Decision-Making Principles of Labor Arbitrators in College and University Grievance Cases

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Disputes can arise over whether an employer violated or incorrectly interpreted the terms of a collective bargaining contract. Strikes may resolve such disputes. So may a unilateral decision by the employer if the union is weak. But during World War II, the War Labor Board encouraged employers to accept grievance arbitration as the final step in resolving contract-interpretation disputes. This step, board members believed, would assure no interruption of production needed for the war effort. Under grievance arbitration, a disinterested third party resolves these disputes by issuing a binding decision. Many union contracts—including contracts covering employees in higher education—incorporate grievance arbitration procedures.

Grievance arbitration differs from interest arbitration. Grievance arbitration involves possible violations of rights provided by existing contracts. Interest arbitration, in contrast, resolves disputes where the parties cannot agree on a new contract. A neutral third party issues binding contract language in these cases. Interest arbitration is often compulsory for disputes involving police or fire fighters because

strikes by these employees are seen as threats to public safety. But interest arbitration is rarely used in higher education.

We may also distinguish between labor arbitration and employment arbitration. Labor arbitration refers to disputes arising in a collective bargaining relationship, including grievance arbitration and interest arbitration. Employment arbitration applies in nonunion situations. Employment arbitrators rule on contract claims such as alleged violations of an oral assurance or employee handbook, alleged common law torts involving public policy violations, or claims about rights under a statute such as Title VII of the Civil Rights Act of 1964. Employment arbitration must provide extensive due process rights and consider rules of evidence to be acceptable to the courts as a substitute for litigation. Labor arbitration, in contrast, is usually less formal and legalistic. It emphasizes prompt resolution of disputes and avoidance of high representation expenses.

Understanding how labor arbitrators handle grievance cases helps union and employer representatives determine when it is wise to settle a grievance rather than pursue it. The president of the faculty union at the University of South Florida sees arbitration as a last resort:

> It's better to win grievances by persuading managers on most cases than [by] taking every issue to an arbitrator. In a large enough workplace, there will inevitably be contract violations, if for no other reason than because most managers don't understand collective bargaining agreements and there are many pressures to take short-cuts on process. Informal resolution of the vast majority of such situations is in the interest of union members.[1]

But when grievances do go to arbitration, the parties need to be prepared.

This chapter describes the decision-making rules governing grievance arbitration. Other studies address discipline in faculty misconduct cases[2] and dismissals, layoffs, and tenure denials.[3] The focus here is on how labor arbitrators interpret collective bargaining contract language *other* than the typical requirement of just cause for discipline and discharge. This chapter also addresses arbitrability (i.e., whether or not a dispute should be subject to arbitration), standards of evidence, the impact of external law on grievance arbitration, and remedies for contract violations.

Information companies such as the Bureau of National Affairs (BNA) and Commerce Clearing House (CCH) prepare guides to arbitral decision-making and publish selected arbitration cases. BNA's *The Common Law of the Workplace* (2005), prepared by the National Academy of Arbitrators, summarizes arbitral principles. BNA's *Grievance Guide* (2008) illustrates many contract interpretation rules with examples from labor arbitration decisions. Ruben's edited volumes, *Elkouri & Elkouri: How Arbitration Works* (2003 and 2008 Supplement), are widely accepted as the standard reference works on labor arbitration.

This chapter follows the classifications used in *Elkouri & Elkouri* and uses as examples arbitration awards published in BNA's *Labor Arbitration Reports*. Many arbitration awards are never published, so these examples represent only a small fraction of all awards in colleges or universities.

SCOPE OF LABOR ARBITRATION

Rarely, arbitration involves an internal union dispute,[4] or an employer grievance against a union (Table 1). But arbitrators mostly decide whether the employer violated union or employee contractual rights.

Collective bargaining is governed by state law for public colleges or universities, but by federal law for private institutions. U.S. Supreme Court rulings about labor arbitration usually apply directly only to private employers, but they often are highly influential with state courts, even when technically the issue at stake is subject to state law.

The U.S. Supreme Court ruled in *Enterprise Wheel* that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[5] Still, this ruling called for considerable judicial deference to arbitrators' decisions:

> Plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final...[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[6]

Enterprise Wheel was part of the Steelworkers Trilogy, three U.S. Supreme Court rulings issued on the same day in 1960. The other two rulings, *American Manufacturing Co.*[7] and *Warrior & Gulf*,[8] required judges to defer to most arbitrator decisions about the arbitrability of a particular dispute. According to the Court, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[9]

An arbitrator followed this reasoning in a case involving denial of promotion to full professor. The arbitrator ruled, "If there is a question regarding arbitrability and the result is not clear on its face, the presumption is that a decision should be made in favor of arbitrability."[10]

We may distinguish between substantive and procedural arbitrability. Substantive arbitrability addresses whether the arbitration clause covers the issue in dispute. Procedural arbitrability speaks to whether a failure to exhaust earlier steps of the grievance procedure or a failure to comply with time limits for filing a grievance or an appeal bars a grievance from arbitration. The U.S. Supreme Court ruled that courts have the ultimate say on substantive arbitrability and that employers should not be required to arbitrate unless the contractual agreement to do so is first established.[11] But the parties usually allow arbitrators to make the initial determination on matters of substantive arbitrability, and they usually accept this initial determination without bringing the issue to court. Arbitrators normally have sole authority on matters of procedural arbitrability.[12]

GRIEVANCE PROCEDURES AND TIME LIMITS

Union contracts normally provide two or more steps in the grievance procedure prior to arbitration: filing the grievance and at least one appeal to a higher level of management. The parties can, by mutual agreement, vault over any step. This is sometimes done in discharge cases, where employers may be eager to resolve the matter quickly because delays increase their potential back pay liability.

To have standing to file a grievance, a bargaining unit member must show "that he or she has been adversely affected by the claimed violation and has a personal interest in the outcome."[13] An arbitrator ruled that the union had standing to file a grievance on behalf of faculty members whose teaching loads exceeded contract provisions: "While contractual authorization for the AFT [American Federation of Teachers] to assume the role of a grievant is not clearly expressed, it may be inferred from the express authorization of group grievances."[14]

Contracts commonly specify time limits for filing a grievance, and arbitrators refuse to hear cases where the grievant did not file in time.[15] But, if an employer allows a grievance to proceed to the next step without objecting to the lack of timeliness, the arbitrator may rule that the employer waived the right to object. The employer in San Luis Obispo Community College (2005), for example, failed to raise the timeliness issue in its level one and two responses

