CHAPTER 6

NEW DIMENSIONS IN PUBLIC-SECTOR GRIEVANCE ARBITRATION

I. MANAGEMENT RIGHTS AND THE PROFESSIONAL EMPLOYEE

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The past 20 years have seen the accelerated development of a new kind of unionism—organizations of professionals whose objectives bring them into severe clashes with traditional management positions.

The story of professional unionism outside of teachers, nurses, and some groups of engineers is largely the story of employees in various forms of public service in both the United States and Canada. In the private sector the number of professional employees represented in collective bargaining is very small so that there is little such experience on which to draw. Also, many enterprises which employed professionals and may have been considered "private" in the past no longer qualify under this heading. In Canada there are now over 1000 *public* general hospitals.

It is inevitable that differences of interest will arise between managers and those they employ. Since both work for the same organization, one would assume they have a common goal—namely, the success of their department or service. But, in fact, they can and do disagree on specific issues. Differences can be resolved through either unilateral management decision-making or some kind of bilateral, employer-employee system for compromises reached in committee meetings. Individual bargaining, which is philosophically most acceptable to professionals, is totally unrealistic for most employees of large organizations.

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Those of us who are arbitrators are already participants in a new kind of ball game—an arena in which management flexibility in dealing with professionals is sorely tested, and if the experience I've had thus far is a guide, I predict managerial authority will be reduced. The term "exclusive management rights" will be subjected to further battering.

I do not propose to replay the familiar arguments we have all heard on increasing the scope of collective bargaining by whittling away at management rights. What I would like to call to your notice is the new types of issues that are appearing on our arbitration agendas for which the old rules won't work—the issues for which previous collective agreements aren't much help. The arbitrator will search in vain for precedent guidance, and the courts have not yet interested themselves in such issues. The arbitrator is not a substitute for the collective bargaining process. These issues are best resolved by the parties, but the arbitrator nevertheless is called on because these problems are so unique that the parties resort to arbitration, not in rancor, but in despair, as a plea for help or guidance.

In the absence of any other useful peg on which to hang his decision, the arbitrator has frequently fallen back on a management rights clause to support his decision which took the management line. This has happened even in cases where the employer has not stressed his prerogatives.

But what to do in a grievance arbitration matter when, for instance, the professional employee, the grievant in front of you, regards herself more capable than her manager of determining the quality of service of her organization?

Consider with me two recent arbitration matters, both involving highly trained and qualified psychiatric nurses, whose disagreement with management over quality of nursing care led to the filing of grievances and subsequent arbitration. Issues of money and status were not directly involved. Both cases go to the heart of the matter of whether management can direct the professional workforce and expect the same degree of unquestioning obedience to its orders it presumes to receive from its blue-collar employees.

In a large hospital in Montreal, Brighitta was employed as an assistant head psychiatric nurse. Her qualifications were impeccable. Her training was thorough, her education of the highest level. Her devotion to duty throughout 16 years of service was praised on all sides. Two new young psychiatrists were added to

the staff of the hospital in supervisory positions. Brighitta was working under their direction. Within a short period after their taking charge, Brighitta was transferred to the Dermatology Department as assistant head nurse. She had always been a psychiatric nurse. That is all she ever wanted to be. She grieved. The case came before me.

There ensued a long parade of witnesses on the union side, including psychiatrists, who testified to Brighitta's value. Management agreed with the positive assessment of her qualities. On management's side, the number of witnesses was small, but the two recently appointed psychiatrists were adamant—they could not work with Brighitta in their unit. Accounts of altercations with fellow employees were given. Complaints about endless arguing were heard.

What was the essence of the difference in the two opposing views? In addition to personality clashes, which came about after the change, Brighitta did not believe in Psycho Drama, a technique espoused by the young doctors. According to them, by her actions and lack of enthusiasm, she denigrated their work. Consequently, the hospital management transferred Brighitta to another department for which she had no special training or aptitude or interest. Management relied on the management rights clause in the agreement giving them the power to transfer employees.

In another hospital, a case involving the Head Nurses Association came before me. In this matter, Cathy, also a trained psychiatric nurse, is an acknowledged specialist in the care and treatment of adolescents who are potentially and actually dangerous to themselves and their associates. Everyone in the hospital testified that she is the best nurse they have; her patients love and trust her; her fellow workers depend on her.

