Wisconsin's Municipal Labor Law: A Need for Change

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WISCONSIN'S MUNICIPAL LABOR LAW: A NEED FOR CHANGE

CHARLES C. MULCAHY*
GARY M. RUESCH**

I. THE SCOPE OF THIS ARTICLE

Elected officials, public employee unions and the public have been struggling during the past twenty years to devise an equitable procedure to resolve collective bargaining and contract administration differences between public employers and public employees. During this period the relationship between the parties has matured in many respects; however, the ultimate question of how public sector collective bargaining disputes should be resolved remains a problem.

This article covers the Wisconsin experience. As the first state to pass a public employee bargaining law, Wisconsin has become the testing ground for numerous and varied public sector bargaining and contract administration procedures. The most recent experience, Mediation-Arbitration (MED/ARB), is now being reviewed by the Wisconsin Legislature. The primary question raised by this article is whether public employment bargaining impasse situations should continue to be resolved through compulsory binding arbitration.

Chapter 178 of the Wisconsin Laws of 1977 (MED/ARB Law) extended compulsory binding arbitration of bargaining impasses to nearly all municipal employees in Wisconsin. Public safety employees (law enforcement and firefighting personnel) continued to be covered by binding arbitration under different statutory provisions, while state employees are not subject to compulsory binding arbitration in any form.1

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2. Wis. Stat. § 111.80-.97 (1971). See also note 23 infra.
The law in Wisconsin, before the enactment of compulsory binding arbitration, served public employers, public employees and the public quite well. From 1959, when the original law was enacted, to 1978, when the compulsory binding arbitration amendments went into effect for most public employees, significant and laudatory improvements in the bargaining and contract administration processes were made. The vast majority of all disputes were resolved through effective collective bargaining; however, a few isolated, but highly publicized public sector strikes caused the Wisconsin Legislature to enact, perhaps prematurely, the MED/ARB Law.

3. The number of public employers affected by municipal strikes since the inception of the Municipal Employment Relations Act has been relatively miniscule. A comparison of the actual number of strikes in relation to the number of public employers yields the following result:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Public Employee Strikes Per Year</th>
<th>Percent of Public Employers Not Subject to Strike Activity Based on 1,118 Public Employers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970-71</td>
<td>12</td>
<td>99.8</td>
</tr>
<tr>
<td>1971-72</td>
<td>5</td>
<td>99.6</td>
</tr>
<tr>
<td>1972-73</td>
<td>19</td>
<td>98.3</td>
</tr>
<tr>
<td>1973-74</td>
<td>25</td>
<td>97.8</td>
</tr>
<tr>
<td>1974-75</td>
<td>7</td>
<td>99.4</td>
</tr>
<tr>
<td>1975-76</td>
<td>8</td>
<td>99.3</td>
</tr>
<tr>
<td>1976-77</td>
<td>7</td>
<td>99.4</td>
</tr>
</tbody>
</table>

The number of strikes per year was compiled from the annual reports of the Wisconsin Employment Relations Commission. The statistics are based on fiscal years beginning July 1 and ending June 30. There are 1,118 public employers in Wisconsin at the following levels: 187 cities, 391 villages, (according to Wisconsin Legislative Reference Bureau, 1979-80 Blue Book 777,780 (1979)), 72 counties, 50 K-8 school districts, 373 K-12 school districts, 10 union high schools, 16 VTAE, and 19 CESA, (according to Wisconsin Department of Public Instruction, [1979-80] Wisconsin Public School Directory 1-117 (1979)). It can safely be concluded that the vast majority of municipal employer-employee relationships in that period were devoid of strike activity.

4. The highly publicized strike in the Hortonville School District, which involved 95 teachers during the 1973-74 school year, ultimately resulted in the termination of all striking personnel. The employer subsequently replaced these teachers. [1973-75] Wis. Employment Rel. Comm'n Biennial Rep., at 21. The disruptive influence of public employee strikes was proven to the legislature in the lengthy 14 day strike by 20,000 state employees in 1976. Milwaukee Sentinel, July 6, 1977, at 1, col. 1. Ironically, the MED/ARB Law, which was enacted in the fall of 1977, excludes state employees from coverage of binding mediation arbitration procedures.
This article will focus attention upon whether the Wisconsin MED/ARB Law has served the public interest and the interest of the immediate parties. Of paramount importance to all concerned is the positive and orderly resolution of municipal labor problems. One unresolved question is whether outside parties or the parties themselves should resolve bargaining impasses. The Wisconsin experience sheds light upon that question.

Wisconsin adopted the nation's first law governing local collective bargaining in 1959. The Wisconsin Legislature thereafter provided a series of additional dispute resolution procedures. Until recently, collective bargaining remained the cornerstone of the Municipal Employment Relations Act (MERA) and encouraged the voluntary settlement of disputes. Elected municipal officials were thereby held accountable to the public. On January 1, 1978, however, a new law became effective which seriously weakened the effectiveness of the collective bargaining process in Wisconsin. It provided compulsory binding interest arbitration as a final means to

<table>
<thead>
<tr>
<th>Employer</th>
<th>Employees Involved</th>
<th>Number of Employees</th>
<th>Days on Strike</th>
<th>Worker Days Lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Superior Schools</td>
<td>Teachers</td>
<td>385</td>
<td>18</td>
<td>6,930</td>
</tr>
<tr>
<td>Racine Schools</td>
<td>Teachers</td>
<td>1,500</td>
<td>35</td>
<td>52,500</td>
</tr>
<tr>
<td>Racine Schools</td>
<td>Maintenance</td>
<td>230</td>
<td>35</td>
<td>8,050</td>
</tr>
<tr>
<td>Milwaukee Schools</td>
<td>Teachers</td>
<td>6,000</td>
<td>17</td>
<td>102,000</td>
</tr>
<tr>
<td>Milwaukee Schools</td>
<td>Aides</td>
<td>1,800</td>
<td>17</td>
<td>30,600</td>
</tr>
<tr>
<td>Milwaukee Schools</td>
<td>Substitutes</td>
<td>900</td>
<td>17</td>
<td>15,300</td>
</tr>
<tr>
<td>Milwaukee Schools</td>
<td>Accountants</td>
<td>15</td>
<td>17</td>
<td>255</td>
</tr>
</tbody>
</table>

5. 1959 Wis. Laws ch. 509, § 1.
6. In 1961 non-binding fact finding was established. 1961 Wis. Laws ch. 663, § 2. In 1963 the Wisconsin Employment Relations Board was authorized to provide mediation services. 1963 Wis. Laws chs. 6 and 87. In 1971 compulsory final and binding interest arbitration for law enforcement and firefighting personnel was established. 1971 Wis. Laws chs. 246 and 247.
7. See text accompanying notes 46-73 infra.
settle disputes involving municipal employees other than law enforcement and firefighting personnel.\(^8\)

The MED/ARB Law is not consistent with the historical development of MERA. It was enacted in response to political pressure when the state was experiencing a few illegal public employee strikes.\(^9\) Commendably, the Legislature anticipated the need to reconsider this impasse resolution procedure by writing a "sunset" provision into the law.\(^10\) As the date of the "sunset" provision draws near, the Wisconsin Legislature is evaluating the MED/ARB Law to determine whether its practical application has served the interests of the public. The "sunset" provision creates a unique opportunity to review the effectiveness of public sector collective bargaining under MED/ARB in Wisconsin.

