III. A Case Study of How the Courts Affect Arbitrators and Arbitration in the Public Sector: Illinois and the Public Policy Exception

Moderator: Jeanne M. Vonhof, NAA Member, Chicago, Illinois
Neutral: Edwin H. Benn, NAA Member, Glencoe, Illinois
Union: Gilbert Feldman, Cornfield & Feldman, Chicago, Illinois
Management: R. Theodore Clarke, Jr., Seyfarth Shaw, Chicago, Illinois, James Baird, Advocate, Seyfarth Shaw, Chicago, Illinois

Vonhof: My name is Jeanne Vonhof, and I am the moderator of this panel. I am an Academy member based here in Chicago. Welcome and good afternoon. We have planned what we hope will be a lively session for you this afternoon on the interplay between arbitration, the law, and the courts in the public sector. We are focusing this afternoon on how this situation has played out in Illinois, over the last couple of years, where the courts have taken, we might say, a more robust interest in arbitration than we had seen in the past.

The Illinois courts' decisions are affecting the way that we decide cases in Illinois. We hope that by discussing our experience in Illinois we will provide a useful case study with regard to the public policy exception that may apply to those of you who are in other states as well.

We are very pleased to have with us this afternoon some of the main players in this drama that has ensued in Illinois over the last several years. First, we have Arbitrator and Academy Member Ed Benn. For some reason, the Illinois courts just seem to like to pick on Ed. And, as you can read in some of his opinions, he likes to pick on them, too. Those of you who have perhaps had a situation where one of your cases has been reviewed or overturned by the courts might look to one of Ed's supplemental opinions for how you can get back at them. You will see, as this session progresses, the fact that Ed has been picked on has nothing to do with the quality of his opinions, which are uniformly well-reasoned and well-written. It has much more to do with the fact that a large

number of these high-profile public sector cases just seem to wind up on Ed's desk. He is a very busy arbitrator in our area and serves on numerous panels in the public and private sectors.

Ed began his legal career with the National Labor Relations Board and went from there to the Chicago firm of Asher, Pavillon, Gittler, and Greenfield where he represented unions. In 1986, he launched his career as an arbitrator, became an Academy member in 1995, and has issued more than 3,000 awards during that period. Ed is a Fellow of the College of Labor and Employment Lawyers, and as you will see, he has been a very instrumental arbitrator in this whole process.

We are also very pleased to have with us today Mr. Gil Feldman to my far right here. Gil is a founding member of the firm of Cornfield and Feldman in Chicago and has been representing labor unions since 1959. He has a wealth of experience, and we are very happy to have him here. It is also the case that Gil was the attorney of record for the union in a number of the cases that we are going to discuss here today.

Ted Clark, who is on our program, could not be with us today. However, he sent a wonderful replacement, Mr. James Baird, a long-time partner in the Chicago-based firm of Seyfarth Shaw. Jim's career also began with the National Labor Relations Board, and his entire practice has centered around labor and employment law, representing employers for more than 30 years in all kinds of matters. He has a very active practice not only in litigation and arbitration but also in negotiating contracts for management.

Jim also has an interest in the public sector, and he has done quite a bit of education for employers in the public sector. He is one of the co-founders of the National Public Employer Labor Relations Association and a similar organization in Illinois. He is also very active in the American Bar Association as well, and we are very pleased to have Jim with us.

We will begin our session with Ed laying out some of the background of how the current situation has developed in Illinois by reviewing some of the cases. Then we will hear the views of both Gil and Jim. Without further ado, I present Ed Benn.

A Ride Into the Legal Abyss[1]

Edwin H. Benn*

Introduction

Welcome to Illinois.

I do not welcome you as would a greeter from the Illinois Bureau of Tourism. I welcome you to inform you that you are in a place of legal bewilderment.

The name of this session is, "A case study in how the courts affect arbitrators and arbitration in the public sector: Illinois and the public policy exception". That is a mouthful. For me, that title is not right—it is not descriptive enough. For me, the title of this session should be: "The story of one arbitrator's personal journey into the abyss of the Illinois court system." Or, "I know that's what the U.S. Supreme Court says, but this is Illinois and the only thing that matters is politics."

I will be addressing a number of cases that I have been involved in concerning public policy that have made their way into the Illinois courts, most of which have been published in the reporter systems and publicized in the media. Given my role as a neutral and my desire that my thoughts about particular cases should be limited to what I write in my awards, my comments on these cases are made with some reluctance. My comments are, however, nothing new from what I have stated in my awards in these cases. And besides, the Academy asked me to speak and write on this topic, specifically addressing those cases. I therefore agreed to engage in this project.[2]

For the most part, the cases I will be discussing grew out of my awards that have been the subject of court challenges as the Il-

[1]Editor's note: The following is a November 2005 revision of the paper Mr. Benn presented at the May 2005 meeting of the National Academy of Arbitrators and reflects the Illinois Supreme Court's decision that was pending at the time of the May meetings.

*Member, National Academy of Arbitrators, Chicago, Illinois.

[2]The NAA Code of Professional Responsibility provides at 2C(1) that "[a]ll significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law . . . b . . . [d]iscussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality." As noted, the cases I will be discussing are court opinions resulting from some of my awards that have been the subject of significant media attention. Given that the Academy asked me to speak and write on this topic, the purpose of my discussion is educational and, given the court opinions and media reports, obviously, there is no breach of confidentiality.

linois courts struggled to formulate their view of how to address public policy in the context of enforcement of arbitrators' awards issued under public sector collective bargaining agreements.

One could look at the limited number of cases I will be discussing—four—and conclude that I have been reversed on a frequent basis—three of the four. That would be a very myopic and incorrect view of my work. Since I became an arbitrator in 1986, I have issued more than 3,200 awards. I suspect that kind of reversal rate (even with a few others thrown in) would be the envy of many judges. And, as you will see from the discussion, the reasons for the court reversals were not because my ". . . words manifest an infidelity . . ." to the parties' negotiated language.[3] Rather, for the most part, in these cases the courts found that I interpreted the contract language correctly. The reversals came precisely because I had strictly adhered to the parties' negotiated language and followed the limited role an arbitrator should play in the grievance arbitration process, which ultimately clashed with what the Illinois courts felt should be the more politically expedient result in these high-profile, politically volatile cases.

Similarly, I suppose one could look at these cases and attempt to read in a bias on my part (the discussed public policy cases were decided by me in favor of the various involved unions). That also would be a misreading of my work. The nature of the topic does not allow discussion of my awards that were decided against the various unions. And, if there were a bias by me toward one side, I would not have had the opportunity to issue more than 3,200 awards since 1986. Indeed, a number of the cases that I will be discussing were decided under collective bargaining agreements where I have been selected in hundreds of cases and continue to serve as an arbitrator for those parties. Therefore, as you will see, this discussion will show that if there is a bias, it is only toward the language negotiated by the parties and my obligation to confine my decisions to that language and not toward one side or the other.

Some of you who know me may be of the opinion that the courts of this state and I have a fundamental disagreement on how the arbitration process works. Those of you who do not know me will now find out why some of those who do know me think that way. Actually, that perception is all wrong. I have the utmost respect for the decisions of the courts of this state—most of the time.

[3] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The Role of the Courts in Reviewing Arbitrators' Awards

Here is an example of an Illinois court opinion that I hold in the highest regard that explains almost half a century of federal law concerning the role of courts in reviewing arbitrators' awards.[4] In this case, I denied a union's grievance and the union filed suit seeking to set aside my award. The First District Appellate Court enforced my award, reasoning as follows:

> While the Union disagrees with arbitrator Benn's interpretation of the agreement, it is his interpretation for which they bargained, not that of a court . . . . Thus, the parties must live with the arbitrator's interpretation even if it is incorrect so long as it can be said to derive its essence from the agreement.[5]

That is a good decision fully appreciative of the role courts play in reviewing arbitrators' awards. In simple terms, the court recognized that its function was to "stay out of it." Why? Because by agreeing to have arbitrators resolve their disputes, the parties to collective bargaining agreements have created their own mini-judicial systems and this hands-off approach keeps these kinds of cases out of the already beleaguered and backlogged state court system.

The "Public Policy" Exception (*Grace* and *Misco*)

The well-settled exception in federal law to limited court review of arbitrators' awards is found in the U.S. Supreme Court decisions in *Grace* and *Misco*.[6] Those cases hold that "a court may not enforce a collective-bargaining agreement that is contrary to public policy"; "the question of public policy is ultimately one for resolution by the courts"; and that policy must be "explicit" and "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[7]

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[4]The many years of law (now approaching a half-century) concerning the role of the courts in reviewing arbitrators' awards began with the *Steelworkers Trilogy (Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Enterprise Wheel & Car Corp.*, 363 U.S. 593) running through *W. R. Grace & Co. v. Local 759*, 461 U.S. 757 (1983); *Paperworkers v. Misco*, 484 U.S. 29 (1987); *Eastern Associated Coal v. Mineworkers*, 531 U.S. 57 (2000); and *Major League Baseball Players v. Garvey*, 532 U.S. 504 (2001).

[5]*Water Pipe Extension, Bureau of Engineering Laborers' Local 1092 v. City of Chicago,* 318 Ill. App. 3d 628, 640, 251 Ill. Dec. 915, 925, 741 N.E.2d 1093, 1103 (1st Dist. 2000).

[6]*Grace,* 461 U.S. 757; *Misco*, 484 U.S. 29.

[7]*Grace,* 461 U.S. at 766; *Misco,* 484 U.S. at 43.

The Role of the Arbitrator

I have a confession. I am a recovering advocate.

When I made the decision to become an arbitrator, I left my former clients' biases behind. But while those biases were left behind, my experiences as an advocate in the grievance arbitration process remained with me. Therefore, I am a recovering advocate.

My prior experience was that after leaving a staff attorney position with the National Labor Relations Board in 1978, I was a union-side attorney with the Chicago firm of Asher, Pavalon, Gittler and Greenfield until I became an arbitrator in 1986. In that advocate capacity, I negotiated contracts and settlements, arbitrated cases, and was involved in quite a bit of litigation.

That experience as an advocate formed my view of the proper role of an arbitrator. My view was fairly straightforward. First, an arbitrator is not a judge, but is just some person empowered by the parties to interpret and apply the specific provisions in the parties' negotiated contract. Second, because the parties negotiated the language—sometimes at great cost through language and benefit trade-offs (*quid pro quos*) and even strikes, and given what they had to give up to get specific language—the parties did not want their negotiated language ignored or changed by an arbitrator, *no matter what the language said.* Third, the arbitration hearings were the advocates' shows. The advocates chose what issues to argue and what evidence to present. The advocates often purposely stayed away from issues and evidence because of political or other concerns. The arbitrator's function was to listen, and then rule on what was presented and what the contract said. The arbitrator was not to take over the hearing and ask questions beyond clarification inquiries or go into areas in the award where the parties did not present evidence and arguments. Fourth, if there were problems with the contract language or the award, those problems were for the parties to sort out in a court proceeding with the limited review standards and the public policy exception. When I was practicing law, an arbitrator who did not follow those rules could count on not getting selected for future cases.

Aside from my practical experience as an advocate, which set the framework for my approach to being an arbitrator, my admittedly restricted view of the arbitrator's role was bolstered by another factor. The debates today over selection of judges for the federal bench including the U.S. Supreme Court are filled with labeling a nominee as a conservative "strict constructionist" (or

"originalist" or "textualist") or a liberal "activist." In performing their functions, arbitrators must be in the conservative strict constructionist category. That is because the parties have negotiated that conservative strict constructionist view into their contracts.

Most contracts contain language restricting the arbitrator's authority, such as ". . . the Arbitrator *shall have no right* to amend, modify, nullify, disregard, add to, or subtract from the provisions of this Agreement." The phrase "shall have no right" leaves little to the imagination. The parties intended that arbitrators must stay within the confines of the contract—no matter what. Contrary to the Constitution, which contains no such explicit restrictions on judicial authority and carries with it the difficult and rarely used amendment process, the parties to collective bargaining agreements have the ability every several years to amend the terms of their agreement. But changing the terms of the contract is for the parties—*not* the arbitrator.

