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# THE OHIO BARGAINING IMPASSE PROCEDURES: AN OUTSIDER'S VIEW\*

*Arvid Anderson\*\**

**A**PRIL FOOL'S DAY is an appropriate time to evaluate the first year of experience under the new Ohio Public Employees' Collective Bargaining Law.<sup>1</sup> Although one year has passed on the calendar, there has been little actual administrative experience under the Act. But things seem to be progressing under the able leadership of Chairman Day and the fine staff of the Ohio Board, with the cooperation of the Ohio public sector labor-management community.

At a conference of this nature it is expected that the shortcomings of the statute will be pointed out and that many of its strengths will be overlooked or given scant attention. As one who has spent some thirty-five years administering both public and private sector bargaining laws in Wisconsin and New York City, I want to make a few observations about evaluating collective bargaining statutes.

My first experience with collective bargaining statutes was the Wisconsin Employment Peace Act<sup>2</sup> which was enacted in 1939, but lay somewhat dormant during the World War II years. This Wisconsin law of 1939 served as a model for the Taft-Hartley Act of 1947<sup>3</sup> and in large measure, the Landrum-Griffin Act of 1959.<sup>4</sup> The Wisconsin law, which also covered agricultural employees, was denounced by organized labor at the time of its enactment, but not today. Similarly, the Taft-Hartley Act of 1947 was denounced by organized labor at the time of its enactment as a "slave labor act."

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\* The text of this Article, with minor changes, was presented at the Ohio Public Sector Labor Law Colloquium, Case Western Reserve University School of Law, Cleveland, Ohio, April 1, 1984.

\*\* Chairman, New York City Office of Collective Bargaining.

1. OHIO REV. CODE ANN. §§ 4117.01-.23 (Page 1984).

2. WIS. STAT. ANN. §§ 111.01-.19 (West 1974), as last amended by ch. 361, L.1981.

3. Labor Management Relations Act, 1947, Pub. L. No. 40-101, 61 Stat. 136 (codified as amended in 29 U.S.C. § 141 *et seq.*).

4. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 153, 158-60, 164, 186, 187, 401 *et seq.*).

While there is an extensive debate this year (the half-century anniversary of the Wagner Act) over whether the Taft-Hartley Act should be repealed, my suspicion is that the criticism is directed at the current administration of the statute rather than with the substantive provisions which protect the right to organize and bargain collectively. One of the lessons that I have learned as an administrator of labor relations statutes is that good and fair administration, even of what is regarded as a bad law, can make an enormous difference in the acceptability of the objectives of the statute. By the same token, poor administration of the best possible law can result in the defeat of the statutory purpose. Finally, not even a good law with good administration is likely to succeed if there is strong opposition to its acceptance by the labor-management community.

A collective bargaining statute, unlike other statutes governing conditions of employment such as wages and hours,<sup>5</sup> age discrimination,<sup>6</sup> or equal employment opportunities,<sup>7</sup> does not depend on the provisions of that statute for determining the conditions of employment. Rather, it provides the means by which the parties can establish their own working and employment conditions. The point is that the cooperation of the parties in accepting the purposes of the statute, that collective bargaining is the best means for resolving questions concerning the employer's needs and the employee's desires, is essential to sound labor relations.

If that concept is accepted by the parties as a desirable precept, the law will work. As for the technical deficiencies in the statute, it must be remembered that lawyers can figure out how to do things as well as how not to. I am not suggesting that the statutory encumbrances be disregarded; but rather that they should not be used to defeat worthwhile objectives. Willard Wirtz once observed that what is required to make collective bargaining work in the public sector is an employer who will say "I will or I won't, rather than I can't." That kind of problem solving attitude can make a world of difference in making the statute work in the public interest.

My experience has also taught me that there is seldom a single dispute mechanism which is the absolute ideal for resolving labor disputes, especially in the public sector. The drafters of the Ohio statute have clearly recognized that fact by providing a considerable

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5. Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982).

6. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982).

7. Equal Employment Opportunity Act of 1972, Pub. L. No. 94-239, 86 Stat. 103 (codified as amended in 5 U.S.C. §§ 5108, 5314-16; 42 U.S.C. §§ 2000e, 2000e-1-6, 2000e-8, 2000e-9, 2000e-13-17).

variety of options which the parties may choose to settle their own dispute. These include conventional arbitration; last best offer either as a package, or issue by issue, or in combination thereof with the fact finders recommendation; or settlement by a citizens council of three persons residing within the jurisdiction of the public employer; and the broadest option of all, any other dispute settlement procedure mutually agreed to by the parties.<sup>8</sup> The latter option may prove to be the wisest, because it will afford the parties an opportunity to fashion a scheme which best suits their particular needs and desires. The wide variety of options afforded should enable the Ohio Public Employment Advisory and Counseling Effort Commission to make sound recommendations for both administrative and legislative improvements based upon actual experience. Advisory Committees have been very helpful in developing amendments to the Wisconsin and New York statutes.