This article will examine the development of Wisconsin's Municipal Employment Relations Act. Special attention will be given to its reliance on collective bargaining as its foundation, and also to the development of alternative impasse resolution procedures. In addition, the practical effect of MED/ARB on the public, municipal employers, unions and municipal employees will be discussed. The article will conclude that the public interest would be best served by expanding the right to strike of certain public employees and by curtailing the use of MED/ARB as a method of dispute resolution.

II. THE MUNICIPAL EMPLOYMENT RELATIONS ACT

A. Development

The foundation of the Municipal Employment Relations

\(^8\) 1977 Wis. Laws ch. 178. Interest arbitration is arbitration of new contract terms (employer-employee "interest"). Interest arbitration should be distinguished from grievance arbitration, which is usually the final step in a grievance procedure in which the arbitrator makes a definite decision on an issue in dispute arising under the terms of an existing labor contract.

\(^9\) See notes 3 and 4 supra.

\(^10\) 1977 Wis. Laws ch. 178, § 17(1) provides:

Section 111.70(1)(nm), (3)(a)7 and (b)6, (4)(cm) and (7m) of the statutes, as created by this act, shall be in effect from the effective date of this act until October 31, 1981, and after that date are void, except that any proceeding under such provisions pending on October 31, 1981, shall continue to be subject to such provisions, until finally settled between the parties or adjudicated by arbitration, the Employment Relations Commission or a court of competent jurisdiction.
Act (MERA) is collective bargaining. As such, the development of collective bargaining under MERA is the natural background against which MED/ARB should be evaluated. In addition, by understanding the evolution of collective bargaining under MERA, changes consistent with its underlying philosophy can be developed to strengthen public sector collective bargaining in Wisconsin.

1. 1959: The Original Act

The original MERA established certain basic rights and procedures. Although coverage of the Act was limited, it was significant because it gave municipal employees the right to self-organize, to affiliate with labor organizations of their own choice, and to negotiate with their municipal employers. MERA limited these negotiations to questions of wages, hours and conditions of employment. The original enactment contained no impasse resolution procedures, no involvement of the Wisconsin Employment Relations Board (WERB), and no requirement to negotiate in good faith.

2. 1961: Mediation And Fact Finding

In 1961 the scope of MERA was significantly expanded. The new law expressly prohibited public employee strikes, and the WERB was granted the power to administer portions of the Act. The WERB had the authority to function as a mediator in disputes and to administer the fact finding provision in the law. Mediation by the WERB was authorized only after a request by both parties. Fact finding, however, could be initiated unilaterally under limited circumstances.

11. For example, Wis. Stat. § 111.70 (1959) was silent on the prohibition against inclusion of supervisory employees in the bargaining unit, the definition of "supervisory," "confidential," and "craft" employees, the scope of bargaining, and the contract bar rule.
13. Id.
14. The WERB subsequently was renamed the Wisconsin Employment Relations Commission (WERC).
The addition of mediation and fact finding to MERA was intended to encourage the collective bargaining process. Both procedures complement the process and facilitate voluntary settlements:

Mediation should be viewed as a continuation of the bargaining process rather than as a substitute for it. Because mediation neither alters the bargaining positions of the parties nor favors any specific group, it is adaptable to, and can operate within, a given political power structure. It is useful not only for its intrinsic value as an impasse procedure but also as a tool for educating parties inexperienced in bargaining.

... Fact-finding ... is fundamentally designed to persuade the parties to come to a voluntary agreement within the parameters of the public sector collective bargaining process.\textsuperscript{19}

MERA, as amended in 1961, was the basis for the evolution of collective bargaining for the remainder of the decade. The recognition of the rights of public employees and the establishment of procedures to resolve collective bargaining impasses served as the catalyst for the growth of public sector labor organizations. The law required voluntary agreements between the parties since it did not provide for compulsory, binding impasse procedures. This statutory scheme recognized the common interests of both parties and encouraged them to work together:

Public management and public unions (the parties) face many similar obstacles in attempting to resolve municipal labor problems. Problem resolution, whether in contract negotiation or administration, should be the goal of both parties. When the parties work together to resolve municipal labor problems, they probably will provide better municipal service at a more reasonable cost and the public employee will be treated fairly.

... Perhaps the reasons may be different, but both parties have a similar interest in serving the public. If efficient and effective public services are provided, both parties will bene-

fit. If labor problems result in disruptive, inefficient or suspended services both parties will ultimately suffer.20

Voluntary collective bargaining capitalizes on a commonality of interest. The dialogue occurring within the collective bargaining process increases understanding and solidifies the relationship between the parties. During the 1960’s, MERA relied on this relationship and the mutual interests of the parties to facilitate the voluntary settlement of municipal labor disputes. Collective bargaining was firmly established in practice as well as in theory as the foundation of municipal labor relations.

3. 1971: Protective Services Arbitration

As municipal labor relations became more complex, the WERC was called upon to provide additional assistance to the parties.21 In 1971, comprehensive revisions and additions were made to MERA by the legislature.22 These changes can be divided into two categories: (1) definitions and procedural sections to clarify MERA; (2) final and binding compulsory municipal interest arbitration (MIA) for law enforcement and firefighting personnel.23

Prior to the 1971 MIA amendments, law enforcement personnel were not considered “municipal employees.”24 They were expressly granted the limited use of fact finding, but by statutory definition were not entitled to other municipal employee rights in MERA.25 Police, deputy sheriffs and county


23. In addition, Wis. Stat. § 111.70(4)(jm) (1971) established a compulsory binding interest arbitration procedure for members of the Milwaukee Police Department which was separate from the procedure in Wis. Stat. § 111.77 (1971). Members of the Milwaukee Fire Department were not included under these provisions.

24. “Municipal employee” was defined in Wis. Stat. § 111.70(b) (1969) as: “any employee of a municipal employer except city and village policemen, sheriff’s deputies, and county traffic officers.”

