Hastings Law Journal

Volume 55 | Issue 1 Article 4

1-2003

Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond

Brian J. Malloy

Notes

Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond

BRIAN J. MALLOY

INTRODUCTION

Binding interest arbitration has provided a sensible solution to public employee strikes, particularly by police and firefighters, for states and localities over the past thirty-five years. In April 2003, the California Supreme Court reopened the debate on the wisdom of binding interest arbitration for public employees. In *County of Riverside v. Superior Court*,[1] the court reversed a twenty-year trend and struck down a binding interest arbitration statute.

Interest arbitration "refers to the arbitration of disputes arising from negotiations for new contract terms."[2] This is different from grievance arbitration, which "arise[s] from the interpretation or application of an existing agreement."[3] "Binding" designates that the arbitrator's decision results in a legally binding contract.[4] Most binding interest arbitration statutes require "final offer" arbitration, whereby the arbitrator must select the last offer submitted by one of the parties, usually on an issue-by-issue basis.[5] Thus, binding interest arbitration takes the final policy decisions out of the hands of the elected representatives and gives them to a neutral third party.

---

1. 66 P.3d 718 (Cal. 2003).

2. Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678, 678 n.1 (1976).

3. *Id.*

4. *Id.*

5. *See* Senator Robert J. Martin, *Fixing the Fiscal Police and Firetrap: A Critique of New Jersey's Compulsory Interest Arbitration Act*, 18 SETON HALL LEGIS. J. 59, 60 (1993). Because it is beyond this Note's scope, I will not be discussing the benefits and disadvantages of final offer arbitration to other more discretionary forms.

Currently, about thirty states (or localities therein) have some sort of interest arbitration statute.[6] There are several rationales for allowing interest arbitration in the public sector. For example, it can protect the public against harmful strikes, while at the same time provide bargaining leverage to unions incapable of striking effectively.[7] However, cities and counties have argued against binding interest arbitration.[8] The public employers' argument is that, as opposed to grievance arbitration in which the arbitrator performs a judicial function by merely interpreting and applying an existing agreement, in interest arbitration the arbitrator is setting the terms, working conditions, and wages of public employees, thereby making a policy determination usually entrusted to politically accountable representatives.[9] Public employers also argue that binding interest arbitration inevitably leads to inflationary wages that have a harmful impact on their budgets.[10]

Although many state courts have traditionally upheld binding interest arbitration, a notable minority has held it to be an unconstitutional delegation of legislative authority to a private third party.[11] In the past twenty years, there has been a trend toward endorsing binding interest arbitration wholeheartedly.[12] The *County of Riverside v. Superior Court* decision was the first decision since 1981 to strike down a binding interest arbitration statute, thus ending this trend of total acceptance.

Provided that certain safeguards are in place, the trend of upholding binding interest arbitration statutes was appropriate. Part I of this Note will compare cases from the 1990s and 2000s to cases from the 1960s and

---

6. *See* Jeffrey Sloan, *New Developments in Municipal Law Practice: Municipal Employee Unions in California*, at 581, 594 (PLI Crim. Law & Practice Course, Handbook Series No. Co-001I, 2001) (listing state and local interest arbitration statutes).

7. *See* Grodin, *supra* note 2, at 679–80.

8. Cities and counties have also argued against grievance arbitration procedures as well, but courts have been more concerned over interest arbitration and more likely to hold interest arbitration unconstitutional.

9. *See* Anthony Modd, Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 16 OHIO ST. J. ON DISP. RESOL. 425, 430 (2001).

10. *See* Sloan, *supra* note 6, at 620.

11. For early state high courts striking down binding interest arbitration statutory framework, see Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654, & 2064, 563 P.2d 786 (Utah 1977); City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35 (S.D. 1975). For early state high courts upholding binding interest arbitration, see City of Warwick v. Warwick Regular Firemen's Ass'n, 256 A.2d 206 (R.I. 1969); State *ex rel.* Fire Fighters Local No. 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

12. *See, e.g.*, Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 138–39 (Colo. 2000); Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d 261, 271 (Okla. 1996); Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n, 839 P.2d 1080, 1090 (Alaska 1992). *Contra* County of Riverside v. Superior Court, 66 P.3d 718, 730–31 (Cal. 2003).

1970s and propose a constitutionally acceptable statutory framework that addresses the political accountability concerns. Part II will provide background on the more relevant states' constitutional provisions, statutes, and cases, examining the early split and analyzing the trend toward acceptance. Part III will provide an analysis of the current state of the law, critiquing some of the decisions both upholding and invalidating the different statutory schemes. Part IV will offer a proposal for California and other jurisdictions that addresses the political accountability concerns, derived in large part from the more recent cases. This Part will also propose that direct accountability through voter approval of an arbitration award is the soundest way to ensure political accountability. This Part is an especially important model for California cities and counties, because, absent a state constitutional amendment, statewide binding arbitration is no longer constitutionally permissible in California.

I. STATE COURTS' INTERPRETATION OF THE NON-DELEGATION DOCTRINE AS APPLIED TO BINDING ARBITRATION

A. CONSTITUTIONAL PROVISIONS

The most successful challenges to the constitutionality of binding interest arbitration statutes have been under the non-delegation doctrine of many state constitutions.[13] The states that have addressed this issue generally have a similar provision in their constitution, that the state 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, or to levy taxes or perform any municipal function whatever."[14] There are also other constitutional provisions that courts have relied upon.[15] While the text of the particular constitutional provisions are important, the overriding concern, regardless of the text, is that

13. *See Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d at 791; *Sioux Falls Firefighters*, 234 N.W.2d at 38.

14. *Sioux Falls Firefighters*, 234 N.W.2d at 36 n.1 (quoting PA. CONST. art. III, § 31) *See, e.g., Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d at 788 n.1; Harney v. Russo, 255 A.2d 560, 562 (Pa. 1969); *Fire Fighters Local*, 437 P.2d at 299. Importantly, the California Supreme Court in *County of Riverside v. Superior Court* based its decision in large part on home rule, rather than simply non-delegation grounds. While both involve delegation, home rule refers to the power of the state to compel a locality to delegate the locality's power, while non-delegation refers to the power of a public entity to delegate its power. Most of the successful challenges have been on strictly non-delegation, rather than home rule, grounds. *See* cases cited *supra* note 12.

15. *See, e.g.*, Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 135. "Every person having authority to exercise or exercising any public or government duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers . . . .") *Id.* (quoting COLO. CONST. art. XXI, § 4).

any binding arbitration framework allows a private party to make what is in reality a legislative policy decision.[16] Regardless of the constitutional provision, it is the details of the statute that have tended to play the determinative role of whether a court will uphold or strike down binding interest arbitration under a non-delegation theory.