My view of the limited role of an arbitrator also found support in the U. S. Supreme Court's view:

> . . . [A]n arbitrator is *confined* to interpretation and application *of the collective bargaining agreement* . . .
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> . . . [T]he specialized competence of arbitrators pertains primarily to the law of the shop, *not* the law of the land. . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts. . . .[8]

With this restricted view of the arbitrator's role, when I started hearing cases as an arbitrator, public policy was irrelevant to me. "Public policy" was not a factor negotiated by the parties into the agreements and I was contractually obligated to follow the terms of the agreement no matter what. If there were problems with my awards conflicting with public policy, my view was that those conflicts were caused by the parties' negotiated contract language and were for the courts to sort out.

To me, this restricted authority view made sense. I grew up on the streets of the North Side of Chicago. My friends and I did not have our parents drive us to the mall. There were none. We hung out on the streets and learned a lot of practical (if not questionable) things. With that kind of city street upbringing, my view of "public policy" was probably quite different from someone who grew up in a farming community in Central Illinois or coal coun-

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[8]*Enterprise Wheel & Car Corp.*, 363 U.S. at 597; *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 56–57 (1974) [emphasis added here].

try in Southern Illinois. Therefore, public policy should be determined by elected officials and the courts, not by some private individual who, by chance selection of two parties to a collective bargaining agreement, briefly functions as an arbitrator.

But then, in 1991, I met Vera DuBose.

AFSCME v. Central Management Services ("DuBose")

Vera DuBose was a State of Illinois employee in the Department of Children and Family Services employed as a caseworker and represented by AFSCME. DuBose wrote in a report that in February 1990, she saw some children under DCFS authority. In her report, DuBose stated that the children were "doing fine". DuBose, however, had a problem. The children had died in a fire prior to the date DuBose said she saw them. The children were therefore not "doing fine"—they were dead.

As you can imagine, there was a great deal of publicity when DuBose's conduct came to light. The Chicago Tribune reported:

> The case of the Wallace girls [the children in DuBose's report], laid out in a DCFS internal investigation report obtained by the Tribune, is another glaring example of a problem that has plagued the agency for years: caseworkers who lie.
>
> But DuBose's statement that she interviewed the girls after they were dead shows how absurdly false caseworkers' reports and testimony can be when caseworkers do not check on children out of laziness or because they are overloaded with work.[9]

DuBose was discharged and AFSCME grieved. I was selected to hear the case. Notwithstanding what appeared to be quite egregious conduct by DuBose, the State of Illinois also had a problem. The contract between AFSCME and the state provided that "[d]iscipline shall be imposed as *soon as possible* after the Employer is aware of the event or action giving rise to the discipline" [emphasis added]. And, the state waited a year to discharge DuBose after learning of her misconduct (nine months after completing its investigation). To complicate matters further for the state, there were three prior arbitration awards under the contract holding that much shorter time delays for imposing discipline were too long under the "as soon as possible" language. Those prior awards held that waiting 99, 71, and 124 days was too long. Again, here, the state waited *a year* to discipline DuBose.

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[9]Chicago Tribune, Oct. 30, 1991, North Sports Final Edition, at 1.

AFSCME argued that the discipline was void because the state waited too long to discipline DuBose. The arbitration clause in the agreement made arbitrators' decisions "final and binding." With my strict constructionist view of the function of the arbitrator, the decision was easy. I found the prior awards with the shorter time limits interpreting the language that discipline shall be imposed as "soon as possible" to be "final and binding" and applied the holdings of those awards. By contract, timely discipline was a contractual precondition to discipline and, if discipline was untimely, the discipline was void. Because the contract also had the language that I could not alter, amend, or ignore the parties' negotiated words, I sustained the grievance, reinstating DuBose with full back pay. I found:

> Whether I like the result is irrelevant. The parties have not asked me to decide this case on what I like. They have asked me to apply the terms of their Agreement and in this case those terms are quite clear. . . . [M]y decision in this matter reflects the parties' negotiated language and the extent of my authority. I therefore cannot address the merits of the allegations against Grievant.[10]

Public policy *never* came up during the hearing. Because the parties did not raise the public policy issue, I therefore did not address it. Arbitration is not "Star Trek"—I am not obligated to go where no one has gone before.

The state filed suit to vacate the award, with the appeal ultimately making its way to the Illinois Supreme Court.[11] Along the way, the decision was not kept out of the public's view. After the Fourth District Appellate Court enforced the award reinstating DuBose, the *Chicago Tribune* expressed outrage in an editorial:

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[10] *Illinois Department of Central Management Services and AFSCME (DuBose)*, Arb. No. 1794, 62/63-0366-91 (148719), Arb. Ref., 91.201 (1992), at 23–24.

[11] The appeal to the Illinois Supreme Court took a winding road. The Circuit Court of Sangamon County vacated the award on public policy grounds and remanded the matter to me for a decision on the merits, at the same time denying AFSCME's request to certify the issue for purposes of appeal. At the remand hearing before me, with the intent of obtaining an appealable order, AFSCME demurred. I then denied the grievance, which prompted an appeal of my second award by AFSCME. AFSCME sought to vacate my second award and filed suit in the Circuit Court of Cook County. The state moved to transfer venue back to the Circuit Court of Sangamon County, which was granted and that court denied AFSCME's request to vacate my second award. AFSCME then appealed to the Fourth District Appellate Court, which reversed the decision vacating my original award and held that the time provisions contained in the collective bargaining agreement could not be relaxed in favor of public policy. The state then appealed to the Illinois Supreme Court. *See American Federation of State County and Municipal Employees v. Department of Central Management Services, et al.*, 173 Ill. 2d 299, 302–04, 219 Ill. Dec. 501, 504–05, 671 N.E.2d 668, 671–72 (1996) ("*DuBose*").

AN UNJUST REWARD FOR DECEIT

> Now what's the proper way to handle such a caseworker, someone who would write out a false report, unaware that three children supposedly in her care had been dead for 10 weeks? Fire her? That's what DCFS tried to do. But it didn't stick.
>
> How about reinstatement to her job with back pay?
>
> That was the recent ruling by the Illinois Appellate Court, a ruling that spits in the eye of every diligent and concerned child-care worker in the state.
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> Reinstatement and back pay for Vera DuBose, a caseworker who lied about three dead children is heading back to work.
>
> Perhaps [the majority judges] haven't been paying attention to the news about child abuse and neglect. When a court demands that a grossly negligent worker be returned to a position where the welfare of children is at stake, it shows a sheer contempt for the public policy that deems abused children should not be further abused by the child-welfare system.
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> . . . The agency ought to take this case to the Illinois Supreme Court, and see if it can undo the harm that has been done by this ruling.[12]

The Illinois Supreme Court reversed the appellate court and vacated my original award.[13] The court agreed with my interpretation of the Agreement on the time limits—indeed, the state conceded that it disciplined DuBose in an untimely fashion.[14] However, the court held that my reinstatement of DuBose on a procedural issue—timeliness of the discipline—violated public policy. After discussing my remedy of reinstatement and back pay, the court stated that I:

> . . . avoided discussion of the charges against DuBose. He did not take any precautionary steps to ensure the misconduct at issue here will not be repeated, and he neither considered nor respected the pertinent public policy concerns that arose from them. Thus, the remedy in this case violates public policy in that it totally ignores any legitimate public policy concerns. [15]

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[12]Chicago Tribune, June 17, 1995, North Sports Final Edition, at 18.

[13]*DuBose,* 173 Ill. 2d 299, 219 Ill. Dec. 501, 671 N.E.2d 668.

[14]". . . DCFS does not dispute the arbitrator's contractual *interpretation* and even concedes that it violated the agreement's time provision" (emphasis in original). 173 Ill.2d at 306, 219 Ill. Dec. at 506, 671 N.E.2d at 673.

[15]173 Ill. 2d at 317–18, 219 Ill. Dec. at 511, 671 N.E.2d at 678.

But remember, public policy *never* came up at the hearing. Yet, the basis for the court's reversal was that I ". . . neither considered nor respected the pertinent public policy concerns. . . ."[16]

How could I consider public policy if it never came up at the hearing? Getting back to the role of arbitrators and their contractual obligation to stay within the confines of the parties' negotiated language and only to rule on what the parties present, if the parties did not raise public policy (in the contract or at the hearing), neither should I. The court felt differently.

For our purposes, the court in *DuBose* placed a remarkable burden on us as arbitrators. Now, after *DuBose*, in Illinois, arbitrators *must* consider public policy in public sector cases irrespective of the contract's silence on the issue and whether the parties raise the issue at the hearing.

But this is Illinois. And here, there is often more present than meets the eye. As *DuBose* was making its way up to the Illinois Supreme Court and aside from the *Chicago Tribune* editorials concerning the *DuBose* case, the Illinois courts were taking a journalistic pounding from former *Chicago Tribune* columnist Bob Greene concerning the handling of the infamous "Baby Richard" adoption.

Baby Richard was a four-year-old boy who was ordered by the Illinois Supreme Court to be turned over from the foster family he had lived with since he was a few days old to his biological parents whom he never met as a result of Baby Richard's biological mother's giving him up for adoption at birth. Baby Richard was given up for adoption apparently without the knowledge of the biological father, who thought the child was dead. The media covered the physical transfer of the child. The scene, which was repeatedly replayed on television, was truly gut-wrenching to watch as the little boy was physically pulled screaming and crying from his foster parents' arms and put into a van with his biological father, who then drove off.

Between May 1993 and September 1995, Greene wrote approximately 66 columns on Baby Richard.[17] In his articles, Greene was particularly critical of Illinois Supreme Court Justice James Heiple, which prompted Heiple in a July 1994 ruling denying a rehearing on the Baby Richard matter to accuse Greene of engaging in "acts of journalistic terrorism . . . designed to discredit me as a judge

[16] *Id.*
[17] Olsen, *Bob Greene's Richard File*, Columbia Journalism Review (Sept./Oct., 1995).

and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population."[18] Unfazed, Greene's journalistic assault on Justice Heiple and the Illinois Supreme Court continued.[19]

The appeal in *DuBose* arrived at the clerk's office in the midst of this war between the Illinois Supreme Court and the various members of the media over Baby Richard.[20] It is therefore no surprise that the court's decision in *DuBose* was a sniping, divisive opinion with stinging dissents and with the justices' minds on something other than the timeliness of disciplinary actions under a collective bargaining agreement.

For example, the majority stated:

> To be sure, the welfare and protection of minors has always been considered one of the State's most fundamental interests.
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> . . . [T]he State's interest in its children's welfare and protection must override AFSCME's concerns for timeliness.[21]

Justice Harrison dissented:

> . . . [T]he majority's professed concern for the welfare of children may seem more then a little disingenuous . . . [citing two cases]. In both of those cases, the court had an opportunity to provide meaningful redress where children were actually injured or killed due to the negligence of others. Instead, when compassion would have made a real difference, it was nowhere to be found. The court refused to help.
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> When all is said and done, this opinion amounts to nothing more than an attempt to exploit the specter of helpless children as a means to rationalize judicial union busting.[22]

In his dissent, Justice Nickels observed the following:

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[18] *In re Petition of John Doe and Jane Doe*, 159 Ill. 2d 347, 366, 202 Ill. Dec. 535, 543, 638 N.E.2d 181, 189 (1994). Some of Greene's articles were as follows: *The Sloppiness of Justice Heiple*, *Supreme Injustice for a Little Boy*, and Greene's bylines included *Justice Heiple: Ruling takes boy from home*, *James D. Heiple: No justice for a child*. *Id.* referencing *Chicago Tribune*, June 26, 1994, Tempo Section, at 1; June 19, 1994, Tempo Section, at 1; June 26, 1994, Tempo Section, at 1; June 19, 1994, Tempo Section, at 1.

[19] *A judge finally listens: Yes, there is another party to the case*, *Chicago Tribune*, July 30, 1997, CN Edition, at 1 ("He [Baby Richard] is the person whose rights have been ignored ever since the Illinois Supreme Court—with James Heiple writing the opinion—refused to allow him even a minute in court on his own behalf before he was loaded into that van.").