In evaluating the progress that has been made under the Ohio statute, I respectfully suggest that you may want to examine the reported experiences of a number of other states with impasse procedures similar to Ohio's. Professor Richard Lester of Princeton University recently completed a major study on labor arbitration in state and local governments.<sup>9</sup> He examined the experience under the Pennsylvania,<sup>10</sup> New York,<sup>11</sup> Minnesota,<sup>12</sup> Iowa,<sup>13</sup> Michigan,<sup>14</sup> Massachusetts,<sup>15</sup> New Jersey,<sup>16</sup> Wisconsin<sup>17</sup> and New York City<sup>18</sup> collective bargaining laws. Three of those states, Pennsylvania,<sup>19</sup> New York<sup>20</sup> and Minnesota,<sup>21</sup> as well as New York City<sup>22</sup> have

8. OHIO REV. CODE ANN. § 4117.14(C)(1)(a-f) (Page 1980 & Supp. 1984).

9. R. LESTER, LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT: AN EXAMINATION OF EXPERIENCE IN EIGHT STATES AND NEW YORK CITY (1984).

10. PA. STAT. ANN. tit. 43, §§ 1101.101-2301 (Purdon Supp. 1985). *See also*, Police and Firefighters Arbitration Act, 1968 Pa. Laws 111.

11. N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1983 & Supp. 1984).

12. MINN. STAT. ANN. §§ 179.61-76 (West 1971) (codified as amended at § 179A .01-.25 (West Supp. 1985)).

13. IOWA CODE ANN. §§ 90.1-.27 (West 1984).

14. MICH. COMP. LAWS ANN. §§ 423.231-246 (1978 & Supp. 1985).

15. MASS. GEN. LAWS ANN. ch. 150E, § 8 (West 1974 & Supp. 1985).

16. N.J. STAT. ANN. §§ 34:13A-14- 13A-21 (West Supp. 1985).

17. WISC. STAT. ANN. §§ 111.80-.94 (West 1974 & Supp. 1985) (covering state employees); WISC. STAT. ANN. §§ 111.70-111.71 (West 1974 & Supp. 1985) (covering municipal employees); WISC. STAT. ANN. § 111.77 (West 1974 & Supp. 1985) (covering police and fire employees).

18. N.Y.C. ADMIN. CODE §§ 1173-1.0-11.0 (1975 & Supp. 1984).

19. PA. STAT. ANN. tit. 43, §§ 1101.801-806(a) (Purdon Supp. 1985).

20. N.Y. CIV. SERV. LAW § 209 (McKinney 1983 & Supp. 1984).

21. MINN. STAT. ANN. §§ 197A.16-.21 (West Supp. 1985).

22. N.Y.C. ADMIN. CODE § 1173-7.0 (1975 & Supp. 1984).

conventional arbitration as the last step in their impasse procedure. Michigan, Iowa, Wisconsin and New Jersey all have variations of the last offer procedure. Wisconsin has last offer as a single package for police and fire,<sup>23</sup> and has a "newer" statute, called the Med-Arb Statute,<sup>24</sup> for other municipal employees. Iowa has final offer, issue by issue, but also allows the arbitrator to pick the final offer of the fact finder.<sup>25</sup> That option is included as a possible option in your procedure. Michigan has final offer on an economic package, but issue by issue on other matters.<sup>26</sup> New Jersey has last offer with economic issues as a single package and non-economic on an issue by issue basis.<sup>27</sup>

Massachusetts has a unique Joint Labor-Management Committee system<sup>28</sup> which is more akin to conventional arbitration. The effectiveness of that statute has been affected by the enactment of Proposition Two and a Half<sup>29</sup> which eliminated the Committee's power to issue binding settlements. However, the uniquely persuasive efforts of Committee Chairman John Dunlop has been successful in maintaining the effectiveness of the Joint Committee to resolve a large number of disputes.

