CHAPTER 10

ARBITRATION IN THE PUBLIC SECTOR: THE NEW SYSTEMS AND THE ESTABLISHED SYSTEMS: WHAT EACH MIGHT LEARN FROM THE OTHER

I. INTRODUCTION

JACQUELIN F. DRUCKER, MODERATOR*

Our purpose today is to examine labor arbitration in the public sector. Our discussion will begin with a look at the newer systems, such as the one recently developed in Puerto Rico. Then we will compare the new systems with the more established systems to see if there are lessons that may be gleaned or trends that may be seen within each context. We also will have an update on developments in federal-sector arbitration. Let's begin with the new system that now is in place in Puerto Rico, which is being overseen by our first speaker, Chairman Antonio Santos.

II. THE PUERTO RICAN SYSTEM

ANTONIO F. SANTOS**

I appreciate the opportunity you have given me to offer you an overview of the Puerto Rican system of arbitration in the public sector. The Puerto Rican government first instituted labor arbitration in 1919 as a substitute for the direct intervention of the government in strikes. At that time, the United States had been governing the island for 20 years, after 4 centuries of Spanish rule,

*Member, National Academy of Arbitrators, New York, New York.
**Chairman, Comisión de Relaciones del Trabajo del Servicio Público, San Juan, Puerto Rico.

and the governor was appointed by the President of the United States. The system of arbitration in Puerto Rico draws from a tradition in both civil and common law. Since 1855 the Spanish Code of Civil Procedure allowed the parties to a dispute to agree to arbitrate through a deed called "compromissum," or commitment. Common law also required such a deed, but oral agreements to arbitrate later were recognized as enforceable contracts.

The Puerto Rico Bureau of Labor was created in 1912 and the following year, its Chief was empowered to investigate the causes of labor disputes. In November 1913, the Bureau suggested that a labor arbitration law be enacted, but this suggestion was not acted upon. Then, between 1915 and 1920, the island experienced a large number of strikes. In 1916, two strikes in the transportation sector were sent to the governor for direct intervention and the Director of the Bureau of Labor suggested again that an arbitration board be created. In 1918, the government named two such boards to deal with strikes called by dockworkers and streetcar workers, and, in 1919, the legislative assembly created a Mediation and Conciliation Commission empowered to create arbitration boards on a case-by-case basis whenever attempts to mediate failed. Their awards were not binding, but failure to abide by them would lead to a report that would describe the nature of the dispute and identify a guilty party to the public.

The Puerto Rico Labor Department was created in 1931 and included a Mediation and Conciliation Service. In 1945, the legislature enacted the Puerto Rico Labor Relations Act. When requests for arbitrations rose sharply, the government added an arbitration division to the Mediation and Conciliation Service. The 1952 constitution recognized the collective bargaining rights of the employees of private employers who were not covered by federal statute, and of government-owned corporations such as the Puerto Rico Water Resources Authority (electric power) and the Transportation Authority. However, the constitution left it to the legislative branch to deal with traditional government employees. Parties to collective bargaining agreements have since then submitted controversies to either an arbitrator specifically named in the contract, the labor departments' arbitrators, or to labor arbitration associations such as the American Arbitration Association (AAA). The AAA has been the more popular choice with the U.S. Postal Service and those private enterprises with headquarters on the mainland. The Labor Department has been a mainstay with government-owned corporations and smaller, locally owned com-

panies that bargain under the Puerto Rico labor relations statute or the National Labor Relations Act (NLRA).[1] Recognizing this fact, in 1990, the governor ordered that the budget of the Conciliation and Arbitration Bureau be subsidized by the government-owned corporations. Thus, that service remains free of charge while the AAA's is not.

Presently the Conciliation Bureau carries a heavy workload, which has led to delays of up to 1 year for a hearing and another for a decision. The Puerto Rico Supreme Court has complained repeatedly about the absence of statutory regulation of labor arbitration. Consequently, it has drawn rules for the judicial review of awards. The courts also have adopted standards of review drawn from federal doctrine, which grant great deference to the arbitrator's expertise. In order to vacate an arbitrator's award, the moving party must prove lack of jurisdiction, fraud, corruption, improper conduct by the arbitrator, violation of public policy, or that an award did not solve all the issues that were submitted. An award need not conform to law unless a collective bargaining agreement or the submission so requires, but most of them do. The Judiciary Act of 1994[2] grants jurisdiction over suits to vacate an award to the court of first instance.

In 1960, public employees were allowed to form and join informal organizations. In 1975, government agencies were granted autonomy to approve their own personnel regulations under the supervision of a central personnel office, and make their own personnel decisions subject to the merit principle and an administrative appeals board. The process is extremely formal and time-consuming. Public employees were not granted the right to bargain collectively until 1998. The government was reluctant to do so because it is the island's largest employer and legislators had been worried about the impact of changing the government's human resource management structure for fear of affecting basic services. By contrast, government-owned corporations have enjoyed management autonomy since the New Deal. Their workers have bargaining rights and labor arbitration as an alternative to costly and time-consuming litigation.

