final and binding on both the public employer and the public employee. In theory, public employees will be pacified by turning disputed matters, such as wages, over to an impartial arbitrator, who can make a more rational finding than can an intractable public employer, cautious about spending the taxpayer's money.[7]

In reality, however, public employee unrest continues.[8] Moreover, public employers and the electorate increasingly are alarmed at the broad powers delegated to arbitrators who are accountable to no one, and who, by awarding large salary and benefit hikes, indirectly can force substantial budgetary reallocations and tax increases.[9] As a result, some local governments, claiming either an inability to pay[10] or the unconstitutionality of binding interest arbitration

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(police, firemen, guards at mental and correctional institutions); PA. STAT. ANN. tit. 43, §§ 1101.804-.805 (Purdon Cum. Supp. 1976-1977) (state and local); PA. STAT. ANN. tit. 43, § 217.4 (Purdon Cum. Supp. 1976-1977) (police and firemen); PA. STAT. ANN. tit. 53, § 39951 (Purdon Cum. Supp. 1976-1977) (mass transit); PA. STAT. ANN. tit. 55, § 563.2 (Purdon 1964) (port authority); R.I. GEN. LAWS § 28-9.1-7 (1968) (firemen); R.I. GEN. LAWS § 28-9.2-7 (1968) (police); R.I. GEN. LAWS § 28-9.3-9 (1968) (teachers); R.I. GEN. LAWS § 28-9.4-10 (1968) (municipal employees); R.I. GEN. LAWS § 28-9.5-9 (Supp. 1976), *reprinted in* [1976 Reference File - 124] GOV'T EMPL. REL. REP. (BNA) 51:4817 (school administrators); R.I. GEN. LAWS § 36-11-9 (Supp. 1975) (state); R.I. GEN. LAWS § 39-18-17 (1969) (mass transit); S.D. COMPILED LAWS ANN. § 9-14A (Cum. Supp. 1975) (police and firemen); TENN. CODE ANN. § 6-3802 (Supp. 1976) (mass transit); TEX. REV. CIV. STAT. ANN. art. 5154c-9 to -15 (Vernon Cum. Supp. 1976-1977) (police and firemen); UTAH CODE ANN. § 34-20a-7 (Supp. 1975) (firemen); VT. STAT. ANN. tit. 3, § 925 (Cum. Supp. 1976) (state); VT. STAT. ANN. tit. 21, § 1733 (Cum. Supp. 1976) (local); VA. CODE ANN. § 15.1-1357.2 (Cum. Supp. 1976) (mass transit); WASH. REV. CODE ANN. § 41.56.450 (Supp. 1975) (police and firemen); WASH. REV. CODE ANN. § 53.18.030 (Supp. 1975) (port authority); W. VA. CODE § 8-27-21 (1976) (mass transit); WIS. STAT. ANN. § 111.70 (West 1974) (Milwaukee police); WIS. STAT. ANN. § 111.77 (West 1974) (police and firemen); WYO. STAT. § 27-269 (1967) (firemen).

6. *See, e.g.*, SAN FRANCISCO, CAL., ADMIN. CODE, art. XI.A, § 16.216 (1974), *reprinted in* [1974 Reference File - 81] GOV'T EMPL. REL. REP. (BNA) 51:1437 (local); NEW YORK CITY, N.Y., ADMIN. CODE ch. 54, § 1173-8.0 (1972), *reprinted in* [1972 Reference File - 40] GOV'T EMPL. REL. REP. (BNA) 51:4167 (local).

7. *See* Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 INDUS. & LAB. REL. REV. 95, 111 (1971).

8. *See* [1976] GOV'T EMPL. REL. REP. (BNA) No. 676, F-1-7, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

9. *See, e.g.*, Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ——, 231 N.W.2d 226, 248 (1975) (separate opinion).

10. *See, e.g.*, City of Buffalo v. Patrolman's Benevolent Ass'n (pending before N.Y. Sup. Ct.), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 674 B-10; Caso v. Coffey, Case 1400 E (N.Y. Sup. Ct., App. Div., decided July 12, 1976), *summarized in* [1976] GOV'T EMPL.

laws,[11] have refused to participate in arbitration proceedings[12] or to honor arbitration decisions.[13]

This Note will focus on the constitutionality of binding interest arbitration laws, beginning with a brief discussion of the social milieu surrounding the enactment of arbitration statutes. It will review the various provisions found in binding interest arbitration statutes, especially those covering public mass transit workers. A case law analysis of constitutional attacks upon binding arbitration in the public sector will be followed by a discussion of the difficulties in creating an arbitration process that can harmonize the conflicting demands of the general public, public employers, and employees. Finally, guidelines will be recommended for insuring that arbitration laws are equitable to all parties as well as constitutional.

I. Social Process: The Interests of the Public v. the Interests of the Public Employee

The number of state and local government employees has grown substantially. In 1964 there were fewer than 8 million public employees;[14] that number had risen to 15 million by 1974, comprising 16% of the total work force.[15] These workers have become highly active,[16] economic dissatisfaction being the primary cause of strikes.[17]

Rel. Rep. (BNA) No. 667, B-5; Harney v. Russo, 435 Pa. 183, ___, 225 A.2d 560, 564-65 (1969); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1318 (1976).

11. *See, e.g.*, Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 916 (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 228 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26, 332 N.E.2d 290, 292, 371 N.Y.S.2d 404, 406 (1975); Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 561 (1969); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1318 (1976).

12. *See, e.g.*, City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1318 (1976).

13. *See, e.g.*, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 389 (Me. 1973); Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 561 (1969).

14. U.S. Dept. of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 1971, at 304 (1971).

15. [1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-5, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

16. In 1958 there were 15 strikes by public employees, one million of whom were union members. There were 382 public sector strikes and over five million unionized public workers in 1974. [1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-1 *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

17. [1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-5, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

Overburdened taxpayers, on the other hand, also have been harmed by higher costs of living. They surrender a material portion of their paychecks to the government and expect quality public services at reasonable rates. Public officials, in an effort to appease constituents, attempt to maximize the productivity of public employees as much as possible while holding public spending to a minimum. Thus, at the negotiating table the government employer may be unresponsive to employee demands for large wage increases. Feeling no duty to accept meager salary settlements, public employees have resorted to more militant strike activity, sometimes with chaotic results.[18] New York City, for example, "was brought to its knees in 1975 because of the overpowering strength of its municipal unions."[19] The government cry of "inability to pay" for public wage increases is spreading.[20] State legislatures have viewed binding interest arbitration laws as a rational solution to the growing public sector labor strife.[21] Although enactment of these statutes has not ended public sector work stoppages, preliminary indications show that the statutes have eased labor relations.[22]

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18. For example, Kansas City firemen who struck illegally in 1975, were accused by city officials of setting fires during the strike. Volunteer firefighters, fearing retribution from the firemen, refused to give their names to newspaper reporters. In Baltimore in 1974, a public employee union official was quoted by Governor Marvin Mandel as warning that the city "would burn to the ground unless the city would give in to his demands."

> The method of operation is to exploit the fears of the citizens and disrupt the services for which citizens are taxed to insure capitulation to union demands.
>
> The results of strikes in the public sector have been the following:
>
> 1. Loss of control of the political process to union officials.
> 2. Disrupted services.
> 3. Security suspended because of police strikes which result in near riots, and harassment.
> 4. Fire protection withheld resulting in increased fires and fire hazards.
> 5. Health endangered through strikes of hospital and sanitation workers.

[1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-6-7, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976).

19. [1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-6, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. August 1, 1976). "Because of the control of its affairs by union bosses," New York City was unable to pay its bills or provide public services for which its citizens are taxed heavily. *Id.*

20. *See* note 10 *supra*. Wages paid to some city employees seem exorbitant. In San Francisco, for example, city street sweepers are paid $17,000 per year, city gardeners receive $22,000, and starting salaries for policemen are close to $19,000. [1976] Gov't Empl. Rel. Rep. (BNA) No. 676, F-5-7, *quoting* Public Service Research Council, *Public Sector Bargaining and Strikes* (2d ed. Aug. 1, 1976). Employee compensation accounts for 66 to 80 percent of city operating expenditures. [1976] Gov't Empl. Rel. Rep. (BNA) No. 667, B-6.

21. McAvoy, *supra* note 4, at 1192.

22. *See* Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ——, 231 N.W.2d 226, 231 (1975); McAvoy, *supra* note 4, at 1210-13.

II. THE LEGAL PROCESS

A. *Binding Interest Arbitration Statutes: Types and Provisions*

All binding interest arbitration statutes[23] have two elements in common: first, all issues left unresolved after completing the contract negotiation process are submitted to an arbitrator or a panel of arbitrators; second, the arbitration settlement is final and binding on both parties.[24]

Beyond these similarities, however, the provisions found in binding interest arbitration laws vary substantially. A number of statutes provide for voluntary binding interest arbitration: the public employer and the employee representative may, in their discretion, present negotiation disputes to arbitration.[25] The majority of binding interest arbitration statutes, however, are mandatory, requiring the parties to submit impasse issues to an arbitration panel if agreement is not reached within a statutorily prescribed length of time[26] or if one party so requests.[27]

Arbitration statutes differ as to the classes of public employees covered: some states, for example, have a single law applicable to all public employees;[28] others have a statute covering only policemen and firemen.[29] The scope of binding arbitration also varies from

23. There are two types of binding arbitration statutes covering public employees: (1) interest arbitration, involving an award that sets the term of a labor contract; and (2) grievance arbitration, involving a decision that interprets the terms of an existing collective bargaining agreement. *See, e.g.*, Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 71-72 (1973). Further, some interest arbitration statutes render an arbitrator's finding advisory rather than binding. *See, e.g.*, R.I. GEN. LAWS § 36-11-9 (Supp. 1975) (state), which provides for both binding and advisory arbitration: "The decision of the arbitrator shall be binding upon both the bargaining agent and the chief executive as to all issues and matters other than an issue which involves wages and as to that issue, the decision shall be advisory in nature." This Note discusses only binding interest statutes.

