

Comment

Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053

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With the advent of increased collective bargaining activity in the public sector, there has been, in the last decade, a rush on the part of state legislatures to enact legislation allowing collective bargaining for public employees. The provisions of the laws passed, however, vary considerably in terms of (1) the level of public employees covered (state or local), (2) items that are negotiable, (3) specific occupational categories of employees covered, (4) procedures for unit petition and impasse resolution, and (5) the legality of strikes. In addition, many of the statutes present linguistic challenges to interpretation. For example, in dispute resolution clauses of state laws, it has been noted that "[w]hat many would consider to be factfinding is, in some legislation, called mediation. In other statutes the terms factfinding and arbitration are so interconnected that interpretation of what is actually meant is most difficult."¹ Despite these difficulties, a majority of states have enacted some form of facilitative legislation.² It can be expected that the others will follow suit shortly in spite of continued discussion of proposed federal legislation for collective action by state and local public employees.³

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¹Sinicropi & Gilroy, *The Legal Framework of Public Sector Dispute Resolution*, 28 ARB. J. (n.s.) 1, 2 (1973).

²For a summary of more recent state legislative activity, see BNA GOV'T. EMPLOYEE REL. REP. No. 51:501 to :523 (1975).

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In October, 1974, the U.S. Senate Subcommittee on Labor of the Committee on Labor in Public Welfare held hearings on two proposed bills. These bills were S. 3294 (matched in the House by H.R. 9730) which would amend the National Labor Relations Act (NLRA) to cover public employees and S. 3295 (National Public Employment Relations Act—NPERA) (duplicated in the House by H.R. 8677) which would establish a new, independent labor agency to determine bargaining units and resolve unfair labor practice charges.

Accompanying the increased collective bargaining activity and experience in the public sector, there has been an increased sophistication in the understanding of both the labor relations issues at stake and the legislation needed to resolve these issues. With this sophistication, it can be tentatively proposed that legislative amendments to existing laws may result in a semblance of uniformity in the laws as well as a clarification of some of the more knotty linguistic problems. An alternative to *ex post facto* amendment is executive veto of proposed legislation to clarify certain issues before they become problematic during the organized labor relations processes that follow. However, the veto of any proposed state labor legislation has been relatively rare. For this reason Indiana Governor Otis R. Bowen's veto in 1975 of House Bill 1053⁴ provides a focus for the discussion of certain public sector labor relations questions which have analogies in other states as well.

I. BACKGROUND OF HOUSE BILL 1053

Prior to 1973, the Indiana Code dealt generally with the regulation of labor relations in Indiana, but did not enable collective action for them. Through a series of statutes the Indiana General Assembly has provided specific legislation to cover different categories of employees. Public Law 217,⁵ enacted in 1973, provides protection for collective action by certificated educational employees,⁶ but prohibits, *inter alia*, strikes by school employees,⁷ and deficit financing by school employers.⁸ The statute created the

A third bill, backed by the independent Assembly of Governmental Employees (AGE), the National Public Employee Merit System and Representative Act (S. 647), then pending before the Senate and House, Post Office and Civil Service Committees, and in the House of Representatives H.R. 4293, would require state and local governments to recognize the right to organize but permit them the freedom to develop their own public sector labor legislation with the proviso that the merit system principle is protected.

BNA GOV'T. EMPLOYEE REL. REP. No. 61:211 (1975). An excellent discussion of the pros and cons of a federal collective bargaining law for state and local employees can be found in *A Federal Collective Bargaining Law for Public Sector—Pros and Cons Reviewed*, P-H PUB. PERSONNEL ADMIN.-LAB. MGMT. REL. REP. ¶ 3111 (1974).

⁴Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. (1975).

⁵Act of April 24, 1973, Ind. Pub. L. No. 217, *codified at* IND. CODE §§ 20-7.5-1-1 to -14 (Burns 1975).

⁶IND. CODE § 20-7.5-1-6(a) (Burns 1975).

⁷*Id.* § 20-7.5-1-14(a).

⁸*Id.* § 20-7.5-1-3. The purpose of this Comment is not to provide a resume of all relevant Indiana Code sections, but rather to underline some points of existing law which figured strongly, by comparison, in Governor Bowen's veto of House Bill 1053.

