

**AN EXPLORATORY ANALYSIS OF THE
SELECTION OF ARBITRATORS IN COMPULSORY
INTEREST ARBITRATION PROCEEDINGS:
THE MICHIGAN EXPERIENCE**

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ABSTRACT

This research provides a review of the compulsory arbitration process in Michigan. It first provides a qualitative description of how arbitrators are selected as members of the arbitration panel maintained and administered by the Michigan Employment Relations Commission (MERC). Using official data from MERC, this study also examined the background characteristics of all arbitrators ($n = 54$) listed as members of the panel. It found that the members of MERC's arbitration panel are predominately white males who have over 11 years of experience and possess law degrees. Using a multivariate model to explore what background characteristics are predictors of the selection of a neutral arbitrator by the parties in dispute, it was found that age, gender, years of experience, and education were not significant variables affecting the selection of arbitrators.

Over the last three decades, interest arbitration has been widely accepted and used as an Alternative Dispute Resolution (ADR) procedure to resolve public sector labor disputes. These interest arbitration statutes have served their primary goal of avoiding the use of the strike as a bargaining tool, maintaining labor peace, and

resolving contractual disputes in an equitable manner for both parties involved in the dispute.

Since 1969 Michigan has had compulsory interest arbitration to resolve contractual disputes for essential services. These essential services include police, firefighters, 911 dispatchers, and emergency medical technicians (EMTs) employed by governmental units. Known as Public Act 312, this legislation calls for the creation of an arbitration panel composed of two delegates and a neutral arbitrator, known as the chair, who is responsible for conducting the arbitration hearing. Under this process, each party is allowed its own delegate on the panel. The chair, meanwhile, is selected by the parties and appointed by the Michigan Employment Relations Commission (MERC). Under Public Act 312, each delegate and the chair have an equal vote. The two delegates and the chair review the final last best offers for each economic issue presented at the arbitration hearing and then make a decision about which final best offer will be awarded. The panel may fashion its own award for all noneconomic issues. Public Act 312 and the arbitrators who conduct Act 312 hearings have come under great scrutiny in Michigan mainly because arbitrators are often called on to make costly wage and benefit decisions. Their decisions may also significantly affect the lives of public employees, the budgets of the employers, and the taxpayers.

Public Act 312 is administered by MERC, which appoints arbitrators for Act 312 cases and appoints mediators to mediate police and fire contracts prior to the parties filing for 312 arbitration. In addition, if there is an unfair labor practice filed before or during an Act 312 case, MERC appoints an administrative law judge to conduct a hearing on the matter. The Bureau of Employment Relations (BER) is the Michigan agency that assists MERC in its duties. BER has full-time mediators and administrative law judges, but it does not have full-time arbitrators. MERC maintains a panel of 312 arbitrators, whom it appoints on a case-by-case basis.

One of the greatest advantages of interest-arbitration statutes such as Public Act 312 is that the parties have control over the selection of the third-party neutral. This point was supported by Edwards [1] and Costello [2], who indicated that a crucial step in the arbitration process is the selection of the neutral arbitrator, who often has broader powers than judges. The Elkouris further supported the significance of the selection of the third-party neutral, stating that “no part of the arbitration process is more important than that of selecting the person who is to render the decision” [3, p. 135]. The discussion by Bloom et al. of third-party neutrals also emphasizes the importance and impact on the arbitration outcome [4]. The authors stated that the “key to a successful outcome in an arbitration hearing is three things: 1) selection of the arbitrator, 2) selection of the arbitrator, 3) selection of the arbitrator” [4, p. 69].

Of interest is that very little research has been conducted regarding the factors that lead to the selection of arbitrators. This article analyzes the selection criteria at two levels in Michigan’s Public Act 312 arbitration statute. First, it provides a

descriptive review of how the arbitration panel in Michigan is maintained and how arbitrators are selected for the panel. Through an analysis of arbitration cases from 1995 to 2000, this research also examines whether the biographical information that MERC maintains on arbitrators serves as a useful selection criterion for those who select third-party neutrals.

