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Alternative Approaches to Interest Arbitration: Lessons from New York City

Abstract

Scholars have not taken adequate account of variation in the interest arbitration process in their research on the effects of interest arbitration on bargaining outcomes. There are two fundamental approaches to interest arbitration, which they term the "judicial prototype" and the "negotiation prototype." The recent cases involving the Patrolmen's Benevolent Association (PBA) of New York City and the city of New York illustrate the differences in these two approaches. There is a relationship between the arbitration prototype and the bargaining power of the parties. A party with greater bargaining power should prefer the negotiation prototype in interest arbitration. The New York City police cases—especially the effects of the attack on the World Trade Center on September 11, 2001—are analyzed to determine whether changes in the parties' bargaining power affected their approach to interest arbitration

Keywords

interest arbitration, judicial prototype, negotiation prototype, bargaining power, Patrolmen's Benevolent Association, New York City

Comments

Required Publisher's Statement

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Suggested Citation

Lipsky, D. B., & Katz, H. C. (2006). *Alternative approaches to interest arbitration: Lessons from New York City* [Electronic version]. Retrieved [insert date], from Cornell University, ILR School site:

<https://digitalcommons.ilr.cornell.edu/articles/1278>

Alternative Approaches to Interest Arbitration:

Lessons from New York City

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ABSTRACT

Scholars have not taken adequate account of variation in the interest arbitration process in their research on the effects of interest arbitration on bargaining outcomes. There are two fundamental approaches to interest arbitration, which they term the "judicial prototype" and the "negotiation prototype." The recent cases involving the Patrolmen's Benevolent Association (PBA) of New York City and the city of New York illustrate the differences in these two approaches. There is a relationship between the arbitration prototype and the bargaining power of the parties. A party with greater bargaining power should prefer the negotiation prototype in interest arbitration. The New York City police cases—especially the effects of the attack on the World Trade Center on September 11, 2001—are analyzed to determine whether changes in the parties' bargaining power affected their approach to interest arbitration.

The rise of unionism among public sector employees in the 1960s led to the passage of state-level legislation regulating collective bargaining between state and local governments and their employees. In the vast majority of states that passed such legislation, public sector employees were denied the right to strike, and legislators established impasse procedures as a substitute for the right to strike as a means of resolving public sector disputes. For police officers and firefighters, in approximately 30 states the law requires that if the parties fail to reach agreement on a new contract through negotiation (and in most of these states mediation) then they must submit their dispute to arbitration.¹ The collective bargaining relationship between the PBA and New York City helps illustrate the contrast between the judicial approach and the negotiation approach to interest arbitration.²

Research on the Effect of Interest Arbitration on the Bargaining Process and Outcomes

After the rise of public sector bargaining in the 1960s, researchers made a considerable effort to use empirical data and rigorous statistical methods to determine whether and to what extent interest arbitration affects salaries, compensation, and other bargaining outcomes. Research in the 1960s and 1970s explored whether arbitrated outcomes were significantly different from negotiated outcomes, or whether outcomes arrived at through conventional arbitration differed significantly from outcomes arrived at through final offer arbitration. Missing from this body of research, however, was any effort to include in a statistical model a variable that denotes a critical dimension of arbitration—namely, the distinction between the judicial approach and the negotiation approach. Accounting for this dimension is essential in understanding the arbitration process and its effects on outcomes. Practitioners and researchers need to recognize that understanding the nature and effects of interest arbitration requires looking into the "black box" of the arbitration process.

There is a surprising lack of recent research on the use of interest arbitration to resolve police and fire disputes. In 1996 a report by a taskforce appointed by the U.S. secretary of labor noted "a surge of scholarly interest in public sector labor relations" in the 1960s and 1970s. The taskforce pointed out that as public sector bargaining laws matured, "conflict declined and the challenges in the field diminished or held less interest for academics," with the consequence that in recent years there has been "an almost total lack of academic research—despite the fact that demands and pressures on the public workplace have been increasing." ³

During the period when scholars did focus their energies on interest arbitration in the public sector, they concentrated principally on two important topics: (1) the effect of the availability and use of interest arbitration on bargaining outcomes, particularly salaries, ⁴ and (2) the effect of interest arbitration on the parties' incentives to negotiate and settle contracts on their own. ⁵ With respect to the former effect, many researchers and practitioners suspected that interest arbitration would significantly increase police and fire salaries. Implicitly, if not explicitly, researchers seemed to believe that the effect of interest arbitration on salaries would be analogous to the effect of collective bargaining itself, and in particular that it would constitute an intrusion on management's unilateral authority to set salaries and result in salaries that would be higher than would otherwise be dictated by market factors. Whether arbitrated salaries would be significantly different from salaries negotiated by the parties through collective bargaining was a different matter, however, and some researchers attempted to estimate the effect of arbitration independent of the effect of collective bargaining.

With respect to the latter effect, many experts believed that the use of *conventional* interest arbitration—the form of arbitration that gives the arbitrator broad authority to fashion an award—would decrease the parties' incentives to negotiate their own agreement (the so-called "chilling effect") and eventually result in the parties' dependence on outside parties to settle their disputes (the so-called

"narcotic effect"). In a seminal article published in 1966, Carl Stevens suggested that the chilling effect of conventional interest arbitration could be overcome if the arbitrator's authority was restricted to choosing the final offer of either the union or the employer. The availability of so-called "final offer arbitration," Stevens claimed, would provide the parties with strong incentives to negotiate and settle contracts on their own, without the necessity of relying on an outsider to determine their contract.⁶ Stevens' proposal came along at a propitious moment: policymakers and scholars were searching for effective methods of controlling the rising tide of conflict in the public sector workplace, and final offer arbitration was an intriguing innovation. About 10 states subsequently adopted the technique for resolving police and fire disputes."

