SESSION IV—STATE AND MUNICIPAL GOVERNMENT
STATE AND LOCAL GOVERNMENT DISCUSSION

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Ellen Alexander: What contract clause promoting or limiting efficiency would management most like to eliminate or would labor consider worth fighting to keep?

Richard Whitmore: The labor contract is not the right place to put clauses dealing with efficiency and productivity in the workplace. Management does not want a provision like that becoming the subject of a grievance that advances to arbitration. I had a grievance once over contract language in which the parties had agreed to "operate with harmonious relations to make the work place a better place to work." The grievance asserted that things weren't "harmonious," that it was management's fault, and that the contract had been violated. With the help of a good arbitrator, we settled that grievance before we got a decision. I feel much the same way from the management perspective about efficiency and productivity provisions, because a grievance about whether management is acting "efficiently" or whether the workplace is as "productive" as it should be is not, it seems to me, something to turn over to a third-party neutral. If we are arguing about that, we have even bigger problems!

Vin Harrington: I have heard people argue that such clauses are only hortatory expressions and do not contain a bargain. My conversations with union clients have been about removing productivity-related clauses—those that link either discipline or compensation to management's assessment of whether employees are producing enough. We are in a dispute on behalf of a Teamster client about precisely such a clause. From the union perspective, there is a problem with the assumption that all workers have an equal ability to do the work, even within the parameters of such

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plans. They create Americans with Disabilities Act (ADA) problems for covered industries. At the arbitration stage, this dispute became a battle of experts, with the arbitrator asked to decide between competing points of view. I don't think it has been an effective contract clause. It is interesting that Dick says he doesn't want to include particular types of management rights clauses either. I have seen voluminous management rights clauses that seem to express the right of management to determine the level of efficiency and take all steps necessary to achieve "nirvana," defined as the most efficient or productive workplace. As part of management rights that is one thing, but attempting to quantify productivity is quite another.

Richard Whitmore: How can "efficiency" in state and local government be defined? With California police officers, you have a special problem. You can't require that they write a particular number of citations. Quantifying productivity in the public sector is tough.

Vin Harrington: I think that is right. How do you define *efficiency* in the public sector when it is essentially taking over what in our former society was viewed as charitable activity? Public services are necessary for a healthy society, but are not designed to earn a profit for anyone. If efficiency is defined in terms of profit, I am not sure it has relevance to a broad range of public service activity.

Audience Question: What about contracts that allow promotion based on seniority unless a junior employee is demonstrably more qualified?

Vin Harrington: From the union perspective, you should try to keep such language out of the contract. If you can't, the battle then focuses on the device by which productivity is measured. You end up fighting about the reviewability of and the fairness of the evaluation process.

Richard Whitmore: In the cities, counties, and special districts that I represent, promotion typically occurs through testing. Seniority plays very little role in typical promotions from one classification to another. It may be considered where you have a classification series, like clerk I, II, III, for example, so that after a period of time you move up. But in classic promotion, I have not often encountered the idea that there is either a seniority or productivity measurement. I agree with what Vin says. That is where we will fight the battle, and it will be a tough one. From the management perspective, we want flexibility and discretion. He is going to want specific, objective, precisely measurable criteria. In

that way, he will try to ensure that we don't play fast and loose with promotion decisions.

Ellen Alexander: In what ways have recent court decisions either freed up or hindered local government efforts to become more efficient?

Richard Whitmore: There was a recent U.S. Supreme Court decision on the Fair Labor Standards Act involving Harris County and the ability of management to require people to take accumulated compensatory time off.[1] The decision is giving management greater flexibility to manage its budget by being able to say, "You gotta take the time off." We are still saddled with restrictions on whether or not, when individuals want to take time off, management has the ability to say "yes" or say "no." The general court perspective now is that once employees earn it, they have substantial discretion about when to use it. So we are hindered in that regard. But in *Harris County,* the Supreme Court gave us the flexibility to force employees to use accumulated comp time so that accrued hours in the books don't get too high. That has freed us up some on the management side.