These statutory variations were developed to a considerable extent because of the joint efforts of labor and management, in the respective jurisdictions, in drafting a statute to meet their individual needs. Several of those statutes were amended from their original enactment based upon actual experience. Thus, when there is sufficient experience under the Ohio law it will be appropriate to evaluate whether the purposes of the statute have been fulfilled or whether changes are needed.

Certainly one of the major purposes of the statute is to resolve impasses and avoid strikes. Considering the unhappy experience of Ohio and a number of other jurisdictions with police and fire strikes, as well as lengthy teacher strikes, it certainly is worthwhile to evaluate whether the law has aided in eliminating strikes.

Another basis for evaluating the statute is whether the arbitration awards have been fair and issued with due regard for the carefully drafted statutory criteria. These criteria include not only

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23. WISC. STAT. ANN. § 111.77 (West 1974 & Supp. 1985).

24. *Id.* § 111.70.

25. IOWA CODE ANN. §§ 90.11-.12 (West 1984).

26. MICH. COMP. LAWS ANN. § 423.239 (1978 & Supp. 1985).

27. N.J. STAT. ANN. § 34:13A-16 (West Supp. 1985).

28. MASS. GEN. LAWS ANN. ch. 23C, § 1-4 (West Supp. 1985) (chairman of conciliation board has power to appoint joint labor management committees).

29. 1980 Mass. Acts 580.

comparability, in both public and private employment or similar work classifications; but also comparisons with other collectively bargained agreements, the interests and welfare of the public including ability to pay and the affect of the contract on the quality of public service, the lawful authority of the public employer, the stipulations of the parties and other relevant factors normally considered in collective bargaining, mediation, fact finding or arbitration in public and private employment.<sup>30</sup> The evaluation should consider how effectively the arbitrators, whether called fact finders, conciliators or arbitrators, performed their functions and whether they have acted largely as judges, or as legislators with a sensitive eye on the statutory standards and the needs of the parties. Evaluation of how the statute has worked should also take into account the record of judicial review.<sup>31</sup>

The Ohio statute has particularly emphasized, at least by implication, the importance of the legislative function, by requiring, in the case of fact finding, a three-fifths vote of the total membership of the legislative body as well as a three-fifths vote of the total membership of the employee organization to reject the recommendations.<sup>32</sup> Clearly, in such circumstances, the factor of acceptability of the fact finding process and recommendations is critical. Thus the ability of the neutrals as mediators, either in resolving the issues or in being sensitive to the areas of possible settlement or acceptability, is critically important. These traits are more akin to the legislative than to the judicial process.

It will be important for the conciliators when issuing final and binding awards, and in those circumstances where fact finding awards become final and binding, for the neutral to give persuasive reasons for the conclusions reached. It is not good enough to say that the evidence and statutory criteria have been reviewed. Neutrals should cite the specific basis for a wage award and a demonstration of ability to pay. This is necessary not only for the acceptability of the award under the statutory standards, but also in recognition of the legislative function, which has been delegated to the neutral. It should be obvious that the delegation of legislative authority should be exercised in accordance with the scope of bargaining allowed by the statute and that the neutrals should take care not to exceed the powers granted to them by the statute. The failure to do so will invite judicial review.

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30. OHIO REV. CODE ANN. § 4117.14(G)(7)(a-f) (Page 1980 & Supp. 1984).

31. *Id.* § 4117.14(H) (providing for judicial review in courts of common pleas).

32. *Id.* § 4117.14(C)(6).

Another basis for evaluation will be the effect of the statute on the collective bargaining process. Whether arbitration and fact finding have been a substitute for the collective bargaining process is difficult to evaluate. In some jurisdictions there will have been collective bargaining prior to the passage of the statute. Although I recognize that a large number of jurisdictions have participated in collective bargaining prior to the enactment of the statute, if Ohio's experience is similar to the other jurisdictions in Professor Lester's study, arbitration awards will induce other parties to reach an agreement. Experience in other states indicates that there is a high probability of settlement, especially where there is an opportunity for mediation either as a separate function or by the fact finder or neutral.