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[1]Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §151 et seq.).

[2]Law No. 1 of July 28, 1994 (codified as amended at 4 P.R. Laws Ann. §22 et seq. (2001 Supp.)).

The Puerto Rico Public Service Labor Relations Commission was created through Law Number 45 on February 25, 1998. The Commission is charged with the task of supervising the election process to certify bargaining representatives for executive branch employees. In addition, the Commission investigates and adjudicates unfair labor practices and promotes the mediation and arbitration of disputes. Not only is this a shift to a contractual model of human resource management, but it is also the first time in Puerto Rico that a single agency governs both processes. The Act compels agencies and unions to submit to arbitration not only those disputes resulting from the administration of the collective bargaining agreement (CBA) but also those issues that cannot be resolved in the bargaining process because public employees may not resort to strike.

When an impasse has been reached at the bargaining table, a mediator will be called to attempt to bring the parties to an agreement within 30 days. The mediator may call for a longer period, but if he or she decides mediation is futile, arbitration is compulsory. The three-member arbitration panel must call a hearing and their decision may be appealed to the circuit court of appeals. We have had two impasse arbitration panels constituted so far. The first panel issued an award within 30 days. It addressed two issues: seniority and which benefits will apply to irregular employees. On the issue of seniority, the union contended that it consists of the time that an employee has worked within the agency, while management argued that the Personnel Act defines seniority as the entire time a person has been employed by the government. The arbitration panel sided with the union, finding that the Personnel Act of 1975 excluded from its coverage those employees who had the right to bargain collectively under special laws. It also held that the union's position did not contradict the merit principle. Management has appealed this award on the seniority ruling itself and on a procedural basis.

The same parties could not agree on most economic issues and requested a second panel. One of the contested issues focused on the application of a section in the Act that limits the cost of the economic clauses in the contract to a special formula developed to assure that any agreement comports with the constitutional mandate calling for a balanced budget. This and other issues will be submitted to the panel next week. The Act also requires the parties to submit to the Commission's arbitrators any dispute that comes up in the administration of the collective bargaining agreement.

Presently, more than 78,000 employees are covered by 23 collective bargaining agreements already negotiated. In the near future we expect to add 16,285 more employees represented by 17 certified bargaining representatives that have not signed agreements yet. All told, there will be almost 95,000 employees in 40 bargaining units.

In the last 3 years, 686 arbitration cases have been filed: 117 in 2001, 299 in 2002, and 270 so far in 2003. They have resulted in 108 awards: 38 in 2001, 47 in 2002, and 23 so far in 2003. Many of the other cases have either been conciliated or mediated. Most of the cases have come from the island's centralized school system, which covers the full island and consists of almost 60,000 employees in four bargaining units. Since there is no cost to unions for filing for arbitration, the number of trivial cases has been substantial. For example, about 40 percent of cases allege trivial matters such as that a supervisor gave an employee a dirty look, an employee was not invited to a meeting, or a teacher was assigned a classroom he did not like. Most of these cases were promptly conciliated or mediated. Approximately 25 percent of the cases allege disciplinary issues. Most of these cases either have resulted in an award or are waiting for a hearing. The remaining cases deal with issues regarding overtime or designation of duties, and with issues arising under the Americans with Disabilities Act.[3]

At the present time, the arbitration division employs eight arbitrators, five of whom have master's degrees in either labor relations or human resources. In addition, two of them have completed their law degrees and are waiting to take the bar exam. All of them have at least 5 years of experience in labor relations or human resources.

Our experience has been gratifying. An average of 119 days passed between the request for arbitration and the award, and last year the arbitrators took an average of 28 days to issue an award after briefs were filed. This certainly compares favorably with the year-long wait for an administrative decision of an award to employees who are covered by the Department of Labor's Arbitration Bureau. Our biggest challenge is to keep the delays short and to hand out swift justice. This promotes labor peace, keeps back pay

[3]Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §12101 et seq.).

awards low, and encourages parties to abide by the collective bargaining agreements.

There are, however, challenges. The Puerto Rico Uniform Administrative Procedures Act of 1988[4] was amended last August to require that a person appear representing himself or herself or through a licensed attorney. As a result of this change, there is a controversy about who may appear before an arbitrator in the Commission since several unions and agencies regularly appear with representatives who are not authorized to practice law by the Puerto Rico Supreme Court. The unions have complained that this proviso limits their ability to serve their membership. There is a bill before the Puerto Rico House of Representatives that will resolve this problem by expressly excluding the conciliation and arbitration office from the Uniform Administrative Procedures Act.

I trust this brief presentation has thrown some light on the brief Puerto Rican experience with public-sector arbitration.

