

# University of Michigan Journal of Law Reform

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Volume 3

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1969

## Michigan Compulsory Arbitration Act for Essential Services

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### Recommended Citation

William J. Rainey, *Michigan Compulsory Arbitration Act for Essential Services*, 3 U. MICH. J. L. REFORM 239 (1969).

Available at: <https://repository.law.umich.edu/mjlr/vol3/iss1/13>

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# MICHIGAN COMPULSORY ARBITRATION ACT FOR ESSENTIAL SERVICES

## I. Introduction

When Public Act 312 became effective on October 1, 1969, Michigan joined Rhode Island and Pennsylvania in permitting compulsory arbitration of unresolved labor disputes involving municipal police and firemen.<sup>1</sup> Wyoming similarly provides for compulsory arbitration in fire department disputes.<sup>2</sup> Passage of the Act was prompted by a desire to avoid the dire consequences of strikes or work stoppages by firefighters and policemen,<sup>3</sup> and to provide a method by which the bargaining power of public service unions could be maintained in the absence of the strike privilege.<sup>4</sup> Since Michigan had barred strikes by public employees in 1947,<sup>5</sup> the unions felt that they lacked a base of power from which to press their demands. The firemen and policemen realized that a strike, aside from its illegality, would, in all likelihood, alienate employer and legislators alike without advancing the cause for which they were striking. The unions representing these groups

<sup>1</sup> MICH. COMP. LAWS §§ 423.231-247 (1969). R.I. GEN. LAWS ANN. §§ 28-9.1-(1-14) (1961) as amended by Pub. L. 1968 ch. 150, § 1, 2 and § 28-9.2-(1-14) (1963) as amended by Pub. L. 1968, ch. 151 § 1, 2 effective June 4, 1968. PA. STAT. ANN. tit. 43, § 217.1-10 (1968).

<sup>2</sup> WYO. STAT. ANN. §§ 27-265 thru 273 (1965).

<sup>3</sup> The seriousness of such strikes was vividly demonstrated when Gary, Indiana's firefighters stood idle as a large lumber yard burned to the ground during their August 5-10, 1969 strike. N.Y. Times, Aug. 7, 1969, at 23, col. 1. N.Y. Times, Aug. 11, 1969, at 70, col. 5.

<sup>4</sup> Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138 (1966).

<sup>5</sup> MICH. COMP. LAWS § 423.202, (1967):

No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any one or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee' shall strike.

It was determined that strikes by public employees may be enjoined in *School District v. Holland Educ. Ass'n.*, 380 Mich. 314, 157 N.W.2d 206 (1968). Firing or discipline was provided for striking public employees in MICH. COMP. LAWS § 423.206 (1967).

feared that the probable result would be more oppressive sanctions for strikes by policemen and firemen. As a result, compulsory arbitration was advanced as a compromise to compensate them for the loss of their right to strike.

The recommendation for compulsory binding arbitration of disputes involving firemen and policemen originated in a committee appointed by former Governor George Romney<sup>6</sup> to examine, among other things, means of "protecting the general public against interruptions or impairment of essential government services."<sup>7</sup> As a result of this study, compulsory arbitration was initiated on an experimental basis for a period commencing October 1, 1969, and expiring June 30, 1972.

## II. Structure of the Act

Public Act 312 provides the unions with an alternative course of action in the event of unsatisfactory collective bargaining and mediation. Rather than engaging in an illegal strike with its potentially disastrous consequences, the union may initiate compulsory arbitration when the employer has rejected the good faith demands of the union and the parties are at impasse.

Under the Act, whenever a dispute involving policemen or firemen has not been resolved within thirty days of its submission to mediation and fact finding, either party may initiate binding arbitration proceedings by a prompt request in writing to the other.<sup>8</sup> Each party then has ten days to select an appropriate delegate for the arbitration panel. These two arbitrators choose a third arbitrator to act as chairman of the panel. If the two selected arbitrators are unable to agree on a third within five days, either of them may request the chairman of the state mediation board to appoint the third arbitrator. This appointment must be made within seven days of the request.

Within fifteen days after his appointment, the chairman is required to hold a hearing. Third parties may be granted leave to

<sup>6</sup> The members of the committee were: Russell A. Smith, chairman; Gabriel N. Alexander; Edward L. Cushman; Ronald W. Houghton; Charles C. Killingsworth.

<sup>7</sup> Governor Romney's letter of July 29, 1966, at 1-2 of App. A to ADVISORY COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, REPORT OF GOVERNOR GEORGE ROMNEY (as reported in GOVERNMENT EMPLOYEE RELATIONS REPORT (GERR)), No. 181, F-1 at F-7 to F-8.