Table 1. Published Arbitration Cases Cited

Employer	Citation	Year
Adelphi University	121 LA 1010	2005
Adrian College	89 LA 857	1987
Associated Universities	73 LA 188	1979
Associated Universities	95 LA 1139	1990
Associated Universities	105 LA 1041	1995
Augsburg College	91 LA 1166	1988
Baker College	112 LA 720	1998
Ball State University	121 LA 774	2005
Bevill State Community College	121 LA 609	2005
Brown University	113 LA 485	1999
California State University	71 LA 647	1978
California State University	86 LA 549	1986
Carlton College	113 LA 786	2000
Carnegie Mellon University	121 LA 723	2005
Central Michigan University	99 LA 134	1992
Central Michigan University	102 LA 787	1994
Central State University	54 LA 1159	1971
Central State University	97 LA 1167	1991
Cincinnati State Technical and Community College	114 LA 153	2000
City Colleges of Chicago	104 LA 86	1995
City Colleges of Chicago	106 LA 292	1995
College of Osteopathic Medicine and Surgery	70 LA 1140	1978
Community College of Allegheny County	124 LA 316	2007
Community College of Beaver County	122 LA 1461	2006
Cook County College Teachers Union	71 LA 1057	1978
Cuyahoga Community College	109 LA 268	1997
Cuyahoga Community College	124 LA 1802	2008
DeVry Institute of Technology	87 LA 1149	1986
Drexel University	85 LA 579	1985
El Camino Community College District	120 LA 1629	2005
Florida State University Board of Regents	99 LA 425	1992
Girard College	71 LA 1051	1978
Grinnell College	83 LA 39	1984
Iowa Central Community College District	124 LA 53	2007
Jefferson Community College	107 LA 1166	1997
Kent State University	59 LA 1007	1972
Kent State University	91 LA 895	1988
Kent State University	103 LA 338	1994
Lakeland Community College	93 LA 909	1989
Lakeland Community College	124 LA 1000	2007
Le Moyne College	73 LA 846	1979
Los Angeles Community College District	85 LA 988	1985
Los Angeles Community College District	87 LA 252	1986
Los Angeles Community College District	103 LA 1174	1994
Los Angeles Community College District	110 LA 13	1998
Los Angeles Community College District	112 LA 733	1999
Massachusetts Institute of Technology	56 LA 751	1971
Michigan State University	104 LA 516	1995
Minnesota State Colleges and Universities	118 LA 935	2003
Niagara County Community College	73 LA 90	1979

Table 1. Published Arbitration Cases Cited (continued)

Employer	Citation	Year
Northwestern University	118 LA 44	2002
Oakland University	98 LA 466	1991
Oakland University	106 LA 872	1996
Oberlin College	93 LA 289	1989
Ohio State University	69 LA 1004	1977
Pennsylvania State University	67 LA 33	1976
Pennsylvania State University	101 LA 890	1993
Roosevelt University	56 LA 604	1971
San Jose/Evergreen Community College District	111 LA 892	1998
San Luis Obispo Community College	120 LA 1545	2005
Triton College	107 LA 796	1996
University of Alaska	120 LA 237	2004
University of California, Berkeley	93 LA 450	1989
University of California, Berkeley	122 LA 532	2006
University of California, Davis	100 LA 530	1992
University of California, Los Angeles	66 LA 342	1976
University of California, San Diego	78 LA 1032	1982
University of Cincinnati	89 LA 388	1987
University of Dubuque	75 LA 420	1980
University of Illinois at Chicago Board of Trustees	100 LA 728	1992
University of Michigan	114 LA 1394	2000
University of Minnesota	111 LA 774	1998
University of Northern Iowa	91 LA 868	1988
University of Pennsylvania	99 LA 353	1992
Ventura County Community College	112 LA 1094	1999
Vermont State Colleges	96 LA 24	1990
Wayne County Community College	119 LA 1303	2004
Wayne State University	76 LA 368	1981
Wayne State University	111 LA 906	1998
West Virginia Wesleyan College	90 LA 1103	1988
Western Illinois University	118 LA 337	2003
Western Michigan University	82 LA 93	1984
Western Michigan University	111 LA 534	1998
Western Michigan University	115 LA 628	2000
Yale University	53 LA 482	1969
Yale University	65 LA 435	1975
Youngstown State University	87 LA 628	1986
Youngstown State University	115 LA 852	2001
Youngstown State University	122 LA 1377	2006
Youngstown State University	123 LA 568	2007

Source: Bureau of National Affairs *Labor Arbitration Reports* (LA). The first number in the citation gives the volume number. LA refers to Labor Arbitration Reports, published by the Bureau of National Affairs. The second number gives the beginning page number..

to a grievance about transferring a custodian to another campus. The college therefore could not cite a lack of timeliness to challenge procedural arbitrability. In El Camino Community College District (2005), the union and the employer exchanged e-mails about the appointment of a retired faculty member to an insurance benefits committee by the college president. The union, which considered the appointment problematic, did not comply strictly with the time limit for filing a grievance. But the arbitrator ruled the union met the standards for procedural arbitrability because the e-mail exchange constituted "substantial compliance."

Employers face less serious consequences than grievants or unions do for failing to meet grievance procedure time limits. If an employer does not act by the deadline, then the employer does not lose the case. Rather, the union is free to advance the case to the next step in the grievance procedure.

In Drexel University, an arbitrator inferred time limits.[16] The grievance procedure for employees of the grounds department had no express time limits. But the university challenged the arbitrability of a grievance filed after a 16-month delay. The arbitrator ruled this grievance was arbitrable but imposed a 45-day time limit for filing all future grievances.

"Continuing violations" refer to repeated employer actions, rather than a one-time breach of the contract. Many arbitrators treat each employer action as generating a new time limit for filing a grievance. Continuing violations can also refer to situations when a single act, like denial of promotion, is treated as having continuing effects, though this is often controversial. When labor arbitrators accept the claim of continuing violations, the requirements of procedural arbitrability will be met, notwithstanding the grievant's failure to file soon after the first in the series of continuing violations. But any remedy won would be retroactive only to the filing date.

The concept of continuing violations was widely accepted in at least one non-arbitration context: pay discrimination litigation filed under Title VII of the Civil Rights Act of 1964. The U.S. Supreme Court overturned this long-standing acceptance in 2007.[17] But Congress enacted remedial legislation—the Lily Ledbetter Fair Pay Act of 2009—immediately after Barack Obama became President. This act restored the notion of continuing violations for purposes of Title VII litigation.

Often, the parties agree to allow post-hearing briefs that summarize and assess evidence and arguments presented at the arbitration hearing. What happens if a brief is submitted late? In a discipline case involving a university bus driver, the union objected to the employer's request to extend the deadline, but the employer still submitted its brief one week late. The arbitrator accepted and considered the brief, reasoning that the short delay did not prejudice the union's case.[18]

EVIDENCE

Courts tend to be strict about rules of evidence, especially in criminal cases tried before a lay jury. Labor arbitrators usually take a much more lenient approach. One important difference involves hearsay evidence: second-hand testimony about facts. For example, Amy testifies that Beth said that she was sexually harassed. If Amy's testimony is presented as evidence that Beth was sexually harassed, it is hearsay. Hearsay evidence is problematic; Beth cannot be cross-examined to assess the credibility of the assertion that she was sexually harassed. Also, Beth did not make the assertion under oath.

Courts exclude hearsay evidence. But labor arbitrators often will receive hearsay to provide additional context, background, and corroboration, even though they usually will not rely on hearsay standing alone to support a material element of a claim or defense. In the sexual harassment example presented above, if Beth will not testify that she was sexually harassed, then an arbitrator will not sustain a discharge based solely on Amy's testimony that Beth said that she was sexually harassed.