Indiana Education Employment Relations Board (IEERB)⁹ to administer in the areas of unit and representation determination, mediation, and factfinding for the certificated employees opting for collective action.¹⁰ Public Law 254,¹¹ enacted in 1975, provides protection for collective action by other categories of public employees, but expressly excludes from coverage "policemen, firemen, professional engineers, faculty members of any university or certificated employees of school corporations or confidential employees or municipal or county health care institution employees."¹²

House Bill 1053 was intended by the General Assembly to continue the process of expanding collective action rights for public employees by extending the rights to police officers and firefighters. Although Public Laws 217 and 254 had been signed into law by Governor Bowen, House Bill 1053 was vetoed on April 17, 1975. Thus present public safety personnel have no legislative coverage for collective action rights because of their exclusion from coverage by Public Law 254.

II. REASONING BEHIND THE VETO

In his message to the House of Representatives regarding his veto of House Bill 1053,¹³ and in other public addresses, Governor

⁹IND. CODE § 20-7.5-1-9 (Burns 1975).

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During [its] first year of operation the Board was requested to intervene in 100 cases to make determinations as to the proper make up of the [collective bargaining] unit. In 50 of these cases the Board was able to prevail upon the parties to reach agreement without formal Board action. In the other 50 cases the Board made formal and final determinations establishing the membership of the unit.

[1973-1974] IND. ED. EMPL. REL. BD. ANN. REP. 1-2.

¹¹Act of April 25, 1975, Ind. Pub. L. No. 254, *codified at* IND. CODE §§ 22-6-4-1 to -13 (Burns Supp. 1975).

¹²IND. CODE § 22-6-4-1(c) (Burns Supp. 1975).

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MESSAGE FROM THE GOVERNOR

MR. SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES:

I have this 17th day of April, 1975, vetoed House Enrolled Act 1053.

This bill contains three structural defects which are of such a magnitude that its implementation would put an undue and unacceptable burden on the municipalities and citizens of the State of Indiana.

First, the bill does not contain an effective prohibition against strikes by the covered employees.

Second, due to the definition of the term "deficit financing", and the timetable provided for the resolution of bargaining issues, the bill fails to incorporate safeguards which would insure the continued fiscal viability of the municipalities involved.

Third, by making it an unfair practice for an employer to refuse to bargain about "any" of the bill's provisions, the door is open for

Bowen indicated that he was not, in principle, opposed to collective bargaining legislation for public safety employees.¹⁴ His veto was based, rather, on what he considered to be four insufficiencies in the bill itself.

Three of the insufficiencies were structural. The first two of these dealt with prohibitions against strikes and deficit financing. In a memorandum to the members of the General Assembly four days after the veto,¹⁵ Governor Bowen presented the legal details of these two issues. The strike prohibition language¹⁶ was considered inadequate because it was contained within the introductory "non-code amendatory section of the act. This placement is of substantial legal significance, for the enduring status of such provisions is in considerable and varying legal question."¹⁷ Further, House Bill 1053 contained "ambiguous and legally provocative"¹⁸ statutory sanctions against strikes, a defect not considered to exist in Public Law 217.¹⁹ As to the second deficiency, Governor Bowen considered the difference between the employing bodies affected by the limitation on deficit financing to be controlling. Public Law 217 defines "deficit financing" as "expenditures in excess of monies legally available to the employer,"²⁰ whereas

bargaining involving matters of strikes, public policy and any other matter appropriately and traditionally left to the discretion of the appropriate governmental authorities.

I recognize fully the essential contributions made by police and fire-fighting agencies in the State of Indiana. It is only fair that policemen and firemen be allowed to exercise collective bargaining privileges as are granted to other public employees. By the critical nature of their services, however, it is necessary that the citizens of the State of Indiana be assured that their services will always be available and that the fiscal soundness and administrative practices of local governments will not be undermined by well-meaning but open-ended legislation.

While I am in sympathy and agree with the thrust of this bill, my opinion is that collective bargaining for policemen and firemen must be coupled with reform of the present pension system for those groups and its method of funding.

OTIS R. BOWEN, M.D., Governor

1975 IND. HOUSE J. 1031-32.

¹⁴Address by Governor Otis R. Bowen to the Indiana Fire Chiefs' Association, August 22, 1975.

¹⁵Letter and memorandum from Governor Otis R. Bowen to the Members of the Indiana General Assembly, April 21, 1975. Governor Bowen's memorandum compared the provisions of Public Law 217 and House Bill 1053 without mentioning Public Law 254.

¹⁶Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 1 (1975).

¹⁷Memorandum, *supra* note 15, at 1.

¹⁸*Id.* at 2.

