Higher Education Collective Bargaining And the Law

by Gregory M. Saltzman

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Labor law substantially affects union organizing and collective bargaining; those involved in higher education labor relations thus must master its intricacies. The *NEA 1998 Almanac* reviewed labor law related to higher education, and the *NEA 2000 Almanac* examined legal issues related to part-time faculty and graduate teaching assistants.[1] This chapter updates those reviews, emphasizing legal developments since 1997 in these areas:

- Are faculty "employees" as defined by the National Labor Relations Act (NLRA)?
- Are TAs "employees" as defined by bargaining laws?
- Privatization and bargaining rights.
- Protected rights to organize and bargain: other developments.
- Definition of the bargaining unit.
- The duty to bargain.
- Enforceability of collective bargaining agreements.
- Contract rights and statutory rights.
- Duty of fair representation.
- Agency shop and union shop provisions.
- Other rights of union members and union dissidents.
- Future prospects.[2]

ARE FACULTY "EMPLOYEES" AS DEFINED BY THE NLRA?

Faculty members at private colleges and universities and graduate teaching assistants (TAs) often lacked a legally protected right to organize and bargain collectively. The Supreme Court deemed faculty to be managers, and labor boards deemed TAs to be students—and therefore not covered as "employees" under bargaining laws. But recently, labor boards have tended to classify faculty at private institutions and TAs as employees with protected rights to organize and bargain.

Classifying faculty at private institutions as managers not protected by the NLRA began with the U.S. Supreme Court's 1980 *Yeshiva* ruling.[3] *Yeshiva* did not prohibit faculty

unionization, but most faculty lacked the militancy and power to win union recognition without legal protection. *Yeshiva*, noted a journalist, "crippled" union organizers at private colleges for 20 years.[4]

But two rulings of the Clinton-era National Labor Relations Board (NLRB) eroded the *Yeshiva* doctrine—a 1997 *University of Great Falls* (UGF) decision,[5] and a June 2000 decision not to hear an appeal of the NLRB regional director's Manhattan College decision.[6] Faculty at both institutions sought representation by the American Federation of Teachers (AFT). The NLRB ruled that they had a protected right to organize and bargain since they had insufficient authority to be considered managers under *Yeshiva*.

At UGF the NLRB upheld the NLRB regional director's decision that spelled out criteria for managerial status for faculty in private institutions. Employee or managerial status, ruled the director, depended primarily on their authority over academic policy matters such as curriculum, grading systems, course scheduling, and admission standards:

> Professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.... [I]t is faculty member's [sic] participation in the formulation of academic policy that aligns their interest with that of management.... In cases where there is substantial indicia of faculty's managerial status in academic areas, an administration's frequent rejection of faculty recommendations in nonacademic areas, such as faculty promotion and tenure, would not preclude a managerial finding.... Nor does effective recommendation in such nonacademic matters as tenure or promotion require a managerial conclusion.[7]

The UGF faculty, the director found, made recommendations in many policy areas, but they would be managers only if "nearly all recommendations are routinely approved by the administrative hierarchy, without review."[8] UGF faculty, he concluded, were not managers by this standard. Nor was representation on key committees sufficient to make faculty managers, since "Decisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations."[9]

Another NLRB regional director reached a similar conclusion at Manhattan College: "[W]hile it is clear that the faculty has an obvious and pervasive influence on curricular and academic life at the College, their lack of majority representation on committees empowered to create academic policy militates against finding them managerial employees."[10] The director also cited an NLRB ruling in a hospital case that a party seeking the exclusion of employees had to prove the employees were managers.[11] The Manhattan College faculty voted against union representation, but the NLRB's refusal to review the director's order suggested that the board wanted to narrow the application of *Yeshiva*.[12]

Yeshiva is not dead. The NLRB cannot overturn the Supreme Court's decision, nor is Congress likely to do so. Further, UGF filed another appeal with the NLRB and said it would appeal in court if the NLRB rules for the union a second time.[13] Still, the NLRB is likely to extend the protection of the NLRA to faculty in other private colleges or universities by distinguishing the local facts from the specifics in the *Yeshiva* decision, *if* the board continues to have a pro-union majority.

At press time, the NLRB had pending cases involving faculty at private institutions at Seton Hall University in New Jersey, and at the Sage Colleges in New York. In June 2000, the labor attorney for the Sage Colleges allegedly told department heads and program coordinators they were supervisors unprotected by the NLRA and threatened disciplinary action if they wore union buttons or discussed pro-union activities on their home telephones.[14] The Sage Faculty Association (SFA), noted an NEA organizer, deterred any disciplinary action by stating that it would publicize any sanctions in the surrounding community (Albany).[15] In September 2000, SFA filed a union representation petition with the NLRB, supported by 110 of the 160 full-time faculty members.[16]

ARE TAs "EMPLOYEES" AS DEFINED BY BARGAINING LAWS?

For graduate assistants, the counterpart to the *Yeshiva* decision was a 1974 NLRB ruling that Stanford University research assistants (RAs) were not employees for purposes of the

NLRA. Their research, said the NLRB, was required for their graduate degrees, regardless of whether they were paid for their efforts.[17] This reasoning seems less applicable to TAs than to RAs since many graduate programs have no teaching requirements, and TAs often teach more than the amount required to receive their degrees in programs requiring some teaching. But neither RAs nor TAs had legally protected bargaining rights, argued administrators in private universities for 26 years after the *Stanford* ruling, because they were primarily students, and their work was part of their training.