24. McAvoy, *supra* note 4, at 1193.

25. *See, e.g.*, VT. STAT. ANN. tit. 3, § 925 (4) (Cum. Supp. 1976) (state), which provides that "an order determining the issue submitted to the board for resolution . . . shall not be binding on either party unless previously agreed to in writing by the parties."

26. *See, e.g.*, WASH. REV. CODE ANN. § 41.56.450 (Supp. 1975) (police and firemen), which provides: "If an agreement has not been reached within forty-five days after mediation and fact finding has commenced, an arbitration panel shall be created . . . ."

27. *See, e.g.*, N.Y. CIV. SERV. LAW § 209.4(c) (McKinney Cum. Supp. 1975-1976) (police and firemen), which provides that "if the dispute is not resolved within ten days . . ., the board shall refer the dispute upon petition of either party to a public arbitration panel . . . ."

28. *See, e.g.*, HAWAII REV. STAT. § 89-11 (Supp. 1975).

29. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 423.231-.240 (Cum. Supp. 1976-1977). Rhode Island, however, has seven binding interest arbitration statutes covering various public employees. *See* note 5 *supra*.

statute to statute. In one state, for example, an arbitration panel is authorized to render a binding decision with respect to wages for firemen, policemen, and mass transit workers,[30] but any wage determination for other public employees is deemed merely advisory.[31]

Binding interest arbitration laws differ in many other respects.[32] For purposes of this discussion, however, it will suffice to outline variations in provisions relating to the selection of the panel, the terms of the award, the payment of expenses, and most importantly, the protections against arbitrariness.

Most binding arbitration statutes require a tripartite panel: the respective representatives of the public employer and of the public employee union or association each choose one arbitrator; a third arbitrator, serving as board chairman, is selected by the two appointed arbitrators[33] either upon simple agreement[34] or from a list of names supplied either by the American Arbitration Association[35] or by a public officer.[36] The statutorily prescribed method of selecting the arbitrators is integral to the constitutional validity of a binding interest arbitration law. For example, a delegation of legislative power to an arbitrator appointed by a public official accountable to the public is less vulnerable to constitutional attack than a delegation of authority to one who is not responsible to the public.[37] Furthermore, judicial involvement in the selection process is suspect, possibly resulting in a claim of unlawful delegation violative of the separation of powers doctrine.[38]

The majority of binding interest arbitration statutes give the arbitrators absolute authority to determine the terms of an award.[39] A few statutes, however, provide for "final offer" arbitration, requiring

30. R.I. GEN. LAWS § 28-9.1-9 (Supp. 1975) (firemen); *Id.* § 28-9.2-9 (Supp. 1975) (policemen); *Id.* § 39-18-17 (1969) (mass transit).

31. *Id.* § 28-9.3-12 (1968) (teachers); *Id.* § 28-9.4-13 (1968) (municipal employees); *Id.* § 36-11-9 (Supp. 1975) (state employees).

32. For an excellent analysis of the various provisions found in binding arbitration statutes see McAvoy, *supra* note 4.

33. *See, e.g.*, ME. REV. STAT. tit. 26, § 965(4) (Cum. Supp. 1976-1977).

34. *See, e.g.*, R.I. GEN. LAWS § 28-9.1-8 (1968).

35. *See, e.g.*, R.I. GEN. LAWS § 36-11-9 (Supp. 1975).

36. *See, e.g.*, MINN. STAT. ANN. § 179.72(6) (Supp. 1976). Some statutes permit a judge to choose the third panel member if the two partisan arbitrators are unable to agree. *See, e.g.*, WYO. STAT. § 27-270 (1967). At least one law requires the state employment relations commissioner to appoint an arbitrator. WIS. STAT. ANN. § 111.70 (jm)(2) (1974).

37. *See* text accompanying notes 106-11 *infra*.

38. *See* text accompanying notes 201-03 *infra*.

39. *See, e.g.*, N.Y. CIV. SERV. LAW § 209.4 (McKinney Cum. Supp. 1975-1976).

that the arbitration panel choose the more reasonable offer made by the parties during negotiations rather than draft the terms of its decision. There are two types of "final offer" arbitration: one requires the arbitrators to select the last "package" offer of the employer or of the union with respect to all unresolved issues;[40] the other permits the arbitrators to choose the employer's or the union's final offer on each disputed item,[41] thereby mitigating the possibility of unreasonable awards on some issues.[42]

Statutes also vary regarding payment of expenses. Although some arbitration laws provide that the state pay a substantial portion of arbitration expenses[43] and others leave the question to the discretion of the arbitrators,[44] most require that the public employer and the public employee union share expenses.[45] The latter statutory provision is a device that may encourage voluntary agreement by the parties during negotiations: rather than attempting to compel agreement during arbitration proceedings, this statutory scheme, by increasing the expense of arbitration,[46] seeks to discourage the parties from maintaining impasse positions during negotiations.

The most important respect in which arbitration laws differ is in their provisions for standards protecting against arbitrary, capricious, and unfair exercise of discretionary powers by arbitrators. Binding interest arbitration laws have been attacked primarily on the ground that they unconstitutionally delegated legislative power insofar as the statutes purportedly failed to provide adequate standards and safeguards to guide and control the arbitrators.[47] Numerous statutes fail to provide any standards at all,[48] and others provide

40. *See, e.g.*, EUGENE, ORE., CODE § 2.876(7)(g), (h) (1971), *reprinted in* [1975 Reference File-104] GOV'T EMPL. REL. REP. (BNA) 51:4621.

41. *See, e.g.*, MICH. COMP. LAWS ANN. § 423.238 (Cum. Supp. 1976-1977).

42. *See* Nelson, *Final-Offer Arbitration: Some Problems*, 30 ARB. J. 50 (1975); McAvoy, *supra* note 4, at 1201. The method of setting the terms of the award may be important in determining whether binding arbitration thwarts negotiations by encouraging disputes. For example, a public employee union may feel it has a better chance of obtaining a suitable settlement from an arbitration panel than from the public employer. The union, believing an arbitration panel will make a compromise decision, may maintain unreasonable demands during collective bargaining negotiations and thus create an impasse without serious discussion of the issues. "Final offer" arbitration has been viewed as a means of ensuring that the parties do not abuse the negotiation process. *See* McAvoy, *supra* note 4, at 1201.

43. *See, e.g.*, PA. STAT. ANN. tit. 43, § 1101.807 (Purdon Cum. Supp. 1976-1977).

44. *See, e.g.*, WYO. STAT. § 27-271 (1967).

45. *See, e.g.*, NEV. REV. STAT. § 288.200(3) (1973).

46. Clark, *Public Employee Strikes: Some Proposed Solutions*, 23 LAB. L.J. 111, 119 (1972).

47. *See* notes 112-177 *infra* & accompanying text.

48. *See, e.g.*, VA. CODE ANN. § 15.1-1357.2 (Cum. Supp. 1976).

only general guidelines.[49] Some binding interest arbitration statutes, however, do mandate that specific standards be considered by an arbitration panel.[50]

In addition to variations in standards, binding interest arbitration statutes vary in terms of procedural safeguards to protect against arbitrary action by arbitrators. The majority of the binding arbitration laws empowering arbitrators to affect government spending substantially, via wage increases, pension awards, and insurance programs, provide for safeguards against abuse of discretion by arbitrators. Such provisions include hearings, written findings of fact, verbatim record, written opinions and orders, and judicial review.[51] Similarly, if monetary expenditures are involved in arbitration pro-

49. WIS. STAT. ANN. § 111.70(4)(jm)(5) (West 1974). This statute, covering Milwaukee policemen, is illustrative. The arbitration panel, in determining the proper compensation for the policemen, must consider standard and cost of living indices.

50. For example, a Massachusetts statute covering policemen and firemen requires arbitrators to consider:

> 1. [t]he financial ability of the municipality to meet costs
> 2. [t]he interests and welfare of the public
> 3. [t]he hazards of employment, physical, educational and mental qualifications, job training and skills involved
> 4. [a] comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities
> 5. [t]he decisions and recommendations of the fact finder
> 6. [t]he average consumer prices for goods and services, commonly known as the cost of living
> 7. [t]he overall compensation presently received by the employees, including direct wages and fringe benefits
> 8. [c]hanges in any of the foregoing circumstances during the pendency of the arbitration proceedings
> 9. [s]uch 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
> 10. [t]he stipulation of the parties

Act of Nov. 26, 1973, 1973 Mass. Acts ch. 1078, § 4, *reprinted in* [1975 Reference File-109] GOV'T EMPL. REL. REP. (BNA) 51:3015 (expires June 30, 1977).