THE SELECTION PROCESS OF ARBITRATORS UNDER PUBLIC ACT 312

Figure 1 provides an outline of the arbitration process under Public Act 312, which requires labor and management to engage in collective bargaining. If the issues in dispute cannot be resolved through the collective bargaining process, either party or MERC may initiate mediation by a state-appointed mediator. If,

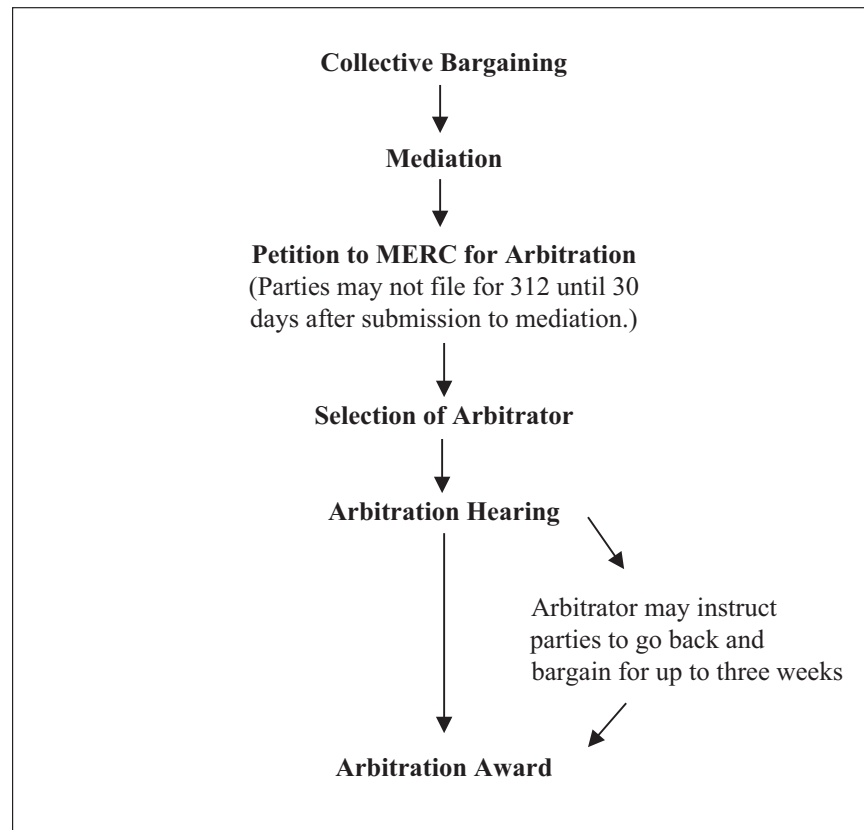


Figure 1. The Public Act 312 arbitration process.

after 30 days of mediation, the parties are still unable to negotiate a contract, the union or employer may initiate binding arbitration [5].

To request interest arbitration, the union or employer must file a petition with MERC. Within seven days of receiving the petition, MERC is required to provide a list of three arbitrators' names to each party. The three names are selected from the panel by a computerized, random-selection process. The parties are also given the resumes of the three arbitrators on the list. Pursuant to MERC's administrative rules, the resumes must include a brief summary of the arbitrator's educational and professional background, a list of the arbitrator's employment history for the past five years, and their arbitration awards and factfinding reports. The resume also provides the parties with information related to the percentage of advocacy work that was performed by the arbitrator and the arbitrator's firm (if applicable) on an annual basis for the preceding five years. An advocate is defined in Act 312 as:

. . . an individual who has represented management or a union in the past 5 years prior to his or her appointment to the arbitration panel. Advocate also means an attorney who is associated with a firm that has represented management or a union in the past 5 years prior to his or her appointment to the arbitration panel [6].

After receiving the list of arbitrators and their resumes, the parties are allowed to strike the name of one arbitrator whom they do not want for the case. The commission then appoints the person who was not struck from either list. On those occasions where each party strikes the same name, the commission selects the arbitrator from the two remaining names. The criterion used for selecting the arbitrator is subjective in nature. Commission members select the arbitrator they feel will best serve the parties' needs, based on their knowledge of the arbitrator's qualifications and past performance in arbitration proceedings.