¹⁹*Id.*

²⁰IND. CODE § 20-7.5-1-2(q) (Burns 1975). Public Law 254 contains the same definition. IND CODE § 22-6-4-1(l) (Burns Supp. 1975).

House Bill 1053 replaces employer with "corporate authorities."²¹ The Governor argued that the employer involved in Public Law 217 "exists solely for the purpose of administering a single educational function,"²² while the corporate authority in House Bill 1053

exists to provide a full range of public services—of which police and fire protection is but a part. When applied to those two different situations, statutory language that generally *appears* the same tends to work out quite differently because, unlike teacher bargainers, police and fire bargainers would have a much broader expanse of tax dollars *legally* available for bargaining, yet the receipt of which would require the substantial cutback or elimination of other local governmental services.²³

The third structural difficulty lay in House Bill 1053's provision that it would be an unfair practice for an employer to "refuse to bargain collectively in good faith with an exclusive representative *any provisions* of this chapter."²⁴ The Governor argued that this opened up a gamut of issues as bargainable, including "matters of strikes, public policy and any other matter appropriately and traditionally left to the discretion of the appropriate governmental authorities."²⁵

The fourth basis of the veto was a statutory insufficiency. It was Governor Bowen's opinion "that collective bargaining for policemen and firemen must be coupled with reform of the present pension system for those groups and its method of funding."²⁶ This was considered necessary to offset the requirement of "an ever expanding percentage of local revenues to fund pensions for those no longer rendering active service."²⁷

III. COMMENTARY

In short, the Governor's veto of House Bill 1053 deals with (1) the strike, (2) deficit financing, (3) contract scope, and (4) the relationship between the enactment of *any* legislation to cover collective action by public safety employees and pension reform.

²¹Ind. H. R. 1053, 99th Gen. Assembly, 1st Sess., § 2 Sec. 1(f) (1975).

²²Memorandum, *supra* note 15, at 3.

²³*Id.* at 3 (emphasis in original).

²⁴Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 2 Sec. 18(a) (5) (1975) (emphasis supplied).

²⁵Message, *supra* note 13, at 1031.

²⁶*Id.* at 1031-32.

²⁷Address, *supra* note 14, at 5 (emphasis in original).

A. *The Pension Factor*

Pensions have traditionally been treated as one of the key fringe benefit items at the bargaining table in the private sector.²⁸ However, with increased expenditures for pensions in the public sector, especially for high risk occupations such as those dealing with public safety,²⁹ a stance taken by some has been to treat pensions as a separate item not subject to collective bargaining. This is the position of Governor Bowen. A variation of this, for example, is found in New York where the state legislature passed a statutory prohibition against all pension bargaining, effective until this year.³⁰ The result is what has become known as double-deck bargaining.

The dilution by statutes and the resulting uncertainty of the public employer's bargaining authority in some areas has been a factor in perpetuating the practice of *double-deck bargaining*, or the legislative "end run." This technique allows employee organizations to seek improvements upon or obtain benefits from the appropriate legislative body that they were unable to obtain at the bargaining table or that they were required by law to obtain at the legislative level.³¹

A variation of double-deck bargaining has received emphasis in Indiana since the Governor's veto of House Bill 1053. The legislative Pension Study Committee received testimony in the fall of 1975 from the Fraternal Order of Police, the Professional Firefighters Association of Indiana, as well as from other interest groups such as the Indiana Association of Cities and Towns, the Excise Police and Conservation Officers, the Judges' Association and the State Police.³² The Committee to Study All Governmentally Administered Pension Funds—State and Local Levels was designed

²⁸In addition to pensions, insurance against illness and supplementary unemployment benefits (SUB) also traditionally have been key fringe benefit bargaining items in the private sector. "The direct costs of these fringe benefits, and their significance in the total employee compensation picture, all require that they be discussed as 'wages.'" G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 154 (1973).

²⁹"In New York City, for example, the annual pension costs [for all categories of personnel] for 1975 have been estimated at \$750 million." *Id.* at 157.

³⁰See A. Anderson, *Labor Relations in the Public Service*, in 3 D. YODER AND H. HENEMAN, JR., *EMPLOYEE AND LABOR RELATIONS* 7-91 (1976) [hereinafter cited as A. Anderson].

³¹*Id.* (emphasis in original). An argument in favor of this option is that it removes one more item—potentially a very problematic one—from the possibility of impasse at the bargaining table during contract negotiations.