A breakthrough came in April 2000, when an NLRB regional director ruled that 1,700 TAs, RAs, and other graduate assistants at New York University (NYU) were employees covered by the NLRA.[18] Later that month, the NLRB held the first NLRB representation election for a TA bargaining unit. This determined if the NYU graduate assistants wanted to be represented by the United Auto Workers (UAW). But NYU appealed the regional director's decision to the NLRB in Washington, and the ballots were impounded. In October 2000, the Board upheld the director's decision that NYU graduate assistants have a protected right to organize and bargain.[19] The NLRB stated:

> [W]e find there is no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students.... [U]nless a category of workers is among the few groups specifically exempted from the [National Labor Relations] Act's coverage, the group plainly comes within the statutory definition of "employee."[20]

The NLRB counted the ballots from the NYU representation election after the board's ruling and determined that the NYU graduate assistants had voted for union representation.[21] More important, judicial affirmation of the board's ruling could lead to rapid unionization of TAs and possibly RAs at other private universities.

TAs at public universities have long had protected bargaining rights in some states, but elsewhere the status of TAs as "employees" for purposes of public-sector bargaining laws remained contentious. In June 2000, an Illinois appeals court ruled that state bargaining law covered some TAs and RAs at the University of Illinois at Urbana-Champaign who were seeking AFT representation.[22] This ruling overturned a 1998 finding by the Illinois Educational Labor Relations Board (IELRB). Graduate assistants whose job duties were not closely related to their academic programs, the court ruled, had the same right to organize and bargain as other educational employees. The court remanded the case to the IELRB to determine which graduate assistants met this condition.

In October 2000, the Pennsylvania Labor Relations Board ruled that Temple University TAs were employees, accepting the representation petition of another AFT affiliate. The board ordered a hearing officer to determine the bargaining unit.[23] This precedent could also apply to TAs at other public universities in Pennsylvania.

In December 1998, the California Public Employment Relations Board ruled that TAs at UCLA were employees with collective bargaining rights. TAs on eight University of California (UC) campuses voted for union representation in spring 1999.[24] Negotiations over a first contract were stalemated for several months after the elections. "The university hasn't come to terms with the change that the elections last year meant," asserted a union representative.[25] Meanwhile, faculty leaders, who had not opposed recognition of a TA union, wished to ensure that a TA contract did not undermine faculty authority over academic matters.[26] But in May 2000, the UC administration and the UAW—representing 10,000 TAs on the eight UC campuses—reached an agreement, and the TAs voted overwhelmingly to ratify this first contract.[27]

In March 2000, TAs at the University of Washington (UW) petitioned for a representation election.[28] The UW administration did not recognize the union—the UAW—and had no legal obligation to do so; but a count verified that 80 percent of UW TAs signed union representation cards.[29] In December 2000, hours before a TA strike was to begin, UW recognized the union as the representative of those who signed union cards and agreed to meet and confer with the union on wages, hours, and benefits. UW and the union agreed jointly to seek legislation giving TAs protected bargaining rights, and UW agreed to bargain collectively if and when the bill passes.[30]

TAs elsewhere also showed interest in organizing. For example, Oregon State University TAs voted for AFT representation in the fall of 1999.[31] If labor boards and courts rule that TAs are employees protected by bargaining laws, then TAs on many campuses may be ripe for organizing.

PRIVATIZATION AND BARGAINING RIGHTS

Two rulings addressed the impact of privatization on bargaining rights. In 1996, the University of Cincinnati (UC) transferred the UC Hospital to a private corporation. UC terminated all hospital employees, but the corporation offered to reemploy them. Replacing state labor board oversight with NLRB jurisdiction would strengthen management's position, noted a confidential memorandum by the provost for health affairs, who initiated the privatizing. Privatization also eliminated the established bargaining rights of the union representing medical interns and residents, since the NLRB then considered house staff to be students, not employees. In 1998, the Ohio Supreme Court overturned a state labor board ruling that privatization was not an unfair labor practice (ULP). The court ordered the labor board to issue a ULP complaint and conduct a hearing on the charge.[32]

Under the second ruling, the NLRA covered employees of outside contractors of public institutions. This 1999 ruling, by the U.S. Court of Appeals, involved the food service operations of the Aramark Corporation.[33] Aramark refused to comply with an NLRB order that it bargain with unions representing food service workers at The Citadel and the Duval County, Florida public schools, arguing that the NLRB had no jurisdiction. Aramark was a private employer but claimed that its contracts with these public institutions left it insufficient control over its labor relations to bargain meaningfully with a union. The Court of Appeals enforced the NLRB's bargaining orders, ruling that the board need not consider whether a public institution effectively controlled a private contractor before exercising jurisdiction.