Public Act 312 administrative rules also allow the parties to forgo the standard selection process and mutually agree to an arbitrator. Under what is known as mutual selection, the parties in cooperation with one another pick an arbitrator from the commission's panel of arbitrators. The parties also have the option of selecting an arbitrator who is not on the panel, with the sole requirement that the arbitrator be a citizen of Michigan. Upon notification from the parties of their intent to mutually select, the commission appoints this individual as the neutral arbitration chair.

Another form of arbitrator selection not found in the act or rules is called the Blue-Ribbon Panel. These panels are rarely used and are reserved for high-profile, highly contested, and complicated contractual disputes. If both parties request a blue-ribbon panel, MERC disregards the computerized random selection of arbitrators and selects three specific arbitrators whom it has identified as uniquely suitable for the case. Upon receiving the list, the parties are each allowed to strike one name. The Commission then appoints the arbitrator whose name has not been struck. Blue-ribbon panels are normally not used more than once per year.

THE SELECTION OF ARBITRATORS BY MERC

As stated previously, MERC appoints the Public Act 312 arbitrators. MERC consists of three members appointed by the governor of Michigan and confirmed by the state senate. To prevent partisan control of MERC, state statute requires that one of the members must be either an independent or a member of a political party other than the governor's political party. The other two members may be from the same political party as the governor. These commission members have staggered terms of three years with no term limits. During the five-year period of our review, the commission members remained the same.

Public Act 312 gives the commission a great deal of discretion when appointing arbitrators to its panel. The act states that the commission:

. . . shall establish and appoint a panel of arbitrators, who shall be known as the Michigan employment relations commission panel of arbitrators. The commission shall appoint members for indefinite terms. Members shall be impartial, competent, and reputable citizens of the United States and residents of the state. . . . The commission may at any time appoint additional members to the panel of arbitrators, and may remove existing members without cause [7].

From 1992 to present, the commission has attempted to improve the quality of its arbitration panel. First, it increased the fee paid to the arbitrators from \$350 to \$650 per day in hopes of attracting and retaining experienced arbitrators. Second, it began regular training sessions on procedural and substantive matters, using successful arbitrators and practitioners as instructors. Third, the commission began reducing the number of arbitrators listed on the panel. The commission heard from both labor and management that many of the arbitrators on the panel had little or no experience in labor law, let alone the ability to manage a complex interest-arbitration case. Both sides of the bargaining table argued that it was irresponsible for MERC to allow inexperienced neutrals to sit as Public Act 312 arbitrators. In response to these concerns, the commission decided to systematically reduce the panel over the five-year period of our review. Using the selection rate as an objective criterion, arbitrators whose names were sent to the parties five times over a three-year period and never selected were deleted from the panel.

This selection process occurs on an annual basis. From 1992 to 2000, the panel was reduced from 104 arbitrators to 54, without the addition of any new names. While the majority of the reductions were attributed directly to this strategy, actions independent from those of MERC also reduced the number of arbitrators. For instance, arbitrators may request that their names be taken off the panel, temporarily or permanently. This often happens when an arbitrator's caseload becomes too big. The deaths of some arbitrators also resulted in a decrease in the number of arbitrators on the panel. During this period, no new arbitrators were

placed on the panel. MERC has no established criteria for selecting individuals to serve on the panel.

REVIEW OF THE LITERATURE

A review of the literature related to the selection of arbitrators in the private sector revealed several explanations for why arbitrators are, or are not, selected. Kaufmann and McKee proposed that many arbitrators are chosen based on popularity, called the “bandwagon effect” [8]. This occurs when arbitrators are selected through word of mouth based on their performance and level of experience [9]. Other researchers were more specific in their explanations for why arbitrators are selected, writing that arbitrators were chosen based on their experience, competence, and recommendations by arbitration associations [10, 11]. The importance of experience and subsequent selection was also discussed by Spelfogel, who stated that some ADR arbitrators may lack experience or training in employment law and may “not be particularly versed in the expeditious resolution of disputes submitted to arbitration” [12, p. 11]. Nolan also wrote that effective arbitrators must have those necessary skills and subsequent training to be an effective arbitrator [13]. If arbitrators should lack those requisite skills needed, they will not be selected again by the parties in dispute [14].