Evidentiary standards in labor arbitration, notes *Elkouri & Elkouri*, resemble the standards used by administrative agencies. These agencies admit evidence liberally to make the process more efficient. But labor arbitrators and administrative agencies may weigh the credibility of evidence—and give hearsay evidence less credence—when making a decision.[19]

Arbitrators consider contemporaneous notes or business records as evidence. An arbitrator, for example, relied on 20 year-old personnel records to resolve a pay dispute involving a training specialist at City Colleges of Chicago.[20] But arbitrators find official business records more convincing evidence than unofficial records. What is an official record? Adrian College (1987) involved discharge of a custodial employee for poor performance. The employer based the discharge in large measure on a diary kept by the supervisor. But it refused a union demand to see the diary prior to the arbitration hearing. The arbitrator sustained a union objection and excluded the diary as evidence. It was inconsistent, the arbitrator noted, to exclude the diary from the personnel record for purposes of a state law regulating such records while allowing its introduction as evidence in arbitration.

Arbitrators usually give less weight to written statements from persons who do not present oral testimony at the hearing and are not available for cross-examination. A professor at Kent State University (1988) was suspended for alleged misbehavior and denied access to campus. The professor, under oath, denied the accusations at the hearing, and the arbitrator was able to assess the professor's credibility. The arbitrator found the unsworn written accusations less convincing because there was no opportunity to assess the accusers' demeanor while testifying.

Arbitrators weigh the plausibility of testimony. Adelphi University (2005) dismissed a maintenance worker for violating student privacy and dignity. Entering the dorm room of two female students, the worker examined and fondled panties that he took from the dresser. The union claimed that he entered the room to change a light bulb and accidentally touched the panties for at most a few seconds when his work tools and the panties became entangled in the drawer. The arbitrator did not believe the worker's story, which he did not present at the grievance meeting prior to the hearing. Instead, the arbitrator believed the roommate of the student who owned the panties. Her contemporaneous written statement asserted that none of the light bulbs in the room needed replacing and that the worker was surprised and nervous when she confronted him.

Circumstantial evidence may allow a decision maker to infer that an assertion is true. Direct evidence, in contrast, supports an assertion without a need for an inference. Often, the only evidence for important facts in a case may be circumstantial. A University of Pennsylvania case (1992) involved a parking lot attendant who allegedly misappropriated parking fees belonging to the university. The circumstantial evidence provided by the employer, the arbitrator ruled, did not sustain a discharge because it did not allow a conclusive inference that this particular attendant had misappropriated money.

Few arbitrators will admit as evidence any settlement offers made prior to arbitration. "It is recognized that a party to a dispute may make an offer with the hope that a compromise can be reached and the dispute ended. Even the mere introduction of such evidence may impair future attempts at dispute settlement."[21]

Arbitrators may issue subpoenas to obtain information, but they lack the authority of a court to enforce a subpoena by imposing sanctions for contempt. The University of Michigan (2000) discharged an employee for repeatedly making personal phone calls during working time. The grievant neither produced his phone records nor explained their absence. A Michigan court had ruled that an arbitrator's subpoena was unenforceable in public-sector labor disputes. The arbitrator ruled: "No adverse inference may be drawn against" the

grievant for failing to produce requested evidence. "But the suspicion remains that…[the grievant's phone] records would have proven harmful to the Grievant's case."[22] This suspicion led the arbitrator to deny 12 months' back pay while reinstating the grievant to the job. Other arbitrators will go further, drawing an adverse inference from a failure to produce.

Labor arbitrators often consider the findings of the court or an administrative agency when a case hinges on evidence previously evaluated in a criminal or civil trial or in an agency proceeding. But they may reach different conclusions because the purposes and evidentiary rules in an arbitration hearing and a trial or agency hearing often diverge. Cincinnati State Technical and Community College (2000) involved alleged unlawful discrimination on grounds of disability. The Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC) had dismissed the claim of unlawful discrimination. The employee, the OCRC found, could not perform his essential job duties even if the employer provided reasonable accommodation for his disability. The arbitrator ruled that the grievant was not precluded from bringing the same issue to arbitration because the doctrine of collateral estoppel—a conclusive earlier decision—did not apply. But the arbitrator also found that the OCRC and EEOC dismissals were "noteworthy" and provided support for the employer argument that the grievance should be denied.[23]

What is the appropriate standard of proof? Arbitrators typically base their rulings on the preponderance of evidence, but many require clear and convincing evidence in discharge cases involving alleged moral turpitude.[24] The arbitrator in a sexual harassment case at Central Michigan University (1992), noting that the ruling could significantly affect the grievant's reputation, decided that a preponderance of evidence was an insufficient standard. But the arbitrator would not apply the criminal law standard of proof beyond a reasonable doubt, even in a case of dismissal for sexual harassment.

The moving party in any arbitration (usually the union) has the burden of proof. But in disciplinary cases, the employer has the burden of proof to establish just cause.[25]

RULES FOR INTERPRETING CONTRACT LANGUAGE

To win in arbitration, the union must establish that the employer violated the contract. This is a matter of specific contract language rather than philosophical notions of justice.

Arbitrators use the plain meaning of the relevant words to determine employer contract violations when the contract language is clear and unambiguous. Arbitrators read the contract as a whole to determine plain meaning, and they follow the rule that specific language controls over general language. Occasionally, arbitrators refer to well known dictionaries for authoritative definitions. For example, in a case about job bidding at West Virginia Wesleyan College (1988), an arbitrator consulted *Webster's New Universal Unabridged Dictionary* for definitions of "arbitrary" and "capricious."

Western Michigan University (1984) required a physician's note justifying sick leave for the fifth or subsequent absence in a year. The old contract, which expired August 12, 1982, used the phrase, "in a fiscal year." The slate was wiped clean when each new fiscal year began on July 1. But the employer proposed, and the union accepted, new contract language that included the phrase, "in any twelve (12) month period." The new contract language was executed on September 13, 1982. The university subsequently notified a painter in the physical plant department that he would need a doctor's excuse for any subsequent sick leave in the next few months because had been out sick on four occasions: December 23, 1981; May 21, 1982; June 7–9, 1982; and July 7–9, 1982. The union grieved, arguing that the old contract had wiped the slate clean one last time on July 1, 1982. But the arbitrator denied the grievance, ruling the plain meaning of the new contract language placed no limits on considering sick leave occurrences prior to July 1, 1982.