25. Wis. Stat. § 111.70(4)(j) (1969), provided:

In any case in which a majority of the members of a police or sheriff or county traffic officer department shall petition the governing body for changes or improvements in the wages, hours or working conditions and designates a
traffic officers were denied the right to petition the WERC for mediation. Firefighters, however, were included in the definition of municipal employees and granted all of the rights and responsibilities in MERA.\textsuperscript{26}

The 1971 Amendments placed law enforcement personnel, who formerly had limited rights under MERA, in the forefront of municipal labor relations in Wisconsin, by giving them access to binding compulsory interest arbitration. The 1971 Amendments also gave firefighters this right. The amendments were made after vital community services had been interrupted by strikes of protective services unions.\textsuperscript{27} These interruptions had indicated to the legislature the need for a change in the collective bargaining process.\textsuperscript{28} The enactment of compulsory final and binding interest arbitration for firefighting and law enforcement personnel reflected a policy judgment that the public's right to continued protective services outweighed the union's right to strike.\textsuperscript{29}

The 1971 Amendments contained a "sunset" provision\textsuperscript{30} which was subsequently voided.\textsuperscript{31} The reenactment of these amendments indicated the willingness of the Wisconsin Legislature to remove the requirement of voluntary settlements in exchange for an assurance of uninterrupted protective services;\textsuperscript{32} the parties would no longer be required to resolve their differences between themselves.

\begin{footnotes}
\item[26] Wis. Stat. §§ 111.70(4)(e) to .70(4)(g) (1969) governed the fact finding procedure.
\item[28] Coughlin & Rader, Right to Strike and Compulsory Arbitration: Panacea or Placebo? 58 Marq. L. Rev. 205, 207 (1975) [hereinafter cited as Coughlin & Rader].
\item[29] Coughlin & Rader, supra note 27, at 235.
\item[31] 30. 1971 Wis. Laws ch. 64(4).
\item[32] Coughlin & Rader, supra note 27, at 235.
\end{footnotes}
4. 1977: MED/ARB

Following the precedent of the 1971 Amendments and responding to the political climate,\(^3\) the Wisconsin Legislature in 1977 established compulsory final and binding interest arbitration for nearly all municipal employees not governed by the 1971 Amendments.\(^4\) In addition, the legislature commissioned a study to evaluate the impact of the law on municipal governments and municipal labor relations.\(^5\) The law contained a "sunset" provision which voids the binding arbitration provisions after October 31, 1981.\(^6\)

B. Impasse Resolution Procedures Currently Contained in The Municipal Employment Relations Act

1. Mediation.

Mediation has been defined as the "intercession of an impartial third person in a dispute for the purpose of assisting the parties to resolve their differences voluntarily."\(^7\) The WERC may function as a mediator in labor disputes\(^8\) or may designate a person to act as a mediator. This may be done

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33. The political climate is demonstrated by the following editorial excerpt:
Lately several newspaper editorials have endorsed compulsory binding arbitration of disputes between public employers and their organized employees. This smacks of expediency.

. . . . .
The editorials cite the number of public employe strikes since 1962 (105, they say). Then, along with many others, the editorial writers over-react. They forget that for every time there has been a strike, there have been hundreds of times when agreements have been reached peacefully. It would be most unfortunate if the legislature were to enact a compulsory binding arbitration law, which most informed labor experts agree would seriously undermine the true collective bargaining process, as a knee-jerk reaction to Hortonville. Yes, the Hortonville situation was serious and unfortunate, but it has been almost one of a kind.

69 THE MUNICIPALITY 107 (June 1974).

34. 1977 Wis. Laws ch. 178 governs municipal employees other than law enforcement and firefighting personnel.

35. 1977 Wis. Laws ch. 178(15) provides: "The legislative council is directed to conduct a study of the effect of this act on the collective bargaining process in municipal employment. The study shall evaluate the effect of the act on all aspects of collective bargaining . . . ."

36. See note 10 supra.


38. Mediation is available for municipal labor disputes, Wis. Stat.
upon the request of one or both parties or upon the initiation of the WERC. The function of the mediator is to encourage voluntary settlement by the parties. The mediator has no power to compel a settlement, but rather employs the power of persuasion. Since the adoption of the MED/ARB Law in 1977, the rate for mediations resulting in settlements has been reduced by nearly half from previous levels.\textsuperscript{39}

2. Fact Finding.

Section 111.70(4)(c)(3) provides that either party, or the parties jointly, may petition the WERC to initiate fact finding upon the fulfillment of two conditions: that the dispute has not been settled after a reasonable period of negotiations; and, that the settlement procedures, if any, established by the parties have been exhausted. Upon receipt of a petition to initiate fact finding, the WERC will conduct an investigation to determine whether or not a deadlock, in fact, exists. After its investigation, the WERC will certify the results. If the WERC decides that fact finding should be initiated, it will appoint a qualified, disinterested person or a three member panel, when jointly requested by the parties, to function as a fact finder. Section 111.70(4)(c)(3)(b) gives the fact finder the authority to establish dates and the place of the hearing. The WERC is authorized to establish rules for the conduct of the hearing and to issue subpoenas for the hearing, if requested. The fact finder is required to make written findings of fact and recom-

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
Before MED/ARB Available & Percent Municipal Mediation Cases Settled \\
\hline
Fiscal 1973-75 & 87.8\% \\
Fiscal 1975-77 & 90.8\% \\
\hline
After MED/ARB Available & Percent Municipal Mediation Cases Settled \\
\hline
Calendar 1978 & 52.8\% \\
Calendar 1979 & 53.7\% \\
\hline
\end{tabular}
\caption{TABLE 3}
\end{table}

\textsuperscript{39} Wisconsin Center for Public Policy, Interim Report to Legislative Council Special Committee 1, (April 29, 1980).
mendations for solution of the dispute and have them served upon the parties and the WERC.

Within thirty days of the receipt of the fact finder's recommendations, or within the time period mutually agreed upon by the parties, each party is required to advise the other, in writing, of its acceptance or rejection, in whole or in part, of the fact finder's recommendation. In addition, the parties must send a copy of that notice to the WERC in Madison. The cost of the fact finder is to be divided equally between the parties.

The theory behind fact finding has been explained as follows:

Theoretically, fact-finding in its final stages is a strike substitute procedure by which dispute issues are set forth, analyzed and presented to the municipal employer and the union by the fact finder along with his recommendation for settlement. The fact finding process was designed to allow both parties, the municipal employer (elected officials) and the municipal union, to test the public support for their position by citing the fact finder's recommendations as justification for their bargaining posture. Supposedly, neither the elected officials nor the union are placed in a decision-making position without the support of the public, the ultimate employer.40

As a practical matter, municipal employees and unions have been reluctant to use fact finding subsequent to the enactment of compulsory binding arbitration. The time, expenses and procedures are similar to arbitration, but the decision is not binding on either party. Furthermore, the fact finding provision in section 111.70(4)(c) is not available to all municipal employees covered by the MED/ARB Law.41

3. Compulsory Final and Binding Interest Arbitration of Disputes Involving Law Enforcement Personnel and Firefighters.

Section 111.77 of the Wisconsin Statutes provides for final and binding compulsory interest arbitration of collective bargaining disputes involving all law enforcement personnel

40. Coughlin & Rader, supra note 27, at 232.
and firefighters in counties and municipalities (other than the City of Milwaukee) with a population of 2,500 or more. The Milwaukee Police are subject to compulsory final and binding interest arbitration under section 111.70(4)(jm).

