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## Final Offer Arbitration: The Last Word in Public Sector Labor Disputes

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# Final Offer Arbitration: The Last Word in Public Sector Labor Disputes

## I. INTRODUCTION

Interest arbitration<sup>1</sup> has become an increasingly important means of resolving contract disputes in the public sector.<sup>2</sup> Due to the widespread statutory prohibitions against strikes by public employees,<sup>3</sup> one purpose of compulsory arbitration statutes is to increase labor's leverage<sup>4</sup> by mandating collective bargaining and, should an impasse result, binding arbitration.<sup>5</sup> Thus legislated arbitration can be viewed as both a replacement for, and a device to prevent, a strike—goals particularly important where “essential” employees are involved.<sup>6</sup> As a substitute for the strike and, consequently, as an equalizer of the parties' bargaining powers, a viable arbitration procedure should encourage the parties to reach a negotiated settlement.<sup>7</sup> Thus a desirable arbitration system may be rarely invoked

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1. Interest arbitration involves the determination by a third party of the substantive terms to be incorporated into a labor contract, as distinguished from grievance arbitration which refers to the resolution of disputes arising under a given agreement by a procedure designated in that agreement. Grievance arbitration is the more widely used procedure. See H. SHERMAN, JR., *UNIONIZATION AND COLLECTIVE BARGAINING* 153-58 (The Labor Law Group, Labor Relations and Social Problems: Unit 1, 2d ed. 1972).

2. The 15 states which authorize the use of interest arbitration to resolve public sector labor disputes are: Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, South Dakota, Wisconsin and Wyoming. Among the municipalities authorizing interest arbitration are Boulder, Colorado; New York City; and Oakland, California.

3. The following states give some public employees the right to strike: Alaska, Hawaii, Montana, Oregon, Pennsylvania and Vermont.

4. See Fleming, *“Interest” Arbitration Revisited*, 7 U. MICH. J.L. REFORM 1 (1973); Howlett, *Contract Negotiation: Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973); Lev, *Strikes by Government Employees: Problems and Solutions*, 57 A.B.A.J. 771 (1971); Loewenberg, *Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968*, 23 IND. & LAB. REL. REV. 367 (1970); Long & Fueille, *Final-Offer Arbitration: “Sudden Death” in Eugene*, 27 IND. & LAB. REL. REV. 186 (1974) [hereinafter cited as Long & Fueille]; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972); Seinsheimer, *What's So Terrible about Compulsory Arbitration?*, 26 ARB. J. (n.s.) 219 (1971).

5. But cf. BNA Gov't EMP. REL. REP. 539: B-2 (Jan. 28, 1974). The National Capital Area American Civil Liberties Union issued a “Bill of Rights” for public employees which includes the right to strike.

6. See note 4 *supra*.

7. See Fleming, *“Interest” Arbitration Revisited*, *supra* note 4; Garber, *Compulsory*

or used to its conclusion.<sup>8</sup> But, if needed to determine the terms of a new contract, the arbitration mechanism should resolve impasses in a just and fair way.

Interest arbitration, generally favored by public employees and opposed by their employers, usually bolsters labor's leverage in contract disputes.<sup>9</sup> Prohibited from striking, public employees could not bargain as effectively as their private sector counterparts whose decisions to strike created great risks of loss for both sides. The advent of third-party determination of contract terms has resulted in packages more advantageous to labor than in the past. Third-party determination confers a special benefit on the weaker unions for whom a strike never was a possibility; compulsory arbitration forces management to bargain seriously with them.<sup>10</sup> The employer must either submit a reasonably acceptable package or risk the imposition of a possibly unfavorable settlement.

Interest arbitration, however, is not a panacea that will peacefully and equitably resolve all public sector labor disputes.<sup>11</sup> The interest arbitrator's rather large discretionary power may produce an award that reflects neither the desires of the parties nor the realities of the market.<sup>12</sup> As an artificial solution in the sense of being externally formulated, conventional interest arbitration may be less preferable to a mechanism which shares the same aims, but limits the arbitrator's discretion.<sup>13</sup> This advantage of restricting discretion is particularly significant in view of the reluctance of many arbitrators to incorporate innovations into a decree.<sup>14</sup> With the

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*Arbitration in the Public Sector: A Proposed Alternative*, 26 *ARB. J.* (n.s.) 226 (1971); Grodin, *Either-Or Arbitration for Public Employee Disputes*, 11 *IND. REL.* 260 (1972); Long & Feuille, *supra* note 4.

8. Long & Feuille, *supra* note 4, at 202.

9. See notes 4 and 7 *supra*; "Interest Arbitration's" Arrival as a Force in Public Agreements Described, BNA Gov't EMP. REL. REP. 553: B-14, 15 (May 6, 1974); Panel of ABA Labor Law Section Scrutinizes Past, Present, and Future of Public Sector Bargaining, BNA Gov't EMP. REL. REP. 571: B-4 (Sept. 9, 1974); *cf.* *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, BNA Gov't EMP. REL. REP. 554: B-3,4 (May 13, 1974).

10. See note 9 *supra*.

11. But *cf.* *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-5.

12. See Panel of ABA Labor Law Section Scrutinizes Past, Present, and Future of Public Sector Bargaining, *supra* note 9, at B-6.

13. *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-6.

14. "Interest Arbitration's" Arrival as a Force in Public Agreements Described, *supra* note 9, at B-16.

wider use of impasse-resolving devices, reliance upon some type of third-party input, particularly in the absence of an effective right or power to strike, is generally approved.<sup>15</sup> The more important issue is the best method of utilizing third parties<sup>16</sup> to prevent strikes, promote negotiated settlements, avoid burdening state and local governments with expensive packages, and draft contracts reflecting the economic and social conditions prevalent in similar areas of employment.

Final offer arbitration,<sup>17</sup> the subject of this article, has been advocated as promoting these goals more effectively than conventional interest arbitration.<sup>18</sup> As the newest version of interest arbitration,<sup>19</sup> final offer arbitration has attracted much attention as the potentially dominant mode of public sector impasse resolution in the future.<sup>20</sup> Under the final offer system, each party submits its final proposal to the arbitration panel. The panel then selects, without modification, one side's offer.<sup>21</sup> Although several variations of final offer exist, there are basically two major prototypes. Michigan<sup>22</sup> has adopted an issue-by-issue approach, whereby the parties submit final offers for each issue in dispute. Under the Eugene, Oregon ordinance,<sup>23</sup> the arbitration panel selects an entire package. This article will focus on these two statutes. It will briefly assess the

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15. *Id.* at B-14.

16. *Id.*

17. Final offer arbitration is also known by such other names as "either-or," "one-or-the-other," or "last best offer" arbitration.

18. See Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, *supra* note 7; Grodin, *Either-Or Arbitration for Public Employee Disputes*, *supra* note 7; Lev, *Strikes by Government Employees: Problems and Solutions*, *supra* note 4; Long & Feuille, *supra* note 4; Rains, *Dispute Settlement in the Public Sector*, 19 U. BUFF. L. REV. 279 (1970); Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 IND. REL. 38 (Feb. 1966); *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9.

19. Final offer arbitration first appeared in articles in 1966 and was not utilized to resolve labor disputes until 1972.

20. See note 18 *supra*. Five states and two municipalities currently have some version of a final offer arbitration statute. The states are Iowa, Massachusetts, Michigan, Minnesota and Wisconsin. The municipalities are Boulder, Colorado and Eugene, Oregon. Only in Minnesota is the final offer procedure not mandatory for the specified employees.

President Nixon proposed a modified version of the total "package" type for the resolution of disputes in the railroad industry. N.Y. Times, Feb. 28, 1970, at 1, col. 8, and 13, col. 3.

21. Under conventional arbitration, the arbitrator has considerable discretion in rendering an award; he is not limited to the parties' offers, but may reach a compromise decision.

22. Michigan Police and Firefighters Arbitration Act, § 8, MICH. COMP. LAWS ANN. § 423.238 (Supp. 1972).

23. EUGENE, ORE., CODE § 2.876 (1971).

advantages of final offer over conventional interest arbitration, and will determine the extent to which these statutes further the goals of arbitration. Although commentators mainly have stressed the settlement-promoting features of such laws,<sup>24</sup> this article will also analyze the relative fairness of arbitration awards in Michigan and Eugene and the degree of leverage accorded to the unions by this procedure. Lastly, it will propose a final offer arbitration statute designed to resolve public sector labor disputes primarily in metropolitan areas.<sup>25</sup>

## II. FINAL OFFER ARBITRATION: THE CONCEPTUAL FRAMEWORK

### A. INCENTIVE TO BARGAIN

Final offer arbitration has been frequently cited as a method that compels serious negotiation and the presentation of reasonable offers.<sup>26</sup> Since the parties know that the arbitrator lacks the capacity to compromise, they must, according to this theory, submit an offer both reasonable and representative of their actual bargaining positions:

Employer and union, realizing that the arbitrator's power is lim-

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24. See note 18 *supra*.

25. Final offer arbitration statutes may also be employed as a guide in resolving private sector labor disputes. A provision mandating the use of the "entire package" type of last offer arbitration has been incorporated into some construction industry contracts. In one case, the parties agreed to a system authorizing selection of one party's final offer in its entirety, without an opportunity for either mediation or last minute modification. This form of final offer arbitration is much more drastic than any of the statutory formulae. For a statement by the union leader that "the finality of the arbitration procedure will pressure the parties 'to be as reasonable as they can,'" see a report of the contract between Operating General Contractors in Oregon and southwest Washington and Operating Engineers Local 701 in 83 LAB. REL. REP. 391, 392 (Aug. 27, 1973).

Final offer arbitration has been adopted by professional baseball to resolve salary disputes between players and owners. In baseball, arbitration's principal function is to give the players' greater leverage rather than to prevent strikes. In this respect, baseball arbitration resembles public sector arbitration more closely than it does third party resolution in the construction industry. The purpose of arbitration in the latter is primarily to avoid strikes.

The players have profited from arbitration. Although not compulsory, arbitration has resulted in owners' offering higher salaries not only to players who elect arbitration, but also to those who decide to negotiate instead. Therefore, the procedure has furthered two of arbitration's goals—the submission of more reasonable offers and the encouragement of equitable settlements. See N.Y. Times, Mar. 3, 1974, § 5 (Sports), at 1, cols. 3-6, and 2, col. 1.

To void the disastrous consequences of a nationwide steel strike, a compulsory interest arbitration provision was incorporated into the steel industry's contract. See 83 LAB. REL. REP. 79 (May 21, 1973); 82 LAB. REL. REP. 266 (Apr. 2, 1973).

26. See note 18 *supra*.

ited to accepting the entire proposed contract of one or the other party, will each bargain in good faith and in great earnestness to reach an agreement. If this process fails to produce agreement, it will, nevertheless, narrow very substantially the area of disagreement as each party strains for a favorable decision from the arbitrators by attempting to make its position appear the more reasonable of the two.<sup>27</sup>

The "either-or" nature of final offer arbitration may create the risk of serious injury, a loss approximating the costs of a strike.<sup>28</sup> The parties' uncertainty as to whose offer the panel will select aggravates this risk factor.<sup>29</sup> Ideally, each side will strive to satisfy the arbitrators by submitting the more reasonable proposals.

