II. SOME RECENT DEVELOPMENTS IN PUBLIC-SECTOR GRIEVANCE ARBITRATION: A VIEW FROM NEW YORK

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I elected to concentrate on New York in reviewing developments related to public-sector grievance arbitration not because of any suspicion that my colleagues may have a mere prurient interest in what's new in one corner of purgatory, but because recent events in New York have a significant bearing on some of the larger questions of principle raised in thoughtful papers on grievance arbitration written in the past few years by distinguished members of the Academy. In a sense, it is probably true that too much of everything happens in New York—for an intricate variety of economic, social, political, and historical reasons. It is a state that has proved accommodating in providing the nation with dreadful and oversized examples of all sorts of problems. That it has an inordinate share of public-sector labor relations problems is not surprising. Indeed, some of the latest events bearing on grievance arbitration originate in the overpowering fiscal difficulties facing the New York city government and the governments and school boards of other cities of New York state, as well as the state government itself.

The public-sector grievance area is still a fairly wide-open preserve, at times faintly reminiscent of the frontier of the Old West, and one in which courts whose inclinations have been regarded as eminently predictable are not really predictable at all when they are engaged in assessing bargainability or the grievability and arbitrability of rights disputes. For instance, the New York courts have come up with a decision in 1977 in the *Liverpool* teachers case (discussed below) which no careful observer of this judicial scene could have foretold. The hazard inherent in predicting court treatment of public-sector arbitration issues is well illustrated by a throwaway comment in an excellent paper on public-sector grievance settlement prepared for the 1975 Wingspread Conference.[1] After venturing a number of incisive generalizations about how state court judges were

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[1]Benjamin Aaron, in The Future of Labor Arbitration in America (New York: American Arbitration Association, 1976).

likely to view arbitrability issues in the public sector, our colleague tempered those generalizations by suggesting that New York courts probably "did not reflect a national pattern" by their indicated willingness to apply the same rules to both private-sector and public-sector arbitration cases.[2] Experience in New York since Wingspread, and certainly since the 1971 court decisions which were the basis for the quoted comment, has shown that we are well advised to be as wary about characterizing the inclinations of the New York courts as any other courts on the mercurial subject of public-sector labor relations policy. Public-sector unions and government agencies alike have shown an increased tendency to take their problems to court in second-try or third-try efforts to prevail, where one of the disputants has met with an adverse result in an earlier stage of the process of grievance administration. The impression grows that increasing recourse to legal challenges of the mechanisms or consequences of grievance processing on what might otherwise be perfectly defensible due-process grounds may have a less worthy motive —that of merely delaying finality where the chance for a favorable outcome in recourse to the grievance and arbitration procedures is in doubt.

In the past year, the "scope" of grievance arbitration in the public sector across the country appears in one sense to have been broadening, but in another sense it has been narrowing. That is, grievances are becoming subject to arbitration in public-sector jurisdictions where they have never before been subject to formal processing through a final and binding arbitration stage, but at the same time there is a discernible tendency to limit the subjects which may be grieved and arbitrated by government employees.

The major arbitration developments in New York continue to center on the policies and actions of the state Public Employment Relations Board, the city Board of Collective Bargaining, and the decisions of the state courts. This review will touch upon, among other things, (1) the status of the arbitrability presumption, (2) some provocative changes in policy on the subject of arbitrable issues, and (3) a few restrained general comments about the current grievance scene in state and local government in New York.

[2] *Id.*, at 43.

Developments Bearing on Arbitrability in the Public Sector

The Private-Sector Presumption of Arbitrability

The pressure on public-sector unions to arbitrate grievances—even weak ones—stems in part from the general absence of compulsory membership provisions in collectively negotiated contracts between such unions and government agencies. To some extent, the inclination and the pressures to arbitrate exerted on private-sector unions by the Landrum-Griffin Act of 1959, the Supreme Court decisions in cases involving Section 301 of the Labor Management Relations Act, and the Supreme Court decisions favoring arbitration in the Steelworkers trilogy [3] and subsequent cases [4] have probably also served to have at least an indirect stimulative effect on the increasing volume of public-sector grievance arbitrations. Clearly, the many bargaining units in the elementary and secondary school systems in the states that have sanctioned public-sector collective bargaining have produced uncountable numbers of contract grievances and arbitration decisions. Indeed, it is these very contract disputes that account for the bulk of the case law that has come out of state and federal courts on the subject of arbitrability of public-sector grievances.

But we are a long way from general court sanction of the machinery of arbitration as the exclusive means of settling disputes arising under public-sector contracts. It is still inordinately possible in the public sector to upset by recourse to state courts the processing of a grievance or its results through arbitration under a contract, on grounds that would be regarded as dilatory at best and frivolous at worst in the private sector. This easy possibility does not bode well for the promotion of labor relations stability, harmony, or tranquility in states which have opted to encourage public-employee bargaining or—to use the New York State euphemism—public-employee "collective negotiations."

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[3] *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[4] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964); *Nolde Bros. Inc.* v. *Local 358, Bakery Workers*, 430 U.S. 243, 94 LRRM 2753 (1977).

Grievances Under Collective Bargaining Law in New York State

New York State's public-sector labor relations statute, first passed in 1967 and repeatedly amended in various respects in 1969, 1970, 1971, 1972, 1973, 1974, 1975, and 1977, is entitled Public Employees' Fair Employment Act (Taylor Law).[5] It contains no detailed references to grievance handling or arbitration. There is a mere mention, in the act's "Statement of Policy," of legislative support for dispute-settling procedures that are worked out by the parties as one of five listed aspects of the act that purport to best effectuate the public policies of the legislature, *viz.*, "(c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes. . . ."[6] There is also mention, in passing, of the purpose of the act in empowering public employers to recognize employee organizations, that is, to negotiate collectively "in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees. . . ."[7] The agency created to administer the Taylor Law, the three-member Public Employment Relations Board (PERB), has provided direct encouragement to grievance arbitration by the indirect route of decisions rendered pursuant to its powers to prevent "improper employer and employee organization practices"[8] and to determine what constitutes "good faith" negotiation over "wages, hours, and other terms or conditions of employment."[9] In making determinations over what must or what need not be bargained about, PERB has in effect also been determining the range of grievable and arbitrable subjects. In addition, PERB and state court decisions in cases that involve petitions to enforce or invalidate specific provisions of collectively bargained contracts have served as a vehicle for further definition of arbitrable grievances. School-district bargaining in New York State—like school-district bargaining elsewhere—has succeeded in producing a rapidly growing body of case law that is astonishing for its variety and its inconsistencies. When collective bargaining law clashes with state education law,

[5]Article 14, Sections 200 through 214, New York State Civil Service Law (CSL).
[6]Section 200, Taylor Law.
[7]Section 204.1, Taylor Law, and repeated in Section 204.2 which requires a public employer "to negotiate collectively" with a recognized employee organization.
[8]Section 205.5(d), Taylor Law.
[9]Section 204.3, Taylor Law.

the most likely result is that collective bargaining is the loser. And, the same adverse result tends to follow encounters between collective bargaining law and long-standing special laws relating to the authority of the heads of police agencies to administer those agencies.