³²Minutes of the Pension Study Committee Meeting, Sept. 23, 1975.

in part to facilitate the discussion of legislation in the police and fire area by the Legislative Council and the General Assembly.³³

The importance attributed to the pension question as a special legislative issue for public safety employees by the Governor—which hinges on the more general question of contract scope limitations—is not mandated by Public Laws 217 and 254 which cover other categories of employees. Public Law 217 includes as mandatory scope items for the school employer “salary, wages, hours, and salary and wage related fringe benefits”³⁴ and Public Law 254 states that both parties should “negotiate in good faith with respect to wages, hours and other terms and conditions of employment.”³⁵ There is no express prohibition against the negotiability of pensions in either of these laws. In effect, there is differential restriction on contract scope if one compares the provisions of Public Laws 217 and 254 with the legislative recommendations of Governor Bowen embodied in the veto of House Bill 1053 as to the question of pensions. This is apparently justified, as the Governor has argued, on uniquely fiscal grounds.³⁶ An alternative to differential scope prohibition has been the introduction of House Bill 1378 as an amended version of Public Law 254, designed to obviate a separate statute for public safety personnel by including them under its provisions.³⁷ This treatment would resolve the legislative difficulties involved in collective action for public safety personnel but would not address the need for pension reform. The passage of such a bill in Indiana is unlikely.

³³Minutes of the Committee to Study All Governmentally Administered Pension Funds—State and Local Levels, Sept. 9, 1975.

³⁴IND. CODE § 20-7.5-1-4 (Burns 1975).

³⁵IND. CODE § 22-6-4-1(k) (Burns Supp. 1975).

³⁶It has been estimated that \$70 million per year over the next 40 years will be required to fund the present pension system for Indiana's 40,000 police and firefighters; and that an average of 40 percent of payroll expenditures for police and fire services currently is spent for pensions. Minutes, *supra* note 33.

³⁷Ind. H.R. 1378, 99th Gen. Assembly, 2d Sess., § 1(k) (1976) (introduced by State Representative S. Halton). The applicable provision states:

“Bargain collectively” means the performance of the mutual obligation of the employer through its chief executive officer or his designee and the designees of the exclusive representative to meet at reasonable times . . . and negotiate in good faith with respect to wages, hours and other terms and conditions of employment

A companion bill introduced by Senators M. Stanley and R. Garton also bypasses the pension problem and treats the scope question under the unfair practices provisions, making it an unfair practice for an employer to “refuse to bargain collectively in good faith with an exclusive representative about wages, rates of pay, hours, working conditions and all other terms or conditions of employment.” Ind. S. 6, 99th Gen. Assembly, 2d Sess., § 1 Sec. 19(a) (5) (1976). Both bills have remained in committee.

B. Contract Scope Limitations

The Governor's position on the need for separate legislative action on pension reform theoretically is related to his objection to the lack of a limitation on bargaining scope in House Bill 1053.³⁸ The items subject to the bargaining process may be limited in a number of ways. They can be enumerated in a separate "subjects of bargaining" section and complemented by an unfair labor practice provision, as in Public Law 217,³⁹ or they can be treated under a definitional collective bargaining provision and complemented by an unfair labor practice provision, as in Public Law 254.⁴⁰ A third way of treating scope is to state under the unfair labor practices provisions, as in House Bill 1053, that it is an unfair practice for an employer "to refuse to bargain collectively in good faith any provisions of this chapter."⁴¹ This procedure is extremely difficult to interpret in terms of scope and is arguably ambiguous. For example, the provisions dealing with the public safety employer's responsibility and authority—a management rights provision—state a number of areas where management rights should control, including directing the work of employees and establishing policy.⁴² Yet the unfair labor practice provision would make all provisions of the chapter negotiable. It is not clear how these ambiguities would be reconciled when the parties meet to discuss, not the substance, but the scope of items to be collectively negotiated. If and when specific statutory coverage for safety personnel is provided, Public Law 217 would appear to provide the clearest model for scope items. If pensions, or any additional questions related to management rights, are to be excluded from negotiations, it must be recommended that the statute include a clear statement of them in a section dealing only with these questions. If further clarity of coverage is desired, this could be complemented with an appropriate clause under the unfair labor practice provisions.

C. The Deficit Financing Deficiency

The Governor's objection to the structural deficiency of deficit financing in House Bill 1053 can perhaps be dealt with more easily than any of the other items outlined in his veto message. The change in terminology from "corporate authority" to "employer," as far as can be determined from the wording of Public Laws 217 and 254, would provide similar legal coverage for

³⁸See text accompanying notes 24-25, *supra*.