<sup>8</sup> MICH. COMP. LAWS § 423.233 (1969). The statutory references for this note are found in MICH. COMP. LAWS §§ 423.231-247 (1969).

intervene at this point upon a showing of substantial interest.<sup>9</sup> The expense of the proceedings shall be borne equally by each of the parties to the dispute and by the state. Unless the parties agree otherwise, the hearings are to be concluded within thirty days.

The proceedings are to be conducted informally with a suspension of the technical rules of evidence. To facilitate examination and resolution of the dispute, any oral or documentary evidence and any other data deemed relevant by the arbitration panel may be received in evidence. The panel has authority to administer oaths, require attendance of witnesses and order the production of relevant papers, contracts, agreements and documents. If necessary, subpoenas may be issued to enforce these powers. If any person refuses to obey a subpoena or to be sworn or to testify, or if anyone present at the hearing is guilty of contempt, the arbitration panel or the Attorney General, if requested, may call upon the circuit court to issue an appropriate order.

The arbitration panel is to base its findings, opinions, and orders upon the following factors: the lawful authority of the employer; stipulations of the parties; the interests and welfare of the public and the financial ability of the unit of government to meet those costs; comparison of wages, hours and conditions of similar employees in comparable communities in both the private and public sectors; the cost of living; the overall total compensation now received by the employees; changes in the foregoing circumstances arising during arbitration; and "other factors," normally considered in collective bargaining and arbitration.<sup>10</sup>

If supported by competent, material, and substantial evidence on the whole record, a majority decision of the panel shall be final and binding. Either party or the panel itself may have the decision enforced in the circuit court for the county where the dispute arose or where the majority of the affected employees reside.<sup>11</sup> If

<sup>9</sup> MICH. COMP. LAWS § 423.236 (1969). "Upon application and for good cause shown, and upon such terms and conditions as are just, a person, labor organization, or governmental unit having a substantial interest therein may be granted leave to intervene by the arbitration panel."

<sup>10</sup> MICH. COMP. LAWS § 423.239 (1969).

<sup>11</sup> The orders of the panel are not self-executing. Thus, if one of the parties refuses to accept the result of the arbitration proceeding, the other party may procure an enforcement order from the circuit court in the county where the dispute arose. MICH. COMP. LAWS § 423.240 (1969).

either party willfully disobeys or encourages resistance to the order of the circuit court, a fine not exceeding \$250 per day may be assessed for each day of continuing violation.<sup>12</sup>

The orders of the arbitration panel are reviewable by this same circuit court if:

... the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means.<sup>13</sup>

Notwithstanding the pendency of judicial review, the order of the panel remains in effect until upset.

During the pendency of proceedings, the parties by agreement may alter the wages, hours and conditions of employment without prejudicing their positions. Anytime after the award, the parties, by stipulation, may amend or modify an award of arbitration.

### III. Evaluation of the Act

Michigan's Public Act 312 of 1969 does not guarantee that labor disputes involving firemen and policemen will result in arbitration if they are not resolved within thirty days of their submission to mediation. While the statute ostensibly provides for "compulsory arbitration of labor disputes in municipal police and fire departments,"<sup>14</sup> arbitration is not, in fact, compulsory. The Act simply provides that, in the event of an unresolved dispute, either party "*may initiate binding arbitration proceedings*"<sup>15</sup> [Emphasis added]. Unless one party desires to submit to arbitration, the Act provides no relief at all. In contrast, the provisions of the Rhode Island and Wyoming statutes require that "any and all unresolved issues *shall be* submitted to arbitration"<sup>16</sup> [Emphasis added]. This

<sup>12</sup> This is a noteworthy increase in the severity of contempt sanctions under Michigan law. The usual penalty for contempt is a maximum \$250 fine or 30 days' imprisonment, or both. MICH. COMP. LAWS § 600.1715 (1967).

<sup>13</sup> MICH. COMP. LAWS § 423.242 (1969).

<sup>14</sup> MICH. COMP. LAWS foreword to §§ 423.231-247 (1969).

<sup>15</sup> MICH. COMP. LAWS § 423.233 (1969).

<sup>16</sup> R.I. GEN. LAWS ANN. § 28-9.1-6 (1961) & § 28-9.1-7 (1963); Wyo. Stat. Ann. § 27-269 (1965), Pennsylvania, like Michigan, does not make arbitration mandatory after 30 days of mediation, but at this time either party "may request the appointment of a board of arbitration." PA. STAT. ANN. tit. 43, § 217.4(a) (1968).

distinction, however, is of limited practical import. If arbitration is available, it is doubtful that any city would allow policemen and firemen to strike. On the other hand, in making compulsory arbitration optional, the Act encourages collective bargaining. If the parties are near agreement in mediation and desire to continue discussion without resorting to arbitration, they may do so even though the thirty day mediation period has expired. If either party should request arbitration, however, the other party's participation is compulsory, and arbitration necessarily follows. In either case, it would appear that the Act provides an effective means of avoiding illegal and potentially dangerous stoppages of essential services while affording the unions some degree of leverage in their collective bargaining efforts.<sup>17</sup>