Vin Harrington: That is an interesting case. I am not sure that all management in the public sector would necessarily agree with you that they want to be in the position of ordering people to use their comp time. In fact, I recently had a client approach me with the problem that management was essentially permitting uncapped accumulation of comp time for political budgetary reasons. It does not show up in the budget as overtime, but it shows up sometime down the road when employees retire. The public agency thus ends up with a large, unfunded liability never previously identified in books or records. But as I looked at this issue, I thought more about whether or not court activity has strained the employer's ability to contract out, downsize, or use outside providers for what would otherwise be deemed public service. In my experience in California—and this is not unique—labor organizations have been effective on the state level in negotiating statutory protections that exist separate and apart from the collective bargaining agreement. The California State Employees Association, for example, has been very effective in obtaining the passage of specific statutes that require management, prior to contracting out, to make a variety of efficiency-related determinations and do "best provider" analyses.

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[1] *Christensen v. Harris County,* 529 U.S. 576, 5 WH Cases 2d 1825 (2000).

There are restrictions on work force reductions as well. To the extent you can get such legislation enacted through the political process, you have a vehicle for court or even arbitral enforcement of the statute's policy against contracting out.

Richard Whitmore: I think that has been particularly true in California, because state employee unions such as the California State Fire Fighters have some leverage in Sacramento. They have been able to lobby for laws that provide them benefits and/or job security. From a management perspective, such laws have diminished the flexibility we once had. The court decisions vary. Some seem to impose restrictions; some give us more flexibility. I am also reminded of U.S. Supreme Court decisions from a year or two ago that said we can assess disability based on the corrected condition.[2] An individual who can wear eyeglasses and be 20-20 is not disabled and is not entitled to accommodation. From a management perspective, it means we don't have the same restrictions we would have if forced to accommodate an individual without correction. It is still a difficult issue in many respects. We still have to look very closely at the situation when an employee or applicant claims entitlement to an accommodation.

Ellen Alexander: Can you address the impact of contracting out on the scope of bargaining unit work? I am also including the use of "contingent employees" in this inquiry.

Vin Harrington: From my perspective as a union advocate representing a variety of public sector unions, the most extreme cases were those involving contracting out on a department-by-department basis. In some California jurisdictions, unions were struggling to keep their work from being transferred to private operators. That was in vogue three or four years ago. I am not now going to debate the philosophy behind it. It does call into question whether efficiency is enhanced by hiring low-wage workers with no connection to the jurisdiction. That is no longer the problem as I see it. The current problem is what I would call "inside contracting out." The assumption is that most public employers—at least in this state—have some kind of personnel system that identifies members of the classified service and provides them with just cause and layoff protections. These systems also identify and exclude nonclassified employees, thereby exempting them from such procedural safeguards. Increasingly, many public employers have been using

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[2] *Sutton v. United Airlines,* 527 U.S. 471, 9 AD Cases 673 (1999); *Albertson's v. Kirkingburg,* 527 U.S. 555, 9 AD Cases 694 (1999).

these nonprotected employees like a contracted work force in some respects. They are usually excluded from the collective bargaining agreement because they work less than half time. They may be excluded because they don't meet some other work schedule pattern. I see that as a contracting-out battle to protect the integrity of the bargaining unit. It is an assault on the recognition clause. In Santa Clara County, we recently fought that battle through grievances asserting that the scope of the recognition clause prevented the employer from assigning what we considered our work to similar non-unit job titles and classifications. We also asserted in superior court that the employer was violating its own personnel system. We are seeking to level the playing field by reducing management's ability to "contract in" bargaining unit work. We are attempting to require that employers pay such employees the same kinds of benefits they pay the regular work force. That is the battle we are now seeing.