Jacquelin Drucker: I do have one question about your system and the rules of the Commission. I note that section 708 of the rules requires a conference prior to the hearing in the grievance arbitration process. I'm wondering if your arbitrators are using that step vigorously and if this may be part of why you are able to move so quickly to an award.

Antonio Santos: Yes, they are using it. We have established a two-system procedure for that. First, when a case is filed, the director of the arbitration division looks at the allegations and may ask the parties if they want to try mediation. The director's query undoubtedly encourages both parties to look again at their case and they may decide to heed this recommendation. If the parties decide to go to arbitration, a pre-hearing conference is held, where parties are again encouraged to explore a solution to the case. The arbitrator's pre-hearing conferences also have speeded up the process because these conferences have facilitated the exchange of exhibits or other information.

Jacquelin Drucker: I understand that there is an effort for certain arbitrators to become organized.

Antonio Santos: As I mentioned earlier, there is a Mediation and Conciliation Division in the Labor Department—an agency that is different from ours. That unit has arbitrators hearing cases involv-

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[4]Law No. 170 of Aug. 12, 1988 (codified as amended at 3 P.R. Laws Ann. §2101 et seq.).

ing the private industry employers subject to the NLRA and employers who are in public corporations. By public corporations, I mean corporations owned and run by the government as a public corporation. We had a petition from a union seeking to represent all Labor Department employees, and one of the issues was whether the arbitrators of the Labor Department could become organized either in a unit of their own or as part of a larger unit. The Commission already has issued a decision stating that the arbitrators of the Labor Department could organize and be represented by a labor organization as long as that organization does not represent any employees that would appear before them. So it would be an independent labor organization. The employer has requested a reconsideration of that decision and it is pending before us at this time.

Jacquelin Drucker: Let's turn to Don Wasserman. Don, you were involved with the development of the public service law in Puerto Rico, and I wonder if you have any observations for us.

Donald Wasserman: * The statute, as it finally evolved, was, of course, a hodgepodge of compromises among many competing interests. The governor and his administration vigorously supported a collective bargaining law, while the legislature was initially hesitant and when it did finally support the idea, it made certain that union activity was somewhat circumscribed, particularly in the area of representation rights.

For example, a preliminary election must be held in a prospective bargaining unit and the workers must first vote in favor of union representation before there can be a representation election among the competing unions. Furthermore, the statute, as it finally evolved, established a "cap" on the percentage of Commonwealth employees that any union could represent, even if the workers desired otherwise. The obvious concern was to assure that no single union would be dominant. These two features are unique, but one is wasteful and the other may be contrary to the desires of the workers and, in the long run, counterproductive to the employer's interests.

One aspect of the law that I resented and was not in the early drafts that I worked on was the prohibition of nonattorneys from

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*Arbitrator and consultant, Washington, D.C.

representing employees in certain procedures before the Board. As a nonlawyer I found that to be particularly egregious.

Antonio Santos: The Supreme Court of Puerto Rico authorizes attorneys to practice before the courts and before quasi-judicial bodies. The court has issued several decisions in which it admonished agencies who allowed nonattorneys to represent any parties in the proceedings, including corporations or organizations. The president of a corporation cannot appear before a court or a quasi-judicial body to represent that entity. The corporation has to have an attorney. Those decisions were expressly added to the Puerto Rico Administrative Procedures Act, and there is not much that an agency can do. As I told you, an amendment has been filed with the legislature trying to get rid of that prohibition because we do realize that most of the arbitration cases are probably better argued by nonattorneys, on both sides, than by attorneys.

III. NOT MUCH THAT'S NEW

JOHN C. DEMPSEY*

In terms of our topic, the old meets the new, and for what's going on in public-sector arbitration, the easiest summary is that there's nothing new. There's nothing that's dramatically different about the new systems. If you look at the two main branches of arbitration in the public sector, the good news is that the new laws are substantially the same as the old laws.

Grievance arbitration in the public sector is really part and parcel of the collective bargaining system. The idea of contract interpretation and the review of disciplinary matters by third-party arbitrators is pretty much accepted across the board. The old arguments that used to be offered have not been resurrected: for example, whether an arbitrator actually could impose discipline or revise discipline, whether the decision should be advisory only, or whether arbitration was an improper delegation of governmental authority. I think the authority of arbitrators is well established and well accepted across the board in grievance arbitration.

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*General Counsel, American Federation of State, County and Municipal Employees, Washington, D.C.

In terms of interest arbitration, the good news here is that it also is becoming more accepted. Whether it is thought of as an alternative to the strike or as a tool for the resolution of impasses, the idea that third-party neutrals can be called in to help the parties form or decide the contract is becoming a more accepted reality in many of the states and other public entities. The process has not achieved the same degree of acceptability as grievance arbitration, but it certainly is moving in that direction. There is one caveat, however: in all these laws, whether new or old, the interest arbitration statutes usually have a clause, often in a footnote, reserving the ultimate decision on funding to the legislative body. This has not changed, and I doubt that it will change.