Section 111.77 requires that the party desiring to modify or terminate a contract must serve written notice upon the other party of the proposed termination or modification 180 days prior to the expiration of the contract. If the contract date contains no expiration date, this notice must be given sixty days prior to the time proposed that such termination or modification take place. The party desiring to modify or terminate the contract must notify the WERC of the existence of a dispute within ninety days after the notice provided for above is given. The contract existing between the parties remains in full force and effect without the union resorting to strikes or the municipal employer to lockouts for a period of sixty days after notice is given to the WERC of the existence of a dispute or until the expiration date of a contract, whichever occurs later. The WERC may also require that the parties participate in mediation sessions. If the parties have provided for voluntary impasse resolution procedures, these must be exhausted before petitioning the WERC for compulsory final and binding arbitration.

Either party may petition for arbitration with the WERC which will then investigate and determine whether impasse has been reached. In addition, the WERC may conduct further mediation. If the WERC determines that an impasse has been reached, it shall issue an order for arbitration. The WERC then submits a panel of five arbitrators and the parties alternately strike four of the five. The remaining person is appointed by the WERC as the arbitrator. The parties share the arbitrator's expenses equally.

Two forms of arbitration are defined in section 111.77(4): Form One allows the arbitrator to determine all issues in dispute involving wages, hours and conditions of employment. Under this procedure, the arbitrator determines each issue in dispute on an individual basis. As a result, under this form the arbitrator has the right to split the award. Form Two requires that the parties submit their final offer to the investigator appointed by the WERC. The arbitrator thereafter selects one of the two final offers as the final award. Form Two is
utilized unless the parties agree to use Form One. Under either form, the arbitrator is required to give weight to specific factors in reaching a decision.

4. Compulsory Final and Binding Interest Arbitration of Disputes Involving Municipal Employees Other Than Law Enforcement Personnel and Firefighters.

The MED/ARB Law provides compulsory interest arbitration for nonprotective-services municipal employees. After advising the WERC of the commencement of contract negotiations, the parties must begin their collective bargaining with an initial open session. This meeting is held for the purpose of presenting the initial bargaining proposals and the supporting rationale so as to inform the public. However, failure to comply with this open meeting requirement is not cause to invalidate a collective bargaining agreement negotiated under MERA.

Section 111.70(4)(cm) provides for mediation, grievance ar-

43. Wis. Stat. § 111.77(6) (1977) provides:
   In reaching a decision the arbitrator shall give weight to the following factors:
   (a) The lawful authority of the employer.
   (b) Stipulations of the parties.
   (c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
   (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
      1. In public employment in comparable communities.
      2. In private employment in comparable communities.
   (e) The average consumer prices for goods and services, commonly known as the cost of living.
   (f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
   (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
   (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in private employment.
bitration and other voluntary impasse resolution procedures. Voluntary impasse procedures are permissive subjects of bargaining and such negotiated procedures must be filed with the WERC. The parties may agree to any form of binding interest arbitration; however, the factors which the arbitrator should consider in making a decision may not be altered.46

The MED/ARB process is initiated by either party’s filing of a petition with the WERC. If a dispute has not been settled after a reasonable period of negotiations and the parties continue deadlocked with respect to any dispute concerning wages, hours and conditions of employment, the MED/ARB process may be commenced. Upon receipt of the petition for MED/ARB, the WERC is required to make an investigation to determine whether an impasse exists and whether there has been statutory compliance. Prior to the close of the investigation, each party is required to submit in writing a single final offer containing its final proposals on all unresolved issues and disputes. Final offers will only be accepted by the investigator where an impasse does in fact exist. The investigator will allow the parties to modify their final offers until he determines that the offers are final.

Final offers normally include only mandatory subjects of bargaining. Permissive subjects of bargaining, however, may be included by a party if the other party does not object. The WERC normally requests a stipulation, in writing, with respect to all matters which are agreed upon for inclusion in the new or amended collective bargaining agreement. After receiving a report from its investigator and determining that the MED/ARB process should proceed, the WERC issues an order requiring MED/ARB and submits a list of five mediator/arbitrators. Upon receipt of such list, the parties alternately strike names until a single name is left. The remaining person is appointed as mediator/arbitrator.

Sections 111.70(4)(cm)(6)(b) and (c) provide the framework in which the mediator/arbitrator functions. Within ten days of his or her appointment, the mediator/arbitrator will establish dates and places for the conduct of the MED/ARB session. Upon the petition of at least five citizens of the jurisdiction served by the municipal employer, filed within ten

days of the date on which the mediator/arbitrator was appointed, the arbitrator is required to hold a public hearing. This hearing provides an opportunity for both parties to explain or present supporting arguments for their positions and for members of the public to ask questions and offer their comments and suggestions.

The final offers of the parties serve as the basis for mediation and continued negotiations between the parties with respect to the issues in dispute. The mediator/arbitrator may attempt to mediate the dispute and encourage a voluntary settlement by the parties. Neither party, without the consent of the other party during this final mediation attempt, may modify its final offer.

If the parties are not able to reach a voluntary settlement, the mediator/arbitrator provides written notification to the parties and the WERC of his or her intent to resolve the dispute by final and binding arbitration. Thereafter, either party may, within the time limit established by the mediator/arbitrator, withdraw its final offer. A party provides written notice of such withdrawal to the other party, the mediator/arbitrator and the WERC. If both parties withdraw their final offers and mutually agreed upon modifications, the labor organization may strike after giving ten days written advance notice to the municipal employer and the WERC. Unless both parties withdraw their final offers, the final offer shall not be deemed withdrawn and the mediator/arbitrator shall proceed to resolve the dispute by final and binding arbitration.

The mediator/arbitrator acting as arbitrator shall adopt without further modification the final offer of one of the parties on all disputed issues. Section 111.70(4)(cm)(7) requires that the mediator/arbitrator, in making any decision, must give weight to the following factors:

a. The lawful authority of the municipal employer.

   b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in
the same community and in comparable communities and in private employment in the same community and in comparable communities.

e. The average consumer prices for goods and services commonly known as the cost-of-living.

f. The overall compensation, presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused times, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

III. AN EVALUATION OF COMPULSORY FINAL AND BINDING INTEREST ARBITRATION FOR MUNICIPAL EMPLOYEES OTHER THAN LAW ENFORCEMENT AND FIREFIGHTING PERSONNEL

An evaluation of the MED/ARB Law begins with a determination of its impact on collective bargaining. The evaluation must include an analysis of compulsory arbitration’s effect on local government, municipal employees and ultimately the public. A more limited analysis would ignore the far-reaching effect of chapter 178.