Often, there is more than one reasonable interpretation of contract language. In such cases, arbitrators may use bargaining history to determine the intent of the parties. An arbitrator found ambiguity in language applicable to a dismissal on grounds of sexual orientation at the University of California, Davis (1992). The union, he noted, proposed unambiguous language supporting its position in the 1983 and 1987 negotiations, but neither of the resulting agreements included these proposals. The arbitrator ruled against the union: "An arbitrator may not grant to a party what it was not successful in obtaining through bargaining."[26]

Past practice is another guide to the meaning of ambiguous contract language. Did the Los Angeles Community College District (1985) contract prevent the employer from shifting English faculty who taught three days per week to a new four-day schedule? The arbitrator denied the grievance: "The practice since 1980 has been consistent with the District's expressed position on this matter, and the Union did not formally protest the practice prior to this dispute."[27]

At Wayne State University (1981), the employer planned to cut budgets by requiring employees to take 10 days off over several months without pay. The employer withdrew a similar plan five years earlier after the union refused to suspend the relevant contract provision. The arbitrator interpreted the 1975 withdrawal as an employer admission that the contract prohibited the 1981 plan.

The arbitrator in Michigan State University (1995) used past practice and bargaining history to interpret ambiguous language regarding health insurance eligibility for domestic partners of employees. A clause in the 1980 agreement committed the parties to non-discrimination on grounds of sexual preference. The employer denied health insurance benefits to domestic partners for the next 14 years, but the union did not grieve. In March 1994, the union proposed explicit language allowing domestic partners to be considered spouses when determining eligibility for employee benefits. But it withdrew the proposal before the new contract was adopted in April 1994.

The union's argument: "The mere submission and withdrawal of proposals during contract negotiations is not necessarily an indication that the rights or obligations contained within the proposals are not already inherent in the contract." The proposals, the union added, "were brought to the table for clarification or codification purposes."[28] The arbitrator, acknowledging the theoretical validity of this argument, saw this particular proposal as a significant change, not a clarification or codification. Given the consistent past practice and the bargaining history, he dismissed the grievance for lack of sufficient evidence of a contract violation.

Contract language normally takes precedence over past practice. Cuyahoga Community College (2008) involved a union request for arbitration filed after the deadline in the contract. The parties, the union claimed, had not enforced the deadline in the past. The arbitrator ruled that the grievance was not arbitrable because the contract contained clear and unambiguous language about filing deadlines.

But some arbitrators allow past practice to modify clear and unambiguous contract language. An article widely cited in the arbitration literature argued that if a practice is "a product of joint determination" so that there is mutual agreement, then this "amounts to an amendment of the contract."[29] This is based on the notion that a collective bargaining contract is a "living document" and that "Those responsible for a contract are free to change it at any time by adding an entirely new provision, by rewriting an existing clause, or by reinterpreting some section to give it a meaning other than that which was originally intended."[30]

The party drafting ambiguous language can find the ambiguity turned against it. The arbitrator in Le Moyne College asserted, "It is the responsibility of the party which proposes a contract provision either to explain what it intends or to use language which leaves the matter free

from doubt."[31] The contract at the University of Alaska (2004) included ambiguous language, proposed by the union, on bumping rights during layoffs. But the union had not clarified during negotiations that laid-off employees could bump into different departments. The arbitrator found there was insufficient evidence, based on the brief discussion during negotiations, that the employer shared the union's interpretation of the language. In adopting the employer's interpretation, he noted that a "basic rule of contract interpretation provides that any ambiguous contract language should be construed against the party that drafted the language."[32] In San Jose/Evergreen Community College District (1998), the arbitrator adopted the union's interpretation of ambiguous contract language because, in this case, the employer had drafted the language.

Arbitrators often consider how a "reasonable person" would interpret contract language. In California State University (1986), the dean decided not to reappoint the grievant—a part-time temporary lecturer in women's studies for eight years. The decision, the grievant alleged, stemmed from complaints by fundamentalist Christians that her course promoted lesbianism. The contract required that applications for employment by temporary faculty "shall receive careful consideration."[33] The arbitrator acknowledged that the parties disagreed about the meaning of this term. But he ruled that a reasonable person would agree with the grievant that the employer failed to give "careful consideration" to her application.

Do policies unilaterally implemented by the employer influence union grievance cases? In Ventura County Community College (1999), an arbitrator ruled that a unilaterally implemented policy was nonbinding where it conflicted with unambiguous contractual language. But in Florida State University (1992), the unilaterally implemented faculty handbook shaped the arbitrator's interpretation of ambiguous contract language.

Arbitrators reject changes in health insurance benefits that conflict with the contract. Youngstown State University (1986) excluded permanent part-time employees from the group insurance plan, claiming that its contract with the insurance carrier did not cover these employees. But the arbitrator noted that the union was not a party to the contract with the insurance carrier. Ruling that the collective bargaining agreement took priority over the employer's contract with the insurer, he ordered the employer to cover permanent part-time employees. In Carnegie Mellon University (2005), the health insurance carrier unilaterally eliminated one of the plans available to university employees. This action was beyond the employer's control, but the arbitrator ruled the collective bargaining agreement required the employer to provide a substitute as soon as possible.

Where there are two possible interpretations of a collective bargaining agreement but only one would make the agreement a lawful contract, arbitrators choose that interpretation. In Girard College (1978), an arbitrator interpreted a collective bargaining agreement to harmonize it with state law. But unambiguous contract language trumps broader notions of equity.[34]

APPLYING EXTERNAL LAW

Arbitrators vigorously debate whether and how they should harmonize labor agreements with federal or state law. Between 1963 and 1974, and between 1990 and 1993, Congress enacted several important employment laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Occupational Safety and Health Act of 1970, the Employee Retirement Income Security Act of 1974 (ERISA), the Americans with Disabilities Act of 1990 (ADA), and the Family and Medical Leave Act of 1993 (FMLA). States have enacted laws regulating public-sector bargaining, civil service, and higher education. Labor arbitrators may consider external law when ruling on grievances, particularly when the collective bargaining agreement incorporates portions of the law. But the arbitrator need not consider external law

that is not incorporated into the labor contract, as in Los Angeles Community College District (1986). The U.S. Supreme Court, in ruling that submitting a discrimination dispute to labor arbitration did not prevent an employee from filing a Title VII lawsuit, noted that the collective bargaining agreement bound labor arbitrators, even if it conflicted with the requirements of Title VII.[35]

Arbitrators have often applied external law. In Lakeland Community College (1989), the arbitrator noted repeal of the state's mandatory retirement law for public higher education faculty members when upholding a grievant's challenge of mandatory retirement for faculty after age 70. In Los Angeles Community College District (1999), the arbitrator applied the ADA requirement that employers make "reasonable accommodations" for disabilities when upholding a faculty member's request to be transferred to a campus closer to his home.

The decision in Triton College (1996) shows how arbitrators may apply common law principles. First, employers are responsible for the deeds of their agents acting within the scope of their employment. Second, employers cannot withdraw a promise to employees if the employees rely on that promise to their detriment (promissory estoppel). A maintenance employee at Triton submitted a letter of resignation. The human resources vice president urged him to reconsider and gave him a few days to think about it. The employee soon rescinded his resignation, but the business services vice president determined that the resignation took effect upon receipt of the letter. The employer argued in arbitration that only the board of the college had the authority to let the employee rescind his resignation. But the arbitrator ruled that the human resources vice president "was clothed with the apparent authority" to allow the rescission.[36] Her decision therefore bound the college. Further, the college was estopped on grounds of detrimental reliance from withdrawing the offer to reconsider. The arbitrator ordered the employee's reinstatement.