51. To illustrate, an Oregon statute covering policemen and firefighters, ORE. REV. STAT. § 243.742 (1975), requires the arbitration panel to hold hearings with respect to disputed issues. Both parties are given an opportunity to present evidence and to cross examine witnesses. Following the hearings, the arbitration panel makes written findings of fact and a just and reasonable opinion and order based upon the record. *Id.* § 243.746. The award, subject to judicial review, must be supported by competent, material, and substantial evidence, *id.* § 243.752, and must be based upon extensive statutory standards. *Id.* § 243.746.

ceedings, most statutes guard against potential budgetary problems resulting from an arbitration panel's untimely award.[52] A number of binding interest arbitration statutes, however, require few protections against the arbitrary and capricious exercise of discretionary power, even though the arbitrators may be delegated broad powers to make wage and other monetary determinations.[53]

The statutes most devoid of standards and safeguards are those covering mass transit workers.[54] Unlike other arbitration statutes enacted to prevent public sector strikes,[55] laws covering transit workers were passed in direct response to the requirements of section 13(c) of the Urban Mass Transportation Act of 1964.[56] Most mass transit systems were privately owned and operated until the early 1960's; since then, however, many systems have changed to public ownership.[57] As a condition to receiving federal aid, section 13(c) of the Act requires that states receiving federal mass transit funding insure that mass transit workers retain the rights they enjoyed as unionized members of the private sector.[58]

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52. Some binding interest arbitration laws provide that an arbitration panel's award will not be given effect until the beginning of the next fiscal year. *See, e.g.*, ORE. REV. STAT. § 243.752 (1975). Others seek to complete arbitration proceedings prior to the last day on which money can be appropriated by a legislative body. *See, e.g.*, WASH. REV. CODE ANN. §§ 41.56.440, 41.56.450 (Supp. 1975). To ensure that arbitrators are aware of legislative appropriations before rendering a binding award, Nevada's binding interest arbitration law requires that the arbitration hearing be staged up to ten days following the adjournment of the legislature *sine die*. NEV. REV. STAT. § 288.200 (1973).

53. Vermont's statute, for example, covers all municipal employees except teachers and provides for judicial review but does not require hearings, written findings, verbatim record, or written opinion. VT. STAT. ANN. tit. 21, § 1733 (Supp. 1976).

54. The following states have enacted binding interest arbitration statutes covering only mass transit workers: Alabama, Delaware, Louisiana, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia. 1971 ALA. ACTS ch. 993, § 21(b); DEL. CODE tit. 2, § 1613 (1974); LA. REV. STAT. ANN. § 23:890 (West Cum. Supp. 1976); N.J. STAT. ANN. § 40:37A-96 (West Cum. Supp. 1976-1977); N.M. STAT. ANN. § 14-53-15 (1976); OHIO REV. CODE ANN. § 306.12 (Page Supp. 1975); PA. STAT. ANN. tit. 53, § 39951 (Purdon Cum. Supp. 1976-1977); R.I. GEN. LAWS § 39-18-17 (1969); TENN. CODE ANN. § 6-3802 (Cum. Supp. 1976); VA. CODE ANN. § 15.1-1357.2 (Cum. Supp. 1976); W. VA. CODE § 8-27-21 (1976).

55. *See* McAvoy, *supra* note 4, at 1201.

56. 49 U.S.C. § 1609(c) (1970).

57. Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168, 168 (1976).

58. *Id.* at 169-71. For a local public transit system to receive federal funds, section 13(c) (section 10(c) in the original act) provides that "[i]t shall be a condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for . . . (2) the continuation of collective bargaining rights . . . ." *Id.* at 171, *quoting* Urban Mass

In response to the requirements of the Act, a number of states, having no similar law for any other group of public employees, have passed binding interest arbitration statutes covering transit employees.[59] Perhaps because these laws were passed by state legislatures more concerned with receiving federal money than with harmonizing public employer-employee relations, legislative draftsmen have not been as careful to structure safeguards against abuse in arbitration programs covering mass transit workers as they have been in establishing arbitration procedures for other public employees.[60]

To the extent that local or state tax dollars are used to finance public mass transit systems, an arbitration decision involving monetary expenditures affects the expenditure of tax revenues. Binding interest arbitration statutes for mass transit workers are therefore unique among arbitration laws entailing public expenditures, insofar as they contain no standards or safeguards.

B. *Challenges to the Constitutionality of Binding Interest Arbitration Statutes*

Although the United States Supreme Court never has considered the issue, ten state supreme courts, including five since 1975, have rendered decisions regarding the constitutionality of binding interest arbitration statutes enacted by state legislatures for public employees.[61] The principal constitutional challenge has been that bind-

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Transit Act of 1964, § 13(c), 49 U.S.C. § 1609(c) (1976). Although the Act does not detail the procedure for maintaining the collective bargaining rights of transit employees, it does specify that the Secretary of Labor must certify that protective requirements have been met. These safeguards are listed in collective bargaining agreements, commonly called "13(c) Agreements," executed between the transit system and the unions. *Id.* Almost invariably, "13(c) Agreements" provide for binding arbitration of disputed labor issues. *Id.* at 173.

59. Barnum, *supra* note 57, at 174.

60. None of the arbitration laws covering transit workers establishes standards to guide arbitrators in making an award or provides procedural safeguards against arbitariness. Virginia's binding interest arbitration statute covering transit workers, for example, says merely that "[t]he employees of any transit facility . . . shall have the right, in the case of any labor dispute relating to the terms and conditions of their employment for the purpose of resolving such dispute, to submit the dispute to final and binding arbitration by an impartial umpire or board of arbitration acceptable to the parties." VA. CODE ANN. § 15.1-1357.2 (Supp. 1976).

61. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, 352 N.E.2d 914 (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Harney v. Russo, 435 Pa. 183, 225 A.2d 560 (1969); Erie Firefighters Local 293 v. Gardner, 406 Pa.

ing interest arbitration statutes create an unlawful delegation of legislative power and discretion to arbitrators. Other objections to the validity of binding interest arbitration statutes include charges that they violate the separation of powers doctrine as well as fourteenth amendment constraints.

1. *Unlawful Delegation of Legislative Power to Arbitrators*

The most significant challenges to binding interest arbitration laws originate in the theory that because the state constitution vests the legislature with the power to appropriate public funds, this power cannot be delegated lawfully to arbitrators.[62] Those conceding that such delegations are lawful argue the narrower proposition that these statutes are invalid because of inadequate safeguards and standards.[63]

Neither the federal nor state constitutions explicitly state the criteria for determining the validity of a delegation of legislative power.[64] Nevertheless, absent a "ripper clause" in a state constitution, a state legislature apparently may delegate power to appropriate public money to arbitrators through binding interest arbitration laws, provided standards and safeguards are included to limit an arbitrator's discretionary decision making.[65] Authority to delegate to arbitrators is not so clear, however, if a local legislative body, such as a city council, is the delegating party.[66]

a. *Delegation in States Having "Ripper Clauses"*

At least seven state constitutions include "ripper clauses"[67] ex-

395, 178 A.2d 691 (1962); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Sioux Falls v. Sioux Falls Firefighters Local 814, ___ S.D. ___, 234 N.W.2d 35 (1975); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, 553 P.2d 1316 (1976); Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

62. McAvoy, *supra* note 4, at 1205.

63. *See* notes 112-177 *infra* & accompanying text.

64. Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 252 (1975), *citing* 1 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 73 (4th ed. C. Sands 1972).

65. *See* notes 67-190 *infra* & accompanying text.

66. *See* notes 191-199 *infra* & accompanying text.

67. CAL. CONST. art. 11, § 11(a); COLO. CONST. art. 5, § 35; MONT. CONST. art. 5, § 36; PA. CONST. art. 3, § 31; S.D. CONST. art. 3, § 26; UTAH CONST. art. 6, § 29; WYO. CONST. art. 3, § 37.

Ripper clause provisions generally follow the wording of the Pennsylvania Constitution, which reads in part: "The General Assembly shall not delegate to any special commission,

pressly prohibiting the state legislature from delegating to a special or private body any power to interfere with municipal moneys or to perform municipal functions.[68] Three state supreme courts[69] and one lower court[70] have interpreted the ripper clause with respect to binding interest arbitration statutes. Although there is a division among the jurisdictions, the weight of authority indicates that a ripper clause prohibits a state legislature from delegating to arbitrators the power to spend public funds.[71]

In *Erie Firefighters Local 293 v. Gardner*,[72] the Supreme Court of Pennsylvania held that a state law requiring binding interest arbitration was an unconstitutional violation of the state's ripper clause. The court reasoned that the power to fix salaries and to create a pension plan for city firemen could not be delegated to a board of arbitrators, because such power, involving purely municipal functions, could be vested only in the city.[73] Following *Erie Firefighters*, the ripper clause in the Pennsylvania Constitution was amended to permit expressly the legislature to delegate power pursuant to binding interest arbitration statutes covering policemen and firemen.[74]

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private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." PA. CONST. art. 3, § 31.

68. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment—Part I*, 1969 UTAH L. REV. 287, 309.

69. *See* Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962); City of Sioux Falls v. Sioux Falls Firefighters Local 814, ___ S.D. ___, 234 N.W.2d 35 (1975); Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968). *See also* Harney v. Russo, 435 Pa. 183, 225 A.2d 560 (1969); Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, 208 A.2d 271 (1965).

70. [1976] GOV'T EMPL. REL. REP. (BNA) No. 671, B-18. In June, 1976, the binding arbitration provisions of the Utah Fire Fighters' Negotiations Act were held "an unconstitutional delegation of legislative functions. . . ." *Id.* The binding interest arbitration statute created "a commission to perform municipal functions contrary to the provisions of . . . the Utah constitution." *Id.*

71. *See* notes 72-91 *infra* & accompanying text.

72. 406 Pa. 395, 178 A.2d 691 (1962).

73. *Id.* at ___, 178 A.2d at 695.

