CHAPTER 9

MAJOR ISSUES IN ARBITRATION IN THE U.S. EDUCATION SECTOR: STATESIDE AND PUERTO RICO

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I. INTRODUCTION

This panel discusses a number of practical problems and issues that arise under collective bargaining agreements in public education. Helen Doughty, representing teachers in the New York school system, and Warren Richmond, who represents school districts in the area surrounding New York City, examine such issues as disciplining teachers, transfers, seniority rights and usage, and cases of alleged child abuse. Ledo Serapio Laureano discusses the problems and issues that have developed in Puerto Rico under a recently enacted law that provided teachers and other government employees with collective bargaining rights.

II. THE PANEL DISCUSSION

Helen Doughty: Arbitration for the United Federation of Teachers (UFT) and the Department of Education is the fourth step in our grievance process. We currently have a panel of eight arbitrators whom we utilize on a monthly basis. They give us 14 dates a month. The panel members have terms of 1 year that is continuous unless one of the parties notifies the other, by May 15th of the

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school year, that it wants to discontinue that panelist's service. The majority of our cases deal with discipline and, to a lesser degree, contract interpretation. The American Arbitration Association (AAA) administers our hearings.

Our hearings are generally informal because most of our advocates are members of the union. We don't use lawyers at arbitration. We select and train our advocates from the local school level, as opposed to officials from the union's office. I started out as a chapter leader, which is what we call a shop steward, and received my training while a chapter leader. Our training is ongoing for about a year until the trainee gets that first case and after that, the training continues throughout the advocate's career. We train approximately 30 advocates every year because some turn out to be unsuited to the position. We continue to use those who are successful, but we always have to replenish our supply. The Department of Education and the UFT generally have a good working relationship. We try to share information and settle as many cases as we can before the hearing. We actually do resolve a high number.

Many of our cases are concerned with salary and leave, transfers, reorganization, and class size issues, but the majority concern the termination of nonpedagogical staff. The nonpedagogical staff consists of teachers' aides and provisional (nontenured) teachers, who are covered by a separate arbitration panel that is not part of the UFT grievance department. A lot of changes have taken place in the last year, as the Department of Education is revamping its system. The Department has been silent about the changes, but when it decides to share with us, we have to negotiate on what some of those changes will be. We have filed several grievances over some of the changes it is proposing. We have cases in the grievance process now on several issues that will end up in arbitration, particularly in the field of special education. That's an overview.

Marcia Greenbaum: In New York City the employer used to be the New York City Board of Education. About a year ago, the system was changed and the new employer is the Department of Education. I want to ask (1) how that change affects the relationship, and (2) what its impact is on the arbitration process.

Helen Doughty: It really doesn't affect the relationship. The arbitration process is contractual. The language in the contract is clear and we can proceed to arbitration on any issue that deals with the application and interpretation of the contract. We can also

proceed to arbitration with issues that deal with Board discretion if the Board violates its policy in a discriminatory, arbitrary, or capricious manner. We feel that any issue that falls within the range of those three categories can be arbitrated. The Department's ability to make changes in the arbitration process is limited because we have an article in our contract called "Matters Not Covered." The Department has to negotiate with us on issues it would like to change. So the change to a Department of Education doesn't really affect us. The arbitration processes are still in place and they have to be adhered to unless the school system negotiates changes with the union.

From the Floor: You mentioned that you have a very informal process in arbitration and you use trained shop stewards as advocates. What kind of background do the management representatives have?

Helen Doughty: The Department of Education uses lawyers who operate through its Office of Labor Relations. While we have a list of 30 working advocates, it has three lawyers handling their arbitration cases.

From the Floor: Do you think that that puts you at a disadvantage?

Helen Doughty: We have problems. In fact, the Department is overwhelmed. We give our advocates at the most two cases a year. Their advocates are usually working on five of our cases while doing other things.

From the Floor: You're saying that you have an advantage over the management staff because they are overloaded. I guess I was thinking more about whether procedural issues become a problem.