Ohio State University (1977) also involved promissory estoppel. The university temporarily closed most operations during severe winter weather. The manager of the receiving and stores department told his employees not to report to work, adding that they would be paid for this day. A few weeks later, the manager announced that the university directed him not to pay department employees for the missed day. The arbitrator ruled the university was estopped from withdrawing the manager's promise of payment.

Another arbitration case used the common law concept of anticipatory repudiation, which occurs when one party declares that he will not perform his duties under the contract. In Western Michigan University (1998), the grievant completed an electrician apprentice program at the university and subsequently worked there. But she could not obtain a state electrician's license because the license of the electrician supervising the apprentices was not in the university's name. The employee grieved the employer's decision to deny her the higher pay of licensed electricians. The employer's failure to take steps allowing her to meet state licensing standards, she argued, constituted anticipatory repudiation. The arbitrator disagreed and denied the grievance.

Closely related to estoppel is a waiver, which occurs when a party voluntarily and knowingly relinquishes a right. "While arbitrators generally hold that acquiescence by one party to violations of an express rule by the other party precludes action about past transactions, they do not consider that acquiescence precludes application of the rule to future conduct."[37] Failure to file a grievance within time limits may be construed as a waiver.

In Los Angeles Community College District (1998), the union filed a grievance when the selection committee for the vice president of administrative services included no union representative. The union, argued the employer, waived its right to grieve by failing to grieve a similar event occurring on another campus.

The waiver, ruled the arbitrator, only applied to the previous event, not to the current case.

In University of Illinois (1992), an electrician grieved the employer's decision to deny him a promotion to foreman. Two years after the electrician filed the grievance, the employer raised the issue of substantive arbitrability. The parties, contended the employer, had not contractually agreed to submit such disputes to arbitration. The grievant argued that the two-year delay constituted employer acquiescence to substantive arbitrability. But the arbitrator noted express language excluding promotion cases from arbitration. He ruled that only an express waiver by the employer—not a delay in raising the arbitrability argument—would make this grievance arbitrable.

Brown University (1999) involved an alleged violation of job posting requirements. The employer argued that the union waived its right to arbitrate this case because it did not take a related grievance to arbitration. But the arbitrator decided that the issues in the two grievances differed and that waiving one right did not imply waiving another.

CUSTOM AND PAST PRACTICE

Arbitrators assess the evidence supporting a claim about custom and past practice by considering whether the practice is clear in application, long-standing, and known to and accepted by the parties. Has enough repetition occurred to make past practice clear? Do the circumstances imply mutual agreement to the practice?[38] In Central State University (1970), the union established that a consistent past practice existed until 1965, but the parties disputed whether the practice continued between 1967 and 1970. The arbitration board ruled that evidence of some contrary practice in the three years prior to the decision nullified the practice existing until 1965.

Repeated failure by a party to object to a contract interpretation made by the other party can imply mutual agreement. The Associated Universities (1979) contract did not clarify employee eligibility for bargaining unit membership. The arbitrator ruled that a 30-year practice of excluding employees on monthly payroll implied tacit union consent to the employer's practice.

Employers sometimes seek a "zipper clause:" either "an acknowledgement that the written contract constitutes the parties' entire agreement and is a waiver of the right to bargain about other conditions, or a specific affirmation that management rights are not limited by prior practices."[39] In Augsburg College (1988), the arbitrator distinguished between past practices about working conditions and those about employee benefits. The former may survive a zipper clause because:

> the parties to bargaining usually do not intend to write all the detail of such conditions into the labor agreement. Economic benefits, however, are usually the primary focus of bargaining. If an entire-agreement clause is to be given any meaning, it must mean at least that the parties have expressed their entire agreement about economic benefits and that any such benefits previously established by practice or policy will not survive.[40]

Past practice may be used to fill the gaps when contracts only address an issue in general terms or fail to specify the consequences of a violation. The contract in Kent State University (1988) was silent about selection procedures for membership on a faculty advisory council that reviewed a professor's suspension. The arbitrator found that past practice—the employer always made the selection—was controlling.

MANAGEMENT RIGHTS

Unions and employers differ strongly about management rights. Employers typically claim the right to do anything not prohibited by the collective bargaining agreement—the "residual rights" theory. Unions argue that they and employers have joint responsibility for matters

implicitly addressed by the contract. They accept the employer's right to initiate action but retain the right to grieve when they object.[41] Laws regulating wages and employment conditions—as well as the duty under labor law to bargain to impasse prior to implementing changes in mandatory subjects of bargaining—constrain management rights regardless of whether an arbitrator adopts the employer or the union view of the contract.

The employer must exercise management rights reasonably. A Yale University employee who exhausted his basic sick pay grieved when Yale denied him additional sick pay. The arbitrator ruled the division manager could decide matters of additional sick pay. But he "may not exercise his discretion arbitrarily, unreasonably, or capriciously."[42]

In Ball State University (2005), the arbitrator assessed the employer's duty to bargain and the reasonableness of the employer's exercise of management rights. The university unilaterally changed vacation-scheduling procedures. Government labor relations boards usually rule on which matters are mandatory subjects of bargaining, but an unusual feature of Indiana law allowed the arbitrator to make the ruling. There was no duty to bargain, he decided, because vacation-scheduling procedures were a permissive, not a mandatory subject. The union, he added, had not sufficiently rebutted the employer claim that it acted reasonably in exercising its management right to schedule vacations.

Employers frequently supplement the residual rights theory by including an explicit management rights clause in the contract. Ohio State University, for example, negotiated a detailed management rights clause:[43]

> Article 4–University Management Rights
>
> 4.1 The University retains the sole and exclusive right to manage its operations, buildings and plants, and to direct the working force. The right to manage shall also include the authority to establish policy and procedures governing and affecting the operations of the University.
>
> 4.2 The right to manage the operations, buildings, plants, and to direct the working force includes but is not limited to the following University management rights:
>
> A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible.
>
> B. To manage and direct the employees of the University.
>
> C. To hire, promote, transfer, assign or retain employees in positions within the University.
>
> D. To establish work rules and rules of conduct.
>
> E. To suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause.
>
> F. To determine the size and composition of the work force and to lay off employees in the event of lack of work or lack of funds or under conditions where the University determines that the continuation of such work is unnecessary.
>
> G. To determine the mission of the University and to efficiently fulfill that mission including the transfer, alteration, curtailment or discontinuance of any goods or services.
>
> 4.3 The above enumerated management rights shall not abridge and shall be exercised consistent with the provisions of the Agreement.

Specific management rights clauses improve the employer's prospects in arbitration. They might also limit the employer's duty to bargain during the term of the contract before making unilateral changes in mandatory subjects of bargaining.

Arbitrators differ in how they interpret management rights clauses. The College of Osteopathic Medicine and Surgery (1978) moved a full professor from a large, carpeted, and well-lit first-floor office to a smaller, uncarpeted,

and less well-lit second-floor office. The professor grieved. The arbitrator cited fairly general management rights language in denying the grievance. But in Central Michigan University (1994) the arbitrator ruled the employer had to use seniority, not a test of job skills, to select employees for layoff, despite detailed management rights language.