[20] Greene was not the only reporter to highly criticize Justice Heiple for the Baby Richard decision. A Chicago television news commentator, Walter Jacobson, publicized the Heiples' publicly listed home telephone number, encouraging viewers to call and ". . . bother him until he did the right thing." Olsen, *supra* note 17. Jacobson eventually apologized admitting that "I probably went over the line." *Id.*

[21] *DuBose*, 173 Ill.2d at 311, 317, 219 Ill. Dec. at 508, 511, 671 N.E.2d at 675, 678.

[22] 173 Ill. 2d at 337, 342, 219 Ill. Dec. at 520, 522, 671 N.E.2d at 687, 689.

> Public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you." . . . In its decision today, the majority grabs the reins of that unruly horse and embarks on a journey that will serve only to frustrate the goals of collective bargaining and sacrifice the efficiency of binding arbitration as a means of resolving labor disputes. . .
>
> In conclusion, I question how an arbitrator in the next case can avoid the folly that this case has become. When faced with a disciplinary action not timely taken, an arbitrator may no longer find that the action is untimely and enforce the collective bargaining agreement as written. The arbitrator must now take proof on the merits in order to determine if the misconduct actually occurred, and if it did, then determine if it is gross enough to negate the operation of the limitations provision. Whatever the arbitrator's decision, it is certain to spawn an appeal thereby sacrificing the efficiency of "binding" arbitration as a means of resolving labor disputes. That is the legacy of the majority's ride on that unruly horse.[23]

"[T]his opinion amounts to nothing more than an attempt to exploit the specter of helpless children as a means to rationalize judicial union busting . . . the folly that this case has become"? All of this (and more) because I found three prior awards decided the timeliness question and I was contractually bound to follow those awards.

As a result of *DuBose*, whether raised or not (and most often it is not), arbitrators hearing public sector cases in Illinois now have an *affirmative* obligation in cases where we reinstate a public employee to: (1) take precautionary steps in our remedies to ensure the public that the misconduct will not happen again; and (2) explain why the public can be reasonably assured that it will not happen again.[24] These affirmative findings have become known as the *DuBose* findings. And, if an arbitrator makes those findings "expressly or by implication," according to the court the award *must* be enforced.

> . . . [A]s long as the arbitrator makes a *rational* finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be *obliged* to affirm the award.[25]

There it is. If an arbitrator makes a "rational finding" that the employee will not do it again then the court will ". . . be obliged

[23]173 Ill. 2d at 342, 348, 219 Ill. Dec. at 522–23, 525, 671 N.E.2d at 689–90, 692.

[24]173 Ill. 2d at 317–18, 219 Ill. Dec. at 511, 671 N.E.2d at 678.

[25]173 Ill. 2d at 322, 332, 219 Ill. Dec. at 513, 518, 671 N.E.2d at 680, 685 (emphasis added).

to affirm the award." Therefore, although not specifically saying so, what the justices of the Illinois Supreme Court really did in *DuBose*, in the process of sniping at each other over whether in the past they have adequately protected the interests of children, was to shift public policy determinations from the legislature and the courts to arbitrators. Talk about passing the buck. But again, arbitrators have no business making those kinds of public policy determinations—those decisions are for our elected officials and the courts.

For stability purposes, however, the parties and arbitrators needed to know what the rules were and the court in *DuBose* set the rules. All of this sounds nice and definitive, I suppose, and it appears to give a framework, but remember, this is Illinois and the only thing that matters is politics.

And now, Engine 100.

Engine 100

Let's move to 1997. *DuBose* is now about a year old. In May 1997, a videotape of an April 1990 retirement party at the Engine 100 firehouse was brought to the attention of the Director of Internal Affairs of the Chicago Fire Department. The videotape showed that during the party, some firefighters at the firehouse consumed alcoholic beverages inside the firehouse; some then went on fire calls; some made offensive comments of a racial, gender, or ethnic nature; and some engaged in other conduct such as exposing themselves. Although having knowledge of the videotape in May 1997, the Department's Director of Internal Affairs did not advise his superiors of the existence of the videotape and its contents until late November 1997, when he learned that a local television reporter had been given a copy of the tape and the tape was going to be played on the news.

The tape was aired on television and the reaction was as expected—outrage. The tape was a political embarrassment for the city. The TV stations kept playing the tape and the newspaper accounts kept the tape in the public eye.[26] After investigation, 7 firefighters were discharged and 21 others were given suspensions ranging

[26] *See, e.g., 27 Firefighters May Fall in Wake of Video Scandal Chief's Son Quits Following Probe,* Chicago Tribune, March 4, 1998, North Sports Final Edition, 1; *Caught on Tape: Sex, Beers and Video Idiocy,* Chicago Tribune, Dec. 10, 1997, North Sports Final Edition, at 1.

from 6 to 60 days. The Firefighters Union grieved the discipline and I was selected to hear the case.

As in *DuBose*, however, there was a substantial procedural problem. The Director of Internal Affairs (who was also the son of the Fire Commissioner) learned of the tape's existence in May 1997. But the investigation into the employee misconduct did not begin until late November 1997—approximately six and one-half months later—when it became apparent that the media had a copy of the tape and was going to publicize it. The procedural problem was that the contract between the City of Chicago and the Firefighters Union had a provision providing that the City ". . . *shall* conduct disciplinary investigations *when* it receives complaints . . ." [emphasis added].

In February 1998, the Director of Internal Affairs was discharged for failing to timely investigate the incident. If the Director of Internal Affairs was discharged for failing to timely investigate the matter (he waited six and one-half months) and the contract had a provision that required the city to conduct disciplinary investigations when it receives complaints, it did not take much to conclude that the investigation was untimely as a matter of contract. Because the contract also had the limitation that "The arbitrator shall have no right to amend, modify, ignore, add to, or subtract from the provisions of this Agreement," I had to find that:

> As offensive as I may find the misconduct depicted on the videotape, I have no authority or choice to ignore the language of . . . the Agreement which requires that the City immediately investigate employee misconduct.[27]

Because the parties contractually agreed that timely investigations of discipline are a precondition to discipline, I found the disciplinary actions untimely and void, revoked all of the discipline, reinstated the discharged, employees and made them whole.[28]

I also made the *DuBose* findings, concluding that the public could be assured that these firefighters would not engage in the same conduct in the future. The evidence in a bifurcated hearing on the public policy issue showed that: (1) those involved were very long-term employees (some having more than 25 years of service), several employees were promoted since the incident (to positions as high as battalion chief), a number of the employees

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[27] *City of Chicago and Chicago Fire Fighters Union Local No. 2 (Engine 100 Discipline)*, Arb. Ref. 98.230 (1998), at 29.

[28] *Id.* at 29–30.

received commendations for their service, there was no discipline for any (with exception of a two minor reprimands) since 1990; (2) these were highly skilled and trained individuals and the public would suffer not having the services of such experienced firefighters; (3) the fact that the city took such strong disciplinary action sent a clear and unambiguous statement to the employees that such conduct would not be tolerated in the future; (4) the extensive damning publicity of the contents of the videotape in the media also sent a strong message to the employees that similar future conduct would not be tolerated; (5) the city had already put into place measures to prevent similar conduct in the future by ordering all employees to review policies prohibiting substance abuse, discrimination, and sexual harassment; and (6) if the city was of the opinion that the views and conduct shown on the videotape persisted, it could order training and take disciplinary action.[29] I concluded on the *DuBose* findings:

> In sum then, I am satisfied—and I find—that Grievants are capable of rehabilitation; that the conduct allegedly engaged in by Grievants will not reoccur; and that steps have been taken and can be taken to assure the public of that result.[30]

In my mind, given the quality of the employees who foolishly engaged in the offensive conduct caught on the videotape more than 7 years before the tape was made public, those findings were "rational" and, under *DuBose*, any reviewing courts were therefore "obliged to affirm the award."[31]

The *Chicago Tribune* felt otherwise. In an editorial, the *Tribune* wrote:

> LOUTS AND TECHNICALITIES
>
> An arbitrator has thrown out sanctions imposed on 28 Chicago firefighters who were fired or suspended for taking part in a 1990 beer blast held, of all places, in a firehouse. The firefighters' behavior was vile. The arbitrator's search for a technicality upon which to reverse the punishment is nearly as insulting.
>
> News of the firehouse party surfaced in November 1997 when a video of the event became public. It is repulsive viewing: firefighters serving up racial slurs, exposing themselves and drinking beer. Some of the beer-swilling firefighters later went out on fire calls. After the tape surfaced, the department moved to dismiss seven firefighters and suspend 21 others.

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[29] *Id.* at 25–28.
[30] *Id.* at 28.
[31] 173 Ill. 2d at 322, 219 Ill. Dec. at 513, 671 N.E.2d at 680.

> As it turned out, the head of the fire department internal affairs division, Edward F. Altman, had known of the tape for six months and taken no action. He was, appropriately, fired.
>
> But Altman's failure has come back to haunt the department. Arbitrator Edwin Benn has seized on the time period between Altman's knowledge and the first steps to discipline the firefighters, and cried foul. Benn, in a ruling this week, said that contract language directing that the city "shall conduct disciplinary investigations when it receives complaints . . ." was violated by the six-month delay. Benn ordered the city to rehire the dismissed firefighters and give back pay to everyone who was disciplined in the case.
>
> The city rightly points out that the contract has no statute of limitations on bringing discipline cases. The arbitrator has, in effect, created his own.
>
> Moreover, the practical impact of this decision is haunting: Firefighters who were caught drinking on the job—who put the public's safety in clear jeopardy—will be rewarded with back pay and get their jobs restored.
>
> Mayor Richard Daley's office has promised to take this case to the Cook County Circuit Court and vowed not to rehire the firefighters until there is a final resolution. Let's hope the court can find the common sense that was missing in arbitration.[32]

The other Chicago newspaper covering the award took a different approach—it conducted a poll. The *Chicago Sun-Times* published the following results:

> Q. Do you agree with the arbitrator's decision overturning the firings and suspensions of firefighters?
>
> Yes: 59%
> No: 41%[33]

Most politicians would envy those numbers.[34]

While the results of an unscientific poll of public opinion apparently agreed with my award, the question became whether the award squared with public policy. Understandably, the city filed suit to vacate the award. The Circuit Court of Cook County en-

[32]Chicago Tribune, Jan. 2, 1999, North Sports Final Edition, at 16.

[33]Chicago Sun-Times, Jan. 1, 1999, MetroChicago Section, Morningline.

[34]The *Sun-Times* poll with responses taken by telephone was admittedly ". . . not a scientifically designed poll and therefore no claims are made as to the validity of its results." *Id.* No one checked to see how many of those responding to the poll were firefighters. I assure you, no one with my last name voted.

forced the award.[35] That prompted another disapproving editorial from the *Chicago Tribune*:

TAXPAYERS BURNED BY TECHNICALITIES

> It's hard to decide which is the more galling: the racist and drunken behavior of those 28 firefighters captured on a 1990 firehouse video, or the fact that the city's disciplinary action against the participants has been overturned—first by an arbitrator, now by a judge—as a violation of the firefighters' union contract.
>
> It's hard to decide which is the more galling: the fact that a Fire Department paramedic drove an ambulance while drunk and sideswiped a school bus in the process, or that his firing was voided by an arbitrator this week as a violation of the firefighters' union contract.
>
> It's hard to know which is the more galling: that there is an investigation now into allegations that private cars have been serviced at the Fire Department's maintenance shop on the South Side—Mayor Daley confirmed it Tuesday—or that any discipline that may result has to run the gantlet of—you guessed it—the firefighters' union contract.
>
> The question raised by all these incidents is the same: Is the Chicago Fire Department a public-service entity answerable to the taxpayers, or a self-serving club devoted to the protection of its members?
>
> The notorious 1990 video showed firefighters drinking beer, singing racist lyrics and exposing themselves. The video did not become public until November 1997, although, crucially, it had been turned over about six months earlier to Edward F. Altman, the department's internal affairs chief, who took no action.
>
> Early last year, Altman resigned—he was about to be fired—and the city also dismissed seven firefighters and suspended 21 others.
>
> But it was the failure of Altman, son of Fire Commissioner Edward P. Altman, to take immediate action that became the basis for the arbitrator to declare the city's disciplinary actions a violation of the union contract.
>
> Lawyers for the city correctly argued that there is no statute of limitations on disciplinary actions, but on Tuesday Cook County Circuit Judge Thomas Hett reaffirmed the arbitrator's decision that under the contract, discipline delayed is discipline forfeited.
>
> Bill Kugelman, president of Local 2 of the Chicago Firefighters Union, pleads that his buddies have been "punished enough." Not nearly as much, one might argue, as the taxpayers who have had to watch in astonishment as city payrollers pull the most egregious stunts—and get away with them.[36]

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[35] *Chicago Fire Fighters Union v. City of Chicago*, 99 CH 518 (Cir. Ct. Cook County, 1999) (Hett, J.).