This "all or nothing" effect is absent in conventional interest arbitration. Consequently, conventional arbitration should result in fewer settlements and less reasonable offers by the parties.<sup>30</sup> In fact, since the parties know that the panel possesses the power to effect a compromise, they may submit very unrealistic offers.<sup>31</sup> If the optimal award would reflect the reality of the market,<sup>32</sup> neither method may produce a desirable result. A compromise may bear little relation to what the parties could reasonably expect; a final offer award merely may represent the less unreasonable of two unrealistic offers.<sup>33</sup>

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27. H. WELLINGTON and R. WINTER, *THE UNIONS AND THE CITIES* (1971). See also Seinsheimer, *What's So Terrible about Compulsory Arbitration?*, *supra* note 4, at 225.

28. Long & Feuille, *supra* note 4, at 188-90. The authors view these costs as "no revenue for the firm, no paychecks for the employees, and a reduced treasury for the union. . . [and] that each party is able to make only relatively uncertain estimates of what its costs of disagreement will be if a work stoppage occurs. . . ."

29. See note 28 *supra*.

30. See note 18 *supra*. Arbitrator Charles M. Rehms, professor at the University of Michigan, found that a significantly higher percentage of settlements was obtained under final offer arbitration than under the conventional interest approach. He made the following comparison when speaking at the National Academy of Arbitrators' meeting on April 26, 1974, cited in *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-4:

Under conventional arbitration, in 24 per cent of the cases where hearings were held no award was necessary because a settlement had been made during the course of the arbitration proceeding. Under final offer thus far, the comparable figure has jumped to 45 per cent.

*But see* Loewenberg, *Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968*, *supra* note 4, at 377-79; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, *supra* note 4, at 1192.

31. See note 18 *supra*.

32. In a telephone conversation, Gary Long stated that the purpose of final offer arbitration was to "pressure everyone into a market resolution."

33. Witney, *Final Offer Arbitration: The Indianapolis Experience*, BNA Gov't EMP. REL. REP. 504: E-1, 4 (May 21, 1973).

These undesirable results are more likely to occur in the public sector where strikes are prohibited.<sup>34</sup> Before the emergence of collective bargaining and arbitration statutes, unions, especially in the smaller cities, had very little leverage.<sup>35</sup> For this reason, some cities either fought for the repeal of these laws or refused to bargain in good faith.<sup>36</sup> Budget limitations, which are often more pressing in the public sector than in the private sector,<sup>37</sup> also contributed to management's intransigence and submission of unreasonably low offers.<sup>38</sup>

Final offer arbitration represents a compromise for management between conventional arbitration and the absence of any compulsory procedure. It lessens the opportunity for an unfavorable compromise and increases a party's chance that its offer will be selected as the final award. Due to this preclusion of compromise, the enactment of final offer arbitration statutes met with some initial opposition from labor.<sup>39</sup>

## B. CRITICISM

The main objection to the final offer mechanism comes from arbitrators who would prefer the larger amount of discretion associated with conventional arbitration.<sup>40</sup> Fred Witney, one of the two

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34. See note 18 *supra*.

35. Cf. McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, *supra* note 4, at 1195.

36. Howlett, *Contract Negotiation: Arbitration in the Public Sector*, *supra* note 4, at 57, n.38: "The Michigan Municipal League opposed the extension of the statute which originally expired June 30, 1972 for the reason, among others, that it damaged collective bargaining."

The statute encouraged a reluctance to bargain: "The Michigan mediators have experienced resistance in some cases where parties have held back on the resolution of bargaining issues, clearly preferring to submit them to arbitration." *Id.* at 58.

Although the city of Eugene supported the final offer arbitration statute, it opposed a conventional arbitration system. Long & Feuille, *supra* note 4, at 192.

37. It is often more feasible for the private sector employer to raise prices than for a city to raise taxes.

38. This statement is based upon conversations with Gary Long and Ronald Helveston. The latter is the attorney for the Michigan fire fighters union.

39. Mr. Helveston stated that the fire fighters prefer conventional interest arbitration to final offer arbitration. Due to the greater flexibility inherent in the former, the union believes that more favorable awards would be rendered under that method.

40. The type of discretion arbitrators desire is flexibility in drafting an order incorporating elements of each party's proposals. With this power, arbitrators such as Fred Witney, the drafter of the Indianapolis award, feel that they can mold an equitable decree. See Witney, *Final Offer Arbitration: The Indianapolis Experience*, *supra* note 23, at E-6.

However, a second form of discretion exists which is shunned by many arbitrators. This

arbitrators of the dispute between the Indianapolis Department of Public Works and the American Federation of State, County and Municipal Employees (AFSCME),<sup>41</sup> felt that the inflexibility inherent in final offer arbitration produced an unfair result.<sup>42</sup> Quoting the panel, he stated:

The Board is expressly precluded from selecting individual terms and conditions from each package, so as to direct a composite consisting of elements selected from both proposals. . . . These restrictions. . . limit the exercise of discretion on the part of the two arbitrators in the event they should be disposed to recommend a modified set of terms, which, pursuant to the evidence and other relevant considerations, they would regard as conforming to the standard of reasonableness.<sup>43</sup>

Skeptical of the view that final offer procedures promote negotiations,<sup>44</sup> Witney argued that such a result, even if true, should not preclude consideration of other goals:

Irrespective of the possible effect that final-offer selection may have in promoting agreement, proponents of this system of arbitration fail to take into account properly the cost that may have to be paid in the loss of flexibility and the increasing likelihood that the quality of the decision may be inferior. This observation is supported by the Indianapolis experience.<sup>45</sup>

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type may be described as the freedom to incorporate innovative plans into the contract award. Arbitrators generally feel that novel policies should be agreed upon by the parties, rather than imposed by an arbitration panel. Thus they will exercise their discretion by not adopting such offers in many cases. See *"Interest Arbitration's" Arrival as a Force in Public Agreements Described*, *supra* note 9, at B-16; *City of Dearborn v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP 545: E-1 (Mar.11, 1974); see notes 137-38 *infra* and accompanying text.

The City of Dearborn and the Dearborn Fire Fighters Association invoked § 8 of Public Act 312 to resolve their disputes over wages and fringe benefits.

41. *Dept. of Pub. Works of City of Indianapolis, Ind. v. AFSCME, Local 725*, 58 LAB. ARB. 1302 (June 14, 1972).

42. *Id.* at 1303, 1316, 1319-21. The parties agreed to resolve their dispute under unenacted Bill 280. It authorized the arbitrators to choose the most reasonable offer based on criteria similar to those included in the Michigan statute with the exception of a "catch-all" clause. The panel could not engage in "mediation-arbitration" so as to alter the final offers. The board found the union's wage offer more reasonable, but selected the city's proposal because the union's family insurance request rendered its offer too expensive. As a result, the board questioned the fairness of a quasi-penal system. Both the Eugene and Michigan statutes feature "med-arb" provisions which ease the possibilities of such hardships; see Part III of text *infra*.

43. Witney, *Final Offer Arbitration: The Indianapolis Experience*, *supra* note 33, at E-3.

44. See *id.* at E-6.

45. *Id.*



Witney's assessment can be criticized on several grounds. Perhaps most importantly, he bases his opinion upon a single decision.<sup>46</sup> In addition, the parties in this one case chose to use the final offer procedure only after they reached an impasse.<sup>47</sup> Therefore, the risk factor which at least theoretically induces settlement did not become operative at the outset. The arbitrators may have been presented with two offers more like those destined for a conventional arbitration procedure.<sup>48</sup> Witney's critique, however, possesses some validity. In the pressure for obtaining the most responsible offer, flexibility, precision and fairness may be lost. Time to reassess proposals and engage in further bargaining relieves some of the harshness of the system by pushing the parties closer together.

### III. FINAL OFFER ARBITRATION IN OPERATION

Currently, at least six governmental units<sup>49</sup> mandate final offer arbitration for some public employees. The Michigan and Eugene statutes most clearly present the different approaches toward a final offer system.<sup>50</sup>

#### A. MICHIGAN

1. *The Statute.* The Michigan Police and Firefighters Arbitration statute, Public Act 312,<sup>51</sup> was originally enacted as a conventional "interest arbitration" statute. Its purpose was to maintain the morale of essential employees who were prohibited from striking<sup>52</sup> by recognizing their unions as responsible bargaining units and providing them with a more effective way of realizing their legitimate demands. The statutory provisions of the final offer arbitra-

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46. *Id.*

47. See Long & Feuille, *supra* note 4, at 202 n.41.

48. See note 42 *supra*.

49. See note 20 *supra*.

50. Wisconsin is the only other state with significant experience under a final offer arbitration mechanism. It was rejected as a model primarily because the statutory provision applies only to fire fighters and police in cities with populations between 2,500 and 500,000. Wis. STAT. ANN. § 111.77(8)(1974). A separate section mandating conventional interest arbitration applies to Milwaukee. Wis. STAT. ANN. § 111.70(4)(jm)(1974). In addition, the parties in the intermediate-sized cities may agree to waive final offer arbitration and submit instead to conventional arbitration.

51. MICH. COMP. LAWS ANN. §§ 423.231-47 (Supp. 1972).

The Michigan Court of Appeals upheld the compulsory arbitration provision in Dearborn Fire Fighters Local No. 412, I.A.F.F. v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972).

52. MICH. COMP. LAWS ANN. § 423.231 (Supp. 1972).

tion law reflect a legislative intent to allow the continuation of negotiations and mediation for a maximum period of time. They reveal a desire to construct as flexible a situation as possible within the last best offer framework. The purpose of maximizing flexibility is to relieve the potentially arbitrary results inherent in this mechanism and to facilitate the parties' attempt to arrive at their own settlement.<sup>53</sup>

The statute establishes a timetable for the commencement of arbitration. After thirty days of unsuccessful mediation and fact finding, either party may "initiate binding arbitration proceedings. . . ."<sup>54</sup> However, to provide flexibility and to encourage a negotiated settlement, the statute permits waiver of the thirty day limit.<sup>55</sup>

The act also provides for the use of a tripartite arbitration panel to settle the impasse. Within ten days after the parties have requested arbitration, each side chooses a delegate to the arbitration panel.<sup>56</sup> The two partisan representatives are authorized to select a neutral chairman within five days after their own appointment.<sup>57</sup> Again, the statute's flexibility empowers the parties to waive the five day limit.<sup>58</sup> If, however, they fail to appoint a chairman during this period, either party "may request the chairman of the state labor mediation board to appoint the arbitrator" who will select a neutral person within seven days.<sup>59</sup>

Hearings, conducted by the chairman, commence within fifteen days and last thirty days "unless otherwise agreed by the parties."<sup>60</sup> The costs of the proceeding are shared by the parties and the state.<sup>61</sup> In an attempt to avoid rendering an arbitration award, the chairman "may remand the dispute to the parties for further collective bargaining" for not more than three weeks if he feels that further discussion would be useful.<sup>62</sup>

For the purposes of this article, section 8 of Public Act 312<sup>63</sup> is

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53. Cf. *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-6.

54. MICH. COMP. LAWS ANN. § 423.233 (Supp. 1972).

55. *Id.*

56. *Id.* § 423.234.

57. *Id.* § 423.235.

58. *Id.*

59. *Id.*

60. *Id.* § 423.236.

61. *Id.*

62. *Id.* § 423.237a. This procedure is known as "mediation-arbitration."