If we look to the future, there may be serious questions about the underlying system itself. Earlier today, your general session discussed the Incredible Shrinking Workplace. The session concentrated on issues such as the downsizing of the work force, the union's role in the bankruptcy process, the impact of reorganizations, and what it all means for arbitration. It's no secret that the private-sector labor movement in the United States is in trouble. Even with the new administration of the AFL-CIO, even with the increased emphasis on organizing, the private-sector union movement is down to about 10 percent of the work force and it is not growing. The public sector continues to grow, but the growth perhaps has slowed down. The New Mexico law is not a new law; it's the reestablishment of a law that expired in 1999. I think it's fair to say that the long-term history of the labor movement cannot ride on the backs of the public sector. We've got to find a way to reenergize private-sector organizing and collective bargaining.

The arbitrators in this room are part of the collective bargaining system. If the future is dim for the system, what does that say for the Academy and what does it say for arbitrators? The bedrock of this organization is labor arbitration, and as I look at your schedule of events here, I question whether the labor-management community is still your prime focus. The sessions are all about things like health care, other aspects of employment, and downsizing. I guess I call to you and say that the good news is that the legitimacy of grievance arbitration and interest arbitration is well established in the public sector. The bad news concerns the direction of the underlying system. I pass this on to Don Wasserman because he comes out of the federal sector. There has been a form of collective bargaining there for many years, but, as we all know from the recent headlines, the present administration is challenging that

repeatedly, whether it's the Transportation Security Administration—they're talking about not having unions there—or reforming the Department of Defense to take more jobs out of collective bargaining. It seems to me that, for those of us who believe in this process, the downward trend of unionization that began in the private sector is starting to spread to the public sector.

IV. Issues in the Federal Sector

DONALD S. WASSERMAN *

I had the opportunity last month to speak before the Society of Federal Labor and Employee Relations Professionals—a professional association of federal-sector labor relations neutrals, union, and management representatives. My observations concerning the future of federal-sector labor relations were very bleak. I started with a generalization on the aftermath of the war in Iraq. I said that I had never witnessed a similar situation in any of our other attempts at what is now called "nation building." Whether it was the Second World War or the breakup of the Soviet Union, one of the first items on the agenda was the idea that if you want to build a democracy, the bedrock must include an independent and strong labor movement. That concept has yet to be mentioned by this administration with respect to Iraq or the Middle East, but it is consistent with the administration's contempt for unions, especially those in government.

Of equal importance are some of the developments taking place that Jack Dempsey alluded to. The Transportation Safety Security Administration recently has been placed within the Department of Homeland Security. Many of the functions previously performed by the Immigration and Naturalization Service (INS) and the Customs Service also have been transferred to the Department of Homeland Security—border patrol agents and customs inspectors and investigators, for example. Historically, these workers have had the right to collective bargaining. How does one reconcile their rights to bargain with the fact that the administration has

*Arbitrator and consultant, Washington, D.C.

refused the petitions that have been introduced by a union claiming to represent the airport screeners throughout the country? The refusal to recognize the representation petitions was based on the claim that collective bargaining is not compatible with national security. It seems to me that there is a complete disconnect. We know that the Homeland Security Department is in discussions with the unions currently representing INS and customs workers, but we don't know how those discussions will be resolved. We do not know if this administration will attempt to strip those workers of their right to bargain and/or to remove from them their Civil Service protections.

Actually, these issues are governmentwide. This administration wants to de-unionize the federal government. There is a case that is now before the Federal Labor Relations Authority (FLRA) that deals with certain computer security people who work for the Social Security Administration and now have bargaining rights. When a case is appealed to the FLRA by the government, the Justice Department, interestingly enough, represents the agency appealing the decision. The FLRA has asked for additional briefs on this issue and the Justice Department brief is outrageous. It is built around national security and confidentiality concerns that could be extended to computer people in other agencies who perform similar functions. The government argues that the bargaining rights of these employees should be revoked because people who are currently retired depend on their Social Security checks, and if these checks are not issued on time there would be a national emergency. This despite the fact that strikes are prohibited in the federal sector.

I'm not certain why bargaining rights are linked to computer security or why 9/11 is the turning point on whether checks are issued on a timely basis. The Justice Department also argues that each federal agency should have the right to determine which employee functions are related to national security and which employees should therefore be denied bargaining rights. Similarly, the proposed Defense Personnel Act, currently before Congress, would grant the Defense Department the right to determine future working conditions and bargaining rights unilaterally.

I'm not terribly optimistic about the overall scheme of labor relations in the federal sector. At an attempt at gallows humor, I suggested to the group of labor relations professionals that I was addressing that they enjoy their 30th anniversary meeting because

they were unlikely to be around for their 35th anniversary if the developments of the past 2 years continue unabated.