Grievances Under the New York City Collective Bargaining Law

New York City has its own collective bargaining law[10] (NYCCBL) enacted in 1967 and amended in 1972, under a Taylor Law authorization to establish its own procedures without PERB approval but with the proviso that these "be substantially equivalent" to those in the Taylor Law.[11] Thus, the city opted to have its law make explicit and detailed references to grievance and arbitration handling. In addition, subjects of bargaining are covered not only by a requirement for good-faith bargaining over wages (with examples of wage-related subjects specified), hours, and working conditions, but also by specification of certain topics that are exempt from the bargaining obligation and of other topics that are bargainable only through specific levels of employee organization (for example, city-wide or uniformed services).[12] It is, of course, largely in the area of "working conditions" that scope-of-bargaining distinctions between the private and the public sectors have developed, with public-sector departures from the settled concepts of mandatory subjects for bargaining in the private sector. One lengthy section of the NYCCBL[13] is devoted to "grievance procedure and impartial arbitration," authorizing the inclusion in executive orders and collective bargaining agreements of provisions for grievance procedures and arbitration but making awards on grievances related to out-of-title work or related to examinations pertaining to advancement, "enforceable only to the extent permitted by law."[14] The NYCCBL also contains a detailed definition of a "grievance."[15] The mayor of the City of New York was authorized by a special city charter amendment of 1972[16] to

[10] Chapter 54, New York City Charter (Administrative Code).
[11] Sections 212.1 and 2, Taylor Law.
[12] Section 1173-4.3, New York City Collective Bargaining Law (NYCCBL).
[13] Section 1173-8.0.a through g. (*See also* Part 6 of the Consolidated Rules of the Board of Collective Bargaining.)
[14] Section 1173-8.0.b, NYCCBL.
[15] Section 1173-3.0.0, NYCCBL.
[16] Section 1103, Administrative Code.

enter into collective bargaining contracts for mayoral agencies which created procedures for disciplining and removal of employees, thereby permitting incursions on the unilateral power granted by the Administrative Code since 1938 to agency heads to appoint, remove, assign, and transfer their subordinates.[17] Indeed, the police commissioner had such statutory powers going back to 1891. It should be noted in passing that Sections 75 and 76 pertaining to disciplinary proceedings and appeals under the state civil service law usually apply to agency heads whose powers are set forth in Section 1103 of the Administrative Code, but the police commissioner is governed by procedures specifically applicable to police operations,[18] and he is subject to other disciplinary procedural obligations in the state civil service law.

Under the NYCCBL, a seven-member, tripartite Board of Collective Bargaining (three public, two city-designated, and two union-designated members) is explicitly empowered to make final determinations, at either the city's or a union's request, as to whether a grievance "is a proper subject for grievance and arbitration procedure"[19] under the applicable provision of the law.

Arbitration Clauses in State and City Agreements

There is a considerable array of grievance and arbitration clauses to be found in collectively bargained agreements between the state and its unions, between school districts and boards and their unions of teachers and maintenance or other employees, between local governments outside of New York City and their unions, between New York City's mayoral agencies and their unions, and between the city's nonmayoral agencies and their unions.

Under the contracts between the Civil Service Employees Association, Inc. and the State of New York, covering state employees across the state, there are two distinctly different procedures for the arbitration of grievances: one is greatly detailed and is exclusively applicable to disciplinary cases, and the other is applicable to all other types of grievances. Disciplinary cases

[17]884 of the City Charter (1938).
[18]Section 434, Administrative Code.
[19]Section 1173-5.0.a(3), NYCCBL.

are subject to a streamlined process; the state agency proposes a disciplinary action for incompetence or misconduct—such as a suspension, fine, or dismissal—with implementation deferred until after an arbitrator hears the case and issues a decision, the arbitrator being allowed seven days from the close of the hearing to provide an award with opinion.[20] The contract explicitly states that the contractual disciplinary procedure replaces that of Sections 75 and 76 of the state civil service law. Nondisciplinary or "contract disputes" are separately dealt with in clauses that refer to disputes "concerning the interpretation, application or claimed violation of a specific term or provision of the contract," explicitly excluding any other, e.g., disciplinary disputes, from coverage by this separate procedure.[21] In most respects the "contract-dispute" procedures resemble the grievance and arbitration provisions found in private-sector contracts.

Police, firefighter, and other uniformed-service contracts also reflect the existence in those services of dual procedures for handling disciplinary and nondisciplinary grievances. In these contracts disciplinary appeals may or may not utilize arbitration as a final step, while nondisciplinary grievances invariably end in arbitration.

The largest single bargaining entity of New York City employees, District Council 37, American Federation of State, County, and Municipal Employees (AFSCME), has a provision in its city-wide contract which sets forth a three-step procedure for handling grievances, with a grievance broadly defined as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement. . . ."[22] The fourth, or arbitration, step of the procedure makes explicit reference to the right of either party to take an unresolved grievance to arbitration through the Board of Collective Bargaining (BCB), in language that reflects the statutory authorization in the NYCCBL to do so. This contract explicitly provides that the contractual grievance and arbitration procedure "shall be the

[20]For example, Article 33, Resignation and Discipline, Agreement Between the State of New York (NYS) *and* The Civil Service Employees Association, Inc. (CSEA), April 1, 1977 through March 31, 1979.

[21]Article 34, Grievance and Arbitration, NYS *and* CSEA, 1977–79.