Empirical research on these two effects certainly did not result in uniform or consistent findings, and researchers and practitioners continue to disagree on the precise effects of interest arbitration on the bargaining process and bargaining outcomes. Nevertheless, most scholars agree on several generalizations. Regarding the effect of interest arbitration on bargaining outcomes, it does not seem to have had dramatic effects on the pay and compensation of police officers and firefighters. The salaries of police officers and firefighters in municipalities that *have* used interest arbitration are not significantly different from comparable salaries in municipalities that *have* not used interest arbitration. This finding suggests that within a given jurisdiction there may not be a significant difference between agreements reached through collective bargaining negotiations and contracts imposed on the parties through interest arbitration. However, the *availability* of interest arbitration seems to have had a positive influence on salaries, regardless of whether the parties have actually made use of the procedure. According to a leading textbook, "A number of researchers have found that the availability of interest arbitration has led to slightly higher wage settlements and more favorable nonwage contract terms. In some states there is also evidence of less *variation* in collective bargaining outcomes across

municipalities that make interest arbitration available although this leveling effect of interest arbitration has not been found in some other states." ⁸

Regarding the effect of interest arbitration on the bargaining process, in virtually all jurisdictions the vast majority of collective bargaining contracts are settled voluntarily by the parties without resorting to arbitration. Lester found that in states where it was available, interest arbitration was used to resolve between six and 29 percent of negotiations. ⁹ It appears, however, that final offer arbitration does provide a greater incentive for the parties to settle on their own than does conventional arbitration: arbitration usage rates are significantly lower in states with final offer arbitration than they are in states with conventional arbitration. The evidence also suggests that in general, interest arbitration does not result in a narcotic effect. ¹⁰

Public Sector Collective Bargaining in New York

In New York State, collective bargaining by public employees is governed by the Taylor Law. ¹¹ In New York during the 1960s, public sector labor relations went through a period of strife and tumult. Especially noteworthy was the strike by the transit workers in New York City, which began on New Year's Day 1966 and continued for eleven more days. At the time, the Condon-Wadlin Law, passed in 1947, governed public sector labor relations in New York State. Injunctions were issued against the transit strikers, but they failed to stop the strike. It appeared obvious to most observers that the Condon-Wadlin Act was a wholly ineffective means of controlling public sector labor relations in the state.

In the wake of the transit strike. Governor Nelson Rockefeller appointed a Committee on Public Employee Relations, chaired by Professor George Taylor of the University of Pennsylvania, which he charged to "make legislative proposals for protecting the public against the disruption of vital public

services by illegal strikes, while at the same time protecting the rights of public employees." ¹² The Taylor Committee recommended that the legislature pass a new, comprehensive public sector statute to replace the Condon-Wadlin Act. The legislature, after considerable debate, by and large adopted the recommendations of the Taylor Committee and the bill passed by the legislature was signed into law by Governor Rockefeller in April 1967 (the effective date of the law was September 1, 1967). The Taylor Law is administered by the Public Employment Relations Board (PERB), which in some ways parallels the National Labor Relations Board, except that PERB has responsibility not only for representation issues and improper practices (i.e., unfair labor practices) but also for overseeing the law's impasse procedures.

The Taylor Law included a so-called "local option" section that allowed New York municipalities to set up their own "mini PERBs" so long as their procedures were substantially equivalent to those in the state law. ¹³ In 1966, a year before the passage of the Taylor Law, Mayor John V Lindsay and the public sector unions in New York City reached an agreement establishing an impartial, tripartite agency "to serve as the neutral in the City's labor relations." ¹⁴ The following year the New York City Council enacted the New York City Collective Bargaining Law (NYCCBL), which was implemented by an Executive Order issued by Mayor Lindsay. ¹⁵ The tripartite agency established earlier became the Office of Collective Bargaining (OCB) under the NYCCBL. OCB remains an independent and impartial agency of city government, operating under the local option section of the Taylor Law. ¹⁶ OCB has two general responsibilities: It conducts formal legal proceedings on such matters as representation questions, improper practices, scope of bargaining disputes, and the arbitrability of unresolved grievances, and it also administers the law's dispute resolution procedures, designating mediators, interest arbitrators, and grievance arbitrators. ¹⁷

The Taylor Law gave public sector employees in New York State the right to engage in collective bargaining but not the right to strike. Nevertheless, in the two years following the passage of the law there were nearly forty strikes by public sector employees in the state. Most notably New York City sanitation workers went on strike in February 1968 and in both the spring and fall of that year the United Federation of Teachers struck the New York City School District, causing the loss of 58 school days for most children in the district.¹⁸ Lawmakers in Albany came to believe that weaknesses in the original Taylor Act, particularly with respect to impasse procedures and strike penalties, needed to be corrected. In 1969 the law was significantly amended. First, the legislature added a series of so-called "improper practices" to the law that were largely analogous to the unfair labor practices included in the Taft-Hartley Act. Second, the 1969 amendments empowered public sector employers to enter into agreements with their unions to submit impasses in new contract negotiations to arbitration; that is, the act encouraged the parties to use voluntary interest arbitration.¹⁹ Third, the 1969 amendments strengthened the anti-strike provisions of the Taylor Law, removing statutory ceilings on the fines that could be imposed on striking unions and, most notably adding penalties directed at individual strikers. The law now called for any public employee on strike to be penalized an amount equal to two days of pay for every day that employee was on strike.²⁰

Although the Taylor Law requires the NYCCBL to be "substantially equivalent" to the state law, there have always been significant differences. With respect to the resolution of impasses, from its inception OCB procedures have provided "finality by interest arbitration of all contract disputes to all covered employees."²¹

