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ALTERNATIVES TO THE RIGHT TO STRIKE FOR PUBLIC EMPLOYEES: DO THEY ADEQUATELY IMPLEMENT FLORIDA'S CONSTITUTIONAL RIGHT TO COLLECTIVELY BARGAIN?

ALAIN S. WILLIAMS*

INTRODUCTION

Public employees in Florida possess a constitutional right that fellow public workers in neighboring states unfortunately do not share—a right to collectively bargain, expressed in the declaration of rights of the Florida Constitution.¹ Although drafters of that provision continue ten years later to debate whether such a right was intended to extend to public employment,² the Florida Supreme Court declared the existence of the right in 1969³ and in 1972 prod- ded the legislature to implement it.⁴

Public sector collective bargaining is different from the bargaining that occurs in the private sector. Private employees have a statutory right to strike.⁵ Public employees, on the other hand, generally are prohibited from striking.⁶ In Florida, the constitutional

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2. In an address to the 1978 Constitution Revision Commission, Chesterfield Smith, a member of the 1965 Constitution Revision Commission, expressed his belief that the draftsmen of FLA. CONST. art. I, § 6 did not intend it to apply to public employees. Charles Harris, a fellow 1965 revision commission member, expressed his belief that the right of public employees to collectively bargain was clearly intended by the 1965 revision commission. Transcript of Fla. C.R.C. proceedings 38 (July 6, 1977); Transcript of Fla. C.R.C. proceedings 36-37 (July 7, 1977). See also McGuire, Public Employee Collective Bargaining in Flor- ida—Past, Present and Future, 1 FLA. ST. U.L. REV. 26, 42-44 n.64 (1973).

3. Dade County Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969). "[W]ith the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6." Id. at 905 (footnote omitted).

4. Dade County Classroom Teachers' Ass'n v. Legislature, 269 So. 2d 684 (Fla. 1972). The teachers union filed an original petition for a writ of mandamus requesting the supreme court "to compel the Legislature . . . to enact standards or guidelines regulating the right of collective bargaining by public employees of this state . . . ." Id. at 685. The court did not grant the petition, ruling that its intervention would be premature but warning the legislature that if it failed to take action within a reasonable period of time the court would develop collective bargaining guidelines. In 1974 the Florida Legislature enacted legislation imple- menting article I, section 6. Ch. 74-100, 1974 Fla. Laws 134 (current version at FLA. STAT. §§ 447.201-.609 (1977)).

5. Labor Management Relations (Taft-Hartley) Act, § 13, 29 U.S.C. § 163 (1976): "Nothing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right."

provision granting public employees the right to collectively bargain specifically proscribes striking. Though strikes in the private sector are viewed with trepidation by both management and labor, the threat of a strike is often the only factor compelling the parties to bargain in good faith.

In the absence of a right to strike, how can public sector collective bargaining be successful? What does "collective bargaining" really mean, and what must it entail to really work? A number of states have decided that an alternative to the strike threat must be available. The alternative that has captured the attention of most lawmakers is compulsory arbitration—a procedure, triggered when contract negotiations break down, requiring management and labor to submit their positions to an arbitrator who then renders a decision binding upon both parties.

Collective bargaining for public employees has not been popularly embraced in Florida. The legislature begrudgingly implemented the constitutional right, but did not give public employees a mechanism to exert significant pressure upon recalcitrant employers; the power to decide what the contract will provide lies ultimately with the public employer. This has diminished the effectiveness of collective bargaining and has impaired public employees' exercise of this important constitutional right.

The fifth anniversary of the passage of the Florida act affords an opportunity to examine public sector bargaining in general, to review the implementation and the effectiveness of the Florida scheme in particular, and to propose alternatives for the resolution of contract negotiation deadlocks.

IMPASSE RESOLUTION IN THE PUBLIC SECTOR

Collective bargaining for public employees is a relatively new area in labor law. Although government employees began joining unions in the 1830's, the unions were relatively docile associations with few members. In 1936 the first national public employees union—the American Federation of State, County, and Municipal Employees (AFSCME)—was founded. It was not, however, until the 1960's

10. Id. at 915-16 n.151.
that public employee unions attained sufficient membership to be considered politically important. ¹¹

Today collective bargaining for public employees has become the rule rather than the exception. Approximately three-fourths of the states have enacted legislation permitting some form of collective bargaining. ¹² Although the laws differ in specifics, the right to strike is generally prohibited, either by statute or by case law. ¹³ Because public employees cannot rely on strikes as a tool in negotiations with their employers, they must be provided with other avenues to break deadlocks if public sector collective bargaining is to have any meaning. Basically, there are three impasse resolution mechanisms used in public sector collective bargaining: mediation, factfinding, and arbitration.

Mediation generally involves an outside party who is brought in to assist the parties in voluntarily agreeing to a settlement after a contract negotiation impasse has arisen. Although the mediator primarily serves as a neutral referee, he generally is allowed to formulate and propose his own suggestions for terminating the dispute. Mediation is viewed merely as an initial impasse mechanism, and additional procedures are usually available in the event of its failure. A majority of states providing for public employee collective bargaining include provisions for mediation. ¹⁴

Undoubtedly the most widely prescribed impasse resolution technique is factfinding. ¹⁵ Factfinding involves an outside party, or panel, who sits as a referee to determine the positions of the public employees and the public employer, and who then issues a written report finding facts and making recommendations for an equitable settlement. The report is then delivered to the legislative body charged with administering the public employer for a final disposition; it is concurrently made public in most of these states to put pressure on all parties for a fair resolution. ¹⁶

The last mechanism for impasse resolution is arbitration, the process resulting from a joint decision by the employer and the union to submit specific issues to a third party for a resolution the