Management rights usually include authority to change methods of operations, but unions can grieve wage rates set for new or changed jobs. Northwestern University (2002) did not assign the duties of an assistant foreman to another worker after he retired. A mechanic began performing some of those duties needed for the orderly operation of the shop. The arbitrator acknowledged the employer's right to decide who should perform these duties but ruled the mechanic was entitled to extra pay for performing them, in the absence of a duty allocation decision by the employer.

Establishing, eliminating, or redesigning job classifications is often seen as a management right. Yale eliminated the job of head waiter/waitress and assigned those duties to the dining room desk attendant. The arbitrator ruled that the elimination and assignment were management rights. "To find otherwise would mean that job duties and responsibilities and the way in which work is to be performed can only be changed when the collective agreement is renegotiated at the end of its term. It is doubtful that any business could survive such a strangulating procedure."[44] But the arbitrator agreed with the union that the new duties entitled the desk attendant to higher pay.

Extra duties need not imply extra pay. Lab assistants went on strike at Minnesota State Colleges and Universities (2003). The employer asked the science faculty to do what was needed to maintain classes as usual, but it did not provide overload pay. The union sought overload pay. But the arbitrator denied the grievance, ruling the temporary extra work did not exceed a normal workload because faculty members routinely performed this work when illness compelled the absence of lab assistants.

Managers may not have the right to add work unrelated to regular duties. Central State University (1971) required food service workers in student cafeterias to work for outside businesses and church groups. The arbitration panel ruled the grievants were entitled to additional pay for work unrelated to university activities.

The employer often has the right to allocate work between job classifications. A situation at Western Illinois University (2003) involved a jurisdictional dispute between the operating engineers and the plumbers about work assignments. The operating engineers cited past practice to claim some pump work for their members. But the arbitrator ruled that the clear language of a jurisdictional agreement gave the university the right to assign this work to the plumbers.

How a decision is framed may affect whether it is a management right. Prior to 2004–05, faculty members from Community College of Beaver County (2006) taught a college psychology course to high school students. The students took the course at the college. Beginning in 2004–05, the college awarded credit to students who took the course at a nearby high school. A high school teacher taught the course. The union claimed the change transferred work out of the bargaining unit. But the arbitrator, seeing the change as a decision to grant college credit for a course taken at a high school, ruled the decision was a management right, absent contrary contract language.

Hiring decisions are a management right, but the contract may limit this right. Oberlin College (1989) hired an applicant outside the bargaining unit for a library technician job. The arbitrator ruled the contract required the college to award the job to an internal applicant as long as one was qualified. He ruled that the grievant, an internal applicant, was qualified.

Determining crew size after a major change in technology or work processes is a management right. Grinnell College (1984) installed a new telephone system that greatly reduced the

need for switchboard operators. The arbitrator ruled the college could eliminate the day-shift operator's job and could assign the remaining limited telephone operator duties to another employee. But the college could not unilaterally cut the pay for the Saturday and evening operators that were still employed, though their work duties became less intense.

Scheduling work is a management right except as restricted by the contract. Provisions for call-in pay imply a management right to make unscheduled work schedule changes. But, as noted by the arbitrator in Community College of Allegheny County (2007), the employer must provide the call-in pay required by the contract. Pennsylvania State University (1976) closed the campus for one day because of disruption from a nearby rock concert. The arbitrator ruled that the university did not have to provide pay for that day, despite the lack of advance notice of the layoff, because the disruption was an unforeseen circumstance.

Can management decide which employees work overtime? Massachusetts Institute of Technology (1971) assigned surveillance work to night shift custodians when the U.S. invasion of Cambodia brought campus unrest. Night watchmen claimed the overtime equalization provision in their contract required the employer to give them the surveillance duties as overtime work. But the arbitrator ruled the contract required only that the employer distribute overtime work equally among the night watchmen, not that the employer assign the emergency tasks to them instead of the custodians.

Subcontracting work is usually held to be a management right unless restricted by the contract, though unions believe subcontracting threatens job security and the stability of the bargaining unit.[45] Associated Universities (1990) continued to subcontract some bargaining unit work, rather than fill vacancies arising when the employer promoted some unit members to supervisory positions. The arbitrator permitted the subcontracting because it did not result in any layoffs in the bargaining unit or in a reduction of the workload of any unit member to less than 40 hours per week. No contract provision required employment of a certain number of bargaining unit members.

Establishing work rules is a management right, but these rules must be reasonable. Bevill State Community College (2005) required faculty to teach 15 credit hours per semester, which meant five courses for a faculty member in a department with three-credit-hour classes. The arbitrator determined this was a reasonable rule, noting that the Alabama State Board of Education required the college to impose it.

The employer may regulate employee off-duty conduct that affects the employer. Western Michigan University (2000) discharged a custodian for possession of cocaine one block from campus. The arbitrator ruled this conduct was related to the custodian's employment and justified discharge.

Management has the right to determine staffing levels and to lay off excess staff, subject to any contractual restrictions such as a seniority clause. Baker College (1998) laid off a full-time accounting instructor but retained part-time accounting faculty members who received less pay per course. The arbitrator ruled that the college had the right to decide how many full-time faculty members to employ. But in Associated Universities (1995), an arbitrator ordered the reinstatement of a laid-off video photographer whose employer cited a lack of work to justify the layoff. The arbitrator ruled the employer violated the contract when it assigned the work to an employee from another job classification instead of recalling the photographer.

Seniority language or other contract provisions may restrict management rights regarding promotions. Niagara County Community College (1979) agreed in the contract to grant a minimum of 15 faculty promotions per year, provided the promotions did not require a tax rate increase. The arbitrator, finding no need to increase the tax rate, ordered the college to grant the minimum number of promotions.

Management has a right to unfettered control over supervisors. A union demand that a supervisor be disciplined for violating the contract normally is not arbitrable.[46]

SENIORITY AND ABILITY

Seniority determines the extent to which employees have property rights to their jobs. Some contracts require that employers offer promotions to employees in order of seniority, while many contracts require employers to conduct layoffs in inverse order of seniority. Seniority disputes often concern competition between members of the bargaining unit for an employment opportunity. Unions must be attentive in such cases to their duty of fair representation for all members of the bargaining unit.

Ability to perform the work is often a factor in promotion decisions and sometimes a factor in layoffs. Contracts can define ability in either relative or absolute terms. The contract for the University of California, Los Angeles (1976) gave priority for promotions to senior employees provided their ability equaled that of junior employees. The arbitrator ruled that the university did not violate the contract when promoting a junior employee instead of a senior worker. The senior employee had a worse performance evaluation score, a worse attendance and punctuality record, and less education and work experience.