The Aramark case shows how privatization can erode union contract coverage. The Duval County school district operated its own food service program, staffed by public employees covered by a collective bargaining agreement, but contracted its operations to Aramark in July 1990. All food service workers employed at that time, stated the agreement, retained their public employee status and remained in the bargaining unit. But all new hires were Aramark employees and were not members of the bargaining unit. The new hires were stranded in a labor law "no man's land," covered neither by the NLRA nor by Florida's public employee bargaining law. The NLRB regional director (1994) and the Florida Public Employee Relations Commission (1995) rejected petitions for union representation elections, refusing to assert jurisdiction. But the NLRB asserted jurisdiction in 1996, and the union won the Aramark representation election in 1997.[34] The NLRA, under the 1999 Appeals Court ruling, covers employees of private contractors. But privatization may require a bargaining agent to win a new representation election under the NLRA, even if previously certified under a public-sector law.

PROTECTED RIGHTS TO ORGANIZE AND BARGAIN: OTHER DEVELOPMENTS

Other legal developments related to protected rights to organize and bargain include:

- the expiration of New Mexico's public sector bargaining law in 1999.
- a state labor board ruling that full-time lecturers were not casual or temporary employees.
- a state court ruling that head coaches at universities were not supervisors.
- an NLRB ruling that concerted activity need not involve a union to be protected.

In a rare case, some New Mexico employees lost statutory protection of the right to organize and bargain.[35] In 1992, New Mexico enacted a public-sector bargaining law, covering colleges, universities, and other public employers. To gain passage, unions agreed to a "sunset" provision: the law would expire on July 1, 1999 unless extended by new legislation. "When Republican [Gary] Johnson beat Democrat Martin Chavez in the 1998 governor's race," noted a journalist early in 1999, "the collective-bargaining law's fate might

have been sealed."[36] The law expired when Johnson vetoed three bills to extend the law passed by the Democratic-controlled New Mexico legislature in 1999.[37] The New Mexico Supreme Court denied a union petition to keep the law alive.[38]

Some, but not all, higher education employees lost collective bargaining when the law expired. Regents eliminated collective bargaining at Northern New Mexico Community College and New Mexico Highlands University.[39] "If the state says we don't have to negotiate," said Northern's executive vice president, "we won't negotiate."[40] But regents at the University of New Mexico (UNM) and Albuquerque Technical Vocational Institute maintained their collective bargaining relationships, and UNM regents also expressed willingness to negotiate with a proposed new bargaining unit.[41]

Are lecturers at Eastern Michigan University (EMU) casual or temporary employees, and therefore not protected under Michigan's public-sector bargaining law? The Michigan Employment Relations Commission (MERC) said yes in 1997.[42] But the union raised the issue again, this time excluding part-timers from the proposed bargaining unit. In December 1999, MERC ruled that EMU lecturers with full-time appointments were not casual employees and therefore had a protected right to organize and bargain.[43]

Supervisors lack protected bargaining rights under the NLRA and some public-sector bargaining statutes. But are head coaches at university athletic departments supervisors? These coaches, ruled the Pennsylvania Labor Relations Board, exercised supervisory authority only sporadically and therefore may be included in the rank-and-file bargaining unit with assistant coaches. A state appeals court upheld the labor board ruling in 1999.[44]

The NLRB ruling on non-union concerted activity arose at Alameda Technical College, in California. Seven student recruiters signed a letter to the college president protesting employment conditions. Nine days later, the president fired two signers, including the employee who drafted the letter. But the NLRB ordered the college to reinstate the employees with back pay. "Protected concerted activity does not have to be union activity," noted the NLRB, "If two or more employees band together to better their working conditions, the activity is protected."[45]

DEFINITION OF THE BARGAINING UNIT

The definition of the bargaining unit determines who votes in a union representation election, and who the union contract covers, if the union wins. Employees must share a community of interest to be grouped together in a bargaining unit. A case at Alpena Community College in Michigan involved a diverse residual group of 30 employees—including a parking attendant, bookstore manager, biology lab assistant, and placement coordinator—not included in the established bargaining units for faculty, building service employees, and clerical employees. The state labor board accepted a Michigan Education Association (MEA) petition to "accrete" the residual unit to the existing MEA clerical unit and ordered an election to determine if the group members wanted to join the unit. The Michigan Court of Appeals stayed the election, saying the employees in the residual group did not have a community of interest. But the Michigan Supreme Court reinstated the board decision.[46] Community of interest, the Supreme Court noted, had to be balanced against avoiding a proliferation of fragmented bargaining units.

Employers sometimes seek to define the bargaining unit to assure the union cannot win a majority in a representation election. The Nova Southeastern University (Florida) administration objected to a unit of 140 employees, proposed by the United Faculty of Florida (UFF), when Nova faculty members sought a representation election. The university requested exclusion of the 55 undergraduate faculty, a pro-union group, from the unit—and inclusion of 54 distance education faculty, an anti-union group, some of whom hired and supervised adjunct faculty at sites in 49 cities in the United States, Canada, and abroad. The NLRB regional director agreed to the addition but not to the exclusion, noting the NLRB's pre-*Yeshiva* ruling in the *Boston University* case that undergraduate and graduate faculty could be included in a single unit.[47] In 1998, the NLRB denied Nova Southeastern's appeal of the director's decision to include the undergraduate faculty

members.[48] But adding the 54 distance education faculty turned the tide: UFF lost the May 1998 election, 73 to 50.[49]