Helen Doughty: They do become a problem in terms of postponement if the Department is not ready to proceed with its cases.

From the Floor: I understand that, but when you get to the hearing do you find that your shop stewards ever get in over their heads?

Helen Doughty: That happens, especially with our inexperienced advocates. But there's always someone from the union with them, like me.

Marcia Greenbaum: Let's move on to Warren Richmond, who is going to talk about this in terms of school boards.

Warren Richmond: The way we deal with arbitrations not only differs from New York City, but differs among the different school

districts that we represent. For instance, in some districts we select an arbitrator from the AAA list; in others, there's a list of arbitrators designated in the agreement who are rotated; and with still others, there's a single arbitrator specified in the agreement. In some districts, we're dealing with attorneys on the other side and with others, a field representative. In some districts, we have an enormous number of arbitration cases, perhaps one or two a week, while in other districts, we'll go for years without having any.

What we try to do in our office is to formalize the process. Obviously, an attorney always handles the case presentation, and we always have a transcript because it provides a truer record. If the union complains, we provide it with a free copy. We virtually always do written briefs for a variety of reasons; one is that we're lawyers and we're comfortable with that. We also try to get involved with the process as early as possible in terms of dealing with the administrators and trying to resolve things at the earliest possible time. From management's point of view, there is a very small margin of error. You are defending a decision that an administrator has made, maybe even a decision that we have advised on, and there is a certain amount of investment from that administrator and from the Board of Education. Even a little case that might involve a letter going into a file becomes a mano a mano between the union and the district. Losing is not a good thing at the end of the day, so we try to resolve many disputes as quickly as we can. I think our involvement differs from the union's in that sometimes the union may be presenting a grievance from someone who is somewhat off center but who the union feels compelled to represent because of the duty of fair representation. In these cases there is not as much emotional investment.

Helen and I agree that the big issues for teachers have remained the same for years: transfers, credit for salary advancement, and letters in the file. A new cottage industry is blossoming with colleges that give credit to teachers from their satellite centers. Many times they give credit to teachers for their graduate program that they would not apply to their own graduate school—often for online or video courses. Attempts to regulate that by school districts, particularly in light of the Internet, have raised some new issues, created some new contract language, and established some new arbitral precedents.

With the noncertified staff, such as custodians and clerical people, promotion is always a big issue along with the question of

how seniority applies. Usually there is a long list of criteria. The union always takes the position that even though seniority may be one of 18 factors, it's the only factor and the person who is most senior should get the position. Just cause issues as well come up very often. That's what we do.

From the Floor: Do you think it's easier to get a principal to settle on an issue like a teacher transfer or is it easier to get teachers to accept the decision? I'm curious about the dynamic and where pressure can be applied successfully.

Helen Doughty: It depends on the individual involved. If the person is emotionally tied into the issue, it sometimes becomes impossible to resolve the case. On the other hand, our advocates are trained to try to persuade them to settle when settlement is in their best interest. If we're not going to get any more from the arbitrator than what the city is offering, we should resolve it. It all boils down to how emotionally tied into the issue they are.

From the Floor: Are your principals emotional?

Warren Richmond: Depends on the individual and the individual they're dealing with. In transfer cases, generally we can figure out if one is a lemon. The main concern for the districts in those situations is that they not disrupt the school year. If you can get to the end of that year, or get a resolution at the end of the year that things will be reversed, they're not terribly upset. You just tell them that they are going to lose and it makes little sense to spend all that money. If you know it's a loser, it's not hard to convince a principal of the obvious.

From the Floor: On transfer cases, suppose there are two competing union members for the same union position. One person gets the transfer and the other person files a grievance. Tell me about the dynamics for settlement. Do you ever call both people into a room to try to work it out?

Helen Doughty: No, we would never do that. We would simply explain to the member that he or she didn't get the transfer, if this is the case, because of seniority. Transfers in our contract are clearly defined by seniority. The most senior person gets the position and the line is generally clear. When our members apply for a transfer, they list three choices. If their first choice is filled by a more senior person, they usually get their second or third choice. So that problem generally doesn't come to pass.