³⁹IND. CODE §§ 20-7.5-1-4, -7(a) (5) (Burns 1975).

⁴⁰*Id.* §§ 22-6-4-1(k), -5(a) (5) (Burns Supp. 1975).

⁴¹Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. § 2, Sec. 18(a) (5) (1975).

⁴²*Id.* § 2, Sec. 3.

public safety negotiators as is provided for union representatives negotiating for other categories of public employees presently covered by law. As worded, House Bill 1053 probably would not have opened avenues for contravention of the letter of the law on deficit financing—that is, no outside borrowing would occur—but it could have led to a contradiction of the spirit of the law through intraorganizational budgetary shifts.

D. The Strike and Alternatives

The status of the strike remains a perennial sore thumb in the public sector. Public Laws 217 and 254 leave little room to question their intent and clearly join the majority of states in their prohibition of strikes.⁴³ The authors of House Bill 1053 may have attempted to erode the illegality of the strike through the legal technicality recognized by Governor Bowen.⁴⁴ Whether or not the effective omission was designed or accidental, it is highly unlikely that the police officers and firefighters of Indiana will have collective action legislation until a substitute for House Bill 1053, in whatever form, is revised to include either a strike prohibition clause, modeled after Public Laws 217 and 254, or a suitable alternative.

On the assumption that the strike is not necessary for leverage at the bargaining table—an assumption that, theoretically, no unionist would accept—a much discussed alternative is final offer, interest arbitration. This is a variation of arbitration under which a panel or single arbitrator selects the last offer of either management or labor on each or all items in dispute.⁴⁵ Although the idea of final offer arbitration was first suggested in 1966,⁴⁶ experience with it in the public sector is still limited.⁴⁷ Indiana was one

⁴³With qualifications, strikes are permitted in Alaska, Hawaii, Oregon, Pennsylvania, and Vermont by statute; and in Montana by case law. They are generally prohibited in all other states with legislative or case law in the area. BNA GOV'T. EMPLOYEE REL. REP. No. 51:501 to :523 (1975).

⁴⁴See text accompanying note 15, *supra*.

⁴⁵Such a provision recently was provided by legislation for local employees in Connecticut. BNA GOV'T. EMPLOYEE REL. REP. No. 617 at B-11 to B-12 (July 4, 1975). See also Feigenbaum, *Final Offer Arbitration: Better Theory Than Practice*, 14 IND. REL. 311 (1975); Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 IND. REL. 302 (1975).

⁴⁶Stevens, *Is Compulsory Arbitration Compatible With Bargaining?*, 5 IND. REL. 38 (1966).

⁴⁷There is a distinction among different types of arbitration depending on where they are used in the organized labor relations process. "Rights" or grievance arbitration, which is the most frequently used, concerns contract interpretation disputes. "Interest" arbitration occurs at the point of contract negotiations. There are many variations of interest arbitration: compulsory, which is mandated by law; voluntary, which is adopted voluntarily by the

of the first states in which voluntary experimentation with final offer arbitration was attempted. This occurred in 1972 when the city of Indianapolis and the union representing public works employees were unable to reach agreement.⁴⁸

Indiana's legislative response to the potential of final offer, interest arbitration as an alternative to the strike has not been consistent. Public Law 217 provides for impasse procedures, including mediation and factfinding⁴⁹ which are initiated at the request of the parties involved⁵⁰ or by the IEERB according to a statutory "timetable for coordination of bargaining with the school corporation budget requirements."⁵¹ It also allows the school employer and the exclusive representative to "at any time submit any issue in dispute to final and binding [interest] arbitration to an arbi-

parties to resolve an impasse; binding, which by law or agreement requires acceptance of the arbitration decision; and advisory, which requires neither party, by law or prior agreement to accept the arbitration decision. Advisory, interest arbitration is procedurally similar to factfinding. The neutral third parties engaging in any of these variations of interest arbitration can be one person or a panel. See A. Anderson, *supra* note 30, at 7-105 to -106, -108. A good resume of aspects of interest arbitration can be found in MIDWEST MONITOR, May-June 1975, at 1-5 (School of Pub. & Environ. Affairs, Indiana Univ., Bloomington). "Final offer" interest arbitration in its widest sense here means: compulsory or voluntary, binding, interest arbitration whereby a panel or single arbitrator would choose either a union's or management's last offer on each or all particular items in dispute by the parties. This definition appears to encompass the variations of final offer, interest arbitration heretofore subject to experimentation. See Feigenbaum, *supra* note 45, at 313-16, for a comparison of final offer, interest arbitration either legislated or voluntarily tried in Eugene, Oregon; Wisconsin; Michigan; and Indianapolis, Indiana.