By contrast, the Taylor Law did not initially mandate interest arbitration for any public sector employees within its jurisdiction. In 1974, however, amendments were added to the Taylor Law requiring interest arbitration for police officers and firefighters.²² (Both the NYCCBL and the Taylor Law

call for the use of *conventional* and not *final offer* interest arbitration.²³) The interest arbitration provisions in the NYCCBL are a permanent part of the law, but the interest arbitration provisions in the Taylor Law have always had a sunset provision, which is currently July 1, 2007. Also, an interest arbitration award under the NYCCBL does not become binding until the appropriate legislative body enacts a law implementing it, whereas an interest arbitration award under the Taylor Law is binding on the local jurisdiction without the enactment of implementing legislation.²⁴ Another significant difference is that arbitration panels appointed by OCB consist entirely of neutrals, while the panels appointed by PERB are tripartite in nature.²⁵ A tripartite panel consisting of an impartial chairperson and an arbitrator appointed by each of the parties functions in a measurably different fashion from a panel consisting of three impartial arbitrators. The former more closely approximates the negotiation approach to interest arbitration and the latter the judicial approach. We will expand on this proposition later.

The Transfer of Interest Arbitration from OCB to PERB

Over time the Patrolmen's Benevolent Association (PBA) and the Uniformed Firefighters Association (UFA) in New York City became increasingly frustrated with interest arbitration under OCB. In the 1990s both unions sought to have responsibility for police and fire impasse procedures transferred from OCB to PERB, and they lobbied in the state legislature in Albany for an amendment to the Taylor Law that would achieve that goal. New York City police officers in the 1990s had become highly dissatisfied with their salaries, which they believed lagged seriously behind police salaries in both comparable local and national jurisdictions. In every round of bargaining since 1968 the PBA and the city had reached impasse and had submitted their dispute to arbitration. With each award, the PBA believed, police salaries in New York City seemed to slip further and further behind police salaries in comparable jurisdictions. The

PBA placed a substantial part of the blame on OCB. In testimony before the New York City Council, PBA President Patrick Lynch characterized OCB "as nothing more than an arm of the Mayor's Office of Labor Relations that no longer served any useful purpose and should be abolished."²⁶ The mayor, of course, disagreed with the PBA and the UFA, and he sought to retain OCB jurisdiction over interest arbitration.

In the view of the PBA and the UFA, interest arbitration under OCB suffered from several major flaws. For example, they believed OCB was too much in the sway of New York City politics, whereas PERB necessarily had a statewide perspective. Of particular concern to the unions was the prominence of so-called "pattern bargaining" in New York City labor relations. In every round of bargaining the mayor's Office of Labor Relations insisted that police and firefighter salaries should follow the pattern set by the settlements it had reached with the other unions in the city especially the city's settlement with its largest union. District Council 37 of the American Federation of State, County and Municipal Employees.²⁷ Over the course of several rounds of bargaining, the city and District Council 37 negotiated agreements containing modest wage increases. The police and firefighter unions maintained that conforming to the so-called pattern in New York City only served to increase the differential between their salaries and the salaries of police officers and firefighters in comparable jurisdictions. There was some irony in this situation: The city insisted on the sanctity of the pattern, whereas the police and firefighter unions demanded that the pattern be broken; in the private sector typically it has been unions that insist on conformity with a pattern and employers that want flexibility.²⁸ The PBA and UFA were certain the only way their members could escape "lockstep" bargaining in New York City was to have PERB assume jurisdiction over interest arbitration. Both unions came to believe that they would have a better chance at winning higher salaries from a PERB-appointed tripartite panel than they would from an OCB-appointed all-neutral one.

In 1996 the state legislature passed legislation transferring jurisdiction over New York City police officer and firefighter impasses from OCB to PERB. At the urging of New York City Mayor Rudolph Giuliani, Governor George Pataki vetoed the bill.²⁹ The legislature, however, overrode the governor's veto—only the second time the legislature had done so in 125 years.³⁰ But the New York State Court of Appeals ruled that the law was unconstitutional because the new legislation violated home rule principles and "did not implicate a substantial statewide concern."³¹ Two years later the legislature again attempted to transfer jurisdiction to PERB, passing a bill that sponsors believed corrected the defect identified by the Court of Appeals in the earlier legislation. This time the governor, despite the continuing objections of Mayor Giuliani, signed the bill into law.³² Again New York City contested the constitutionality of the law in the state courts, but the Court of Appeals decided that the legislature had successfully corrected the imperfections of the original version. The high court ruled that the new version did not single out New York City but applied "to all local governments in that none are permitted to require their police or fire unions to forego access to PERB and instead utilize a mini-PERB established by the locality" The new statute, the court held, was enacted in furtherance of "a substantial statewide concern"—in particular, the "orderly resolution of collective bargaining disputes involving police and fire bargaining units."³³

In 2001, when the Court of Appeals approved the transfer of jurisdiction to PERB, the PBA was entering a new round of bargaining with New York City. As the PBA and the city moved toward impasse that year, for the first time PERB had direct authority over the impasse procedures applicable under the Taylor Law. Arbitration was expected to occur sometime in 2002; the attack on the World Trade Center occurred on September 11. Of the 2,726 people killed at the World Trade Center on that terrible day 23 were New York City police officers and 37 were Port Authority police officers.³⁴

The Judicial Prototype v. the Negotiation Prototype

There are two fundamental approaches to or styles of interest arbitration. We will call them the judicial prototype and the negotiation prototype. Arbitrators and advocates who explicitly or implicitly hold to the judicial prototype view interest arbitration as identical or closely analogous to a civil trial. The arbitrator in the judicial prototype needs to be scrupulous in adhering to proper procedures, including the use of discovery, the examination and cross-examination of witnesses, and the admissibility of evidence. The arbitrator's goal in the judicial prototype is to render an award based squarely on the record presented by the parties that matches or at least closely approximates a decision that would have been made by a judge in an analogous civil trial.