B. THE EARLY CASES

In the late 1960s and 1970s, state courts routinely upheld constitutional challenges to binding interest arbitration. Two early and often-cited cases are *State ex rel. Fire Fighters Local No. 946 v. City of Laramie*[17] and *Warwick Regular Firemen's Ass'n*,[18] which both upheld binding arbitration statutes. In *Fire Fighters Local*, the firefighter's union sought to compel Laramie to comply with the procedures of a binding interest arbitration statute.[19] The city defended on the ground that the statute was unconstitutional.[20] The Wyoming Supreme Court, while not even discussing the specifics of the statute, upheld it, reasoning that performance of arbitration is not "performance of a municipal function" within the meaning of the state constitution.[21]

In *Warwick Regular Fireman's Ass'n*, the Rhode Island Supreme Court upheld the Firefighters' Arbitration Act, a binding arbitration statute.[22] The city challenged the statute on non-delegation grounds.[23] The court discussed the provisions of the statute, including the appointment of a three-person arbitration panel.[24] One arbitrator is to be appointed by the firefighters' union, one arbitrator is to be appointed by the municipality, and if the parties cannot agree on the third arbitrator then the chief justice of the Rhode Island Supreme Court will appoint the final member of the panel.[25] While not discussed in this early case, who appoints the arbitrators will, and should, have an impact on the constitutionality of these provisions. Here, however, the court did not ad-

16. Louis S. Cataland, *Binding Arbitration and the Nondelegation Doctrine: Does Ohio's Collective Bargaining Act Unconstitutionally Delegate Legislative Authority to Administratively Appointed Arbitrators?*, 6 OHIO ST. J. ON DISP. RESOL. 83, 88 (1990).

17. 437 P.2d at 301 (Wyo. 1968).

18. 256 A.2d at 212.

19. *Fire Fighters Local*, 437 P.2d at 298.

20. *Id.*

21. *Id.* at 300.

22. *Warwick Regular Fireman's Ass'n*, 256 A.2d at 212.

23. The constitutional provision at issue in *Warwick Regular Fireman's Ass'n* was Article VI, Section 2 of the Rhode Island Constitution, which read: "The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws." R.I. CONST. art. VI, § 2.

24. *Warwick Regular Fireman's Ass'n*, 256 A.2d at 208.

25. *Id.*

dress this aspect. Instead, the court simply declared that "an arbitrator appointed under the pertinent provisions of the statute is a public officer and that collectively the three constitute a public board or agency."[26] Declaring the board to be a "public agency" led the court to conclude that there was not a delegation to a private person, and therefore no constitutional non-delegation problems.[27] This circular reasoning has received severe criticism, even by proponents of binding arbitration.[28] Other courts around this era also routinely upheld binding arbitration statutes.[29]

While many courts upheld these statutes, there were several courts that invalidated binding arbitration schemes based entirely on non-delegation grounds.[30] In 1962, the Pennsylvania Supreme Court held that a binding arbitration act ("the Act of June 30, 1947") involving police and firefighters was not binding on the public, and alternatively, that if it was binding, it would violate the Pennsylvania Constitution.[31] In *Greeley Police Union v. City Council of Greeley*, the Colorado Supreme Court invalidated a binding arbitration provision in a city charter amendment that applied to police officers.[32] The court noted that the charter amendment provided that the American Arbitration Association select a single person who is granted authority to resolve all disputed issues.[33] The court held that the Colorado Constitution prohibited "delegating legislative power to politically unaccountable persons."[34] The court concluded that the charter amendment unconstitutionally delegated this legislative power.[35]

---

26. *Id.* at 211.

27. *Id.*

28. *See, e.g.*, Charles B. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L. REV. 557, 565 (1980).

29. *See* Milwaukee County v. Milwaukee Dist. Council 48, 325 N.W.2d 350 (Wis. Ct. App. 1982); City of Richfield v. Local No. 1215, Int'l Ass'n of Firefighters, 276 N.W.2d 42 (Minn. 1979); Medford Firefighters Ass'n, Local No. 1431 v. City of Medford, 595 P.2d 1268 (Or. Ct. App. 1979); City of Spokane v. Spokane Police Guild, 553 P.2d 1316 (Wash. 1976); Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914 (Mass. 1976); City of Amsterdam v. Helsby, 332 N.E.2d 290 (N.Y. 1975).

30. *See* Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654, & 2064, 563 P.2d 786, 789–90 (Utah 1977); Greeley Police Union v. City Council of Greeley, 553 P.2d 790, 792 (Colo. 1976); City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35, 38 (S.D. 1975); Erie Firefighters Local No. 293 v. Gardner, 178 A.2d 691, 695–96 (Pa. 1962).

31. *Erie Firefighters Local No. 293*, 178 A.2d at 695. The constitutional provision at issue here was typical: "The General Assembly 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 or perform any municipal function whatever." PA. CONST. art. III, § 31 (1994).

32. 553 P.2d at 792–93.

33. *Id.* at 791.

34. *Id.* at 792.

35. *Id.*

The South Dakota Supreme Court, in *City of Sioux Falls v. Sioux Falls Firefighters, Local 814*, held that the South Dakota Firemen's and Policemen's Arbitration Act, a state statute providing for binding arbitration for police and firefighters, was a "clearly unconstitutional" delegation of legislative authority.[36] The court specifically rejected the reasoning provided by the Wyoming and Rhode Island Supreme Courts.[37] The Utah Supreme Court also invalidated the Firefighter Negotiation Act that applied only to firefighters.[38] The court was concerned that no statutory standards were in place to control the arbitrator: "Although it is not dispositive of the delegation issue, in this case the legislature failed to provide any statutory standards in the act or any protection against arbitrariness, such as, hearings with procedural safeguards, legislative supervision, and judicial review."[39] Finally, in 1981 the Supreme Court of Kentucky, in a brief opinion, struck down a city's binding arbitration ordinance on non-delegation grounds in *City of Covington v. Covington Lodge No. 1, Fraternal Order of Police*.[40]

These early cases provide a good preview of what was to happen in the next two decades. While the majority of the courts were upholding binding arbitration statutes, there was a significant minority that took a hard look at the statute and invalidated those statutes that simply gave too much unfettered power to the arbitrator. The concerns over political accountability and especially lack of standards would not dissipate. As more and more states and localities experimented with binding interest arbitration, more courts faced the political accountability and standards issues. Until recently, state courts had unanimously upheld binding arbitration statutes over the past twenty years. However, the opinions suggest that the political accountability and standards concerns did not get lost on either the courts or on the legislatures who were drafting the statutes.

C. A Trend Towards Acceptance

While most recent state court decisions have overwhelmingly upheld binding arbitration statutes, this section will begin with an examination

36. City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35, 38 (S.D. 1975).

37. *Id.* at 36–38.

38. Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654, & 2064, 563 P.2d 786, 789–90 (Utah 1977).

39. *Id.* at 789.

40. 622 S.W.2d 221, 223 (Ky. 1981). In this case, the previous employment contract between the police and the city stated that when this contract expired, in the event of a bargaining impasse, binding arbitration would take place. *Id.* at 221. The city had passed this previous contract as part of an ordinance. *Id.* This case was unique in that unlike a blanket city ordinance that applied across the board to all police and/or firefighter negotiations, this ordinance applied only to this particular situation.

of three state courts that had previously found binding arbitration unconstitutional but, in a subsequent decision, upheld the rewritten provisions. Each of these state courts took a different approach.

In the late 1980s, the Ohio Supreme Court flip-flopped on the constitutionality of binding interest arbitration. In 1988, in *City of Rocky River v. State Employment Relations Board* (*Rocky River I*), the court struck down portions of Ohio's Public Employees' Collective Bargaining Act as unlawfully delegating legislative authority to an arbitrator.[41] After several motions for reconsideration, a year later in *City of Rocky River v. State Employment Relations Board (Rocky River IV)* the court upheld the same statute as a constitutional delegation of legislative power.[42] The Ohio Supreme Court noted that the statute provides "the conciliator with detailed guidelines under which to proceed," and that these standards were sufficient for delegation purposes.[43] These standards included consideration of past collectively bargained agreements, the interests and welfare of the public, and the ability of the public employer to finance and administer the agreement.[44] This case has "at least temporarily, settled a constitutional debate among the justices of the Ohio Supreme Court."[45] It is interesting to note that this decision, while making mention of the non-delegation issue, did not really address it in full detail, and has been criticized for that important omission.[46] But the court did address another important factor: standards to control the arbitrator.

Pennsylvania, whose Supreme Court had invalidated a binding interest arbitration statute in *Erie Firefighters*, approached the non-delegation problem another way. Rather than a change of justices or redrafting the statute, the state adopted a constitutional amendment[47] that

41. City of Rocky River v. State Employment Relations Bd., 530 N.E.2d 1, 9 (Ohio 1988) (*Rocky River I*).

42. City of Rocky River v. State Employment Relations Bd., 539 N.E.2d 103, 119 (Ohio 1989) (*Rocky River IV*). One commentator has noted that in this intervening year, one justice had replaced another justice, and the court agreed to reconsider the motion for rehearing. *See* Cataland, *supra* note 16, at 83 n.3.

43. *Rocky River IV*, 539 N.E.2d at 112.

44. *Id.*

45. *Id.* at 83.

46. *See* Cataland, *supra* note 16, at 83–84.

47. The constitutional amendment reads:

> Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen and firemen and their public employers shall be binding upon all parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivisions

permitted binding interest arbitration. The amendment immediately followed the constitutional delegation article that the Pennsylvania Supreme Court relied upon in invalidating the statute in *Erie Firefighters*. Nonetheless, a city council challenged the Act of June 24, 1968, which provided for compulsory arbitration to resolve disputes between police and firefighters and the public employers.[48] The city argued that the statute did not contain sufficient standards required by the court in other instances of delegated authority.[49] The Pennsylvania Supreme Court rejected this argument, reasoning that "[t]o hold that the statute before us is invalid because it does not contain the standards necessary under our decisions interpreting Article II [section] 1 would be to directly contradict the language of the Amendment to Article III [section] 31, and would violate its obvious intendment as well."[50] Thus, the placement of authorization for binding arbitration *directly into a state constitution* virtually eliminates any successful challenges to the statute.

Colorado, whose Supreme Court rejected a binding arbitration statute in *Greeley Police Union*, was once again faced with the issue in *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*.[51] This case exemplifies the modern trend with a well-reasoned and analyzed opinion that addressed the political accountability issue. Commerce City challenged a charter amendment that established a detailed binding arbitration framework.[52] The amendment required the City Council to create a permanent panel of at least three arbitrators.[53] The Council was allowed to add and remove arbitrators from the panel at any time.[54] In addition, the amendment required the arbitrator to consider seven enumerated factors and issue a written decision.[55] The seven factors, which are typical of the standards set out by many state and local legislatures and demanded by some courts, are: (1) the interests and welfare of the public and the financial ability of the City to bear the costs involved; (2) the lawful authority of the City; (3) stipulations of the parties; (4) comparison of the compensation, benefits, hours, and other terms or conditions of employment of the members of the police department in-

---

or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings.

PA. CONST. art. III, § 31.

48. Harney v. Russo, 255 A.2d 560, 561 (Pa. 1969).

49. *Id.* at 562–63.

50. *Id.* at 563.

51. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 133–34 (Colo. 2000) (en banc).

52. *Id.* at 135.

53. *Id.* at 134.

54. *Id.*

55. *Id.* at 134–35.

volved with other police department members performing similar services in public employment in comparable communities; (5) the cost of living; (6) any claims of failure of a party to bargain in good faith pursuant to section 21.7(c); and (7) other similar standards recognized in the resolution of interest disputes.[57] Finally, the amendment provided for limited judicial review of the arbitrator's award.[58]

The Colorado Supreme Court upheld the charter amendment, stating that the case was consistent with *Greeley Police Union*.[59] The court reasoned that in *Greeley Police Union*, the court made clear that the Colorado Constitution prohibited delegation of legislative power to "politically unaccountable" persons.[60] Here, the court held that, by requiring the City Council to create the arbitration panel and by allowing the City Council to remove persons from the arbitration panel, the panel was politically accountable.[61] Furthermore, the court held that the amendment provided sufficient standards and safeguards to guide the arbitrator's decision.[62]

Over the past decade, other states have also dealt with constitutional non-delegation challenges to binding interest arbitration statutes. The cases of Oklahoma and Alaska are illustrative of the new approach legislatures are taking. Instead of unaccountable arbitrators with absolute discretion, these statutes address political accountability concerns and constrain arbitrator discretion.