The role of collective bargaining in the operation of municipal government is significant. Decisions once made exclusively by local officials are now a part of the collective bargaining process. For example:

The right of the employer to make the initial selection of individuals for jobs is still universally recognized. In other areas collective bargaining has completely bypassed the existing personnel system. In some governmental units agreements provided something like a local personnel system for the first time. In the larger jurisdictions, collective bargaining has required an intricate meshing of traditional civil
service goals with procedures evolved through collective bargaining.46

The WERC and the courts have properly limited the scope of collective bargaining through a strict adherence to the principles of mandatory and permissive subjects of bargaining.47 Nevertheless, because of the widespread unionization of municipal employees, every citizen has a stake in the functioning


47. Wis. Stat. § 111.70(1)(d) (1977) limits the scope of bargaining as follows: "Collective bargaining" means the performance of the mutual obligation of municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order to the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employees by the constitutions of this state and of the United States and by this subchapter.

The Wisconsin Supreme Court clarified this definition of the scope of bargaining in Beloit Educ. Ass'n v. Wisconsin Employment Rel. Comm'n, 73 Wis. 2d 43, 54, 242 N.W.2d 231, 236 (1976):

The dictionary defines "primarily" as meaning "fundamentally." It is in this sense of the word that "primarily" is here used. What is fundamentally or basically or essentially a matter involving "wages, hours and conditions of employment" is, under the statute, a matter that is required to be bargained. The commission construed the Statute to require mandatory bargaining as to (1) matters which are primarily related to "wages, hours and conditions of employment," and (2) the impact of the "establishment of the educational policy" affecting the "wages, hours and conditions of employment." We agree with that construction.

(footnotes omitted)(emphasis in original).

See also Unified School Dist. v. Wisconsin Employment Rel. Comm'n, 81 Wis. 2d 89, 259 N.W.2d 724 (1977) and City of Brookfield v. Wisconsin Employment Rel. Comm'n, 87 Wis. 2d 819, 275 N.W.2d 723 (1979).

of MERA in Wisconsin. This becomes obvious when one considers the fact that employee wages and benefits constitute between sixty percent and eighty percent of nearly every municipal budget. Thus, decisions arrived at over the bargaining table have a direct and immediate impact on a municipality's public services, tax rate, and distribution of local resources.

Municipal labor problems are most effectively resolved in collective bargaining. Effective long term public employment relationships are built upon mutual trust and understanding. This relationship should remain at arm's length at all times, and no attempt should be made to undermine the other side. Trickery and intentional omissions may prove temporarily satisfying but are ultimately counterproductive. Once a relationship is impaired it is extremely difficult to rebuild.

Collective bargaining under MERA does not require either party to agree to proposals of the other. The parties negoti-

48. The following statistics indicate the widespread unionization of municipal employees:

<table>
<thead>
<tr>
<th>Level or Type</th>
<th>1976 Employes Represented</th>
<th>1974 Employes Represented</th>
<th>1972 Employes Represented</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Number</td>
<td>%</td>
</tr>
<tr>
<td>State</td>
<td>48.3</td>
<td>24.6</td>
<td>51.0</td>
</tr>
<tr>
<td>Local</td>
<td>(149.2)</td>
<td>(94.6)</td>
<td>(63.4)</td>
</tr>
<tr>
<td>County</td>
<td>34.1</td>
<td>19.3</td>
<td>56.7</td>
</tr>
<tr>
<td>Municipalities</td>
<td>54.9</td>
<td>36.8</td>
<td>66.9</td>
</tr>
<tr>
<td>Town</td>
<td>1.9</td>
<td>0.2</td>
<td>10.5</td>
</tr>
<tr>
<td>School District</td>
<td>57.5</td>
<td>38.0</td>
<td>66.1</td>
</tr>
<tr>
<td>Special District</td>
<td>0.7</td>
<td>0.4</td>
<td>57.1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>197.5</td>
<td>119.2</td>
<td>60.4</td>
</tr>
</tbody>
</table>

Source: Data from the U.S. Bureau of the Census. Figures may not add because of rounding. Data is as of October 1, for the years indicated. "Municipalities" figure includes employes of dependent school systems.

50. Wis. Stat. § 111.70(1)(d) (1977) provides: "The duty to bargain ... does not
ate a supportable, voluntary agreement. Collective bargaining allows all the parties to maintain local control of the decision-making process. Absent compulsory interest arbitration, the parties negotiate in a power relationship. The municipal employer's power as management is balanced with the union's power as a representative of the employees. This power relationship has not, however, been fully developed in MERA.

The right of a union to strike is a necessary component to balance the relationship between municipal employers and public employee unions. Absent this right, unions are without the leverage which traditionally has been available to their private sector counterparts. As a result of this denial, the public sector collective bargaining process remained unbalanced until public employee unions resorted to illegal strikes. The legislature then enacted compulsory final and binding arbitration to eliminate these strikes. Unfortunately, MERA has not eliminated illegal public employee strikes.51

Compulsory binding interest arbitration has a devastating effect on collective bargaining. It has diminished the effectiveness of public sector collective bargaining and has made local municipal governments and elected officials less accountable to the public.52 The imposition of a settlement taints the process and diminishes the incentive to settle voluntarily:

One alternative . . . is to provide for compulsory binding arbitration of all bargaining impasses. We are opposed to this approach since we feel that, among other things, com-

51. There were seven illegal public employee strikes during 1978 and 1979: (1) the Fond du Lac County institutions were struck from June 12, 1978 to July 1, 1978 by aids and; (2) by LPNs and by RNs; (3) Stevens Point Schools were struck on September 26, 1978 by 25 of 65 busdrivers; (4) the Union Grove High School District was struck on September 28, 1978 by two units of employees; (5) in the City of Appleton a WERC examiner found that a strike occurred during February 1978; (6) the Milwaukee Metropolitan Sewerage District was struck by 310 operators and non-craft employees beginning on October 15, 1979 and concluding on November 7, 1979 with the granting of an injunction by the Circuit Court for Milwaukee County; and (7) the Douglas County highway workers went on a wildcat strike on December 31, 1979.