63. The act will expire on June 30, 1975. *Id.* § 423.245.

the crucial part of the statute. That section establishes the issue-by-issue method of final offer arbitration.<sup>64</sup> The panel must "identify the economic issues in dispute" before concluding the hearing.<sup>65</sup> The parties then present last offers on each economic issue during a period prescribed by the panel.<sup>66</sup> Since the board determines which issues are economic and in dispute, it is not completely deprived of discretion. Within thirty days after the hearings terminate,<sup>67</sup> the panel adopts one of the parties' last offers on each economic issue.<sup>68</sup> The conglomerate of these winning issues constitutes the arbitration award.

The statute prescribes the criteria on which the panel must base its decision.<sup>69</sup> Although appearing in different forms, this provision is common to all final offer arbitration statutes. It guides the panel in its selection of the more reasonable offer and reinforces the procedure's "incentive-to-bargain" goal.<sup>70</sup> The parties know in advance the standards to be utilized in rendering an award. When combined with the last offer feature of the statute, this section should compel each party to submit a realistic offer. Michigan enumerates a rather large number of considerations: lawful authority of the employer; stipulations of the parties; public welfare and financial ability of the governmental unit; comparison of wages, hours and conditions of employment of employees involved in the arbitration proceeding with those of employees performing similar services and with other employees generally in both public and private employment in comparable communities; cost of living; overall compensation presently received by the employees, including fringe benefits; changes in any of these circumstances during the arbitration proceedings; and such other factors normally and traditionally considered in determining wages, hours and conditions of employment.<sup>71</sup> Combined with three factors — the retention of conventional arbitration for non-economic disputes, the issue-by-issue approach in the economic area and the numerous enumerated cri-

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64. *Id.* § 423.238.

65. *Id.*

66. *Id.*

67. *Id.* The parties may agree to extend this period as well.

68. *Id.*

69. *Id.* § 423.239.

70. Long & Feuille, *supra* note 4, at 199; see *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-6.

71. MICH. COMP. LAWS ANN. § 423.239 (Supp. 1972).

teria—the last “catch-all” clause<sup>72</sup> significantly augments the arbitrators’ discretion in molding an order within a final offer arbitration context.<sup>73</sup> This clause also increases the parties’ uncertainty as to which offers will be selected by rendering the guides of “reasonableness” more amorphous.

2. *The Decisions.* The “last best offer” section became effective on January 1, 1973;<sup>74</sup> several awards have subsequently been rendered under its authority.

The central issue in the *Dearborn Firefighters* dispute was salary.<sup>75</sup> The arbitration panel had evidence of the pay scale for firemen in twenty-four Michigan communities. Based upon the Cost of Living Council’s guidelines, the city offered a 5.5 percent wage increase<sup>76</sup> placing Dearborn nineteenth of the twenty-four communities surveyed.<sup>77</sup> Relying upon Dearborn’s comparatively high state equalized valuation,<sup>78</sup> the comparatively low wages the city pays,<sup>79</sup> and the current inflation,<sup>80</sup> the union proposed a 10 percent wage raise for positions beginning with Fire Fighter I.<sup>81</sup>

The dispute involved an extremely large number of economic issues concerning wage and fringe benefits and conditions of employment. Not only did the controverted issues cover a wide range of areas, but also they were divided into numerous sub-issues.<sup>82</sup> This broad proliferation of issues may result in compromise orders rather

72. *Id.* § 423.239 (h). This subsection directs the panel to consider the factors relied upon in “. . . voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.”

73. *Id.* § 423.240. The “majority decision of the arbitration panel, if supported by competent, material and substantial evidence on the whole record, shall be final and binding upon the parties. . . .” § 423.242 permits review of the panel’s orders by the circuit court “only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. . . .”

74. See note 65 *supra* and accompanying text.

75. *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F.* (Mar. 6, 1974), on file with the *Columbia Journal of Law and Social Problems*.

76. *Id.* at 6-7, 15; Brief for Union at 7, *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F.* (Mar. 6, 1974).

77. *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F.* (Mar. 6, 1974). Dearborn historically ranked among the bottom third of cities surveyed; the city’s offer would have lowered Dearborn’s position even further. *Id.* at 12.

78. Brief for Union at 8, *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F.* (Mar. 6, 1974). The Ford Motor Company is situated in Dearborn.

79. *Id.*

80. *Id.* The brief relies upon reports issued by the Bureau of Labor Statistics on January 23, 1974 indicating a record 8.8 percent rise in consumer prices in 1973.

81. *Id.* at 3.

82. *E.g.*, medical benefits for retirees and the establishment of dental and optical plans.

than in the selection of the best last offers. Since the statute authorizes the arbitrators to define the economic issues in dispute,<sup>83</sup> the panel in this case classified the issues to achieve a maximum amount of discretion.<sup>84</sup> It focused on the wage increment<sup>85</sup> and then considered the less important proposals in light of its decision which found the union's wage offer more reasonable.<sup>86</sup>

The order's numerous references to the "substantial" wage increase granted<sup>87</sup> suggest two interpretations of the award. Both support the contention that it was a compromise decision. The first interpretation suggests that the board adopted the union's last offer on most of the significant issues, but selected a sufficient number of the city's proposals to satisfy that party. The panel, perhaps considering the union's wage offer too high, but still "less unreasonable"<sup>88</sup> than the city's, felt obligated to accept the city's last offers on other issues. Such a selection method could lead to the rejection of otherwise meritorious offers merely because of the size of the salary increase. Under the conventional arbitration system, the panel could avoid this problem by granting a lower percentage raise as well as other reasonable fringe benefits.<sup>89</sup>

The second interpretation still accepts the idea of a compromise, but focuses more on the substantive fairness of the decision,<sup>90</sup>

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83. MICH. COMP. LAWS ANN. § 423.238 (Supp. 1972).

84. It should be noted, however, that counsel for the fire fighters, Ronald R. Helveston, an advocate of a return to the interest arbitration system, contended that "there were too many issues in dispute" in this case. Telephone interview with Ronald R. Helveston in Detroit, Mich., Feb. 1974.

85. *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 6*, 29-30 (Mar. 6, 1974).

86. *Id.* at 15, 29-30. This method of decision is in accord with the statute's direction to examine the city's ability to pay and the compensation presently received by the employees. MICH. COMP. LAWS ANN. § 423.239 (c) and (f) (Supp. 1972).

87. *See, e.g., City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 29-30* (Mar. 6, 1974): "Because of the necessity to take care of first things first, namely, make Dearborn Fire Fighters competitively paid, the Chairman. . . is not prepared. . . to join in an order for a reduction in hours when there is a need to take care of other basic needs of the Dearborn Fire Fighters." *Id.* at 33: ". . . a cost of living provision for fire fighters is not universal. The wage increase recommended here is substantial. . . ."

88. *See* note 33 *supra* and accompanying text.

89. For a discussion of conventional arbitration as a compromise between the parties, and hence for a discussion of the problem with this interpretation, *see* notes 9-16 *supra* and accompanying text.

90. Fred Witney, the arbitration chairman in *Dept. of Pub. Works of City of Indianapolis, Ind. v. AFSCME, Local 725*, 58 LAB. ARB. 1302 (June 14, 1972) and author of *Final Offer Arbitration: The Indianapolis Experience*, 96 MONTHLY LAB. REV. 20 (May 1973), was concerned primarily with substantive fairness. However, he felt that a fair result was best attainable by according the arbitrator a maximum degree of discretion.

one of the criteria utilized in evaluating different types of final offer arbitration.<sup>91</sup> The decision does not find that the fire fighters' final wage offer was too high.<sup>92</sup> Although the panel often referred to the substantiality of the wage increase when rejecting other not unreasonable union offers, these statements may merely serve to advise future bargaining units that they must moderate their salary demands when proposing increased fringe benefits.<sup>93</sup> Moreover, by accepting several of the union's other final offers,<sup>94</sup> the panel indicated that it did not regard the salary offer as the maximum amount acceptable.<sup>95</sup>

When examined substantively, the award appears fair. After it dismissed the threshold question of the city's ability to pay,<sup>96</sup> the panel relied mainly on the simple criterion of the salaries paid to fire fighters in comparable communities.<sup>97</sup> Emphasizing Dearborn's industrial character<sup>98</sup> and high state equalized valuation,<sup>99</sup> the panel examined wages paid by industrial cities rather than by suburban areas.<sup>100</sup> The 10 percent wage increase raised Dearborn's rank,<sup>101</sup> making it competitive with comparable towns. The new wage scale by no means surpassed the salaries paid to fire fighters by other Michigan cities.<sup>102</sup> The panel relied on comparisons with similar

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91. See note 42 *supra*.

92. City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 15 (Mar 6, 1974): "We cannot say that the Fire Fighters have been unreasonable in their last offer."

93. See Howlett, *Contract Negotiation Arbitration in the Public Sector*, *supra* note 4; Long & Feuille, *supra* note 4, at 197.

94. City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 67 (Mar. 6, 1974).

95. But see *id.* at 2-3 of the dissent of Dudley L. Sherman, representative of the city. He argues that "the panel majority failed to give proper weight to the over-all cost of the added fringe benefits. . . ."

"The Dearborn Firefighter now receives 7.28% more fringes than the average Firefighter in the North Central Region, which would include all large Cities in the Mid-West. . . ."

96. *Id.* at 5-6, 8. If Dearborn had pleaded an inability to pay substantiated by corroborative evidence, the panel would probably not have engaged in a comparative analysis as authorized by § 9 of the Act.

97. *Id.* at 9-15.

98. *Id.* at 12.

99. *Id.* at 13-14.

100. *Id.* at 12. "The Chariman of the panel is attempting to point out that Dearborn is not a bedroom variety suburb. It is a viable community having particular fire fighter needs because of its large industrial base as well as its residential homes."

101. See note 78 *supra*.

102. City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 10 (Mar. 6, 1974); Brief for Union at 8, *id.* Dearborn Heights, one of the principal cities relied upon by the panel, pays a Fire Fighter I at the maximum \$1,405 more than Dearborn will pay under its new contract.

cities not to achieve identity of pay scales but to render an award acceptable in the market place.<sup>103</sup> This goal is purportedly achievable by final offer but not by conventional interest arbitration.<sup>104</sup> The salary award, based upon comparisons with other communities, appears to meet this aim.

The panel utilized the same criterion in assessing the parties' last best offers for the other disputed issues. If the union's proposals could be found in the fire fighters' contracts of similar communities, the panel usually adopted the union's offer.<sup>105</sup> A demand absent in other contracts often resulted in a rejection of the offer.<sup>106</sup> If future panels follow this board's almost exclusive reliance on this criterion, the uncertainty theoretically inherent in the Michigan statute due to the "catch-all"<sup>107</sup> clause will decrease.

The use of the "comparable community" standard might have a conservative effect<sup>108</sup> by encouraging the rejection of innovative last best offers.<sup>109</sup> Throughout the *Dearborn Fire Fighters* opinion, the chairman, when confronted with a new proposal, recommended further negotiations to the parties.<sup>110</sup>

Many of the questions raised by the "issue-by-issue" method appear in this decision. Thus, it serves as a useful focal point for assessing the Michigan experience and will consequently aid in the drafting of a model final offer arbitration statute for the larger metropolitan areas.<sup>111</sup> Although Dearborn has a population of over 100,000 and a fire fighters' union membership of only 114,<sup>112</sup> it is an industrial town qualitatively similar to Warren and Detroit.<sup>113</sup>

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103. *City of Dearborn v. Dearborn Fire Fighters*, Local 412, I.A.F.F. 9 (Mar. 6, 1974).