A few studies on arbitrator selection have concentrated on and examined the biographical background of arbitrators. Peterson and Katz found that an arbitrator’s gender was not an important issue in selection [15]. The authors concluded that the use of biographical data was not a likely strategy for selecting arbitrators [15]. Briggs and Anderson hypothesized that arbitrators’ acceptability was based on their background characteristics, including age and education; the “visibility” of arbitrators based on activities (including experience) that expose their name to the parties more often than other arbitrators; and, the arbitrators’ practices at the arbitration hearing [16]. The authors concluded that visibility characteristics were the most important variable, while background characteristics were determined to be the least predictive variables for increased caseloads [16]. Nelson also conducted research on how the impact of age, education, experience, and occupation affects the selection of arbitrators [17]. He concluded that background factors were considered when selecting arbitrators and that parties did not always select arbitrators who were thought to decide in their favor. As an example, union representatives were found to avoid the youngest and least experienced arbitrators whether or not their backgrounds would have maximized their chances of winning [17].

Other research in the private sector examined whether arbitrators’ backgrounds influenced their decisions. Bemmels studied the background characteristics of grievance arbitrators who made decisions in discharge and suspension cases and concluded that few significant relationships existed between their background characteristics and decisions [18]. This was consistent with earlier research

findings by Block and Stieber [19] and Heneman and Sandver [20], who also found little relationship between the background characteristics of grievance arbitrators and the decisions they rendered.

Beyond the characteristics of arbitrators, the environment in which arbitrators operate was examined. In the case of some arbitration proceedings, such as the arbitration of Equal Employment Opportunity Commission complaints, the lack of diversity among arbitrators may make it difficult to find arbitrators who are sympathetic to the grievant's claims [21]. Other authors indicated concerns related to unfairness and the lack of diversity by using industry arbitrators over arbitrators listed on national registers to handle employment disputes [22].

Some research exists that addresses how arbitrators are selected in the public sector. Delaney and Feuille, in an early multistate study of over 300 arbitration awards from 1970 to 1983, found that the typical arbitrator wrote only a single award [23]. The authors concluded that police interest arbitration awards are not dominated by a small number of arbitrators [23]. Bloom and Cavanagh conducted research on what characteristics unions and employers find desirable and whether the parties engage in strategic behaviors when ranking arbitrators [24]. Using 193 arbitration cases collected from New Jersey's Public Employment Relations Commission, they found that employers preferred arbitrators trained in economics, while unions disliked economists and preferred those with legal training [24]. The authors also found that the parties based their selection on an arbitrator's win-loss record; parties do not select based on an arbitrator's arbitration strategy; and an arbitrator's years of experience was a significant factor in arbitrator selection [24].

In addition to examining the characteristics of arbitrators, some researchers studied selection issues based on the dynamics of the arbitration hearing. Olson and Rau wrote that prior arbitration decisions provide the parties with new information about an arbitrator's beliefs [25]. That is, the behavior in bargaining is affected and shaped by the parties' expectations about the behavior of the arbitrator. Posthuma and Dworkin also proposed a model based on behavioral theories of arbitrators [26]. By combining a variety of behavior-related theories, the authors concluded that arbitrators will increase their level of acceptability (and selection rate) if they demonstrate acceptable levels of procedural and interactional justice during the arbitration process [26]. Other authors suggested that arbitrators may also influence their own selection rate by making decisions similar to those of other arbitrators in similar cases [26, 27].

Some research also revealed the importance of quality arbitrators. Kanowitz indicated some concerns based on the fact that arbitrators are politically unaccountable and may replace legislatures in setting legal norms [28]. Others, meanwhile, discussed how the level of competency of the third-party neutral will have a direct effect on the level of confidence the parties have in the process [29]. Other public sector research discussed the dangers of using third-party arbitrators

who may be unfamiliar with the complexities of the organization [30] or lack expertise in issues related to public finance and budgeting [31].

While these studies have provided some insight into the arbitrator selection process, the review of the literature reveals that very little contemporary research exists regarding the criteria or basis for selecting arbitrators. The review also shows little systematic research focusing on the arbitrator selection process. The existing research seems even more fragmented when one considers that much of the research has been conducted in the private sector, where arbitrators deal primarily with grievances.