52. See text accompanying notes 60-63 infra.
pulsory binding arbitration is likely to retard the give and take inherent in the bargaining process. Why should the parties make a sincere effort to compromise during bargaining when by doing so they may prejudice their respective positions if and when they find themselves before an arbitrator?\textsuperscript{53}

The spirit and intent of Wisconsin public employee laws is frustrated with this approach. The parties are even refusing to tentatively approve matters resolved in negotiations for fear of prejudicing their positions in arbitration.

The substitution of compulsory interest arbitration for the right of public employee unions to strike\textsuperscript{54} inherently weakens collective bargaining. Arbitration does not replace the natural pressures on the parties to settle when a strike is a realistic future possibility. Public employees can and will strike regardless of statutory prohibitions and penalties.\textsuperscript{55} Because the dynamics of collective bargaining are missing, arbitration is not an effective method of municipal labor dispute resolution.\textsuperscript{56}

The effect of the MED/ARB Law extends beyond collective bargaining. MED/ARB has threatened the foundation of representative government on the municipal level in Wisconsin:

In a period when public confidence in government is already at a low point, this kind of decision-making [pulsory arbitration] by wayfaring strangers, not chosen or accountable to the electorate, can only contribute to further alienation from government and growing questions about the actual nature of representative government.\textsuperscript{57}

\textsuperscript{53} Dr. H. Wise, Past President of the National Education Association in testimony on October 4, 1973, before the Special Subcommittee on Labor of the House Committee on Education and Labor, reprinted in COALITION OF AMERICAN PUBLIC EMPLOYEES, A FEDERAL BARGAINING ACT FOR STATE AND LOCAL PUBLIC EMPLOYEES 27 (1973).

\textsuperscript{54} Although 1977 Wis. Laws ch. 178 allows a limited right to strike, it has not been successfully invoked to date.

\textsuperscript{55} See note 51 supra.

\textsuperscript{56} Although chapter 178 was heralded by the press as a law granting the right to strike for public employees, its practical application has exposed this as a misnomer. In practice, the law has operated to effectively preclude the ability of public employees to strike. This is evidenced by the complete absence of legal public employee strikes since the adoption of chapter 178.

\textsuperscript{57} Address by Sam Zagoria, Director of Labor Management Relations Services of
When critical decisions are made for municipal governments by unelected and unaccountable people, the needs and priorities of the local citizens are often forgotten and misplaced.

58. The following indicates the number and type of issues awarded under MED/ARB during 1978 and 1979:

### TABLE 5

A. Number of Issues per Award in 1978 and 1979.

<table>
<thead>
<tr>
<th>Number of Issues</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>5+</th>
<th>Not Clear</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Awards</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>13</td>
<td>8</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>1979</td>
<td>15</td>
<td>9</td>
<td>11</td>
<td>3</td>
<td>4</td>
<td>16</td>
<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>28</td>
<td>17</td>
<td>13</td>
<td>5</td>
<td>6</td>
<td>28</td>
<td>13</td>
</tr>
</tbody>
</table>

B. Number of Times in Med/Arb Awards in 1978 and 1979.

<table>
<thead>
<tr>
<th>Issue</th>
<th>1978</th>
<th>1979</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wage/Salary</td>
<td>33</td>
<td>48</td>
<td>81</td>
</tr>
<tr>
<td>Fair Share</td>
<td>17</td>
<td>18</td>
<td>35</td>
</tr>
<tr>
<td>Health Insurance</td>
<td>13</td>
<td>13</td>
<td>26</td>
</tr>
<tr>
<td>Retirement</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Holidays</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Vacation</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Dental Insurance</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Extra Duty</td>
<td>5</td>
<td>14</td>
<td>19</td>
</tr>
<tr>
<td>Longevity</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Just Cause</td>
<td>0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Layoff</td>
<td>0</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Duration</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Calendar</td>
<td>5</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>Transfers</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

Wisconsin Center for Public Policy, Interim Report to Legislative Council Special Committee 11 (April 29, 1980).

59. A review of the credentials of Wisconsin arbitrators as distributed by the WERC indicates that few, if any, have been an elected or appointed municipal offi-
IV. PROPOSED CHANGES IN THE MUNICIPAL EMPLOYMENT RELATIONS ACT

A. A Substantive Change to Strengthen MERA

Procedural changes to MERA cannot appreciably strengthen collective bargaining or return accountability to municipal governments. Rather, a substantive change is necessary whereby municipal governments would have the option to reject binding arbitration with a corresponding acknowledgement of municipal employees’ right to strike. This proposal would return effective collective bargaining to MERA and return local control to municipal government.

The change would allow local officials to decide whether or not to risk a strike in lieu of arbitration. If the municipality would decide against the use of arbitration, collective bargaining would become the focal point of the pressures inherent in a dynamic state of affairs. The addition of the strike possibility balances the equation and provides all of the components necessary for healthy collective bargaining:

Isn’t the strike a part of the collective bargaining process? A

In addition, few arbitrators reside in the municipality to which they are called to issue an award. These arbitrators make decisions with a lasting impact upon the local community, as described by Raymond D. Horton:

Particularly in interest arbitration, neutrals should recognize that this function often goes far beyond the task of resolving an immediate impasse, for their decisions may also produce systemic impacts that spread beyond the immediate labor relations dispute. Changes in labor costs, for example, may affect inputs (taxes) and outputs (services). Thus it would seem that an arbitrator, in order to properly gauge what (future) systemic as opposed to (immediate) situational, consequences are likely to result from his or her decision, should possess some understanding of the interplay over time among variables such as labor costs, governmental revenue and expenditure patterns, taxes, employment levels, work rules, and productivity.


60. The approach would allow local government officials to reject binding arbitration. Upon rejection of the union’s arbitration petition, the union would no longer be prohibited from engaging in a strike. However, if the employer petitions for arbitration or accepts the union’s request for same, strikes would be prohibited and the arbitrator would make a binding award. The proposal would allow a right to strike by unions where local elected officials believe that the public interest would not be served by submission to binding arbitration. At the same time, where a strike would be against the public interest as determined by local officials, the option of proceeding to compulsory and binding arbitration would be available. This proposal would only apply to municipal employees other than law enforcement and firefighting personnel.
strike isn’t a tragedy; it doesn’t signal the demise of collective bargaining. It is . . . a far better alternative in the short term than the long term effect of compulsory and binding arbitration which removes the ultimate solution to be reached at the bargaining table.  

If elected officials would choose to reject binding arbitration and thus free the union to strike, leverage would come to bear on both parties and would encourage a voluntary settlement of the dispute. If a strike did occur, the public would ultimately hold the parties accountable for the interruption of services. If local officials would decide to proceed to arbitration, then they would also be held accountable to the public for the result. The present law practically precludes public accountability since the imposition of MED/ARB removes local decision making and places the decision in the hands of an unelected third party.  