104. *See* note 32 *supra*.

105. *E.g.*, *City of Dearborn v. Dearborn Fire Fighters*, Local 412, I.A.F.F. 23-24 (Mar. 6, 1974). Note also that where the union's demand involved a very small expenditure in an already existing program, the panel granted its request without investigating practices in comparable communities. Thus, the board adopted the union's last best offer for a \$25.00 increase in the annual clothing allowance.

106. *See, e.g., id.* at 24-28.

107. *Compare* Long & Feuille, *supra* note 4, at 199.

108. Such an effect was moderately evident in this case. *See* note 110 *infra*.

109. *Cf.* Long & Feuille, *supra* note 4, at 201.

110. *City of Dearborn v. Dearborn Fire Fighters*, Local 412, I.A.F.F. 29, 33, 45 (Mar. 6, 1974). The panel commended innovative offers to the parties for further negotiation. But, the fact that the contract was due to terminate in a few months may qualify the assertion that the chairman was unwilling to initiate the new program. He may have preferred them to discuss these innovations during the impending negotiations.

111. *See* Part V *infra*.

112. *City of Dearborn v. Dearborn Fire Fighters*, Local 412, I.A.F.F. 5 (Mar. 6, 1974).

113. *See id.* at 9, 11, 13.

The fire fighters' pattern is evident in a simultaneous Dearborn proceeding. It involved the city and the Police Officers Association.<sup>114</sup> As in the Dearborn fire fighters' dispute,<sup>115</sup> a large number of issues remained unresolved.<sup>116</sup> The panel focused upon the wage proposals, whose resolution often was dispositive of the subsidiary emolument and fringe benefit issues.<sup>117</sup> However, the two Dearborn proceedings differed significantly in the disparity between the wage proposals offered by the unions and the city. Unlike the demands proffered by the fire fighters and the city, those advanced by the parties in the policemen's controversy were very similar.<sup>118</sup> The Association requested a 6.2 percent increase in pay while the city suggested a 5.5 percent raise with a six month postponement of the salary increase at the second and third steps.<sup>119</sup> Relying upon the 5.6 percent escalation of the cost of living index in the Detroit metropolitan area, a comparison of the salary increases for police in comparable communities, and Dearborn's solid financial base, the panel found both wage offers reasonable.<sup>120</sup> The arbitrators, finding the comparable community criterion most compelling, selected the union's salary offer.<sup>121</sup>

Arguably, the panel's conclusion that both wage offers were reasonable should have produced a more independent evaluation of the merits of the remaining proposals than occurred in the *Dearborn Fire Fighters* decision.<sup>122</sup> In the *Fire Fighters* case, the panel was more eager to compromise so as to compensate for granting the union's request for a large salary raise.<sup>123</sup> Although the panel also consciously allocated victories between the police and the city, the compromise method of decision was less striking. This comparison between the two proceedings suggests that greater sophistication on the part of the parties may lessen the incidence of arbitrary compromises. By modifying their wage demands, both the police and the

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114. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn* (Dec. 11, 1973), BNA Gov't EMP. REL. REP. 545: E-1 (Mar. 11, 1974).

115. *City of Dearborn v. Dearborn Firefighters, Local 412, I.A.F.F.* (Mar. 6, 1974).

116. See note 82 *supra* and accompanying text.

117. Compare notes 85 and 86 and accompanying text. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP. 545: E-1 (Mar. 11, 1974).

118. *Id.* at E-1.

119. *Id.*

120. *Id.* at E-1 to E-2.

121. *Id.* at E-2.

122. See notes 85, 86 and 117 and accompanying text.

123. See notes 87 and 88 and accompanying text.



city increased the possibility of realizing their secondary goals. The emergence of this pattern would signify the realization of a theoretical advantage of final offer arbitration. Awards, reflecting the parties' desires, would be rendered by a method maximizing their autonomy and minimizing the discretionary power of the arbitrators.

The Dearborn police panel tended towards compromise mainly in new areas, while deciding on a more principled basis where precedents in Dearborn existed. The union's advocacy of greater health coverage for retirees and their spouses resulted in an assessment of the value of such a program. Relying upon the expanded coverage given by comparable communities, the panel accepted the Association's offer.<sup>124</sup> However, the existence of some retiree benefits for Dearborn's police was a significant factor in the formulation of an award. This precedent allowed the arbitrators to merely order an increase in the level of benefits, rather than initiate new policy.

Although the panel examined the union's health coverage demand in the context of the previously granted wage increase, this consideration was mandated mainly by the statutory criterion concerning the city's financial ability rather than by a compulsion to compromise.<sup>125</sup> The board accepted the union's offer because it found the proposal to be a progressive measure. The panel was also impressed by the Association's suggestion of relieving the city's obligation to provide health benefits should the retiree obtain a new job with comparable coverage.<sup>126</sup> This qualification, lessening the city's financial burden, emphasized the fairness and merit of the offer. The effect of the final offer system upon the framing of this proposal is difficult to assess. However, the constraints of the mechanism, in addition to the parties' sophistication, may have contributed to this tempered request. The Association, desirous of obtaining greater coverage and aware of the risk factor present in the final offer framework, appears to have attempted to formulate its policy in the most responsible way.

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124. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP. 545: E-1, E-2 (Mar. 11, 1974).

125. Section 9 of Public Act 312 implicitly requires the panel to consider all the issues as a unit. The statute provides:

. . . the arbitration panel shall base its findings, opinions and order upon the following factors as applicable:

. . .

(c). . . the financial ability of the unit of government to meet those costs.

126. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP. 545: E-2 (Mar. 11, 1974).

The element of compromise was more apparent in the panel's resolution of disputes involving the more innovative fringe benefits. In rejecting the Association's proposal for percentage-based longevity pay, the panel chairman indicated his approval of the suggestion as a discrete item.<sup>127</sup> However, due to the union's request for a continuance of a gun allowance,<sup>128</sup> the panel felt constrained to deny the proposal on longevity pay:

. . . while the chairman is highly sympathetic to the Association's longevity request in and of itself, he feels constrained by the parties' continuing inclusion of the gun allowance not to add a provision which would so dramatically alter Dearborn's comparative ranking among southeastern Michigan communities.<sup>129</sup>

This statement indicates the arbitrators' conscious acceptance of a compromise solution.<sup>130</sup> Yet, because of the pressure on the parties to narrow their differences by submitting responsible offers, this particular compromise may be less crude than those reached under conventional interest arbitration. Conceptually, a final offer decree would seem to reflect more realistically both the parties' demands and the economic and social conditions of the market.<sup>131</sup> Under conventional interest arbitration, the panel might have reduced the gun allowance and awarded a modified version of the union's request for a percentage-based longevity pay. But this suggestion rests upon an unlikely assumption that similar offers would have been proposed under both systems.

The panel's primary reliance on the comparable community standard in evaluating the merits of the offers has important precedential value. Combined with the disregard of the "catch-all" clause, this emphasis on one criterion should serve as a future guide to the parties. By providing this reference to reasonable proposals, the board is advising each side to formulate carefully those offers of major concern. The police union's submission of a wage offer which

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127. *Id.* at E-2.

128. *Id.* It should be noted that the parties agreed to continue the gun allowance of \$300 a year.

129. *Id.* at E-2.

130. This approach was also followed in resolving the controversy over holidays. The panel divided the subject of holidays into two subsidiary issues, one dealing with the number of holidays and the other with the method of payment. Although the panel relied upon practices in similar communities, its acceptance of one of each party's proposals may indicate a compromise resolution. *See id.* at E-2 to E-3.

131. *See* note 18 *supra* and accompanying text.

maintained Dearborn's rank in its geographic area<sup>132</sup> enabled the arbitrators to choose the more reasonable union proposal on retiree benefits.<sup>133</sup> The latter also conformed with the basic practice of similar communities.<sup>134</sup> Due to the fire fighter's unreasonably large wage award, the union lost its fringe benefit proposals.<sup>135</sup>

But, as evidenced in both Dearborn proceedings, dispositive use of the comparable community criterion tends to maintain the status quo. Traditionally reluctant to innovate,<sup>136</sup> arbitrators applying the final offer mechanism often justify their rejection of an otherwise reasonable offer on the absence of that program in similar communities. Thus, the police union's proposal to include dental insurance in their new contract met with an unfavorable response from the panel because only three other cities had instituted this fringe benefit.<sup>137</sup> When confronted with a new idea, the chairman preferred "to leave most of the pioneering in labor agreements to voluntary collective bargaining, rather than impose new provisions through the compulsory process of statutory arbitration."<sup>138</sup>

A cautious role for arbitrators also favors the cities which usually do not suggest innovative policies. Although statutory arbitration purports to bolster labor's bargaining position,<sup>139</sup> leaving new proposals to the bargaining table or imposing a heavy burden of justification upon unions reduces final offer's advantages to labor. Unresponsiveness of management to reasonable union proposals for new fringe benefits may make employees dependent for their ultimate success upon conditions voluntarily acceded to elsewhere. Ideally, innovations should be agreed upon by the parties, rather than imposed by an outsider.<sup>140</sup> Pragmatically, however, the only tenable way to adopt financially reasonable proposals, particularly in disputes involving weaker unions, may be through arbitration.<sup>141</sup> By authorizing the panel to focus on many individual issues rather than

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132. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP. 545: E-1 (Mar. 11, 1974).

133. *Id.* at E-2.

134. *Id.*

135. See notes 108-10 *supra* and accompanying text.

136. See note 40 *supra*.

137. *City of Dearborn, Mich. v. Police Officers Ass'n of Dearborn*, BNA Gov't EMP. REL. REP. 545: E-1 to E-2 (Mar. 11, 1974).

138. *Id.*

139. See note 9 *supra* and accompanying text.

140. Cf. "Interest Arbitration's" Arrival as a Force in Public Agreements Described, *supra* note 9, at B-16.

141. See note 10 *supra* and accompanying text.

upon the reasonableness of a more encompassing package, the Michigan statute places novel suggestions in vulnerable positions. In practice, the Michigan panels have tended to select the unions' wage proposals while rejecting many of their fringe offers.<sup>142</sup>

Despite these limitations of the final offer system, the resulting decrees in both Dearborn controversies appear to be reasonably fair. They are economically competitive resolutions in the context both of packages won by unions in similar communities and of increases in the consumer price index. The police union's development of a sophisticated plan to obtain maximum retiree benefits<sup>143</sup> at a low cost to the city may signify a commitment by the parties to Michigan's method of impasse resolution. Moderate and well-developed plans which rely on precedent may also provide a satisfactory way of obtaining innovative, yet reasonable programs.

Although Michigan panels often prefer the municipalities' fringe offers to those submitted by the unions, they generally have found labor's last offers on most major wage issues more reasonable.<sup>144</sup>

Besides labor's successes in the Dearborn cases, the arbitration panel favored the Lansing firemen's proposals in a 1972 decision based on the final offer section.<sup>145</sup> Although the reason for the unions' victories might lie in the reasonableness of their offers, it also may be due to the quality of the cities' proposals. The Lansing panel

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142. See this section generally; e.g., *First "Final Offer" Arbitrations in Dearborn and Lowell Favor Unions on Wages But Cities on Most Economics Items*, BNA Gov't EMP. REL. REP. 545: B-10 (Mar. 11, 1974).