In contrast, those who hold to the negotiation prototype view interest arbitration in a much less formal or legalistic manner. An arbitrator subscribing to the negotiation prototype would be much less concerned about the use of courtroom procedures and would in fact be eager to encourage the parties to negotiate a resolution of their dispute even in the midst of a hearing. In this prototype the arbitrator is perfectly willing to play the role of a mediator in assisting the parties to reach an agreement. If required to issue an award, the arbitrator's goal is to produce one that is identical to or at least closely approximates a deal the parties might have negotiated on their own.³⁵

The two constructs posited here are obviously metaphors, and a metaphor can be useful in helping gain insight into the essential nature of a phenomenon. Another metaphor has frequently been used to describe interest arbitration—"legislative." An interest arbitrator's function, consistent with the legislative metaphor, is to write the "laws" that will govern the parties' relationship during the term of the contract. Scholars who have used the legislative metaphor seek a construct that will aptly apply to interest arbitration *in general*. Interest arbitration always requires writing rules that will govern the parties' future relationship. In contrast, a means of describing *variation* in the interest arbitration

process is sought. Variation in the arbitration process should help explain variation in arbitration outcomes.

As noted, apart from the broadest distinctions (e.g., between conventional arbitration and final offer arbitration) previous researchers have not recognized and included in their statistical models other sources of variation in the arbitration process. Whether a given jurisdiction uses conventional or final offer arbitration is likely to influence the extent to which arbitrators and advocates adhere to the judicial or negotiation prototype. As noted earlier, conventional arbitration gives arbitrators the broadest authority to fashion an award, whereas final offer arbitration strictly limits the arbitrator's authority. Accordingly one might well hypothesize that conventional arbitration gives arbitrators the most latitude to negotiate a settlement with the parties, whereas final offer arbitration dictates that the arbitrator adopt the judicial prototype. On the other hand, conventional arbitration is widely thought to have a chilling effect on negotiation, whereas final offer arbitration is designed to promote negotiation between the parties. It was noted earlier that empirical research indicates that there are significantly more negotiated settlements in jurisdictions using final offer arbitration than there are in jurisdictions using conventional arbitration. This evidence suggests a contrary hypothesis—specifically that the negotiation prototype is more likely to be used in final offer jurisdictions than in jurisdictions using conventional arbitration. Only further empirical evidence can cast light on which hypothesis is the correct one.

Significant variation in the arbitration process is likely to exist *even within the same statutory framework*. Further, the distinction between the judicial approach and the negotiation approach is one that is capable of capturing a significant proportion of the variation in the arbitration process and is a good proxy for other dimensions of interest arbitration, and collective bargaining more generally, that are thought to influence outcomes.

Whether and to what extent the two approaches affect arbitration outcomes in practice is in the end an empirical question. A negotiations approach might be more efficient at matching the parties' preferences (i.e., it is probably more integrative), especially when the dialogue promoted by the presence of party-appointed representatives allows the arbitration panel to hone in on desirable tradeoffs and needs when fashioning its award. In contrast, a judicial approach might lead an arbitration panel to be more responsive in its award to environmental and economic circumstances. Legislative-style arbitrators have the opportunity to shape an award to fit those circumstances because they are more insulated from the parties' preferences and power.

A Spectrum, Not a Dichotomy

All arbitration cases can be arrayed along a spectrum anchored on one end by the negotiation prototype and on the other end by the judicial prototype. It is likely that the majority of interest arbitration cases do not belong at either end of this spectrum but fall somewhere in between. Whether the arbitrators and the parties in any particular case are inclined toward the judicial prototype or the negotiation prototype will obviously significantly affect the arbitration process, and the nature of the process will affect the nature of the outcomes. But social scientists who have studied interest arbitration have failed to take account of this critical dimension in their research.

Factors Determining the Arbitration Prototype

There are two factors that determine which prototype is used in an arbitration case. The first factor (we will term it the *legal environment*) consists of the applicable statutes, court decisions, and prevailing arbitration practices that apply in the jurisdiction in which an arbitration case arises. The second factor is

the *preferences* of the arbitrator and the parties. Regarding the first factor, the transfer of jurisdiction over police and fire impasses from OCB to PERB in 2001 constituted a highly significant change in the legal environment of police and fire arbitration cases in New York City. As previously noted, under OCB impasse panels in arbitration cases have always consisted of three impartial arbitrators; under PERB an arbitration panel consists of one impartial chairman, a member appointed by the union, and a member appointed by the employer. An all-neutral panel is likely to be closer to the judicial end of the spectrum and a tripartite panel to the negotiation end.

There are constraints on the form and nature of communications that can occur between members of an all-neutral panel and the parties in a dispute during the course of an arbitration proceeding.³⁶ By contrast, there are virtually no constraints on communications between party-appointed arbitrators and their constituents. *Ex parte* communication is the norm for party-appointed arbitrators before, during, and after formal hearings. A party-appointed arbitrator can play a significant role in shaping the strategy the union or the employer pursues in arbitration and, in deliberations with the impartial chair and the other party-appointed arbitrator, frequently assumes the role of the principal advocate or negotiator for the party he or she represents. However, in the conduct of the formal hearings, a party-appointed arbitrator plays a role similar if not identical to the role played by the impartial chair. On balance though, the use of a tripartite panel, compared to the use of an all-neutral one, expands the opportunity for negotiation significantly.