In 1971, the Oklahoma Legislature passed the Fire and Police Arbitration Act (the "Act"), where the right of police and firefighters to strike was withheld.[63] However, the Act only provided for non-binding interest arbitration.[64] The Act was amended in 1985 and 1995 to provide for binding interest arbitration.[65] The 1995 amendment also provided a unique process: If the arbitrators did not choose the city council's best offer, the city council could call a special election and submit the two proposals to a vote of the people.[66] The citizens of the affected municipal-

57. *Id.* at 135 n.5.
58. *Id.* at 135.
59. *Id.* at 136.
60. *Id.*
61. *Id.* at 137.
62. *Id.* at 138–39.
63. Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d 261, 265 (Okla. 1996).
64. *Id.*
65. *Id.*
66. *Id.*

ity could, in essence, have the final say as to whether to ratify or reject the collective bargaining agreement.[67]

In 1996, the Oklahoma Supreme Court upheld the Act despite numerous constitutional challenges, including non-delegation, in *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw*.[68] The court compared the Oklahoma statute to other state binding arbitration statutes that were held constitutional. The Oklahoma court found the reasoning of the other state courts persuasive that the "delegation of authority to an arbitrator was permissible because there were sufficient guidelines and standards set forth in the legislation."[69] The court pointed out that here, the Act "requires that the arbitrators give weight to factors such as a comparison of wages and benefits with prevailing wage rates, interest and welfare of the public and revenues available to the municipality."[70] The court reasoned that similar "guidelines were noted by the Alaska Court in approving their statute for binding interest arbitration."[71] (This case is discussed immediately below.) Therefore, the Oklahoma Supreme Court upheld the Act against the political accountability challenge because the "delegation of power is accompanied by sufficient guidelines."[72]

Surprisingly, the Oklahoma Supreme Court did not analyze the political accountability aspect of the municipality allowing the submission of final offers to the voters if the municipality's offer is not chosen. The court merely stated that "the ultimate decision resides with either the city council or the people themselves."[73] This lack of analysis may be because direct voter approval of the offer makes the arbitration offer per se politically accountable; but it is more likely because the court never reached this issue, since it held that the statute contained sufficient standards and guidelines. In fact, the municipalities in *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw* argued against the direct vote provision, stating that it took away the city's power to tax and that it was an illegal use of the initiative and referendum process.[74] The court rejected all of these contentions.[75]

In 1975, Anchorage, Alaska enacted a comprehensive labor ordinance that included a binding arbitration provision for police, fire per-

67. *Id.* at 269.
68. *Id.* at 263.
69. *Id.* at 267.
70. *Id.*
71. *Id.* at 268.
72. *Id.*
73. *Id.*
74. *Id.* at 268–69.
75. *Id.*

sonnel, and emergency medical service workers.[76] In 1989, Anchorage, while in contract talks with local police and firefighters, filed suit claiming that the binding arbitration provision was unconstitutional.[77] Three years later, the Supreme Court of Alaska in *Anchorage Police Department* heard the case and addressed both the issues of political accountability and sufficient standards.[79] The court upheld the ordinance under both challenges.[80]

Unlike Colorado's case in *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*, where the City Council chose the list of arbitrators, here the American Arbitration Association supplied the list.[81] That was not determinative for the Alaska high court. First, the court, citing language used by the Supreme Judicial Court of Massachusetts stated that "we are less concerned with the labels placed on arbitrators as public or private, as politically accountable or independent, than we are with the totality of the protection against arbitrariness provided in the statutory scheme."[82] Unlike the South Dakota and Utah courts, the Alaska Supreme Court held that the delegation of legislative power to an arbitrator was not per se unconstitutional.[83]

Here, the court held that the statute contained sufficient protections against arbitrariness. First, the court pointed out that the arbitration must be conducted according to published rules by the American Arbitration Association.[84] Second, while the American Arbitration Association provides the list of arbitrators, the choice of the arbitrator must be mutually agreed to by the parties.[85] Third, the arbitrator must conduct a hearing and produce a written decision with findings of fact concerning the specific issues in question.[86] Finally, the written decision is "subject to

76. Municipality of Anchorage v. Anchorage Dep't of Employees Ass'n, 839 P.2d 1080, 1081–82 (Alaska 1992).

77. *Id.* at 1083.

79. The court framed the challenges this way: "The Municipality argues that the Code's binding interest arbitration provisions, delegating legislative authority to a politically unaccountable arbitrator, violate the Alaska Constitution. Alternatively, the Municipality contends that the Code is unconstitutional because its provisions fail to provide standards to guide the arbitrator." *Id.*

80. *Id.* at 1085, 1089.

81. *Id.* at 1082 n.5.

82. *Id.* at 1084 (quoting Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914, 920 (Mass. 1976)).

83. *Id.* at 1085.

84. *Id.* at 1088.

85. *Id.* at 1086.

86. *Id.*

judicial review for abuse of discretion, fraud, or misconduct on the part of the arbitrator."[87]

Another important factor was the list of standards that has become common in modern binding interest arbitration statutes. The statute provided that the fact-finder is to consider "workload, productivity, economic feasibility, cost of living, the parties' bargaining history, relevant market comparisons in the public sector, and relevant market comparisons in the private sector."[88] After an exhaustive analysis of the statute, the court concluded that "[i]n light of the elaborate and detailed structure which guides the arbitrator's decisions and guards against arbitrary action we conclude that the Code's delegation of legislative authority is constitutional."[89]

D. The Trend Ends in California

The trend of courts upholding binding arbitration statutes involving public employees and public entities ended in April 2003, when the California Supreme Court invalidated the state's binding interest arbitration statute.[90] Until 2001, California had been without a state-wide binding interest arbitration statute. Twenty-one California localities, however, had implemented various forms of binding arbitration.[91] During the 1999–2000 session, the California Legislature enacted into law Senate Bill 402, entitled "Arbitration of Firefighter and Law Enforcement Officer Labor Disputes," which added sections 1299 et seq. to the California Code of Civil Procedure.[92] Under Senate Bill 402, a labor union representing public safety employees can declare an impasse in the negotiations and require a local agency to submit unresolved economic issues to binding arbitration.[93] Each party then chooses an arbitrator, who together choose a third arbitrator.[94] The arbitration panel then chooses between each side's last best offer, based on an enumerated list of factors.[95] Interest-

87. *Id.* at 1088.

88. *Id.* at 1082 n.5.

89. *Id.* at 1089.

90. County of Riverside v. Superior Court, 66 P.3d 718, 721 (Cal. 2003).

91. Sloan, *supra* note 6, at 605.

92. County of Riverside v. Superior Court, 66 P.3d at 721.

93. *Id.* at 722. For a discussion on the distinction between economic and noneconomic issues, *see infra* note 145.

94. *Id.* (citing CAL. CIV. PROC. CODE §§ 1299.4 to .6 (West 1982)).

95. *Id.* The factors included: the interest and welfare of the public; the financial condition of the employer and its ability to meet the costs of the award; the availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration; comparison of wages, hours, and other terms and condition of employment of other employees performing similar services in similar employment; the average consumer prices for goods and services; particular requirements of employment, including, but not limited to, mental, physical, and educational qualifications, job training and skills, and hazards of employment; and changes in any of the foregoing that are traditionally taken into

ingly, Senate Bill 402 only applied to any local agency or any entity acting as an agent of a local agency, but did *not* apply to the State of California even acting as such an agent.[96] Therefore, the California Highway Patrol, among others, were not covered by this statute.