Municipal officials and some union leaders believe that the MED/ARB Law has an adverse effect on collective bargaining. The experience under MERA would suggest that the ex-


62. On September 3, 1980, the Wisconsin Valley Mayors Organization passed a resolution opposing the reenactment of MED/ARB in Wisconsin.

The recent busdrivers strike in Madison demonstrates the unwillingness of unions to participate in binding arbitration. After Mayor Joel Skornicka called for binding arbitration, Teamsters Union Local 695 Secretary, Robert Rutland, responded as follows: “Teamsters Union Local 695 does not consider it (binding arbitration) as a viable alternative to our established collective-bargaining process. We will not relinquish our duty of fair representation to a third party.” Wis. St. J., June 7, 1980, pt. 4, at 1, col. 1. Madison bus drivers were not subject to MED/ARB because technically they are not government employees, since Madison contracts with a management firm to operate the bus utility.

A more telling example is provided by examining the initial proposal of a municipal employees union in Wisconsin. At the first meeting between the parties held on July 24, 1980, the union, representing the Price County courthouse and highway employees presented the following joint proposal:

Article 23 - Duration and Bargaining Procedure:
Add to Section B. a new step 4. “In the event the parties cannot reach agreement on a successor agreement by December 31, it is agreed that the parties will enter into around the clock negotiations beginning January 1, for a period of 72 hours. If a successor agreement is not reached, the parties agree the employees may then take the option to either continue negotiations or exercise the right to strike.”

(emphasis added).

See also text accompanying note 53 supra.
perimental MED/ARB Law be rejected. Instead, a renewed system of public sector collective bargaining should be adopted:

[A]n *a priori* ban on all public employee strikes regardless of circumstances and regardless of impact is not only inequitable . . . but is, in addition, empirically unsound. They [the facts] point to a need for flexibility — for a system which provides a motive for good faith collective bargaining; which allows for the assessment of relative fault if bargaining breaks down and a strike occurs; and which permits the development of a remedy that is appropriate to the facts in each case.\(^{63}\)

The adoption by the legislature of the proposed change would have a far-reaching and immediate impact. Mediation would regain its former importance as a method of impasse resolution, relying on Wisconsin’s tradition of highly talented third-party mediators. Settlements would be reached under the pressure of meaningful negotiations. Third parties would not impose settlements unless called upon by local elected officials accountable to the public.

**B. Procedural Changes to Improve the MED/ARB Law**

The extension of the right of public employees to strike and the curtailment of compulsory final and binding interest arbitration is the surest way to strengthen collective bargaining under MERA. Regardless of any substantive change involving the right to strike, however, certain procedural changes should be made to the MED/ARB Law.

1. **The Public's Right to Know**

Under current procedures, the parties must present and explain their initial proposals in an open meeting.\(^{64}\) The par-

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\(^{63}\) Dr. H. Wise, Past President of the National Education Association in testimony on October 4, 1973, before the Special Subcommittee on Labor of the House Committee on Education and Labor, reprinted in *Coalition of American Public Employees, A Federal Bargaining Act for State and Local Public Employees* 28 (1973).

\(^{64}\) *Wis. Stat.* § 111.70(4)(cm)(2) (1977) provides:

Presentation of initial proposals; Open meetings. The meetings between parties to a collective bargaining agreement or proposed collective bargaining agreement under this subchapter which are held for the purpose of presenting initial bargaining proposals, along with supporting rationale, shall be open to the
ties often are unprepared to respond to the proposals of the other side since they are unaware of the proposals. As a result, the parties and the public are denied an important opportunity to participate in constructive dialogue as the meeting often degenerates into one-sided orations. If the exchange were required to occur at least two weeks before the initial open session, the parties could be prepared to engage in an informed discussion of the issues and an analysis of areas needing clarification. Legislation adopting this proposal would also provide the public with an opportunity to observe such dialogue. This proposal is clearly in the public interest.

2. Expediting Mediation

While MERA presently provides three periods during which mediation may take place, its effectiveness during the first two stages is questionable. The WERC investigator's attempt to mediate the dispute in the first two stages is often frustrated by parties who are biding their time in order to be able to save movement for later mediation efforts by the mediator/arbitrator. In an effort to maintain an advantageous bargaining position, the parties often postpone compromises. This significantly diminishes the WERC investigator's success. Unfortunately, the vast amount of experience and expertise brought to the mediation session by the WERC investigator is lost in this futile attempt to mediate.

If the third-stage mediation attempt by the mediator/arbitrator were eliminated, the arbitration process would be expe-
dited. The arbitration hearing could be scheduled at a specific time with no fear that mediation attempts by the mediator/arbitrator would unduly delay the process. Mediation attempts by the WERC investigator would assume greater significance if it were understood that the mediator/arbitrator would not engage in mediation.

In addition to expediting the process, another advantage could be realized by eliminating the third mediation attempt. Under the MED/ARB Law, the involvement of the mediator/arbitrator in mediation may color the resulting arbitration award. The parties are highly suspicious that it is humanly impossible for the mediator/arbitrator to ignore the impact of one party's inability to compromise from its final offer position even though the full extent of its compromise was offered in an earlier mediation stage. Eliminating the mediation effort of the mediator/arbitrator would preclude such suspicion and instill more confidence in the process.

3. A Standard Procedure for Exchange of Final Offers

An investigator assigned by the WERC must determine whether a bargaining impasse exists before proceeding to MED/ARB.\textsuperscript{67} The investigators frequently utilize different procedures in collecting final offers from the parties. Because some investigators have requested a series of "final offers," the parties are often unable to determine the status of the proceedings. The uncertainty in this stage often leads to gamesmanship in structuring a final offer with the hope of emerging victorious in the arbitration. Such tactics are inconsistent with the spirit and efficient functioning of MERA. Therefore, the MED/ARB Law should provide a uniform procedure to expedite the process and minimize gamesmanship.

4. Amending Final Offers Prior to Hearings

Under the present law, the arbitrator must consider several factors in making a decision.\textsuperscript{68} These factors can change during the time between the certification of the final offer and the date of the arbitration hearing. This span of time may extend to three or four months. During this period, changes fre-

\textsuperscript{67} Wis. Stat. § 111.70(4)(cm)(6)(a) (1977).
\textsuperscript{68} See text accompanying notes 15-16 supra.
quently occur concerning the cost of living, comparisons with other governmental and private operations, and the financial status of the governmental unit. For example, the state often does not determine its aid formula and funding for school districts, which leaves grave uncertainties in the school district's revenue side of the budget. This has an impact upon the district's ability to pay an award, which will be considered by the arbitrator.

The reasonableness of the final offers should not hinge on the ability of the parties to forecast economic, social or political change. Because the parties should control the reasonableness of their final offers, amendments should be allowed three weeks prior to the arbitration hearing.

