IV. THE CLASH OVER WHAT IS BARGAINABLE IN THE PUBLIC SCHOOLS AND ITS CONSEQUENCES FOR THE ARBITRATOR

LAWRENCE T. HOLDEN, JR.*

In the realm of public-school labor relations, some issues have a familiar look, while others do not. Familiar to us are the arguments over what is bargainable and what is not; what may be less familiar to us is the *process* by which such matters are being decided. I shall talk about the novel manner in which scope-of-bargaining issues in the schools are being resolved and the consequences of this for the arbitrator. I have drawn heavily upon my native state of Massachusetts for examples in this paper, but my experience informs me that these examples are not unique to Massachusetts.

Statutory Development of School-Board and Teacher Rights

First, a word needs to be said about the historical development of statutory law regarding school-board prerogatives and teacher rights. Early on, many states passed legislation that set forth the powers and duties of local school boards and that provided certain statutory protections for teachers. For example, in Massachusetts the local school committees are entrusted by statute with the "general charge of all the public schools,"[1] including the right to elect, contract with, and promote teachers following nomination of such teachers by the superintendent of schools.[2] Nontenured teachers must be notified by April 15 if they are not to be reemployed for the following school year.[3] If a teacher is to receive tenure, it must be conferred within a certain period of time.[4] Teacher dismissal is governed by certain procedures and standards,[5] and tenured teachers may appeal their dismissal to the courts for *de novo* review.[6]

*Member, National Academy of Arbitrators, Lincoln, Mass.
[1]Mass. Gen. Laws, Ch. 71, Sec. 37.
[2]Mass. Gen. Laws, Ch. 71, Sec. 38.
[3]Mass. Gen. Laws, Ch. 71, Sec. 41.
[4]*Ibid.*
[5]Mass. Gen. Laws, Ch. 71, Sec. 42.
[6]Mass. Gen. Laws, Ch. 71, Sec. 43A.

Later in legislative time in many states came a collective bargaining law for teachers which afforded them the right to bargain collectively over the terms and conditions of their employment. In Massachusetts, for example, such law[7] makes no declaration as to what matters remain within the exclusive control of the school committee. Such law does provide that in the case of a conflict between the terms of a negotiated agreement and certain prior-existing statutory provisions, the terms of the negotiated agreement shall prevail,[8] but the law is silent with regard to the outcome of conflict between the terms of a negotiated agreement and the statutory provisions relating to superintendence of the schools and teacher rights cited above.

So what exists in Massachusetts, as in many other states, is a stratum of collective bargaining laws layered over a substratum of various statutes pertaining to the governance of the public schools and teacher rights.

Judicial Separation of Bargainable Issues From Management Rights in the Schools

The early statutes entrusting school boards with broad powers over the governance of schools are being construed by the courts as a declaration of management rights to be reconciled with the duty to bargain created in the later enactment of collective bargaining legislation.[9] Thus, the courts are arbitrating what they perceive as conflicts between one stratum of legislative enactment and another.[10]

In resolving such conflicts, the courts find themselves in the position of deciding what ought or ought not to be bargainable. They are confronting issues, such as tenure or class size, that

[7]Mass. Gen. Laws, Ch. 150E.

[8]Mass. Gen. Laws, Ch. 150E, Sec. 7.

[9]Sometimes a result is expressed in terms that the particular matter is a nondelegable power of the school board. It may be that in some of these cases the following consideration is being overlooked, which is that the imposition upon the parties of the duty to bargain over the terms and conditions of employment constitutes an express delegation of legislative authority to them; in other cases it may be that the outcome of a clash between statutory school-board powers and the duty to bargain is being expressed in a declaration that the particular subject comprises a nondelegable power of the school board.

[10]Also, it should be noted that in other instances conflict may arise from separate provisions in the same legislative enactment where, for example, matters of educational policy are exclusively reserved for determination by the school board, on the one hand, and a broad bargaining duty is mandated, on the other hand.

may be at once both a matter of educational policy and a matter affecting teacher working conditions. They, no doubt, are finding that distinctions between the polarities of management rights and bargainable conditions are not easily made, and they may or may not be aware of the kinds of compromises that have been worked out in the past by administrative agencies, such as the National Labor Relations Board and various state public employment relations boards, in resolving these difficult problems.

What is significant about these scope-of-bargaining decisions is that such decisions are in various instances being made by the courts without deferral to prior administrative-agency determination—namely, determination by that agency vested by law with the duty of administering the collective bargaining law. In the private sector, scope-of-bargaining questions are typically raised on refusal-to-bargain charges and are brought before the NLRB for decision; then the Board's determination may be reviewed by the courts. This is not always happening in public-sector school cases. What is happening is that scope questions are often being decided in the first instance by courts in the course of judicial review of arbitrators' awards. After an arbitrator has construed a provision of a collective bargaining agreement, one party may move to vacate the award on the ground that the parties had no authority to bargain over and reach agreement on the particular subject since that subject was reserved to the exclusive discretion of the school board by virtue of the statutory law giving the school board general powers of superintendence over the public schools.