The California Supreme Court invalidated Senate Bill 402 as violating the California Constitution. The court, however, invalidated the law on "home rule" grounds, not under the non-delegation doctrine.[97] The court held that the legislature did not have power to legislate in this area because compensation of county public employees is not a statewide concern, and therefore the power to compensate county employees is within the sole powers of counties (and presumably cities for city employees).[98] The court specifically did not address whether a county (or city or the state for its *own* employees) could enact a binding arbitration statute on matters it controlled:

> At the outset, we emphasize that the issue is not whether a county may *voluntarily* submit compensation issues to arbitration, i.e., whether the county may delegate its own authority, but whether the Legislature may *compel* a county to submit to arbitration *involuntarily*. The issues involves the division of authority between the state and county, not what the county may itself do.[99]

This is an important distinction, because it leaves open the possibility that cities, counties, and the state may enact binding arbitration procedures involving public employees whose compensation they control. For example, cities, counties, and even the state could enact the proposal below for the workers they each employ.

Although the court's opinion can be read as forbidding any state legislative requirement of binding arbitration onto localities as an impermissible infringement on "home rule," the State could attempt a state-wide system based on a direct accountability system, where the locality has the

---

consideration in the determination of wages, hours, and other terms and conditions of employment. *See* CAL. CIV. PROC. CODE. § 1299.6(c).

96. County of Riverside v. Superior Court, 66 P.3d at 722 (citing CAL. CIV. PROC. CODE § 1299.3(c) (West 1982)).

97. *See id.* at 723–27. *See also* cases cited *supra* note 14 for distinction between home rule and non-delegation.

98. *See id.* at 725–26. It is interesting to note that in *Salt Lake City v. Int'l Ass'n of Firefighters*, the Utah Supreme Court, which involved a similar constitutional provision at issue in *County of Riverside v. Superior Court*, held that binding arbitration was *not* an infringement on home rule; it did not impermissibly interfere with a municipal function because police and firefighter compensation was a statewide concern. Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1654, 593, 1654, & 2064, 563 P.2d at 789. Rather, the Utah Supreme Court held that the statute, as written, violated the non-delegation doctrine. *Id.* at 789–90.

99. County of Riverside v. Superior Court, 66 P.3d at 722. *See also id.* at 726 ("Whether the *county* may delegate its own authority is irrelevant here.... As noted, the issue involves the distribution of authority between county and state, not what the county itself may do.").

ultimate choice of sending the decision to the voters. The court stated that the reason Senate Bill 402 fails to pass constitutional muster was because "the county's governing body does not retain ultimate power."[100] The State could argue that an arbitration statute (as proposed below) that allows the locality to take to the voters any adverse arbitration award *does* provide that locality's governing body with the "ultimate power" over the decision. Drafting a statute with more political accountability on the local level may be a way to overcome *County of Riverside v. Superior Court*'s concerns.

As this section demonstrates, for almost twenty years state courts routinely upheld binding interest arbitration statutes as an appropriate constitutional means for resolving public labor disputes. However, legislatures have also been drafting more careful statutes, which may be the reason why the trend has been towards complete acceptance. The next Part will address whether this trend is appropriate in light of the still lingering constitutional issues.

II. ANALYSIS OF THE CURRENT STATE OF THE LAW

The prior trend in favor of binding interest arbitration in certain parts of the public sector was appropriate, provided that certain requirements are met. First, there are several positive aspects that should continue to play a role in future binding interest arbitration statutes. The most important aspects are the acknowledgment of the unique "no strike" rules that apply to police and firefighters, the provisions that address political accountability, and the demand for sufficient standards. However, the trend was not without faults. Some state courts have upheld binding arbitration statutes with insufficient protections, while others have struck down adequate statutes. This Part will examine the current state of the law, looking at both the positive aspects of the last thirty-five years and the flaws in some statutes and court decisions.

A. POSITIVE ASPECTS OF THE TREND

As an initial matter, many of the state and local statutes apply only to police and fire services. This is because most states outlaw strikes by police and firefighters,[101] otherwise known as essential services, because of the detrimental impact a strike of that nature would have on the communities.[102] On the other hand, the right of public employees to collec-

100. *Id.* at 725.

101. *See, e.g.*, Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d 261, 265 (Okla. 1996).

102. *See* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 155 (1987).

tively bargain has increased substantially over the past forty years.[103] Some commentators have suggested that "[t]he right to bargain collectively has been so connected with the right to strike in this country that legitimate questions arise as to whether genuine collective bargaining can occur without the right to strike."[104] This creates a problem for police and firefighter unions: Without binding interest arbitration, they have the right to bargain collectively, but do not have direct striking pressure to place on the public employer.

The courts have not been oblivious to this problem. The Oklahoma Supreme Court in *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw* noted this dilemma in quoting the Oregon Supreme Court, which stated that "binding arbitration is essentially a quid pro quo for the prohibition of strikes by firemen. Together, these statutes protect the public from interruption of essential health and safety services while recognizing the employees' right to engage in meaningful collective bargaining."[105]

Indeed, in the absence of the right to strike, interest arbitration is a strong substitute to make collective bargaining effective.[106] The courts are correct to note this unique feature of binding interest arbitration. It provides the police and firefighters unions with a pressure similar to that of a strike on the public employer, while at the same time protecting the health and safety of the community.[107]

Another positive aspect has been the discussion of the need for political accountability.[108] What separates interest arbitration with other private forms of arbitration is the fact that the arbitrator, never an elected representative, is making legislative policy decisions.[109] In order to be truly accountable to the citizens, arbitrators who are making these legislative decisions need to have some connection to the elected representatives.

However, having an arbitrator who is politically accountable raises certain issues if the arbitrator is accountable to the local entity and other issues if the arbitrator is accountable to the state. For example, an arbitrator may be made "politically accountable" to the local city or county

103. *See* Marcus R. Widenor, *Public Sector Bargaining in Oregon: The Enactment of the PECBA*, 8 LERC MONOGRAPH SER. 1, 6 (1989).

104. Anderson & Krause, *supra* note 102, at 153.

105. Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d at 267 (quoting Medford Firefighters Ass'n v. City of Medford, 595 P.2d 1268, 1271 (Or. 1979)).

106. Anderson & Krause, *supra* note 102, at 155.

107. *Id.* at 156.

108. *See, e.g.*, Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 137–38 (Colo. 2000) (en banc).