METHODOLOGY

Population and Variables

To investigate which factors lead parties in a dispute to select a specific arbitrator over other arbitrators, we examined all of the arbitration cases ($n = 140$) that occurred from 1996-2000. Data were obtained from official MERC-published arbitration awards and the resumes of panel arbitrators maintained by the commission. Since all interest-arbitration cases fall under the jurisdiction of Public Act 312, the data for this research comprises the total population of arbitration cases heard during this time period. The arbitration awards and arbitrator resumes were reviewed for accuracy. These documents contained information related to the names of the parties in dispute and the background information of the arbitrator. Each file was checked to ensure that it contained all the information necessary for this study. Following this check for accuracy, all relevant demographic and biographical information was transcribed from the documents onto code sheets and analyzed for this study.

Procedures

As stated earlier, one of the goals of this study was to explore the background characteristics of arbitrators listed in MERC's panel. To accomplish this, a descriptive analysis of the variables was conducted to gain an understanding of the general characteristics and backgrounds of the arbitrators on MERC's arbitration panel. Second, this research examined whether any background characteristics of arbitrators predispose them to be selected at a greater rate over other arbitrators on MERC's arbitration panel. To investigate this research question, a linear regression model was constructed to determine and identify which background characteristics of arbitrators were significant predictors of being selected to serve as the arbitration chair in Act 312 proceedings.

FINDINGS

The Background Characteristics of Arbitrators

Table 1 displays the background characteristics of arbitrators listed on MERC's arbitration panel for the years 1996-2000. Of the total 54 arbitrators on the panel, the majority (93.7 percent) were white males with a mean age of 60.24 years. Twenty-six arbitrators, consisting of approximately 48 percent of all arbitrators on the panel, had between 11 and 20 years of experience. Approximately 39 percent (or 21 arbitrators) had more than 21 years of experience. In regard to their educational levels, all arbitrators listed on the panel had graduate degrees. Over 80 percent of the arbitrators listed on the panel had a law degree. Other terminal degrees included a Ph.D. or a master's degree.

Variables related to the frequency of arbitration selection are shown in Table 2. On average, an arbitrator's name went out to the parties in dispute 24 times during the five-year period under investigation. Because the arbitrator's name is randomly chosen from a computerized database, a variance exists in the number

Table 1. The Background Characteristics of Arbitrators, 1996-2000

Variable	N	Percent	Mean	Mode	Range
Age	54		60.24	55	46-77
Years of experience			18.22	19	4-28
1-10 years	7	13.0			
11-20 years	26	48.1			
21-30 years	21	38.9			
Race					
White	52	93.7			
African American	2	9.7			
Other	0	0.0			
Gender					
Male	49	90.7			
Female	5	9.3			
Educational level					
Law degree	45	83.3			
Ph.D.	4	7.4			
Master's degree only	5	9.3			
Bachelor's degree only	0	0.0			

Table 2. Variables Related to Arbitrator Selection, 1996-2000

Variable	N	Percent	Mean	Mode	Range
Times listed on arbitration list	54	—	24.69	28	0-44
Number of times selected	54	—	7.19	9	1-18
Ratio times name went/ actual selection					
.000-.333	37	68.5			
.334-.666	13	24.1			
.667-1.0	4	7.4			

of times an arbitrator's name actually is placed on the list. The range of times an arbitrator's name was included on the list sent out to the parties ranged from a low of zero to a high of 44 times. The findings also show that over the five-year period an average of seven cases was heard by those arbitrators selected. The range of cases heard, meanwhile, shows that arbitrators actually heard as little as one case in five years or a maximum of 18. The data in Table 2 also show the selection rate based on the number of times the arbitrator's name went out to the parties. In the majority of cases, when an arbitrator's name was sent to the parties in dispute, that arbitrator was selected less than one-third of the time. In some instances, however, there was a high selection rate of arbitrators. As shown in Table 2, 7.4 percent of the arbitrators were chosen over two-thirds of the time when their names were listed.