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¹¹ Id. at 896.
¹⁴ The majority of jurisdictions studied had a provision for factfinding or arbitration following mediation. See H. TANIMOTO, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: IMPASSE RESOLUTION PROCEDURES 13, 97 table 1 (Univ. of Haw. Indus. Rel. Center 1973).
¹⁵ Id.
¹⁶ Id. at 15-17.
parties are bound to accept. There are two broad categories of arbitration. The first, voluntary interest arbitration, usually arises in commercial contract situations and involves a voluntary agreement by the parties to submit to arbitration in the event of a contract dispute. The second category, with which this article is directly concerned, is compulsory interest arbitration, whereby the parties are statutorily mandated to submit to arbitration upon the occurrence of a certain event, usually exhaustion of other impasse resolution mechanisms. Where arbitration has been adopted, it will most likely be compulsory for only the more "essential" public employees, such as police and firefighters. It is currently mandated in various forms in nineteen states. In either category of arbitration, the arbitrator’s decision is binding on both parties.

THE FLORIDA SCHEME

Until recently, the Florida Constitution made no provision for collective bargaining for any employees, public or private. Then, in 1968, article I, section 6 of the constitution was revised, apparently to afford public employees the right to bargain collectively:

Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any


labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.\textsuperscript{20}

This section was interpreted one year later, in Dade County Classroom Teachers’ Association v. Ryan, as guaranteeing public employees the right to collectively bargain.\textsuperscript{21} Despite this clear statement from the Florida Supreme Court, the Florida Legislature failed between 1968 and 1973 to implement this right by legislation. In 1972 the supreme court stepped into the void and warned the legislature that if it did not adopt implementing legislation, the court would be forced to enact collective bargaining guidelines by judicial decree.\textsuperscript{22} The court reiterated that the right of public employees to collectively bargain is a constitutionally protected right, stating:

It is a right which should be exercised in accordance with appropriate guidelines in order to make sure that there may be no denial of the right and, at the same time, that the prohibition against strikes by public employees will not be violated, either directly or indirectly, and with appropriate penalties for doing so.\textsuperscript{23}

In 1974, five years after the effective date of the constitutional revision, the legislature enacted chapter 447 of the Florida Statutes, finally implementing public employees’ right to collective bargaining.\textsuperscript{24} With this legislation, Florida became the first state in the South to adopt a comprehensive labor relations act for public employees.\textsuperscript{25}

The Florida impasse resolution scheme allows an impasse to be declared by either party after a reasonable period of negotiation. Negotiations are carried out between the chief executive officer of

\begin{itemize}
\item \textsuperscript{20} FLA. CONST. art. I, § 6 (emphasis supplied).
\item \textsuperscript{21} 225 So. 2d 903 (Fla. 1969). Public employees’ constitutional right to collective bargaining has since been recognized by all four Florida district courts of appeal. See District 57, Int’l Ass’n of Machinists v. Talisman Sugar Corp., 352 So. 2d 62, 63 ( Fla. 4th Dist. Ct. App. 1977); Pinellas County Police Benevolent Ass’n v. Hillborough County Aviation Auth., 347 So. 2d 801, 803 (Fla. 2d Dist. Ct. App. 1977); School Bd. v. Public Employees Relations Comm’n, 330 So. 2d 770, 775 (Fla. 1st Dist. Ct. App.), cert. dismissed, 336 So. 2d 603 (Fla. 1976); City of Coral Gables v. Coral Gables Employees Ass’n, 289 So. 2d 453, 454 (Fla. 3d Dist. Ct. App.), appeal dismissed, 301 So. 2d 777 (Fla. 1974).
\item \textsuperscript{22} Dade County Classroom Teachers’ Ass’n v. Legislature, 269 So. 2d 684, 686-88 (Fla. 1972).
\item \textsuperscript{23} Id. at 687 (emphasis supplied by the court).
\item \textsuperscript{24} Ch. 74-100, 1974 Fla. Laws 134 (current version at FLA. STAT. §§ 447.201-.609 (1977)).
\end{itemize}
the governmental entity and the bargaining agent for the employee organization. The declaration of impasse must be in writing and is submitted to the other party and the Public Employees Relations Commission (PERC). The parties may engage in permissive mediation to resolve the impasse, or they can proceed immediately to the factfinding phase. A factfinder, called a special master, appointed by PERC or mutually agreed upon by the parties, is authorized to hold hearings, determine facts, and render a decision on unresolved contract issues. Rules, promulgated by PERC, require the parties to stipulate the issues in dispute prior to submitting the impasse to a special master.

Criteria the special master must consider in arriving at his recommended decision include salary comparisons between similar private sector employees and comparably sized public employers, the public interest and availability of funds, and a comparison of the peculiarities of employment, such as hazards, physical, educational, or intellectual qualifications, training and skills, retirement plans, sick leave, and job security.

The special master submits his report, consisting of a finding of facts delineating the unresolved issues and a recommended decision, to PERC fifteen days after the hearing. PERC is required to transmit the recommended decision to both parties within five days of receipt. The recommended decision is subject to further negotiations by the parties and is deemed approved by both parties unless a written rejection specifying the causes therefor is filed with PERC and the other party within twenty days of receipt of the decision.