109. *See* Grodin, *supra* note 2, at 681.

by appointment by the city council, as was the case in *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*. If an arbitrator is made politically accountable to the local electorate, which can be considered a "party" in the arbitration proceeding, then the arbitrator may not be seen as neutral.[110] In addition, "to the extent that the arbitrator's constituency is the same as that of the legislative body that would otherwise exercise authority over the policy questions posed, the process becomes redundant."[111]

On the other hand, the state legislature may form a statewide arbitration panel, so that the arbitrators are politically accountable to elected representatives, albeit at the state level. This poses a problem of the state infringing on local autonomy.[112] The state is in essence indirectly dictating to the localities how to set police and firefighter wages. This is what doomed the California statute, as there were specific constitutional provisions that protected cities and counties "home rule" in this area.[113] Statewide legislation, therefore, may run into two problems. First, the state constitution may not permit it. Second, even if *statewide* binding interest arbitration that applies to cities and counties is constitutionally acceptable, it ultimately removes the decisions from the citizens of the localities and places those decisions with the representatives of the state. This could anger citizens who would in effect be told by the state how much the locality needs to budget for its police and fire protection.

Legislatures have begun to recognize the concerns raised by scholars and the courts about political accountability. It is important to point out that not every court that has upheld a binding interest arbitration statute has done so on political accountability grounds. For example, the statute upheld in *Anchorage Police Department* called for the American Arbitration Association to provide a list of arbitrators.[114] The Colorado Supreme Court in *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*, on the other hand, stated that a previous statute that had been struck down suffered from a lack of political accountability due to

110. *Id.* at 693.

111. *Id.*

112. *Id.* at 694.

113. In *County of Riverside v. Superior Court*, the California Supreme Court held that the binding interest arbitration statute violated two home rule provisions of the California Constitution. 66 P.3d 718, 730–31 (Cal. 2003). Article XI, Section 1(b) stated that a county's "governing body shall provide for the . . . compensation . . . of employees." CAL. CONST. art. XI, § 1(b). Article XI, Section 11(a) provides: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." *Id.* at 11(a).

114. Municipality of Anchorage v. Anchorage Dep't Employees Ass'n, 839 P.2d 1080, 1082 n.5 (Alaska 1992).

the fact that the American Arbitration Association, "an independent organization with no political accountability," submitted the list.[115]

One state court may see a political accountability problem where another court does not. The point is, however, that courts are properly considering this aspect of the non-delegation doctrine. Instead of the bright-line rules of *Sioux Falls Firefighters*, where no delegation to an arbitrator is proper, no matter the form, today there is *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*, where the court will examine the statute in actual application to determine if there are sufficient legislative safeguards.

The legislatures and courts are addressing the need for some political accountability, in two distinct ways. The first way is to make the *arbitrator* politically accountable, while the other alternative is to make the *arbitrator's award* politically accountable.

Legislative bodies in Colorado and Nebraska, for example, seek political accountability through the arbitrator. In Colorado, the city charter amendment sought to have the arbitrator directly accountable to the city council. The city council creates a permanent panel of arbitrators, and has the authority to add and remove arbitrators from the panel at any time.[116] This is to ensure that the arbitrators themselves are subject to direct control from elected representatives. Nebraska, on the other hand, has a "politically accountable" administrative agency to resolve bargaining impasses.[117] This is similar to other states whose arbitrators, rather than supplied by a list from the American Arbitration Association, are supplied by an administrative agency.[118] These statutes, have direct political control over the arbitrator, but not necessarily the award. If the award is upsetting to the elected body, then it will be the arbitrator who is subject to dismissal.

On the other hand, Oklahoma's Fire and Police Arbitration Act represents an attempt to get political accountability over the award itself. The concern is not who is actually arbitrating, but what is the end result. If the city's offer is not selected, the city can request a direct voter approval of the award.[119] In this way, the legislature seeks to give control over the policy decision to the citizens. While this new type of political accountability has not been extensively addressed by commentators, in

115. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 135–36.

116. *Id.* at 134.

117. Craver, *supra* note 28, at 565.

118. *See* Cataland, *supra* note 16, at 99 n.87.

119. Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d 261, 264 (Okla. 1996).

Part IV this Note will argue that this is a more effective response to the political accountability issue.

The third positive aspect has been the demand of courts to require enumerated standards on which the arbitrator is to base his or her decision. To begin with, even some of public employers acknowledge that binding interest arbitration is not per se unconstitutional.[120] Rather, they argue that without standards and guidelines binding interest arbitration is an invalid delegation of authority. For example, in *Anchorage Police Department*, the city argued that "our problem is not with binding interest arbitration as a concept.... Our problem is with the way it has been done with this ordinance. The ordinance simply does not provide the necessary standards and safeguards to make that delegation of authority valid."[121]

An excellent example of the courts requiring standards was the decision by the Supreme Judicial Court of Maine in *City of Biddeford v. Biddeford Teacher's Ass'n.*[122] The case involved the validity of the binding arbitration provision of the Municipal Employees Labor Relations Law, which applied to all public employees, but in this case was being invoked by teachers.[123] The court first held that binding interest arbitration was not a per se violation of the non-delegation doctrine of the state constitution.[124] However, the court closely scrutinized the statute and found that adequate standards did not exist.[125] The court noted that "[t]his Act—unlike those in some other states—does not provide that the arbitrators' award is to be subject to existing statutory restrictions."[126]

Although an earlier case, *Biddeford Teacher's Ass'n* provides an excellent analysis of the need for standards. Standards parallel political accountability, as the Maine court noted that the "arbitrators are not public officials and are not required to answer to the electorate or to the elected representatives of the electorate."[127] In the last decade, the necessity of standards have been an important factor for courts in upholding these statutes.

120. Municipality of Anchorage v. Anchorage Dep't Employees Ass'n, 839 P.2d 1080, 1085 n.9 (Alaska 1992).

121. *Id.*

122. 304 A.2d 387, 403 (Me. 1973).

123. *Id.* at 389–90.

124. *Id.* at 398.

125. *Id.* at 402–03.

126. *Id.* at 402.

127. *Id.*

B. CRITIQUE OF DECISIONS

While the more recent decisions have demonstrated a positive step taken by legislatures and the courts in drafting and interpreting binding interest arbitration statutes, there have been problematic decisions over the years. The purpose of this analysis is to show that the means are important in achieving the end of a constitutionally acceptable statutory framework.

My first critique is addressed to state legislatures. Generally, binding interest arbitration statutes are tailored to a narrow sector of public employees, usually police and firefighters.[128] However, some states have provided binding interest arbitration to all public employees, regardless of whether they perform "essential services" or not.[129] This is a mistake, for it broadens the use of this unique procedure to public employees who have other recourses.