Warren Richmond: This is an issue which I've always found very interesting. If a grievance—and transfer is the best example—

pursued by one individual is going to affect another individual adversely, shouldn't that person be a party to the proceeding? The conventional wisdom is that in labor arbitration they don't have a right to be a party. It seems that in America, if you're going to lose your job as a result of a proceeding, you should have the right to be involved with that proceeding.

I had a case a number of years ago where some excess teachers were seeking appointments to positions, but they didn't get them and new teachers were hired. I took the position that these people who were going to be out of a job should be parties and the administrator should write a letter to each of them saying that there is this proceeding that could result in your losing your job, and you might want to get a lawyer. This caused a major row with the union and the arbitrator told me that my letter showed that I had no appreciation for 80 years of labor history. I think if people are going to lose their jobs as a result of a proceeding, they have a right to be in that proceeding and participate. To my knowledge no one has agreed with me.

From the Floor: Why do you feel that you need them as a party to the proceeding as opposed to calling them as a witness?

Warren Richmond: In any legal proceeding there is a concept of necessary joinder. When somebody is going to be adversely affected by the result of a proceeding, they have a right to be involved; they have a right to present their case; they have a right to cross-examine, etc. This is particularly true when it involves the merits of the qualifications of the individual involved.

From the Floor: As a management representative, I've often been in that dilemma. I've called the individual as a witness to testify.

Warren Richmond: Certainly we would do that.

From the Floor: Another sort of third-party interest. How frequently do you get in a position where you feel that your local administrator has to discipline a teacher because of pressure from a parent about, say, inappropriate discipline? Local administrators may be in sympathy with the teacher, but because of the parent-teacher association and external pressure from parents, they feel that they must come down hard on the teacher and hope that the arbitrator bails them out.

Warren Richmond: When we get complaints from children about treatment from a teacher, we investigate those independently and talk to that child as well as other children in the class. We don't really get involved in bringing a disciplinary case because

of parental pressure, although we certainly conduct investigations because of parental pressure. The worst thing is to get involved in a disciplinary proceeding where there is a large district investment and to lose.

Marcia Greenbaum: Here's a related question. I have had a number of cases involving teacher dismissals in Massachusetts, where there is a new statute called the Education Reform Act. This law has done away with tenure in the school system and created a title called Professional Status for Teachers that provides standards to be applied by arbitrators in deciding whether or not there was proper cause for the termination of the teacher. In some of those cases, I've had large numbers of students testify. Have you had a similar experience and have you had parents, as well as students, testify in these cases?

Warren Richmond: We have children testify all the time. Parents testify less frequently because they rarely have direct evidence. What we do in disciplinary cases has been very successful, particularly in cases involving teachers allegedly using bad language or some sort of corporal punishment. My feeling has always been that once that complaint makes it to the top, there are so many barriers they have to go through that it's probably not the first time. The children have to tell their parents, the parents have to tell the school, and the school has to tell the school board. We interview all sorts of children, whether they had anything to do with the case or not.

Marcia Greenbaum: Would you say that there is an age at which students shouldn't be called to testify?

Warren Richmond: If they can't tell the story. If a teacher of very young children is committing misconduct, he should be disciplined.

Helen Doughty: Many of our cases involve termination and often the charge against the teacher or the teacher's aide is the use of corporal punishment. In most of these cases, the board does not bring in the student to testify at the hearing. It generally uses witness statements or investigator's notes that were taken during the earlier stages of the process. We win a large percentage of those cases because the board is relying on hearsay evidence instead of putting someone who was actually involved in front of the arbitrator.

Marcia Greenbaum: Interesting. Let's move on to the Puerto Rican experience in terms of education and arbitration and hear from Ledo Serapio Laureano.

Ledo Laureano: I should give an overview of our legal and procedural background to help you understand the state of our arbitration process in education. This is a new situation in the island because the bill that granted bargaining and arbitration rights to the teachers was signed into law in 1998 and the first collectively bargained contract was signed in the year 2000. We have only 2½ years' experience with this matter. Because things are so new, the relations between the union (the Federación de Maestros de Puerto Rico), the Department of Education, and the commission that administers the law are strongly influenced by the past.