Employers typically cannot directly appeal labor board rulings on unit determination. But they can refuse to bargain with the certified bargaining representative and appeal a labor board's ULP ruling by claiming the bargaining unit was inappropriate. In 1997, nonfaculty employees at the University of Rio Grande in Ohio narrowly voted for United Mine Workers representation. But the university refused to bargain, arguing the NLRB improperly excluded contracted service employees from the bargaining unit. In 1999, the U.S. Court of Appeals upheld the NLRB's bargaining order, noting that the courts defer to the NLRB on unit determination issues unless an NLRB decision is "arbitrary, unreasonable, or an abuse of discretion."[50]

The Court of Appeals took the same stance in a decision involving Case Western Reserve University (CWRU). CWRU challenged an NLRB decision to add three maintenance workers who did unskilled electrical work to an existing bargaining unit of electricians, arguing that a better unit would include all 40 maintenance workers, and not just those who did electrical work. But in 1997, the court upheld the NLRB decision, noting that "the Board is not required to select the most appropriate unit.... It need only select 'an' appropriate unit."[51]

A 1995 Illinois statute, in contrast, allowed the state labor board no such discretion, nor did it continue the state's policy of considering the bargaining history when determining appropriate units. The law changed Sangamon State University to the University of Illinois at Springfield, the university's third campus. "The sole appropriate bargaining unit for academic faculty at the University of Illinois," stated the law, shall be a systemwide unit including all faculty on all three campuses, "regardless of current or historical representation rights."[52] This provision effectively wiped out the faculty bargaining unit established in 1988 at Sangamon State, since the union did not have majority support in the new three-campus unit. The union challenged the constitutionality of the law, alleging retaliation by the Republican governor and legislature for union support of Democrats in the 1994 election.[53] The U.S. Court of Appeals rejected the challenge, noting other plausible rationales for the legislation, such as encouraging the integration of Sangamon State into the university system.[54]

THE DUTY TO BARGAIN

Legal disputes about the duty to bargain sometimes arise if an employer refuses to provide information the union needs for negotiations. For example, in 1997, the NLRB ordered Hofstra University to give the clerical union the report of a consultant hired to evaluate the university's clerical operations.[55] More often, such disputes concern the scope of bargaining—the subjects that must be negotiated.

Employers must bargain over mandatory subjects of bargaining if the union so requests, but they have no obligation to bargain over permissive subjects. The trade, maintenance, and custodial employees of the University of Alaska unionized in 1993 and asked in their first contract negotiations (1994) to bargain over the university's policy restricting smoking in its buildings and vehicles. The university refused, asserting the smoking policy was a permissive subject over which it had no duty to bargain. The smoking policy, ruled the Alaska Supreme Court ruled in 1998, was a mandatory subject. But the court added, the union waived its right to bargain over this subject for the duration of the contract signed in 1995, which included a "zipper" clause.[56]

Can employers make unilateral changes without negotiating with the union? No, when the changes affect mandatory subjects of bargaining;[57] but yes, when they affect only permissive subjects. The Grand Rapids Community College administration relied on this distinction when it unilaterally restricted the opportunity for faculty members to accept overload teaching hours. The restriction, the administration argued, was a permissive subject. The state labor board agreed, but the Michigan Court of Appeals reversed the board.[58] The aggregate number of hours of overtime available to the bargaining unit was a permissive subject, ruled the court, but allocating these overtime hours to individual faculty members was a mandatory subject.

Some scope of bargaining disputes involve prohibited subjects. In the private

sector, prohibited subjects concern actions that the employer cannot take even unilaterally. In contrast, prohibited subjects in the public sector often concern decisions that legislators, labor boards, or judges want public employers to make without any union input.

Examples from Ohio, Hawaii, and South Dakota show how prohibited subjects are used to curb union influence. A 1993 Ohio law prohibited bargaining of faculty workload policies and required state universities to increase the time that faculty spent teaching undergraduates. A faculty union challenged the law's constitutionality, but the U.S. Supreme Court ruled the law constitutional in 1999.[59] The Ohio Supreme Court, which earlier ruled that the 1993 law violated the U.S. and the Ohio constitutions, reversed its judgment concerning the Ohio constitution when the U.S. Supreme Court remanded the case.[60]

In Hawaii, state employees were traditionally paid on the 15th and last day of each month. A 1997 statute authorized state agencies to delay paychecks by up to three days, at six different times, to adjust paychecks for absenteeism. The pay lags, the law stated, were not subject to collective bargaining. But the faculty union, whose collective bargaining agreement did not expire until 1999, obtained a preliminary federal injunction against the law, saying it violated the Contract Clause of the U.S. Constitution. The U.S. Court of Appeals affirmed the district court's ruling and upheld the preliminary injunction.[61]

In South Dakota, the labor agreement between the Regents of the state university system and the South Dakota Education Association (SDEA) expired in 1996. After bargaining to impasse in Spring 1997, the Regents unilaterally imposed the terms of their last offer. A 1998 appropriations statute specified that salary increases to faculty at state universities were to be distributed "in a manner to be determined at the sole discretion of the Board of Regents, any other provisions of chapter 3-18 [South Dakota's public-sector bargaining law] notwithstanding."[62] The Regents refused further negotiations about the distribution of salary increases.