143. See note 126 *supra* and accompanying text.

144. But see *City of Mt. Clemens v. Command Officers' Unit Teamsters Local 214*, BNA Gov't EMP. REL. REP. 501: B-9 (Apr. 30, 1973) and *City of Kalamazoo, Mich. v. Local 394 Int'l Ass'n of Fire Fighters* (Mar. 1974), on file with the *Columbia Journal of Law and Social Problems*.

Although the union's wage offer was rejected in the *Mt. Clemens* case, the panel chairman, Richard Bloch, found the award one that "the parties can live with." In addition, the parties had reached a negotiated settlement on 90 percent of the issues. Therefore, final offer procedure was successful in this case because it was invoked for only one issue and it produced a fair result. It should be noted that the parties had voluntarily agreed to use § 8 of Public Act 312 since the proceedings began prior to January 1, 1973.

Due to a misunderstanding about the validity of a retroactive economic award, the *Kalamazoo* case cannot be utilized in this analysis. Most of the issues in the contract terminating on February 28, 1974 were resolved in favor of the city; the parties negotiated a settlement for the contract governing the period March 1, 1974 to December 31, 1974. According to Ronald Helveston, counsel to the fire fighters, the union was satisfied with that resolution. Telephone interview with Ronald R. Helveston in Detroit, Mich., March, 1974.

145. *City of Lansing v. Int'l Ass'n of Fire Fighters*, BNA Gov't EMP. REL. REP. 493: B-2 (Mar. 5, 1973).

examined the city's past practices in deciding to accept the union's overtime pay offer.<sup>146</sup> The board was reluctant to accept Lansing's proposal to withdraw benefits already conferred on the employees. In the Dearborn fire fighters' proceeding<sup>147</sup> the city often proposed no more than the maintenance of the status quo.<sup>148</sup> Such offers suggest an unwillingness or an inability on the cities' part to negotiate seriously<sup>149</sup> and indicate a need for a compulsory arbitration statute.<sup>150</sup> Since one criterion for any award is the city's ability to pay,<sup>151</sup> the unions' successful offers could not have been exorbitant. The arbitration decisions in these cases will thus have precedential value to the cities. Municipalities will be forced to compete with the unions by proposing more reasonable, and more generous, offers.

### B. EUGENE

1. *The Statute.* Eugene adopted an ordinance<sup>152</sup> providing for the resolution of contract disputes between the city and the policemen, fire fighters and municipal employees. Like the Michigan statute, it establishes a timetable so that the execution of the contract will precede the adoption of the budget.<sup>153</sup> The parties must begin bargaining by October 15, and if they still disagree by December 15, the city manager will request mediation. Either party may petition between January 2 and January 5 for bilateral negotiations. Both sides may continue to seek further mediation or fact-finding.

The final offer mechanism is activated twenty-five days later if discord persists. The procedure differs from Michigan's in two major ways. Each party may submit an alternate offer. An offer may consist of either a "complete draft of a proposed collective bargaining agreement" or a "package proposal on specific impasse items."

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146. *Id.* at B-4.

147. *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F.* (Mar. 6, 1974).

148. *Compare City of Mt. Clemens v. Command Officers' Unit Teamsters Local 214*, BNA Gov't EMP. REL. REP. 501: B-9 (APR. 30, 1973). Richard Bloch, the panel chairman, noted the "'city commission's uncompromising attitude.'"

149. *Id.* at B-9.

150. That Michigan labor groups favor the state statute is evidenced by the state police's desire to be covered under Public Act 312. The Michigan State Police Troopers Association claimed that the civil service department has an "'anti-state police attitude. . . . To us, this means giving state police the right to collective bargaining and binding arbitration.'" *Mich. State Police Seek Coverage of Police-Fire Arbitration Law*, BNA Gov't EMP. REL. REP. 493: B-15 (Mar. 5, 1973).

151. MICH. COMP. LAWS ANN. § 423.239 (c) (Supp. 1972).

152. EUGENE, ORE., CODE § 2.876 (1971).

153. Long & Feuille, *supra* note 4, at 191.

To promote settlements, the parties are permitted an additional thirty days to negotiate.<sup>154</sup> This continued pressure to negotiate compensates for the timetable's rigidity which tends to push the parties towards arbitration.<sup>155</sup> As another compensatory provision, the "med-arb" section authorizes the parties to continue to discuss their offers until either a settlement or an arbitration decision is reached. Moreover, as does the Michigan statute, the Eugene ordinance permits the "[t]ime limits relating to collective bargaining procedures preceding bilateral negotiations. . . [to] be waived or deferred by mutual agreement of the parties."<sup>156</sup> The costs of the entire proceeding are charged to the city.

Like the Michigan statute, the Eugene ordinance establishes a tripartite arbitration panel consisting of a neutral chairman and representatives of the city and the union.<sup>157</sup> Ten days after its formation, the panel meets and conducts hearings to consider the parties' final offers. Within another ten days, it must select the most reasonable package. The board can base its choice only on the content of the offer and may not review any evidence of the parties' collective bargaining positions unless they submitted specific impasse items rather than an entire package. In the latter case, the panel must assess the reasonableness of the final offers in light of prior agreements. Thus, in both situations, the arbitrators focus upon an entire package.

The Eugene ordinance includes fewer criteria than does the Michigan act.<sup>158</sup> The panel may consider only four factors: (1) past collective bargaining experiences and contracts between the parties; (2) comparison of wages, hours and conditions of employment of other employees engaged in comparable work, considering factors peculiar to the market area and the classifications involved; (3) comparisons of wages, hours and conditions of employment as reflected in municipalities in general, and in the same or similar municipalities reasonably proximate to the city; (4) the public welfare and the ability of the city to finance economic adjustments on the normal standard of city services.<sup>159</sup>

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154. *Id.* at 192.

155. *Id.* at 199.

156. EUGENE, ORE., CODE § 2.876 (10) (1971).

157. *Id.* The partisan delegates shall be appointed within four days after the bilateral negotiations terminate. They are authorized to select a chairman within the next four days.

158. Compare MICH. COMP. LAWS ANN. § 423.239 (Supp. 1972).

159. EUGENE, ORE., CODE § 2.876(7)(g) (1971).

The exclusion of a "catch-all"<sup>160</sup> clause and the obligation to select an entire package may restrict the arbitrators' discretion in rendering an order in a Eugene situation to a greater extent than in a Michigan procedure.<sup>161</sup> Since both greater certainty and risk in here in a single package plan specifying definite criteria, Oregon parties should submit more realistic offers.

In considering the limited experience in Eugene, however, it is important to remember that the dual offer system gives the arbitrators more flexibility and so decreases the parties' certainty.<sup>162</sup> Conceivably, each side may submit offers which it feels conform to the criteria established by the statute, but only one may represent the party's final negotiation position.<sup>163</sup> Although the bargaining representative is not obligated to submit an alternate proposal, he may be faced with the specter of two opposing offers, thus lowering the probability of a favorable award.<sup>164</sup> Therefore, the certainty produced by finite guidelines is combined with the uncertainty of a dual offer situation.<sup>165</sup> The latter creates the danger not only of losing entirely, but also of winning the award with an alternate that appeared more reasonable to the panel.<sup>166</sup> These risks suggest additional incentives for the parties to bargain. In order to determine the validity of these assumptions, Eugene's management-labor experience must be investigated.<sup>167</sup>

2. *The Decisions.* Enacted in 1971, Eugene's final offer arbitration ordinance<sup>168</sup> has had a greater precedential impact than the more recently passed Michigan statute. Peter Feuille and Gary Long analyzed subsequent labor relations in Eugene<sup>169</sup> and concluded that past experience promotes the successful operation of the package method by providing the parties with an incentive to set-

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160. See MICH. COMP. LAWS ANN. § 423.239 (h) (Supp. 1972).

161. This statement may be more true conceptually than practically as seen from the discussion of Michigan cases, notes 75-151 *supra* and accompanying text, where the "catch-all" clause was never invoked.

162. Long & Feuille, *supra* note 4, at 198.

163. *Id.*

164. *Id.*

165. *Id.*

166. Of course, the dual offer system also enables a party to submit a proposal catering to its constituents or whose statutory reasonableness may be uncertain. See *id.* at 198.

167. Experience under both the Eugene and Michigan statutes is still quite limited; so any evaluation based upon empirical evidence cannot be conclusive.

168. EUGENE, ORE., CODE § 2.876 (1971). For the events leading to its enactment, see Long & Feuille, *supra* note 4, at 191.

169. Long & Feuille, *supra* note 4.

tle.<sup>170</sup> To exemplify their assertion, the authors cite the first fire fighters' experience under the statute. The union lost because the chairman questioned the reasonableness of a single offer on one issue.<sup>171</sup> It had submitted two packages, each containing an objectionable manning requirement.<sup>172</sup> Although the panel found the rest of the union's package more acceptable, it selected the city's offer because of the union's offensive manning provision.<sup>173</sup> In their next contract dispute, the firemen and the city invoked arbitration to resolve only one issue, that of longevity pay.<sup>174</sup> Long and Feuille conclude that the first experience induced the parties to bargain more seriously, resulting in only one disputed issue.<sup>175</sup> However, the question of whether only the "package" scheme, rather than the Michigan plan, could have produced the following year's increased bargaining sophistication remains unresolved.<sup>176</sup>

The firemen's 1971-72 bargaining-inducing experience satisfied the fairness criterion<sup>177</sup> because the parties did not differ greatly on the wage issue.<sup>178</sup> If the union had proposed a larger, but still more reasonable salary increase, selection of the city's package because of labor's manning provision could be regarded as punitive.<sup>179</sup> In considering which type of final offer system to adopt, a legislature must balance the interest in achieving a just award<sup>180</sup> against the

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170. *Id.* at 196, 203. Although Long and Feuille recommend the use of the Eugene final offer system, they concede that it is still premature to formulate definitive conclusions:

. . . the Eugene experience suggests, but certainly does not prove, that final-offer arbitration, as compared to conventional arbitration, can increase the probability of negotiated settlements by requiring the parties to bargain in the context of an effective "strikelike" impasse resolution procedure. (203)

171. *Id.* at 193, 196-97.

172. *Id.* The union demanded that three people of designated rank operate certain fire vehicles.

173. *Id.* at 193-94.

174. *Id.* at 194-95. The arbitrators rejected the union's proposal "primarily because of the scarcity of similar pay plans in the relevant labor market."

175. *Id.* at 197. "[T]he incentive to bargain is increased primarily because of the 'sudden death' nature of the procedure: either party may 'lose the entire ball game'. . . ."

176. *But see id.* See also Part IV *infra*.

177. See Part I *supra*.

178. Long & Feuille, *supra* note 4, at 196. The city proposed a 6.0 or 6.5 percent wage increase while the union requested a raise of 8.6 or 7.4 percent.