Because this study was also interested in determining whether the background characteristics of arbitrators are predictors of being selected as neutral chairs, a linear regression model was constructed. Variables included for analysis in the full model include the arbitrator's years of experience, age, gender, race, and educational level. For the purpose of statistical analysis, some of the variables used in the model were re-coded into dichotomous dummy variables. The variable race was re-coded as white/not white, while the variable law degree was coded as law degree/non-law degree. The non-law degree variable included all arbitrators who have master's degrees or doctorates. The variables in the model were checked for multicollinearity. No significant linear relationships were found between the variables used in the model.

Table 3 displays the findings of the full linear regression model. The model shows that no variables related to the background characteristics of the arbitrators are statistically significant predictors of selection. Age, gender, race, years of experience, and whether the arbitrator has a law degree were not significant (at .05 level).

Table 3. Summary of Linear Regression Model Coefficients for Arbitrator Background Characteristics Associated with Dependent Variable

Variables ^a	Unstandardized coefficients Beta	Std. error	Standardized coefficients Beta	<i>t</i>	Sig.
(Constant)	.153	.358		.427	.671
Years experience	3.592E-03	.005	.103	.653	.517
Age	-9.860E-04	.005	-.037	-.215	.831
Gender	3.285E-02	.119	.042	.277	.783
Race	.159	.247	.096	.644	.523
Law degree	-6.096E-02	.087	-.109	-.704	.485

^aDependent Variable: Selection Rate.
 $R^2 = .026$, Adj. $R^2 = -.075$, $N = 54$.

DISCUSSION

This study sought to determine what factors, if any, led to the selection of third-party individuals to serve as neutrals in arbitration proceedings under Michigan's Public Act 312 compulsory arbitration statute. Unlike earlier studies related to the selection of arbitrators, this study contributes to the compulsory arbitration literature by providing a descriptive analysis of how arbitrators are selected at the state level. It has shown that the selection of arbitrators does not begin with the parties in dispute. Instead, the selection process actually begins with MERC, which determines who will serve on the arbitration panel. It is the responsibility of MERC to maintain the arbitration panel and provide a list of qualified arbitrators to parties in dispute. Retention on the panel is based on clear, objective criteria related to the arbitrator's selection rate. If an arbitrator is not selected by any of the parties seeking arbitration during the preceding five years, his/her name is eliminated from the panel.

The findings from this study raise some policy considerations for Michigan and other states that have similar compulsory arbitration statutes. First, the findings from this research raise questions related to the diversity of the arbitration panel in the context of race and gender. In Michigan, the arbitration panel is not highly diverse in the context of race and gender. At the same time, the average age of

arbitrators was relatively high. This finding suggests that in the near future many of MERC's existing arbitrators may retire. To ensure an adequate pool of arbitrators, MERC will need to consider developing some strategies to increase the selection rate and exposure of younger and less-experienced arbitrators listed in its panel. As an example, selection rates may be improved through internships, training, and other activities that include promoting new members and publishing their works for the parties in dispute to review [32]. Strategies such as these could make the parties in dispute less hesitant to select inexperienced arbitrators. These previously unknown arbitrators would now be exposed to the disputing parties, increasing their chance for selection. While MERC has established objective criteria for eliminating arbitrators, it will also need to establish criteria for selecting new arbitrators to its panel.

This study contributes to the literature by providing a contemporary analysis of the actual composition of an arbitration panel maintained in the state of Michigan. The majority of arbitrators in Michigan are white males with law degrees who have over 11 years of experience with MERC. This research also found that an arbitrator's age, gender, race, level of education, and experience were not valid predictors for selection. These findings support some earlier research that also found that background characteristics are not determinants of whether an arbitrator is selected [16, 20].

While not providing an explanation as to why parties select particular arbitrators over others, the research has served to re-explore the issue of what factors lead to arbitrator selection. It has provided the reader a direction for future research into the factors that influence the selection of arbitrators. One area that should be addressed in future research is how individuals are selected to serve as arbitrators on panels maintained by state agencies. This is crucial to understanding the selection of arbitrators, since these state agencies engage in prescreening activities that have a direct effect on the selection of arbitrators by the parties in dispute. It would also be beneficial to gather a large amount of qualitative data related to the arbitrator's actions during the arbitration hearing to identify whether these factors lead to an increase in his/her selection rate. More advanced quantitative analyses of arbitration awards may also provide insight regarding arbitrator suitability and the selection of arbitrators.

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