Recent supreme court decisions in Massachusetts[11] and other jurisdictions[12] have resolved such scope-of-bargaining issues in the course of judicial review of arbitration awards. In such cases, I believe that grounds exist for arguing that the courts should confine their review of arbitration awards to the traditional bases, such as whether or not the award drew its essence from

[11] *Boston Teachers Union, Local 66, American Federation of Teachers (AFL-CIO)* v. *School Committee of Boston,* 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707; *School Committee of Hanover* v. *Curry,* 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144, 92 LRRM 2338 (1976); *School Committee of Braintree* v. *Raymond,* 1976 Mass. Adv. Sh. 396, 343 N.E.2d 145, 92 LRRM 2339 (1976); *Dennis-Yarmouth Regional School Committee* v. *Dennis Teachers' Ass'n,* 1977 Mass. Adv. Sh. 428, 94 LRRM 3187 (1977).

[12] *Dunellen Board of Education* v. *Dunellen Education Ass'n,* 64 N.J. 17, 311 A.2d 737, 85 LRRM 2131 (1973); compare *Belanger* v. *Matteson,* 115 R.I. 332, 346 A.2d 124, 91 LRRM 2003 (1975).

the collective bargaining agreement, and that courts should decline to decide scope questions in this setting. Such a policy would have the effect of forcing the parties to funnel all scope questions first through the administrative agency whose job it is to decide these questions.

Let me cite an example: Suppose that the parties have agreed that class size shall not exceed a certain number of pupils during the life of the contract, and an arbitrator has so construed the contract. The arguments favoring judicial deferral on the question of whether or not class size is a bargainable subject follow. First, if the court did not defer, it would be putting itself in the position of deciding such an issue without the prior judgment from an administrative agency—an agency created presumably for the purpose of developing some expertise in making such judgments. Second, if the scope question is decided upon review of an arbitrator's award, it is being decided after the parties have struck their bargain, and an after-the-fact invalidation of some part of that bargain upsets the dynamics of the original bargain. On the other hand, if a scope question is raised on refusal-to-bargain charges, the foregoing consequence is avoided. Third, there exists a general trend in both statutory and decisional law to afford as much finality as possible to the settlement of grievance disputes. Is not this policy of finality weakened by permitting parties to litigate scope questions in the course of judicial review of arbitration awards, especially when such review could just as well be had by requiring scope issues to be channeled first through the forum of an administrative agency?

The Role of the Arbitrator in Dealing With Scope-of-Bargaining Issues

However, if we assume, these arguments notwithstanding, that scope issues will continue to be decided by the courts in the course of review of arbitral awards, what consequences does this have for arbitrators? One consequence is that arbitrators will continue to be faced with challenges to the arbitrability of a wide range of subjects. The challenger will assert that, despite the fact that the parties have a contractual provision on the subject, the subject was not a proper one for bargaining, as it falls within the exclusive prerogative of the school board. What does one do in such a case?

Let us take a particular example: Suppose that a state's highest court has broadly ruled that the subject of teacher reappointment cannot be the subject of either negotiation or arbitration because it falls within the purview of an exclusive management prerogative. Suppose further that the case that gave rise to this ruling factually involved the nonreappointment of a nontenured teacher in the year in which a tenure decision for that teacher had to be made. Now let us suppose that an arbitrator in a subsequent case is presented with a contract which provides that there must be just cause for nonreappointment of teachers, and the facts are that a nontenured teacher was not reappointed in a year in which a tenure decision for that teacher did not have to be made. The school board argues that the case is nonarbitrable in view of the supreme court ruling that reappointment decisions are exclusively committed to its determination. Should the arbitrator reach out and resolve an apparent conflict between the contract and external law, or should the arbitrator confine himself/herself to the contract and resolve the problem in contractual terms?

I offer the following arguments against reaching out in these circumstances to resolve an apparent conflict between the contract and external law. A reading of the developing decisional law on scope-of-bargaining issues indicates that judicial thinking is in a state of some flux as decisions are shaped, reshaped, and refined. Moreover, scope decisions are often being made by the courts without prior input from administrative agencies, and the courts, therefore, are facing a cold template. These factors do not make for stable precedents.

Also, varying facts can produce varying decisions. For instance, in my hypothetical supreme court ruling, might not the presence of the tenure factor have influenced the court's decision in its ruling on the exclusivity of the reappointment decision, and might not the absence of such a factor in my hypothetical arbitration case similarly affect judicial judgment?

Finally, let us not lose sight of the most important factor. It was the parties who mutually negotiated the troublesome provision into the contract; now, one of them is asking the arbitrator to rule it nonbargainable under circumstances where that party had ample opportunity during negotiations to raise the scope issue through refusal-to-bargain procedures and did not do so. If a party chooses not to raise a scope issue before an appropriate administrative agency in the first place, should an arbitrator

be sympathetic to a plea that the matter now be heard before him or her? I think not.

In sum, it seems to me that the better part of wisdom under these circumstances is for the arbitrator to confine himself/herself to the contract and not attempt any reconciliation between external law and the contract. However, if one nonetheless insists on going beyond the contract in order to effect a reconciliation for all time, I offer, as my last argument, a passage from Ozymandias[13]—the ancient king who sought to make permanent a great stone edifice to himself:

> "My name is Ozymandias, king of kings:
> Look on my works, ye Mighty, and despair!
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare
> The lone and level sands stretch far away."