[22]Article XV, Adjustment of Disputes, City-Wide Contract Between the City of New York (NYC) *and* District Council 37, AFSCME, AFL-CIO (DC37), July 1, 1976 to June 30, 1978.

exclusive remedy for the resolution of disputes defined as 'grievances' herein."[23] The contract also requires that when there is a request for arbitration, both the union and any employee(s) involved are to file a written waiver of the right to take the grievance to any other "administrative or judicial tribunal" for adjudication. This latter provision is aimed at curbing forum-shopping and attempts to have two swings at the same grievance pitch. Two other noteworthy features of the grievance mechanism as applied by District Council 37 in a separate contract covering nine of its locals and the city's Health and Hospitals Corporation are its extension of the grievance definition to include "a claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders applicable to the agency . . . affecting the terms and conditions of employment . . ." and claimed "wrongful disciplinary" actions covered by Civil Service Law Section 75(1),[24] but it limits that extension by excluding "disputes involving the Rules and Regulations of the New York City Civil Service Commission or the Rules and Regulations of the Health and Hospitals Corporation" as these pertain to matters set forth in state law.[25]

In New York City, municipal employees who are subject to its "Career and Salary Plan" are covered by an extensive set of "Time and Leave Regulations," originally promulgated by the city but amended by negotiation in city-wide bargaining between District Council 37 and the city. Grievances pertaining to the application and interpretation of these regulations are subject by local law and by contract to the contractual grievance procedure.

Under policy established by the Board of Collective Bargaining in a series of arbitrability cases decided between 1968 and 1976,[26] the BCB has deferred to the arbitrator challenges to arbitrability that involve "intrinsic" delay, i.e., cases in which there is a claim that timeliness provisions of a contract were violated, thus raising a question of contract interpretation. The BCB has reserved to itself the authority to decide arbitrability challenges involving "extrinsic delay," i.e., cases in which inac-

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[23] *Ibid.*

[24] Article VII(B) and (E), Grievance Procedure, Collective Bargaining Agreement Between District Council 37 (and 9 Affiliated Locals) *and* New York City Health and Hospitals Corporation, January 1, 1976 to June 30, 1978.

[25] Specifically, Section 7390.1, first paragraph, Unconsolidated Laws (New York State).

[26] Decision Nos. B-6-68, B-7-68, B-18-72, B-6-75, B-25-75, and B-14-76.

tion or apparent actions of the parties to resolve a grievance informally have resulted in prolonged failure to pursue a grievance formally. Under state law, other governmental jurisdictions have sought to resolve arbitrability challenges by filing "improper practice" charges with PERB or by petitioning the state courts to stay arbitration or negate the results of a completed arbitration proceeding.

The intricate interplay of statutory, contractual, and judicial mandates produced in 10 years of formal encouragement to public-sector collective bargaining in New York State has unfortunately not yet resulted in an increasingly clear pattern of support for grievance arbitration. On the contrary, 1977 has seen case-law developments that have been construed by many to have struck a severe blow to what was previously an evident presumption in favor of grievance arbitration in the public sector.

Changes in the Pattern of Mandatory Subjects of Bargaining

In 1972 and 1973, PERB and the state's highest court in the *Huntington* cases,[27] involving Section 204 of the Taylor Law, had found to be arbitrable the question of validity of an agreement to arbitrate disputes over disciplinary actions against tenured teachers. This ruling was based on the New York Court of Appeals conclusions that a "term" or "condition" of employment was involved, that it was the "declared policy of the state" to encourage the arbitration of grievances, and that "public policy impels" the use of arbitration as a "preferable" means of settling labor disputes. The court saw a broad power for the public employer to negotiate voluntarily all matters in controversy, even those not subject to a mandatory bargaining obligation, and to submit voluntarily all such controversies to arbitration, but within the limit of any applicable statutory provision which "explicitly and definitely prohibits" an employer agreement to do so. The court rejected the school board's request to have the contract provisions at issue declared illegal.

Thereafter, in 1974 and 1975, decisions of the court of appeals in other teacher cases narrowed the ample scope of the

[27] *Board of Education of the Town of Huntington* v. *Associated Teachers of Huntington,* 30 N.Y.2d 122, 331 N.Y.S.2d 17, 79 LRRM 2881 (1972); and *Associated Teachers of Huntington* v. *Board of Education,* 33 N.Y.2d 229 (1973).

bargaining and arbitrability concepts enunciated in *Huntington.* That tendency became clearer in New York in 1977 than it was in some earlier disquieting developments in 1974, 1975, and 1976. In 1974, in the *Syracuse Teachers* case,[28] the New York Court of Appeals—while upholding an appellate division ruling that a contract clause which provided a "sick leave bank" was a bargainable fringe benefit related to "terms and conditions of employment" under the Taylor Law regardless of education-law provisions related to sick leave—went on to limit, in seemingly gratuitous fashion, its *Huntington* opinion by stating that the "broad scope" of bargaining under the Taylor Law was "limited by plain and clear, rather than express, prohibitions in the statute or decisional law. . . ." In the following year, the court of appeals in the *Susquehanna* teachers case[29] found a dispute over "class size" and its staffing implications arbitrable, even though it was an "exclusive prerogative" of the school board and did not involve a Taylor Law obligation to bargain, because the board had indeed voluntarily bargained about class size and had agreed to include a provision on the subject in its contract with the union. Here, again, the court took occasion in a case in which it found in favor of arbitrability to restrict the scope of bargaining and arbitration—by going beyond its "expansive rule" in *Huntington* (where the limit began in any statute that "explicitly and definitively prohibits" bargaining and arbitration), and beyond its "more accurately" stated rule in *Syracuse* (where the limit now began in statutory or case law which contained "plain and clear, rather than express, prohibitions")—by holding in *Susquehanna* that "[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate." As troubling as the *Syracuse* and *Susquehanna* departures from *Huntington* were, it would have been difficult to foretell the quantum leap taken by the court of appeals in 1977 in its *Liverpool* decision. I suppose a particularly reckless seer could have regarded the court of appeals *West Irondequoit Teachers*[30] decision in 1974, about three months before the *Syracuse* decision, as one of those

[28] *Syracuse Teachers Ass'n* v. *Syracuse Board of Education,* 35 N.Y.2d 743, 320 N.E.2d 646, 88 LRRM 2112 (1974).

[29] *Susquehanna Valley Central School District at Conklin* v. *Susquehanna Valley Teachers Ass'n,* 37 N.Y. 2d 614, 396 N.Y.S.2d 427, 90 LRRM 3046 (1975).

[30] *West Irondequoit Teachers Ass'n* v. *Helsby,* 35 N.Y.2d 46, 358 N.Y.S.2d 720, 87 LRRM 2618 (1974).

fertile seeds sown by the court for cultivation and harvesting when the time was ripe; in *West Irondequoit*—a "class size" case in which PERB had ruled that this was not one of the "terms and conditions of employment" covered by the Taylor Law, hence there was no employer obligation to bargain on the subject—the court had already indicated that decisional precedents from the private sector were not binding where an application of the Taylor Law was under review. The significance of *Huntington* in New York lay in the court's apparent adoption for the public sector of the spirit of the private sector's *Steelworkers* trilogy in favor of grievance arbitration. The significance of *Liverpool* in New York is the court's explicit dismissal of federal case law on arbitrability in the private sector as inapplicable to the state's public sector, a decision which has received mixed reactions from government employers in New York State and which appears to have pleased those who believe that history took a wrong turn when collective bargaining came to the public sector.