Carlton College (2000), unlike UCLA, considered the absolute ability of the senior candidate to perform a job. The contract required the employer to promote the most senior grounds maintenance employee able to do the work. The arbitrator ruled the union failed to prove by a preponderance of the evidence that the most senior employee was qualified for the promotion. Roosevelt University (1971) also used an absolute standard. It required an employee to complete at least one course in accounting for promotion to a disbursement accountant job. The arbitrator, finding that a senior applicant had not completed this course, ruled that the university had not violated the contract's seniority clause when it awarded the job to an outside candidate.

Peer evaluation is frequently used to evaluate faculty job performance. California State University (1978) declined to promote an associate professor to full professor after a faculty committee ranked her 66th among professors eligible for promotion; only the top 25 were promoted. The arbitrator would not substitute his judgment for that of the university in assessing the professor's job performance. Still, the university's peer-review system, upon re-evaluating the grievant, found she was better qualified than the least qualified professor who was promoted. The arbitrator ordered her promotion.

The University of Dubuque (1980) initially found an associate professor eligible for promotion to full professor based on his assertion that he earned his doctorate from an accredited institution. But the university denied his promotion request when an investigation revealed that the doctoral institution was unaccredited. The arbitrator found the denial of promotion reasonable.

Kent State University (1972) addressed the fairness of performance reviews in assessing the relative ability of employees. The administrative assistant in the political science department received exceptional performance ratings in the two evaluations prior his appointment as union steward. But the assistant received average or below average ratings afterwards. The arbitrator found plausible that the steward's rating would drop on some performance dimensions because he was often away from work on union business. But office absences could not account for the drop in his ratings on such factors as "knowledge of work" and "judgment." The arbitrator ordered the university to remove from the personnel files the negative performance evaluations issued after the appointment.

EMPLOYEE RIGHTS AND BENEFITS

The French have statutory vacation rights, but Americans have this right only when provided

by contract. Cuyahoga Community College (1997) could lawfully adopt a practice allowing carryover of only 240 hours of vacation time. But the 1993 contract expressly increased carryover to a 320 hour maximum. The new contract language overruled the past practice, and the arbitrator ordered that the cash-out for an employee retiring with 287 hours of unused vacation time include the 47 hours that exceeded the old limit. Similarly, in Girard College (1978), the arbitrator ruled the contract required the college to pay employees for their unused sick leave at the time of retirement.

Iowa Central Community College District (2007) concerned the impact of sick leave on extra duty pay. An instructor on sick leave received sick pay for her regular classes but not for extra classes she contracted to teach before her illness. The arbitrator rejected the employer's claim that instructors were independent contractors for purposes of extra classes and ordered the college to provide sick pay for those classes.

An arbitration ruling from one collective bargaining relationship is not a binding precedent for another. Youngstown State University (2006) did not grant holiday pay for the day of mourning declared by the president when former President Ronald Reagan died in 2004. The parties cited arbitral interpretations of other contracts determining whether the days of presidential mourning qualified for holiday pay. Differences in contract language and in bargaining history led to varied outcomes. In this case, the arbitrator ruled the contract did not require Youngstown State University to provide holiday pay.

Many contracts provide leave for union business. University of California, Berkeley (2006), did not pay a bargaining committee member for travel time on the day before a negotiating session almost 400 miles away. The university, the arbitrator ruled, should have considered the reasonableness of the request, rather than refuse outright to provide any paid leave for such travel.

College faculty typically need not report to work on days when they do not teach. But should they be charged for leave on the day or days when they had no scheduled classes if they miss work for an entire week? At Jefferson Community College (1997), a faculty member with no Tuesday classes missed an entire week after her father died. The college charged her for five days of leave, including the Tuesday, and the arbitrator ruled the charge did not violate the contract.

An Ohio statute grants state employees four days of personal leave per year. Youngstown State University (2007) and a union, unaware of this statute, negotiated contract language providing two personal days. The arbitrator ruled the parties did not intend to negate statutory rights and ordered the university to provide four days of personal leave.

Arbitrators generally uphold employees' right to work for another employer during off-duty hours. But employees do not have a right to take a second job that creates a conflict of interest with the primary employer. A related issue arose at the University of California, San Diego (1982), which discharged an administrative assistant for obtaining purchase orders from a firm partly owned by her husband. The arbitrator, in sustaining the discharge, noted that the employee did not disclose her conflict of interest prior to the purchases.

Under Title VII of the Civil Rights Act of 1964, employers must make reasonable accommodations for the religious beliefs of employees. City Colleges of Chicago (104 LA 86, 1995) discharged a faculty member for failing to meet a city residency requirement. The faculty member contended that her religious beliefs as a Jehovah's Witness required her to live with her husband, who lived outside city limits. But the arbitrator found no employer failure to accommodate religious beliefs. The union presented no evidence supporting her claim about the requirements of her religion. Nor did it show a religious need for her husband to live outside city limits.

Sexual harassment may violate an employee's right to be free from sex discrimination. In 1986, the U.S. Supreme Court ruled that sexual harassment violates Title VII if it creates a hostile work environment, even if the victim suffers no economic loss.[47] But what is a hostile environment? Wayne County Community College (2004) dismissed a student services specialist who made sexually suggestive comments. But the arbitrator ruled these comments, while inappropriate, were neither severe nor pervasive enough to create a hostile work environment. An incident at Central Michigan University (1992) involved far more offensive behavior. A male custodian trapped a female student in the women's bathroom and refused to let her out. The student looked pale and shaken when she left the bathroom, and there was no evidence that the custodian was cleaning the bathroom. The arbitrator upheld the dismissal.

Many college and university contracts ban discrimination on grounds of sexual orientation. Some grievants claim that such a ban requires the employer to provide health insurance benefits to same-sex domestic partners, as they do to legal spouses. Arbitrators disagreed in Kent State University (1994), Michigan State University (1995), and Youngstown State University (2001).

Employees accustomed to 100 percent employer-paid health insurance premiums have come to see a noncontributory health insurance plan as a right. But rapid increases in health care costs led many employers to challenge that perception. Lakeland Community College (2007) had a noncontributory health insurance plan prior to 2005. The union reluctantly gave up the principle of a noncontributory plan in the 2005–08 contract. It agreed to employee contributions of $15 per month for single coverage; $25 per month for family coverage. The employer claimed the contract permitted increases of $15 single and $25 family for each year in monthly premium contributions. In 2006, Lakeland raised these contributions to $23.20 single and $46.24 family. The arbitrator ruled this increase violated the contract, and froze monthly premium contributions at $15 single and $25 family for the duration of the three-year contract.

REMEDIES IN ARBITRATION

Arbitrators often must decide the appropriate remedy for a contract violation. Most contracts do not expressly define the extent of the arbitrator's power to remedy violations, yet even arbitrators claiming broad remedial power recognize limits on that power.[48] Vermont State Colleges (1990) gave a professor a letter of reprimand but rescinded the letter and removed it from the file. The grievant claimed that he had not yet been made whole. He asked for copies of the documents leading to the letter of reprimand and reimbursement for incurred legal fees. But the arbitration board ruled that it lacked authority to order any remedy beyond rescinding the letter and ordering its removal from the file. It dismissed the grievance because the employer had granted these remedies.