The next step in the impasse resolution scheme involves the legislative body of the governmental entity. Within ten days of rejection of the recommended decision, the chief executive officer and the bargaining agent each submit their recommendations for settling the impasse to each other and the legislative body. The legislative body conducts a public hearing wherein both parties are required to explain their positions on the special master's recom-

27. Id. § 447.403(1).
28. Id. § 447.403(1), (2).
29. Id. § 447.403(3). The special master also has access to any pertinent records (§ 447.409) and has the power to issue subpoenas and administer oaths (§ 447.403(3)). Costs incurred during the process are to be shared equally by the parties (§ 447.407).
32. Id. § 447.403(3).
33. Some examples of legislative bodies (with their respective chief executive officers) are boards of county commissioners (county executive), district school boards (county school superintendent), and the state legislature (chancellor of the university system). See McHugh, supra note 25, at 277-81.
mended decision. The legislative body is then authorized to take "such action as it deems to be in the public interest, including the interest of the public employees involved."  

THE EFFECTIVENESS OF CHAPTER 447

Drawing any conclusions about the effectiveness of the Florida impasse resolution scheme is difficult because of the lack of empirical data on its use. PERC has gathered information on certain phases of the procedure, but it is of limited significance because comparison data are inadequate. For example, annual figures are available on how often factfinding by a special master occurred, but the total number of contracts negotiated in that same year is not available; thus, it is impossible to determine what percentage of negotiations result in impasse and are submitted to factfinding. Although PERC has promulgated a rule requiring the parties to file a notice of negotiation with it when negotiations are begun, the rule is not strictly enforced.

In any event, the data PERC has collected on the use of special masters indicate that a special master was used more often in 1978 than in previous years and that the percentage of special masters' reports being accepted by both parties has increased.

35. Id. § 447.403(4)(d).
37. Interview with Millie Seay, Administrative Assistant to Chairman of PERC, Tallahassee, Florida (Mar. 7, 1979). Ms. Seay indicated that most parties felt that because the requirement was not specified in chapter 447, it was not necessary to comply. The rule is promulgated pursuant to a general grant of authority under § 447.207(1). Although there is some dispute as to what types of rules can be promulgated pursuant to such a grant, the rule in question would seem to be a rule "necessary and administratively feasible to carry out the provisions" of chapter 447 and should be upheld in a challenge. Fla. Stat. § 447.207(1) (1977).
### USE OF SPECIAL MASTERS IN FLORIDA

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<td>1</td>
<td>1</td>
<td>4</td>
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<td>(Percent)</td>
<td>11%</td>
<td>4%</td>
<td>8%</td>
<td>10%</td>
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<td>5</td>
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<td>83%</td>
<td>68%</td>
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<tr>
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<td>11%</td>
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<td>17%</td>
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The current chairman of PERC points to the declining rate of rejection and the concomitant rise in the acceptance rate of the special master reports as an indication of success. Acceptance by both parties, however, does not necessarily mean that the special master report was accepted by the legislative body.

39. Lecture by Leonard Carson, Chairman, Public Employees Relations Commission, Tallahassee, Florida (Feb. 26, 1979). On the other hand, the two teacher unions, the Florida Education Association/United (FEA) and the Florida Teaching Professionals-National Education Association (FTP-NEA) agree that the present system is unfair to the employees but disagree on which alternative would be preferable: the former advocates a right to strike (interview with Bob Lee, President, FEA, Tallahassee, Florida (June 5, 1979)); the latter, compulsory interest arbitration (interview with Tay Green, representing FTP-NEA, Tallahassee, Florida (Mar. 3, 1979)).

40. Although current, comprehensive evidence that legislative bodies frequently reject special masters’ reports is unavailable, a recent study by Professor William McHugh of Florida State University College of Law indicates that this is, in fact, quite a problem with chapter 447. According to this study, the legislative body rejected 78% of all special masters’ reports in Florida in 1975, 84% in 1976, and 75% in 1977. W. McHugh, Public Labor Law Research Project (1977) (unpublished study at Florida State University College of Law). See also Note, Prohibiting Binding Arbitration: The Proposed Change in Article I, Section 6, 6 FLA. ST. U.L. REV. 1003, 1007 (1978).
Irrespective of the lack of data, the inadequacy of the Florida scheme relative to the public employee is clear, for the inescapable result of granting one of the parties—namely, the legislative body—the power to unilaterally declare the ultimate terms of the contract is to render the "bargaining" illusory. One commentator, addressing the whole scheme generally and the education system specifically, recently noted:

Impartiality is nearly impossible when the school board is both the public employer (with responsibility for negotiating the contract) and the legislative body (with ultimate authority for resolving contract disputes). Nothing undermines the validity of factfinding in the school districts more than the fact that the school boards wear two hats.  

A recent negotiation involving the state university system clearly demonstrates this problem. The bargaining agent for the faculty of the state university system entered into negotiations with the Board of Regents on monetary issues. An impasse was declared and the parties submitted to factfinding. The special master issued a recommended decision which was ultimately accepted by both parties. The following month, the Florida Legislature passed a general appropriations act which underfunded the collective bargaining agreement.

The faculty union sued the Board of Regents, notwithstanding a provision of the public employee relations law which states that failure by the legislature to appropriate adequate monies to fund the special master's recommendation will not constitute an unfair labor practice, and which requires that the chief executive officer administer the contract on the basis of amounts appropriated. The union asserted that sufficient monies were available and that the Board had deviated from the essential requirements of law by refusing to allocate the funds to meet the commitments in the negotiated contract. The court noted that the Board of Regents had properly requested that sufficient funds be appropriated, but that the legislature had failed to heed the request. Accordingly, relying on the statutory provision absolving the employer from responsibility for the legislature's failure to provide sufficient funding, the court ruled in favor of the employer.