Under New York State law,[31] school districts and boards have absolute discretion to grant or deny applications for leave. Nevertheless, public employers have been held to have the right voluntarily to undertake to negotiate on nonmandatory subjects of bargaining. In 1977, the state's highest court in the *Rochester Teachers* case[32] reversed a lower court decision which had set aside an arbitrator's award on sabbatical leave. The arbitrator had been asked by the parties to decide a dispute over a contract provision which stated that the district "may" grant sabbatical leaves to teachers with five years of service. The arbitrator had ruled that the contract contemplated the granting of some sabbaticals even though the district faced financial difficulties. The court of appeals held that the district, having participated in the arbitration proceeding, raised its challenge to arbitrability after the award was handed down and had done so too late, and that it should have done so prior to completion of the arbitration proceeding. It also held that the arbitrator's award had not exceeded the authority to arbitrate provided to him under the contract. The court said that it would vacate an arbitration award if it was "completely irrational," construing such an

[31]Section 1709, subd. 16, Section 2554, Education Law.

[32]*Rochester City School District* v. *Rochester Teachers Ass'n,* 39 N.Y.S.2d 179, 95 LRRM 2118 (1977).

award to be "misconduct" or an instance in which the arbitrator "exceeded his power."[33] Especially noteworthy in this opinion is the court's citation of decisions in commercial arbitration cases in New York in partial support of its refusal to set aside the arbitrator's award. The court's opinion scrupulously avoided any reference to landmark decisions by the federal courts on arbitrability in private-sector labor cases. The unfailing wisdom of hindsight reveals an inclination of the state court of appeals, as evidenced in its 1974 decision in *West Irondequoit* and then early in 1977 in its *Rochester* decision, to step back from any indicated adoption in earlier cases of a *Steelworkers*-trilogy approach to arbitrability in the state public sector. That evolving inclination was more fully revealed in the state court's decision later in 1977 in the *Liverpool* case.

The Liverpool *Decision and Some of Its By-Products*

In October 1977, the decision of the state court of appeals in the *Liverpool Teachers* case[34] created ripples that were observed far beyond New York's borders. That case came to the courts when the school board involved petitioned for a stay of arbitration sought by the union in a dispute over a female teacher's insistence that she would submit to a physical examination by a female physician, and not the district's male physician as requested by the district, as a prerequisite to returning from sick leave. As a result, the district had put her on leave without pay for refusal to abide by a school-board resolution directing her to submit to physical examination by the district's male physician. The union's request for arbitration was brought under a contract clause which defined a grievance as "any claimed violation, misinterpretation, or inequitable application of the existing laws, rules, procedure regulations, administrative orders or work rules of the district, which relates to or involves Teachers' health or safety, physical facilities, materials or equipment furnished to teachers or supervision of teachers"; and then goes on with a proviso which says, "however, that such term shall not include any matter involving a Teacher's rate of compensation, retirement benefits, disciplinary proceeding or any matter which

[33]Section 7511, subd. (b), ¶ 1, Civil Practice Law and Rules (NYS).

[34]*Liverpool Central School District* v. *United Liverpool Faculty Ass'n,* 42 N.Y.2d 509, 399 N.Y.S.2d 189, 96 LRRM 2779 (1977).

is otherwise reviewable pursuant to law or any rule or regulation having the force and effect of law." After the dispute went through the grievance procedure of the contract, the school board took the view that it was not an arbitrable matter because it involved a contractually excluded "disciplinary proceeding." The court found that "a very reasonable assertion can be made" that the dispute involved fell within both the included category of grievable subjects and the excluded category of such subjects. And so, when the arbitrability coin fell on its edge and a dispute could be either arbitrable or inarbitrable, the court opted against arbitrability. This is the essence of *Liverpool.* The court found no presumption of arbitrability under the Taylor Law despite the clear provision in the law prohibiting strikes.[35] The court explicitly undertook to distinguish between arbitration agreements that "derive their vitality" from the Taylor Law and private-sector labor agreements which provide for arbitration, as well as private-sector agreements to arbitrate commercial disputes.

The dicta in *Liverpool* are diffuse and will probably create confusion and bargaining tension for years to come over the appropriate wording of public-sector grievance and arbitration provisions, unless the New York State legislature amends the Taylor Law to enunciate clearly a presumption in favor of grievance arbitration. If I had to sum up the tone of the court's two separate opinions in *Liverpool,* I would do it simply in these terms: "Trilogy-shmilogy, don't bother us with federal case law related to the private sector, or with theories of the relationship between a public-sector strike ban and the mechanisms for resolving contract grievances in the public sector." The court exhibited a patent uneasiness about subjecting an agency of government to an expansion of binding third-party decisions under any such principle as "When in doubt, let it go to arbitration." The state court was evidently not moved by the U.S. Supreme Court decision in *Warrior & Gulf,* one of the 1960 *Steelworkers* trilogy, where the federal High Court had offered a powerful argument in favor of arbitrating grievances that arise during the term of a collective bargaining agreement. The Court there found that the presence of a no-strike clause in an agreement was evidence that the union had received in exchange for

[35]Section 210.1, Taylor Law.

that clause a right to have grievances arbitrated. The Supreme Court also concluded that substitution of a court's judgment for that which came from a collectively bargained arbitration procedure would not promote industrial peace and harmony. "Doubts," the Court said, "should be resolved in favor of coverage."[36]

Close observers of the New York labor relations scene were quick to liken *Liverpool* to the private-sector decision of the New York State Court of Appeals in *Cutler-Hammer*[37] in 1947. The shades of *Cutler-Hammer* were invoked because the court had affirmed, in a majority decision, a stay of arbitration in a case in which the Machinists union had sought arbitration of its claim that a provision of its contract with the company required payment of a bonus, with only its amount remaining to be determined by an arbitrator because the parties were in disagreement. The court dipped into the merits of the matter by reviewing the wording of the disputed contract clause and, assuming the traditional function of an arbitrator, expressed the view that the wording did not bear out the union's assertion as to its meaning. It thereupon found the dispute to be inarbitrable. It was not until 1963 that the state legislature eventually got around to enacting a one-sentence amendment to Section 7501 of the Civil Practice Act,[38] nullifying the effect of *Cutler-Hammer* in the private sector. The 1963 amendment to the law, which provided for the enforceability of written agreements to arbitrate, stated: "In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable or otherwise pass upon the merits of the dispute."