179. Cf. Howlett, *Contract Negotiation Arbitration in the Public Sector*, *supra* note 4, at 73.

180. Compare conversation with Peter Feuille. He contends that the purpose of final offer arbitration is to punish the more "unreasonable" party and thus serve as a disincentive to the submission of disputes to arbitration. Mr. Feuille regards arbitration as an undesirable way to resolve disputes. Therefore, he is willing to sacrifice a just result if it will ultimately



interest in rapidly changing the habits of labor in the public sector from a dependence on arbitration to the seeking of negotiated settlements.<sup>181</sup>

Mediation-arbitration<sup>182</sup> or "med-arb" is another feature of the ordinance<sup>183</sup> which has been found to induce negotiations and settlements in Eugene.<sup>184</sup> "Med-arb" permits the panel to continue mediation efforts throughout the arbitration proceeding. Thus, the arbitrators are not disinterested judges, but may be active participants prior to rendering an award. During the 1971-72 negotiations for a police contract, the parties declared all items to be in dispute.<sup>185</sup> A wide gulf existed between the city and the union on the wage issue.<sup>186</sup> The "med-arb" provision permitted the labor arbitrator to inform the union delegate of the panel chairman's dissatisfaction with the size of its wage proposals.<sup>187</sup> The union then requested the city to recommence negotiations and the parties ultimately settled.<sup>188</sup> The following year, the police and the city reached agreement without even invoking arbitration.<sup>189</sup> Feuille and Long conclude that the policemen's first experience with final offer arbitra-

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lead to more settlements. Telephone interview with Peter Feuille in Eugene, Ore., March, 1974.

But he also recognizes arbitration's function as an outlet to satisfy constituent demands. For this reason, he supports Eugene's dual offer system which allows ". . . union leaders. . . [to] load one offer with many 'goodies' in order to satisfy membership pressures, but they may also make another offer that is structured in a more realistic manner." Long & Feuille, *supra* note 4, at 198.

It should also be noted that the Michigan final offer statute is perceived by some arbitrators as inducing results different from those intended at the time of enactment. Charles Rehms noted that the law's principal function is to promote bargaining between the parties by forcing municipalities to recognize the unions as a serious force: "Contrary to the expert expectations, the law's principal importance is 'not dispute resolution' but as a force pressuring 'the public employer to bargain in good faith. . . .' This was the only hammer that the police and the fire fighter unions had for getting themselves to the bargaining table." *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-4. In Eugene, as opposed to Michigan, the unions initially submitted the more unreasonable offers and the city always regarded the bargaining process seriously. See, e.g. note 171 *supra* and accompanying text.

181. See generally Part IV (B) *infra*.

182. See note 62 *supra* and note 235 *infra* and accompanying text.

183. EUGENE, ORE., CODE § 2.876 (1971).

184. Long & Feuille, *supra* note 4, at 192, 194, 198-99.

185. *Id.* at 194.

186. *Id.* The city proposed increases of either 6.2 or 6.7 percent; the union asked for a 15.9 or 13.0 percent raise.

187. *Id.*

188. *Id.*

189. *Id.* at 195-96.

tion induced them to reach a negotiated agreement with the city the following year.<sup>190</sup>

"Med-arb" was employed again to produce a settlement between the city and AFSCME during the 1972-73 negotiations.<sup>191</sup> The parties submitted offers, dealing with the size of the wage increment, which differed by more than 4 percent.<sup>192</sup> The partisan arbitrators relayed the chairman's preference for the city's alternate offer.<sup>193</sup> As a result, the parties agreed to a three year contract, providing for a 13 percent economic adjustment during the first two years and a wage reopener for the following year.<sup>194</sup>

Feuille and Long credit "med-arb" with pressuring the parties into a negotiated settlement.<sup>195</sup> Nevertheless, they imply that Eugene may be more conducive than other cities to successful "med-arb":<sup>196</sup>

Critics may legitimately question whether in most situations there would be an incentive for a party to negotiate further if it knew it was going to be awarded the decision. . . . The fact remains, however, that in Eugene most of the arbitration chairmen have perceived the city's offers as most reasonable, and yet city representatives have been willing to resume negotiations.<sup>197</sup>

Indeed, many of their conclusions are colored by the character of Eugene, a racially and socially homogeneous, economically secure city<sup>198</sup> of about 90,000 people and 800 public service employees.<sup>199</sup> In a city having poorer relations with its unions, the potential flaws of "med-arb" may be realized.<sup>200</sup>

"Med-arb" also may reintroduce into the final offer system some of the undesirable characteristics of conventional interest arbitration. By authorizing feedback from the arbitrators, "med-arb"

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190. *Id.* at 196.

191. *Id.* at 194. "Med-arb" was employed during the negotiations involving the second contract executed between the city and AFSCME since the ordinance's enactment. The parties had agreed on all the provisions to be included in their first contract with the exception of union security. The panel accepted the union's offer.

192. *Id.* at 195.

193. *Id.*

194. *Id.*

195. *Id.* at 198.

196. For a discussion of "med-arb's" inclusion in a model final offer arbitration statute, see Parts IV(A)(4) and IV(B)(2) *infra*.

197. Long & Feuille, *supra* note 4, at 199.

198. *Id.* at 200.

199. *Id.* at 190.

200. For a proposed solution to this problems, see Part V *infra*.

may encourage the parties to submit more excessive demands instead of inducing them to bargain seriously between themselves.

#### IV. COMPARATIVE ANALYSIS

Both the Michigan and Eugene statutes include provisions advantageous to the equitable resolution of contract disputes.<sup>201</sup> With a view towards the proposal of a model final offer arbitration statute for the public sector,<sup>202</sup> this section will assess the comparative merits of each law<sup>203</sup> in light of the goals of final offer arbitration.<sup>204</sup>

##### A. ENCOURAGEMENT OF NEGOTIATED SETTLEMENTS AND MORE REASONABLE BARGAINING POSITIONS

These two goals will be considered together since both deal with the most effective means to formulate issues in order to produce a settlement reflective of the competitive market. The same features of the final offer mechanism which encourage the parties to negotiate a settlement should also induce them to minimize their differences after an impasse develops. With the prospect of total loss of either an entire package,<sup>205</sup> a cluster of similar issues,<sup>206</sup> or a single issue,<sup>207</sup> each party, conscious of this strike-like analogue, theoretically should be driven to submit responsible offers reflective of their actual positions. If their respective proposals are identical, the need for arbitration will be obviated. But, if real differences remain, arbitrators should be faced with less extreme demands and fewer disputed issues under this new system.

1. *Method of Offer Selection.* Based upon the limited experience with the "package" and "issue-by-issue" methods, the Eugene plan appears to serve these aims more effectively. The Eugene experience reveals a higher incidence of partial or total settlements before an arbitration award could be rendered.<sup>208</sup> Although more settlements have occurred under the Michigan final offer statute than

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201. See Part III *supra*.

202. See Part V *infra*.

203. This section will also draw upon the other types of final offer arbitration discussed in this article.

204. See Part I *supra*.

205. See EUGENE, ORE., CODE § 2.876 (1971).

206. For a proposed final offer arbitration statute providing for a resolution of disputes by selection of the most reasonable offers on each subject, see Part V *infra*.

207. MICH. COMP. LAWS ANN. § 423.238 (Supp. 1972).

208. See Part III(B)(2) *supra*.

under the old interest arbitration statute,<sup>209</sup> the great proliferation of issues evident in some cases<sup>210</sup> suggests that issues are not narrowed before the initiation of arbitration to the same extent as in Eugene.

However, the number of disputed issues may be due to causes other than the ineffectual operation of Michigan's final offer plan.<sup>211</sup> Many of Michigan's cities, such as Dearborn, are heterogeneous and very industrialized, and thus present a different milieu for the settlement of labor disputes than does Eugene. As a socially homogeneous city without a history of bitter labor disputes,<sup>212</sup> Eugene may be better suited for the more extreme "package" method.<sup>213</sup> Since both labor and the city of Eugene favored the ordinance,<sup>214</sup> both sides may be more willing to negotiate.<sup>215</sup> In a more socially and racially complex city, political tensions, stronger union pressures and governmental financial difficulties<sup>216</sup> may inhibit such negotiations. Although Dearborn may not face the numerous problems of New York or Los Angeles, it is an industrial town where conflicts are more likely to occur.<sup>217</sup> The "issue-by-issue" method operated relatively well in Dearborn where the parties submitted fairly reasonable offers. This experience suggests a potentially successful role

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209. This information is based upon a conversation with Ronald Helveston, counsel to the Michigan fire fighters union. Interview with Helveston, *supra* note 144.

210. See note 82 *supra* and accompanying text.

211. Especially since the success of final offer arbitration depends partially upon its precedential effect, bargaining behavior of only one year can lead to no more than cautious speculations.

212. See note 198 *supra* and accompanying text.

213. Conversation with Gary Long.

214. For evidence that Michigan municipalities opposed a compulsory arbitration statute, see note 36 *supra*.

Ronald Helveston stated that the final offer arbitration statute represented a compromise between the union's support of the conventional interest arbitration statute and the cities' opposition to any compulsory arbitration law. Interview with Helveston, *supra* note 144.

215. See Long & Feuille, *supra* note 4, at 199, n.33:

City representatives place a high value on negotiated settlements because they believe that such agreements are more likely than imposed settlements to reflect both parties' objectives and that needed innovations can be implemented successfully only if voluntarily agreed to, and also because they desire to avoid the negative impact on union-management relations that may result when one party loses in arbitration.

216. See note 269 *infra* and accompanying text for a discussion of the effect of governmental budgetary considerations on the arbitration process.

217. The Wisconsin legislature distinguished between Milwaukee and the intermediate-sized towns by authorizing final offer arbitration for the latter only. WIS. STAT. ANN. § 111.70(4)(jm) (1974); WIS. STAT. ANN. § 111.77 (1974); see note 50 *supra*.

for "last best offer" in larger cities.

A modification of the Michigan blueprint may provide the most satisfactory approach.<sup>218</sup> By authorizing the submission of offers for each large group of issues, the new procedure could avoid the problem of proliferation and maintain the advantage of limited flexibility.<sup>219</sup> Thus, all increases in emoluments would be grouped as one issue while different types of fringe benefits would be classified as a separate issue.<sup>220</sup> This proposal would lessen the opportunity for compromise by precluding the arbitrators from dividing fringe offers between the parties. Confronted with discrete issues, the panel would select the more sensible offer for each subject.<sup>221</sup> This scheme would also allow the arbitrators to consider more rationally the economics of the package.<sup>222</sup> If the arbitration board found the union's wage proposal more reasonable, but considered its fringe offer too exorbitant, it could accept only the former. The result would be less punitive than the awards rendered in the Indianapolis<sup>223</sup> and the first Eugene firemen<sup>224</sup> cases. Yet this plan retains more of a "strike-like" effect<sup>225</sup> than is present under the Michigan statute. The union risks losing all of its fringe benefit demands if it requests too much, just as the city hazards greater expenditures due to an unwillingness to offer a realistic proposal.

2. *Number of Offers Submitted.* Though absent in the Michigan statute, the dual offer mechanism injects flexibility<sup>226</sup> into the otherwise rigid Eugene procedure. It permits a party uncertain of the reasonableness of some of its proposals to present more realistic offers as well.<sup>227</sup> To insert this additional flexibility into the Michigan blueprint could remove the pressure on each to submit an offer representing its final bargaining position. Moreover, since the sec-

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218. See Part V *infra*.

219. But see Long & Feuille, *supra* note 4, at 201-03, for an advocacy of a minimum of discretion for the arbitration panel.

220. The purpose of this plan is to avoid the situation in the *Dearborn Fire Fighters* case where proposals for medical, optical and dental programs constituted separate issues; see note 82 *supra* and accompanying text.

221. Non-economic issues would be included in this system since they may also be the subject of much contention and exaggerated offers by both sides.

