CHAPTER VI

THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYMENT DISPUTES

I. ARBITRATION OF REPRESENTATION AND BARGAINING UNIT QUESTIONS IN PUBLIC EMPLOYMENT DISPUTES

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Barely 10 years ago the American Bar Association reported that the field of public employee unionism was one in which there was no general interest; it was unpreempted, unoccupied, and unwanted. Surely recent developments in this field provide some slight additional evidence that the rate of change in our society can at times be almost exponential.

In the federal government, in the last five years, over 1,000 exclusive bargaining units have been created and are in business, and this figure excludes the traditionally unionized postal service, which alone has 23,000 units. In over a dozen of our states new or contemplated legislation is concerned with the unremitting demands of public employees for treatment akin to that received by workers in the private sector. In the important area of public education, developments are proceeding so rapidly that it is difficult to say that the employment relationship is anything like it was five years ago. Truly, public employee unionism is today the greatest growth stock of the American union movement. It is a little early to say whether this growth in public employee unionism will be matched by a related increase in grievance arbitration. It is clear, however, that problems unusual in grievance arbitration

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in private industry are increasingly being presented to arbitrators in public employee disputes.

My assignment is briefly to outline the extent and nature of the use of arbitration to resolve disputes that have arisen over representation and bargaining-unit issues in the public sector. For the sake of convenience and because the situations are quite different, I will divide my comments into two areas: (1) disputes arising in the federal service and (2) disputes involving state and municipal employees, including those in public education.

Arbitration of Representation Issues in the Federal Service

Federal Executive Order 10988, signed by President Kennedy on January 17, 1962, established a wholly new framework to govern the relations between federal agencies and organizations which represent federal employees. Under the order, an employee organization which represents a majority of the employees "in an appropriate unit" is entitled to exclusive recognition. Section 6 (a) of the order provides that "Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned . . ."

The broadness of this language is obvious. It provided little specific guidance to the individual agencies that were charged under Section 11 of the order with responsibility "for determining . . . whether a unit is appropriate . . ." Obviously employee organizations and federal agencies could disagree and have disagreed on whether particular bargaining units requested by employee organizations were appropriate.

Section 11 provides that in such circumstances either party may apply to the Secretary of Labor, who shall nominate from the Federal Mediation and Conciliation Service National Panel of Arbitrators a neutral to investigate the facts and issue an advisory decision as to the appropriateness of the requested unit. It should be noted specifically that the arbitrator's award is not binding, but only advisory to the head of the agency. Moreover, by analogy with the private sector, the order provides that all costs of the arbitrator's award shall be paid by the government, in this case by the agency to which the award relates.

Under the federal order, 154 requests for the nomination of an arbitrator had been filed through the end of 1966. Such requests have resulted in 51 decisions: 20 in 1963, 14 in 1964, 8 in 1965, 8 in 1966, and 1 thus far in 1967. Forty-five different arbitrators, over half of whom have been members of this Academy, have rendered these awards. They have ordinarily been selected by the agency and employee organization, using a method of their choosing, from a panel of potential arbitrators nominated by the Secretary of Labor.

Some have criticized this procedure on the basis that *ad hoc* advisory arbitration has meant a lack of consistency in unit determinations.[1] I cannot agree with this conclusion for several reasons. First, as the figures I cited a moment ago show, after the first several years of the federal program the number of unit arbitrations found necessary has dropped significantly despite a fairly steady growth in new-unit formation. In fact, recent disputes going to arbitration have been increasingly concerned with challenges to the conduct of elections rather than unit or representation issues. Second, because 47 of the 154 applications for arbitration have been withdrawn, I infer that we have provided some consistent body of decisions. The most common reason for withdrawal, it is believed, is that the issue in dispute was resolved in some other arbitration.[2] Finally, I believe that examination of a number of the awards does show a pattern of decision at least as reliable as any that might have been generated by some "little NLRB."

