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Is Public Sector Grievance Arbitration Different From the Private Sector: An Introduction

by HUGH D. JASCOURT*

Just a few years ago the dominant subjects of court litigation were the questions of whether public employers could negotiate with unions representing their employees, union security and the "right" to strike. Today the large bulk of litigation involves questions of whether a dispute between the parties is subject to grievance arbitration or whether the arbitrator either should not have heard the matter or exceeded his authority in disposing of the case. Although these cases arise in the context of narrow factual issues and of the interpretation of contractual language perhaps peculiar to the parties, implicity, significantly broader and more important issues are being decided. The real results are decisions on negotiability, i.e., what limitations are there on what the parties may agree to. Even more importantly, the results involve decisions whether broad latitude will be given to the arbitrator in dealing with a dispute between the parties or whether the public sector situation requires some different rules.

In the private sector the "hands off" approach by the courts and the deference to arbitrators now seem logical because employers were not likely to have had preexisting work rules; and working conditions, if they were reduced to writing, were likely to be evidenced through the collective bargaining agreement. In contrast in the public sector there is an overlay of preexisting rules, regulations and laws—both on the local level and the state level—on terms and conditions of employment. Commonly, tenure, sabbatical leave, or even certain salary aspects are among these matters already regulated. Consequently, the question arises whether these laws can be modified by collective bargaining or by interpretation of an arbitrator. In some cases, courts have found the school board's powers are non-delegable, not withstanding a negotiated agreement to the contrary, or that a school board's acquiescence nevertheless is contrary to public policy.

Perhaps these cases have been a major factor in school boards' feeling compelled to contest arbitrability or at least feeling that they will be subject to the wrath of the taxpayers if they do not obtain a legal declaration of rights before capitulating. This is not to say that there are not some employers who are not trying to escape from improvident contractual provisions. It is not to

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say that both sides living in a structured legalistic environment are not more prone to use both the arbitration and judicial avenues to a greater degree than their private sector counterparts.

Just how the private sector doctrine has evolved and what it really means are described in the accompanying two articles. They also describe how the public sector case law has treated the private sector model so that one might be in a better position to judge what to expect in the future. These articles focus on the critical issue whether the courts should presume that a grievance is arbitrable.

There are also other areas in which the private sector model has been questioned. Several examples are cited to show how a major area of the law is still evolving, although the cases may be presently unrepresentative of the present case law and perhaps will be unrepresentative of the case law of the future. One such example is provided by a Pennsylvania Common Pleas Court review of the Pennsylvania Labor Relations Board's actions in *North Star School District v. PLRB.*[1] The court held that for a grievance to be submitted to arbitration it had to involve a "legitimate" dispute. The private sector doctrine does not impose any threshold burden of proof in the belief that processing of even frivolous claims will have a desirable therapeutic effect.

A second area is the ability of an arbitrator to fashion whole remedies. The most difficult area is the situation in which a probationary teacher has not attained tenure due to the failure of the school board to conform to procedures negotiated by the parties as requisites to making tenure determinations. Can the arbitrator compel tenure?[2] Or is the arbitrator limited to finding only a technical violation since to compel tenure would intrude into an inviolate decision-making realm of the school board? If a court would find that the teacher could not obtain tenure as the result of the grievance arbitration proceedings, shouldn't be a basis to stay the arbitration and not mandate the school board to be subject to what will be a ritual without substance giving the teacher and union unrealistic expectations? Perhaps the decision of the Massachusetts Supreme Court in *School Committee of Denver v. Tyman*[3] represents an emerging trend. The grievance alleged violations of contractual requirements of teacher evaluation and classroom observation. The court held it would not stay arbitration unless no lawful relief could conceivably be awarded. Therefore, because the arbitrator, if he were to find a violation, could "fashion a remedy which falls short of intruding into the school committee's domain," the grievance was arbitrable.

The *Journal* is appreciative of the expert explanation of the private sector precedent and the lucid description of the developing public sector case law

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[1] 96 LRRM 2309 (1977)

[2] The extremes may be represented by *Gresham Grade School Dist. No. 4* v. *Employment Relations Bd. and Gresham Teachers Ass'n*, 31 Or. App. 435,570 P.2d 682 (Ore. App. 1977) where reinstatement resulted in tenure; and by *Bd. of Educ. of Louisville v. Louisville Educ. Assn.*, 46 LRRM 2980 (Ky. App.) where arbitration was precluded since the right of dismissal given to a school board is "absolute and cannot be limited by contract."

[3] 360 NE 2d 877 (1977), See also *School Committee of W. Springfield v. Kobut*, 309 NE 2d 1148 (Mass. 1977).

presented in the accompanying articles and the insights they afford into the looming areas of controversy and the probable judicial responses to them. We, therefore, thank Patrick L. Vaccaro for presenting the management perspective. He is also the co-chairman of the American Bar Association Subcommittee on Public Sector Grievance Arbitration. We are equally appreciative for the union perspective supplied by Wendy L. Kahn and John C. Dempsey, who, on behalf of AFSCME, handle these questions on a nationwide basis.