II. A COMMENT ON THE ROLE OF GRIEVANCE ARBITRATION IN PUBLIC-SECTOR BARGAINING IN HAWAII

Edward H. Nakamura*

According to the program, this morning's panel discussion is on "How Others View Us and Vice Versa: Administrative and Judicial Critiques of the Arbitration Process." However, my remarks this morning will be related to the assigned topic only in a peripheral sense. And while the Hawaii experience may be different from that of other states, my remarks will be confined for the most part to a situation in Hawaii because of an ignorance of what is happening elsewhere and because I have reason to believe our experience is by no means unique.

If clear precedent emanating from the Hawaii Supreme Court is still vital, the relationship between the judicial process and the grievance arbitration process in Hawaii is undoubtedly governed by precepts enunciated in the *Steelworkers Trilogy.* While the court earlier had adopted a restrictive view of the authority conferred upon arbitrators, we began marching in cadence with the rest of the country in 1966 when the decision in a case involving an arbitration between Local Union 1260, IBEW, and the Hawaiian Telephone Company was issued.[1] Previously, in a case involving another local of the IBEW, Local 1357, and the telephone company,[2] the court had this to say about an arbitrator's authority:

> "Where an arbitration agreement contained in a collective bargaining agreement does not expressly confer upon the arbitrator jurisdiction to determine legal questions arising under the agreement but does limit his decision expressly to the terms and provisions of the agreement, the arbitrator has no authority to interpret or construe the provisions of collective bargaining but the court must determine the extent of the arbitrator's authority."

However, this narrow approach was unceremoniously abandoned with the following terse comment in the Local 1260 decision of 1966:

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*Associate Justice, Supreme Court of Hawaii, Honolulu, Hawaii.

[1] *In the Matter of the Arbitration Between Local 1260, IBEW, and the Hawaiian Telephone Co.*, 49 Haw. 53, 411 P.2d 134, 61 LRRM 2390 (1966).

[2] *In the Matter of the Arbitration Between Local Union 1357, International Brotherhood of Electrical Workers, A.F. of L., and Mutual Telephone Co.*, 40 Haw. 183 (1953).

> "It is conceded by the company that the law applicable in the case is federal and that the holding in *In the Matter of the Arbitration Between Local Union 1357, International Brotherhood of Electrical Workers, A.F. of L., and Mutual Telephone Company,* 40 Haw. 183, has been 'swept into oblivion.' "

And the court held that:

> "The question as to whether there was cause to discharge or suspend the employee under section 6.1 and 6.2 was determined by the arbitrator and so far as the arbitrator's decision concerns the interpretation and application of section 6, this court has no business weighing the merits of the grievance and the award."

The citations of authority made clear that the governing principles thereafter were to be those from the *Trilogy.* The court subsequently echoed similar sentiments in contexts of commercial arbitration.

While the discernible tensions between the judicial process and grievance arbitration in the private sector may be few, the advent of collective bargaining in the public sector has resulted in a regeneration of some old tensions. To put it mildly, our courts are being requested by public employers to reshape the broad powers heretofore entrusted to arbitrators to conform to a much narrower concept of collective bargaining—one which apparently does not allow much room for grievance resolution with the aid of neutral third parties.

The Hawaii Public Employment Relations Act, the ostensible basis for these pleas to redirect the course of grievance arbitration, at least in one sector of collective bargaining in Hawaii, was among the earlier and more comprehensive public-sector collective bargaining laws. Its enactment was mandated by a constitutional amendment approved in 1968. Article XIII, Section 2, of our constitution unequivocally provides that: "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." The statute implementing this right follows the private-sector model in most of its essential provisions. For example, it permits strikes by public employees, albeit only after the exhaustion of lengthy procedures designed to encourage the settlement of bargaining disputes and after a continuation of services essential to public health and safety has been assured by the designation of essential employees whose participation in strikes is proscribed. I believe the law follows the private paradigm in grievance arbitration, too.

That the private-sector model was selected by the Hawaii legislature is evident from the policy statement in the statute. The legislative declaration of policy reads:

> "The legislature finds that joint-decision making is the modern way of administering government.Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment.
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> "The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other terms and conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a public employment relations board to administer the provisions of this chapter."

The obligation to negotiate and enter into written agreements is reiterated elsewhere in the law.

The scope of bargaining decreed by the foregoing thus covers "matters of wages, hours, and other terms and conditions of employment," exactly what employers in the private sector are mandated to bargain on. And while a maintenance of "merit principles and the principle of equal pay for equal work" is also mandated, the objectives of constructive collective bargaining have hardly been inconsistent with these principles.

The negotiated agreements have, to no one's surprise, borne more than a slight resemblance to private-sector agreements, and provisions for the arbitration of grievances, to my knowledge, are included in all agreements covering public employees in Hawaii. But the public employers here, especially in the field of higher education, perceive differences in the laws governing the two sectors that could serve as the means to diminish the

scope of bargaining and to circumscribe the authority of third parties to intrude in their relations with employees. They urge that other statutory provisions have rendered arbitrators impotent in large areas where arbitrators traditionally have exercised much authority. The contention is that resort to arbitration on matters such as tenure denials and promotions is foreclosed by the law. The crucial language comes from the section entitled Scope of Negotiations, quoted earlier, and reads in pertinent part:

> "The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work . . . , or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies."

Some public employers view the relevant language as an ideal management rights clause that reserves all meaningful personnel actions unto themselves. At first sight, the language appears to lend itself readily to the foregoing view. But a closer look reveals that the public-sector collective bargaining law does not foreclose bargaining as contended. What apparently has been removed from bargaining are civil service protections for employees and the exercise of traditional management functions not subject to mandatory bargaining even in the private sector. There is a definite difference between the challenge of a decision not to fill a position by promotion and a grievance premised on an alleged failure to follow negotiated procedures after a decision is made to fill a position by promotion. But some public employers would even deny an arbitrator authority to determine the latter. And some of our judges have agreed. The Hawaii Supreme Court is scheduled to pass on these crucial matters soon. The law is nonetheless ambiguous, as most pioneering statutes are. It probably would not have been approved if it did not provide different meanings for people with different interests in collective bargaining. The function of the judiciary in

such a situation is to reconcile what purportedly is irreconcilable and to furnish interpretations accommodating competing interests within a rational scheme. Its function is never to emasculate a law or create a vacuum.

Arbitrators likewise have a function to supply reasoned decisions consistent with the stated policy of the law in this situation. The judiciary's final determination will undoubtedly be influenced by what arbitrators have said about their role in public-sector bargaining and grievance settlement. The Hawaii Supreme Court has acknowledged the salutary presence of arbitrators in the past; there is no reason why it should not continue to do so and to be influenced by what arbitrators have to say in their area of expertise.

But, in my opinion, arbitrators here in Hawaii and throughout the United States will influence the course of public-sector collective bargaining only to the extent they are willing to participate in this process of attempting to reconcile what may appear irreconcilable by supplying reasoned opinions consistent with concepts of collective bargaining they helped to develop in the private sector. This is definitely not a time for them to be quibbling about the implications of external law and whether arbitrators should or should not heed them. They should be part of the process of determining what the law will be.