5. The Public Welfare as a Required Statutory Factor

In the gamesmanship of the MED/ARB process, the ultimate welfare of individual communities is overlooked. Decisions are made primarily in terms of what would be fair and equitable for employees based upon the comparables and other factors which are unrelated to the public welfare. Arbitrators should be required to consider the public welfare as a factor, particularly where the award would have a significant negative impact on the local community. For example, awards which have the effect of requiring the laying off of significant numbers of employees, closing down of buildings or eliminating of programs certainly have this type of negative impact. The arbitrator should be required to evaluate whether the award is justified based upon the public welfare of the community.

6. Strengthening Strike Penalties

The strike penalties for public sector employees set forth in section 111.70(7m)(c) are weak and uncertain. Neither the labor organization nor the individual employees are subject to fines for illegal strikes until after the employer obtains an injunction. The union and the employees can escape liability

69. The equitable remedy of injunctive relief is authorized in Wis. Stat. § 111.70(7m)(a) (1977) which provides:

At any time after the commencement of a strike which is prohibited under sub. (4)(l), the municipal employer or any citizen directly affected by such strike may petition the circuit court for an injunction to immediately termi-
by merely returning to work after the injunction is issued. The forfeiture of pay for those days on strike may be the only sanction. This enables the union or its members, prior to an injunction, to engage in illegal activities and gain the advantage of leveraging the employer without being penalized.

Perhaps the most important misconception associated with the strike penalty under section 111.70(7m)(c)(1)(a) involves the suspension of any dues check offs or fair share agreements. On its face, the statute would appear to provide an automatic penalty associated with all strikes. However, under the definition of "strikes" set forth in section 111.70(1)(nm), all conduct which is not authorized or condoned by a labor organization does not subject such labor organization to the penalties of the MED/ARB Law. Labor organizations may be able to avoid all penalties by merely telling all members that they cannot strike under the law and that the labor organization will not authorize, condone or support any such activities. Under these circumstances, a clever union could avoid penalties or sanctions against it.

In order to balance the inequities and inhibit unions and employees from engaging in illegal strikes, the following revisions should be made to MERA: (1) all fines and penalties be retroactive to the first day of a strike after an injunction is granted; (2) in the event of a strike or work stoppage of any kind, the union and its individual members be responsible for payment of the prevailing party's attorney's fees and costs incurred in dealing with the strike. The number and type of strikes occurring since the adoption of the MED/ARB Law70 requires these changes.

V. Conclusion

This article has outlined the evolution of public sector collective bargaining in Wisconsin. This evolution has resulted in what the authors consider to be some of the most sophisticated

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nate the strike. If the court determines that the strike is prohibited under sub. (4)(L), it shall issue an order immediately enjoining the strike, and in addition shall impose the penalties provided in par. (c).

See generally Wherry, Strikes, Injunctions and Contempt Proceedings, in MUNICIPAL LABOR RELATIONS IN WISCONSIN 205 (C. Mulcahy ed. 1979), for a thorough analysis of strikes, injunctions and contempt proceedings.

70. See note 51 supra.
cated labor agreements in the United States. Unlike the parties' bargaining militancy and resistance in the late 60's and early 70's, in most instances now the parties have assumed a more mature, problem-solving attitude which has resulted in stability. The MED/ARB Law has added a dimension of complexity which has not resulted in effective, timely and equitable collective bargaining. Due to the technical nature of the process, the parties have found it increasingly difficult to adequately protect their interests. Considerable emphasis is now placed upon strategy, comparables and timing. The law has not encouraged the parties to voluntarily resolve municipal labor problems. Rather, the parties are now involved in a competitive situation where gamesmanship,\(^7\) rather than statesmanship, is becoming increasingly prevalent. This is contrary to the spirit and intent of MERA in Wisconsin.\(^2\)

The MED/ARB Law has weakened the effectiveness of collective bargaining, diminished the accountability of local elected officials and eroded the responsiveness of municipal government to the needs of the public. As the date of the "sunset" provision draws near, the Wisconsin Legislature has an opportunity to restore true public sector collective bargaining and encourage the voluntary resolution of labor disputes. This can only be accomplished by curtailing the use of compulsory final and binding interest arbitration and expanding the right of certain public employees to strike. In so doing, the interests of the public will be served by encouraging a dy-

\(^7\) For example, there are few inducements for the public employee union to voluntarily accept the final position of the municipal employer, since if the union loses the arbitration, the very least it will obtain is the final offer of the municipal employer. This can accurately be described as a "can't lose" situation which encourages the union to resort to arbitration. The authors do not believe that the municipal employer can always effectively structure a final offer which discourages such gamesmanship.


Government officials must exercise greater flexibility and ingenuity, therefore, to arrive at a workable procedure for dealing with municipal labor matters. The only alternative is to resist application of the existing law. Arguments of unconstitutionality (illegal delegation and challenge of sovereignty) may sound temporarily appealing to a government official who is set in his ways but judicial rulings are steadfastly affirming municipal labor legislation.
dynamic and workable system of public sector collective bargaining:

[W]e should be encouraging the process of collective bargaining. . . . It works, we know it works, we should do everything possible to make it work. And we should remove every impediment to collective bargaining that exists. Most particularly we should remove compulsory arbitration. . . . [T]he central theme of the State's Labor laws must be collective bargaining. This is the key to the reasonable employee relations in the public sector in this state. We must not destroy collective bargaining with compulsory arbitration and we must not destroy it with lopsided changes in labor laws.73

Regardless of any substantive change curtailing the use of MED/ARB and expanding the right of certain public employees to strike, procedural changes should be made in the MED/ARB Law:

1. The initial proposals of the parties should be exchanged two weeks prior to the initial open bargaining session.
2. The process should be expedited by eliminating the mediation by the arbitrator.
3. Standard procedures should be adopted for the exchange of final offers.
4. Final offers should be amendable three weeks prior to the arbitration hearing.
5. The public welfare should always be a factor to be given serious consideration by the arbitrator.
6. Penalties for illegal strikes should be strengthened.

The Wisconsin Legislature anticipated and provided for a careful review of the new MED/ARB Law by enacting a "sunset" provision. This review should come to the conclusion that the parties should voluntarily resolve their differences at the bargaining table. MED/ARB should be curtailed and the right of certain public employees to strike should be expanded. These changes would place significant pressure upon the parties to reach voluntary agreements and thereby restore ultimate control of local government to the people — where it belongs.

73. Address by Coleman A. Young, Mayor of the City of Detroit, given at a Legislative Forum on New Directions for Public Employee Labor Relations, reprinted in 11 LABOR MANAGEMENT REL. SERV. NEWSLETTER, No. 5, at 3 (United States Conference of Mayors, May 1980).