74. The Pennsylvania ripper clause now reads:

> The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever. Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen and firemen and their public employers shall be binding upon all

Despite its state's ripper clause,[75] the Supreme Court of Wyoming in *Wyoming ex rel. Fire Fighters Local 946 v. City of Laramie*[76] upheld a statute providing for binding arbitration of labor disputes between firemen and their municipal employers. Because arbitration of labor disputes was common in the private sector, the court denied that administration of arbitration proceedings could be deemed a purely municipal function. As the legislature had granted the city authority to pay and employ firemen, it could limit that authority by requiring the city to submit to arbitration. Thus, the court reasoned, the binding arbitration statute did not violate the constitution's ripper clause.[77]

In *Laramie*, the court noted further that an arbitrator's wage increase award was not an interference with municipal moneys within the meaning of the constitutional provision prohibiting delegation of legislative power.[78] Purporting to follow the Supreme Court of Pennsylvania's decision in *Division 85, Amalgamated Transit Union v. Port Authority*,[79] and without challenging the same court's holding in *Erie Firefighters*, the Wyoming Supreme Court stated that the purpose of the ripper clause was to protect against the exercise of the taxing power and of other purely municipal functions by officials who might be unaccountable to the electorate.[80] The Wyoming court's reliance on *Amalgamated Transit*, a case upholding a statute providing for binding interest arbitration of labor disputes between a county-owned port authority and its employees, seems misplaced in that the port authority had no power to levy taxes or to pledge the credit of any political subdivision of the state.[81] Rather, it paid for wage increases by adjusting the fares and rents it collected during the course of its operations.[82] Because the

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parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings.

PA. CONST. art. 3, § 31.

75. WYO. CONST. art. 3, § 37.

76. 437 P.2d 295 (Wyo. 1968).

77. *Id.* at 300.

78. *Id.* at 301.

79. 417 Pa. 299, 208 A.2d 271 (1965).

80. 437 P.2d at 299-300.

81. *See* 417 Pa. at ___, 208 A.2d at 274.

82. *Id.* at ___, 208 A.2d at 274.

ripper clause had been designed to prevent separating the power to incur debts from the duty to provide for their payment by taxation, the Pennsylvania court held in *Amalgamated Transit* that any interference by a board of arbitrators was immaterial because it did not deal with municipal money in the sense contemplated by the ripper clause.[83] The Wyoming court in *Laramie* did, however, distinguish *Erie Firefighters*, a case holding the delegation of power to the arbitrators violated the ripper clause, because, in *Erie Firefighters*, the arbitrator's findings might have created debts and obligations that the city would have had to pay with tax dollars.[84] Such a distinction appears invalid in that the arbitration panel in *Laramie* also had the power to create debts by awarding an increase in firemen's wages, which was to be satisfied out of tax revenues.

In *City of Sioux Falls v. Sioux Falls Firefighters*,[85] a case holding that a binding interest arbitration statute violated the state constitution's ripper clause,[86] the Supreme Court of South Dakota criticized the *Laramie* decision,[87] emphasizing that the ripper clause was intended to prohibit legislative interference in municipal affairs. Because the statute abrogated the city's authority to fix firemen's salaries, a distinctly municipal function,[88] the court held the statute was "clearly unconstitutional."[89] Consistent with these holdings of the Pennsylvania and South Dakota courts, a Utah district court recently invalidated a binding interest arbitration statute covering city firemen on the ground that it "creates a commission to perform municipal functions"[90] contrary to the ripper clause in the Utah Constitution.[91] Thus, in general it appears that a state constitution containing a ripper clause prohibits any delegation of powers to arbitrators that would enable them to increase the debt of any political subdivision of a state.

b. *Delegation in States Not Having "Ripper Clauses"*

Most state constitutions do not contain a ripper clause prohibiting the delegation of legislative powers to an arbitration panel.

83. *Id.* at ___, 208 A.2d at 274 n.6.
84. 437 P.2d at 301.
85. ___ S.D. ___, 234 N.W.2d 35 (1975).
86. S.D. CONST. art. 3, § 26 (referendum to repeal submitted to voters November 2, 1976).
87. ___ S.D. at ___, 234 N.W.2d at 36.
88. *Id.* at ___, 234 N.W.2d at 37-38.
89. *Id.* at ___, 234 N.W.2d at 38.
90. [1976] GOV'T EMPL. REL. REP. (BNA) No. 671, B-18.
91. UTAH CONST. art. 6, § 29.

Nonetheless, in several state supreme court cases, arbitration laws have been challenged, albeit unsuccessfully, as an unconstitutional delegation of power by the state legislature.[92] Four theories have been advanced: (1) the legislature cannot delegate its power at all; (2) the legislature cannot delegate to arbitrators, who are unaccountable private persons; (3) the legislature cannot delegate without providing adequate standards and safeguards; (4) the legislature cannot delegate taxing powers to arbitrators.

(1) *Can the Legislature Delegate?*

Although a legislature may delegate its power if the state constitution so provides,[93] most state constitutions do not describe explicitly the scope of the legislature's delegable authority. Typically, a state constitution provides that the legislative power shall be vested in two houses but fails to specify whether the legislative body can delegate its constitutional power.[94] Several state supreme court cases have reiterated the non-delegation language of the Supreme Court,[95] which as recently as 1932 asserted: "That the legislative power of Congress cannot be delegated is, of course, clear."[96]

State supreme courts seeking to circumvent the proposition that legislative power may not be delegated have argued that "filling up the details" is not an exercise of legislative authority.[97] Similarly,

92. *See* Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, 352 N.E.2d 914 (1976); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, 208 A.2d 271 (1965); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, 553 P.2d 1316 (1976); Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968). *See also* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (court divided on adequacy of standards); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) (court divided on accountability of private citizens).

93. *See* School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, ___, 199 N.W.2d 752, 756 (1972); Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 563 (1969). *See also* Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). The Michigan supreme court, discussing a challenge to a binding interest arbitration statute covering firefighters, said that the power to delegate resolving authority is implicit in the legislative power conferred by the constitution to enact laws providing for the resolution of disputes concerning public employees. *Id.* at 231 N.W. 2d at 230.

94. *See, e.g.*, R.I. CONST. art. 4, § 2.

95. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.07, at 102 (1958).

96. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

97. 1 K. DAVIS, *supra* note 95 § 2.07, at 102.

several state supreme courts considering the authority of the legislature to delegate discretionary powers to arbitrators pursuant to binding interest arbitration statutes have made the following distinction: although the power to make a law cannot be delegated, the power to implement an existing law may be.[98] Yet, as noted by Professor Davis, one exercising discretion under the law in reality has power to make the law.[99]

Other courts reviewing binding interest arbitration laws have taken a more reasonable approach to the non-delegation doctrine, with one concluding, for example, that the legislature can delegate its power if necessary to effectuate antecedent legislation.[100] Another court upheld binding interest arbitration because of the "rational reason" for choosing the device, that is, providing public employees with sources other than the government for relief of labor problems.[101]

Thus, despite the language used by some courts, in the absence of a constitutional provision explicitly prohibiting delegation, a state legislature can delegate authority to arbitrators pursuant to binding interest arbitration statutes.

(2) *Can the Legislature Delegate to Arbitrators Who Are Unaccountable Private Citizens?*

Several courts have stated that delegations to a nonpublic agency or to private parties unaccountable to the public are unlawful.[102]

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98. *See, e.g.*, Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295, 301 (Wyo. 1968); Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, ___, 178 A.2d 691, 695 (1962). The Supreme Court of Wyoming in *Laramie*, for example, said the legislature alone had authority to fix firemen's wages; instead of setting the exact amount of wages, however, the legislature elected to fix the minimum amount to be paid, with administrative authority in the city to pay wages in excess of such amount. Rather than creating a maximum, the legislature provided a formula through the medium of interest arbitration for setting a specific amount above the minimum in the event the firefighters exercised their statutory right to enter into a collective bargaining agreement with the city. Stating that power to make laws could not be delegated, the court asserted that nothing in the binding interest arbitration statute suggested the administrative powers of the arbitrator constituted any delegated power to legislate, for granting the power to execute a law already in existence is not a delegation of legislative authority. 437 P.2d at 301.

99. 1 K. DAVIS, *supra* note 95, § 2.07, at 102.

100. Jennings v. Exeter-West Greenwich Regional School Dist. Comm., ___ R.I. ___, ___, 352 A.2d 634, 638 (1976), *citing* City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969).

101. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 398 (Me. 1973).

102. *See, e.g.*, Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 228 (1975); City of Sioux Falls v. Sioux Falls Firefighters Local 814, ___ S.D. ___, ___, 234 N.W.2d 35, 36 (1975).

Yet, no binding interest arbitration statutes enacted by state legislatures have been invalidated merely because the courts considered the arbitration panels to be committees of private citizens. Even courts concluding that arbitrators were private citizens have held that the legislature could delegate to them "limited portions of its sovereign power"[103] provided the delegation was accompanied by adequate standards and safeguards.[104] Thus, regardless of some courts' language to the contrary,[105] an arbitrator's public or private status seems irrelevant to the validity of binding interest arbitration statutes; his accountability to the public, however, is significant.

In *Dearborn Fire Fighters Local 412 v. City of Dearborn*[106] the Michigan Supreme Court examined the issue of accountability in depth. The binding interest arbitration statute provided for ad hoc panels composed of three members: two partisan arbitrators and a chairman chosen either by them, or if they were deadlocked, by the chairman of the state's employment relations commission. Although one justice deemed the statute valid,[107] two justices held it to be unconstitutional on its face in that its provisions for ad hoc panels left the arbitrators politically unaccountable.[108] The latter two justices asserted, however, that a law creating a permanent board of arbitrators would insure public accountability, and as such, would withstand constitutional challenge.[109] As a permanent panel would be more costly and potentially more biased,[110] this view probably will not be followed by other courts. Nonetheless, to guar-

103. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 398 (Me. 1973).

104. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 920 (1976); Jennings v. Exeter-West Greenwich Regional School Dist. Comm., ___ R.I. ___, ___, 352 A.2d 634, 638-39 (1976).