⁴⁸Witney, *Final-Offer Arbitration: The Indianapolis Experience*, 96 MONTHLY LAB. REV. 20 (May 1973).

⁴⁹IND. CODE § 20-7.5-1-13 (Burns 1975). Mediation is the process whereby a third party

enters the negotiations to help the parties reach agreement. The mediator acts as a go-between guiding the parties into areas where agreement seems likely to occur. The mediator has no authority to compel agreement or make decisions on issues in dispute.

MIDWEST MONITOR, *supra* note 47, at 2. Factfinding (or advisory, interest arbitration) is the process whereby a third party

investigates the dispute [usually] by holding a hearing. This technique which came into its own in the public sector, represents a greater degree of intervention than mediation. The parties in the dispute present their cases to the factfinder who then issues a report. This report may or may not include recommendations for settlement of the dispute. The parties are free to accept or reject these recommendations, but most often the factfinding report becomes the basis for settlement.

Id.

⁵⁰IND. CODE §§ 20-7.5-1-13(a) to (b) (Burns 1975).

⁵¹*Id.* § 20-7.5-1-12.

trator appointed by the [IEERB]."⁵² Thus Public Law 217 provides for voluntary, binding, interest arbitration but it does not provide for final offer, interest arbitration.⁵³ Public Law 254 likewise provides for mediation and factfinding in case of impasse,⁵⁴ but the substance of its provisions is considerably different from that of Public Law 217. Its timetable for bargaining⁵⁵ differs in detail from that of Public Law 217; and it provides that the findings and recommendations of the factfinder "shall be advisory only, *unless* the exclusive representative or the employer has previously notified the employer or exclusive representative that such recommendations are to be binding in which case they shall be binding."⁵⁶ In addition, the statutory provisions for arbitration procedures found in Public Law 254 are considerably more complex than those in Public Law 217. Public Law 254 provides leeway for the parties to substitute their own procedures to bring about impasse resolution or by utilizing "any other governmental or other agency or person in lieu of the [IEERB];"⁵⁷ it provides for voluntary, binding, interest arbitration similar to Public Law 217;⁵⁸ and it also provides for voluntary, final offer, interest arbitration.⁵⁹

⁵²*Id.* § 20-7.5-1-13(c).

⁵³Couched in this terminology is an important procedural difference. Public Law 217 provides for the possibility of an arbitrator to make a final, binding decision on an impasse issue. It does not say that the arbitrator must choose either one or the other final offer.

⁵⁴IND. CODE § 22-6-4-11 (Burns Supp. 1975).

⁵⁵*Id.*

⁵⁶*Id.* § 22-6-4-11(c) (emphasis supplied). This practice, known as "Med-Arb," first originated in the Pacific Northwest. It provides a new twist in impasse procedures because "the mediator becomes the arbitrator on all issues yet unresolved through mediation. The arbitrator's decision then consists of all mediated settlements with all the remaining issues being determined by arbitration." MIDWEST MONITOR, *supra* note 47, at 3. On "Med-Arb", see also H. Davey, *Third Parties in Labor Relations—Negotiation, Mediation, Arbitration*, in 3 D. YODER & H. HENEMAN, JR., EMPLOYEE AND LABOR RELATIONS 7-203 to -204 (1976).

⁵⁷IND. CODE § 22-6-4-13(g) (Burns Supp. 1975).

⁵⁸*Id.* § 22-6-4-13(h).

⁵⁹

The parties *may* agree in any case where no agreement is reached to submit a final offer to the other party, which offer shall be transmitted to the board. Each party shall, at the same time, submit one [1] alternative offer. Final offers shall be presented within three [3] days from the date on which a party pursuant to the agreement requests submission of a final offer. The board shall transmit the offers to the other parties simultaneously:

(1) If no final offer is submitted by a party, the last offer made by such party during the previous sessions shall be deemed that party's final offer.