Of course the arbitrator and the parties do not have total discretion in choosing the approach they prefer but need to work within the constraints imposed by the legal environment. Nevertheless, in most jurisdictions, within these constraints, the parties have considerable latitude in shaping the arbitral process they prefer. In New York typically the chair of the impasse panel will meet with the parties in advance of formal hearings to discuss and agree upon the procedures that will govern the hearings. In

the 2002 PBA case the chair of the impasse panel, Dana Eischen, pressed both parties to agree upon a tight time frame for completing the hearings. Because he wanted to expedite the hearings, he obtained the parties' agreement to use narrative testimony and limited cross-examination. In contrast, in the 2004-05 case, the chair of the arbitration panel, Eric Schmertz, proposed a schedule of hearings that included nearly twice as many days as Eischen had allowed. Given the more expansive schedule, the arbitrator and the parties agreed to a more traditional approach to the direct and cross-examination of witnesses. Eischen's preference for a more informal and flexible approach encouraged negotiation, whereas Schmertz's more traditional approach made the hearings more like a conventional trial.

Bargaining Power and Interest Arbitration

Social scientists believe that outcomes (or agreements) reached through negotiation are more likely to be a function of the relative bargaining power of the parties and less likely to be a function of the relative merits of each party's case.³⁸ By contrast, they believe that an impartial judge, empowered to make a decision in a dispute, is more likely to base his or her decision on the merits of the case and not on the power of the parties. Accordingly, we hypothesize that a party in an interest arbitration case that believes it has more power than its adversary will favor a process that allows greater scope for negotiation (or mediation by the arbitrator). By the same token, a party that has—or believes it has—more bargaining power will favor a statutory regime that allows the parties more opportunity to negotiate.

The Effect of 9/11

Does the police arbitration experience in New York City support these hypotheses? An array of factors affected the bargaining power of the PBA and the city in recent years, and it would be difficult for even the most impartial observer to assess which party had the upper hand. There is no question that the attack on the World Trade Center profoundly affected the relationship between the city and the PBA (and virtually everything else that occurred in New York City after September 11), but the net effect of 9/11 on the bargaining power of the parties is problematic.

On the one hand, the pendulum of public opinion seemed to swing in the direction of police officers and firefighters after the tragic events of 9/11. As a consequence of 9/11, police officers assumed new anti-terrorist responsibilities, which required all officers to participate in new training programs. No one disputed the fact that the job of a police officer in New York City had become more complex and challenging.³⁹ More than ever, people in New York City realized how vital police officers were to their safety and health. Thus, it would appear that the PBAs bargaining power should have increased after 9/11.

On the other hand, 9/11 also coincided with a slump on Wall Street and a deep downturn in the New York City economy. In its post-hearing memorandum in 2002, the city pointed out some of the consequences of 9/11: over 15.7 million square feet of office space at the World Trade Center was destroyed and about the same amount of space was either destroyed or significantly damaged in the surrounding neighborhood; hundreds of small businesses were closed down, dislocating thousands of workers, and many never reopened; 60,000 jobs were lost in October 2001, including 24,000 in the finance sector. The New York City Partnership and the Chamber of Commerce estimated that the cost of the attack to the city of New York was 183 billion. The city estimated that it lost over \$800 million in tax revenue as a consequence of the attack.⁴⁰ The mayor needed to obtain increases in property taxes to

cover projected deficits. One might assume that the city's deteriorating economic condition after 9/11 caused the bargaining power equation to tilt in the city's favor, rather than the PBAs. On balance, 9/11 probably did not measurably affect the balance of power between the city and the PBA.

Constraints on Bargaining Power

In the public sector, and especially in the bargaining between the city and the PBA, the latitude for either party to exercise bargaining power is limited. The PBA, of course, does not have the right to go on strike and has never seriously contemplated doing so. It would be equally risky for police officers to engage in other forms of job actions. They are confined to informational picketing and demonstrations as well as advertising in various media outlets.⁴¹ By the same token, the city lacks the leverage a private sector employer would have; unlike a private employer, it cannot threaten a lockout, relocation, or the termination of the essential services it provides. The city has, however, sought means of reducing its reliance on uniformed officers. For example, during the Giuliani administration it pioneered the use of a computer system called Compstat as a tool for managing the police force. Compstat has been widely heralded as an effective crime-fighting technique.⁴² In fact the size of the New York City police force decreased from more than 41,000 officers in 2000 to under 35,000 in 2005.⁴³ In the 2002 and 2004 bargaining rounds the city contended that it had planned to reduce the size of the force because of its introduction of more efficient management techniques. But the PBA argued that the reduction in the force had not been planned but was the consequence of the city's increasing difficulties in recruiting and retaining officers.⁴⁴

Post-Hearing Negotiations

There is no doubt that the PBA honestly believed in both the 2002 and the 2004-05 rounds that its demands for substantial salary increases and other contract improvements were based on the merits of its case—but the city seemed equally persuaded that its persistent demand in both rounds that the union accept the so-called citywide pattern was also based squarely on the merits. One might imagine that under these conditions both sides might be content to let a truly impartial arbitration panel decide which party was right and which party was wrong. But that is not what transpired.

In both rounds when formal hearings were concluded, the arbitration panel went into executive session, a phase of the arbitration proceeding that involved intense, private negotiations over several months (nearly four months in 2002 and six months in 2005), as well as close communication between each party-appointed arbitrator and his or her constituents. Under the gun of an award that might be imposed on both sides by the impartial chair (provided, of course, that he obtained the vote of one of the party-appointed arbitrators), the parties engaged in hard bargaining that narrowed the scope of their differences but did not lead to a final agreement. In the end, the impartial chair in both rounds wrote an award, but each chair obtained the support, or at least concurrence, of the party-appointed arbitrators. The protracted negotiations clearly served to narrow the differences between the parties and gave the chairs a clearer understanding of the parties' priorities and the tradeoffs that would or would not be acceptable to them.