As discussed above, courts and commentators view binding interest arbitration as a replacement for the right to strike and to make collective bargaining rights effective.[130] While strikes are certainly disruptive, the bargaining is still between public employees and the politically accountable public employer. Binding interest arbitration, which involves a private individual making legislative decisions, should only be used for those service providers, such as police and firefighters, that the community simply cannot afford to go on strike. It should not be used to enable the public employer to abdicate completely its role determining the compensation of most of its employees.[131] Although it is tempting to use binding interest arbitration for all public employee labor disputes, it should not be a substitute for groups of employees who have the option to strike.

My second critique is addressed to state judiciaries. It is imperative that courts analyze the statutes to make sure the arbitrators are politi-

128. *See, e.g.*, OKLA. STAT. ANN. tit. 11 § 51-101 (West 1994) (applying to police and firefighters); Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 135 (Colo. 2000) (citing city charter amendment applying to police officers).

129. *See* ME. REV. STAT. ANN. tit. 26, §§ 961–974 (West 1964 & Supp. 2002) (applying to all public employees); MINN. STAT. ANN. §§ 179A.01–A.30 (applying to all public employees).

130. *See supra* notes 101–08 and accompanying text.

131. Conceivably, the arbitrator under an "all public employee" scheme could end up setting most of the public employees' salaries. For example, if bargaining units of police, firefighters, administrative workers, parks and recreation workers, etc., all cannot come to an agreement, then the arbitrator would have to decide the compensation for each of the employee groups. While this may be considered a "worse case scenario," under an all employee system, the possibility grows that an arbitrator will have to decide a disproportionate amount of compensation levels. While binding interest arbitration laws are positive when drafted in a particular manner, they should not become a substitute for the elected representatives in every case.

cally accountable and are guided by enumerated standards. The Rhode Island Supreme Court's decision in *Warwick Regular Fireman's Ass'n*, is an example of an opinion that lacks proper analysis. Rather than critique this opinion, which has been done by many commentators,[132] I will point out the danger in this type of decision. The court held that arbitrators when acting in their binding interest capacity were in reality public officials.[133]

This type of semantic manipulation does not justify the end result of a constitutionally acceptable statutory framework. Courts that engage in this type of ends-justifying reasoning simply do not examine the statute at all, nor do they determine if the arbitrators are constrained by any political accountability or enumerated standards. This type of poor judicial review allows legislatures to draft broad proposals that could leave arbitrators unchecked. Fortunately, *Warwick Regular Fireman's Ass'n* is an aberration, rather than a trend. It is important that courts engage in meaningful judicial review, so not as to let wholly unaccountable private parties make legislative policy decisions.

III. "MODEL STATUTE" PROPOSAL

While a binding interest arbitration statute may seem like a complex way to resolve labor disputes, it is the best solution for dealing with police and firefighter labor impasses. The State of California and its cities and counties should do likewise. The alternatives are not desirable. Public employers will argue that binding interest arbitration is not necessary, that police and firefighters already have been given a "fair shake" by the public employer and that they do not need this unnecessary weapon.[134] However, considering that so many states and localities have opted to create such a system, clearly there is a feeling that police and firefighters are not given a "fair shake." Without this system, police and firefighters would have to accept whatever the public employer offered.

California now stands at a crossroads. For over thirty-five years, public entities have experimented with binding interest arbitration. California attempted to join this group, but a statewide attempt to impose binding interest arbitration on cities and counties has failed. The easiest solution would be to follow Pennsylvania's lead and enact a constitutional amendment that allows for binding interest arbitration.[135] However, that would not address the fundamental problems and concerns about the role of the arbitrator. California and its cities and counties

132. *See, e.g.*, Craver, *supra* note 28, at 565.
133. City of Warwick v. Warwick Regular Firemen's Ass'n, 256 A.2d 206, 209 (R.I. 1969).
134. *See* Sloan, *supra* note 6.
135. *See* PA. CONST. art. III, § 31.

have a great opportunity to pass statutes that are not just constitutionally acceptable but that also address political accountability and arbitration standards in an ideal manner. Having examined the positive and negative aspects of binding interest arbitration, I propose a statute that the State, cities, and counties of California can adopt toward employees whom they control that includes the best practices of the last thirty-five years. The statute I propose should only apply to essential services such as police and firefighters, should include direct political accountability, and should contain sufficient standards to constrain the arbitrator. This proposal could be adopted statewide or on a local basis.

A. ONLY FOR "ESSENTIAL EMPLOYEES"

The binding interest arbitration statute or ordinance should only be for essential employees, which are typically police and firefighter personnel. As discussed above, this is because of the unique nature of their work: they perform services that are absolutely essential to health and safety, but at the same time they are not allowed to strike. Other employees may be found to be essential also.[136] Whatever the classification, it should not be a blanket right to binding interest arbitration for every public employee.

B. DIRECT POLITICAL ACCOUNTABILITY

The statute or ordinance should address the political accountability problem through a direct voter approval of the arbitration awards.

If direct voter approval is not desired, then other political accountability measures must be enacted. The arbitrators themselves could be made accountable to elected representatives. On the political accountability side, statutes such as that involved in *Fraternal Order of Police, Colorado Lodge No. 165 v. City of Commerce City*[137] are much more appealing than the statute involved in *Anchorage Police Department*.[138] It is important that the elected representatives play a role in who will be on the arbitration board. Therefore, if a state or locality does not adopt the direct elections approach, there are a number of alternatives to place political accountability on the arbitrator. For example, a state or locality can devise a public arbitration agency similar to Nebraska.[139] Or, a state

136. *See* Grodin, *supra* note 2, at 679 n.4 (noting that some states have classified prison guards, hospital employees, public transportation workers, and port authority employees as under this umbrella).

137. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 133–35 (Colo. 2000) (en banc).

138. Municipality of Anchorage v. Anchorage Dep't Employees Ass'n, 839 P.2d 1080, 1081–83 (Alaska 1992).

139. *See* Cataland, *supra* note 16, at 99 n.87.

or locality can allow the legislature or city council to play a direct oversight role, such as the city charter in *Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City*. Either way, the elected body is placing some political restraints on the arbitrators themselves.

The real issue that concerns citizens is what the arbitrator is actually awarding. It is the award of compensation that will directly affect the citizens, possibly either through cuts in other services, decrease in overall spending, or increased taxes. Cities and counties of California should look to Oklahoma's unique solution to this problem. If the city's final offer is not chosen by the arbitrator, the city council can request the arbitration award to be voted on by the citizens.[140] In that way, direct political accountability is realized.

As discussed above, commentators have pointed out some of the problems with political accountability of the arbitrator.[141] The arbitrator, if responsive to the elected officials, is in effect responsive to one of the parties who cannot resolve the labor dispute. Conceptually, the same argument can be applied to the citizens who vote, who are supposed to be represented by the elected officials.