A number of early arbitrations arose because an employee organization sought a craft, functional, or blue collar unit whereas the agency and/or some other union contended that an activity or installation-wide unit was more appropriate. Almost without exception the arbitrators concluded that it was not their job to determine the *most* appropriate unit; they concluded that if what the employee organization sought was *an* appropriate unit, it might have the unit which it sought. This view was clearly expounded by Harold Davey in a decision in which he permitted the

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1 For example, Jean T. McKelvey, "The Role of State Agencies in Public Employee Labor Relations," 20 *Industrial and Labor Relations Review* 181 (January 1967).
2 Statement of Louis Wallerstein, Chief, Division of Federal Employee Management Relations, U.S. Department of Labor, January 24, 1967.

Brotherhood of Firemen and Oilers to carve out a functional unit despite the protests of the Machinists and the Department of the Army, both of which favored an all-inclusive blue collar unit. He stated:

> . . . Executive Order 10988 does not contemplate, as I construe it, a requirement of a finding as to *the* most appropriate unit. On the contrary, it clearly contemplates that under certain circumstances multiple units may be found to be appropriate . . .[3]

Consensus on this point among most arbitrators selected in federal unit situations has reduced agency rejections of requested units by an unknown but certainly substantial amount.

But what are the circumstances under which multiple or partial units may be appropriate? The problem, of course, is to determine what factors demonstrate the "clear and identifiable community of interest among the employees concerned" as called for by Section 6 (a) of the order.

In general, arbitrators have identified the following five criteria as demonstrating a community of interest, particularly when several are present:

(1) All of the employees involved work at a common work site.
(2) All have a common supervisor at the work site or in some reasonably proximate relationship.
(3) All employees in the proposed unit have a common skill or educational requirement.
(4) All of the employees involved are part of an integrated work process or contribute to a continuous work flow.
(5) All of the employees have similar working conditions.

In addition to these general criteria, it is also generally agreed that wage-board employees, who may be characterized loosely as blue collar workers, have sufficient differences in the nature of their work and basis of pay that they may be in a unit separate from classified or graded employees if they so desire. Thus, most arbitrators, when faced with a choice between an installation-wide and an ungraded unit, have recommended the ungraded or blue collar unit as appropriate.

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[3] "Arbitrator's Advisory Opinion to the Secretary of the Army in the Matter of Rock Island Arsenal," BNA, *Government Employee Relations Report,* January 13, 1964, p. 4.

In nearly all situations in which craft units were in dispute, the craft units were ruled appropriate provided the petitioning union had traditionally and historically represented the craft or class of employees involved. Functional units have been generally approved if all the employees involved were responsible for one clearly defined and identifiable task, and if the unit included all the employees in the organizational unit performing the task. In functional-unit cases it has generally been emphasized that the requested unit involved a distinct and homogeneous group of employees with a distinctive job, that all the group employed common skills (though perhaps at differing levels of proficiency or experience), and that they had common supervision and similar working conditions.

Clerical units have also been commonly supported where they have been found to be composed solely of white collar classified employees with a common supervisor, common work site, and similar working conditions. In the case of requested units involving professionally or technically oriented employees, common educational or skill requirements have been the major factors emphasized in finding a community of interest. If all of the group have college degrees, or have passed a required training or apprenticeship program, arbitrators have generally found a community of interest and recommended favorably on the unit requested.[4]

In sum, the body of decisions that permit the foregoing generalizations have been sufficiently alike, and broadly enough publicized, so that most federal industrial relations managers now feel confident in most situations to predict what arbitrators will do. They therefore take relatively fewer disputes to arbitration. The cases now coming up commonly relate to peculiar situations, such as requests for units involving all employees in a particular division or bureau of an agency, or all employees in a particular wing of a building. In these situations agency resistance is usually predicated on a suspicion that the requested unit is based on the extent of union organization among the employees involved, a factor specifically stated by E.O. 10988 not to provide the sole basis for exclusive recognition.

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[4] Greater detail on some of these points may be found in *Federal Employee Unit Arbitration*, Labor-Management Services Administration, U.S. Department of Labor, June 1964.