SDEA asked the South Dakota Supreme Court to prohibit the Regents from implementing this provision of the appropriations statute. The Supreme Court agreed, in part, ruling that the statute violated the state constitution to the extent that it amended or repealed provisions of the public-sector bargaining law.[63] The court ordered the Regents to bargain with the union prior to distributing funds appropriated for salary increases.

ENFORCEABILITY OF COLLECTIVE BARGAINING AGREEMENTS

Can a public employer violate a labor agreement during a fiscal crisis? The labor agreement with the faculty union at the University of the District of Columbia (UDC) regulated reductions in force (RIFs). In 1997, a Control Board established to address the District's financial management problems directed UDC trustees to reduce the faculty "notwithstanding the provisions of any collective bargaining agreement." The Control Board, ruled the U.S. Court of Appeals in 1998, lacked the authority to abrogate existing collective bargaining contracts.[64]

Who adjudicates disputes about terminating a collective bargaining agreement—arbitrators or courts?[65] New England Cleaning Services (NECS) had an agreement with the Service Employees International Union (SEIU) covering employees who worked at Harvard University. When Harvard discontinued NECS services, NECS notified SEIU that it was terminating the collective bargaining agreement, citing a provision permitting either party to terminate by giving written notice. SEIU, claiming NECS improperly terminated the agreement, requested arbitration under the grievance and arbitration clause of the contract. But NECS claimed the company was not obligated to submit to arbitration since there was no longer a collective bargaining agreement in force. If a union has a broad arbitration clause covering all types of disputes, ruled the U.S. Court of Appeals in 1999, an arbitrator would handle disputes about contract termination. But in this case, the court determined, the arbitration clause covered only employee grievances, not disputes about contract termination.

A Wisconsin case concerned a new requirement by Northcentral Technical College (NTC) that faculty complete 18 graduate credits in their teaching field within five years.[66] The faculty union grieved, but NTC

rejected the grievance and sought an injunction barring arbitration. The trial court ordered arbitration on whether the five-year timetable violated the labor contract; it denied arbitration on whether the 18-credit rule breached the contract. But, ruled the appeals court in 2000, all issues raised by the union were arbitrable, including the 18-credit rule. "Grievances enjoy a broad presumption of arbitrability," noted the appeals court.

> The judicial role on determining arbitrability is limited. Courts do not examine whether the grieved conduct breached the contract.... Rather, they look no further than whether an arbitration clause exists and whether it is susceptible by any reasonable construction to cover the grievance.[67]

Courts usually enforce arbitration rulings that interpret a labor agreement. A Cheyney University probationary employee was arrested for speeding while driving a state-owned car. The police impounded the car when the worker failed to produce a valid driver's license, and the university terminated the employee. An arbitrator reinstated the worker, but a lower court vacated the arbitrator's award, noting the employee's probationary status. But the Supreme Court of Pennsylvania reversed this decision in 1999, upholding the arbitrator's ruling. A court, the decision noted,

> will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.... An analysis of the "reasonableness" of an award too easily invites a reviewing court to ignore its deferential standard of review and substitute its own interpretation of the contract language for that of the arbitrator.[68]

But judges may decide that arbitration rulings contradict a contract. The union contract at Hocking Technical College specified, "Any employee accumulating ... (7) seven unexcused absences in any consecutive 365 calendar day period will be subject to discharge for just cause."[69] The college fired a media technician who was absent from work without excuse seven times and late to work at least 21 times in less than seven months. The arbitrator reinstated the employee, without back pay, because the college failed to give formal warnings that this conduct made the technician subject to discharge. But the county court vacated the arbitrator's award, asserting the arbitrator added a procedural requirement not in the collective bargaining agreement. The Ohio Court of Appeals upheld the county court.

CONTRACT RIGHTS AND STATUTORY RIGHTS

Some employer actions are regulated by a collective bargaining agreement and by statute or the Constitution. Overlap or conflicts may therefore exist between employee contract rights and statutory or constitutional rights.

Sometimes, the availability of grievance arbitration does not foreclose the right to sue in the courts. In 1974, the U.S. Supreme Court ruled that taking a grievance about racial discrimination to arbitration under procedures provided by a collective bargaining agreement does not cause the employee to forfeit the right to file suit under Title VII of the Civil Rights Act of 1964.[70] Similarly, in 1998, the U.S. Supreme Court ruled that having grievance arbitration available under a union contract does not cause an employee to forfeit the right to sue under the Americans with Disabilities Act of 1990 (ADA), unless the agreement to arbitrate ADA claims was "clear and unmistakable."[71] A community college professor disciplined for using profane language in the classroom, ruled a U.S. district court in 1999, need not exhaust contractual remedies before challenging an alleged violation of a Constitutional right to free speech in court.[72]

But having contract rights sometimes undermines an employee's ability to sue in court to enforce statutory or Constitutional rights. In 1995, Portland State University placed a tenured professor on unpaid sick leave and threatened him with termination if he did not provide an evaluation from a mental health professional concerning his fitness to return to duty. The professor sued, alleging the university violated his due process rights under the U.S. Constitution by placing him on unpaid sick leave without following the Oregon Administrative Rules. The professor, though covered by a collective bargaining agreement, had not filed a grievance under

the contract. The U.S. Court of Appeals ruled, two to one, that the grievance procedure available under the agreement provided all the due process guaranteed by the Constitution.[73]