[36] Chicago Tribune, June 24, 1999, Chicago Sports Final Edition, at 28.

Appeals followed and the case went up and down like an elevator in Water Tower Place during the Christmas shopping season, making it to the Illinois Supreme Court three times.[37] Ultimately, the case was remanded to me by the courts taking away the procedural issue concerning the timeliness of the discipline and requiring that I consider the merits of the disciplinary actions. When all the smoke cleared, the reasoning for vacating the award on public policy grounds was because I did not consider the merits of the case:

> The record shows that the arbitrator cited six reasons why he was assured that employees posed no further danger to the public *without ever considering the merits of the case.*[38]

That conclusion is nothing short of silly. There was a hearing on the public policy question—the *DuBose* issue. Public policy is different from the merits or just cause. And, most importantly, it is hard to hold a hearing on and consider the merits of a disciplinary action if the discipline is procedurally defective. If a grievance is untimely, an arbitrator cannot decide the dispute on the merits of the case no matter how good the merits may be. This case is no different—but this is Illinois and politics prevail. In order to appease a frenzied press and to accommodate the politics of this very volatile situation, the court issued decisions in *Engine 100* that are simply embarrassing to read.

On remand, I was not very restrained in my comments. I reviewed the history of the case and commented that the "Appellate Court's decision was a judicial embarrassment" and that the court had created a "mess".[39] I pointed out that this contorted legal reasoning by the appellate court undermined the finality of arbitration decisions. I also pointed out that civil suits and criminal actions are routinely dismissed as being outside of pertinent statutes of limitations or if procedural or Constitutional safeguards are not followed even if the merits of the suit are good or the accused actually committed the crime.[40] A cardinal rule for writing

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[37] *Chicago Fire Fighters Union Local No. 2 v. City of Chicago*, 315 Ill. App. 3d 1183, 248 Ill. Dec. 788, 735 N.E.2d 108 (1st Dist., 2000) (reversing the circuit court and denying enforcement of the award); petition for leave to appeal denied, 192 Ill. 2d 686, 742 N.E.2d 326 (2000); request for reconsideration granted vacating appellate court decision, No. 90217 (Dec. 28, 2000) (unpublished); enforcement of award denied on remand, 323 Ill. App.3d 168, 256 Ill. Dec. 332, 751 N.E.2d 1169 (2001); petition for leave to appeal denied, 196 Ill.2d 537, 763 N.E.2d 316 (2001).

[38] 323 Ill. App. 3d at 180, 256 Ill. Dec. at 342, 751 N.E.2d at 1179 (emphasis in original).

[39] *City of Chicago and Chicago Fire Fighters Union Local No. 2 (Engine 100 Discipline—Supplemental)*, Arb. Ref. 98.230 (2002) at 8, 15, note 21.

[40] *Id.* at 12–13.

decisions is that if you have to twist your logic into a pretzel to get to the end result, the decision is wrong. The appellate court's reasoning in *Engine 100* was a family-size bag of pretzels.

The courts got their pound of flesh. On remand, all of the suspensions were upheld; the discharged employees were reinstated with no back pay, but they had to go through an employee assistance program, and they had their pensions restored. My hands were tied.[41] The matter ended.

Another Aberration

Another procedural problem that clashed with public policy arose concerning the discipline of a sergeant working for the DeWitt County Sheriff's office. The sergeant knew of the existence of an arrest warrant for an individual for domestic battery and violation of a protective restraining order, but allowed the individual to delay turning himself in. After the sergeant failed to make the arrest and prior to turning himself in, the individual again violated the restraining order and battered his wife.

The sergeant was then discharged. However, more than 30 days had elapsed from the time that the employer learned of the misconduct. The procedural problem was that the contract between the Sheriff and the Fraternal Order of Police (FOP) had a provision which stated that "*[a]ll* discipline *must* be administered within thirty (30) days of the date of the alleged offense becoming known to the Sheriff or from when he/she reasonably should have known" [emphasis added]. The contract also contained language restraining an arbitrator's authority to alter, amend or ignore the parties' negotiated terms.[42]

Contractually, I had no choice. "*All* discipline *must* be administered *within 30 days*" and this discipline was not so administered. I noted that:

> This harsh result is personally troublesome to me. However, that harsh result comes from clear language of the Agreement. It is a fundamental rule of contract construction that, even if harsh, an interpre-

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[41] *Id.* at 23–25.

[42] It is understandable why the sheriff did not act in a timely fashion. At the time of the sergeant's failure to make the arrest, the sheriff's daughter had been involved in a serious car accident and the sheriff was tending to his daughter's needs (sadly, she died). However, the sheriff's management subordinate who ran the department in the sheriff's absence was fully apprised of the circumstances surrounding the sergeant's failure to make the arrest.

> tation must be followed if that result comes from clear language of the Agreement.[43]

I sustained the grievance and reinstated the sergeant.[44]

With respect to public policy (which the parties argued at the hearing), I also made the *DuBose* findings that:

> Grievant is no short-term employee—he has approximately eight years of service for the County as an officer. Even though Grievant has been subjected to discipline in the past, it seems to me that upon Grievant's reinstatement, clear, concise instructions by the Employer to Grievant concerning his obligations along with the appropriate degree of training as deemed necessary by the Employer, coupled with the clear indication that should Grievant fail to act accordingly in the future, severe discipline (*e.g.*, discharge) will follow, will sufficiently serve as adequate protection to the public that Grievant will in all likelihood act in accord with the Department's standards, particularly with respect to enforcing the obligation to arrest individuals in accord with the Illinois Domestic Violence Act. Those kinds of safeguarding steps are all within the Employer's managerial prerogatives.[45]

The Sheriff filed suit to vacate the award and prevailed in the circuit court. The FOP appealed to the Fourth District Appellate Court, which upheld the circuit court.[46] The court found that "[t]he arbitrator's decision was based on its [sic] interpretation of the Agreement and we will not reverse the award on those grounds."[47] The court also stated, however:

> We find the arbitrator's strict application of the 30-day provision, as applied to the facts of this case, violated public policy. In cases of domestic abuse and other matters of clearly established public policy, the strict application of the 30-day provision must yield to the public's safety and the provisions of the Illinois Domestic Violence Act. We cannot allow the Sheriff's Department to contract away its responsibility to discipline its officers for serious infractions that jeopardize the public's well-being. . . .[48]

The most troubling aspect of the court's decision is its statement, "We cannot allow the Sheriff's Department to contract away its responsibility to discipline its officers for serious infractions that jeopardize the public's well-being." According to the Fourth

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[43] *County of DeWitt/DeWitt County Sheriff and Fraternal Order of Police Labor Council (Daugherty)*, Arb. Ref. 97.275 (1998), at 4.

[44] *Id.* at 6.

[45] *Id.* at 10.

[46] *DeWitt County Sheriff v. The Illinois Fraternal Order of Police, Labor Council*, No. 4-98-0673 (4th Dist. 1999).

[47] *Id.*, slip op. at 4.

[48] *Id.* slip op. at 6–7.

District Appellate Court, contractual time limits for disciplining employees are apparently illegal subjects of bargaining.

The court simply changed the terms of the parties' negotiated language to prevent what it (and I) saw as a distasteful but contractually required result. But again, aren't criminals set free on procedural issues? Aren't meritorious suits dismissed for the same reasons? How is this different? The Fourth District's decision is unpublished and nonprecedential. It should remain that way.

The court remanded the case to me to consider the merits of the disciplinary action. On remand and with the procedural issue taken away by the court, I found just cause for the discharge.[49]

But There Is Hope

Public policy again came into play in a recent case, but this time it was not in a procedural context, but concerned the merits. A police officer employed by the City of Highland Park, Illinois, was given an 18-day suspension for off-duty misconduct after he thought he observed a van bump a vehicle driven by his wife. The officer's misconduct—which consisted of showing the driver of the van his badge, demanding that the driver of the van produce his driver's license, pounding on the van's window, reaching into the van to prevent the driver from leaving the scene, and touching or grabbing the van driver's wife in the process—resulted in the officer's prosecution for battery and disorderly conduct.

The 18-day suspension was given to the officer by the City of Highland Park with full knowledge that criminal charges were pending against the officer. The officer served the 18-day suspension. After serving the suspension and after the officer was convicted of one count of criminal trespass to a motor vehicle (a misdemeanor resulting a sentence of supervision, which, under Illinois law could be dismissed if he successfully completed the terms of his supervision),[50] the City of Highland Park discharged the officer. The Teamsters Union then grieved the discharge and I was selected to hear the case.

I found that by giving the officer an 18-day suspension and then discharging him after the finding of guilt for the same miscon-

[49] *County of DeWitt/DeWitt County Sheriff and Fraternal Order of Police Labor Council (Daugherty—Supplemental),* Arb. Ref. 97.275 (1999).

[50] *City of Highland Park v. Teamster Local Union No. 714,* 357 Ill. App. 3d 453, 293 Ill. Dec. 341, 344, 828 N.E.2d 311, 314 at n.1 (2d Dist. 2005), *citing* 730 ILCS 5/5-6-3.1(d), (e).

duct, the City of Highland Park subjected the officer to double jeopardy.[51] With respect to the *DuBose* findings, I found:

> I am satisfied—and I find—that Grievant is capable of rehabilitation; that the conduct engaged in by Grievant will not reoccur; and that steps can be taken to assure the public of that result.
>
> First, prior to the April, 2001 incident which ultimately resulted in his discharge, Grievant was a fairly long term employee with approximately 13 years of active service as a police officer for the citizens of Highland Park. During that period and prior to the events in this matter, Grievant had no disciplinary suspensions. In short, Grievant was a good police officer.
>
> Second, the fact that the City only initially chose to impose an 18 day suspension for the underlying misconduct engaged in by Grievant in April, 2001 speaks volumes concerning Grievant's abilities and underscores the conclusion that Grievant was a good police officer. The City could have taken much stronger discipline at the time it suspended Grievant, but it chose not to do so. To me, that inaction by the City says that *the City* recognized that Grievant was a good police officer and that he would understand and benefit from a disciplinary action short of discharge.
>
> Third, the purpose of discipline is to rehabilitate and to send a corrective message to an employee that he must conform his conduct to his employer's rules and expectations. With the 18 day suspension given to Grievant, a corrective message has been sent to Grievant that he cannot engage in the type of conduct he exhibited in April, 2001.
>
> Fourth, but the public may need further assurance that Grievant will not again engage in the underlying conduct. To give the public that further assurance, the City shall be free to require Grievant to undergo reasonable retraining to make certain that Grievant understands the Department's rules and that he cannot engage in similar kinds of conduct in the future. Further, at the City's option, the City can require that Grievant submit to an evaluation pursuant to its Employee Assistance Program ("EAP") with an emphasis on anger management. In addition, as a condition of continued employment, I shall require that if the City chooses to exercise this EAP option, that Grievant comply with any program deemed appropriate by the EAP.[52]

The City of Highland Park filed suit to vacate the award. The circuit court vacated the award on public policy grounds. The Second District Appellate Court reversed and reinstated the award.[53]

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[51] *City of Highland Park and Teamsters Local 714 (Stumpf)*, Grv. No, 02-02, Arb. Ref. 02.227 (2003), at 7-9.

[52] *Id.* at 10–12 (footnotes omitted, emphasis in original).

[53] *City of Highland Park,* 357 Ill. App. 3d 453, 293 Ill. Dec. 341, 828 N.E.2d 311.

While I have expressed continued concern over the years that arbitrators have no basis making public policy decisions that should be made by elected officials and the courts and that the result of *DuBose* was to shift that decisionmaking process to arbitrators, I have recognized that *DuBose* is the law in this state and as arbitrators we now have to make those decisions. My complaint is that notwithstanding *DuBose*, in the cases I have discussed so far, the courts have ignored *DuBose* and have made the politically expedient decisions.