Richard Whitmore: I agree. As distinguished from privatizing the entire range of public services, this is the battle I see more often. A major problem from the management perspective, usually pointed out by the union, is that by having part-time seasonal employees do the work, we violate our own rules. I am startled at how often I get a question from a public agency asking, "Can you look at our practices and see if they comply with external law and our own rules?" Another issue is raised by contracts that say something like, "Employees who work more than 1,000 hours per year are covered by the California Retirement System." And we are not even following our own rules. If we end up in arbitration or in court, one of our most uncomfortable moments is when the judge or arbitrator says, "You haven't even followed your own rules." That is the big problem. It is a big battleground.

Ellen Alexander: We all heard speaker Jon Hiatt say that the grievance arbitration process was originally designed to be informal, expeditious, inexpensive, and binding. It was intended to help workers resolve issues at the lowest level with their immediate supervisors. Are those goals being met today? Or are employees now so remote from the process that they don't feel a part of it? Are there too many layers of lawyers? I ask our speakers to give us their views about how grievance arbitration is working today.

Vin Harrington: Arbitration is in many respects a substitute for litigation. It is the place where the union confronts management in the presence of the affected employees. Sometimes it is an essential component of the union organizing struggle on the shop

floor, because the union could be seen confronting management and enforcing the contract. In terms of cost, we have historically covered arbitration as part of our retainer with clients. The practical reality is that the union with 1,000 members has the same needs in this area as the union with 28,000 members.

Increasingly, we are seeing what Jon Hiatt noted. The case that was a one-day or half-day case, argued orally on the record then submitted to the arbitrator, hardly exists anymore. It is now a two- or three-day case. There are battles about discovery in the form of subpoenas. Virtually every management lawyer I know today will write a brief, but will never argue a case orally. Arbitrators historically have permitted that option. The continuing demise of closing oral arguments in favor of posthearing briefs has displaced the union's ability to be seen as effective and dynamic during the hearing itself. This evolution has made what was supposed to be a substitute for court in many ways a less effective process than that provided in court. Every judge I know of will say, "You will be back here tomorrow at nine o'clock." Arbitrators lack that authority unless the contract grants it. Increasingly, we see second and third hearing days occurring weeks and months apart. Such problems reflect a significant deterioration in the arbitration system.

Richard Whitmore: I think your observation is accurate. During second and third hearing dates following weeks and months from the initial one, you start going over ground you have covered previously. From the management perspective, we want to make sure we are as thorough as we can be. We have a client, a city manager, a member of the board of supervisors, who says, "We cannot lose this case." My response is, "Oh, sure we can. Let me tell you how." But his or her response is, "Do whatever you can to win." That means I am going to write a brief, research other arbitration decisions—do whatever I can. Absolutely it is changing what was supposed to be alternative dispute resolution; that is, alternative to the courts.

On a related issue, the California Supreme Court is about to hear a case involving agreements to arbitrate between individual employees and employers.[3] In cases for the most part involving alleged

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[3] *Armendariz v. Foundation Health Psychare Servs.,* 6 P.3d 669, 99 Cal. Rptr. 2d 745, 83 FEP Cases 1172 (Cal. Sup. Ct. 2000).

discrimination issues, the lower courts have produced conflicting decisions.[4] For example, some have said that such agreements to arbitrate are not enforceable, because the arbitration process provides for no discovery, no jury, no attorneys' fees, and no punitive damages.[5] The judicial sentiment seems to be that individual employees should not be compelled to forgo in arbitration the rights they would otherwise have in court—even though they signed an arbitration agreement. That position, it seems to me, could take us even further from what was supposed to be an expedited, inexpensive, alternative form of dispute resolution.

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[4] *Vasquez v. Superior Court*, 80 Cal. App. 4th 430, 164 LRRM 2142 (2d Dist. 2000); *Lagatree v. Luce, Forward*, 74 Cal. App. 4th 1105, 15 IER Cases 865 (2d Dist. 1999); *Lee v. Technology Integration*, 82 Cal. Rptr. 2d 387, 79 FEP Cases 221 (6th Dist. 1999); *Kinney v. United Health Care*, 70 Cal. App. 4th 1322, 79 FEP Cases 894 (4th Dist. 1999).

[5] *Armendariz, supra; Kinney, supra.*