A comparison of the impasse procedures of House Bill 1053 with those of Public Laws 217 and 254 provides yet further contrast in the areas of mediation and arbitration. House Bill 1053 does not use the term factfinding.⁶⁰ Rather, it directs that, if an agreement cannot be reached according to a given time schedule, the IEERB shall appoint a mediator.⁶¹ If with the assistance of the mediator no agreement can be reached on given items within thirty days, "any unresolved issues *shall be* submitted to arbitration."⁶² After a panel of arbitrators is selected and has conducted its hearing, "[a] majority decision of the arbitrators shall be binding upon both the employee organization and the corporate authorities."⁶³ Thus there is provision for compulsory, binding, interest arbitration. However, the arbitrators' decision may be appealed by the corporate authority over "the sole issue of whether the decision of the arbitrators places the corporate authority in [a] position of deficit financing;"⁶⁴ or may be avoided if "[a]ny agreements [are] actually negotiated between the employee or-

(2) Any offer submitted by a party pursuant to this subsection must comply with the agreement of the parties with respect to issues in dispute: Provided, that the final offers shall not contain any issues that were not issues at the time of final dispute or impasse; contents of the agreements must be legal issues and not in conflict with the provisions of this chapter, or constitute demands upon the employer contrary to actions of the general assembly.

Id. § 22-6-4-12 (emphasis added). The statute then goes on to say that the parties shall continue to negotiate for five days after receiving each other's offer, with the assistance of an IEERB mediator if they desire. If they are still at an impasse after this time, a final offer arbitration panel should be selected within two days with or without the assistance of the IEERB. The panel then selects the most reasonable, in its estimation, of the final offers which will be binding on the parties. The statute then lays out the criteria that the panel must use in arriving at their decision on the final offers. *Id.*

⁶⁰Interestingly, House Bill 1053 is the only one of the three that states a labor-management policy on the relationship between the strike and other types of impasse procedures. It does this in what the Governor calls the "non-code amendatory section of the Act." See note 15, *supra*. This section says specifically that:

The establishment of this method of mediation and arbitration shall not, in any way whatsoever, be deemed to be a recognition by the state of compulsory arbitration as a superior method of settling labor disputes between employees who possess the right to strike and their employers, but rather shall be deemed to be a recognition solely of the necessity to provide some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike.

Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess., § 1 (1975).

⁶¹*Id.* § 2, Sec. 7.

⁶²*Id.* § 2, Sec. 8 (emphasis supplied).

⁶³*Id.* § 2, Sec. 10.

⁶⁴*Id.* § 2, Sec. 11.

ganization and the corporate authorities either before, or within thirty (30) calendar days after arbitration"⁶⁵

Therefore, while the strike is forbidden in Indiana, statutory requirements or recommendations for strike alternatives are not consistent. Only Public Law 254 provides for one variation of final offer, interest arbitration in addition to a number of other alternatives. Any future legislative coverage for public safety personnel and others who are not presently covered by law could profit from a closer examination of the strike alternative model found in Public Law 254.⁶⁶

IV. AN ADDED COMPLEXITY

The statutory regulation of collective bargaining for public employees covered by Public Laws 217 and 254 assumes that both laws satisfy constitutional requirements of the state of Indiana. Whether in fact Public Law 254 does this has been called into question by a recent Benton Circuit Court ruling.⁶⁷

The circumstances of the court's decision stem from the attempt by the Retail Clerks Union, Local No. 25, to file a representation petition with the IEERB to be certified as exclusive representative for certain employees of the Benton County School Corporation.⁶⁸ The school corporation, as plaintiff, sought a declaration that Public Law 254 was unconstitutional in that provisions of section 8 of Public Law 254 prohibited judicial review

⁶⁵*Id.* § 2, Sec. 14.

⁶⁶There is no intention here to simplify the ultimate workability, or the specific procedural questions, related to either voluntary or compulsory final offer, interest arbitration. It is presented as an alternative to the strike and its long-range workability is not fully known. This is an empirical question. In the long run, bipartite labor-management negotiations would appear to be the ideal, rather than tripartite which introduces a third party in whatever capacity. However, since public sector policy has rather consistently questioned the wisdom of the legality of the strike—which is labor's "ace in the hole" in bipartite negotiations—final offer, interest arbitration appears to be a viable theoretical alternative to strike usage.

The assumption behind the potential effectiveness of compulsory, final offer, interest arbitration, which is not found in Public Law 217, Public Law 254, or the vetoed House Bill 1053, is that it will discourage unreasonable proposals by either labor or management by putting them in an all-or-nothing bargaining stance. In this sense, its theoretical long-range effectiveness would lie in the ability of negotiators to avoid its impact by negotiating reasonably before its potential application is realized. It is of interest that Ind. H.R. 1378, *supra* note 37, proposes that final offer, interest arbitration be compulsory rather than voluntary. This bill is still in committee as of the present writing.