Most of the grievances and complaints have to do with the personal relationship between teachers and administrators. That's a very difficult issue because of the need for mutual respect and the problems in defining clearly what these relationships are to be. Most of the time we deal with that problem by creating special committees that look into the relationship.

The law recognizes the rights of teachers and all other public service employees to organize and to bargain collectively. However, it is a very restrictive and punitive law because many things that should be left to negotiation are controlled by the government. For example, because strikes are prohibited, most contract impasses go to arbitration and, as a result, it becomes more difficult to deal with problems that later arise from the administration of the collective bargaining agreement. Furthermore, we only negotiated part of the contract in 2000 because there is a prohibition in the law against negotiating in an election year. So we negotiated a wage increase, but we still have to negotiate the rest of the economic issues and working conditions.

Other problems arise from previous relationships within the public education system. It is difficult for administrators to recognize that they must abide by the contract between management and the union. It is often very hard to begin processing the grievance because many administrators will not accept the grievance when the delegate of a school gives it to them. As a result, many grievances begin at the second step of the process, and there we have a lot of difficulties with the central administrative unit. The people in this unit find it hard to recognize that there is another organization in the school system, a teacher federation, which has a lot of power.

We, the Maestros (teachers), are the Teacher Federation. The other organization is the Teacher Association. The Federation does not belong to the National Education Association now although it once did belong. Most of the officials of the Department of Education who have to deal with the grievance procedure are members of the Teacher Association. One of their objectives is *not* to promote the development of the grievance procedure in ways that will create problems for the Association. During the past 6 months we have been able to surmount that barrier and today we have a very good relationship with some parts of the Department of Education, especially the legal division.

During the past few months we have begun to solve many of the complaints and criticisms made by the teachers. More than 2,500 grievances have been raised during the past 2½ years. Most of them have not been discussed and are waiting for hearings before a special conciliation commission. This commission consists of two lawyers representing the Department of Education and two lawyers representing the union. That is the second step of the grievance procedure, but this is where the cases jam up because the conciliation commission has not held the necessary meetings and there are no other arbitrators to deal with so many grievances.

Marcia Greenbaum: Have any of these cases actually gone to arbitration?

Ledo Laureano: More than 25 cases have been discussed in arbitration. The special conciliation commission referred to above was created because we submitted more than 300 cases to the Department of Education. Because we know what we are dealing with, it is easier to solve a lot of grievances there. That is what we've had to do to put the grievance procedure into motion so that it benefits both the union and the Department of Education.

Another important issue is participation of the teachers in the organization of the schools. Here in Puerto Rico we have a central system. There are no local boards of education. All administration of the school system is done centrally and there is a great deal of distance between the schools' directors or principals and the central agency. Most of the time when principals are talking about the Department of Education, they are talking about the central body and they say that they have nothing to do with it. When faced with a problem, they attribute it to instructions that come from the Department of Education, and when the Department is asked

about the problem, the response often is: it was the decision of the principal.

The other main issue is transfers and seniority rights. On the island we have a special register that lists the experience of the teachers and their academic background. Teachers ask for the right to be treated according to their qualifications as defined in that register. Sometimes, teachers are moved because of political considerations, rather than because of their status on the list, and they protest this violation of their rights through the grievance procedure.

The main problem we face comes from the lack of experience of all the parties in the administration of the collective bargaining agreement and the law. We are conscious that the commissions that are responsible for administering the law do not have the trained officials and the resources necessary to deal with all the problems that arise from the administration of a collective bargaining agreement.

From the Floor: I think it would be very interesting to those outside Puerto Rico to describe what happened when the government decided it could not pay an increase that it had negotiated.