105. City of Sioux Falls v. Sioux Falls Firefighters Local 814, ___ S.D. ___, ___, 234 N.W.2d 35, 36 (1975); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 299, ___, ___, 231 N.W.2d 226, 252, 259 (1975).

106. 394 Mich. 229, 231 N.W.2d 226.

107. *Id.* at ___, 231 N.W.2d at 243-44 (Coleman, J.).

108. *Id.* at ___, 231 N.W.2d at 243 (Kavanagh, C.J.); *Id.* at ___, 231 N.W.2d at 228 (Levin, J. & Kavanagh, C.J.).

109. *Id.* at ___, 231 N.W.2d at 243 (Kavanagh, C.J.); *Id.* at ___, 231 N.W.2d at 243 (Levin, J. & Kavanagh, C.J.).

Although rejecting the view that permanence would guarantee accountability, *id.* at ___, 231 N.W.2d at 265, a fourth justice contended the statute was valid as applied because one member of each board was appointed by a state officer with a high degree of accountability. *Id.* at ___. 231 N.W.2d at 268. (Williams, J.). Justice Williams did conclude, however, that delegations of legislative authority to arbitration boards composed only of partisan members and their appointees were unconstitutional. *Id.* at ___, 231 N.W.2d at 268.

110. *See id.* at ___, 231 N.W.2d at 249 (Coleman, J.).

antee the constitutionality of such statutes, provisions insuring arbitrators' public accountability should be included; because arbitrators are neither public officials nor required to answer to the voters or to their elected representatives, more stringent statutory standards and safeguards to guide and control the arbitrators' exercise of delegated authority are required.[111]

(3) *What Standards and Safeguards Are Required?*

Assuming a state legislature is authorized to delegate some of its powers to arbitrators, a binding interest arbitration statute still is vulnerable on the ground that it fails to provide adequate standards and safeguards to protect against unfair and arbitrary use of discretionary powers.[112] No arbitration statute covering public employees has been invalidated by a state supreme court on this basis; nevertheless, the question of standards and safeguards is of increasing concern. Binding interest arbitration statutes covering public mass transit workers, which thus far have not been challenged on this issue, seem particularly susceptible to attack on the ground that they provide no standards and safeguards.[113]

Only one state supreme court has invalidated a binding interest arbitration statute because of insufficient standards.[114] That New Jersey statute provided for compulsory binding interest arbitration of private sector labor disputes between public utilities and their employees. Although the statute prescribed a number of safeguards against abuse of discretion by the arbitration board by requiring hearings, written findings of fact, and a written decision and order based upon the issues,[115] the court deemed these protections insufficient, citing the particular need for objective considerations whenever the public ultimately must pay the awards granted.[116] More-

111. *Id.* at ___, 231 N.W.2d at 257 (Williams, J.), *citing* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 402 (Me. 1973).

112. *See* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, 352 N.E.2d 914 (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, 208 A.2d 271 (1965); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, 553 P.2d 1316 (1976).

113. *See* notes 54-60 *supra* & accompanying text.

114. State v. Traffic Tel. Workers' Fed'n, 2 N.J. 335, 66 A.2d 616 (1949).

115. *Id.* at ___, 66 A.2d at 619.

116. *Id.* at ___, 66 A.2d at 625-26. As the court noted, if standards are lacking,

over, the court added that standards are required especially if the legislature mandates new patterns of social conduct such as arbitration of labor disputes.[117]

Subsequently, the New Jersey Legislature amended the binding interest arbitration statute to require arbitrators to consider, in addition to other factors, the interests and welfare of the public, the wages, hours, and working conditions of comparable work in other industries and utilities, and the security and tenure of employment.[118]

Professor Davis criticized the New Jersey tribunal for stressing the presence or absence of specific standards in a statute that provided adequate procedural safeguards against arbitrariness, and in particular, required written findings of fact.[119] Nevertheless, courts apparently will scrutinize statutes that do not require arbitrators to consider the public's willingness or ability to pay an arbitration award.

The first decision reviewing the adequacy of standards provided in a binding interest arbitration statute covering public employees was *Division 85, Amalgamated Transit Union v. Port Authority*,[120] a case in which the statute did not require the board of arbitrators to consider any specific standards when rendering its award. The Supreme Court of Pennsylvania upheld the statute, stating that the announced legislative policy established "primary standards" sufficient to guide the arbitrators in executing the legislative intent.[121] Perhaps reflecting the modern tendency "toward greater liberality in permitting grants of discretion . . . to facilitate the administration of the laws as the complexity of governmental and economic

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> the tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right is inevitable . . . especially . . . in the case of an arbitration where the rights of third parties, here the public, are concerned . . . . But the board of arbitration is nowhere directed to consider the rights of the public, which will ultimately be called upon to foot the bill. In these circumstances the need of legislative standards is peculiarly apparent.

Id. at ___, 66 A.2d at 625-26. Professor Davis has contended that if the legislature had required the arbitrators to consider "the interests of the public, whose tax money is used to pay the wages, . . . then the delegation might have been sustained." K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.06, at 38 (3d ed. 1972).

117. 2 N.J. at ___, 66 A.2d at 626.

118. The statute as amended was upheld in New Jersey Bell Tel. Co. v. Communications Workers, 5 N.J. 354, ___, 75 A.2d 721, 734 (1950).

119. K.DAVIS, *supra* note 116, § 2.06 (3d ed. 1972).

120. 417 Pa. 299, 208 A.2d 271 (1965).

121. *Id.* at ___, 208 A.2d at 275.

conditions increases,"[122] the Pennsylvania court stated that the legislature may validly establish primary standards and impose upon others the duty of implementing its policies in accordance with general provisions.[123]

In *Harney v. Russo*[124] the Supreme Court of Pennsylvania again reviewed the constitutional adequacy of standards. There the court upheld a standardless statute providing for binding interest arbitration of impasse disputes between policemen and firemen and their public employers, on the ground that the Pennsylvania Constitution recently had been amended[125] to permit such standardless delegations of power, if the arbitrators adhered to the requirements of the enabling legislation and of due process.[126] The court added, in dictum, that even if the constitutional amendment did not supersede the standard requirement, the "obvious legislative policy [of protecting] the public from strikes by policemen and firemen" would be an adequate standard for the arbitrators to follow.[127]

In upholding a legislative delegation pursuant to a binding interest arbitration statute covering firemen, the Supreme Court of Rhode Island established criteria for evaluating standards in *Warwick v. Warwick Regular Firemen's Association*.[128] According to the court, the constitution mandated that any legislative delegation be limited by standards "sufficient to confine the exercise of power to the purpose for which the delegation was made."[129] Although the statute did not explicitly require arbitrators to consider the financial ability of the employer to pay an arbitration award, it did require consideration of the general interest and welfare of the public, as well as of prevailing wage comparisons, the hazards of employment, the employees' physical and educational qualifications, and job training and skills.[130] After asserting that one important

122. Pressman v. Barnes, 209 Md. 544, 555, 121 A.2d 816, 822 (1956).

123. 417 Pa. at ___, 208 A.2d at 275. Significantly, the arbitration panel in *Amalgamated Transit* had no authority to create public debts or to levy or collect taxes. *Id.* at ___, 208 A.2d at 275. The port authority was a self-sufficient public corporation that, as any business in the private sector, relied on its operating revenues rather than tax dollars to pay for wage increases. *Id.* at ___, 208 A.2d at 274. Thus, an arbitration award could affect the "interest and welfare of the public" only indirectly by necessitating an increase in fares or a diminution of transportation services. *See* notes 81-83 *supra* & accompanying text.

124. 435 Pa. 183, 255 A.2d 560 (1969).

125. *See* note 74 *supra* & accompanying text.

126. 435 Pa. at ___, 255 A.2d at 562-63.

127. *Id.* at ___, 255 A.2d at 563.

128. 106 R.I. 109, 256 A.2d 206 (1969).

129. *Id.* at ___, 256 A.2d at 211.

130. *Id.*

criterion for evaluating the sufficiency of such standards is that they should enable a reviewing tribunal to determine whether an arbitrator's action was "capricious, arbitrary, or in excess of the delegated authority,"[131] the court concluded that the standards established in the binding interest arbitration statute fulfilled the test.[132]

After its well-reasoned analysis, the court, in an aside, unfortunately echoed the dictum of *Harney v. Russo*[133] espousing the intrinsic sufficiency of a legislative policy to prevent strikes as a standard for arbitrators.[134] It is doubtful the court intended to adopt that theory; for if the legislative policy statement were the sole standard regulating an arbitration decision, any award, regardless how unreasonable, would satisfy the standard if it had prevented a strike by firemen. Consequently, under the court's own criteria, the legislative policy statement alone is an inadequate standard, for it would not aid in determining whether the arbitrators' actions were arbitrary and capricious.

In *City of Biddeford v. Biddeford Teachers Association*,[135] the Supreme Judicial Court of Maine was divided evenly on the issue of whether a policy statement declaring the legislature's intention to create more harmonious public employer-employee relations constituted a sufficient standard to sustain an otherwise standardless arbitration statute covering public school teachers. Although the statute provided for binding arbitration regarding teachers' hours and working conditions,[136] arbitrators' findings concerning salaries, pensions, and insurance were to be advisory only.[137] Moreover, arbitrators had no jurisdiction to decide matters of educational policy. Furthermore, the employees' representative was required to give the employer notice of any financial issues at least 120 days prior to the conclusion of the current fiscal budget.[138] Three justices held that because the legislative policy statement in combination with implicit guidelines created a "primary standard" or "intelligible principle" to prevent arbitrators from capriciously exercising delegated power, the statute was constitutional.[139]

131. *Id.*
132. *Id.*
133. *See* note 127 *supra* & accompanying text.
134. 106 R.I. at ____, 256 A.2d at 211-12.
135. 304 A.2d 387 (Me. 1973).
136. *Id.* at 390.
137. *Id.*
138. ME. REV. STAT. tit. 26, § 965(1).
139. 304 A.2d at 411-12 (Wernick, Weber & Pomeroy, JJ.).