Conclusions

In August 2002 the Eishen panel awarded the police officers an 11.75 percent increase in their salaries covering the contract period August 1, 2000 to July 31, 2002. Nearly three years later, in July 2005, the

Schmertz panel awarded the police officers a 10.25 percent increase in salaries covering the period August 1, 2002 to July 31, 2004. The PBA regarded these awards as victories, not only because both awards were significantly above the prevailing citywide pattern but also because both Eischen and Schmertz included in their awards language that supported one or more of the PBA's arguments for substantial salary adjustments. Interestingly however, the two distinguished arbitrators disagreed on which part of the PBA's case best justified an above pattern award. Eischen focused primarily on what he termed the "recruitment and retention crisis" to justify his award but was silent on other elements of the PBA's case. Schmertz was silent on the recruitment and retention issue but relied heavily on the PBA's arguments regarding the relevance of comparing the salaries of police officers in New York City with the salaries of police officers in cities and communities in the New York City region. After the awards were issued, city officials denied that the citywide pattern had actually been broken.

But it is easy to understand why they made such a claim. Collective bargaining between the city and its unions is conducted in the glare of a very bright spotlight. The press follows every twist and turn in the city's dealings with its unions, and every major labor conflict in New York City (such as the 2006 transit strike) makes national headlines. Political and professional reputations and careers are at stake, and we observed at first hand the stress felt by all of the key players.

Some people may believe that New York City is unique and therefore no meaningful lessons can be learned from public sector collective bargaining in the city. The experience in New York City may not be unique but does stand in contrast to the usual practices in the private sector and many other public sector jurisdictions. For example, with regard to bargaining over salaries, the city's continuing insistence on fidelity to an alleged "pattern" stands in marked contrast to the efforts of many public and private managers to avoid patterns and obtain wage settlements tailored to the needs of their organizations. In contrast to most unions, the PBA has consistently argued that market factors, rather than patterns,

should determine police pay because it believes that police pay in New York City has for many years been significantly below market levels.

With regard to the interest arbitration process, the PBA and the city have reached impasse and relied on arbitration in *every round* of bargaining since the NYCCBL was passed in 1967, strongly suggesting the presence of a narcotic effect. We previously noted, however, that researchers have not found the presence of a narcotic effect in most jurisdictions where interest arbitration is used. Again, New York City may be *sui generis*. The evidence does suggest strongly that the transfer of jurisdiction over interest arbitration from the OCB to PERB, resulting in a change from all-neutral to tripartite arbitration panels, moved the parties in New York City away from the judicial prototype and toward the negotiation prototype.

We believe all public sector jurisdictions have much in common. When public sector employers and unions use interest arbitration, they retain considerable latitude in determining which arbitration prototype will be used. In this article we have explored some of the implications of that choice for the interest arbitration process and bargaining power, and we hope—and believe—the themes we have articulated have applicability in a wide variety of settings.

Notes

1. Obtaining a precise count on the number of states requiring the arbitration of interest disputes is difficult in part because state statutes are frequently revised, repealed, or amended. A summary of state laws providing impasse procedures in public sector disputes is given in Frank Elkouri and Edna Asper Elkouri (2003). *How Arbitration Works* (6th ed., Alan Miles Ruben, editor-in-chief (Washington, DC: The Bureau of National Affairs, pp. 1370-1391).
2. In addition to serving as consultants to the New York City PBA and Kaye Scholer, we have also served as consultants to the Sergeant's Benevolent Association of New York City and Patterson, Belknap, Webb and Tyler LLF; the principal law firm representing the SBA. In recent rounds of bargaining the SBA and the city successfully negotiated new agreements without resorting to interest arbitration. We have also served as consultants to the United Federation of Teachers in New York City and Stroock & Stroock & Lavan LLP, the principal law firm representing the UFT, and in 2005 we testified at the fact-finding hearing between the UFT and the city.
3. U.S. Department of Labor. (1996). Working together for public service. *Report of the U.S. Secretary of Labor's Taskforce on Excellence in State and Local Government through Labor-Management Cooperation* (pp. 102-103) Washington, DC: U.S. Government Printing Office.
4. See for example, Ann Bartel and David Lewin (1981). Wages and Unionism in the Public Sector: The Case of Police, *Review of Economics and Statistics* 63: 53-59; David E. Bloom (1981). Collective Bargaining, Compulsory Arbitration, and Salary Settlements in the Public Sector: The Case of New Jersey's Municipal Police Officers, *Journal of Labor Research* 2: 369-384; Peter Feuille and John Thomas Delaney (1986). Collective Bargaining, Interest Arbitration, and Police Salaries, *Industrial and Labor Relations Review* 39(2): 228-241; Peter Feuille, John Thomas Delaney, and Wallace Hendricks (1985). The Impact of Interest Arbitration on Police Contracts,

Industrial Relations 24(2): 161-181; Craig A. Olson (1980). The Impact of Arbitration on the Wages of Firefighters, *Industrial Relations* 19: 325-339.