42. Ch. 77-465, 1977 Fla. Laws 1899, 1900 (uncodified appropriations bill).
43. United Faculty v. Board of Regents, 365 So. 2d 1073 (Fla. 1st Dist. Ct. App. 1979).
44. FLA. STAT. § 447.309(2) (1977).
The collective bargaining agreement to which the petitioner is a party did not divest the Legislature of its constitutional powers in the appropriation of public monies. It did not reconstitute the exercise of legislative discretion a simple ministerial function. The agreement subsumed the Legislature's appropriations authority. It depended, as the parties knew full well from the outset, upon an appropriation in the amount requested, failing which the agreement was to be administered within the appropriation made.\(^\text{45}\)

The one-sided nature of the Florida collective bargaining process, together with the prohibition on public employee strikes, leaves little leverage in the hands of the worker over terms and conditions of employment. Essentially, Florida law requires only that the public employer meet and confer in good faith; a recalcitrant employer who has complied with the statutory requisites need accept no position with which he does not agree.\(^\text{46}\) Consequently, public employees can do nothing to resolve bargaining disputes except to exert political pressure upon elected members of the legislative body who make the ultimate decision on the final contract. Unfortunately, such pressure usually will have insignificant effect, for although public employee unions wield great power in certain areas of the United States, the South (and particularly Florida)\(^\text{47}\) is largely antiunion and has been fairly immune to this power;\(^\text{48}\) a local legislator may occasionally regret voting for a final contract that will disaffect constituents who are public employees, but in all likelihood the majority of his constituents are hostile to unions and will support his vote.

Under the present scheme, the public employer's position is weighted so heavily that collective bargaining is rendered illusory. This being so, the present Florida statutory scheme should be declared unconstitutional as a meaningless implementation of public employees' constitutional right to collectively bargain. Initially, however, a basic question must be resolved: What does the right to collectively bargain entail?

This question has not been answered in Florida. The First District Court of Appeal, however, commenting on the prohibition against strikes, stated that the prohibition was not intended to "give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circum-

\(^{45}\) United Faculty v. Board of Regents, 365 So. 2d 1073, 1078-79 (Fla. 1st Dist. Ct. App. 1979).

\(^{46}\) But see School Board v. Public Employees Relations Comm'n, 350 So. 2d 819 (Fla. 1st Dist. Ct. App. 1977).

\(^{47}\) See Miami Herald, Mar. 8, 1979, § A, at 6, col. 1.

\(^{48}\) See Collective Bargaining and Politics, supra note 9, at 887.
vent the rights of public employees to meaningful collective bargaining with their employer.”

A similar response should result if the courts are challenged to comment on Florida’s meaningless impasse resolution scheme.

It is important to remember that it is a constitutional, rather than a statutory, right which is at issue. The people of Florida manifested their high regard for collective bargaining by placing it in the constitution in 1968. Legislative implementation of constitutional rights must be closely scrutinized by the courts. As the Florida Supreme Court said:

The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. . . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

If the legislature has enacted legislation which inadequately implements and protects the constitutional right to collectively bargain, the judiciary should be bold in declaring the law unconstitutional. Thereafter, the legislature would be compelled to enact meaningful collective bargaining—in other words, to institute compulsory interest arbitration.

One reason for implementing compulsory interest arbitration is because without it “collective bargaining” in Florida lacks any


50. Dade County Classroom Teachers’ Ass’n v. Legislature, 269 So. 2d 684, 686 (Fla. 1972); cf. Hortonville Educ. Ass’n v. Hortonville Joint School Dist. No. 1, 225 N.W.2d 658 (Wis.), cert. granted, 423 U.S. 821, opinions of individual justices in chambers, 423 U.S. 1301 (1975) (Rehnquist, Circuit Justice), rev’d on other grounds, 426 U.S. 482, cert. denied, 427 U.S. 904 (1976). (By statute, public employees were not allowed to strike. Police and firefighters, however, had a right to compulsory arbitration, while teachers did not. In a suit brought by the teachers, the Wisconsin Supreme Court held that there was a rational basis for the classification and that the teachers had not been deprived of equal protection of the laws. Note, however, an important factor distinguishing the Florida situation from that in Wisconsin: Florida’s right to collective bargaining is constitutional, as opposed to statutory, and as such is subject to much stricter judicial scrutiny than that involved with the rational basis test.)

51. Direct appeal to the Florida Supreme Court would be available because the circuit court in which the action was commenced would be construing a provision of the state constitution. F.LA. CONST. art. V, § 3(b)(1). There should be, consequently, a definitive resolution of the issue.
meaning whatsoever. Another substantial and more positive reason to do so is because interest arbitration is a rational alternative to strikes.52

Private employees have a right to strike, a right believed to be significant for the maintenance of labor peace53 and essential to meaningful bargaining.54 Most public employees in this country have a right to collectively bargain, but because the majority of jurisdictions prohibit strikes, the right has been more accurately described as "collective begging." In a 1972 decision upholding the sentences of a group of striking teachers, a New Jersey court noted that:

Jailing teachers is not the answer to school strikes. . . . Public employees have the right to bargain collectively as to the terms and conditions of their employment but cannot do so on equal terms with their employment unit since they have no means of negotiating from a position of strength. If the present policy prohibiting strikes by public employees is to be continued, machinery for the compulsory settlement of deadlocked labor disputes involving public employees should be established.55

With an effective, fair method of settling contract negotiation disputes, as opposed to the one-sided factfinding system in Florida, public employee strikes, besides being illegal, would also occur less often.56

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53. Public employees' right to compulsory arbitration has also been held to be significant to the maintenance of labor peace. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