Ledo Laureano: In the contract that we negotiated this year, the government agreed to pay a $150 increase. There is another organization that is asking for a representation election now and it is our understanding that because of pressure it exerted, the government decided not to honor the negotiated increase. There is a clause in the law, and in the contract imposed by the law, that the House of Representatives and Senate have the last word on all agreements that deal with increases in salary and increases in government contributions to the health plan, retirement plan, and other economic or financial benefits. The legislators pretended to use that as a means of attacking the validity of the contract and validity of the word they gave to the teachers and to the other public employees. Finally, about 1 week ago the government said that it was going to honor that salary increase.

From the Floor: I think you should add that it was because of a very powerful and effective political campaign. It moved from negotiating a contract to using political muscle to get the contract honored. I have a question about the arbitrators. As I understand it, the arbitrators are picked by the commission rather than by the parties.

Ledo Laureano: There is a panel of arbitrators. The commission will decide who will arbitrate each case. We only have a choice when

there is an impasse in the negotiations, when we may select from a list of three arbitrators. In grievance procedures, the commission decides who is going to be the arbitrator.

From the Floor: What is your opinion of the quality of the arbitrators selected by the commission?

Ledo Laureano: I think that all the parties here have the same problem—inexperienced arbitrators. I think that the procedure that the commission is using is too restrictive and I believe that the arbitration procedure should be more simple and more flexible if it is to solve the different grievances in a just manner. That is something we will learn as the commission, Department of Education, arbitrators, and union gain experience.

Marcia Greenbaum: The arbitration commission is appointed?

Ledo Laureano: The board that administers the collective bargaining law is a public commission. There are three commissioners, and they have a special division that deals with the arbitration process. The current commissioners were appointed by the past administration and they have a limited budget under the new administration.

From the Floor: In your opinion, does the commission have the resources to represent 175,000 public employees, practically all of whom are organized into unions?

Ledo Laureano: The commission does not have enough resources. Most of the grievances that are raised today come from the teachers' unit. But as the other unions begin to become conscious of their rights, more grievances will be submitted and the commission will be more limited in its ability to cope.

Marcia Greenbaum: To give you an idea of the various sizes of the units being represented here, there are something like 100,000 people in the UFT unit in New York City. The units that Warren Richmond deals with on Long Island and in Westchester County range from probably about 50 people in the small units to around 2,000 in the large units. How many employees are represented by your union here?

Ledo Laureano: We represent close to 40,000 teachers.

From the Floor: If the commission appoints the arbitrators, how are those arbitrators paid?

Ledo Laureano: They are full-time salaried employees of the commission.

From the Floor: I understood you to say that there are restrictions under the law on what could be bargained. Can you give us a sense of what sorts of matters do get negotiated and what

matters frequently show up in grievance procedures and arbitration?

Ledo Laureano: We are prohibited from negotiating anything that has to do with retirement and health plans. Anything that has to do with the movement of personnel is not to be bargained because these issues are considered to be matters of state policy. We were able to negotiate some of those matters, but there are questions about the legality of what we had negotiated.

From the Floor: What about salary?

Ledo Laureano: We can negotiate salary. We once had a negotiation that created a special formula, but it had to be discarded because it ended up making some government employees pay the government and not the government pay the employees. It was so ridiculous they had to throw the formula away and begin negotiating from a different perspective. And as I mentioned before, the legislature has the final word and may say that it does not have enough money to grant the salary increase that we had negotiated. From our point of view, that is ridiculous.

From the Floor: Your collective bargaining law differs dramatically from the recent public sector statutes in the states—I'm thinking of California and Illinois. And it differs in some pretty significant ways. The parties don't choose the arbitrator and the legislature retains the final word. What do you plan to do in the future?

Ledo Laureano: It is very difficult to define what we can do. The government says that because it will have to pay for everything that is negotiated, it has to control everything that can be negotiated. It will be difficult to move the government from that position because I do not believe there is enough strength in the public employees to force dramatic changes in the law right now.

Marcia Greenbaum: I would say that it's more like the way it was stateside maybe 25–30 years ago. This is an evolutionary process and it will take time for the island to get there. I would also note that there are still groups in the states who do not have contracts that specify that the parties select individual arbitrators through, for example, using an AAA process. The Massachusetts Board of Conciliation and Arbitration has full-time staff arbitrators who are paid by the state. Those parties who write a particular state agency into their contract are basically agreeing to use those arbitrators and not to make individual selections. That practice is somewhat akin to the selection process here in Puerto Rico.