The grievance in arbitration stemmed from a fundamental difference in approach toward allocation of staff services. In the assigning of staff time, it turned out that on the evening shift, Cathy was responsible for only 65 patients while her fellow shift nurses were responsible for about 1000 altogether. However, her fellow workers were not complaining. They enthusiastically testified at the arbitration hearing that their patients, mostly adults, did not present the severe problems which the adolescents in psychiatric care caused because of their destructive tendencies. They reiterated that Cathy was performing first-class services of a rare and unusually high caliber. They were content to leave the adolescents in Cathy's care.

However, in the meantime, the hospital administration decided to reorganize staff assignments and decided that Cathy and the other two nursing staff were to divide over 1000 patients equally among the three of them. The change was effected. Cathy protested in informal meetings to no avail; the union objected on her behalf and finally grieved.

All of the argument centered on the quality of patient care, since there had been no allegation by the hospital that Cathy had not been working hard enough. The argument centered on the rationalization of staff services and the management rights clause was invoked.

After long protracted debate on arbitrability of the issue (it was resolved in favor of the association), the arbitrator was faced with one fascinating dilemma of this newest industrial relations arena. How does one regard the special relationship of management with its employed professionals? Can management have it both ways? Can the same management seek out highly qualified professionals willing to involve themselves in the maintenance of high standards, encourage them to solve problems on their own, and then turn around in a distinct role change and hand down dicta from on high? Can they then treat these nurses and technicians in contractual relationships the same way they treat their blue-collar employees? Can management expect from this group unquestioning acceptance of their decisions? The dilemma is compounded because the everyday working environment is quite different from the usual blue-collar arrangements. In many work activities, the manager and professional work side by side. They share decision-making responsibility; they share the frustrations of putting across new ideas to top managerial executives and of fighting together for budget allocations. A manager may defer on many occasions to a professional since the practitioner's knowledge and techniques may be more up-to-date than his own. There are even rare instances where the capriciousness or ineptitude of management becomes apparent and can't be easily hidden from an organization.

Two incidents indicative of these highly charged professional situations come to mind. The first involved a geographer in a large university. The geographer, assigned to a lonely outpost in the Arctic, arrived at certain scientific conclusions which ran counter to the theories of his dean, a much older and less sophisticated scientist. In pressing his dean to publish his findings, the younger Arctic expert offended his dean to the point where

the dean refused to renew his university contract for reappointment. All of the university officials who were consulted agreed that the dean was clearly in the wrong, but it was "one of those things—one doesn't go against the establishment." This is the stuff that professional unionism is made of, organized in defense against the "old boy net."

Canada has among its organized Federal Government professionals one of the unique unions in the world, the Professional Association of Foreign Service Officers, or the diplomats' union. This association is unusual because it grants full bargaining rights save the right to strike to its members, who include ambassadors in a few instances. (In fact, one of our distinguished Academy members, Chief Judge Alan B. Gold, has served as mediator in two of their contractual disputes.) The diplomats' group has five grievance officers in major centers around the world, since they regard as unrealistic the hope that their special problems will engage the attention of "functionnaires" sitting at desks in Ottawa.

An account of their grievances sounds like pages from an Ian Fleming novel. One will suffice for illustration. A dedicated junior embassy officer is assigned to a Canadian ambassador in a small European country. Total number of foreign-post employees—10. The ambassador is an alcoholic. The junior officer covers for him in matters involving official documents and, to the extent possible, in social functions. All the while the junior is sending frantic messages back to officials in Ottawa to urge them to replace the ambassador. No action is taken; the ambassador is powerful, influential, and a heavy financial contributor to the party in power. Ranks of top officialdom are closed.

There is more at stake here than working conditions or career enhancement of the junior. He knows he'll be transferred and advanced eventually if he can hold out, but he's humiliated by the damage to the reputation of his country. The local nationals feel slighted. They can't help but wonder about a country which would send such a person abroad to represent them and conclude they are not highly regarded by the ambassador's country. It is this sort of problem which convinced the professional diplomats of Canada they couldn't count on the upper echelons of their civil service to solve their problems. They decided to take matters into their own hands. They look on their grievance procedures as aids in bringing about improvements in the qual-

ity of foreign-affairs service. It should be borne in mind that the grievance procedure need not actually be invoked. Its mere availability may be all the force needed to get the attention of the ultimate authorities, for a problem will not necessarily go away, even if ignored.