5. See for example, Orley Ashenfelter and David E. Bloom (1984). Models of Arbitrator Behavior: Theory and Evidence, *The American Economic Review* 74(1): 111-124; Vincent P Crawford (1979). On Compulsory-Arbitration Schemes, *Journal of Political Economy* 87: 131-160; Henry S. Farber and Harry C. Katz (1979). Interest Arbitration, Outcomes, and the Incentive to Bargain, *Industrial and Labor Relations Review* 33(1): 55-63; Henry S. Farber (1981). Splitting the Difference in Interest Arbitration, *Industrial and Labor Relations Review* 35(1): 70-77; Peter Feuille (1975). Final Offer Arbitration and the Chilling Effect, *Industrial Relations* 14(3): 302-310; Harry Graham and Jeffrey Perry (1993). Interest Arbitration in Ohio: The Narcotic Effect Revisited, *Journal of Collective Negotiations in the Public Sector* 22(4): 323-327.
6. Stevens, C. M. (1966). Is compulsory arbitration compatible with bargaining? *Industrial Relations* 5 (1), 58-52.
7. Currently, Connecticut, Delaware, Nevada, Ohio, Oklahoma, Oregon, and Wisconsin use final offer arbitration in either police or fire disputes, or both. Nebraska uses final offer arbitration in disputes involving state employees and teachers, but not in police and fire disputes. A handful of states experimented with the use of final offer arbitration, but now rely on conventional arbitration or other dispute resolution techniques. For example, Massachusetts enacted a statute requiring the use of final offer arbitration in police and fire disputes in 1974. In 1977 the legislature repealed the law and gave authority for resolving police and fire disputes to a committee chaired by John Dunlop. The Dunlop Committee had the authority to use mediation or fact finding, and could compel the parties to undergo conventional arbitration. The state attorney general later ruled that the use of arbitration in police and fire disputes would not be final and binding. Elkouri and Elkouri, p. 1378. See Jonathan Brock (1982). Bargaining Beyond

Impasse: Joint Resolution of Public Sector Labor Disputes (Boston: Auburn House) for an analysis of the development and operation of the Dunlop Committee. See also David B. Lipsky and Thomas A Barocci, (1978). Final-Offer Arbitration and Salaries of Police and Firefighters, *Monthly Labor Review* 101(4): 34-37.

8. Katz, H. C. & Kochan, T A. (2004). *An introduction to collective bargaining and industrial relations* (3rd ed.) (p. 347). Boston, MA: McGraw Hill Irwin.
9. Lester, R. A. (1984). *Labor arbitration in state and local government: An examination of experiences in eight states and New York City*. Princeton, NJ: Princeton University.
10. Katz & Kochan, op. cit., p. 346.
11. N.Y Civ Serv Law §200-214. A standard reference on the Taylor Law is Jerome Lefkowitz, Melvin H. Osterman, and Rosemary A. Townley, eds. (1998). *Public Sector Labor and Employment Law* 2d ed. (Albany, NY: New York State Bar Association). For this review we have also drawn on Ronald Donovan (1990). *Administering the Taylor Law: Public Employee Relations in New York* (Ithaca, NY ILR Press).
12. Donovan, p. 23, quoting the New York State Governor's Committee on Public Employee Relations, Pinal Report, March 1966, p. 9.
13. N.Y Civ. Serv. Law §212.
14. "Office of Collective Bargaining," found at <http://www.ocb-nyc.org/about.php>, p. 2, accessed on August 24, 2006.
15. New York City Administrative Code, Title 12, Chapter 3, §§12-300.
16. Lefkowitz, et al., op. cit., pp. 761-765. "OCB's jurisdiction extended to city departments and agencies under the control of the mayor...with the proviso that non-mayoral agencies could elect to come under its coverage...Remaining outside OCB jurisdiction were a number of government entities, most prominently the Board of Education and the Transit Authority."

Donovan, pp. 105-106. Another provision of the Taylor Law, §206, allows a public employer to adopt procedures for resolving disputes over representation issues. See Lefkowitz, et al., p. 794.

17. Lefkowitz, et al., op. cit., pp. 763-765.

18. Walter E. Oberer, Kurt L. Hanslowe, and Robert E. Doherty (1970). *The Taylor Act Amendments of 1969: A Primer For School Personnel (and Others Interested in Collective Negotiations)* (Ithaca, NY: New York State School of Industrial and Labor Relations, Cornell University, p. 4).

19. N.Y. Civ. Serv. Law §§209.2 and 209.3. Lefkowitz, et al., op. cit., pp. 525-526.

20. 20 N.Y. Civ. Serv. Law §210.2(f).

21. Lefkowitz, et al., op. cit., p. 766.

22. N.Y. Civ. Serv. Law §209.4. Lefkowitz, et al., pp. 166-767. The Taylor Law also mandates interest arbitration for employees of the New York City Transit Authority and the Metropolitan Transportation Authority; N.Y. Civ. Serv. Law §209.5.

23. In 1985 the United Federation of Teachers (the union representing school teachers in New York City) and the New York City Board of Education, after reaching impasse in new contract negotiations, agreed to use final offer arbitration (which the parties called "last offer binding arbitration" or LOBA) to resolve their contract dispute. The three-person arbitration panel selected the Board of Education's proposal, rather than the UFT's. This experiment with final offer arbitration soured the teachers on the technique, and to our knowledge was the only time that the technique was used to resolve an impasse in New York State. For one account of the experience, see Pre-Hearing Memorandum on Behalf of the City of New York and the New York City Department of Education, In the Matter of the Impasse Between the United Federation of Teachers and the City of New York/New York City Department of Education (State of New York, Public Employment Relations Board, Case Nos. M2004-253, 268-279), June 2005.