According to the three justices, the advisory status of any arbitrators' decisions on salaries, pensions, and insurance, as well as the notice requirement concerning financial issues, meant that the arbitrators must consider the monetary impact of an award.[140] Similarly, the justices reasoned, because matters of educational policy were excluded from binding arbitration, the arbitrators had to consider the general interests of the public.[141] Moreover, as such legislation reflects a public policy alternative to strikes, the arbitrators had to consider what the teachers might win if allowed to strike.[142] Finally, the justices deemed that the statute also implicitly contemplated that the arbitrators were to act reasonably and fairly.[143] Although the three justices deemed the preceding implicit standards sufficient in themselves to sustain the statute, they added further that because the statute provided adequate procedural safeguards it constituted a valid delegation of legislative power.[144]

In contrast, the other three justices thought the binding interest arbitration statute was unconstitutional for lack of sufficient standards to protect the employees and the public from irresponsible exercise of power delegated to arbitrators,[145] for a statement enunciating the legislature's purpose to create a more harmonious employer-employee relationship is not "a meaningful criterion for the arbitrators' determination, issue by issue, of the individual subject matters before them."[146] In addition, the three concluded that the statute's exclusion of salaries, pensions, insurance, and educational policies did not imply standards an arbitrator must consider in making an award; the statutory exclusions merely defined the boundaries within which the arbitrators may act.[147] Although conceding that the legislature expected arbitrators to act fairly and reasonably, the justices noted that such "an unspoken demand for integrity" was implicit in every statute delegating power to administrative bodies, yet did not furnish any criteria to guide the arbitrators regarding the factors to be considered in their examination of the issues presented to them.[148] Moreover, the arbitration law failed

140. *Id.* at 412.
141. *Id.* at 414.
142. *Id.*
143. *Id.* at 412.
144. *Id.* at 412-15.
145. *Id.* at 400 (Weatherbee, Dufresne & Archibald, JJ.).
146. *Id.* at 401.
147. *Id.*
148. *Id.*

to state adequately the scope of the arbitrators' authority because the statute did not define or distinguish between the terms "educational policy" and "working conditions."[149] Nor did the statute establish criteria to guide arbitrators when a single decision might affect both educational policies and working conditions.[150]

As such, the justices asserted that the binding interest arbitration statute did not contain a "primary standard" to guide the arbitrators and, in the alternative, that the "primary standard" or "intelligible principle" test was insufficient to satisfy the constitutional mandate for standards.[151] Specific standards are required whenever the arbitrators are not accountable to the electorate or to their elected representatives and whenever their tenure is so brief that they are unable to develop their own standards based upon accumulated experience.[152] In addition to the insufficiency of standards, the procedural safeguards were deemed inadequate; because the arbitration statute did not require that the arbitrators make findings of fact, a reviewing court's ability to protect against unbridled discretion was seriously limited.[153]

The latter three justices' view that the Maine binding interest arbitration statute was unconstitutional is the better reasoned position, for the statute created no standards to guide the arbitrators and lacked adequate procedural safeguards in that it required no findings of fact. A statutory exclusion of salaries, pensions, and insurance, and a notice requirement intended to insure the completion of arbitration proceedings in time sufficient to avoid budgetary reallocation problems, do not establish standards that an arbitrator could apply in considering the financial impact of his award.[154] Nor does the unexpressed underlying legislative policy of preventing public sector strikes require an arbitrator to consider what employees might receive if they were to strike. Moreover, the contention that a statutory exclusion of matters of educational policy from binding arbitration means that the arbitration award must reflect the general interests of the public is indefensible.

Standards in binding interest arbitration statutes were deemed sufficient in the four most recent state supreme court cases deciding

149. *Id.* at 402.
150. *Id.*
151. *Id.* at 400.
152. *Id.* at 402.
153. *Id.*
154. *Id.* at 401.

the issue.[155] In each case the arbitration law covered public employees and gave arbitrators substantial power to create public debt.[156] The statutes listed numerous factors for the arbitrators to consider in rendering their awards, including the employer's ability to pay,[157] and provided detailed procedural safeguards.[158]

Based upon the eight state supreme court decisions discussing the sufficiency of standards and safeguards in binding interest arbitration statutes, some general observations may be made. Regarding the adequacy of standards, there are two opposing points of view: some courts require arbitration statutes to state specific standards in the form of factors for arbitrators to consider in rendering their awards;[159] other courts demand only general primary standards.[160] If

155. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 916 (1976); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1319-20 (1976). *See* Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 236-37 (1975).

156. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 916, (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 232 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1318 (1976).

157. *See* Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 919 & n.5 (1976), *quoting* Act of Nov. 26, 1973, 1973 Mass. Acts ch. 1078, § 4 (*see* note 47 *supra*); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___ & n.40, 231 N.W.2d 226, 236 & n.40 (1975), *quoting* MICH. COMP. LAWS ANN. § 423.239 (Cum. Supp. 1976-1977); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 299, 371 N.Y.S.2d 404, 408 (1975); *Id.* at 37 & n.4, 332 N.E.2d at 299 & n.4, 371 N.Y.S.2d at 417 & n.4 (concurring opinion), *quoting* N.Y. CIV. SERV. LAW § 209(4)(c)(v) (McKinney Cum. Supp. 1975-1976). *See also* City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1320 (1976), *citing* WASH. REV. CODE ANN. § 41.56.460 (Supp. 1975).

158. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, ___, 352 N.E.2d 914, 917 n.3, 919 (1976), *citing* Act of Nov. 26, 1973, 1973 Mass. Acts ch. 1078 § 4; Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 236 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 37 N.Y.S.2d 404, 408 (1975); *Id.* at 37-39, 332 N.E.2d at 300-01, 371 N.Y.S.2d at 417-18 (concurring opinion). City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1320 (1976), *citing* WASH. REV. CODE ANN. § 41.56.450 (Supp. 1975). The New York statute does not require written findings of fact nor a written opinion. *See* N.Y. CIV. SERV. LAW § 209(4)(c)(iii) (McKinney Cum. Supp. 1975-1976).

159. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 398 (Me. 1973) (evenly divided court); Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 920 (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 258 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1319-20 (1976).

160. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 403 (Me. 1973) (evenly

a binding interest arbitration statute empowers the arbitrators to create substantial public debt by permitting wage, pension, and other monetary awards, specific standards usually are required.[161] A "primary standard" or "intelligible principle" derived from a legislative statement of purpose is sufficient if arbitrators are given no authority to create public debt.[162] If, however, a statute provides for binding arbitration only on matters such as working conditions, which require relatively modest public expenditures, authority is divided whether primary or specific standards are constitutionally mandated.[163] Thus, the more extensive the power to create public debt the more specific the standards must be.[164] When no specific standards are stated, however, courts have upheld arbitration laws granting arbitrators power to produce substantial public debt only if a constitutional provision expressly provides for delegation to arbitrators[165] or if the issue of standards was never raised.[166]

Two general comments about statutory procedural safeguards against arbitrary exercise of discretion by arbitration may be made: first, judicial review of an arbitration award is always available, whether or not the arbitration statute so provides;[167] second, if a statute requires arbitrators to make written findings of fact or to keep a verbatim record of all proceedings, the safeguards are adequate.[168] Only one court has considered a statute that required neither findings of fact nor verbatim records.[169] Half of the justices

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divided court); Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, ___, 208 A.2d 271, 275 (1965).

161. *See* notes 130, 132, 155-57 *supra* & accompanying text.

162. *See* Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, ___, 208 A.2d 271, 275 (1965).

163. *See* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 287 (Me. 1973) (evenly divided court).

164. City of Amsterdam v. Helsby, 37 N.Y.2d 19, 36, 332 N.E.2d 290, 299, 371 N.Y.S.2d 404, 416 (1975) (concurring opinion).

165. Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 562-63 (1969).

166. Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1969). *But see* McAvoy, *supra* note 4, at 1206.

167. *See* notes 208-09 *infra* & accompanying text.

168. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 919 (1976); Dearborn Firefighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 236-37 (1975); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1320 (1976).

169. *See* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973). Without commenting on the lack of a requirement of written findings or verbatim record, the Court of Appeals of New York held that judicial review alone was an adequate safeguard. City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975). Two statutes not providing for written findings or verbatim record have been upheld by the Supreme Court

deemed the statute constitutional because it provided for hearings and judicial review;[170] the remaining justices deemed the statute invalid because it required no written findings of fact.[171] Because judicial review of whether arbitrators acted capriciously would be meaningless unless the reviewing court had some means of determining the grounds for the arbitrators' decision, a minimal safeguard requirement of written findings of fact or verbatim record is necessary.

Yet, as noted previously, a number of states have enacted public mass transit binding interest arbitration statutes lacking any such standards and safeguards. Assuming that these statutes authorize arbitrators to create public debt by making wage decisions and other monetary awards, they may be unconstitutional. The first attack on an arbitration statute covering mass transit workers is presently pending before the Supreme Court of New Jersey.[172] Challengers contend that the statute is unconstitutional because it fails to require the arbitration panel to consider the public interest in maintaining an inexpensive mass transit system and the public transit authority's ability to pay increased wages.[173] Moreover, they contend that if the arbitrators' award is upheld, monetary expenditures would increase substantially, forcing the urban transit system out of business.[174]

Increasingly, public employers are asserting the inability to pay arbitration awards.[175] The City of Buffalo, for example, currently is seeking reversal of a three million dollar wage increase decision which the city asserts would "bring the city to its financial knees."[176] In view of the apparent excessiveness of some awards, statutes must require arbitrators to consider the public employer's ability to pay. Minimally, arbitrators should review current revenues and the com-

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of Pennsylvania, which never addressed the issue of safeguards. Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Division 85, Amalgamated Transit Union v. Port Auth., 417 Pa. 299, 208 A.2d 271 (1965).