Before I leave this subject, I think one further point is in order. It may happen that in scope cases a dual question of arbitrability is presented—dual in the sense that there is first an issue of whether the contract covers the particular subject in dispute, and if it does, then a scope-of-bargaining question may be presented as well. For example, a contract may provide that no teacher shall be denied a professional advantage without just cause. A claim may then be made that this clause is of sufficient breadth to include the matter of teacher reappointment. If that clause is so construed by the arbitrator, then such a construction may raise a further issue of arbitrability concerning the authority of the school board to agree to such a provision in light of judicial rulings on scope-of-bargaining matters. In this type of situation, I think that even though the arbitrator's mission remains one of interpreting the collective bargaining agreement only, the arbitrator should nonetheless be conversant with scope-of-bargaining developments under the pertinent collective bargaining law.

Impingement of Arbitral Relief Upon Management Prerogatives

A description of scope cases would not be complete without reference to another class of cases, somewhat separate and dis-

[13]The poem, *Ozymandias*, by Percy Bysshe Shelley.

tinct from those I have already mentioned. These are cases where the subject matter under review, such as teacher-evaluation procedures, are avowedly bargainable subjects, but the arbitral remedy, fashioned to redress the wrong, impacts upon a claimed statutory management prerogative. For example, let us assume that a contract sets forth a number of procedures that are to be followed with regard to teacher evaluation. Let us further assume that the arbitrator finds substantial violations of these procedures on the part of the school board. Let us then assume that the arbitrator believes that the terminated nontenured teacher ought to be returned to his/her job for the duration of another teaching year so that a proper evaluation can be made and so that the teacher may have a proper opportunity to improve his/her performance before the ultimate decision on reappointment is made again. Does a reinstatement order under these circumstances invade any exclusive management interest? How does such an order square with a school board's statutory right to appoint teachers? If the result of the reinstatement order in the above situation were to have the effect of conferring tenure upon the teacher, are the considerations different?

A number of courts[14] which have considered these issues have held that a reinstatement order, issued under circumstances comparable to those set forth in the hypothetical situation, is proper so long as the reinstatement order does not have the effect of conferring tenure upon the teacher. These courts recognize that arbitrators must be allowed some latitude in fashioning remedies to redress contractual wrongs, but they draw the line at an award that confers tenure. In the absence of an express statutory provision which speaks to the issue, they hold that the conferral of tenure remains the exclusive prerogative of the school board.

I might say, parenthetically, that while cases involving the reconciliation of arbitral remedies with management rights might technically be regarded as scope cases, I see here none of the reasons for initial deferral to an administrative agency as were advanced earlier in this paper on behalf of the other class

[14] *School Committee of West Bridgewater* v. *West Bridgewater Teachers' Association*, 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886, 94 LRRM 3189 (1977); *Board of Education, Bellmore-Merrick Central High School District* v. *Bellmore-Merrick United Secondary Teachers, Inc.*, 39 N.Y.2d 167, 347 N.E.2d 603, 92 LRRM 2244 (1976).

of scope cases. It seems to me that questions concerning scope of arbitral remedies are proper matters of first impression for the courts to decide.

With regard to the fashioning of arbitral remedies, an arbitrator derives his authority from the collective bargaining agreement and/or the submission agreement. Arbitral remedies should be reasonably related to the contractual wrong they seek to redress. There may be, for example, only a de minimis or technical violation of the contract that requires nothing more than a simple declaration of rights, or there may be more serious violations for which compensatory damages or reinstatement, or both, are appropriate. Arbitrators of public-school disputes are going to have to take increased account of court rulings that place limits on the scope of the arbitral relief which may be granted when such relief impinges upon cherished public policies. I think the best expression of the mix of factors that an arbitrator must take into account in fashioning remedial relief in this area is found in the remedy devised by one of our own colleagues when confronted with the following problem (and, by the way, this is *not* one of my cases):

A school board had not renewed the teaching contract of a nontenured teacher in that teacher's tenure year. The arbitrator found that the school board had committed violations of the teacher-evaluation procedures with the result that a proper evaluation had not been conducted. Recognizing that an ordinary reinstatement order under these circumstances would have the effect of conferring tenure upon the teacher, the arbitrator elected to reinstate the teacher to a further probationary term *without tenure* so that a contractually proper evaluation could be made of the teacher. That award was confirmed by the state's highest court.[15]

Conclusion

In conclusion, I would like to say that writing a paper of this sort is somewhat akin to trying to launch a homemade rocket. Sometimes you lose your guidance system; other times you experience some nasty explosions on the launch pad. In any event,

[15]See *Board of Education, Bellmore-Merrick Central High School District* v. *Bellmore-Merrick United Secondary Teachers, Inc.*, *supra* note 14.

now that this paper has been launched, I want to disclose to you the theme around which it was written, which was: "Everything has been thought of before. The problem is to think of it again."[16]

[16]Johann W. von Goethe.