How, then, would the distinguished arbitrators in this audience interpret a management rights clause in the PAFSO Agreement which reads: "Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the Public Service"?

Do arbitrators have an added responsibility in matters where incompetence is used as the excuse given for terminations? The kinds of cases encountered, for instance, can in reality be personality clashes, square pegs in round holes, nonconformists in large routinized organizations. How far can management rights clauses be expected to extend when these types of friction can cause measurable psychological damage and disrupt the operations of a university department or a hospital unit?

Increasingly, arbitrators will be called upon to decide upon grievances that arise from different roots than what has been hitherto called a change in normal working conditions—wages, reclassification, overtime, seniority, and so on. The newer types of cases will involve the problems I have described. They stem from the essence of professionalism—from the conscience, correct or incorrect, of the highly trained, educated employees who have a strong sense of what they regard as high-quality performance. Good professionals want to concern themselves as much with how a job is performed as how they are paid for the job. Many factors are involved—education, work experience, professional reputations among their peer group, job satisfaction, and their sense of responsibility to their organizations.

There are critical questions which deeply trouble this arbitrator. What should our primary concern be when the language in the agreement can be interpreted in different ways? For example, should it be the good of a hospital as an institution, and its administrative procedures, its managerial image, or should we dare to make judgments on what is good for the patients for whom the hospital exists? To put it in blunt personal terms, do we want the severely emotionally disturbed child who needs hospital care to have a Cathy with 65 patients looking after him or a Cathy who must be responsible for 350 patients because it makes more administrative sense to the hospital?

Obviously, the two concerns are not exclusive and should be complementary. But frequently, as is the case described above, those directly involved in providing the services feel they should have some voice in the type of services given. Authorities in the personnel office are considered to be more concerned with budgets than with personal patient care. Should only management's voice be heard?

The difficulties faced by the arbitrator are compounded because so many of these matters are couched in language which obscures the real issues. Grievances on work load or assignment come to the arbitrator couched in terms of the number of doctors in clinics or emergency rooms, or the availability of physical therapists. Those issues which involve the quality of patient care are of great concern at all professional levels. But in many cases economic concerns overlap concerns of professional quality. Interns demanding shorter schedules will work fewer hours and cost the hospital more money, but they may also provide better care if they get proper sleep, some television series to the contrary! Professors who grieve at increased student loads or object to elimination of some courses are, in a sense, trying to protect their jobs. But, in another sense, they are also vitally concerned with the effects of these proposed changes on the quality of the education in their institution.

The position of the administrator in these situations is not an enviable one. Forced to come before the arbitrator to defend cost-cutting or denigration of quality by increasing work load, he sometimes, in desperation, falls back on the management rights clause, but rarely does he enter into this line of defense with any personal enthusiasm. After all, he himself was recently in the position of the professional before him. He prefers leaving to his legal counsel the responsibility for the argument. The attorney, not part of the working environment, can take up the cudgel in defense of the administration without having to face the grievant the next day when a hospital emergency calls for all the best brains and performance of which the professional is capable.

A usual defense for the manager is that he must insist on uniform policies which equate the needs of the organization among departments which have completely different sets of problems.

While I, as arbitrator, would be the first to recognize the necessity of preserving the maximum *necessary* managerial

prerogatives for employers, I am equally concerned about the *responsibilities* of management. It is the apparent failure of management to face up to decision-making responsibilities that has contributed to a deterioration of employer-employee relations in many public jurisdictions. Any competent management should be able to recognize the signs long before organized employees are forced to take drastic action in order to emphasize the extent of their dissatisfaction.

Procrastination and delay are too often the characteristics of the exercise of managerial responsibility in the public service. These sometimes stem from the naîve and outmoded belief that public employees are somehow different from those employed in the private sector and that they will not resort to such drastic action as a strike.

Looming ahead for cases involving professionals are new frontiers in arbitral precedent-making. No matter the nature of the employing institution, few individuals outside of show business or sports believe they have sufficient personal clout to effectively control their own careers or affect the direction of their employer's policies. So we can count on increased dissatisfaction with the authority and decision-making powers that be. More and more professionals will turn to unions, associations, or some other synonym to secure rights in areas that are at the heart of their ability to properly perform their professional duties. There will be new strains on standard grievance procedures and fascinating new issues to engage the arbitrators.