Monetary awards normally are limited to financial losses suffered by the grievant. Oakland University (1996) ended its practice of giving parking privileges to the union president. The arbitrator, finding that this change violated the contract, ordered the university to issue him a parking permit and to pay any tickets he incurred when he did not have a permit.

An earlier Oakland University case (1991) involved denial of longevity pay to an employee on leave of absence when the pay was granted. The arbitrator, finding that this denial violated the contract, ordered the university to grant the longevity pay provided by the contract.

What is the appropriate remedy when a supervisor does bargaining unit work? If the amount of bargaining-unit work done was small and no unit employee was readily available, an arbitrator may cite the *de minimis* rule and dismiss the grievance as a trivial contract violation.[49] But in Associated Universities (1995), a supervisor completed at least 500 hours of bargaining unit work during a 12-month period,

while a unit-member was on layoff; the *de minimis* rule did not apply. The appropriate remedy, the employer argued, was an arbitrator directive to cease using the supervisor for this job assignment. But the arbitrator, noting this remedy did not remedy the grievance, ordered the employer to reinstate the laid-off bargaining unit member and to provide back pay for the lost earnings.

Arbitrators normally do not award punitive damages, as these are seen as damaging to the collective bargaining relationship.[50] Similarly, arbitrators rarely order employers to pay the attorney's fees of an individual grievant, even when ruling for the grievant. Arbitrators in Pennsylvania State University (1993) and University of Northern Iowa (1988) called for reinstatement of improperly terminated employees with back pay. But they denied the requests for attorney's fees and expenses.

Still, punitive damages and attorney's fees may be awarded in judicial rulings on employment discrimination lawsuits. The Supreme Court ruled that punitive damages could be awarded in Title VII cases even when the employer's conduct was not egregious if the employer failed to make a good-faith effort to enforce antidiscrimination policy.[51] Potential Title VII plaintiffs may be more willing to pursue their complaints through grievance arbitration rather than litigation if labor arbitrators are authorized to issue punitive damages and award attorney's fees in discrimination cases.

Some arbitrators award interest as part of a make-whole remedy because of the time value of money,[52] though other arbitrators do not. Central State University (1991) assigned overload teaching to an adjunct, despite contract language requiring the university to offer the assignment first to full-time faculty members. The arbitrator ordered the university to give back pay plus six percent interest to a full-time faculty member who grieved.

In wrongful discharge cases, unemployment compensation or earnings from new jobs taken after termination reduce the amount of back pay owed by the employer. A grievant must make reasonable efforts to mitigate. Wayne State University (1998) involved a wrongfully discharged grounds department employee who did not seek employment in the six-month period immediately prior to his reinstatement. The arbitrator denied back pay for that six-month period because numerous well-paying jobs were available in 1998 for a person with the grievant's skills.

Some employees work two or more jobs. Outside earnings are not deducted from the back pay needed to make an employee whole if these earnings did not increase after a wrongful discharge. In DeVry Institute of Technology (1986), the grievant had outside earnings from a photography business that began before discharge and continued afterwards. The arbitrator excluded these earnings when calculating the employer's back pay liability after a wrongful discharge.

Delays in bringing a case to arbitration can increase the amount of lost earnings in discharge cases. If the employee or the union contributed to the delay, then the arbitrator may not hold the employer liable for some of the lost wages.[53]

In wrongful discharge cases where the employee bears some fault, many arbitrators reduce back pay, deny seniority credit for the time after discharge but before reinstatement, or require the employee to obtain counseling or substance abuse treatment. But other arbitrators see the appropriate remedy as dichotomous: either full reinstatement, including back pay and seniority credit, or no reinstatement. In Drexel University (1985), the arbitrator reinstated the employee but put him on probation for the first 90 days. At the University of Cincinnati, the arbitrator reinstated the employee, but ruled the employer "shall have the right to dismiss her summarily, with no right of Grievant to file a grievance with respect to such termination, if she should have more than two unexcused absences" or be tardy for work by more than five minutes more than twice within 180 days of reinstatement.[54]

CONCLUSION

Contract wording varies, and the exact wording can affect an arbitrator's interpretation of a collective bargaining agreement. Still, "All conscientious arbitrators remain loyal to the concept that the contracting parties' intent, as best we can discern it, lies at the very heart of our endeavors."[55]

"The grievance and arbitration system may well be collective bargaining's foremost contribution to the American workplace," argues Theodore St. Antoine, a labor law scholar. "To the employee it means freedom from arbitrary treatment. To the employer it means a peaceful resolution of disputes that could otherwise lead to work stoppages and lost production."[56] A better understanding by union and employer representatives of how arbitration works can increase the ability of this process to attain salutary ends.

NOTES

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[1] Sherman Dorn, "Why unions need competent administrators on the other side," blog posting October 27, 2009, at http://shermandorn.com/ accessed October 31, 2009.

[2] See, for example, Euben and Lee, 2006.

[3] Saltzman, 2008.

[4] Cook County College Teachers Union, 1978.

[5] *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), at 597.

[6] Ibid., at 598.

[7] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

[8] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[9] Ibid., at 582-883.

[10] University of Dubuque, 1980, at 426.

[11] *Wiley v. Livingston*, 376 U.S. 543 (1964).

[12] Ibid.

[13] Ibid. at 211.

[14] Los Angeles Community College District, 1994, at 1178.

[15] Ruben, 2003, 217.

[16] 1985, at 580-581.

[17] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[18] University of California, Berkeley, 1989.

[19] Ruben, 2003, 346-347.

[20] 106 LA 292, 1995.

[21] Ruben, 374.

[22] University of Michigan, 2000, at 1401, note 24.

[23] Cincinnati State Technical and Community College, 2000, at 158.

[24] Ruben, 2003, 950-951.

[25] Ibid., 949.

[26] University of California Davis, 1992, at 534.

[27] Los Angeles Community College District, 1985, at 990.

[28] Michigan State University, 1995, at 520-521.

[29] Mittenthal, 1960, at 1030.

[30] Ibid., at 1029.

[31] 1979, at 850.

[32] University of Alaska, 2004, at 243.

[33] California State University, 1986, at 550.

[34] University of Illinois, 1992.

[35] *Alexander v. Gardner-Denver Co.* 415 U.S. 36 at 57.

[36] Triton College, 1996, at 798.

[37] Ruben, 2003, 560-560.

[38] Ibid., 608-609.

[39] Ibid., 620-621.

[40] Augsburg College, 1988, at 1173.

[41] Ruben, 2003, 634-636.

[42] Yale University, 1969, at 486.

[43] 1977, at 1005.

[44] Yale University, 1975, at 437.

[45] Ruben, 2003, 743-744.

[46] Ibid., 829-831.

[47] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

[48] Ruben, 2003, 1191-92.

[49] Ibid., 1214-1215.

[50] Ibid., 1216-1217.

[51] *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

[52] Ibid., 1216-1220.

[53] University of Minnesota, 1998, and University of Pennsylvania, 1992.

[54] 1987, at 392.

[55] St. Antoine, 2005, viii.

[56] Ibid., ix.

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