Unfortunately, the Act contains numerous ambiguities as yet unresolved. It is unclear, for example, whether mediation and fact-finding are necessary prerequisites to the submission of the dispute to arbitration. The Act states that "[w]henever in the course of mediation . . . the dispute has not been resolved . . . within 30 days of the submission of the dispute to mediation and fact-finding," either party may request arbitration.<sup>18</sup> This provision seemingly requires that the parties must submit their dispute to mediation and fact-finding before seeking arbitration. Subsequently, however, it is stated that the Act is supplementary to Act No. 336 of the Public Acts of 1947 as amended<sup>19</sup> and does not amend or repeal any of its provisions.<sup>20</sup> According to Public Act 312, "any provisions [of Act No. 336] requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act."<sup>21</sup> Thus the Act appears not to require fact-finding, despite some language to the contrary. If the Act establishes mediation alone as a prerequisite to arbi-

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<sup>17</sup> However, the availability of arbitration does not guarantee that the essential services will be free from strike activities. For example on October 7, 1969, 3,700 policemen and 2,400 firemen walked off their jobs in Montreal, Quebec after learning of the wage award granted them by an arbitration board. In their one day absence, arson and looting were widespread, one policeman was killed and ten banks were robbed. The firemen and policemen were reacting to the arbitration board's binding decision which left their wages below Toronto's scale. N.Y. Times, Oct. 9, 1969, at col. 1.

<sup>18</sup> MICH. COMP. LAWS § 423.233 (1969).

<sup>19</sup> MICH. COMP. LAWS §§ 423.201-216 (1967).

<sup>20</sup> MICH. COMP. LAWS § 423.244 (1969).

<sup>21</sup> *Id.*

tration, this pre-arbitration procedure should have been made explicit.

The nature of the disputes which may be submitted to arbitration under the Act also remains unclear. The Act speaks of labor disputes generally, and does not limit the application of the Act to interest (contract terms) disputes alone. Since the Act is, by its own terms, to be "liberally construed,"<sup>22</sup> it appears that the Act may well be equally applicable to grievance disputes under an existing contract.<sup>23</sup>

The Act also fails to provide explicit standards governing intervention by interested third parties. Persons, labor organizations and governmental units may intervene on "such terms and conditions as are just" and for good cause shown.<sup>24</sup> In all likelihood, the usual standards governing intervention in civil cases will be adopted under this Act, although this is by no means made clear.<sup>25</sup>

A further problem may arise when the hearing has been concluded and the neutral arbitrator is called upon to join with one party or the other to formulate a majority ruling. If both parties maintain positions basically unacceptable to the neutral arbitrator, he may be forced to compromise his own best judgment in order to reach a decision.<sup>26</sup>

Once the arbitration panel has made a ruling or order, either party or the panel itself may seek an enforcement order in the appropriate circuit court.<sup>27</sup> If either party willfully disobeys such

<sup>22</sup> MICH. COMP. LAWS § 423.231 (1969).

<sup>23</sup> Pennsylvania specifically provides for arbitration of grievance disputes. PA. STAT. ANN. tit. 43, § 217.1 (1968). However, the cost of arbitration would in all likelihood discourage the submission of the typical grievance dispute.

<sup>24</sup> MICH. COMP. LAWS § 423.236 (1969).

<sup>25</sup> Furthermore, even if good cause and substantial interest are proved to the satisfaction of the panel, intervention is not necessarily permitted. The panel "may" grant leave to intervene, permission being contingent upon agreement by two of the three arbitrators. MICH. COMP. LAWS § 423.236 (1969).

<sup>26</sup> This problem is avoided in Ontario's statute which provides that, upon the request of either party, "the appointment of a single arbitrator shall be made by the Attorney General." The single arbitrator then hears and "determines the difference" and makes a final and binding decision. The arbitrator will not be forced into a compromise that he deems undesirable. REVISED STATUTES OF ONTARIO (R.S.O.) 1960, c. 298, s. 32, subs. 2, re-enacted in 1963-1964. R.S.O. 1960, c. 145, s. 17, subs. 5, amended in 1963-1964. This problem will be avoided, however, if those appointed to the arbitration panel by the parties adopt a conciliatory rather than an adversarial approach. This was the hope of the sponsors of the Act. Interview with Theodore Sachs, Chief Counsel for the Michigan Firefighter's Association, October 15, 1969.