This case is different. In enforcing my award in this case, the Second District hit the nail on the head. The court found the circuit court's reasoning for vacating of my award "highly problematical."[54] The court then went on to find:

> . . . We are aware of nothing that allows a trial court reviewing an arbitrator's award to make its own findings of fact *de novo*. . . .
>
> . . . [A] court must defer to the arbitrator's decision to reinstate a discharged employee "as long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct." *DuBose*, 173 Ill.2d at 322, 219 Ill.Dec. 501, 671 N.E.2d 668. In arguing that the arbitrator's finding in this case was not rational, the City emphasizes that, despite the jury's finding that he violated the law, Stumpf [the officer] has remained unrepentant and has persisted in his belief that he did not violate the law. The City reasons, as did the trial court, that nothing is gained by allowing the City to order Stumpf to undergo anger management training, as his acts resulted not from anger but from a stubborn belief that he was right. The City's argument is not without force. *However, the issue is not whether we agree with the arbitrator's optimistic assessment of Stumpf's future but only whether that assessment was rational. We conclude that it was.* [55]

The Second District Appellate Court followed *DuBose* to the letter.

Perhaps the most amusing part of the case was the rather desperate argument made by the City of Highland Park that because I have been the arbitrator in a number of the high-profile public policy cases discussed in this paper, the court should take that into account to set aside the award. The court rejected that notion out-of-hand:

> Finally, we note the City complains that the arbitrator in this case, Edwin H. Beane [sic], has made at least three awards reinstating public employees that were later vacated by Illinois courts. . . . The City

[54]293 Ill. Dec. at 348, 828 N.E.2d at 318.

[55]293 Ill. Dec. at 349, 351–52, 828 N.E.2d at 319, 321–22 (emphasis added).

> fails to explain how the arbitrator's previous decisions are relevant to this case. We note that the CBA provides a process allowing both the Union and the City input in the selection and rejection of neutral arbitrators. If the City is so against this particular arbitrator, the process allowed the City to reject him.[56]

And that is how the process should work.[57]

Perhaps the most disturbing aspect of this case was an attempt by the attorneys handling the court proceedings for the City of Highland Park to take my deposition in the circuit court arguing that "[i]f the City is given the opportunity to depose Arbitrator Benn, it will be able to more fully analyze Arbitrator Benn's bias during his decision-making process." That motion was made notwithstanding the fact that I mediated the first collective bargaining agreement between the City of Highland Park and the Firefighters Union and had been the permanent arbitrator under that contract since 1988 and that I had previously ruled against the union in this case and in favor of the City of Highland Park in an interest arbitration.

Because of the attack upon the arbitration process and the principle that arbitrators are immune from discovery and suit, with the assistance of the Academy, the American Arbitration Association, and with Academy member Peter Meyers acting as my counsel, that motion to take my deposition prompted my filing a motion for personal sanctions against the attorneys representing the City of Highland Park in the circuit court action on grounds that they filed a frivolous and bad-faith motion. After receiving my motion for sanctions, the City of Highland Park's attorneys agreed to drop the effort to take my deposition if I similarly agreed to drop my motion for sanctions. That aspect of the dispute then quietly died.

The issue of the attempt to take an arbitrator's deposition did not go away, however. As a result of this attempt, a bill was introduced in the Illinois Senate (SB 1846) during the 2005 legislative session seeking to amend the Illinois Uniform Arbitration Act (710 ILCS 5/1) to provide that an arbitrator is immune from civil liability, is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling

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[56] 293 Ill. Dec. at 352–53; 828 N.E.2d at 322–23.

[57] The City of Highland Park filed a petition for leave to appeal to the Illinois Supreme Court. Illinois Supreme Court Docket No. 100701. On September 29, 2005, the court denied the petition, thereby enforcing the award. 216 Ill. 2d 686, 298 Ill. Dec. 377, 839 N.E.2d 1024 (2005).

occurring during the arbitration proceeding to the same extent as a judge acting in a judicial capacity. The bill also provided that if a person commences a civil action against an arbitrator arising from the services of the arbitrator or if a person seeks to compel an arbitrator to testify or produce records in violation of the new provisions, the arbitrator would be entitled to reasonable attorneys' fees and expenses of litigation. The bill made it through two readings in the Senate Judiciary Committee, but, for political reasons, unfortunately died for that session when it was referred to the Rules Committee on May 10, 2005. I do not believe, however, we have heard the last about that bill.

My Fellow Panelists' Views

My esteemed colleagues on this panel have stated their views on public policy and arbitration awards. Our views come from different perspectives in this process.

From labor's perspective, Gil Feldman traces the cases in the courts where the unions have successfully applied *DuBose* to enforce arbitrators' awards, notwithstanding public policy challenges, and concludes that the Illinois courts have crafted a formula well-designed to eliminate the real, rather than any esoteric, problem in the courts—the attempt by judges to second-guess arbitrators. I agree that in routine cases, that is the result if *DuBose* is applied as it is written.

Nevertheless, given some of the high-profile, politically volatile disputes I have been faced with, and as shown by the above discussion, Gil's conclusion is not always the result. Moreover, the fact that all of those cases cited by Gil had to be litigated in court makes one of the important points of this discussion. The Illinois courts' approach has encouraged appeals, undercut finality of arbitrators' awards, and in many instances has made the courts the fifth step in the grievance process.

From management's perspective, Ted Clark and Jim Baird urge that parties to collective bargaining agreements in the public sector (and arbitrators) should not be surprised when a court sets aside an award even though the award is based on the parties' collective bargaining agreement. I would share that view if the parties did not have the language found in most contracts that prohibits an arbitrator from altering, amending, or ignoring the parties' negotiated words. I would also share that view were it not for the *DuBose* standard shifting public policy determinations from elect-

ed officials and the courts to arbitrators when the court stated that a "rational" finding by an arbitrator that an employee would not engage in the same misconduct in the future "obliged" the court to affirm the award.

Again, arbitrators are not judges—we cannot do equity. When the parties put language in their contracts prohibiting arbitrators from altering, amending, or ignoring negotiated language, they have effectively tied our hands and told us to stick to the plain language of the Agreement no matter what the result. We are therefore strict constructionists whether those constructions favor labor or management. Knowing Ted and Jim as I do, I highly doubt that they would want an arbitrator to ignore language that favors their position in a case or add language that undercuts their position. For example, I do not believe Ted and Jim would be appreciative of an arbitrator's decision that sustained a grievance on the merits when the grievance was not timely filed. Nor do I believe that Ted and Jim would appreciate a court ordering an arbitrator to hear the merits of a grievance due to public policy concerns after the arbitrator dismissed the grievance as untimely filed. And, while I agree that courts are to determine public policy issues—a mantra I have repeated over the years—a close reading of *DuBose* shows that when the court determined that ". . . as long as the arbitrator makes a *rational* finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be *obliged* to affirm the award," the Illinois Supreme Court effectively shifted public policy determinations from our elected officials and the courts to arbitrators.[58] I never believed arbitrators should have that authority and I never wanted that power. But now, if that is to be the rule, the courts and the parties must abide by that shift of authority. The court decisions I have discussed that did not enforce the underlying awards merely gave lip service to that rule and failed to follow that mandate.

Conclusion

In sum then, I believe the court decisions in Illinois concerning public policy have resulted in the following:

First, there has been an improper shifting of the responsibility for making public policy determinations from elected officials

[58] 173 Ill. 2d at 322, 219 Ill. Dec. at 513, 671 N.E.2d at 680 (emphasis added).

and the courts to private arbitrators who are ill-equipped to make such determinations and whose function is only to strictly apply the terms of the negotiated agreement.

Second, arbitrators are now required to make these public policy determinations even in cases where the parties do not raise or discuss the issue—a result that I believe undermines the arbitration process in that the parties are the ones who frame the issues and present the arguments and evidence in support of the issues they choose to bring forward.

Third, if the implications of an award have sufficient political overtones, some Illinois courts have disregarded the limited review standard articulated by the Illinois Supreme Court for these cases and have made politically expedient decisions that have changed the negotiated terms of the parties' contracts.

Fourth, the end result is that the finality contemplated for arbitrators' awards has been seriously undermined because the Illinois public policy exception encourages court challenges.

Fifth, the absurd result is that the Illinois courts now require arbitrators to make determinations on the merits of disciplinary actions even when the merits cannot be addressed because of a contractual procedural infirmity. This is akin to requiring a court in a civil or criminal case to first consider the merits of an underlying action before ruling on any procedural or jurisdictional challenges. That is nothing short of silly.

Sixth, the ironic twist is that because a number of these cases arose in procedural contexts where the public employer did not act in a timely fashion, it will be *unions* and *not* employers who will ultimately benefit from the Illinois courts' willingness to ignore contractual time limits on public policy grounds. With the Illinois courts' willingness to ignore time limits on public policy grounds, unions will now be able to formulate rational arguments to a court that an untimely grievance must be considered on the merits since the underlying disciplinary action violated some public policy (for example, various forms of statutorily prohibited discrimination).

Getting back to *DuBose*, Justice Nickels observed in his dissent that "[p]ublic policy 'is a very unruly horse, and . . . once you get astride it you never know where it will carry you." Justice Nickels then characterized the majority opinion as "folly" and states that the decision ". . . will serve only to frustrate the goals of collective bargaining and sacrifice the efficiency of binding arbitration as a means of resolving labor disputes."[59]

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[59]173 Ill. 2d at 342–43, 219 Ill. Dec. at 522–23, 671 N.E.2d at 689–90.

I believe from my long involvement in the grievance/arbitration process as an advocate and an arbitrator that because of the Illinois courts' approach to the public policy exception, public employers and unions in Illinois are now riding that "'unruly horse'". Obviously, as I have done since the *DuBose* decision, if I have to reinstate a public employee, I will follow *DuBose* and structure a remedy that will reasonably assure the public that the employee will not engage in the same misconduct in the future. If I cannot make that reasonable assurance, I will not order reinstatement. But, I will continue to adhere to the principle that as arbitrators we are obligated to follow the parties' negotiated language no matter what. For us as arbitrators to do otherwise will result in a ride on Justice Nickels' "unruly horse" on a trip down a slippery slope.

But then again, "welcome to Illinois."

Vonhof: Thank you very much, Ed. Gil, you can get on the unruly horse now.

Public Policy Challenges to Labor Arbitration Awards in the Illinois Public Sector[1]

Gilbert Feldman*

Labor arbitration awards interpret and apply collective bargaining contracts and become part of the contract. Under Illinois law, an award is not subject to court review as long as the arbitrator acted within his or her authority. That authority is basically derived from the principles enunciated in the *Steelworkers Trilogy*. Essentially, the authority of an arbitrator cannot be challenged if (1) he or she decided the issues submitted and (2) any rational person would agree with the arbitrator's decision.[2]

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*Cornfield & Feldman, Chicago, Illinois.

[1]Editor's Note: What follows are the prepared remarks of Mr. Gilbert Feldman and Mr. R. Theodore Clark, Jr., Partner, Seyfarth Shaw. Mr. Clark was unable to attend the National Academy Meetings, so his colleague, James Baird, also a Partner at Seyfarth Shaw, represented Mr. Clark during the verbal exchange that followed the presentation of the papers.

[2]*Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 391–92, 574 N.E.2d 636 (1991).

Common law, however, recognizes that a contract is unenforceable if the contract violates public policy. As labor arbitration awards were challenged on the basis of public policy, an inevitable judicial conflict emerged involving the apparent inconsistency between public policy law and the finality of collective bargaining contract law. Most of the cases involved discharges that arbitrators found were not for just cause, but in which arbitrators found misconduct by the discharged employee which warranted disciplinary suspensions. Responding to this confusion, the Illinois courts, in two supreme court and two appellate court decisions, have devised a workable formula calculated to reconcile this conflict and to accord credibility to both legal principles.[3]

That formula encompasses three overriding legal principles to resolve the public policy based attacks on labor arbitration awards that vacate discharges: (1) the findings of the arbitrator are not subject to court review; (2) the issue before the court is whether the contract as interpreted by the arbitrator violates public policy—the issue is not whether the misconduct of the employee violates public policy;[4] and (3) if the arbitrator expressly or implicitly finds that the employee is amenable to progressive discipline, the court lacks the authority to vacate a disciplinary suspension remedy imposed by an arbitrator in lieu of the employer's action discharging the employee.