The potential in the *Liverpool* decision for spreading litigious mischief was promptly translated into reality following a decision issued by the New York City Board of Collective Bargaining in a recent case. A *Local 3, IBEW* case before the BCB had involved arbitrability of a promotion to the job of foreman of mechanics, and the board had ruled on September 28, 1977, that the issue was arbitrable. Three weeks later the court of appeals decided *Liverpool,* and two weeks after that the City of

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[36] *Warrior & Gulf, supra* note 3, at 582–83.

[37] *Cutler-Hammer, Inc.* v. *IAM District No. 15, Local No. 402,* 297 N.Y. 519, 20 LRRM 2445 (1947).

[38] Section 7501, as amended, L.1963, C.532, Section 47.

New York moved to have the BCB reopen the *Local 3, IBEW* case in the light of the court's dicta in *Liverpool.* The earlier BCB decision dealing with the union's request for arbitration and the city's resistance to the request on the grounds that the matter was not grievable, had found that a mayoral executive order to an agency was in effect a rule or regulation of the agency and subject to grievance and arbitration procedures (under a different executive order). The BCB reopened the case, allowed argument by the parties on the city's further contentions, and concluded that *Liverpool* was not a case in point and was inapplicable to the *Local 3, IBEW* case.[39] In a puzzling 12-line dissent, city-designated alternate members of the BCB cited *Liverpool* in support of their view that the issue in the *Local 3, IBEW* case was not a specifically "included" subject for arbitration under the contract involved.

In decisions in three other teacher cases issued shortly after *Liverpool,* the New York Court of Appeals hewed to the line it drew in *Liverpool.* It denied arbitration in two of the cases and granted it in the third. In the *South Colonie* case,[40] some six weeks after *Liverpool,* the court held that a broadly worded definition of an arbitrable grievance—which incidentally made no specific mention of any types of issue or dispute—was "sufficiently express, direct and unequivocal" to cover the grievance involved. Thus, the court appeared to be following one of the principles enunciated in its *Liverpool* decision: the contractual definition of an arbitrable grievance must be clear enough and broad enough to embrace a particular grievance for it to be a valid subject for arbitration. The *South Colonie* contract defined a grievance as being "based upon an event or condition which affects the terms and conditions of employment of a teacher or group of teachers and/or the interpretation or meaning of any of the provisions of this Agreement. . . ." In the *West Babylon* teachers case,[41] the appellate division of the state court denied the union's appeal from a state supreme court grant of a stay of arbitration under Article 75 of the Civil Practice Law and Rules in a matter involving the union's effort to arbitrate the school board's refusal to

[39] *The City of New York* and *Local Union No. 3, IBEW, AFL-CIO,* OCB Docket No. BCB-278-77 (A-664-77), February 1, 1978.

[40] *South Colonie Central School District* v. *South Colonie Teachers Ass'n,* Ct. of Appeals (No. 463, November 21, 1977).

[41] *Board of Education, West Babylon Union Free School District* v. *West Babylon Teachers Ass'n,* 97 LRRM 2581 (1977).

fill a vacancy in the job, director of attendance. The court held that the arbitration provision of the contract involved did not cover the subject of the dispute and that the subject was a permissible, not a mandated, subject of bargaining. The court, citing *Liverpool,* found no "express and unequivocal" agreement to arbitrate the dispute involved, and it refused to treat the specification in the contract of a pay rate for the vacant job as an indication that the contract required the job to be filled.

The same appellate division also adhered to *Liverpool* in its decision in the *Levittown Teachers* case,[42] issued three days after the *West Babylon* decision, by affirming a lower court stay of arbitration where the union had claimed a school-board violation of a contract clause providing for nonpayment of certain monies into the New York State Retirement System as a claimed *quid pro quo* for a clause requiring payment for accumulated sick leave. Citing the *Liverpool* decision, the appellate division found that the contract contained not only a provision for arbitrating alleged contract violations, but also a provision setting forth a procedure to follow if any provision of the contract was held contrary to law. Once again, the court held that a controversy which can be both included in and excluded from the contractual arbitration procedure was not arbitrable because there was no public-sector presumption of arbitrability under the state's Taylor Law.

Arbitrability of Layoffs During a Budget Crisis

In two related and much litigated cases involving the *Yonkers School District,*[43] the appellate division of the New York state supreme court's second department found to be arbitrable the school board's suspension of all pay increases provided for noneducational employees in its contract with the Civil Service Employees Association. In *Cassidy,* the school board had suspended contractual pay increases due after November 20, 1975,[44] claiming that Section 10 of the state's Financial Emer-

[42] *Levittown Union Free School District* v. *Levittown United Teachers,* 97 LRRM 2716 (1977).

[43] *Yonkers Federation of Teachers* v. *Board of Education of the Yonkers City School District,* 395 N.Y.S.2d 484, 58 A.D.2d 607, 95 LRRM 3110 (1977); and *Board of Education of the Yonkers City School District* v. *Raymond G. Cassidy, et al.,* 399 N.Y.S.2d 20, 97 LRRM 2057 (1977).

[44] The CSEA had a Memorandum of Agreement with the School District for the period July 1, 1975, to June 30, 1976, which provided for a 5-percent pay increase on March 1, 1976, plus scheduled pay increments.

gency Act of 1975[45] contained an express statutory prohibition against negotiating salary increases.[46] In finding the dispute arbitrable, the court rejected the union's claim that the Financial Emergency Act was unconstitutional and also rejected the school board's claim that Section 10 of the act contained a prohibition against the negotiation of pay increases. The court noted that suspension was not the same as prohibition or removal, and it carefully delineated the possible alternatives open to an arbitrator within the proscriptions of the act and the court's prior decisions on the act, pointing out that the arbitrator would have scope for a possible remedy at a time following the end of the pay-suspension provisions of the act, and that in general the merits were for the arbitrator to consider. In denying the stay of arbitration sought by the Yonkers school board, the court concluded that should an award by the arbitrator conflict with applicable law, it would of course be illegal and unenforceable and subject to school-board refusal to comply.

In the *Yonkers* teachers case, the appellate division affirmed a lower court's confirmation of an arbitrator's award against the school board in which the board had been found to have violated its contract with the union when the board laid off 50 teachers for budgetary reasons, even though a provision in the contract expressly prohibited a layoff on such grounds. The board had taken the position that a city's financial crisis made it necessary to suspend the operation of the job-security clause. In a prior decision[47] on another aspect of this dispute, the court had found the job-security clause involved to be valid and a dispute over its provisions to be arbitrable. After the case went to arbitration and the school board lost the decision, the board renewed its attack, this time taking aim at the award. The court found that the arbitrator did not exceed his authority and that the award "was not irrational or incapable of being implemented." The court also found the arbitrator's award of 6-percent interest on back pay for the reinstated teachers to be "solely a matter in the arbitrator's discretion." The job-security clause involved read: "During the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or

[45]Financial Emergency Act, L.1975, Ch. 871, Section 2.