170. *See* note 144 *supra* & accompanying text.

171. *See* note 153 *supra* & accompanying text.

172. Division 540, Amalgamated Transit Union v. Mercer Improvement Auth., Civil No. 12381 (Sup. Ct. N.J., filed May 27, 1976), *cert. granted*, No. 12381C-160.

173. Petitioner's Brief for Certiorari at 8, Division 540, Amalgamated Transit Union v. Mercer Improvement Auth., Civil No. 12381 (Sup. Ct. N.J., filed May 27, 1976), *cert. granted*, No. 12381C-160.

174. *Id.* at 4-5.

175. *See* note 10 *supra* & accompanying text.

176. Buffalo v. Patrolman's Benevolent Ass'n (pending before N.Y. Sup. Ct.), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 674, B-10.

munity's capacity to absorb tax increases. To insure that the arbitrators heed such limitations, state legislatures should provide adequate procedural safeguards, because, as Professor Davis notes,

> [a]uthority of a single officer to act impetuously against a particular party's vital interests without procedural safeguards is quite different from authority of a regularly constituted agency, having its own internal checks and balances, to take evidence, to hear argument, to consider briefs, and then to make findings based on the record, and to write a reasoned opinion, with all that is done not only subject to judicial review but also with a record that helps the reviewing court to keep the agency within the bounds of reasonableness.[177]

Thus, whatever the need for limitations on administrative authority, the need for checks on the arbitrators' discretion is even greater because arbitration boards usually are ad hoc groups, and, unlike regularly constituted agencies, are entirely unaccountable to the public.

(4) *Do Arbitrators Have Taxing Powers?*

Although several binding arbitration statutes have been attacked on the ground that they unconstitutionally delegate the taxing power, the courts have rejected that argument.[178] In a Michigan case,[179] for example, the public employer claimed that because a wage increase award could be paid only by imposing new taxes, the power to grant pay raises constituted an indirect power to raise taxes.[180] The court rejected that contention, noting that because the city could adjust for wage increases awarded either by raising taxes or by decreasing other public expenditures,[181] the city's power to tax remained intact.[182] For, as asserted by the Massachusetts Supreme

177. K. DAVIS, *supra* note 116, § 2.06, at 41.

178. *See, e.g.*, Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 230 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27-28, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); City of Spokane v. Spokane Police Guild, ___ Wash. 2d ___, ___, 553 P.2d 1316, 1318-19 (1976).

179. Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226, (1975).

180. *Id.* at ___, 231 N.W.2d at 230.

181. *Id.* at ___, 231 N.W.2d at 230. *See also* City of Amsterdam v. Helsby, 37 N.Y.2d 19, 41, 332 N.E.2d 290, 302, 371 N.Y.S.2d 404, 420 (1975) (concurring opinion).

182. 394 Mich. at ___, 231 N.W.2d at 252 (separate opinion).

Judicial Court, the power to establish salaries does not equal the power to appropriate the funds for them.[183]

c. *Conflicting City Charters*

Binding interest arbitration statutes also have often been challenged on the ground that they violate state constitution "home rule" provisions. The courts, however, consistently have rebuffed these attacks.[184] Numerous state constitutions have "home rule" clauses that typically empower each municipality to adopt resolutions and ordinances relating to its municipal concerns, property, and government, subject to the constitution and law.[185] These home rule powers will sustain an exercise of authority pursuant to local laws and ordinances regarding the regulation of matters involving wages, hours, and working conditions of public employees "only to the extent that such exercise is not inconsistent with any general law enacted by the [l]egislature."[186] Because binding interest arbitration statutes are general laws, local governments must abide by their provisions.[187] Therefore, an arbitration panel's award pursuant to a binding interest arbitration statute enacted by a state legislature supersedes any conflicting city charter provision prohibiting arbitration[188] even though the arbitration decision indirectly may affect a city's fiscal and budgetary process[189] and influence a city's policies pertaining to public employees.[190]

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183. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 919-20 (1976).

184. *See, e.g.*, Town of Arlington v. Board of Conciliation, & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 918 (1976); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 229-30 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26-27, 332 N.E.2d 290, 292-93, 371 N.Y.S.2d 404, 407-08 (1975).

185. *See, e.g.*, MICH. CONST. art. 4, § 22.

186. City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 407 (1975).

187. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 918 (1976); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 407 (1975).

188. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 918 (1976).

189. Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, ___, 231 N.W.2d 226, 248 (1975) (separate opinion).

190. *See* Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, ___, 214 N.W.2d 803, 810-12 (1974).

d. *Binding Interest Arbitration Without State Statutory Authority*

Delegation problems pursuant to arbitration of labor disputes in states making no provision for binding interest arbitration arise in two contexts: if a city charter permits or requires public sector arbitration,[191] or if, absent any state or local statutory authority, a public employer and its employees agree to submit unresolved issues to binding arbitration.[192]

A state constitution or statute prohibiting a local legislative body from delegating its powers to arbitrators clearly voids any city charter provision allowing binding interest arbitration.[193] In the absence of such prohibition, however, authority is divided whether city charter authorization of binding interest arbitration is valid. The Supreme Court of California has upheld delegation to arbitrators if a city charter expressly provides for interest arbitration.[194] The majority of decisions, however, have invalidated charter provisions permitting binding interest arbitration on the ground that delegations to arbitrators who are unaccountable to the public are unconstitutional,[195] for "[t]he theory of delegation of authority is that the person or group, to whom authority has been delegated, acts for and as the agent of the person or group delegating such authority."[196]

Because it is doubtful that a city has power to delegate even when

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191. *See, e.g.*, Bagley v. City of Manhattan Beach, ___ Cal. 3d ___, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976); Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Greeley Police Union v. City Council of Greeley, ___ Colo. ___, 553 P.2d 790 (1976); City of Aurora v. Aurora Firefighters Protective Ass'n, No. 26743 (Adams County Colo. Dist. Ct., April 22, 1976), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 670, B-13-14.

192. *See, e.g.*, Taylor Fed'n of Teachers Local 1085 v. Board of Educ., Civil No. 76-603-818 CL (Wayne City Mich. Cir. Ct., March 12, 1976), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 663, B-9.

193. *See* Bagley v. City of Manhattan Beach, ___ Cal. 3d ___, ___, 553 P.2d 1140, 1143, 132 Cal. Rptr. 668, 671 (1976) (statute); Greeley Police Union v. City Council of Greeley, ___ Colo. ___, 553 P.2d 790, 792 (1976) (constitution).

194. Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 622 & n.13, 526 P.2d 971, 980-81 & n.13, 116 Cal. Rptr. 507, 516-17 & n.13 (1974). *See* Bagley v. City of Manhattan Beach, ___ Cal. 3d ___, ___ n. 1, 553 P.2d 1140, 1143 n.1, 132 Cal. Rptr. 668, 671 n.1 (1976).

195. Greeley Police Union v. City Council of Greeley, ___ Colo. ___, ___, 553 P.2d 790, 792 (1976); Washington *ex rel.* Everett Fire Fighters Local 350 v. Johnson, 46 Wash. 2d 114, ___, 278 P.2d 662, 666 (1955); City of Aurora v. Aurora Firefighters Protective Ass'n, No. 26743 (Adams County Colo. Dist. Ct., April 22, 1976), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 670, B-14. *See* notes 106-11 *supra* & accompanying text.

196. Washington *ex rel.* Everett Fire Fighters Local 350 v. Johnson, 46 Wash. 2d 114, ___, 278 P.2d 662, 666 (1955).

authorized by charter and because voluntary grievance arbitration constitutes an unlawful delegation absent an express statutory provision,[197] voluntary interest arbitration apparently is unconstitutional if neither the state legislature nor a city charter permits binding interest arbitration. A Michigan circuit court, however, recently held that a school board may voluntarily agree to binding arbitration of the terms of a collective bargaining agreement with a representative of its employees.[198] Other courts probably will not follow this decision absent statutory or charter authorization; in particular, the Supreme Court of Michigan, which is evenly divided on whether arbitration is lawful pursuant to statute,[199] may well reverse.

2. *Separation of Powers*

All state constitutions vest legislative powers in the state legislative body and provide that under the separation of powers doctrine these powers cannot be delegated to the judiciary.[200] In view of this doctrine, binding interest arbitration statutes may be attacked on three grounds. First, separation of power problems arise if a judge is given a statutory role in the selection process of an arbitration panel[201] that makes decisions regarding legislative matters. One justice has questioned whether the selection of arbitrators is a legislative function and as such should not be vested in the judiciary.[202] Although another court rejected this argument,[203] to prevent

197. *See* Greeley Police Union v. City Council of Greeley, ___ Colo. ___, ___, 553 P.2d 790, 792 (1976); Fellows v. LaTronica, 151 Colo. 300, ___, 377 P.2d 547, 550-51 (1962); San Francisco Fire Fighters Local 798 v. City of San Francisco, 129 Cal. Rptr. 39 (1976).

198. Taylor Fed'n of Teachers Local 1085 v. Board of Educ., Civil No. 76-603-818 CL (Wayne City Cir. Ct., Mar. 12, 1976), *summarized in* [1976] GOV'T EMPL. REL. REP. (BNA) No. 663, B-9, B-10.