54. See generally Bernstein, supra note 8; Kaden, supra note 8.


56. But see Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 225 N.W.2d 658 (Wis.), cert. granted, 423 U.S. 821 (1976), rev'd on other grounds, 426 U.S. 482, cert. denied, 427 U.S. 904 (1976) (teachers' claim that interest arbitration was a necessary, rational alternative to strikes was dismissed summarily).
In addition, negotiations should be more fruitful when some form of threat—namely, forced arbitration—is present. If the public employer in Florida were subject to outside arbitration in the event contract negotiations broke down, he probably would be more enthusiastic about good faith bargaining. The threat of arbitration would have the desired effect of encouraging bargaining and would motivate the parties to voluntarily agree to the contract. Although some argue that arbitration is not a substitute for strikes but rather a substitute for bargaining, statistics compiled under the New York arbitration law indicate that there is no evidence that compulsory interest arbitration has chilled collective bargaining. Instead, factors such as hostility between union and management representatives, political pressure tactics by the union, and the use of outside negotiators were more likely to account for an impasse than the availability of arbitration machinery.

ARGUMENTS AGAINST COMPULSORY ARBITRATION

The most popular argument against compulsory interest arbitration is that it is undemocratic to give a nonelected, unaccountable, outside arbitrator the power to commit public funds. In debate before the 1978 Florida Constitution Revision Commission, proponents of the prohibition of compulsory interest arbitration asserted that such arbitration "placed in the hands of private persons not answerable to the voters the ultimate authority to set taxes, to force

57. See Kaden, supra note 8, at 780-81.
58. See W. Wirtz, Labor and the Public Interest 46-57 (1964); McAvoy, supra note 18, at 1209.
59. See Anderson, MacDonald, & O'Reilly, supra note 52, at 508.


It has often been argued that compulsory arbitration has not eliminated strikes. See H. Wellington & R. Winter, supra note 41, at 177. This, however, is unfounded, for there has been a noticeable absence of strikes by groups covered by arbitration mechanisms. P. Feuille, Final Offer Arbitration: Concepts, Developments, and Techniques 10 (Public Employee Relations Library No. 50, 1975).

60. See Anderson, MacDonald, & O'Reilly, supra note 52, at 476.

A final argument favoring compulsory interest arbitration is the certainty and finality of the award. Although most statutes allow an appeal from an arbitration award, the scope of review is generally limited, employing an "arbitrary and capricious" or a "substantial evidence" test. See Note, Compulsory Arbitration: The Scope of Judicial Review, 51 St. Johns L. Rev. 604, 620 (1977).

61. See McAvoy, supra note 18, at 1208.
elected officials to reduce services or reallocate spending priorities in the means they believe to be in the best interest of the public."

This argument presupposes that arbitral awards are more generous than voluntary agreements or settlements imposed by the public employer. A recent study of the New York arbitration statute conducted by the New York State School of Industrial and Labor Relations at Cornell University found that the difference between arbitral awards and negotiated settlements was statistically insignificant, and that, in fact, arbitral awards were somewhat lower than negotiated settlements.

The argument also assumes that the arbitrator will be unresponsive to the fiscal condition of the public employer. According to many commentators, however, that assumption is unwarranted. Furthermore, the public employer's ability to pay can be included as a criterion to be considered by the arbitrator in reaching a decision. Massachusetts, for example, recently amended its interest arbitration law to specify five factors to be considered by the arbitrator in determining the financial ability of a municipality to meet the costs of an award. Among those factors are a municipality's reimbursements and assessments, its bond indebtedness, and the average per capita property tax burden.

The constitutional argument most often asserted against compulsory interest arbitration is that the enabling statute constitutes an unlawful delegation of legislative authority. The basic premise underlying the nondelegation doctrine is that as a result of the requirements of separation of powers and political accountability the legislature may not delegate its power. Although the doctrine has been eroded entirely under federal law, it is still strong in Florida.

Even in Florida, however, practical necessity dictates that the legislature delegate some of its power to the other branches. Therefore, a delegation generally will be upheld if the court determines that adequate standards have been provided to restrict the discre-

63. See Anderson, MacDonald, & O'Reilly, supra note 52, at 473-77.
64. See, e.g., id. at 507.
67. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397-400 (1940); K. Davis, supra note 66, at § 2.01 (1958).
tion of the decisionmaker and to prevent encroachment upon the domain of another governmental branch. 69

The majority of enabling statutes authorizing compulsory interest arbitration have withstood unlawful delegation challenges. 70 As long as the court was satisfied that adequate standards were provided, the statutes were upheld. The New York Court of Appeals, in upholding the New York enabling statute, stated that "there is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment." 71 Although some enabling statutes have been found to constitute unlawful delegations, it is invariably because a controlling constitutional provision exists which prohibits such delegations. 72

A properly drafted statute, specifying the guidelines to which the arbitrator should adhere in making decisions, should withstand a constitutional challenge in Florida. A recent Florida case held that the nondelegation doctrine required that legislative programs be administered "pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." 73 Enumerating specific factors that the arbitrator must consider in reaching his decision should be sufficient to withstand an unlawful delegation challenge. Limiting the arbitrator's discretion by requiring final offer arbitration might also be effective. 74

69. See generally K. Davis, supra note 66.


72. See Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786 (Utah 1977) (controlling constitutional provision: "The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions." Utah Const. art. VI, § 28). See also Greeley Police Union v. City Council, 553 P.2d 790 (Colo. 1976); City of Sioux Falls v. Sioux Falls Firefighters Local 814, 234 N.W.2d 35 (S.D. 1975); City of Kingsville v. International Ass'n of Firefighters Local 2390, 568 S.W.2d 397 (Tex. Ct. App. 1978).

73. Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

74. See text accompanying notes 87-90 infra.
Whether an arbitrator's decision can bind a state legislature is an issue rarely raised in discussions of compulsory interest arbitration, probably because compulsory interest arbitration statutes apply primarily to police officers and firefighters—local government employees. Local governments have no inherent powers to govern; they have only those powers which are delegated by the constitution and by general and special laws. If the legislature enacts a general law requiring bargaining impasses to be submitted to compulsory interest arbitration, local governmental entities would be forced to comply with the law.

But where the subject of the legislation is state, rather than local, public employees, a serious problem arises. It is well established in Florida that one legislature cannot bind its successors. Therefore, the enactment of compulsory arbitration legislation by a legislature in one year would not bind an unwilling legislature in future years. Precisely what impact this will have on compulsory arbitration legislation is speculative at best, but the following hypothetical will bring the problem into focus. Hypothesize an arbitral award resulting from an impasse between the state university faculty and the Board of Regents which grants the faculty a seven percent pay increase. The Board of Regents and the faculty are bound by the award, but they must go to the legislature for an appropriation to fund it. The legislature refuses to appropriate sufficient funds, asserting that a five percent increase is more than adequate. The "binding" quality of the arbitrator's award clearly has lost its effectiveness.

Two possible solutions to this problem come to mind. One solu-

75. FLA. CONST. art. VIII, §§ 1(f), (g), 2(b); art. IX, § 4(b).

The issue usually arises in the context of tax exemptions granted by one legislature being revoked by a subsequent legislature. See Note, Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property, 6 FLA. ST. U.L. REV. 1085 (1978). These revocations are uniformly upheld by the Florida Supreme Court.

77. Whether affirmative action must be taken by a legislative body to amend or repeal the law in question or whether the law can be merely ignored is unclear. The tax cases referred to supra note 76, involved repeals of previously granted exemptions. Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dismissed, 429 U.S. 803 (1976); Straughn v. Camp, 293 So. 2d 689 (Fla. 1974), appeal dismissed, 419 U.S. 891 (1975). For an example of the legislature having the authority to simply ignore a statute, see [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. No. 055-82, 109, 110 wherein the attorney general issued an opinion allowing the legislature to overrule by implication a statute providing a four-year limitation on claims bills. (The legislative body in question had approved payment for an action arising 15 years earlier.) Also, the legislature often refuses to appropriate funds for programs apparently required by statute. Regardless of which action is taken, the legislature does have the authority to ignore its own previous edicts.
tion would be to promote the concept that a moral obligation existed—that although a future legislature could not be bound, it would have an obligation to acquiesce in the award and to appropriate sufficient funds. Moral obligation generally arises in the context of “moral obligation bonds,” a form of revenue bond in which the state does not pledge its full faith and credit but somehow becomes morally obligated. Although Florida has not officially authorized moral obligation bonds, the concept of a lurking moral obligation has been considered, but not adopted, by the Florida Supreme Court.

The other solution would be to include a clause in the compulsory interest arbitration statute specifying that arbitral awards requiring state legislative action would not be effective without such action. Of the nineteen states that have enacted compulsory interest arbitration statutes, only four states include all state employees in the coverage. Of those four, two states, Maine and Rhode Island, provide that awards involving financial benefits are only advisory upon the state legislative body. Presumably, the advisory nature of these awards is mandated by the rule that future legislatures cannot be bound.

Types of Compulsory Interest Arbitration

After the courts, and possibly the legislature, recognize that collective bargaining in Florida has not been adequately implemented, some action must be taken to amend chapter 447 to include compulsory interest arbitration provisions. Three forms of compulsory interest arbitration have been developed: conventional, final offer, and issue-by-issue. Although conventional arbitration is presently the most widely used, final offer and issue-by-issue arbitration are growing in acceptance. An understanding of the mechanics of each, as well as an appreciation of its effectiveness, is necessary to determine which path Florida should follow.

Conventional arbitration allows the arbitrator (or arbitration panel) to resolve disputes according to his best judgment, the only
restraints being statutory criteria. The resolution, or award, is generally a compromise containing parts of both parties' positions. The biggest advantage of conventional arbitration is that it allows arbitrators the flexibility needed to fashion equitable awards. It also simultaneously protects the interests of both the employer and the union—the employer cannot unilaterally impose his terms on the union if he is dissatisfied with the arbitral award, and the union cannot summarily reject the award in an attempt to get one more beneficial to its position.

The most significant drawback of conventional arbitration is that it tends to chill collective bargaining—neither party will truly bargain in good faith because each fears it may give up more than necessary prior to an impasse. It has long been thought that conventional arbitration awards are a compromise of both parties' positions. Thus, if a compromise is likely to result, the union will staunchly maintain during negotiations that it must have a ten percent wage increase, and management will predictably maintain that it can only give a three percent increase. The usual result is that the arbitrator will compromise and award six percent.

Final offer arbitration is a procedure whereby each party simultaneously submits its last best offer to the arbitrator. The arbitrator is limited to a choice of one of the offers in totality and may not fashion a compromise award. Because the arbitrator is limited to choosing the offer of either management or labor, both parties arguably will engage in serious collective bargaining and their respective final offers should be nearly identical. This incentive to present the most reasonable offer, for fear of losing everything if the opposition's offer is adopted by the arbitrator, truly encourages good faith bargaining. It also severely limits arbitral discretion. On the other hand, it has the effect of tying the hands of the arbitrator and may result in awards that are unsatisfactory to all parties. Furthermore, arbitrators themselves have been particularly critical of final offer

84. See generally Anderson, MacDonald, & O'Reilly, supra note 52, at 494.
85. See P. Feuille, supra note 59, at 7.
86. Id. at 8.
87. E.g. HAW. REV. STAT. § 89.11(d) (Supp. 1978); MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1979).
89. See Witney, Final-Offer Arbitration: The Indianapolis Experience, 96 (No.5) MONTHLY LAB. REV. 20 (1973).
selection, presumably because they are unable to fashion awards which give something to both sides.  