[46]Actually, a one-year suspension of certain salary increases on November 20, 1976, which was extended to June 30, 1977, by the Control Board on May 22, 1976.

[47]40 N.Y.2d 268 (1976).

abolition of programs but only for unsatisfactory job performance as provided for under the Tenure Law."[48] I should add that the grievance and the arbitration provisions of the contract were broad in scope.[49]

In an *Oneonta Teachers* case,[50] decided two days after the *Liverpool* decision, an appellate division of the state supreme court denied the district's petition for a stay of arbitration of a union claim that evaluation procedures set forth in its contract were violated. However, the court also found that the notice of intention to arbitrate was so broadly worded that it did not specify the nature of the claimed violation of contract, and so offered no basis for "intelligent disposition" of the application to stay arbitration. The appellate division remanded the case to a lower court to afford the union an opportunity to file an appropriately specific notice of intention to arbitrate. It will be interesting to see how the court will view the case in the light of *Liverpool* after its doubt about the nature of the claimed contract violation is cleared up.

Subjects for Bargaining and Arbitration as Seen by PERB

A number of PERB and court decisions in 1977 affected the scope of bargainable and arbitrable subjects under the Taylor Law, in some instances affirming and in others altering previous positions on the same or similar issues. PERB had in the past found various police-union proposals related to department operations to be nonmandatory subjects of bargaining. It had also found teachers' union demands pertaining to administrative organization and operations to be nonmandatory subjects.[51]

In a *New Rochelle* police case,[52] PERB found police-union demands pertaining to carrying shotguns in police vehicles, to specified disciplinary procedures in the contract, and to the elimination or curtailment of city services were not mandatory subjects for bargaining. This decision was consistent with a PERB police decision issued in 1975 in the *Scarsdale* police

[48]Article VIII, Section A, Agreement dated July 1, 1974, to June 30, 1977.
[49]Article XIII, Sections A and C, Agreement dated July 1, 1974, to June 30, 1977.
[50]*Oneonta City School District* v. *Oneonta Teachers Ass'n,* 398 N.Y.S.2d 907 (1977).
[51]For example, its decisions in the *Orange County Community College* case (1976) and in the *New York City Board of Higher Education* case (1974).
[52]*Matter of Police Ass'n of New Rochelle, Inc. (City of New Rochelle),* 10 PERB 3042 (June 1977).

case[53] where the police union had made a bargaining proposal for structuring the village police department, with specified position titles and the numbers of employees in each title. PERB sketched out a fairly broad employer duty to bargain, but found the proposal at issue was not a mandatory subject for bargaining under the Taylor Law.

PERB's rationale for deciding mandatory and nonmandatory bargaining subjects in police cases, and possibly in others, had begun to become unclear in a PERB decision in 1976 in a *Buffalo* police case.[54] PERB had there found—with little or no explanation for its determinations—that union demands for a ban on required breathalizer tests, blood tests, or standing in a line-up; for contractually stated manpower minimums; for a ban on layoffs during a contract term; for elimination of the requirement that off-duty policemen carry revolvers;[55] and for the mandated assignment of certain union officials to the police department's division of planning and operations, were not mandatory subjects of negotiation under the Taylor Law. In the same decision, PERB found union demands for tenure for detectives, for rotation of weekend assignments, and for the right to grieve transfers to be mandatory subjects for bargaining—in equally terse determinative statements with little indication of the underlying rationales. Given PERB's rationalized decisions on the nonbargainability of certain administrative actions in earlier police and teachers cases, PERB's handling of the *Buffalo* case was, at the least, confusing.

PERB took a similar position on managerial prerogatives in 1977 in a *Newburgh* firefighters case[56] where the union had sought to negotiate minimum and other manning requirements for the provision of firefighting services. PERB held that the matter of how best to serve the needs of public safety was a management prerogative and not a mandatory subject of bargaining.

A New York Court of Appeals decision in a *Rockland County*

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[53] *Matter of Scarsdale Patrolmen's Benevolent Ass'n, Inc.* and *Village of Scarsdale,* 8 PERB 3131 (November 1975).

[54] *Buffalo Policemen's Benevolent Ass'n* and *City of Buffalo,* 9 PERB 3039 (March 1976).

[55] PERB had ruled this subject to be a nonmandatory subject of bargaining in its *Albany Police Officers Union* case, 7 PERB 3132 (1974).

[56] *International Ass'n of Fire Fighters of the City of Newburgh* and *City of Newburgh,* 10 PERB 3001 (January 1977), affirmed by the appellate division of the state supreme court in *IAFF Local 1589* v. *Helsby,* 59 A.D.2d 342, 399 N.Y.S.2d 334 (1977).

BOCES case [57] weakened PERB's "Triborough Doctrine." In *Triborough,* [58] PERB had developed in 1972 the rule that a unilateral change by management during contract negotiations over a mandatory subject of bargaining was a refusal to bargain, hence an improper practice under the Taylor Law. In *Rockland BOCES,* the court modified a PERB order to the Rockland board which would have required the employer to pay salary increments due under an expired contract while contract negotiations were under way. The court held that maintenance of the status quo during negotiations did not require payment of automatic increases for the purpose of preserving the existing bargaining relationship after a contract had expired.

PERB itself followed the principle enunciated by the court in *Rockland BOCES* and in a 1974 decision by the appellate division in the *Poughkeepsie* teachers case [59] when PERB ruled in a *Port Chester* teachers case [60] that a provision to arbitrate contained in an expired contract was no longer in effect, but that the employer had a statutory obligation, quite apart from a contract obligation, to "entertain" the grievance involved. In effect, PERB seems to have said, "They can grieve but they can't arbitrate." PERB's ruling was a notable departure from *Triborough.* The decision in 1974 by the appellate division in the *Poughkeepsie* teachers case had held that an arbitration provision in an expired contract was no longer in effect.

Subjects for Bargaining and Arbitration as Seen by BCB

The New York City BCB's decisions on scope of bargaining had found police union demands pertaining to the police department's level of manpower and the number of patrolmen on duty at a given time to be nonmandatory subjects of bargaining. The BCB has also found that various demands by clerical and craft unions pertaining to the methods, means, and types of personnel for conducting government operations were nonmandatory subjects of bargaining. Yet, even where a prohibited

[57] *Board of Cooperative Educational Services of Rockland County* v. *New York State Public Employment Relations Board, et al.,* 41 N.Y.2d 753 (1977).