On the other hand, when the citizens get to directly vote on the arbitration award, that provides direct political accountability. There may be factors that are skewing the bargaining process, such as elected representatives holding a grudge against the bargaining agents or other factors that may come into play during negotiations. But it is the citizens' checkbook that the parties are negotiating over. If the citizens want to give the police and firefighters a substantial raise, then they can voice themselves at the polls. Therefore, California and its cities and counties should adopt a statutory scheme similar to Oklahoma.[142]

C. SUFFICIENT STANDARDS

The statute or ordinance should contain sufficient standards to regulate arbitrator discretion. The legislatures and the courts have handled these safeguards convincingly and thoroughly. Many courts that have upheld binding interest arbitration statutes have discussed the standards

140. OKLA. STAT. ANN. tit. 11, § 51-108 (West Supp. 2003); *see also* Fraternal Order of Police, Lodge No. 165 v. City of Choctaw, 933 P.2d 261, 263 (Okla. 1996).

141. *See supra* notes 109–13 and accompanying text.

142. Oklahoma Statutes, title 11, section 51-108 reads in pertinent part:

> Each arbitration statement shall also include a final offer on each unresolved issue.... Within seven (7) days after the conclusion of the hearing, a majority of the arbitration board members shall select one of the two last best offers as the contract of the parties.... If the city's last best offer is not selected by the arbitration board, that party may submit the offers which the parties submitted to the arbitration board to the voters of the municipality for their selection by requesting a special election for that purpose.

OKLA. STAT. tit 11, § 51-108 (1994).

that are in place to constrain the arbitrator's discretion.[143] "Standards" encompasses three distinct areas: requirement of a written decision by the arbitrator, enumerated criteria in the statute, and judicial review of the award.

First, the cities, counties, or State of California should require the arbitrator to issue a written opinion addressing each issue.[144] It is important to note that this is related to judicial review in that, for the court to have meaningful judicial review, it needs to have some evidence of what and how the arbitrator came to his or her decision.

This written decision will be just as important in areas that have a referendum on the award as those that do not. Where there is a referendum, the written decision will provide voters with reasons why the award was made. Where there is no referendum, a written decision is an essential part of the restraint on arbitrator discretion (see judicial review discussion below). Therefore, a written decision on each issue needs to be a part of any statute.[145]

Second, the statute or ordinance needs to contain a list of standards that the arbitrator must consider.[146] There are a variety of standards that legislatures have drafted,[147] but California should adopt the comprehensive list of factors provided by the Michigan statute:

> (a) The lawful authority of the employer.
>
> (b) Stipulations of the parties.
>
> (c) The interest and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages,

---

143. *See* Anderson & Krause, *supra* note 102, at 158–59.

144. *See, e.g.*, Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 135 (Colo. 2000) (en banc).

145. "Issue" refers to the bargaining issues being decided by the arbitrator. These fall into two categories: economic and non-economic issues. For example, wage increases is an economic "issue," while working conditions would be a "non-economic" issue. *See* Sloan, *supra* note 6, at 603–04. Therefore, under my proposal, and under many current state statutes, the arbitrator would make a separate written finding on his or her award of wages, a separate written decision on his or her decision on working conditions, and thereon.

146. This Note will not address the debate on what factors should be considered and what factors should not be considered. For example, one critique is that factors such as the public employer's ability to pay should be given more weight than others. *See* Martin, *supra* note 5, at 63. Even though there is an agreement on standards, there is disagreement and a lot of commentary on what should be included and what weight these factors should be given. *Id.*

147. The most significant and controversial factor is "comparability," which requires a "comparison of the overall compensation of the employees involved in the dispute with the overall compensation of comparable employees performing similar work in both private and public employment in a particular community or like communities." *See* Anderson & Krause, *supra* note 102, at 161.

> hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> (i) In public employment in comparable communities.
>
> (ii) 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, vacations, holidays and other 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.[148]

By following these statutory criteria, courts have held that this comprehensive list of factors "provides the necessary standards" required "for the exercise of legislative power."[149]

Finally, the last required safeguard is judicial review of the arbitration award. If California's cities and counties adopt the proposed voter approval system, then judicial review will not be required. The voters, not the arbitrator, will have the ultimate review. However, in other forms of binding arbitration statutes, where voters do not "review" the decision, judicial review is essential. Typically, the arbitrator's award, which should be in writing, is subject to judicial review for "abuse of discretion, fraud, or misconduct on the part of the arbitrator."[150] This judicial review, while limited, ensures that the arbitrator is acting in accordance with the law and in accordance with the enumerated criteria.[151] The standard of judicial review of interest arbitration awards is much stricter than most arbitration awards, including grievance arbitration.[152]

---

148. MICH. COMP. LAWS ANN. § 423.239 (West 2001); *see also* City of Detroit v. Detroit Police Officers Ass'n, 294 N.W.2d 68, 81–82 (Mich. 1980).

149. Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d at 139.

150. Municipality of Anchorage v. Anchorage Dep't of Employees Ass'n, 839 P.2d 1080, 1088 (Alaska 1992).

151. For an excellent analysis of the role of judicial review in both pre- and post- interest arbitration award enforcement, see Craver, *supra* note 28, at 568–77. *See also* Grodin, *supra* note 2, at 697–700.

152. *See* Craver, *supra* note 28, at 571.

As stated earlier, written decisions, enumerated standards, and judicial review are important, but, with direct political accountability, they become less so. That is because the citizens of the community have the final "review." Therefore, while these standards are important in constraining arbitrator discretion, direct political accountability provides an additional safeguard against any troublesome delegation problem.

CONCLUSION

Binding interest arbitration has become a popular tool in many states and localities for resolving potentially debilitating strikes.[153] Although California's statewide venture into binding interest arbitration has failed, there remain several avenues by which California public entities can enact binding interest arbitration legislation. Many legislatures on the state and local level have drafted comprehensive statutes not only to resolve the labor dispute problem, but to ensure that the delegation of this legislative authority is constitutionally permissible. Until recently, state courts had unanimously upheld these statutes. The upholding of these provisions was a positive trend, in light of the carefully crafted statutes.

The State of California and its cities and counties should adopt a statute or ordinance that the limits binding arbitration to "essential" employees and provides a list of enumerated statutory standards that an arbitrator is to consider. The best way to obtain political accountability is through a direct election by the voters on whether to approve or reject the arbitration award. That way, the arbitration award is truly politically accountable and is the message of the citizens who will have to pay, directly or indirectly, for the new labor contracts.

153. Stuart S. Mukamal, *Unilateral Employer Action Under Public-Sector Binding Interest Arbitration*, 6 J.L. & COM. 107, 107 (1986).

***