I want to segue to more generic comments about the federal labor relations system itself, with emphasis on matters that affect arbitration. One is logically advised never to be defensive and never to be apologetic when making a presentation to a distinguished group. This is very sound advice that I shall now ignore. The complaint that I heard most from arbitrators when I was first appointed to the FLRA was that the Authority expects arbitrators to enforce the statute and that is not an arbitrator's job. I acknowledge that this is a legitimate complaint, or should I say a legitimate grievance on the part of arbitrators. The real point, I think, is that the Federal Service Labor-Management Relations Act [1] is perverse. To steal a line from a court of appeals judge's concurring opinion in a Racketeer Influenced and Corrupt Organizations case, "since logic was not the coin of the realm when Congress drafted and debated [the statute,] logic has not proven to be a very useful tool in interpreting the statute." [2] More directly, another appeals court judge referred to the statute's contradictions as "confusing duplicity." [3]

So what's a poor arbitrator to do? If you share my conviction that our law is too complex, too convoluted, and too contradictory and that the system is too legalistic, too litigious, and too adversarial, I suggest that there is little reason to believe that the arbitration process would be an exception. To begin with, the word "no" is not easily accepted or understood in the culture of federal-sector labor management relations. Arbitrators should understand that there is a very good chance that within 30 days of the receipt of their decision, the losing party will file exceptions to their award. Said more simply, the award will be appealed to the FLRA. Therefore, even the most garden-variety arbitration award—and most federal-sector grievances are garden-variety or less—must be carefully constructed. Too frequently, decisions are not carefully constructed, or the record leaves too many gaps, at least in the opinion of FLRA personnel.

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[1] Pub. L. No. 95-454, 92 Stat. 1191 (1978) (codified as amended at 5 U.S.C. §7101 et seq.).

[2] *Yellow Bus Lines v. Drivers, Chauffers & Helpers Local 639*, 913 F.2d 948, 957, 135 LRRM 2177 (D.C. Cir. 1990) (Mikva, J., concurring).

[3] *Government Employees (AFGE) Local 2782 v. FLRA*, 702 F.2d 1183, 1186, 112 LRRM 3112 (D.C. Cir. 1983).

Furthermore, the question of jurisdiction can immediately arise because the election of remedies is somewhat broader in the federal sector than it is in state and local government or in the private sector. Here, I am not referring to whether the case should go to the Merit Systems Protection Board or the Equal Employment Opportunity Commission instead of the FLRA. I mean that under our statute, where applicable, the dispute could be filed as a grievance or as an unfair labor practice (ULP). If it is filed as a ULP, it goes through the General Counsel's office and, when that route is taken, it doesn't cost the grieving party anything. However, these cases become the property of the General Counsel, who has prosecutorial discretion as to whether to issue a complaint. Inasmuch as the matter cannot be taken to both forums, on occasion the issue will be framed as a grievance that terminates in arbitration and will then be given another spin and filed as a ULP under another rationale. Thus, an arbitrator must be alert to the situation if one party mentions that a ULP has been charged, thus raising a jurisdictional issue.

It is relatively rare in the federal sector for the parties to stipulate the issue to be arbitrated. It is expected that the arbitrator will frame the issue. In the Authority's defense, arbitrators are typically given great deference by the Authority as to how they have framed the issue and the latitude given to them is very broad. With one addition, the grounds for review of an arbitration award are similar to those that are applied by the federal courts in private-sector labor-management cases. For example, did the decision draw its essence from the collective bargaining agreement, was it based on a nonfact, was the arbitrator biased, did the arbitrator exceed his or her authority, and the like. For the most part these present few or no problems for arbitrators.

During my time as a member or chairman, I emphasized the importance of arbitration in federal-sector labor relations, at least in part because of the narrow scope of bargaining and the broad management-rights provisions. I felt that it was extremely important to protect the integrity of the arbitration process and the awards that ensued. The other members were gradually convinced not to substitute their judgment for the arbitrator's when cases were appealed on the grounds I mentioned. For the most part, exceptions in these cases were frivolous and treated accordingly. There were some occasions in which the parties stipulated the issues that were to be arbitrated and the losing party took exception to the award on the grounds that the arbitrator had gone beyond

the stipulation and therefore had exceeded his or her authority. In such cases, we would carefully review the circumstances. With that exception, the arbitrator received great deference and the bar for upsetting the award was high.

The major difference I alluded to earlier was when the exception claimed that the award was contrary to law, rule, or regulations. In these cases, the Authority would likely engage in a de novo review of the decision. It carefully reviewed the exceptions because of the likelihood that the case would later be appealed to the courts of appeals. This is the one area where decisions more likely could be sent back to the arbitrator for further explanation or the decision may be vacated. The lesson for arbitrators is that cases that challenge management's rights must be carefully reviewed by arbitrators. Blame it on the Supreme Court, which rules that management cannot bargain away any of its management rights even if only for the duration of the collective bargaining agreement.