⁶⁷Benton Community School Corp. v. Indiana Educ. Employee Relations Bd., No. C75-141 (Benton Cir. Ct., Feb. 4, 1976).

⁶⁸*Id.* (page 2 of findings of fact—conclusions of law).

of a state administrative agency's determinations in violation of article 1, section 12 of the Indiana Constitution.⁶⁹ Specifically, the plaintiff argued that section 8 prohibited judicial review of the determination by the IEERB of the appropriate bargaining unit and its certification of exclusive bargaining representation.⁷⁰ The court accepted the plaintiff's argument, and held that Public Law 254

is unconstitutional since it violates Article I, Sec. 12, of the Constitution of the State of Indiana in that it prohibits judicial review in Subsections 8(d), (g), and (i) of state administrative agency determinations made in regard to representation proceedings held under Sec. 7 of said Act. The unconstitutional provisions are an integral part of the statute and are not severable from the remaining provisions. Therefore, the entire Act is void, and Defendants, Indiana Education Employment Relations Board, and its members are hereby permanently enjoined from further proceedings under Public Law 254, Acts of Indiana 1975.⁷¹

Although collective bargaining in the public sector without enabling legislation has been attempted by various states in the past, the peaceful implementation of the process is immensely enhanced by statutory protection. Wisdom would suggest that the constitutionality of Public Law 254, and consequently its applicability to public sector collective bargaining, be reviewed by a higher court, or that the constitutional defects be remedied by legislative amendment as quickly as possible.⁷²

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All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay.

IND. CONST. art. 1, § 12.

⁷⁰No. C75-141 (Benton Cir. Ct., Feb. 4, 1976) (page 3 of findings).

⁷¹*Id.* (page 1 of judgment).

⁷²Irrespective of how this constitutional issue is resolved, it can be stated as a general principle that the less third parties (neutrals, the judiciary or anyone else) enter the bipartite process, at any point, the better. Historically, American organized labor has had a profound mistrust of the courts as third parties entering labor-management relations processes because of the widespread use of the injunction against labor in the 19th and early 20th centuries before the passage of the Norris-La Guardia Anti-Injunction Act of 1932. G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 565-66, 572-77 (1973).

CONCLUSION

The veto of House Bill 1053 by Governor Bowen touches on a number of major issues of enabling legislation for collective action by public employees in the state of Indiana which go beyond the immediate stretches of the bill itself. The veto underscores the difficult question of the strike, the alternatives to the strike supplied by interest arbitration procedures, and ultimately the wider question of the wisdom of tripartite versus bipartite collective bargaining in the public sector. The Benton Circuit Court decision provides a constitutional dimension which must be considered in any future legislative response to these questions. Resort to the courts, in whatever capacity, as part of the total labor-management process should not be legislatively encouraged.

Governor Bowen only indirectly addressed the question of interest arbitration procedures by way of his veto comments on the strike provisions of House Bill 1053. A comparison of impasse provisions in Public Law 217, Public Law 254, and House Bill 1053 reveals a marked variation. The exact reasoning which brought about this variation is not clear. Final offer arbitration is theoretically a viable impasse resolution alternative that is gaining some acceptance in other states.⁷³ In this sense, Public Law 254—assuming that its constitutional status will be clarified—on final offer, interest arbitration would be one possible model to follow. In addition, the authors of legislation to cover the remaining classes of public employees excluded from Public Laws 217 and 254 would do well to keep the principle of legislative consistency in mind.

The veto of House Bill 1053 because of its bargaining scope provisions and because it was not accompanied by pension reform for public safety personnel are two aspects of the same question: bargaining scope limitations. Since there appears to be little chance of enabling legislation for safety personnel until the pension systems are dealt with legislatively, Indiana can expect, in this respect, increased double-deck bargaining on the part of these personnel.

Lastly, the veto of House Bill 1053 must challenge by implication the policy of providing separate legislative coverage for different categories of public personnel. One alternative would be a single statute covering all categories of public personnel. It would appear, however, that Indiana has been committed to a piecemeal approach of separate legislation for different groups. At the very least, then, new legislation should be designed around the models of earlier statutes so that statutory consistency may be approximated.

⁷³See Feigenbaum, *supra* note 45, for a discussion of the Michigan and Wisconsin statutes.