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What are the most significant looming legal issues which may most affect labor relations in education over the next several years? This question was posed to the attorneys who met this year to put together the report of the American Bar Association on public sector labor relations. Their answers are summarized below to help identify difficulties which may not have been adequately recognized. They are summarized also as a preview of some of the issues the Journal will try to address in coming issues. In addition, they are summarized as an invitation to readers to submit their agreement or disagreement. Reader comments may shape the focus of coming editions of the Journal and depending on the quantity of comments, they may generate an article quoting some of the thoughts received.

Agency Shop

Heading the list are a group of questions concerning agency shop. The states have reached a consensus to an amazing extent on a great many labor relations issues but, nevertheless, display great diversity of opinion on certain issues involving agency shop, such as the amount of the fee or remedies related to enforcement. As stated by labor relations issues, but display great diversity of opinion on agency shop including basic aspects such as amount of remedy. As stated by union attorney Richard J. Datko of the Indianapolis, Indiana firm of Bayh, Tobbert and Capehart: "'Refund and return', permissible subjects for collection, religious exemptions are all in a state of flux. Issues overlap constitutional, statutory, contractual and common law areas."

This concern for future litigation was voiced despite knowledge of recent cases, such as *Grant v. Spellman*,[1] in which the Supreme Court remanded the judgment of the Washington Supreme Court.

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[1] ___ U.S. ___, 102 S. Ct. 2028 (1982) (reversing 96 Wash. 2d 70, 655 P.2d 1071 (1981)).

The state law authorizes agency shop payments for public employee unions, but exempts employees whose objection to financial support of a union is predicated on the tenets of a church or religion of which the employee is a member. In this case the employee objected to the payment, setting forth his religious belief as the basis although he was not a member of any church. The Washington Court held that personal religious beliefs could not be the basis for an objection and that limiting the exemption to only beliefs of organized religious denominations did not violate the first amendment. The remand will require the state court to view the issue in terms of whether the preference for organized religions as opposed to merely requiring a "sincere religious belief" violates the establishment clause of the Constitution.

The diversity is illustrated by two cases. The California PERB, in *Comero v. King City High School District*[2] held that agency shop fees could extend to purposes beyond actual negotiations, contract administration and grievance adjustment. The PERB held as permissible expenditures: lobbying related to legislation affecting employees' interests in the matter of employer-employee relations; contributions to campaigns for or against ballot propositions related to employee interests in labor relations and school financing; and charitable and philanthropic activities. The New Jersey law permits agency shop fees to be spent for "the costs of supporting lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the employer."[3] Nevertheless, a federal district court, in *Robinson v. State of New Jersey*,[4] granted a preliminary injunction upon a petition by a university professor and school teachers who objected to agency shop fees. The court stated that, although unions may argue that certain conditions, such as procedures pertaining to reductions-in-force, or certain benefits, such as pensions, may be secured only through lobbying, employees in bargaining units may oppose such efforts since their ideological beliefs may differ from their desires for personal gain obtained as employees.

The *Robinson* case turned also on the demand-for-rebate system in which the union did not set forth in advance the components of its

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[2] 6 PERC 13065 (1982).
[3] N.J.S.A. 34:15A-5.5(b).
[4] 112 L.R.R.M. 2308 (D.N.J. 1982).

expenditures. The court characterized the system as so onerous that a non-member did not have a reasonable opportunity to be relieved of paying for expenditures which the employee was not compelled to pay and distinguished it from the plan upheld in *Kentucky Educators v. Kentucky Registry*[5] where the teacher could prevent deductions for political purposes by notifying the school district.

California amended its statute to require the governing bodies of school districts and community college districts to deduct agency shop fees from employees' salaries without authorization of the affected employees, if the collective bargaining agreement so provides. Before the law was changed, some California teachers refused to pay the required fee and the state supreme court, in *San Lorenzo State Education Association v. Wilson,*[6] refused to terminate the non-paying employees on the basis that dismissal was "too drastic a measure for the Court to endorse." Meanwhile, where states do not compel the withholding of dues, disputes continue to rage over the propriety of termination and over the applicable procedures, in light of tenure statutes, to hear termination cases.

Duty of Fair Representation

A second major issue identified is the apportionment of damages, in light of *Bowen v. United States Postal Service,*[7] when a union is found to have violated its duty of fair representation. In *Bowen,* the Supreme Court held that where damages sustained by a grievant were initially caused by the employer, damages could be apportioned against the union when the employer's liability was increased by the union's failure to properly pursue the grievance to arbitration. The attorneys felt that although the *Bowen* case involved an action pursuant to the National Labor Relations Act, the principles were equally applicable to the public sector, including education. Nevertheless, many in the field of education pay little heed to labor relations decisions not involving the public sector and frequently do not take into account decisions involving public employees who are not employees of educational institutions.

The *Bowen* case has been widely reported in newspapers as a decision which changes the duty of fair representation when in fact there has been no change. The apportionment of damages has been changed, which is what brings about questions on the implications.

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[5] 110 L.R.R.M. 2398 (6th Cir. 1982).
[6] 187 Cal. Rptr. 432, 654 P.2d 202 (1982).
[7] 51 U.S.L.W. 4051 (U.S. 1983).

The standard of the duty remains that, where a refusal to process a grievance is made in good faith, is not arbitrary, and is not a product of inexcusable neglect, such refusal is not a breach of the union's duty to the employee.[8] In fact, the standard used in the public sector is that applied by the Supreme Court in the private sector case of *Ford Motor Co. v. Huffman.*[9] The standard is that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, subject always to complete good faith and honesty in the exercise of its discretion, which means that ordinary negligence would not amount to a denial of fair representation. However, a Massachusetts court, which believed that the union's actions were within the wide range of reasonableness, deferred to a trial jury which believed the union was discriminatory and acted in bad faith by failing to call upon witnesses suggested by the aggrieved terminated nontenured assistant professor and by failing to employ the "best" method of presenting her interests.[10] The *Bowen* case, by implication, also raises the questions of employer liability in cases such as the successful suit by the assistant professor.