Jacquelin Drucker: We have touched on a lot of different areas and our two management voices have been very restrained up to this point. It is time now to turn to the management perspective.

V. A California Case and the Florida Experience

M. Scott Milinski*

I'm with the city of Fort Lauderdale and have accumulated between 20 and 30 years of experience in primarily public-sector labor relations. I am also the President of the National Public Employers Labor Relations Association (NPELRA), and in that capacity I represent management public-sector negotiators. As NPELRA President, this year I will visit a number of states, talk to different people, and see the commonality of some of our problems.

I have been asked here to speak about the recent case in which California's binding arbitration statute was struck down by the state's supreme court as well as about the Florida system of impasse

*Employee Relations Office, City of Fort Lauderdale, Florida, and President, National Public Employers Labor Relations Association.

resolution. The California Supreme Court's decision striking down the state's interest arbitration provision in *County of Riverside v. Superior Court of Riverside County*,[1] turned on specific provisions in the California Constitution, one of which involved language that had been borrowed from the Pennsylvania Constitution (which Pennsylvania later amended). Under the California interest arbitration statute**,** when a union declared an impasse in contract negotiations, the local government—in this case a county—was required to go through binding arbitration. The California Appeals Court said that this requirement was unconstitutional, and the California Supreme Court concurred. The court basically held that the state constitution provides that the local employer shall determine the number, compensation, tenure, and employment of employees. Thus, in *Riverside* the court concluded that the county, and not the state, the legislature, or someone else, is to provide for the compensation of employees.

Now let me turn to Florida. Florida is a "sunshine" state, with all our collective bargaining, and our impasse process done in public. That's problematic. We've had court cases where the two parties have gone out to have a discussion in the hall and the newspapers have protested that discussion as being a violation of the state's sunshine law. The Florida system is very brutal to collective bargaining because everything is open. It's difficult to negotiate when reporters are present and the cameras are rolling. We also have a process where we appoint a special master when there's an impasse. Special masters are usually selected off the Federal Mediation and Conciliation Service arbitrator list. The special master conducts a public factfinding hearing. Not many people show up for this hearing because it is boring. The special master then makes a written recommendation for settlement of the issues in dispute, and the parties discuss the recommendation and try to see if they can agree on reducing the issues or agree with the special master in entirety. Finally, the remaining issues in dispute go before the legislative body for resolution. There the issues receive a public hearing and at the close of the hearing the legislative body imposes a resolution.

People in other states often say to me that they wish they didn't have binding arbitration, for then the commissioners and other

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[1]30 Cal. 4th 278, 66 P.3d 718, 172 LRRM 2545 (2003).

elected officials would be free to do the right thing. But the reality is that it is not easy being an elected official with 200 or 300 firefighters, police officers, and their allies in a public meeting going over pay, benefits, rights to pick a shift, and so on. People from other states tell me that we have the model negotiations law because we keep the right to make a final decision in the hands of the city. But I'm not sure that those decisions made by the governing body are any better than those an arbitrator would make. I've been through this often and many times I wished we had an arbitrator. It all depends on how you look at this process.

I have to agree with what someone else said here. I think most of the action in public-sector labor relations is at the local level. Our state governor is trying to privatize many of the government employees except for police and fire. September 11th has changed the bargaining landscape in our society. But I think the old has *not* met the new in public-sector labor-management relations. The world has changed. The economy has changed with globalization, technology, and so on. The private sector has dealt with these changes but the public sector has not. The settlements are almost out of control. The pay and benefits being provided to public-sector employees, particularly public-safety employees, continue to increase at a pace that I don't think anyone can keep up with over the next 5 to 10 years. We've had settlements in South Florida where safety personnel receive a pension benefit of 4 percent a year for 20 years, enabling them to retire at age 42 or 43 with an 80 percent pension benefit. When we look at the private sector and I see that there's a real misalignment between what's going on in the two sectors.

I'm not here to say that arbitrators or dispute-resolution specialists are the people who have caused that. I'm saying that all of us—managers, the unions, the elected officials, the media, and the arbitrators—are playing a role. We are caught in a river with a very swift current, and I don't think it can continue. As the pay and benefits continue to increase, the first groups to be let go will *not* be public-safety employees. They will not be touched, particularly after 9/11. The first to be laid off will be the general employees and the managers whose work will be contracted out. There's a real debate on whether government work should be contracted out. I don't think it's a good idea to have our water supply, for example, handled by a private-sector firm. But I just don't see how we, in the public sector, can continue as a society to be so disconnected from what's going on in the rest of the United States and the world.