222. Cf. *City of Dearborn v. Dearborn Fire Fighters*, Local 412, I.A.F.F. 3 (Mar. 6, 1974) (Sherman, Arb., dissenting).

223. See notes 41-42 *supra* and accompanying text.

224. See note 178 *supra* and accompanying text.

225. See note 170 *supra* and accompanying text.

226. See note 180 *supra* and accompanying text.

227. See Long & Feuille, *supra* note 4, at 201.

ond offer may merely be a concession to the demands of a party's constituency,<sup>228</sup> labor and management may invoke arbitration as a "face saving" device.<sup>229</sup> However, the dual offer plan is essential to the Eugene system because an entire contract constitutes the sole issue.<sup>230</sup> Under the scheme proffered, sufficient opportunity for compromise is available and any greater proliferation of offers would probably inhibit negotiations and the opportunities for settlement.<sup>231</sup>

3. *Timetable.* Theoretically, since the Eugene ordinance provides a shorter, more rigid timetable,<sup>232</sup> it might produce fewer settlements. However, as seen from the six cases decided under the statute, the parties were able to agree on at least some issues before the rendering of an award.<sup>233</sup> The crucial feature is waiverability, present in both the Michigan and Eugene statutes; for it provides the parties with an opportunity to continue negotiations if they so choose.<sup>234</sup> Nevertheless, to insure sufficient time for further discussions, a longer timetable is preferable, especially for the package method of arbitration. Since the parties' offers under this system deal with all the disputed issues, a greater period of time would permit them to settle at least some of their disagreements. The arbitrators would then be faced with a choice between two smaller packages. The possibility that a single provision would render an entire package unreasonable decreases.

Since the Michigan statute is much more flexible, arguably, a shorter timetable would pressure the parties into more serious bargaining postures. However, the "issue-by-issue" method may also require more time to reach a settlement. Under both types of arbi-

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228. *Id.*

229. *Id.* at 197 and 201.

230. This statement assumes that the parties are sufficiently sophisticated not to include the same controversial provision in both offers as was done by the Eugene fire fighters in their first contract experience under the ordinance.

231. Sometimes a dual offer is important to the losing party because the arbitrator may select the alternate proposal preferred by the loser. The panel chose the city's first offer in the first arbitration proceeding between the fire fighters and Eugene for this reason; see Long & Feuille, *supra* note 4, at 193-94.

232. The timetable is waivable by the parties.

233. Of course, it is impossible to determine whether more disagreements would be settled if the parties had a longer time during which to negotiate.

234. Some type of timetable is necessary, however, especially in the public sector. In addition to applying pressure similar to that produced by a strike threat, it enables the contract to be executed before the adoption of the budget. See also Long & Feuille, *supra* note 4, at 191.

tration, allowing additional time for negotiation after the submission of the parties' final offers could induce more serious evaluation of their differences. Thus, flexibility would be injected into the system internally, rather than from third-party arbitrators acting as mediators under a "med-arb" clause. In this respect, the final offer method resembles a judicial proceeding more than does conventional interest arbitration. Prohibiting the arbitrators from giving substantive opinions on the offers' merits prior to rendering an award would be consistent with their judicial posture. Although decrees initially might be more punitive, both the increase in the risk factor due to the parties' uncertainty as to the panel's position and the precedential value of the final order compensate for the decreased flexibility resulting from the absence of "med-arb."

4. *"Mediation-Arbitration" Clause.* Both the Michigan and the Eugene statutes contain a "med-arb" clause, but its use is more apparent in Eugene.<sup>235</sup> The inclusion of "med-arb" in the Eugene ordinance represents another concession to that rigid system. "Med-arb" has encountered success in Eugene,<sup>236</sup> where the parties listened seriously to the panel chairman's objections. It encouraged negotiated settlements and helped to narrow the gap between the parties' offers.

Whether "med-arb" will encourage settlements and the submission of reasonable offers more effectively under the Eugene plan or under the Michigan scheme is still speculative due to the different experiences and environments of the two areas. In Eugene, the unions lost almost all the arbitration decisions.<sup>237</sup> The city, which had advocated the ordinance,<sup>238</sup> agreed to renegotiate with the unions even after it learned that the chairmen preferred its offers.<sup>239</sup> The city's desire to maintain good relations with labor helps explain this moderate attitude.<sup>240</sup> A willingness to accommodate is important when the loss of an award due to one unreasonable offer could make the losing party antagonistic to the entire arbitration procedure.

Relationships between government and labor are not as harmo-

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235. *Id.* at 195-96. "Med-arb" was successfully used to resolve the disputes between the city and the police and AFSCME respectively.

236. *See Long & Feuille, supra* note 4, at 196.

237. *Id.*

238. *Id.* at 191.

239. *Id.* at 199.

240. *See* note 215 *supra* and accompanying text.

nious in Michigan where the municipalities had opposed the compulsory arbitration statute.<sup>241</sup> Unlike Eugene, these cities may refuse to make any concessions. This problem has not proved acute in Michigan since the unions generally have presented the more reasonable offers.<sup>242</sup> Furthermore, it is unlikely that a panel would decide for one party on every issue.<sup>243</sup> A "med-arb" procedure could serve to advise the parties of their respective strengths. The union might agree to a smaller salary increase in return for the city's assent to a fringe benefit.<sup>244</sup>

"Med-arb" has been used successfully in a non-statutory case.<sup>245</sup> The university and the Oakland chapter of the American Association of University Professors (AAUP) submitted four issues to an arbitration panel. Despite the initial disagreement, "med-arb" furthered the two goals of final offer arbitration:

The parties were thus able to reach final agreement on a number of issues. . . .

Further, even in the areas in which there was not general agreement, the parties in most cases substantially modified their positions looking toward possible agreement. In short, the parties negotiated in good faith under the terms of their unusual arbitration clause and came very close to reaching agreement on all issues. . . .<sup>246</sup>

Thus, at this time, no empirical evidence exists to substantiate the speculative criticism of "med-arb." Even if the risks posited by the authors of the Eugene experience<sup>247</sup> are real, their effect may be minimized under the final offer system.<sup>248</sup> A refusal by the party

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241. See note 36 *supra*.

242. See Part III(A)(2) *supra*.

243. See Long & Feuille, *supra* note 4, at 202-03.

244. Of course, should the city be preferred on most of the issues, it too might be willing to trade.

245. *Oakland Univ. v. Oakland Am. Ass'n of Univ. Professors*, BNA Gov't EMP. REL. REP. 526:B-15 (Oct. 22, 1973).

246. *Id.*

247. See note 197 *supra* and accompanying text.

248. See *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-4 - 5. Charles H. Rehmus, the Michigan arbitrator, advocates the use of "med-arb" as an effective way to promote settlement. He found this effect evident in both Eugene and Michigan:

This kind of flexibility in the timing and nature of final offers is obviously an open invitation to the arbitrators to mediate. The data suggest they are doing so. . . . [T]he experience under the Eugene . . . ordinance has been similar to Michigan's findings that "continued bargaining and/or mediation takes place all during the



submitting the more "reasonable" offer to continue negotiations may result in the other side's alteration of its offer, thus making it the more "reasonable" one. If "med-arb" had been used, the Eugene fire fighters could have deleted their manning provision and won the arbitration award.<sup>249</sup> Several decisions involving this hypothetical situation would possess great precedential value, inducing the "less reasonable" party to modify its offer and the "more reasonable" party to continue negotiations. The punitive nature of such an award is more justified after the invocation of "med-arb" than in the absence of notice of the panel's dissatisfaction.

The possibility that the use of "med-arb" will transform final offer arbitration into conventional arbitration is difficult to evaluate. Knowledge that subsequent modification is possible may encourage the parties to present more extreme offers. Although Eugene's experience with "med-arb" has been a positive one, the reason may again lie in the city's homogeneous character. Michigan offers a more varied history. "Med-arb" worked well in the *Oakland University* case<sup>250</sup> and the Kalamazoo proceeding<sup>251</sup> where the parties negotiated a settlement for their prospective contract. It was not used in the *Dearborn Fire Fighters* case.<sup>252</sup> Instead of "med-arb," the panel's opinions on many of the proposals may help the parties draft more realistic offers, and ultimately may lead them to a settlement, in their next contract dispute.

The possibility that the parties' last offers may not represent their final bargaining positions is real. An initially large gulf between the parties would diminish the opportunities for settlement and increase the likelihood of an award consisting of the "less unreasonable" offer.<sup>253</sup> However, the parties' uncertainty as to which offer the arbitrator will prefer and the omnipresent danger of total loss may replicate the effect of "med-arb."

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arbitration hearing and . . . has frequently resulted in a settlement without the need for an award."

See Part V *infra*.

In Wisconsin, "med-arb" is not employed as extensively because more mediation occurs before the parties turn to arbitration. See *Bargaining Enhanced in Michigan, Wisconsin by Novel Final-Offer Arbitration Statutes*, *supra* note 9, at B-5.

249. See note 173 *supra* and accompanying text.

250. *Oakland Univ. v. Oakland Am. Ass'n Univ. Professors*, BNA GOV'T EMPL. REL. REP. 526: B-15 (Oct. 22, 1973).

251. See note 144 *supra* and accompanying text.

252. See notes 75-86 *supra* and accompanying text.

253. See Witney, *Final Offer Arbitration: The Indianapolis Experience*, *supra* note 33, at E-4, 6.

Lastly, "med-arb" increases the arbitrators' discretion and consequently their satisfaction with the final offer system. Although greater discretion for arbitrators is not crucial to a successful final offer system, their increased amenability to the procedure may promote negotiations and settlements.

Thus, "med-arb" is a valuable asset to both types of final offer arbitration. It permits the parties to reach their own agreements after being advised of the panel's unofficial decision. Due to the greater risk involved in the Eugene plan, it may produce more settlements there as the disadvantaged party tries to eliminate its objectionable offer. But as manifested by the *Oakland* case, it has also played a valuable role in the "issue-by-issue" method.<sup>254</sup>

Although "med-arb" may induce settlements and the reformulation of offers, its dependence upon amiable parties and its resemblance to conventional arbitration may render it undesirable for widespread use. In the context of a system which is more flexible than Eugene's and which provides a compensatory substitute, "med-arb" may be neither necessary nor desirable. If an actual threat of relatively severe loss confronts the parties, final offer, without "med-arb," would better serve the end of maximum party autonomy.

5. *Enumerated Criteria: The Question of the "Catch-All" Clause.* The opponents of a "catch-all" clause argue that it creates too much uncertainty and prevents the parties from determining the criteria upon which arbitrators base their awards.<sup>255</sup> Greater certainty in this area theoretically would produce more reasonable offers. Advocates of this provision contend that it affords arbitrators more discretion in comparing the reasonableness of the offers.<sup>256</sup> Furthermore, it allows for the consideration of unforeseeable contingencies.

The first argument is more persuasive. By their disregard of the "catch-all" provision, Michigan arbitrators reveal a preference for the enumerated criteria. In particular, they have looked to past practices of the employer, the city's ability to pay and, perhaps most importantly, the conditions of employment in comparable

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254. Rehmus claims that "med-arb" contributed to a significantly higher percentage of settlements than had been achieved under the former conventional interest arbitration statute. See his comment in note 30 *supra*.