From the Floor: The Puerto Rico law, Law 45, was passed over the objections of the legislature. The governor made a commitment to the principal public employee unions that he would have such a law passed, and the law that was passed was something that the legislators never would have voted without pressure from the governor. In the next election, the public employee unions had sufficient political influence to get some changes made in the law. The labor leaders I talked to say that their hope is that they will gradually eliminate from the law those provisions which they think are antithetical to collective bargaining. They think that this is a long process, but I think it is possible that we will have a meeting here 10 years from now and the picture will have changed considerably. Do you agree?

Ledo Laureano: Yes.

Marcia Greenbaum: Panelists, do you have any questions for each other?

Warren Richmond: I would like to know about the procedure for disciplining teachers in Puerto Rico—for terminating a teacher's contract for misconduct.

Ledo Laureano: That procedure was negotiated into the collective bargaining agreement. Our law, Law 115, provides for teacher decertification. There has to be a complaint against a teacher, an investigation, and a formal hearing. Then the Department of Education reviews the charges against the teacher and after that we go to arbitration for the final decision.

Warren Richmond: Does that take place after the person has been terminated or does it take place before?

Ledo Laureano: There is a provision in the contract establishing that a teacher can be suspended from employment, but not from salary, for 60 days. In that time, formal hearings are supposed to be conducted and, following that, teachers can be suspended from their employment and their salary. There are special arbitrators named by the Department of Education, who conduct a formal hearing. The arbitrator produces a report to the agency, where the decision is made.

Warren Richmond: How long does it take to complete the hearing?

Ledo Laureano: The informal one is supposed to be completed within 60 days, but we have had cases that have taken more than 2 years from the time the teacher was suspended to the time the agency made the decision. There are cases where we have

been able to force the agency to get the teacher back after 6 months.

Marcia Greenbaum: In the states, when a teacher is dismissed, the teacher has other school districts he or she can apply to. He may apply to a private or parochial school or find other employment as a teacher. Is that possible here in Puerto Rico, given that it's basically a single employer? Is it the end of the teacher's career as well as the end of a job?

Ledo Laureano: There is a private system in the island. If a teacher is fired from the public system, however, it is very difficult to be hired by the private system. In reality, he or she doesn't have that possibility.

Marcia Greenbaum: So it's more like being an airline pilot. If you're dismissed as an airline pilot, you're probably not going to have other employment as a pilot.

From the Floor: This is a new and ongoing process here on the island and we have lots of grievances in the commission. I am one of about 10 arbitrators and we are having problems keeping the process moving. Also, we are limited in some of our cases because the agency is in San Juan and grievances come from people in other parts of the island.

Marcia Greenbaum: Do you go to the location or do they come to you here in San Juan?

From the Floor: They come to us in San Juan.

Marcia Greenbaum: So often there's an expense associated with travel.

From the Floor: Yes, and we have a problem if one of the parties does not come, either agency or union.

Marcia Greenbaum: What do you do when you have that kind of ex parte situation.

From the Floor: The arbitrator has to either close the case, listen to one of the parties, or suspend the hearing.

Marcia Greenbaum: Perhaps you could tell us what kinds of issues you've heard as an arbitrator.

From the Floor: Discipline cases, transfers, and mainly interpersonal relations between the school, teacher, and the directors. About 70 percent of our cases are from the union and the Federation of Teachers.

Marcia Greenbaum: Are there standards or precedential cases that you use to resolve or answer questions about teacher and administrator interpersonal problems?

From the Floor: We mainly use decisions from the Supreme Court of Puerto Rico or awards from other arbitrators, from both Puerto Rico and the United States. We also try to explore the mediation process, which is optional for the parties. They can go to mediation before going to the arbitration process.

Marcia Greenbaum: Thank you, panelists and participants.