[58] *Matter of Triborough Bridge & Tunnel Authority* (District Council 37 and Local 1396), 5 PERB 3064 (1972).

[59] *Matter of Board of Education (Poughkeepsie Teachers Ass'n),* 44 A.D.2d 598 (1974).

[60] *Matter of Port Chester-Rye Union Free School District* and *Port Chester Teachers Ass'n, Local 2934, AFT,* PERB Case No. U-2390 (September 15, 1977).

subject is involved, under Section 1173-4.3.1(b) of the NYCCBL the practical impact of management decisions such as those pertaining to work load and manning are bargainable and therefore possible subjects for grievance and arbitration.

In 1977, the BCB had an opportunity to consider the arbitrability of an employee promotion dispute in a *Local 3, IBEW* case,[61] referred to above with reference to *Liverpool.* A few more details about the case are in order at this point. In that case the BCB had before it a union claim that there had been a violation of a mayoral executive order (No. 4) by reason of a claimed improper bypassing in promotion to the job of foreman of mechanics. A majority of the seven-member BCB ruled (one city member dissenting) that the dispute was a grievance properly subject to arbitration. The initial challenge to arbitrability was made by the city on the grounds that Executive Order No. 4, issued by then Mayor Abraham D. Beame to city agencies under his direction, was not subject to the grievance and arbitration procedures because a claimed violation of Executive Order No. 4 did not fall within the definition of a grievance set forth in another executive order (No. 83, Sec. 5(b)(B)), i.e., it was not a "claimed violation of the rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment. . . ." The BCB was not convinced by the city's argument that an executive order by the mayor to mayoral agencies under his direction was not to be treated as a rule or regulation "of the mayoral agency" or agencies involved. The BCB found the distinction urged by the city to be untenable, and concluded that an order issued by the mayor became a rule of the agency to which it was issued. The BCB's passing mention in its decision of its established presumption in favor of arbitrability, even in doubtful cases, became after the state court of appeals decision in *Liverpool* on October 18, 1977, the basis for a city motion to reopen and review the BCB finding in favor of arbitrability. In essence, the city's *Liverpool* argument was that the state court had announced a presumption against arbitrability where a doubt existed. The BCB's decision to grant the motion to reopen was made after careful consideration of all of the implications of a reopening

[61] *City of New York* and *Local Union No. 3, IBEW, AFL-CIO,* BCB-278-77 (A-664-77), September 26, 1977; City motion to reopen B-13-77 (November 11, 1977), granted by BCB (November 28, 1977).

where the basis for the motion was a state court action that had followed by about three weeks the board's delivery of the decision to the parties in the *Local 3, IBEW* case.

Upon reconsideration, the BCB affirmed its decision in favor of arbitration of the dispute on the grounds that *Liverpool* was not applicable to the *Local 3, IBEW* case. In *Liverpool,* the court had before it a contract clause which offered the choice of treating a particular dispute as a health matter (and therefore arbitrable) or as a disciplinary matter (and therefore not arbitrable). The court opted to treat the issue as a disciplinary matter after it found that the subject of the dispute fell "within both the included and excluded categories" of the grievance and arbitration provisions of the contract. The BCB had no doubtful dual classification problem before it in *Local 3, IBEW;* it faced only the clear-cut question of whether an executive order by the mayor was a rule or regulation of the agency for purposes of the grievance and arbitration procedure under another executive order, and the BCB found that it was. It is possible that this case will be taken by the city to the courts for review. I might add that the public members of the BCB welcome that prospect.

One other development, in nearby Yonkers in 1977, is worth returning to with reference to BCB policy on arbitrability issues. In 1975, the state supreme court in *Burnell* v. *Anderson*[62] had ruled against the BCB where the board had found arbitrable a dispute over payment for the performance of out-of-title work. The court held that payments for such work were prohibited by state law, and that an award by an arbitrator which would order the city to make such payment would be illegal. In the *Yonkers* (Cassidy) case [63] in 1977, the appellate division expressed the view that there was no basis for staying arbitration on the possibility that an arbitrator might issue an award which would be in conflict with applicable law. The BCB was most anxious at the time the state supreme court decision came down in *Burnell* to take the case to the supreme court's appellate division. However, the issue was mooted when the parties involved settled the matter, with the city making payment to the employees involved for the disputed work.

One case still pending before the BCB, as of the time of this

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[62] *Burnell* v. *Anderson,* N.Y.L.J., November 26, 1975, Supreme Court, New York County, Special Term.

[63] *Board of Education of the Yonkers City School District* v. *Cassidy, supra* note 43.

writing, involves a city request for a finding against a detectives' union which is seeking to bargain for a clause which would provide arbitration of disciplinary charges against a detective and for a clause which would grant a detective tenure in that title and bar return of a tenured detective to the uniformed force unless written charges were filed and sustained against him.[64] PERB's unexplained bargainability finding on the issue of detective tenure in the *Buffalo* police case [65] in 1976 affords the BCB no guidance to a principle for decision on the tenure issue in the New York City *Detectives* case, leaving it up to BCB to develop a rationale and a decision virtually *de novo.*

In general, in cases involving various aspects of disciplinary procedure, the BCB has usually treated those matters as "working conditions" and therefore mandatory subjects of bargaining under the NYCCBL. The BCB has found a proposal by a nurses' union for a notification in writing to the union of a management disciplinary action to be a mandatory subject of bargaining—in that it is information needed for effective union representation of the employees involved. The BCB has also found a proposal by a lifeguards' union for contract provisions which would permit appeals and arbitration of a disciplinary action to be bargainable; it was the BCB's view that lifeguards were noncompetitive employees and therefore without rights to statutory provisions relating to hearings in disciplinary matters, and while the city had the right to take disciplinary actions, that right was distinct from the union's right to seek redress by negotiating for a procedure to bring appeals from such action to arbitration in the only vehicle available to the employees involved—the contract.

External Law as It Influences Grievance Handling

As in the private sector, external law impinges upon public-sector bargaining and grievance handling. Some of this legislation has been cited above—the civil service law; restrictions that apply to police, firefighters, and the uniformed services; various provisions of the education law; mayoral executive orders; and the Financial Emergency Act of 1975. Space limitations pre-

[64] *Matter of the Detective's Endowment Ass'n of The City of New York, Inc.* and *The City of New York*, BCB-286-77, 1977.
[65] 9 PERB 3039 (1976).

clude discussion of other recent developments related to this legislation as well as some constitutional issues and the effect of federal law on public-sector negotiations and grievance procedures at the state and local levels.