255. See Long & Feuille, *supra* note 4, at 199, 201-03.

256. Cf. Witney, *Final Offer Arbitration: The Indianapolis Experience*, *supra* note 33, at E-4.

communities.<sup>257</sup> In the *Dearborn Fire Fighters* decision,<sup>258</sup> the arbitrators clearly relied upon this last criterion. Since the arbitrators' preference is so blatant, the parties hopefully will draft proposals conforming to conditions prevalent in the market place;<sup>259</sup> such proposals should meet the reasonableness test if they satisfy the other criteria.

In Eugene, reliance upon the comparable community criterion resulted in the rejection of several union proposals.<sup>260</sup> As in Michigan, Eugene panels used this criterion to avoid rendering innovative awards,<sup>261</sup> thus forcing the parties to reach a negotiated agreement on new issues. Such a procedure is advantageous since innovations should be agreed upon by the parties and not imposed by the arbitrator.<sup>262</sup> Nevertheless, a new idea often may only be accepted if imposed by the arbitrator, particularly where labor relations are not as harmonious as in Eugene.<sup>263</sup> But to the extent that definite criteria promote bargaining, the goals of arbitration are furthered.<sup>264</sup>

#### B. ACHIEVING EQUITABLE ARBITRATION AWARDS

Although negotiated settlements may represent the ideal solution to labor disputes, they are not always attainable. Therefore, a procedure must be developed which permits an equitable resolution of labor impasses.<sup>265</sup> Some of the same provisions considered in the first section will be analyzed in light of this goal.

1. *Method of Selection.* The less punitive nature of the Michigan plan suggests that, on an individual basis, its awards will be more equitable than those rendered under the Eugene system. Since the bargaining-inducement features of the Michigan statute should encourage the submission of realistic offers,<sup>266</sup> a compromise decision may not necessarily be unfair.<sup>267</sup>

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257. See, e.g., *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 3*, 9 (Mar. 6, 1974).

258. *Id.*

259. See note 32 *supra*.

260. Long & Feuille, *supra* note 4, at 197.

261. *Id.*

262. Cf. *id.* at 202.

263. See note 269 *infra* and accompanying text.

264. See note 204 *supra* and accompanying text.

265. A fair award is one that is satisfactory to both sides, yet also competitive in the market place. Therefore, a compromise award under conventional interest arbitration might not satisfy both requirements.

266. See Part III(A)(1) *supra*.

267. Cf. note 7 *supra*.

The argument that the Eugene procedure ultimately produces fairer results is based upon the unrealizable prediction of the settlement of virtually every labor dispute.<sup>268</sup> To achieve an equitable result, the possibilities of inducing a settlement must be balanced against the factors contributing towards a coherent and workable award. Especially in larger cities with budget difficulties, arbitration is necessary to resolve many labor impasses. Unwilling to commit itself to a substantial economic outlay at negotiations, the city will often prefer to tell its citizenry and board of estimate that an arbitration panel ordered this expenditure.<sup>269</sup>

To achieve the fairest possible solution by means of final offer arbitration, a legislature could adopt a "subject-by-subject" scheme.<sup>270</sup> As a compromise between the Eugene and Michigan approaches, it virtually guarantees to each party at least partial success upon submission of a reasonable offer. Thus, the Eugene fire fighters<sup>271</sup> and the Indianapolis municipal employees<sup>272</sup> would have received awards consisting of their wage proposals and the cities' fringe offers.<sup>273</sup> An "issue-by-issue" method may permit more careful discrimination in molding an order. But the importance of the risk factor in pressuring parties into a market place resolution<sup>274</sup> and the need to avoid conventional arbitration-compromise decisions<sup>275</sup> argues for the "subject by subject" approach.

The "subject-by-subject" method, as compared with the Michigan system, would have the additional advantage of producing a more integrated award. If either side offers several related proposals, it is often more rational to accept them as a package.<sup>276</sup> The parties, aware of the method of decision, will be forced to calculate the total cost of their integrated plan.

2. "*Mediation-Arbitration*" Clause. This provision promotes equitable awards by permitting the parties to modify their last best offers to conform more closely with the statutory criteria. Thus, the

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268. Interview with Feuille, *supra* note 180.

269. Interview with Helveston, *supra* note 144.

270. See Part V *infra*.

271. See Long & Feuille, *supra* note 4, at 193-94.

272. See note 90 *supra*.

273. Although these cases would have been decided the same way under the "issue-by-issue" as under the "subject-by-subject" methods, *Dearborn Fire Fighters* would have been decided differently; the union would have lost its fringe package.

274. See note 36 *supra*.

275. See note 7 *supra*.

276. E.g., the medical benefits in *Dearborn Fire Fighters* should have been considered together.

arguments supportive of "med-arb" for the purposes of this part, are the same as those made in the previous section.<sup>277</sup> "Med-arb" has enabled parties to narrow the differences between their offers.<sup>278</sup> This process helps to insure that each offer is relatively close to the conditions prevailing in the relevant market area.<sup>279</sup>

In practice, arbitration awards following "med-arb" have been relatively fair. The panel in the *Oakland* case<sup>280</sup> selected the union's wage offer providing for an increase of 5.9 percent, the exact figure for the cost-of-living increase in the Detroit area.<sup>281</sup> Conforming also to the percentage increases granted by neighboring universities,<sup>282</sup> this figure represents a just result.

### C. THE AMOUNT OF LEVERAGE FOR LABOR

The unions prefer conventional interest arbitration to final offer arbitration because of a belief that they receive larger awards under the former scheme.<sup>283</sup> Based upon this partiality, their preference for the Michigan system over the Eugene plan is not surprising.<sup>284</sup> The justification for this preference lies in their perception that interest arbitration provides the maximum opportunity for compromise.<sup>285</sup> The penalties inherent in a final offer plan are absent under interest arbitration. The validity of these perceptions is reinforced by an examination of the governments' position. Opposed to conventional interest arbitration, Michigan cities grudgingly agreed to the adoption of a last best offer statute as a substitute for both interest resolution and the right to strike.<sup>286</sup> City officials in Eugene also assented to the passage of the final offer ordinance when they would have opposed conventional arbitration.<sup>287</sup>

Since the Michigan plan resembles conventional arbitration more closely than does the Eugene method, the unions should re-

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277. See Part IV(A)(4) *supra*.

278. See note 248 *supra*.

279. See note 265 *supra*.

280. *Oakland Univ. v. Oakland Am. Ass'n Univ. Professors*, BNA GOV'T EMP. REL. REP. 526: B-15 (Oct. 22, 1974).

281. *Id.* at B-16 to B-17.

282. *Id.* at B-17. The recently negotiated increases ranged from 5.5 to 6.0 percent.

283. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, *supra* note 4, at 1210.

284. Interview with Helveston, *supra* note 144.

285. See note 4 *supra*.

286. Interview with Helveston, *supra* note 144.

287. Interview with Feuille, *supra* note 180.

ceive more favorable awards under the Michigan statute. This proposition is supported by the arbitration experiences in Eugene and Michigan.<sup>288</sup> Labor's achievements in Michigan, as opposed to those in Oregon, may rest on other reasons such as its greater bargaining sophistication<sup>289</sup> and the Michigan cities' unwillingness to submit realistic offers.<sup>290</sup> Yet, undoubtedly, the arbitrators' tendency to issue some type of compromise award can be realized to a much greater extent in Michigan.<sup>291</sup>

Logically the Michigan system also extends greater leverage to the unions. By permitting a great proliferation of issues, the statute increases labor's opportunities of achieving significant successes. During the short history of final offer arbitration in Michigan, such a success pattern has emerged. The arbitrators generally have accepted the unions' reasonable wage offers and conservative fringe proposals.<sup>292</sup> The submission of more radical plans would not affect the success of the unions' more conventional requests and so would decrease the risk of severe loss. Since the city's ability to pay constitutes a ceiling on any award, union extravagance in Eugene results in rejection of its entire package and complete victory for the city.<sup>293</sup> Even the union's inclusion of a few innovative proposals in its package may result in the panel's selection of the city's offer under the Eugene ordinance. Consequently, the unions would be more reluctant to behave militantly and so would enjoy less leverage. However, in Michigan the panel may accept those union proposals whose sum does not exceed this "ability to pay" maximum. The remaining part of the award would be composed of the city's offers.

As a compromise proposal, the "subject-by-subject" scheme guards the unions from total loss by permitting a less refined separation of the issues. It also places greater pressure on the unions to submit less extravagant plans and forces the city to offer something more than the status quo.

Strikes have not occurred under either law partly because of the statutory prohibition.<sup>294</sup> However, since the unions have never au-

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288. See Part III *supra*.

289. But cf. Long & Feuille, *supra* note 4, at 201.

290. See *City of Dearborn v. Dearborn Fire Fighters, Local 412, I.A.F.F. 12* (Mar. 6, 1974).

291. See Long & Feuille, *supra* note 4, at 203.

292. See Part III(A)(2) *supra*.

293. See Part III(B)(2) *supra*.

294. Interviews with Peter Feuille and Ronald Helveston, *supra* notes 180, 144.

thorized a strike, a determination of the effects of final offer statutes on public employees' strikes is premature.

#### V. A MODEL FINAL OFFER ARBITRATION STATUTE

The proposed final offer arbitration statute<sup>295</sup> is a modification of the Michigan law.<sup>296</sup> It incorporates all the provisions of that statute except § 423.239 (h), the "catch-all" clause, and § 423.238, the section mandating the "issue-by-issue" selection. This statute substitutes a "subject-by-subject" approach, eliminates the use of "med-arb," and increases the flexibility of the timetable. By injecting flexibility into the final offer structure, both a looser timetable and a "med-arb" clause may produce more equitable results. Although these devices may be complementary, only the timetable is incorporated into the model statute. When the possibility of obtaining an equitable award is balanced against the increased input of the arbitrators and the relaxation of the pressure to submit the most reasonable offers, the disadvantages of "med-arb" are dominant. This assessment is particularly applicable to larger communities with more antagonistic parties. As a multi-offer system, the model statute excludes Eugene's dual offer provision which would unduly complicate the procedure. The statute also provides for mandatory arbitration for non-economic, as well as economic, issues.

As an amendment to the Michigan law, the proposed article reads: Sec. 8. At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other, its last offer of settlement on each issue. After the parties have submitted their last offers, they shall have ten days to continue negotiations and review their respective offers. The issues shall be grouped into the appropriate subjects, based upon the determination of the arbitration panel. There shall be three subject groups concerning wages, hours and conditions of employment, and fringe benefits respectively. The determination of the arbitration panel as to the issues in dispute and as to which subject these issues belong shall be conclusive. The arbitration panel shall not indicate its preference for any last offer on any subject or engage in mediation subsequent to the submission of the last offers. The arbitration

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295. See Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, *supra* note 7, at 227.

296. The proposed statute is designed primarily, but not exclusively, for larger cities.

panel, within thirty days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the subjects presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each subject, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9.

## VI. CONCLUSION

Final offer arbitration is a relatively new method of resolving labor disputes. Its use is confined almost exclusively to the public sector where it applies to essential employees. By providing for the selection of one party's best offer, final offer arbitration statutes represent a compromise between interest arbitration statutes and laws prohibiting strikes by essential public employees. The Eugene package system focuses upon the creation of a "strike-like" risk while the Michigan "issue-by-issue" method concentrates more on achieving an equitable result. This article proposes a model statute which involves a broader selection method to achieve both these goals.

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