Some states are passing legislation to control costs, and public-sector management negotiators are astounded by the pay and benefits afforded to police and firefighters in New York City. Health insurance benefits have quadrupled, the pension benefits costs are going up, employees pension out very early, and the salaries are way out of line with the public sector, considering the level of education required.

The costs of all these planned benefits are going to hit us very, very soon and I think the best solution is to have a more cooperative model in our day-to-day relationships between management and the union. We adopted that kind of model in our city with our American Federation of State, County and Municipal Employees employees. The problem is that the employees want the cooperative model but they also want the pay and benefits that the public-safety unions were receiving. Now, a police union represents our general employees unit. It's a real dilemma for public-sector managers.

That's where we are. In the local government area, we are pricing ourselves out of the market. I do not know how we will pay for what we have done.

VI. ON THE NEW YORK EXPERIENCE

RICHARD ZUCKERMAN*

I am speaking strictly about New York. Those of you who practice and arbitrate in New York will, I think, be aware of these things, and perhaps the rest of you will see this as well in the work that you do. Our Public Employment Relations Board (PERB), has undergone a sea change with regard to the way that it handles improper practice charges. There has been an extraordinary amount of deference to the arbitrator's ability to decide disputes that normally would have been handled by PERB. I would say that the PERB caseload over the last couple of years has probably dropped by somewhere between 60 and 70 percent, in part because of the Board's decision to defer more improper practice cases to arbitration.

*Rains and Pogrebin, Mineola, New York.

Another trend, interestingly enough, starts with our court of appeals, which, in New York, is the highest court in the state. Over the last few years, this court has issued several determinations in which it gives lip service *only* to the concept of deference to the arbitrator's decisions. The court of appeals repeatedly reasserts that arbitrators' decisions are sacrosanct unless there's fraud or something along those lines. Even if there are errors of fact or errors of law, the arbitrator's decision stands. But the trend I see, notwithstanding those pronouncements, is that there has been a major increase in court scrutiny and court review of arbitration awards. I think that is because of the amount of authority that has been delegated to arbitrators to make decisions in the public sector that affect elected officials, the unionized work force, and taxpayers. As a result, judges are under increasing pressure to make sure that the right decision has been reached, whatever that might be. On the one hand, the court of appeals says we're not interested in or authorized to review your decision. But, on the other hand, that's exactly what the courts are doing and they are vacating, modifying, or sending back more decisions that they don't like.

With regard to compulsory interest arbitration, unlike Puerto Rico, New York has no requirement that an award be limited to the amount of money that has been appropriated by the legislature. We do have a provision in the Taylor Law that says that any change in appropriated funds that results from collective bargaining must be approved by the legislature. But, according to our code and our courts, that does not apply in interest arbitration. As a result, whatever the arbitrator decides binds the parties and there's very little that the employer can do about it. Our PERB made a real effort over the last few years to make sure that arbitrators were aware of the fact that the trend in wage increases and benefit escalation had slowed—that the days of 6 percent raises and fully paid health insurance are history for police officers in New York. But when the awards continued to come out very high, PERB actually got involved and started sending out information and holding meetings with the arbitrators so that they would know of PERB's concern, on behalf of the process, for what I call more realistic numbers.

Notwithstanding PERB's initiative and lack of a balanced budget requirement, there is increasing court scrutiny of interest arbitration awards. We have seen interest arbitration awards vacated on a variety of grounds, including a lack of record development. The panel comes out with a decision that grants a 4 percent raise, citing

the management and union arguments but not showing the thought processes. Today the courts are saying that's not good enough. We want you to explain it to us.

VII. QUESTIONS

Jacquelin Drucker: Jack has graciously suggested that, rather than responding, it might be more appropriate to open the discussion to the floor. Are there any questions or comments for the panelists?

From the Floor: Mr. Wasserman, would you please give us a rough estimate of the percentage of awards that are appealed, and what is the result of your adjudication of those appeals?

Donald Wasserman: I can't tell you what percent of awards are appealed because nobody tracks the total number of awards. The agency is aware only of those in which exceptions are filed, that is, appealed to the Authority. Very few awards are sent back for further explanation or vacated when the exceptions were not based on "contrary to law, rule or regulation." However, the number of awards that are vacated increases substantially when the issue is "law, rule or regulation." One aspect that I did have some success in changing was insisting that the issue of law, rule and regulation be brought up during the arbitration proceeding. If that matter was not raised during the arbitration proceeding, but arose only after a decision was issued, I did have some success convincing others to dismiss the exceptions and uphold the arbitrator's decision. But please be aware of two factors: understand current FLRA case law, because it changes as members come and go, and realize that the court of appeals has absolutely no hesitation in upsetting the arbitration award or an FLRA decision in cases that involve "law, rule, or regulation." Authority members have become very sensitive to the decisions of the courts of appeal in such cases.