In *Blasingame*, the Illinois Supreme Court manifested the arbitrator's broad authority. Relying upon *United Paperworkers v. Misco*,[5] the court found that, when applying the just cause provision in the collective bargaining agreement, it is the function of the arbitrator, and not the court, to decide whether the punishment fits the crime.[6] Moving to the public policy issue, the *Blasingame* court observed, "There simply is no public policy that mandates the discharge of all employees found guilty of mistreatment of a

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[3]*AFSCME v. Illinois*, 124 Ill. 2d 246, 529 N.E.2d 534 (1988) (*Blasingame*); *AFSCME v. Illinois*, 173 Ill. 2d 299, 671 N.E.2d 668 (1996) (*DuBose*); *Illinois v. AFSCME*, 322 Ill. App. 3d 257, 748 N.E.2d 1262 (3d Dist. 2001) (*Hayes*); and *Illinois v. AFSCME* 321 Ill. App. 3d 1038, 749 N.E.2d 472 (5th Dist. 2001) (*Henderson*).

[4]This principle initially proved particularly troublesome in the lower courts. To some extent, all misconduct of public employees impinges on the achievement of a public employer's goals. Predicated upon this fact and until barred by the decisions discussed, courts were engaged, under the guise of public policy, in the wholesale review of binding arbitration awards decided under a just cause standard. This misuse of legal authority was directly confronted and rejected in the post-*Blasingame* case, *Hyatte v. Quinn*, 239 Ill. App. 3d 893 (2d Dist. 1993).

[5]484 U.S. 29, 38 (1987).

[6]124 Ill. 2d at 255–57.

service recipient in a mental health facility" notwithstanding the arbitrator's findings of mitigation.[7]

The *Blasingame* court, once again relying upon *Misco*, held that, although a court and not an arbitrator decides public policy, the court is bound by the arbitrator's fact findings as they relate to reinstatement.[8] The court further stated regarding the risk of reinstatement issue, ". . . we are not prepared to say that the arbitrator's decision to reinstate these grievants poses a threat of harm or danger to third persons and thereby violates public policy. The arbitrator's order of reinstatement is specifically premised upon his judgment that the grievant would be able 'to return to the useful employ of the Employer and provide appropriate services to the residents without the likelihood of a repetition of the occurrences [involving the misconduct].'"[9] One of the mitigating factors relied on was a lack of any nexus between the misconduct and any harm to others. In *Dubose*, the Illinois Supreme Court, citing *Blasingame* and federal cases, held that an arbitrator's rational express or implied fact findings related to the risk of reinstatement were binding upon the courts and dispositive of the public policy challenge to the arbitration award that had reduced a discharge to a disciplinary suspension.[10] The *DuBose* court cited *Stead Motors v. Automotive Machinists Lodge #1173*,[11] in support of its holding that the finding that the employee is subject to rehabilitation could be made "expressly or by implication." *Stead Motors* made clear that silence on the subject of amenability to rehabilitation would not imply an unexpressed finding by the arbitrator that a grievant was not amenable to rehabilitation where such amenability was inherent in the text of the award.

The *Hayes* court applied *DuBose, Misco, Stead Motors*, and *Blasingame*. It relied on mitigation factors involving the grievant's long work history, a lack of evidence that the grievant was incompetent, the grievant's clean record and a lack of progressive discipline. The *Henderson* court found that the seriousness of the misconduct by a correctional officer—initiating a fight with an inmate in the correctional facility and failing to report the incident—was not dispositive. Applying the reasoning in the earlier decisions, the *Henderson* court observed, "That there is a public policy against

[7] 124 Ill. 2d at 262–64.
[8] 124 Ill. 2d at 263–65.
[9] 124 Ill. 2d at 264.
[10] 173 Ill. 2d at 322–23, 331–32.
[11] 886 F.2d 1200 (9th Cir. 1989).

battering prisoners . . . is not disputed. The question is whether the arbitrator's award of reinstatement actually violated that public policy."[12] The mitigating factors relied upon by the court in upholding the award included lengthy seniority, good evaluations, and a lack of premeditation. The court, citing *DuBose* and *Stead Motors,* found it implicit in the award that the arbitrator had considered the public policy against battering prisoners and that the arbitrator had found the grievant amenable to rehabilitation and that the risk of similar conduct in the future was low.

In two cases, the Illinois courts have held that a discharge vacated solely on procedural due process grounds will be remanded to the arbitrator for further findings in the absence of findings on amenability to rehabilitation and risk of reinstatement.[13]

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Arbitrators have long asserted that their authority is derived solely from the collective bargaining agreement and the opinions in their awards have usually been limited to contract interpretation. For this reason, arbitrators were taken by surprise when learning that, under Illinois law, when determining the appropriate discipline short of discharge, they are also charged with deciding an issue delegated to them from outside of the contract. In my opinion, however, this additional responsibility largely involves form and not substance. In most cases, there is no meaningful difference in the factors relied upon when selecting an appropriate disciplinary penalty under a just cause provision and the application of considerations of public policy. Amenability to discipline is normally weighed in either case. The additional burden on the arbitrator consists largely of making careful public policy related mitigation findings. The exception occurs when the award is based on a denial of industrial due process. In that situation, the arbitrator is required to make findings that would not normally be included in an award.

In my opinion, the Illinois higher courts have crafted a formula well-designed to eliminate the real, rather than any esoteric problem in the courts—the attempt by judges to second-guess arbitrators. I conclude by observing that, when writing the opinion in *DuBose,* Justice Freeman said as much.

[12] 321 Ill. App.3d at 1041.

[13] *DuBose,* 173 Ill. 2d 299, *Chicago Firefighters v. City of Chicago,* 315 Ill. App. 3d 1183, 735 N.E.2d 108 (1st Dist. 2001).

THE VACATION OF ARBITRATION AWARDS ON PUBLIC POLICY GROUNDS IN ILLINOIS: A MANAGEMENT PERSPECTIVE

R. THEODORE CLARK, JR.*

At the outset, it is important to discuss the statutory framework for grievance arbitration in Illinois. Under both the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA), grievance arbitration has an exalted status. Thus, both Illinois Acts require that any collective bargaining agreement must include a grievance procedure with arbitration as the terminal step to resolve disputes that arise during the term of a collective bargaining agreement, although the IPLRA mandates arbitration only if the parties do not mutually agree otherwise.[1] As a result of these statutory mandates, all collective bargaining agreements under the IELRA must have a grievance procedure ending in binding arbitration and an overwhelming majority of the contracts negotiated under the IPLRA likewise provide for arbitration as the terminal step of the grievance procedure.

Despite their similarity in mandating the inclusion of grievance procedures ending in arbitration, the two Illinois Acts treat the enforcement of grievance arbitration in sharply different ways. While the IPLRA leaves the courts with their traditional jurisdiction to deal with petitions to require or enjoin arbitration and to enforce or vacate arbitration awards under the Illinois Uniform Arbitration Act,[2] the Illinois Supreme Court, in its *Coles County*[3] and *Warren Township*[4] decisions, agreed with the Illinois Educational Labor Relations Board (IELRB) that the IELRB has the authority and jurisdiction initially to rule on both pre-arbitration and post-arbitration disputes, and that resort to the courts is, for all intents and purposes, limited to appealing the IELRB's post-arbitration decision to the appellate court. In other words, the courts have held that the IELRB has exclusive primary jurisdiction

*Seyfarth Shaw, Chicago, Illinois.

[1]IPLRA, § 8, 5 ILCS 315/8; IELRA, § 10(c), 115 ILCS 5/10(c).

[2]*Illinois Departments of Central Management Services,* 3 PERI ¶ 2033 (ISLRB, Apr. 17, 1987).

[3]*Board of Education of Community School District No. 1, Coles County v. Compton*, 123 Ill.2d 216, 526 N.E.2d 149 (1988) (the IELRA divests the circuit courts of jurisdiction to vacate or enforce arbitration awards in the context of public educational labor disputes).

[4]*Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers Local 504,* 128 Ill. 2d 155, 538 N.E.2d 524 (1989) (since the IELRB is vested with exclusive jurisdiction to resolve arbitrability disputes, circuit courts lack "jurisdiction to enjoin arbitration and to decide questions of arbitrability").

to resolve both pre-arbitration substantive arbitrability issues and post-arbitration enforceability issues. This is perhaps the most significant substantive difference between the two Illinois statutes.

To summarize, the forum for litigating the enforceability of arbitration awards under both Acts has now been resolved. Under the IPLRA, it is the courts under the Illinois Uniform Arbitration Act;[5] under the IELRA, it is the IELRB.

The topic of this session concerns the most litigated issue with respect to arbitration awards issued under Illinois collective bargaining agreements, that is, whether an arbitrator's award should be vacated on the ground it violates public policy. The Illinois Supreme Court has held that arbitration awards can be vacated on public policy grounds even if the award itself is based on the arbitrator's interpretation of the contract.[6] As the Illinois Supreme Court noted, "Courts [in Illinois] have crafted a public policy exception to vacate arbitral awards which otherwise derive their essence from a collective-bargaining agreement."[7] In line with the basic approach taken by the U.S. Supreme Court in the private sector,[8] Illinois courts have held that the public policy must be "well-defined and dominant" and must be determined by "reference to the laws and legal precedents and not from general considerations of supposed public interest."[9]

Applying this standard, in addition to the *Chicago Firefighters* case that I will discuss later, Illinois courts have vacated arbitration awards on public policy grounds in the following circumstances:

- An award that required the reinstatement of an investigator who falsified an investigation report that violated the public policy favoring accurate and truthful documentation of child abuse investigations.[10]
- An award that ordered the reinstatement of a school bus driver whose reckless driving could result in a potential injury to school children or other motorists.[11]

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[5]Illinois Uniform Arbitration Act, 710 ILCS 5/1 *et seq.*

[6]*See AFSCME v. State*, 529 N.E.2d 534, 540 (Ill. 1988).

[7]*AFSCME v. Department of Central Management Services*, 671 N.E.2d 668, 673 (1996).

[8]*See, e.g., W.R. Grace & Co. v. Local Union No. 759*, 461 U.S. 757, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983); *Eastern Associated Coal Corp. v. UMW*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

[9]*Board of Education of School Dist. U-46 v. IELRB*, 576 N.E.2d 471, 476 (Ill. App. Ct. 1991); *AFSCME v. Department of Central Management*, 173 Ill. 2d 299, 671 N.E.2d 668 (1996).

[10]*Department of Central Management v. AFSCME*, 614 N.E.2d 513 (Ill. App. Ct. 1993).

[11]*Board of Education of School District U-46 v. IELRB*, 576 N.E. 471 (Ill. App. Ct. 1991).

- An award that voided discipline because of a contractual provision that limited the investigation of an employee's alleged criminal acts.[12]
- An award that reinstated a nursing home employee who hit a resident on the ground that the arbitrator's "one free hit" rule violated the established public policy of protecting senior citizens from abusive and degrading conduct.[13]
- An award that reinstated a nurse violated the public policy of safe and competent nursing care where the arbitrator found that the nurse in question had "endangered the lives of third persons in her care."[14]

At the outset, I would assert that the justification for a court vacating an arbitration award on public policy grounds in the public sector is considerably stronger than in the private sector. If a private sector employer, for example, agrees to a contractual provision that requires the employer to immediately investigate any allegations that might result in discipline and an arbitrator rules that an employer did not have just cause to discipline an employee for what would normally be dischargeable conduct because the employer did not immediately investigate the allegations, it is the private employer that is adversely affected. In the public sector, however, it is the public at large that is adversely affected by the arbitrator's ruling. It is the courts that are the ultimate protector of the public interest through application of the public policy doctrine. As the Illinois Supreme Court has observed, "When public policy is at issue, it is the court's responsibility to protect the public interest."[15]

Let's discuss the *Chicago Firefighters* case in which Arbitrator Benn held that the City of Chicago did not have just cause to take disciplinary action against 28 firefighters (7 discharges and 21 suspensions without pay) for engaging in what can only be called extremely egregious on-duty misconduct, because the City did not begin its investigation for approximately six and one-half months after obtaining knowledge of the conduct in question. In so rul-

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[12] *State Police v. Fraternal Order of Police Troopers Lodge No. 41*, 751 N.E. 1261 (Ill. App. Ct. 2001).