DUTY OF FAIR REPRESENTATION

The duty of fair representation requires unions with exclusive bargaining rights to serve in good faith as the agent of each bargaining unit member. A union could not, for example, seek contract language requiring the dismissal of Black bargaining unit members to create more job opportunities for white members.[74] Nor could a union "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[75]

Many duty of fair representation complaints involve fired employees. The employee must allege that the union breached its duty of fair representation if the employee wants to sue the employer under §301 of the Labor Management Relations Act for breach of the collective bargaining agreement. When a Howard University campus police officer was fired in 1995, the union's business representative tried to prosecute a wrongful termination grievance on the officer's behalf. But the union's vice president repeatedly stymied the representative. The fired police officer hired a lawyer to file suit, but the lawyer failed to follow through. Eventually, the officer filed a hybrid §301/fair representation suit. But the U.S. Court of Appeals dismissed the suit in 1998, saying the officer filed the suit after the six-month statute of limitations expired.[76]

Also in 1995, Howard abolished the positions of 70 university hospital employees as a result of a RIF. Five terminated employees filed a hybrid §301/fair representation suit against the local and international unions. The international, the plaintiffs alleged, should have made the local—the exclusive bargaining representative—perform its duties under the collective bargaining agreement. But, ruled a federal district judge, "International unions are distinct legal entities and, absent an agency relationship, are not vicariously liable for the activities of their locals or members."[77]

AGENCY SHOP AND UNION SHOP PROVISIONS

How do unions address the problem of "free riders" who receive all benefits of union representation without paying any of the union's operating costs? SEIU Local 1107 confronted the free rider problem in 1994, when 100 union members in an SEIU bargaining unit at the University Medical Center of Southern Nevada revoked their union dues authorization forms. The union announced a fee schedule for representing nonmembers in grievance matters. Some nonmembers alleged that this policy was a ULP because it coerced them into joining the union, but the state labor board disagreed. On appeal, the Supreme Court of Nevada ruled that the union's fee schedule did not violate Nevada's right-to-work law.[78] The fee-for-service arrangement could continue.

In states without right-to-work laws, unions often seek agency shop (fair share) or union shop provisions requiring all bargaining unit members to pay their proportionate share of the cost of representation, regardless of whether a member needs grievance or arbitration representation. Dissenting bargaining unit members may allege infringement of their constitutional rights when union dues or service fees are compulsory and union funds are used for political or ideological purposes.

In 1998, the Democrats won control of the California governorship and increased the size of their majorities in both houses of the state legislature.[79] In early 1999, the legislature required all employees of California State University (CSU) and the University of California (UC) who are represented for purposes of collective bargaining to join the union or pay a fair share service fee.[80] This agency shop provision was not unprecedented: Hawaii enacted a similar provision in its public-sector bargaining law in 1970. Still, most bargaining statutes prohibit the agency shop or make it a negotiable subject—so that the employer must agree before it can be instituted. The California law thus was unusually favorable to unions.

The California law also favored unions in specifying the activities that could be charged to agency shop fee payers:

> the costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, *or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the higher education employer* [California Government Code, Section 3583.5(a)(2); italics added].

The italicized language, critics alleged, went beyond what a divided U.S. Supreme Court voted to allow in the 1991 *Lehnert* case.[81]

Two lawsuits—filed respectively by three CSU support staff employees and three CSU faculty members—challenged the California law in federal court after it took effect on January 1, 2000.[82] The support staff suit claimed that §3583.5 was unconstitutional because it allows unions to charge dissenting members for lobbying expenses not directly related to collective bargaining negotiations. The notices sent by the union to fair share fee payers, the suit also alleged, did not meet the requirements established by the U.S. Supreme Court's 1986 *Hudson* ruling.[83] In February 2000, the U.S. District Court judge in the case denied the plaintiffs' motion for a preliminary injunction halting collection of agency fees.[84] The next month, he granted the plaintiffs' motion for class certification.[85] The similar faculty suit, filed in a different federal court, was transferred in April 2000 to the court hearing the support staff suit.[86] The two cases are ongoing.

OTHER RIGHTS OF UNION MEMBERS AND UNION DISSIDENTS

When can a union fine a member? A custodial employee at the University of the Pacific—designated as the lead person for his crew—was required to report coworker misconduct. He later reported two custodians sitting in a storage area when they were supposed to be on duty elsewhere. Management took disciplinary action against the two, and the union fined the lead person $500 for causing harm to fellow union members. But the NLRB ordered the union to rescind the fine, and the U.S. Court of Appeals upheld the NLRB decision in 1999.[87] "When a union punishes a member for complying with his employer's instructions," the court noted, "it is no longer regulating its purely internal affairs, but enforcing a rule ... that affects an employee's relationship with his employer."