From the Floor: I have a comment and a question. In some of the public-sector arbitrations that I've had, I sometimes thought that the rationale behind the grievance was to encourage negotiation and settlement by making the process time-consuming and exasperating. My question has to do with the cutback in government funding for state and municipal programs, where more and more of the financial burden is being shifted to the states and municipalities. What effect do you anticipate this fund-shifting burden is going to have on labor relations?

John Dempsey: I think we're facing major cutbacks and layoffs and entrenchment after July 1 in virtually every state in the union. New Mexico happens to have a surplus, as does Idaho, but New York and Illinois have huge problems. We finally coaxed $20 billion out of the federal administration a couple of weeks ago, which will provide some relief, but I think we're going to be facing layoffs and cutbacks in public service across the board.

Donald Wasserman: It's going to get worse before it gets better. I think this is the worst financial crisis that state and local governments have faced since World War II.

Scott Milinski: Add 9/11 to that and, if you're a local government, every time the alert level is heightened, we have additional overtime costs for police and fire. The Conference of Mayors estimated that when the war with Iraq reached an elevated level, it cost cities $70 million more a week for additional security costs. We're getting federal mandates now on many homeland security issues that will continue to grow and there's inadequate funding for that. However, I still see police and fire unions at the local level saying that we need more, more, more and the public is saying, yes, they do. Something has to give.

From the Floor: We have a shrinking economic or industrial base and we have cities like Buffalo that are on the verge of bankruptcy. We used to think that a municipal employer or the county could raise taxes without limitations—but we may be reaching the end of that rope.

Richard Zuckerman: I think there are enough elected officials, at least in New York, who raised taxes so that they could balance the budget in the first year in their term and then swore that they wouldn't raise taxes again. They don't want to make the mistake the first President Bush made by saying, "No new taxes," and then raising them. The challenge for all of you as interest arbitrators is going to be this: Do you want to impose a contract that essentially requires the employer to decide whether to raise taxes or to lay off personnel, or do you want to impose contracts that require work rule concessions and benefit concessions to fund some of the costs that would otherwise have to be assumed through layoffs or increased taxes? There's a great reluctance to award these sorts of things. Some unions will prefer to lay people off rather than surrender rights and benefits, but other unions will make a different choice. Ultimately, when the parties can't reach that agreement, the challenge will come before the arbitrator. And telling

the employer, "Here's the award—now go and deal with it," may not be the best way to go.

John Dempsey: I think he's right. I think the issue for us on the union side is going to be which way do we go. We've negotiated certain standards of employment, and are we willing to see a diminution of those standards to keep the work force up or do we allow the work force to shrink and preserve the standards? I don't know the answer, but obviously that is the question.

Scott Milinski: There's one other answer. I've worked with AFSCME and they're a great union to work with in these areas. The answer could be more cooperation between using an integrative approach to make the pie bigger. For example, in our city we actually sat down with the union and modified work rules that saved the taxpayers several million dollars and also saved individuals from being laid off. That's something that everybody needs to push as an alternative to the traditional model. The old model by itself is not going to resolve these issues. We need to be more cooperative and that's where we have to go or everybody's going to be hurt.

Donald Wasserman: Alternatively, people speak up and force the feds not to push unfunded mandates to state and local governments in this post-9/11 period.

John Dempsey: One of the problems faced in Puerto Rico is we've negotiated agreements and then have problems in getting them funded. We've had a great deal of difficulty with the governor and the legislature to find the funds that the administration agreed to put into the contract—because they weren't there. The government agreed to something, but when we had an economic downturn, we discovered that the money was not there.

Richard Zuckerman: If I understand it correctly, it was a $150 a person raise and there wasn't enough money for that in the budget.

From the Floor: The mystery of that question is where they found the money—federal funds.

John Dempsey: We came up with $20 billion a couple of weeks ago. It's the nature of the problem that we're all facing, that the panel's talking about. We've negotiated agreements and now July 1 is coming and the revenue stream that was to fund budgets for next year is not there.

From the Floor: I listen to all of you talk about layoffs and it breaks my heart. A lot of people are going to be shoved from the middle class into the working poor. We don't have the same view of cutting executive salaries. We can't fund our teachers, our cities,

health care, but the people at Enron, WorldCom, Tyco, and people like Martha Stewart who misuse countless dollars aren't even in jail and they don't have to give the money back. I asked my students the other day about why they weren't marching in the streets. I grew up in the sixties, so I guess I want another revolution. We're all numb to those shady practices—that's just business as usual. We're not going to get any equity unless some of those stolen billions get back into the cash flow and help support labor or management.

John Dempsey: We can debate the fine points of this system, but it's the system that's at risk here. If there's anything that I believe, it's that our system of labor-management relations is what has built the middle class here in America. If we're faced with a circumstance in which private-sector labor representation is dwindling and the public sector is under attack, what happens to the middle class as a result of all this? At some level we're all in this together. If you don't accept that proposition, that's a whole different question.