Although most cases do not permit a union to refuse to process to arbitration the grievance of a non-member, a few states, such as Florida, do.

Impasse Arbitration

A third topic of interest involves the legal and practical issues involved in binding interest arbitration. More and more public employers have come to the view that the strike weapon is tolerable compared to the use of arbitration to resolve negotiation impasses. In contrast, more and more unions have advocated the use of impassee arbitration rather than the strike. Where arbitration has been compelled by law, constitutional challenges generally have been unsuccessful. Recent challenges to such statutes have been on the basis that the statute provides inadequate standards for arbitrators to use and fails to provide sufficient safeguards to protect against unfair and arbitrary decisions. Perhaps a sign of the future is the decision in *Superintending School Committee of City of Bangor v. Bangor Edu-*

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[8] *See* Wayne St. University, 4 NPER 23-13053 (Michigan ERC 1982); Hudson Valley Community College Faculty Association, 15 N.Y. PERB 3080 (N.Y. PERB 1982); and Association of Pennsylvania State College and University Faculties, 5 NPER 40-13279 (Penn. LRB 1982).

[9] 345 U.S. 330 (1950.

[10] Trinque v. Mount Waschusett Community College Faculty Association, 437 N.E.2d 564 (Mass. App. 1982).

cation Association,[11] by the Maine Supreme Court, which had at an earlier time upheld the constitutionality of interest arbitration.[12] The court denied a school committee's claim that arbitrators were provided insufficient standards and stated that the everwidening use of arbitration has resulted in the evolution of criteria which has become inherent in "today's arbitration process." Citing non-education court decisions in Minnesota, New Jersey and Pennsylvania, the court added:

> Formulation of rigid standards for the guidance of arbitrators in dealing with complex and often volatile issues would be impractical, and might destroy the flexibility necessary for arbitrators to carry out the legislative policy of promoting the improvement of the relationship between public employers and their employees.

Although the Maine decision has not put an end to this controversy, questions still rage over the effect on funding and the legal effect on public bodies which would have to ratify an agreement if the parties had not gone to binding arbitration. The opposite problem exists also if a city council or mayor or county council rejects the arbitration award. Fiscal constraints have led to many cases questioning the binding effect of multiple-year agreements in the face of budget cuts by outside sources. Obviously, the same problem exists also if the multiple-term contract has been produced by a binding arbitration award. Some of these "what ifs" were raised many years ago but were perceived as disingenuous speculations to create doubts about the efficacy of binding arbitration. Due to unanticipated budgetary realities, many of these questions may be re-opened.

Tenure

A fourth major topic is one of long standing, but still remains a subject of difficulty. That topic is the precedence of tenure requirements over the provisions of collective bargaining agreements and ensuing problems concerning choice of forums. Added to this, according to Stanislaw S. Damas, a management attorney in Damas and Smith of Denver, Colorado, is the problem of conflicting decisions between forums or of decisions of courts interpreting decisions of those forums. Put a different way, is a court decision interpreting a tenure decision binding upon a grievance arbitrator?

Difficulties arise also in determining what is a union proposal which constitutes a procedure and what is a proposal which affects

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[11] 433 A.2d 383 (Me. 1981).

[12] City of Biddeford v. Biddeford Teachers' Association, 304 A.2d 387 (Me. 1973).

the substance of tenure rights or changes the nature of the role the local school board is obliged to perform in this regard. Illustrative of this is the New Jersey case of *Bethelem Township Board of Education v. Bethelehem Township Education Association,*[13] in which the court held that, except to the extent that union proposals did not interfere with a local school board's managerial responsibility to evaluate teachers' qualifications, collective bargaining over teacher evaluation was preempted by the regulations of the state board of education requring local boards to adopt policies and procedures for the evaulation of teachers. The court translated this proposition into finding proposals that teachers be evaluated only by persons certified by the state board of examiners to supervise instruction and proposals on the frequency of evaluation to be nonnegotiable. On the other hand, the court found negotiable union proposals that (1) teachers be notified by a specified date of the identity of the individual who would evaluate them; (2) visitations and observations not occur on the same day; and (3) no observations should occur within 10 days of a previous evaluation.

Curriculum

As the issue of teacher "accountability" has become more salient, the negotiability of issues surrounding curriculum has been perceived as an issue of greater prominence on the horizon. Specifically in issue is what should the curriculum contain or not contain and who has standing to question the ultimate inclusion or exclusion of subject matter. Particularly, with the reduction of personnel, the elimination of courses or subjects of instruction will directly affect the selection of teachers for nonretention. Ivor Moskowitz, of the New York State United Teachers, points out that the bar and the educational community should be alerted to attempts by courts to balance the interests of parents, teachers, students and administrators and how such decisions portend the treatment of curriculum issues.

Other Issues

Two other issues evoked great concern although both have received prior treatment in the *Journal.* However, it was thought that the persistance and magnitude of the problems involved warranted continued attention. Those issues are: (1) substantive and procedural issues concerning reductions-in-force and (2) standards applied in the re-

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[13] 427 A.2d 80 (N.J. Super. Ct. App. Div. 1981).

view of grievance arbitration decisions. A very high proportion of cases reaching the court involve appeals of arbitration decisions in contrast to the minimal number of private sector arbitration decisions appealed to the courts.