Issue-by-issue arbitration allows the arbitrator or arbitration panel to choose between the final offers of the parties on an issue-by-issue basis. The arbitrator has the prerogative of considering each issue on its merits and accepting the most reasonable offer. The arbitrator, however, cannot refashion an offer on a particular issue; he must accept the offer on the issue in its entirety. In this respect, issue-by-issue arbitration is quite similar to conventional arbitration, for the discretion granted the arbitrator in selecting various issues from the proposals of both parties allows great flexibility in molding a final award that seems equitable to everyone. Besides the advantage of flexibility, issue-by-issue arbitration provides an opportunity for each party to influence directly the final award, thereby producing the beneficial effect of allowing both parties to feel they have won something. It also forces the parties to be reasonable in their demands at the risk of losing an entire issue.

It may, however, have a chilling effect on negotiations, because the parties have little incentive to reach agreement on separate issues. A study completed in 1975 indicated that jurisdictions with issue arbitration were invoking arbitration more often than states with final offer arbitration. Moreover, it is becoming apparent that issue arbitration does not induce parties to narrow their area of disagreement as much as does final offer arbitration. Finally, dividing the parties' proposals into separate issues creates confusion as to what, exactly, will constitute an issue. Recently, the Iowa Supreme Court recognized the criticisms directed at issue-by-issue arbitration and held that parties must submit their final offer on particular issues by subject categories, rather than submit "any word, clause, phrase, sentence or paragraph upon which parties" may disagree.

For purposes of comparison, information from the nineteen states providing compulsory arbitration has been assembled in a chart appended hereto. Analysis of this information indicates that most states mandating compulsory arbitration restrict it to police, fire-
fighters, and essential public safety employees. Only Iowa, Maine, Nebraska, and Rhode Island provide compulsory arbitration for virtually all public employees, and only Iowa, Maine, and Rhode Island require compulsory arbitration for teachers upon impasse. It is interesting to note that in Maine and Rhode Island any awards involving money are advisory only.

The chart further shows that conventional arbitration is by far the most popular form of arbitration. A number of jurisdictions, however, are experimenting with new ideas. For example, certain states allow parties the option of choosing which form of arbitration to use. Massachusetts recently amended its law to provide for a joint labor-management committee to oversee police and firefighter negotiations, the purpose of which is to encourage collective bargaining and discourage resort to the impasse procedures. Composed of representatives from both parties and a neutral chairman, the committee is empowered to determine whether a true deadlock in negotiations has occurred and, if so, what form of arbitration should be employed to resolve the impasse.

CONCLUSION

Bargaining collectively over terms and conditions of employment, like all forms of negotiation, cannot work when one of the parties to the negotiation is also the final decisionmaker. Florida has enacted a scheme that gives public employees rights to organize, to be free from unfair labor practices, and to submit grievances to arbitration. It has, however, denied them the right to bargain meaningfully over the terms of their contract—a right so fundamental to collective bargaining that its impairment compels a declaration that chapter 447 is unconstitutional.

An action seeking a declaration that the impasse resolution provisions of chapter 447 violate the Florida Constitution is now pending before a Broward County trial court. This suit provides the judici-

97. Presumably, in states that permit rather than mandate arbitration, a number of local governments and school districts have opted to employ compulsory interest arbitration. It would generally be provided for by charter, ordinance, executive order, or contract. See, e.g., PRINCE GEORGE'S COUNTY, MD., CODE OF ORDINANCES AND RESOLUTIONS ch. 13-A (1973), reprinted in State and Local Programs: Maryland, 51 GOV'T EMPL. REL. REP. (BNA) 2911, 2923-29 (May 5, 1975).
98. See also HAW. REV. STAT. § 89.11(d) (Supp. 1978) (providing that arbitral awards items requiring any monies for implementation are subject to appropriations); PA. STAT. ANN. tit. 43, § 1101.805 (Purdon Supp. 1979) (providing that arbitral awards involving correctional officers and court employees requiring legislative action are advisory only).
100. Broward County Classroom Teachers Ass'n v. School Bd., No. 79-9435 (Fla. 17th Cir. Ct., complaint filed May 25, 1979).
ary with an opportunity to determine whether a statute that undermines a constitutional right will be allowed to stand. Although Florida courts should, and do, pay great deference to legislative implementation of constitutional provisions, the courts have in the past been willing to act when the implementation is ineffectual. Such is the case here, and the courts should be bold in declaring the statute unconstitutional.

Compulsory interest arbitration has not been free from criticism. Neither party in arbitration is entirely comfortable being bound by the decisions of an outsider. One must remember, however, that the principal purpose of compulsory arbitration is to stand as a threat—the way strikes stand as a threat—to pressure labor and management to negotiate together voluntarily, in good faith, so that resort need not invariably be made to impasse resolution mechanisms. It should not be allowed to chill fruitful contract negotiation; it should not become an automatic step in the bargaining process.

Final offer and issue-by-issue arbitration have been specifically designed to maximize good faith bargaining, for both parties stand to lose if their offers have not been reduced to the most reasonable denominator. Combined with this, the flexibility potential in issue-by-issue arbitration makes it the most desirable form of compulsory arbitration. Florida should adopt it, specifying that each issue be submitted by broad category rather than by minute points. Additionally, in order to ensure that arbitration is not perceived by labor and management as a substitute for bargaining, Florida should carefully scrutinize the aforementioned joint labor-management committee being tested in Massachusetts and, if it appears practicable and effective, create a similar committee.