[13] *County of DeWitt v. AFSCME*, 699 N.E.2d 163 (Ill. App. Ct. 1998), *appeal denied*, 706 N.E.2d 496 (1998).

[14] *University of Illinois Board of Trustees (Tomanek)*,. 15 PERI ¶ 1111 (IELRB, Sept. 28, 1999), *aff'd sub nom, Illinois Nurses Ass'n v. Board of Trustees of the Univ. of Illinois*, 741 N.E.2d 1014 (Ill. App. Ct. 2000).

[15] *AFSCME v. Department of Central Management Services,* 671 N.E.2d 668 (1996).

ing, Arbitrator Benn held that the City violated a contract clause that provided that the City "shall conduct disciplinary investigations when it receives complaints or has reason to believe an employee has failed to fulfill his responsibilities as an employee and just cause for discipline exists."[16]

While it was Arbitrator Benn's prerogative to interpret the contract clause in question, surely the court, on review, had the unquestioned right to determine whether this particular clause and the arbitrator's interpretation of it violated public policy. Not surprisingly, on review, the appellate court had no difficulty in determining that the arbitrator's ruling, which prevented a hearing on the merits of the discipline, violated public policy. Accordingly, the appellate court remanded the matter to Arbitrator Benn for a hearing on the merits.[17]

Although not used by the court as a basis for vacating Arbitrator Benn's award, the decision could be fully justified on the ground that a *contractual* provision that shields employees from disciplinary action for engaging in egregious misconduct is per se void as a matter of public policy. Even Gil Feldman acknowledges that "the common law recognizes that a contract is unenforceable if the contract violates public policy."[18] Because termination of an employee is frequently referred to as the civil equivalent of "capital punishment" on the criminal side, it is helpful to consider the public policy governing capital offenses. In this regard, I know of no jurisdiction where there is statute of limitations with respect to the crime of murder. Thus, someone can be charged and prosecuted for a murder that took place many decades before. For example, there were recent reports that the federal government was looking into the possibility of reopening the Emmett Till case, a case involving the horrendous murder of a black teenager in Mississippi 50 years ago. In view of the extremely egregious nature of the misconduct that led to the City of Chicago's decision to discharge or suspend 28 firefighters, the court was surely right in deciding that the contractual provision, as interpreted by Arbitrator

[16]Quoted in *City of Chicago and Chicago Fire Fighters Union Local No. 2* (Benn, Supplemental Opinion and Award, 2002), at p 3.

[17]*Chicago Fire Fighters Union Local No. 2 v. City of Chicago,* 323 Ill. App. 3d 168, 751 N.E.2d 1169 (Ill. App. Ct. 2001).

[18]Feldman, "Public Policy Challenges to Labor Arbitration Awards in the Illinois Public Sector," at p. 1 (2005) (hereinafter cited as "Feldman"). As the court noted in *City of Harvey v. AFSCME,* 776 N.E.2d 683 (Ill. App. Ct. 2002), "as with any contract, a court will not enforce a collective-bargaining agreement that is repugnant to established norms of public policy," and a court "may not ignore the same public policy concerns when they are undermined through the process of arbitration."

Benn, simply could not stand. Courts in the arbitration context exist to protect the public interest and surely the public interest required that the case be heard on its merits.

Arbitrator Benn's reaction to the court's decision borders on being fanatical. Consider, for example, the following comments of Arbitrator Benn in his supplemental opinion:

> . . . the Appellate Court's decision in this case and the Supreme Court's refusal to exercise its jurisdiction to review the matter on appeal were nothing short of a judicial embarrassment which will undermine the finality that the parties bargained for when they agreed that arbitration is the "final and binding" method for resolving their disputes. [19]

In his supplemental opinion, Arbitrator Benn argued passionately for the proposition that the finality of the arbitration process is put up for grabs when the courts vacate arbitration awards on public policy grounds. He asserts that court decisions such as the *Chicago Firefighters* case invite not only employers but unions as well to challenge arbitration awards and that the process will be worse off as a result. While he makes what amounts to a "floodgates" argument, I would suggest that there is no indication that the use of public policy doctrine to vacate arbitration awards has led to voluminous litigation over arbitration awards in Illinois. To the contrary, in my experience, suits to vacate arbitration awards on public policy grounds are relatively rare.

Moreover, I would suggest that many of the suits brought to vacate arbitration awards involve egregious circumstances, circumstances that cry out for justice such as the *Chicago Firefighters* case. The existence of the public policy doctrine in Illinois provides an appropriate vehicle to ensure that justice is done and that the public interest is protected.

I would also like to comment on Arbitrator Benn's position that because employers have voluntarily agreed to use the contractual grievance and arbitration procedure to resolve discipline cases, employers should be bound by the arbitrator's decision as long as the arbitrator's award is somehow based on the parties' collective bargaining agreement. Although that contention might have some force if Illinois public sector employers truly had the right to agree or not to agree on whether discipline should be submitted to the contractual grievance and arbitration process, Illinois

[19] *City of Chicago and Chicago Fire Fighters Union Local No. 2* (Benn, Supplemental Opinion and Award, 2002), at 8.

employers do not have such contractual freedom. As noted above, both Illinois statutes, in effect, require final and binding arbitration. And, although it is true that there is no requirement that the grievance and arbitration procedure cover disciplinary matters, for both firefighter and police bargaining units in home rule jurisdictions, an impasse over whether discipline should be subject to the contractual grievance procedure or remain with the local board of fire and police commissioners is subject to interest arbitration. And, guess what? In the overwhelming number of cases, interest arbitrators have held that firefighters and police officers should have the right to use the contractual grievance and arbitration procedure to contest discipline. So it is not quite accurate to say that employers have voluntarily agreed to have arbitrators rule on discipline and that they therefore should be deemed to have assented to an arbitrator's decision with respect to discipline. Rather, in many instances, the arbitration of discipline in Illinois has come about via an interest arbitrator's decision and over the public employer's strong objection.

Let me turn now to the comments of my good friend Gil Feldman. I am pleased that he agrees that Illinois courts do have a role to play in reviewing arbitration awards on public policy grounds. Nevertheless, I have to disagree with his view that "the findings of the arbitrator are not subject to court review."[20] A close examination of Illinois precedent reveals otherwise. For example, in *County of DeWitt v. AFSCME,*[21] the Illinois Appellate Court rejected the arbitrator's finding that a certified nurse's aide was unlikely to strike a patient again, especially where the nurse denied the conduct at issue. Similarly, in *Illinois Nurses Association v. University of Illinois,* the Illinois Appellate Court upheld the IELRB's vacating an arbitration award where the court found that "the arbitrator lacked a rational basis for reinstating" the nurse in question.[22] In short, Illinois courts are not required to leave their common sense and good judgment at home when called upon to review an arbitrator's award.[23]

While many arbitrators, including my esteemed colleague Ed Benn, seem to believe that an arbitrator's determination of

[20]Feldman, at 2.

[21]699 N.E.2d 163 (Ill. App. Ct. 1998), *appeal denied,* 706 N.E.2d 496 (1998).

[22]*Illinois Nurses Ass'n v. Board of Trustees of the Univ. of Illinois,* 741 N.E.2d 1014, 1024 (Ill. App. Ct. 2000).

[23]Under the Illinois Uniform Arbitration Act, the Illinois Supreme Court has held that an arbitrator's award can be vacated when a gross error of law or fact appears on the face of the award. *Rauh v. Rockford Products Corp.,* 574 N.E.2d 636, 644 (Ill. 1991).

whether there is just cause to discipline a public employee is a private matter governed by the parties' collective bargaining agreement, and that the courts should not intrude upon on arbitrator's decision, they fail to appreciate that it is the court that makes the ultimate decision on whether public policy has been violated, not the arbitrator.[24] Interestingly, Gil Feldman has no trouble recognizing this very fact. In other words, the courts are both: (1) the final arbiter of public policy; and (2) the final arbiter of whether an arbitration award violates public policy. In this regard, the courts have a legitimate role and arbitrators should accept this fundamental fact rather than contest the right of the courts to review their awards.

Ironically, the public policy doctrine that many arbitrators are wary of was recently invoked by the Illinois Appellate Court to *uphold* an arbitration award. In this case, an insurance contract contained an arbitration clause that included a provision for a *de novo* court trial if an award exceeded a specified amount. The court, however, held that the *de novo* trial clause was unenforceable as unconscionable and contrary to public policy.[25] The court ruled thusly:

> . . . [I]n order to preserve the parties' agreement to the greatest extent possible and because arbitration is an encouraged form of dispute resolution in Illinois, we hold only the trial de novo clause is unenforceable and that the trial court properly entered a judgment confirming the arbitration panel's decision.[26]

The public policy doctrine is, indeed, a two-way street.

In conclusion, I would like to refer to Arvid Anderson's candid remarks in his 1988 Presidential Address to the Academy. In discussing the increasing role that courts were playing in reviewing arbitration awards, Anderson noted that while the Supreme Court in the Trilogy case of 1960 had placed arbitration and arbitrators "on a pedestal," he went on to say that "what the courts and the parties have given, they can also take away."[27] He then stated:

> . . . Unfortunately, there are still examples where arbitrators have, "ignored the plain language of the contract" and where the award has

[24]This is not unlike the Supreme Court's uniform rulings that the determination of whether the parties have agreed to arbitrate, i.e., whether the grievance is substantively arbitrable, is for the court to decide, not the arbitrator.

[25]*Parker v. American Family Insurance Co.*, 734 N.E.2d 83 (Ill. App. Ct. 2000).

[26]*Id.*, 734 N.E.2d at 88.

[27]Anderson, *The Presidential Address: Labor Arbitration Today*, in Arbitration 1988: Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), at 4.

> failed to draw its "essence" from the contract and instead "simply reflected the arbitrator's own notions of industrial justice."

In such circumstances, Anderson said that "[a]rbitrators and the parties cannot expect their awards to be immune from challenge. . . ."[28] My only addendum to Anderson's wise counsel is that arbitrators in Illinois and elsewhere should accept the applicability of the public policy doctrine in issuing awards. Their failure to do so will only invite more judicial challenges.

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Vonhof: Our arbitrator panelist, naturally, has said it all in his written submission, but I have invited both of our advocate panelists to contribute additional comments before we open the floor for questions and discussion. Gil?

Feldman: Let me tell you a secret. There are some judges in Illinois who do not like labor arbitration awards. As Claude Reins said, "How shocking." The fact of the matter is that for a century in the private sector you had worse decisions than this coming down until 1938 when the United States Supreme Court validated the Norris-LaGuardia Anti-Injunction Act.

You had the same thing, except it was in the private sector. And to make my friend, Ed Benn, feel a little better, he isn't the first one whom the Illinois courts are picking on. Before we got to these public policy cases, we had another cute doctrine—a doctrine called *nondelegable decisions.* What that was, very simply, was a doctrine that said that all governmental bodies have limited powers given to them by statute. And if the authority is given to the public employer, the employer must make these decisions—they cannot delegate them to arbitrators in a collective bargaining contract.

The reason I'm sensitive to this is that for 35 years, I have spent a good deal of my life on these issues. Almost all of these cases in Illinois are mine, in both areas. The nondelegable cases were, by and large, teacher cases, and we solved that problem in 1984 by adopting a labor act in Illinois covering public employees. The courts, however, were not deterred. They developed a new doctrine.

It is beyond the purview of what we are going to talk about here, but Illinois is a very narrow public policy state. It is almost

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[28] *Id.*

impossible in Illinois under our case law to get anything nullified on the grounds of public policy. But when it came to labor arbitration awards, which are final and binding by statute, they came up with the public policy doctrine saying that the award is vacated because it is contrary to public policy.

Now, for Ed Benn, I would say in the earlier cases, the cases involving nondelegability, it was the late Joe Bergman they were picking on here in Illinois. Almost all the cases for one reason or another were his, and I was defending them. What I have to say is: You have to be patient. Unfortunately, not everybody is going to live as long as I have, but if you wait long enough and fight the battle long enough, you reach the point where you solve these problems. As I indicated, we solved the problem of nondelegability by a statute. We have solved the problem in Illinois by a number of cases, two Illinois Supreme Court cases, the main one being *DuBose*, to which Ed referred. We now have decisions in four of the five appellate districts in Illinois.