Can dissidents use union mailing lists to communicate with the membership? In June 1998, the City University of New York (CUNY) reached a tentative agreement with its faculty union. The New Caucus, a dissident union faction, asked the union for mailing labels so it could communicate with the membership before the ratification vote. The union refused, and New Caucus sought an injunction under the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act) ordering the union to provide the mailing list and to refrain from distributing ratification ballots until it allowed New Caucus to use the mailing list. The U.S. District Court declined jurisdiction, saying the act did not govern a union representing only public employees. In 1999, the U.S. Court of Appeals remanded the case for further consideration because employees of the Research Foundation of CUNY, represented by the union, arguably were not public employees.[88] In April 2000, New Caucus won full access to the union's mailing lists without further court action by defeating the leadership group it had criticized in a union election.[89]

FUTURE PROSPECTS

The future of labor law depends on shifting political winds. Some Republicans are more pro-union than some Democrats, but Democratic members of Congress and state legislatures are more likely to support pro-union labor laws.[90] Democratic NLRB appointees are more likely to interpret labor laws in ways favorable to unions.[91] It was no accident that California passed an agency shop law after a Democratic victory in the 1998 elections, that a 1994 Republican victory in Illinois preceded enactment of a law wiping out an established bargaining unit, that a Republican governor vetoed extension of the New Mexico bargaining law, or that erosion of the Yeshiva doctrine began when President Clinton's NLRB appointees replaced Reagan-Bush appointees. Labor law is closely linked to the outcome of state and national elections.

NOTES

[1] Saltzman, 1998; Saltzman, 2000.

[2] The chapter does not address distinctive legal rules governing bargaining in hospitals, though many hospital employees work in academic medical centers.

[3] *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

[4] Leatherman, January 21, 2000.

[5] *University of Great Falls and Montana Federation of Teachers,* 325 NLRB No. 3, slip op. (1997).

[6] *Manhattan College and Manhattan College Faculty Coalition,* NLRB Regional Director's decision in Case 2-RC-21735, November 1999, posted at http://www.chronicle.com/weekly/documents/v46/i14/4614manhattan.htm. NLRB decision to deny appeal reported in Leatherman, July 7, 2000.

[7] *University of Great Falls,* at 11.

[8] *Ibid.,* at 12.

[9] *Ibid.,* at 13.

[10] http://www.chronicle.com/weekly/documents/v46/i14/4614manhattan.htm at 29.

[11] *Montefiore Hospital and Medical Center,* 261 NLRB 569 (1982).

[12] Leatherman, July 7, 2000.

[13] Leatherman, January 21, 2000.

[14] Brownstein, 2000. Whether department chairs are supervisors for purposes of the NLRA is a separate legal issue from whether faculty members are managers.

[15] Telephone interview with Mike Lynch, NEA-NY, September 26, 2000.

[16] Karlin, 2000.

[17] *Leland Stanford Junior University,* 87 LRRM 1519 (NLRB, 1974).

[18] Arenson, 2000.

[19] "UAW Blasts NYU Interference with Vote Count in Student Employee Recognition Election," UAW press release, May 11, 2000, at http://www.uaw.org/publications/releases/2000/nyuvote.html

[20] *New York University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* NLRB Case 2-RC-22082, October 31, 2000, at http://www.chronicle.com/weekly/documents/v47/i11/4711NYU.htm

[21] Leatherman, November 16, 2000.

[22] *Graduate Employees' Organization v. Illinois Educational Labor Relations Board,* 2000 Ill. App. LEXIS 548 (Appellate Court of Ill., First Dist., Fifth Division, 2000). The students sought AFT representation.

[23] Leatherman, November 2000.

[24] Saltzman, 2000.

[25] Quoted in Leatherman, March 31, 2000, A16.

[26] Leatherman, March 31, 2000.

[27] *Government Employee Relations Report* (hereafter, GERR), Vol. 38, No. 1864, May 30, 2000: 659.

[28] "Union Announces Huge Majority in University of Washington Organizing Drive, UAW press release, March 15, 2000, available on August 2, 2000 at http://www/uaw.org/publications/releases2000/univofwash.html

[29] Williams, 2000.

[30] Wilson, 2000; McGhee, 2000; Schubert, 2000.

[31] Leatherman, December 3, 1999.

[32] *Service Employees International Union, District 925, v. State Employment Relations Board,* 158 LRRM 2094 (Ohio Supreme Court, 1998).

[33] *Aramark Corporation v. NLRB,* 179 F.3d 872 (10th Cir. 1999).

[34] *Aramark Corporation v. NLRB,* 156 F.3d 1087 (10th Cir. 1998).

[35] One of the few other instances of this happening, other than by court action, was the provision in the 1947 Taft-Hartley Act revoking private-sector supervisors' right to organize and bargain, which had been protected by the 1935 NLRA.

[36] Oswald, 1999.

[37] *GERR,* Vol. 37, No. 1820, July 12, 1999: 834-835.

[38] *American Federation of State, County, and Municipal Employees v. Johnson,* 161 LRRM 3013 (New Mexico Supreme Court, 1999).

[39] Lozano, June 12, 1999; and Lozano, July 3, 1999. A faculty bargaining unit was established in 1994 and a support staff bargaining unit was established in Spring 1999 at the community college. A faculty bargaining unit was established at the university in 1998.

[40] Lozano, July 3, 1999.

[41] Lozano, July 3, 1999; Archuleta, 1999.

[42] Saltzman, 2000.

[43] Schneider, 2000.

[44] *State System of Higher Education v. Pennsylvania Labor Relations Board,* 162 LRRM 2955 (Commonwealth Court of Pennsylvania, 1999).

[45] *Alameda Technical College,* 303 NLRB 343 (1991) at 347.