24. Lefkowitz, et al., op. cit., pp. 766-767.

25. *Ibid.*
26. Quoted in Michael Murray (ND). "Taking on the Taylor Law," found at <http://www.nycpba.org/publications/mag-06-spring/murrayhtml>, accessed on August 25, 2006.
27. In recent years the city has had approximately 300,000 employees; nearly 200,000 are represented by unions affiliated with District Council 37.
28. But note that in the case of New York City the "pattern" the city prefers links all of the occupational groups employed by New York City that is, it links police officers and firefighters with New York City's clerical and administrative employees, blue collar employees, sanitation workers, teachers, and others. In the private sector, by contrast, a union typically insists on a pattern that links employees with identical or similar jobs who work for different employers. For example, the United Auto Workers prefer a pattern linking assembly line workers at Ford, General Motors, and DaimlerChrysler. The former has been called a "vertical pattern" and the latter a "horizontal pattern." The city believes a vertical pattern is most relevant, while the police and firefighter unions believe a horizontal pattern should be given the greatest weight.
29. Dao, J. (1996, February 14). Pataki vetoes police bill, then drops the fight," *TVew York Times*, p. B1.
30. Axelrod, M. C. & Miccio, J. (2004). Special: PERB & Taylor Law. Retrieved August 25, 2006, from http://www.ufalocal94.org/652_main/652_2004/652_21of04.html.
31. *City of New York v Patrolmen's Benevolent Assn.*, 89 NY 2d 380 (1996).
32. In 1998 Governor Pataki was seeking reelection, and some observers believe that he signed the bill because he hoped the PBA and the UFA would endorse his reelection bid.
33. *Patrolmen's Benevolent Association of the City of New York v. City of New York*, 2001 NY Int. 149 (December 20, 2001), found at http://www.law.cornell.edu/nyctap/I01_0I49.htm, accessed on August 25, 2006.

34. See for example, "New York City Police Department," *Wikipedia*, found at http://en.wikipedia.org/wiki/New_York_City_Police_Department, accessed on August 29, 2006 and "Port Authority Police Department," *Wikipedia*, found at http://en.wikipedia.org/wiki/Port_Authority_Police, accessed on August 29, 2006. New York City police and Port Authority police shared jurisdiction at the World Trade Center. The latter particularly had jurisdiction at the PATH commuter rail station immediately beneath the World Trade Center. At the time, the salaries of Port Authority officers were 20 to 30 percent higher than the salaries of New York City officers. The PBA has argued that it is appropriate to compare the pay of Port Authority officers with New York City officers because they perform similar work in overlapping jurisdictions and, as 9/11 demonstrates, are subject to similar risks. The city has argued that the Port Authority is not a relevant comparison because, compared to New York City, the Port Authority has a different mission, a different means of governance, and different sources of funding.
35. We do not claim to be the first to recognize that arbitrator styles differ from case to case. For example, Lefkowitz, et al. write the following: "The conduct of hearings varies from arbitrator to arbitrator; each has a specific style. Some will conduct a 'tight' hearing, which is closely akin to a legal proceeding with little being presented or discussed outside the strict parameters of the issue, while others conduct a less formal hearing. In any event, certain statutes and rules are applicable." Lefkowitz, et al., p. 849.
36. See the discussion of arbitrator misconduct in Lefkowitz, et al., pp. 867-873. This discussion applies to arbitrator misconduct in grievance arbitration, but Lefkowitz, et al. point out elsewhere in their volume that the rules applying to interest arbitration are quite similar. Lefkowitz, et al., p. 550.

37. See John P McMahon (1994). The Role of Party-Appointed Arbitrators: The Sunkist Case, *Dispute Resolution Journal* 49(3): 66-69. McMahon discusses an 11* Circuit decision affirming an arbitrator's award in a commercial arbitration case in which the party-appointed arbitrator, appointed by the winning party in the arbitration case, met with the lead counsel and witnesses in the arbitration case and helped to prepare the party's case.
38. There is, of course, a large literature on bargaining power. For a summary of that literature, see Katz and Kochan, pp. 72-79. Our discussion is heavily influenced by the definition of bargaining power contained in Samuel B. Bacharach and Edward J. Lawler (1981), *Bargaining Power: Tactics and Outcomes* (San Francisco, CA: Jossey-Bass). Briefly, Bacharach and Lawler maintain that bargaining power is a function of *dependence and alternatives*. Party A has greater bargaining power, according to Bacharach and Lawler, to the extent that Party B is dependent on Party A for outcomes it values; Party A also has greater bargaining power to the extent that Party B does not have alternative sources of the benefits it receives from Party A.
39. Nearly 5,000 New York City police officers were on duty at the World Trade Center site on September 11 and 12. Virtually every officer on the New York City police force worked at the World Trade Center site, the morgues, or the Staten Island landfill in the days and weeks that followed the 9/11 attack. One study reported that "most of the rank and file of the NYPD reported that they were still suffering from stress-related symptoms from September 11* at the end of 2003." Frank G. Dowling et al. (2006). A Peer-Based Assistance Program for Officers With the New York City Police Department: Report of the Effects of Sept. 11, 2001," *The American Journal of Psychiatry* 163(1): 151-153, found at <http://ajp.psychiatryonline.org>, accessed on August 29, 2006.
40. Post-Hearing Memorandum on Behalf of the City of New York, In the Matter of the Impasse Between the Patrolman's Benevolent Association of the City of New York and the City of New

York (State of New York, Public Employment Relations Board, Case Nos. Lf[^]OI-027 and M201-146), June 14, 2002, p. 89.

41. See for example, William K. Rashbaum, "Firefighters and Police Hold Protest for Raises," *New York Times*, August 16, 2002, p. B-3 and Steven Greenhouse, "Unions to Picket at Garden to Put Pressure on Mayor," *New York Times*, July 17, 2004, p. B-3.
42. For a nontechnical description of this system, see "Defeating the Bad Guys," *The Economist.com*, October 1, 1998, found at http://www.economist.com/research/backgrounders/displaystorycfm?story_id=166819 accessed on August 30, 2006; see also Jack Maple (1999). *The Crime Fighter* (New York City, NY: Doubleday).
43. These figures are taken from the New York City Independent Budget Office, *Analysis of the Mayor's Preliminary Budget for 2005*, March 2004, p. 115 and from the same reports for other years.
44. We should disclose that we played a major role in shaping the PBA's arguments regarding the recruitment and retention of police officers; we also conducted research on pattern bargaining, which supported the PBA's position on this issue as well.