199. *See* notes 106-09 *supra* & accompanying text.

200. *See, e.g.*, MICH. CONST. art. 3, § 2. "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id.*

201. *See, e.g.*, WYO. STAT. § 27-270 (1967) and note 36 *supra*.

202. *See* City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 119, 256 A.2d 206, 212 (1969) (remarks of the trial justice).

203. Wyoming *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295, 302 (Wyo. 1968). *But see* Local 170, Transport Workers Union v. Gadola, 322 Mich. 332, 34 N.W.2d 71, 77-78 (1948) (arbitration statute covering public utility employees, providing that a judge be the third arbitrator when the parties cannot agree, held invalid); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 119, 256 A.2d 206, 212 (1969) (court declined to decide the issue).

future challenges on this basis state legislatures should eliminate judicial participation in the selection of arbitrators.

A second challenge based upon the separation of powers doctrine was raised in a South Dakota case[204] concerning a statute that provided an appeal de novo from arbitration orders.[205] The theory of the claim was that, when such an appeal de novo was available, a delegation of legislative powers to arbitrators constituted an unconstitutional delegation of power to the courts whose decisions ultimately would be "final and binding" as to the legislative matters in issue. Although the Supreme Court of South Dakota voided the arbitration law on other grounds,[206] and therefore never discussed the separation of powers question,[207] the argument has substantial merit. Thus, state legislatures should avoid provisions for de novo appeal from arbitration decisions.

A third possible separation of powers violation would be that binding interest arbitration statutes unlawfully confer upon the judiciary an implied power to reallocate public funds or to order tax increases even though a public employer may be financially incapable of paying an arbitration award. The Supreme Court of Pennsylvania, for example, asserted in dicta that although such implied powers appear to be an unlawful delegation of legislative authority to the courts, the statute conferred it upon them.[208] To guard against this claim, binding interest arbitration statutes should require that arbitrators consider the employer's ability to pay prior to rendering a final, enforceable decision.

3. *Fourteenth Amendment Challenges*

In addition to attacks based upon provisions in state constitutions, binding interest arbitration statutes have been challenged on due process and equal protection grounds.

a. *Due Process*

Binding interest arbitration statutes have been challenged as violative of fourteenth amendment procedural due process guarantees

204. City of Sioux Falls v. Sioux Falls Firefighters Local 814, ___ S.D. ___, 234 N.W.2d 35 (1975).

205. S.D. COMPILED LAWS ANN. § 9-14A-19 (Supp. 1976).

206. *See* note 89 *supra* & accompanying text.

207. ___ S.D. at ___, 234 N.W.2d at 38.

208. Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 564-65 (1969).

on two theories. For example, New York's interest arbitration law covering policemen and firemen has been attacked on the ground that the statute's failure to provide expressly for judicial review of arbitration awards denied the city due process.[209] Rejecting this argument, the court noted that the act did not attempt to prohibit judicial review and that even if it did, procedural due process nonetheless was guaranteed in that the courts still would have power to review whether the arbitrators acted in excess of their statutory grant of authority or in disregard of statutorily mandated standards.[210]

A second type of due process challenge arose in a case[211] in which the public employer claimed a denial of due process because it could be held in contempt for failing to implement an arbitration award even though tax limitations might leave the employer with insufficient funds to do so.[212] The court refused to decide the issue because the public employer did not show on the record that it lacked ability to pay the arbitration award.[213] Again, a simple means of avoiding similar due process claims would be to require that arbitrators consider the employer's ability to pay.

b. *Equal Protection*

Some courts also have contended that the method by which arbitrators are selected under binding interest arbitration statutes contravenes the "one man, one vote" principle, thus violating equal protection requirements.[214] The Massachusetts Supreme Judicial Court, however, has held the "one man, one vote" principle inapplicable to arbitration statutes.[215] In so holding, the court followed

209. City of Buffalo v. New York State Public Employment Relations Board, 80 Misc. 2d 741, ___, 363 N.Y.S.2d 896, 899 (Sup. Ct. 1975).

210. *Id.* at ___, 363 N.Y.S.2d at 899. Even if appeal from an arbitration award is prohibited by statute, a court may review questions of jurisdiction, the regularity of the proceedings before the panel, questions of abusive exercise of power, and constitutional issues. Skiles v. City of Lancaster, ___ Pa. Commw. Ct. ___, ___, 358 A.2d 131, 133 (1976), *citing* Washington Arbitration Case, 436 Pa. 168, 259 A.2d 437 (1969).

211. Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

212. *Id.* at ___, 255 A.2d at 564-65.

213. *Id.* at ___, 255 A.2d at 566.

214. *E.g.*, Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, ___, 352 N.E.2d 914, 920-21 (1976); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27-28,, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); Harney v. Russo, 435 Pa. 183, ___, 255 A.2d 560, 564 (1969).

215. Town of Arlington v. Board of Conciliation & Arbitration, ___ Mass. ___, 352 N.E.2d 914 (1976).

two Supreme Court decisions[216] indicating that the principle applies only to bodies having general legislative powers.[217] An arbitration panel is purely administrative, for it is neither "a unit of local government with general responsibility and power for local affairs" nor a unit "with general governmental powers over an entire geographical area."[218] As the court noted, powers granted to school boards, which are not even general legislative powers within the scope of the "one man, one vote" principle, are broader than those granted to arbitrators.[219] Thus, the allegation that binding interest arbitration violates equal protection appears untenable.[220]

III. Binding Interest Arbitration Statutes May Interfere With Societal Needs

Many binding interest arbitration statutes permit arbitrators, who serve on a temporary basis and are politically unaccountable, to award wage and other increases requiring expenditure of tax dollars, without considering the public employer's, and therefore the public's, ability to pay. Furthermore, binding interest arbitration awards rendered after budget appropriations have been made may require substantial budgetary reallocations. Arbitration, then, can lead to disruption of public services and financial confusion.

Because arbitrators are removed from the political process, public employees may make unrealistic demands during negotiations, believing that arbitrators will be more sympathetic than the city government. Similarly, the public employer, believing an arbitrator ultimately will compromise disputed issues, may maintain unreasonable positions. The net effect may be that the purpose of collective bargaining, to encourage voluntary agreements between employer and employee, may be thwarted by binding interest arbitration. Moreover, strikes and employee dissatisfaction have continued, even though binding interest arbitration statutes were enacted to harmonize employer-employee relations.

These aspects of the arbitration process are antithetical to the

216. Avery v. Midland County, 390 U.S. 474 (1968); Sailors v. Board of Educ., 387 U.S. 105 (1967).

217. ___ Mass. at ___, 352 N.E.2d at 920.

218. *Id.* at ___, 352 N.E.2d at 921, *quoting* Avery v. Midland County, 390 U.S. 474, 485-86 (1968).

219. ___ Mass. at ___, 352 N.E.2d at 921, *citing* Sailors v. Board of Educ., 387 U.S. 105, 110-11 (1967).

220. 435 Pa. 183, ___, 255 A.2d 560, 564 (1969).

needs and desires of the public employer and the public in general. As a result, public employers increasingly have refused to submit disputed issues to arbitrators or to implement arbitration orders. Consequently, the enforcement of some arbitration laws of dubious constitutionality has spawned expensive and time-consuming litigation. Such a result is detrimental to public employees because it delays the execution of financial awards, and it harms the public because tax dollars, originally intended for purchasing public goods and services, are dissipated in litigation. Thoughtful drafting of binding interest arbitration statutes, however, can insure that the statutes are impervious to constitutional attack and concomitantly can insure that they better serve the needs of all parties.

IV. RECOMMENDATIONS

To mitigate the claim of unaccountability and the resultant allegation of unlawful delegation, binding interest arbitration statutes should require that a public officer who is either elected or responsible to an elected official choose the arbitrator-chairman or provide a list of arbitrators from which the chairman is selected.[221] Moreover, any judicial involvement in arbitration panel selection or composition should be avoided to prevent claims that the selection process violates the separation of powers doctrine.

To encourage voluntary agreements and to protect against unreasonable demands during negotiations, the terms of the award should reflect each party's "final offer" on each disputed issue[222], and binding interest arbitration statutes should provide that the parties share the expenses of arbitration proceedings.[223]

Most importantly, to ensure the constitutional validity of binding interest arbitration laws and to prevent costly and time-consuming litigation, the statutes should contain specific standards to be considered by the arbitrators, in particular the ability of the employer to pay, and adequate procedural safeguards, including hearings, written findings and opinion, verbatim record, judicial review, and provisions to prevent budgetary disruptions.

V. CONCLUSION

The interests of the general public, which seeks quality public

221. *See, e.g.*, PA. STAT. ANN. tit. 43, § 1101.802 (Purdon Cum. Supp. 1976-1977).
222. *See* notes 39-42 *supra* & accompanying text.
223. *See* notes 43-46 *supra* & accompanying text.

services at the lowest possible cost, conflict with the interests of public employees, who are attempting to maximize their financial status. In an attempt to bridge the gap between public employers and public employees, an increasing number of states are enacting binding interest arbitration statutes.

The provisions in public sector arbitration laws vary greatly from state to state; if poorly drafted, a binding interest arbitration statute may be vulnerable to constitutional attack on the grounds of unlawful delegation, violation of the separation of powers doctrine, and unconstitutional interference with fourteenth amendment requirements. Additionally, carelessly worded arbitration statutes, enacted to ease employer-employee relations, may in reality interfere with the needs and desires of the public employer, the public employee, and the public in general. If carefully drafted, however, binding interest arbitration statutes are likely to withstand constitutional challenge and to ease significantly the resolution of public sector labor disputes.