One interesting aspect of the federal program has been the extent of voluntary agency compliance with advisory awards. Despite the fact that federal agencies have "lost" well over half the awards, the arbitrator's recommendations have been accepted in all but one or two minor instances. The General Counsel of the National Labor Relations Board, commenting as an employer on a case which the NLRB lost, stated what has been the general attitude:

> While the Arbitrator's decision is only advisory under Executive Order No. 10988, the National Labor Relations Board and the Courts have recognized that it is the national labor policy to encourage and support the private arbitration of labor disputes. On the basis of this policy, the general scheme of Executive Order No. 10988, and the fact that it cannot be said that the Arbitrator was clearly erroneous in his ultimate decision, the General Counsel will accept and follow the Arbitrator's decision.[5]

Another federal industrial relations manager stated his view of advisory awards to me in even more succinct fashion. He said, "I look at the matter much as does the private employer considering whether to go to court to upset an arbitrator's award. Barring malfeasance in office or the arbitrator's exceeding his jurisdiction, I recommend that we accept all awards and live with them as best we can."

Arbitration of Representation Issues by State and Local Government

It is often said that one of the virtues of our federal system of government is that it permits state and local experimentation in developing areas of public policy. In the field we are discussing today, nothing could be more true. What has emerged at the local government level, in the words of one commentator, "is a crazy-quilt pattern which defies rational analysis and understanding."

Some form of legislation favoring collective bargaining for public employees has been adopted in 13 of our states, but the nature of these laws—their coverage, administrative machinery, permissible scope of bargaining, and impasse procedures—is almost infinitely varied. In Wisconsin, for example, one act applies

[5] Supplemental Decision on Appropriate Bargaining Units, General Counsel, NLRB, March 1964.

to municipal employees, including teachers, and a second applies to state employees. Somewhat similarly, in Connecticut there are separate acts for municipal employees and teachers, but none for state employees. In Michigan, one act covers all public employees except that the state civil service and possibly the employees of the state universities are exempted. In Washington and California, separate laws have been adopted for teachers. In Minnesota, teachers have been excluded from the coverage of an act which covers all other public employees. In Rhode Island, police are treated separately from other public employees, but in Massachusetts, Michigan, and other states they are not. In Wisconsin, police are excluded from the general coverage of the law but may use the fact-finding procedures of the Wisconsin Employment Relations Board. And so it goes.

So far as bargaining-unit questions are concerned, most states have adopted the principle of exclusive representation. In California, however, proportional representation on bargaining committees has been adopted for teacher units only. In Wisconsin, the law specifically makes provision for craft units. In Connecticut, the State Labor Relations Board has approved many craft units despite a legislative history which admonishes it to keep the unit as broad as possible. I should add at this point that the question of unit determination in public employment is not simply a sterile exercise in boundary setting, for it is in fact pregnant with implications for the scope of bargainable issues in the negotiations that will follow.

The question of whether units should be composed of both supervisors and employees whom they supervise has been particularly thorny in some 30 elections contested by affiliates of the American Federation of Teachers and the National Education Association. Though neither organization is consistent in its approach to this issue, generally the AFT favors teachers-only units and the NEA the broader grouping. In Michigan, the law specifically excludes supervisors from teacher bargaining units. In Connecticut, a mixed unit is possible if both groups favor the idea in self-determination, Globe-type elections, and the election results have gone both ways in different cities. Most of the existing state statutes, however, say little or nothing on the subjects of appropriate units and supervisory inclusion or exclusion. Thus,

resolution of these questions is left to unilateral agency discretion, negotiation between the parties, or determination of administrative agencies.

In some jurisdictions the results of this imprecision have been reasonably good, particularly where policies have been formulated by disinterested parties who are competent in the field. This is largely true of the various state agencies—in some states more than one—given authority to implement the statutes. In other circumstances, however, policies have been unilaterally set by the employer or by inexperienced groups, such as the League of Women Voters, leading to intense employee resentment and vitiation of the very purposes for which the new statutes or policies were promulgated. For example, one school board reversed a year-long refusal to bargain without advance notice, and scheduled an election a week later. It made a unilateral unit determination only four days before the polls opened. In circumstances like these it is hardly surprising that the public demand for mature and peaceful relationships has not been quickly met.