[46] *Michigan Education Association v. Alpena Community College,* 158 LRRM 2892 (Supreme Court of Michigan, 1998).

[47] *Trustees of Boston University,* 228 NLRB 1008 (1977) at 1010-1011.

[48] *Nova Southeastern University*, 325 NLRB No. 150 (1998).

[49] Telephone interview with Louis Bolieu, director of organizing, United Faculty of Florida, August 24, 2000.

[50] *University of Rio Grande v. NLRB*, 161 LRRM 2704 (6th Cir. 1999).

[51] *Case Western Reserve University v. NLRB*, 124 F.3d 196 (6th Cir. 1997).

[52] Section 50-423 of Illinois Public Act 89-0004, amending Section 7 of the Illinois Educational Labor Relations Act.

[53] The union electoral efforts were unsuccessful: the Republicans retained the governorship, increased their majority in the state senate, and took control of the state house of representatives from the Democrats in the 1994 election. See Barone and Ujifusa, 1993: 386; and Barone and Ujifusa, 1995: 415.

[54] *University Professionals of Illinois v. Edgar*, 114 F.3d 665 (7th Cir. 1997).

[55] *Hofstra University*, 324 NLRB No. 95 (1997).

[56] *University of Alaska v. University of Alaska Classified Employees Association*, 157 LRRM 2887 (Supreme Court of Alaska, 1998). A zipper clause allows the employer to take unilateral action during the contract term on any matter not discussed in bargaining or, for broadly worded clauses, on any matter not expressly covered by the contract. The Reagan-Bush NLRB interpreted zipper clauses literally, but the Clinton NLRB and the pre-Reagan NLRB did not. See Feldacker, 2000, pp. 218-219.

[57] *NLRB v. Katz*, 369 U.S. 736 (1962).

[58] *Grand Rapids Community College Faculty Association v. Grand Rapids Community College*, 164 LRRM 2166 (Michigan Court of Appeals, 2000).

[59] *Central State University v. American Association of University Professors*, 526 U.S. 124 (1999).

[60] *American Association of University Professors v. Central State University*, 162 LRRM 2901 (Supreme Court of Ohio, 1999).

[61] *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999).

[62] Section 31, South Dakota Senate Bill 242, 1998.

[63] *South Dakota Education Association/NEA v. Barnett*, 159 LRRM 2818 (Supreme Court of South Dakota, 1998).

[64] *University of the District of Columbia Faculty Association v. District of Columbia Financial Responsibility and Management Assistance Authority*, 163 F.3d 616 (D.C. Cir. 1998).

[65] *New England Cleaning Services v. Service Employees International Union*, 199 F.3d 537 (1st Cir. 1999).

[66] *Northcentral Technical College v. Central Wisconsin Uniserv Council-North*, 2000 Wisc. App. LEXIS 528 (Court of Appeals of Wisconsin, District 3, 2000).

[67] *Ibid.*, at 3-4.

[68] *State System of Higher Education v. State College and University Professional Association*, 164 LRRM 2227 (Supreme Court of Pennsylvania, 1999).

[69] *Hocking Technical College v. Hocking Technical College Education Association*, 697 N.E.2d 249 (Ohio Court of Appeals, Fourth Appellate District, 1997).

[70] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

[71] *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). The Supreme Court did not address the issue of whether a clear and unmistakable waiver in a collective bargaining agreement would be enforceable.

[72] *Bonnell v. Lorenzo*, 81 F.Supp 2d 777 (U.S. District Court, E.D. Mich., Southern Division, 1999).

[73] *Onstine v. Portland State University*, 1998 U.S. App. LEXIS 20553 (9th Cir. 1998).

[74] *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

[75] *Vaca v. Sipes*, 386 U.S. 171 (1967) at 191.

[76] *Simmons v. Howard University*, 157 F.3d 914 (D.C. Cir. 1998).

[77] *Coble v. Howard University*, 154 LRRM 3039 (D.C. District Court, 1997).

[78] *Cone v. Nevada Service Employees Union*, 164 LRRM 2202 (Supreme Court of Nevada, 2000).

[79] Barone and Ujifusa, 1997: 140; and Barone and Ujifusa, 1999: 172.

[80] Chapter 952, creating Section 3583.5 of the Government Code. See Sandbank, 2000.

[81] *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). Saltzman, 1998 summarizes the Lehnert ruling.

[82] The National Right to Work Legal Defense Foundation provided legal representation for both suits.

[83] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

[84] *GERR*, Vol. 38, No. 1851, February 29, 2000: 269-270.

[85] *Friedman v. California State Employees Association*, 163 LRRM 2924 (U.S. District Court for the Eastern District of California, 2000).

[86] *Baird v. California Faculty Association*, 2000 U.S. Dist. LEXIS 6145 (U.S. District Court for the Northern District of California, 2000).

[87] *NLRB v. Teamsters Local No. 439*, 175 F.3d 1173 (9th Cir. 1999).

[88] *London and the New Caucus v. Polishook,* 189 F.3d 196 (2d Cir. 1999).

[89] Leatherman, May 12, 2000.

[90] Saltzman, 1985, 1986, 1987, 1988.

[91] Cooke and Gautschi, 1982; Moe, 1985.

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