The most extreme case applying the *DuBose* doctrine was one involving a parole officer in a correctional facility who started a fight with an inmate and failed to report it. On the basis of the *DuBose* doctrine, that man was reinstated subject to a suspension. So in every case I have seen recently, we have solved this problem in Illinois under this doctrine.

Let me talk a little bit about the doctrine and what Ted Clark has to say about it. What he describes in his paper would be better termed as “Clark’s law” because the Illinois Supreme Court and the appellate court in the six cases we refer for your attention have narrowed the public policy issue and adopted what I refer to as the *DuBose* doctrine.

Mr. Clark does not accept the *DuBose* doctrine. He cites a statement taken from me out of context that distorts what my paper says. There are a number of areas in Mr. Clark’s paper that are simply erroneous with regard to the *DuBose* factor.

One is with regard to findings. The court, starting with the United States Supreme Court decision in *Misco*, has held that the arbitrator’s findings are binding on the courts as long as they are rational. The test is rationality. That’s the standard. The Court has also said that it is not the conduct of the employee that is subject to public policy; it is the arbitration award itself that is subject to public policy. If an arbitrator says he likes people who kill wardens, and reinstates a grievant because he killed a warden, that award is contrary to public policy. But if the arbitrator finds that the

employee is amenable to discipline and is a good candidate for rehabilitation based upon whatever facts the arbitrator finds—and Mr. Benn can give you lessons on how to find facts in this area—the outcome does not violate public policy. If an arbitrator puts his findings into his award, those findings are subject only to a rationality test. And it is very difficult for anybody to overcome that.

DuBose also considered what happens if there are no findings by the arbitrator—for example, *DuBose* involved a situation that was decided completely on a procedural due process issue. The court said that what an appellate court is to do if it faces a situation like that is to remand it back to the arbitrator for findings on whether the employee is amenable to rehabilitation. If you come from outside Illinois to arbitrate a dispute involving any union I represent, our representative will tell you that if you include your findings on the grievant's amenability to discipline upon reinstatement and whether the employee is a good candidate rather than somebody who might be expected to continue bad conduct—if you include such findings, your award is protected.

In a sense, what the Illinois courts have done to you arbitrators is contrary to what arbitration law was before. Prior to *DuBose* your authority was derived purely from the contract. Illinois law now says that in addition to that, you had better be sure that there is no public policy that your award could contravene. So you need to have some findings on that issue if it is relevant to your case.

Now Mr. Clark has a very different interpretation on these issues in his paper, but if you read the cases I have cited—the two Illinois Supreme Court cases and the four appellate court cases—he is simply wrong. There is a very cute case—the *Aurora* police case—which came down recently. In that case, a public employee did something utterly stupid, but he did not do it maliciously. There was no harm to anybody, and the arbitrator in that case, Lisa Kohn, put him back without a disciplinary suspension. The city had fired him.

The city went to court arguing that the conduct justified discharge. My position was that under Illinois law it was none of the court's business what the employee's conduct was. The question was: What kind of candidate is he for reinstatement? What was different about the case is Ms. Kohn did not impose any discipline at all. All prior cases involved an arbitrator reducing a discharge to a disciplinary suspension.

After listening to us and reading the briefs, the judge, who came from the city and obviously was very disturbed, remanded the case back to Ms. Kohn for reconsideration as to whether there should be some discipline. She issued a supplemental award in which she offered a number of policy reasons as to why she believed that, under the circumstances, discipline was not warranted.

We go back to court—to the Circuit Court in the city where the incident took place—and the city's attorney makes the same argument as before—the conduct is terrible, the arbitrator is wrong, etc. I simply said, "Look, judge, I have given you the cases and we all know how this case is ultimately going to come out. The only one who benefits from this case is me because I am being paid. You are wasting your time. It is wasting the City's time and resources, and I am entitled to judgment as a matter of law."

The judge looks at the city's counsel with a very disgusted look on his face and says, "He is right. Motion to vacate denied." And as he walks off the bench saying, "This is the craziest decision I have ever seen in my life."

That is where we are. Notwithstanding the fact that some of the thinking of some of these judges is not to our liking—labor side attorneys and arbitrators who are being second guessed—the fact is, if you do the right thing, the law is now in a stage where the arbitration decisions are upheld.

I conclude with my answer to a question that Mr. Baird raised with me last night, which I assume he is going to present to you today. He asked me what is the percentage of arbitration awards that have been overturned? What are you complaining about? My answer, which I will give him now, is this: Jim, you go home from work hundreds of times. If you are mugged and robbed only twice, your percentage is very good, so you have nothing to complain about.

Vonhof: Thank you, Gil. And now Jim gets to defend himself here.

Baird: Hi, folks. I am honored to be here. I am honored to be squeezed behind the eloquent Ed Benn and the always accurate Gil Feldman. I am delighted to share all that I know in the next three-and-a-half minutes. As they say, I knew this was coming when the order was set. I wasn't able to change it because I was outvoted on the panel.

First of all, Ted sends his apologies. He wishes he were here. It is a very high honor for him to be invited, and it is a greater honor

for me to have the opportunity to speak in front of the National Academy. I know time is short, but I want to digress for two seconds because my mentor was a giant in this organization. A long, long time ago when I was at law school, Nate Feinsinger took me under his wing and brought me into labor law. I got a letter in the mail from the National Labor Relations Board, and I went to Nate, and I said, "Who are these people, and what are they writing me for?" He said, "Well, I've arranged for you to have a job. Do you want to work on the Board side or General Counsel side?" He said, "It is better on the Board side. Here is who you are working for," and the rest is history. So I'm very much honored to be here

Now, I know better than to criticize an arbitrator in front of a group of arbitrators. I would say to Ed, however, I think all Ed Benn's decisions are completely accurate most of the time. I think he missed it badly in the *Chicago Firefighters* case, and I have told him that privately. If I had another 45 minutes, I would be delighted to give you half of the reasons why I think that he was wrong. But I don't want to digress.

I have had to actually read these cases because I practice in this state. I do a lot of this arbitration business, and frankly, the public policy exception is virtually irrelevant to my practice because it comes out so infrequently. I was astounded when Jeanne told me we had to get ready for 150 people to attend a program on Illinois public policy exception. I said "What? Are they nuts?" I am happy to find out you are not nuts. You are merely here because you are just friends and colleagues.

Let me stress a few points from Ted Clark's paper. First, the public policy exception in my view makes all the sense in the world. It is a very limited exception. Fundamentally, the public policy exception is a check—a check on the arbitration process, a check on us, and a check on you. There is the "smell test." Just ask, "Does this thing stink?" If it does, there just might be a public policy issue. If you pretend that egregious conduct didn't occur, or if you infer an exclusionary rule that isn't in the contract which says that says discipline must be imposed in a reasonable period of time, you are more likely to see a public policy issue arise.

I agree with Gil in that where there was not just cause for discipline, we are not talking about public policy. What we are really looking at is the contractual basis for the rule under which the reinstatement occurred. In that regard, let me just remind everybody in Illinois we are under the Illinois Uniform Arbitration Act for the review of arbitration decisions. While the Act sets forth the

basis for overturning and vacating an arbitration award, it specifically provides that those grounds for vacating the award in Illinois are not applicable to the enforcement of collective bargaining agreements. Instead, in Illinois, pursuant to the Arbitration Act, we refer to the common law of the State of Illinois, and such common law has always voided contractual provisions that are against public policy. There is nothing new with that.

What is new is the application of such common law to the labor-employment context. I have lost cases before—some that I should have lost, some that I shouldn't. We never filed to vacate. It takes the extreme case. Ed talks about politics. Here is a surprise for you. In the public sector, there are political considerations, and the public employer has to respond to those political considerations. They sometimes have to take steps to vacate because it's a political necessity. There is nothing personal with that.

Occasionally the courts step in. Two points: In the public sector there are greater issues of public policy raised as Ted points out in his paper and we think that's important. Second, in Illinois, many employers have had no role in crafting the arbitration process. Ed said, "Well, gee whiz, the parties agreed to the arbitrator. They have got to be stuck with his decision." But in Illinois the law requires the contract to end in binding third-party arbitration. We have got to arbitrate. Moreover, in the police and fire context, when we go to interest arbitration and say we want discipline decided by the Board of Fire-Police Commissioners, guess who steps in and tells us we can't have that? The interest arbitrators.

So Illinois employers are mandated to have grievance arbitration. We get our lists, and, Ed, you do get a lot of these cases, but let me assure you it is only because there are four other names that get stricken first. It is nothing personal. We don't voluntarily do all this stuff, folks, so don't give us the "voluntary" business. This isn't all voluntary. Consequently, I think it has to be held to a little higher standard.

Last, on the *Chicago Firefighters* case, Ed pointed out these guys had perfect records. They had not been disciplined in ten years. What he forgets is there was no management at the firehouse. In the State of Illinois, no firemen get disciplined to speak of. I have 12 different jurisdictions that I work with in which no fireman has been tardy in 10 years. Never. I think we are looking at some of the wrong factors. With respect to *DuBose*, let me simply say it is a little bit of ado about not very much.

Thank you.

Vonhof: Okay. Any responses from panel members?

Feldman: I think it is clear, Jim, that you and I are in agreement to a certain point. I have no problem with the application of public policy in cases involving third parties and public employment. The problem is that anti-union, anti-arbitration judges get their hands on this, and before *DuBose,* they would simply reverse the arbitrator by reviewing his decision.

The formula, which we have under *DuBose*, which is now applied by four of the five appellate courts, is fine as far as I am concerned. The arbitrator must make findings that in reinstating a grievant, he or she is not doing something that is contrary to the public interest, and if those findings are rational, the court has no business touching them. I am surprised you are as accepting of that as you are. You are normally not so reasonable, but thank you.

Baird: Well, I would say in response, Gil, and I don't mean to be facetious about this, I read these cases in great detail. I spend most of my time negotiating labor agreements, and when I read some of these decisions with their reinstatement orders I am literally blown away. How in the world these employees, particularly protective service or DCFS, are being reinstated is absolutely beyond me. I never would have dreamed it would be possible.

Consequently, I know when I draft my agreements I am going to have to change the verbiage somewhat. To leave it to just cause I am afraid will not work. We are going to have to throw some other standards in there that provide more direction and guidance, so that when public employees engage in egregious acts, we don't have a 2-week suspension, or reinstatement, or a decision which holds, in effect, that the egregious act never happened.

Feldman: You are entitled to do that at the bargaining table, but let me remind you, you picked the arbitrator.

Baird: Let me remind you that I had no choice.

Feldman: You don't have to pick a given arbitrator . . .

Baird: Who am I going to pick?

Feldman: . . . if you don't like him. When I get a judge in a case, I don't get any right to select him. I know that a particular judge may be violently opposed to my client, but there is nothing I can do about it. So once you pick an arbitrator and you get the arbitrator's judgment, if you disagree with the judgment, then don't pick him again.

Baird: I understand, and let me just say, a bit facetiously, we don't get to pick because it is mandated on us, but the fact of the matter is you are entirely correct, Gil, and we try desperately to

choose veteran experienced arbitrators. At least they have a track record we can deal with. And if you get a bad award, you don't pick them again.

I digress, but I had someone on a list the other day and someone said, "What do you think of this arbitrator. I think she is dynamite. I think she is tremendous." And, of course, another person came back and said, "She is the worst darn arbitrator in Illinois. She is absolutely terrible. Don't ever pick her for any case." Why? Because it was the one award that went the wrong way with that person, and that meant it was the arbitrator's fault. We understand that there is that bias that gets into it.

Feldman: We have that bias on our side in some instances, too. On the union side, there are people who are very sophisticated, and there are people who are not so sophisticated.

Baird: Ed?

Benn: You think I am going to get in the middle of this? (Laughter.)

Vonhof: Questions? Comments? Everybody is ready to go.

Feldman: Friday afternoon, folks.

Vonhof: All right. Thank you very much panel members, excellent presentation. And thank you all for being here this afternoon.