In all of this ferment there has been relatively little resort to neutral third-party arbitration, either because unilateral or negotiated decisions have proved satisfactory or because the new statutes located administrative decision-making power in a state agency. In a few states, however—those in which employee organizations are strong and militant and in which no legislative policy-making has yet become effective—resort to neutral advisory arbitration has occurred. Notable among such states are New York, New Jersey, Pennsylvania, and Illinois.

A number of such cases, all involving teacher units, have occurred in the last several years.[6] In each of these situations an experienced arbitrator was asked to recommend solutions for bargaining-unit problems, supervisory definition and participation, election procedures, and other such matters.

For example, in a dispute in New Rochelle, N.Y., Ben Wolf recommended both the constitution of the bargaining unit and the election procedures. George Hildebrand was given similar re-

[6] See Robert E. Doherty, "Determination of Bargaining Units and Election Procedures in Public School Teacher Representation Elections," 19 *Industrial and Labor Relations Review* 573-95 (July 1966).

sponsibilities in Newark, N.J., and Lew Gill recommended the bargaining unit and the place of election in the city of Philadelphia. In Rochester, N.Y., Walt Oberer did not deal with the bargaining-unit question because this had already been unilaterally determined by the school board.

A fundamental issue in all of these cases that involved unit determination was the question of whether supervisors, particularly department chairmen, should be included. In New Rochelle they were excluded because they were sometimes required to evaluate classroom teachers. In Philadelphia they were included because their role was "quite comparable to working foremen in industrial plants." In Newark, Hildebrand used a formula to decide inclusion or exclusion, based upon whether department chairmen taught more or less than 50 percent of the time. In a New York City arbitration they were excluded because they were deemed to be representatives of management.

Similar variances exist in cities where the school board unilaterally determined the unit. In Rochester, department chairmen were excluded. In Cleveland and Chicago they were included, along with assistant principals. In Detroit, on the other hand, both categories were excluded. Parenthetically, I might add that the excluded principals and assistant principals in Detroit have just organized their own unit in order to regain through bargaining some of "their" rights that they felt were given away in the classroom-teacher contract.

Too few cases exist to permit any broad generalizations concerning the reason that this kind of "57 varieties" is being created. At this point, I can best echo Robert Doherty. These differences seem to be attributable less to the predilections and whims of individual arbitrators than to the uniqueness of individual school administrative systems and the diverse aspirations of competing teacher organizations.[7]

In concluding this summary analysis of neutral participation in public representation disputes, I would like to cite a significant set of recommendations recently issued in Cook County, Ill.[8] A

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[7] *Id.* at 576.

[8] "Report on Collective Bargaining and County Public Aid Employees," Cook County Commissioners' Fact Finding Board, October 12, 1966.

tripartite panel chaired by Alex Elson was asked to consider whether an election should be held among county public-aid employees to select an exclusive bargaining representative. Despite the fact that the Illinois Legislature, by granting bargaining rights to two specific groups of government employees, had inferentially denied it to others, and despite the legal opinion of the State's Attorney of Cook County that the County Board could not enter a bargaining arrangement, the fact-finding board recommended that it should. After serious and lengthy consideration, the Elson board recommended that a bargaining unit be determined by agreement of the parties or, failing agreement, by arbitration; that an election be held; and that a union obtaining a majority be recognized as the exclusive bargaining representative.

I cite this case not because I am shocked by it; on the contrary, I fully agree. The real point is that this board was appointed because of the demonstrated willingness of the employees involved to go on strike to obtain recognition rights. If state, local, and other units of government do not provide public employees with viable procedures whereby they can make known their complaints and desires—whereby they can participate in the formulation and administration of personnel policies—their failure to do so can only lead to recurrent strife in the public sector. If governments do not provide representation procedures for their employees, then I conclude that neutrals can and very probably will take whatever opportunities are offered to do it for them.

II. ROLE OF THE NEUTRAL IN GRIEVANCE ARBITRATION IN PUBLIC EMPLOYMENT

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A. Introduction

At the 1958 meeting of the Academy, Charles Killingsworth, in his paper on "Grievance Adjudication in Public Employment," referred to the paucity of established collective bargaining rela-

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