<sup>27</sup> See note 11, *supra*.

order as the court may issue, or encourages or offers resistance thereto, by strike or otherwise, the court may fix a fine for contempt at not more than \$250 per day.<sup>28</sup> Whether this provision ensures enforcement of the arbitrators' decision is not certain. On the one hand, the union and the municipalities may be reluctant to pay such a fine over an extended period of time. On the other hand, where the parties to the dispute stand on materially disparate financial footing, this pre-determined penalty can become an effective weapon in the hands of the well-financed party. Since one cannot be imprisoned for a violation of this Act,<sup>29</sup> the \$250 per day fine is the greatest penalty that can be assessed for non-compliance with the panel's decision. Thus, if a well-financed party thought the other might withdraw certain demands, it might attempt to hold out, pay the fine, and alter the award by stipulation, thus avoiding the panel's decision. Such a result might be avoided if the courts were left free to assess a penalty commensurate with the financial resources of the employer or union.<sup>30</sup>

Although judicial review of arbitration panel decisions may be generally undesirable because it eliminates the finality of those decisions, it is nonetheless required by the state constitution.<sup>31</sup> Moreover, such review is desirable as a check on the arbitration panel's jurisdiction, and to ensure that the guidelines for decision set out in the Act are not completely ignored.<sup>32</sup>

On the other hand, if judicial review were too easily attainable, the panel's decision would lack substantial finality. In an attempt to avoid excessive resort to judicial review, the opportunity for the parties to select two of the arbitrators was provided. This procedure enables the parties to draw on those professionals in the field on whom they may confidently rely. In this way, the sponsors of the Act hoped to ensure adherence to the panels'

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<sup>28</sup> See note 12, *supra*.

<sup>29</sup> MICH. COMP. LAWS § 423.246 (1969).

<sup>30</sup> Other states have taken an approach similar in effect to that of Michigan. Pennsylvania, for example, does not prescribe any punishment for violation of the arbitration board's decision in disputes involving policemen and firemen. Rather, the board's determination constitutes a mandate to the employer. If the board's decision is not obeyed, either party can presumably obtain court enforcement of the order, although the statute is not explicit on this point. Once the court issued an order requiring compliance with the board's determination, refusal to obey the board's order could be ruled contempt of court.

<sup>31</sup> MICH. CONST. art. VI, § 28.

<sup>32</sup> These standards are set out in text accompanying note 10 *supra*.

decisions. Moreover, under Public Act 312, review is limited to cases of fraud, lack of jurisdiction, or lack of any evidentiary support. It can therefore be expected that judicial review of the arbitration award will be rare, and that the finality of the award will not be weakened.<sup>33</sup>

If Michigan's statute follows the course set by similar statutes in other states, it will face constitutional challenges. These challenges will probably be initiated by municipalities who do not desire to submit to arbitration. Such attacks have generally been based on the ground that the statutes are unconstitutional delegations of legislative power to non-governmental agencies. It is argued that these statutes do not provide sufficient standards governing the exercise of the delegated power by the arbitration panel. Notwithstanding such arguments, the Rhode Island and Wyoming provisions, which are quite similar to Michigan's, have survived constitutional challenge.<sup>34</sup> Moreover, a Michigan circuit court upheld compulsory arbitration for public employees in a 1967 decision.<sup>35</sup> In all likelihood, Public Act 312 will be upheld against such a challenge.

#### IV. Conclusion

With enactment of compulsory arbitration, Michigan policemen and firemen need no longer rely solely on collective bargaining and mediation to settle disputes with employers. The availability of arbitration strengthens the unions' position vis-à-vis the employer despite the absence of the strike privilege. By allowing either party in police and fire department disputes to initiate compulsory arbitration, Michigan has given these groups a means beyond collective bargaining and mediation by which to achieve

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<sup>33</sup> Interview, Theodore Sachs, *supra* note 26.

<sup>34</sup> *City of Warwick v. Warwick Regular Firemen's Assn.* 256 A.2d 206 (R.I. 1969). *State ex rel Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295 (Wyo. 1968).

<sup>35</sup> *Local 953 and Council 55 v. School District of the City of Benton Harbor*, Circuit Court for the County of Berrien, No. C-6229(B), October 12, 1967, Circuit Judge Chester J. Byrns. (Arbitration provision in a contract between a Michigan School District and the union representing the District employees held binding and enforceable.)

their goals.<sup>36</sup> The statute should therefore make damaging and potentially disastrous stoppages of essential services unlikely.<sup>37</sup>

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<sup>36</sup> It seems doubtful that compulsory binding arbitration could be expanded to cover other public employees, at least in the near future. According to one source:

Implementation of this approach on a wider basis would be difficult without substantial public support as well as the support of the employing agencies and the employee organization directly concerned, and the latter may not be quickly forthcoming. Smith, *State and Local Advisory Reports on Public Employment Labor and Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 916 (1969).

<sup>37</sup> However, see note 17 *supra*.