The fact that a considerable number of employers and employee organizations in Ohio have agreed voluntarily to dispute settlement procedures which are more realistic in terms of the statutory timetable is an encouraging sign. I have heard that much of the criticism of your current statute centers on the time procedures, charging they are unrealistic with either a sixty or ninety day bargaining period. The possibility of intervention by the Ohio Board on the forty-fifth day, with mediation for fifteen days and then fact finding for two weeks is a very compressed timetable, even if the parties and neutrals cooperate. But a fixed time schedule is not always bad. The drafter of the Ohio statute had to be aware that the absence of deadlines meant that parties would be unwilling to act. Deadlines are needed to make bargaining work. The Postal Service arbitration procedure worked very well with a similarly tight schedule. Since the strike is not permitted except under limited conditions, a stimulus to the bargaining process was needed and calendar deadlines are part of the solution. Based upon my own experience in New York City where we have few statutory deadlines, I can report that the absence of such deadlines can result in very prolonged negotiations or impasse procedures. There are no ideal solutions, but the best that can be found is one where the parties have developed their own processes which compel decisionmaking with reasonable opportunities to accommodate to changing circumstances.

The Ohio statute imposes substantial obligations on the Board for the administration of strike penalties. The Board, on the request of a public employer, who has obtained a temporary restraining order, is responsible for determining whether a strike constitutes a

threat to the health and safety of the community.<sup>33</sup> While most employees who are likely to cause such problems, if they strike, do not have the right to strike, other groups with the protected right to strike conceivably could cause such a problem. Employees of sewer and water departments, and health and hospital workers are examples of employees who could cause a threat to health and safety if they struck. It is my view that the determination as to whether a strike could constitute a genuine threat to health and safety is really an executive decision to be made by a governor, a mayor or county executive and not by a labor relations agency. Although I believe the authority to make such a determination can under some conditions be constitutionally delegated, I am not at all comfortable with a policy that requires such decisions to be made by an administrative body created for its labor relations expertise. My labor relations expertise as a mediator of a New York City sanitation strike was of little value when the Mayor, on the advice of the Commissioner of Health, declared a health crisis, sought an injunction and asked the governor to send the National Guard. The Ohio procedure does have the advantage of ensuring more consistent determinations since all of the determinations are made by a single agency, rather than by trial courts located throughout the state. Nevertheless, that objective could be achieved by creating a special judicial panel to hear all such cases.

Perhaps a larger policy issue has been created by charging the Board with the responsibility for enforcing the two for one penalty; the loss of two days pay for each day a worker is on an illegal strike.<sup>34</sup> I do not want to be misunderstood. I do not object to effective penalties for an illegal strike and, based on New York's experience, the two for one penalty is effective. My point is, however, that the responsibility for enforcing the penalty provisions places the Board in a position which could conflict with its duty to mediate or assist in the resolution of disputes. In addition, knowledge gained in the effort to settle the dispute by mediation could create the appearance that the Board exercised its penalty powers, or refused to exercise them, based on its knowledge of the parties conduct in mediation.

Let me illustrate. In the fall of 1973, New York City experienced a five and a half hour firefighters strike. Acting as a mediator, I learned certain facts about why the union called the strike,

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33. *Id.* § 4117.16(A).

34. *Id.* § 4117.23(B)(3).

which subsequently could have been the subject of both civil and criminal penalties. At the same time, if I had been called upon as the Chairman of the New York City Board of Collective Bargaining to impose the two for one penalty or to seek an injunction on the ground that the strike posed a threat to health and safety, which I fully believed it did since there were only 150 firefighters on duty at the time, I did not see how my role as a mediator and a strike penalty enforcer could be reconciled.

The appearance of fairness and impartiality is as important in the administration of a labor relations statute as is the existence of fairness and impartiality itself. Therefore, it is my view that strike penalties should be a matter for court enforcement, rather than enforcement by a labor relations agency.

Since the Ohio legislature has decided otherwise, my advice is that your Board do all it can to separate the responsibility for administration of the two functions; the settlement of disputes and enforcement of strike penalties. The New York State Public Employment Relations Board (PERB) has demonstrated that with some skillful administration it is possible to walk successfully the tightrope between dispute resolution and strike penalty enforcement. But its role has not been easy and the Chairman of the New York State PERB has consistently sought legislative change to relieve the Board of the burden of enforcing strike penalties, primarily because of the conflict of such duties with the Board's mediation role.

The potential conflict in New York PERB's statutory duties, which include the initiation of strike penalty procedures<sup>35</sup> and the enforcement of strike penalties,<sup>36</sup> was illustrated in a case involving a strike of security guards.<sup>37</sup> The union claimed the combined prosecutorial and adjudicative functions of the Board, when strike penalty enforcement proceedings are instituted by the Board on its own motion, violate the due process clauses of the first and fourteenth Amendments. The federal district court upheld the law stating that the combination of prosecutorial and adjudicative functions in one agency does not in itself offend the due process clause. The court noted, however, that special circumstances could be presented where the risk of unfairness is intolerably high and that this deter-

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35. N.Y. CIV. SERV. LAW § 210.3(c).