Arbitration will not be warmly embraced in Florida, just as collective bargaining was not. The Florida Constitution, however, grants citizens the right to collectively bargain, and that right cannot be exercised fully unless employees share with their employers the right to determine terms and conditions of employment; under the present system, public employees do not share this right with their employers. Public employee collective bargaining in Florida is meaningless. If the legislature does not voluntarily amend chapter 447 to adequately implement this constitutional right, the courts must act to force effective implementation.

101.  *E.g.*, District 57, Int'l Ass'n of Machinists v. Talisman Sugar Corp., 352 So. 2d 62 (Fla. 4th Dist. Ct. App. 1977) (the court acknowledged that farmworkers had a constitutional right to collectively bargain, but said that the legislature, rather than the judiciary, was the appropriate branch of government to grant relief).
# APPENDIX

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<td>Alaska</td>
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<td>Essential state employees</td>
<td>Mediation</td>
<td>Arbitration carried out pursuant to Uniform Arbitration Act</td>
<td>Conventional Arbitration</td>
<td>None</td>
<td>Non-essential employees have a limited right to strike.</td>
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<td>State</td>
<td>Code or Statute</td>
<td>Party Representation</td>
<td>Resolution Method</td>
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<td>Hawaii</td>
<td>HAW. REV. STAT. firefighters § 89-11(d) (Supp. 1978)</td>
<td>Mediation Tripartite panel, unless parties otherwise agreed. Final offer, unless parties agree to an alternative form of arbitration.</td>
<td>9 specific 1 open-ended</td>
<td>1. Other public employees have a limited right to strike. 2. All money awards are subject to legislative appropriation.</td>
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<td>Iowa</td>
<td>Iowa Code Ann. All public employees § 22.20 (West. 1978)</td>
<td>Mediation and factfinding Tripartite panel, issue-by-issue unless parties agree to single arbitrator.</td>
<td>4 specific</td>
<td>1. The factfinder's recommendation may be considered by the panel as one of the offers. 2. Issues must be considered by subject categories. West Des Moines Educ. Ass'n v. Public Employment Relations Bd., 266 N.W. 2d 118 (Iowa 1978).</td>
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<td>State</td>
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<td>Method of Facts Finding</td>
<td>Type of Panel</td>
<td>Time Limit</td>
<td>Note</td>
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<td>Louisiana</td>
<td>LA. REV. STAT. ANN. § 23-890 (Supp. 1979)</td>
<td>Municipal transit employees</td>
<td>None</td>
<td>Tripartite</td>
<td>Conventional</td>
<td>None</td>
<td>This is the only state law on public sector collective bargaining in Louisiana.</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>Participants</td>
<td>Mediation</td>
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<td>Massachusetts</td>
<td>MASS. GEN. LAWS ANN. ch. 150E, § 4 (West Supp. 1979)</td>
<td>Police and firefighters</td>
<td>Mediation and factfinding</td>
<td>Tripartite panel, unless otherwise agreed.</td>
<td>10 specific, including 5 subpoints on the employer's financial ability to fund the award.</td>
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<td>1. Factfinder's recommendations may be considered by the panel as one of the offers.</td>
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<td>2. Joint labor-management committee established by statute to oversee negotiations and encourage bargaining.</td>
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<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. §§ 423.231-.244 (1978)</td>
<td>Public safety and emergency service employees</td>
<td>Mediation</td>
<td>Tripartite panel, issue-by-issue for economic issues; conventional for non-economic issues.</td>
<td>8 specific, 1 open-ended</td>
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<tr>
<td>State</td>
<td>Statute</td>
<td>Type of Mediation</td>
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<th>Nev. Rev. Stat. § 288.200, § 288.215 (1977)</th>
<th>Local government employees and firefighters</th>
<th>Mediation and factfinding</th>
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<th>Local government—conventional; firefighters—final offer.</th>
<th>2 specific</th>
<th>Local government—parties can agree to have factfinder's report be binding, or the Governor may proclaim it so.</th>
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<td>New Jersey</td>
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<td>Mediation and factfinding</td>
<td>Optional</td>
<td>Parties have option of conventional, final offer, or issue-by-issue. If parties cannot agree, final offer will be used.</td>
<td>7 specific, 1 open-ended</td>
<td>Factfinder's recommendations may be considered by the arbitrator as one of the offers.</td>
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<td>State</td>
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<tr>
<td>Oregon</td>
<td>OR. REV. STAT. §§ 243.742 to .782 (1977).</td>
<td>Police, firefighters, and guards at prisons and mental hospitals</td>
<td>Single arbitrator or tripartite panel</td>
<td>Conventional, 7 specific, unless otherwise agreed.</td>
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<td>Pennsylvania</td>
<td>PA. STAT. ANN. tit. 43, §§ 217.4 -.7, § 1101.805 (Purdon Supp. 1979).</td>
<td>Police, firefighters, correctional officers, and court employees</td>
<td>Tripartite panel</td>
<td>Conventional</td>
<td>None</td>
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1. Other employees have a limited right to strike.

2. Counties may enact ordinances that are not inconsistent with state law.

3. Arbital awards involving correctional officers and court employees which require legislative action are advisory only.
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| Wisconsin | WIS. STAT. ANN. § 111.77, 111.70(4) (West Supp. 1978) | Police and firefighters; will apply to all municipal employees | Mediation Single arbitrator or tripartite panel | Conventional or final offer | 1. Both parties may submit a final offer; if mediation breaks down, a party can withdraw its offer and strike.  
2. Applies only to cities with populations between 2,500 and 500,000. |