36. *Id.* § 210.3(f).

37. New York State Inspection Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO v. New York State PERB, 17 PUB. EMPLOYEE BARGAINING REP. (CCH) ¶ 7002 (1984).

mination is for the court to make on a case by case basis.<sup>38</sup>

In Ohio you are fortunate to have as a Board Member Judge Jack E. Day, whose substantial judicial experience will undoubtedly aid the Board in solving any dilemmas that may occur as a result of its dual role.

As for the legislative decision to grant the right to strike to public employees or to substitute arbitration when that right is denied, only the future will tell whether this is a wise choice. But I can say that the Ohio legislature has recognized the need for a stimulus to the bargaining process to enable both employees and employers to make decisions. As a philosopher once observed: nothing is as certain to focus a person's mind as the certainty that he is to be hung in the morning. Similarly, the decision to strike, to take a strike, or to submit to arbitration may stimulate the parties to reach settlements or to at least make reasonable proposals.

Finally, I would like to point out that mediation has proven to be one of the best tools to resolve public employee disputes. Iowa and Florida, which also rely heavily on the Federal Mediation and Conciliation Service (FMCS) for assistance, report good results. In one year Iowa had the benefit of FMCS in 215 cases. Of those cases, forty were assigned to ad hoc mediators and three were handled by staff mediators. Special Masters proceedings in Florida also have been aided greatly by the dedicated work of the FMCS. However, based on my observation of the experiences in Wisconsin, Michigan, Minnesota, New Jersey and New York, I strongly endorse the employment of permanent staff and ad hoc mediators. Mediation has no jurisdictional boundaries. Furthermore, even if the FMCS is able to fully meet the enormous seasonal demands of bargaining under the Ohio statute, there will be the need for constant communication between the Board, the mediator and the parties. Skilled staff mediators and good ad hoc mediators can perform a most valuable service in evaluating the status of a dispute and providing insight into the question of whether the legal proceedings, such as a claim of unfair practices, are merely tactical maneuvers or serious impediments to settlement.

Mediators can also be most helpful in resolving disputes over the scope of bargaining, either by eliminating some issues entirely or by rephrasing them so they do not pose an illegal threat to statutory management prerogatives.

The unique procedures of the Ohio Law, which require a three-

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38. *Id.*

fifths vote by both the legislative body of the employer and the employee organization, provide the mediators and the Board with an opportunity carefully to explain and clarify the proposals to be voted upon. Skilled dispute settlers can perform a useful service at this crucial time in the dispute settlement process.

As you know all too well, the statute tends to concentrate the dispute period to a limited time on the calendar, which may prove to be more than the FMCS can handle at a particular time. This is another reason for ad hoc and staff mediators.

I also believe that because the mutually agreed dispute resolution procedures authorized by the statute require finality, the statute creates an opportunity for the parties to employ experienced, available and acceptable ad hoc mediators and neutrals from neighboring jurisdictions, including Pennsylvania and Michigan. I am not sure whether the Ohio statute actually permits this, but I believe the point is worth raising. After all, those states have had public sector bargaining laws providing for arbitration, and in the case of Pennsylvania also the right to strike, for a number of years. Money spent on mediation service may also avoid far greater expenditures for legal causes.

As a member of the legal fraternity, I am not against full employment for the profession, but it is my belief that the Ohio statute contemplates that settlement is the name of the game and mediation is a faster, cheaper and often fairer way of achieving that objective rather than litigation.

Thus, I heartily endorse the suggestion of Chairman Day that your legislature authorize the employment of both ad hoc and staff members in addition to the great help that the FMCS can provide.

Remember, collective bargaining means change. One of the strongest features of collective bargaining is the possibility for the parties to change their dispute settlement procedures to meet their respective needs. The Ohio statute specifically encourages it.

Let me suggest to the critics of the Ohio statute or its administration that they also have an opportunity and a responsibility to do something about the problem, rather than depend solely upon the legislature or the administrators to deal with their difficulties. Again I refer to the chance for alternate voluntary dispute procedures. All in all, I suspect that an exciting beginning has occurred in Ohio in developing an orderly system for dispute settlement in the public sector. I am confident that, with good administration, and with the cooperation of the affected parties, any deficiencies in

the statute or its administration can be overcome in a manner that will allow the new collective bargaining statute and process to work in the public interest.