Let it be noted here only that there have been other important recent developments in New York State case law on problems of procedural due process; the continuing conflict between labor law and the education law over the scope of negotiations, arbitrability, and tenure; the applicability of private-sector case law to public-sector issues; as well as on regulations that apply to prevailing wages, retirement benefits, out-of-title work assignments, and representation at disciplinary hearings.

Under the emergency statutes enacted to deal with the New York City financial crisis, tangled questions of arbitrability on the grounds of laches have arisen. Another important issue is where the burden of proof should lie in disciplinary cases in hospital and custodial-care facilities. A further interesting development is the introduction of a form of nonbinding arbitration for the settlement of disputes over welfare-benefits payable to members of New York City Employees Union Local 237, International Brotherhood of Teamsters, from a city-financed welfare fund. The costs of the arbitrations are borne equally by the fund and the insurance carrier.

Elaboration and discussion of these issues will have to be reserved for another time and another forum.

A Few Conclusions

I see no purpose in estimating, for the objectives of this paper, whether any particular new legislative enactment, court action, board decision, or contract clause is a harbinger of more or less work for arbitrators, a question that has provoked such lively published and unpublished dispute. Reading the future of arbitration—in terms of its form, substance, and volume of activity —out of a single new court decision is probably akin to the method used at Delphi where the oracle read the future out of the entrails of a single chicken. Both procedures present the same problem. Unless one is a true believer in the method, reliance on its prediction comes hard.

Arbitration is far too flexible and diverse, far too widely ingrained in the processes of conducting labor relations, and far too convenient and serviceable a substitute for a court proceed-

ing to be done permanent damage by any one court action which bears on the substance or scope or procedure of arbitration. This has been so in the private sector and is increasingly so in public-sector jurisdictions which encourage collective bargaining.

The shifting winds of judicial opinion relating to the impact of external law on arbitration in the public and private sectors have fairly promptly been made the subject of comment by watchful observers and scholars among us. Their observations have not produced a consensus about the most likely or the wisest divisions of "turf" as between arbitrators and the courts. Like weather forecasts, and like the predictions of union and management attorneys as to how long a given day's arbitration hearing is likely to last, the *ex post* phenomenon is subject to variables that cannot be reliably perceived in advance, or if they are to some extent perceivable, they are not readily manageable for forecasting purposes.

Some of the same kind of prompt study, trend spotting, and reporting has been accorded to the different patterns of evolving case law in matters of public-sector grievance arbitration. Among the places in which much has been happening, as should be evident from this broad sketch of recent developments, are New York State and its political subdivisions (including New York City) where too much of everything always seems to be happening.

Given some of the recent court decisions in grievance and related cases in New York, it can be argued not only that the courts have moved further in the direction of a previously disavowed tendency to compress the scope of arbitration in the public sector, but that they may have been influenced in part in so doing by the drift of court decisions that relate to the impact of external law on private-sector labor agreements. It is a fair speculation that the departures from the *Steelworkers* trilogy in federal court decisions since 1960 have provided potential ideas, possible support, and perhaps further impetus for state court decisions that have found new grounds for narrowing the scope of arbitrable issues in the public sector.

In New York City, public-sector arbitration is alive and well. The BCB has—in 10 years of operation—received for processing 707 grievance-arbitration cases, with 646 of these closed by award, settlement, dismissal, or withdrawal. While there is no accurate way of ascertaining exactly how many of those awards

were taken to the courts for review, BCB records indicate that only seven have been so reviewed. In the same period, the BCB issued 87 decisions on arbitrability challenges, and here the record shows that judicial review was sought in four instances. In 1977 alone, 83 grievance-arbitration cases were filed, and as of January 1, 1978, there were 63 grievance arbitrations pending. The current annual volume of grievance arbitrations is relatively modest, given the fact that there are just under 90 bargaining units in BCB's jurisdiction, covering 190,000 employees.

Among the legislative proposals bearing directly on grievance arbitration that are due to be considered in the current session of the New York State legislature, there are three among several which are likely to have the governor's sponsorship. One bill[66] would amend Section 76.4 of the state civil service law by providing that all public employers in the state—not only state government itself—would have the authority to negotiate with unions grievance and arbitration procedures as a substitute for the statutory disciplinary procedures contained in CSL Sections 75 and 76. Under this bill, if the employer and the union involved could not agree upon an alternate procedure, then CSL Sections 75 and 76 would continue to apply. This same bill would also permit village police departments to agree to arbitrate disputed disciplinary actions. (Neither of these provisions of the bill would have any application in New York City.)

Another bill on the same subject is being sponsored by both the Public Employee Conference, a statewide consortium of unions of government employees, and the New York State Conference of Mayors and village officials. This bill is designed to dispel the confusion that developed out of incongruent decisions by PERB and the state courts on the subject of negotiated disciplinary procedures.[67] Among other things, the bill would clearly make negotiable any disciplinary procedure designed to supplement, modify, or replace the statutory procedure, and it would also hold valid such negotiated procedures as are already

[66]OER-L-78-1.

[67]The state supreme court in 1977 reversed PERB's strange *Auburn* (10 PERB 3045) and *New Rochelle* (10 PERB 3042) decisions in which PERB chose to abandon the policy it had adopted in 1975 in the *Bronxville* (8 PERB 4511) and Scarsdale (8 PERB 3131) police cases and which it had affirmed early in 1977 in the *Albany* police case. The court held that a negotiated disciplinary procedure to replace that in CSL Section 75 was not a prohibited subject of bargaining. *See Auburn Police Local 195* v. *Helsby,* 398 N.Y.S.2d 934, 97 LRRM 2150 (1977).

in effect under existing agreements in a number of local-area jurisdictions.

Another bill[68] would amend Section 200 of the Taylor Law's "Statement of Policy" so as to make explicit a public policy presumptively favoring contracts that provide for binding arbitration of grievances. This bill would also introduce a new provision into Section 204 of the law which would bar a court stay of arbitration of the *Liverpool* type where a written contract contains an arbitration clause and where there is no clearly stated intent to exclude from arbitration a dispute over a given subject. This bill is intended to overcome what has been regarded by its sponsors as the chilling effect on arbitration of the *Liverpool* decision, and it is likely to engender some controversy in the state legislature. Responsible union officials and thoughtful public-agency administrators in the state have been troubled by the potentially adverse effect of *Liverpool* on the expeditious adjudication of contract grievances. The arbitration of disputes over contract rights has served as a practical and necessary escape value for the pressures that can and do arise in public-sector employment, particularly where work stoppages are illegal.

One more bill worth singling out for mention has to do with the right of a union to represent its members in a statutory disciplinary proceeding. Under present state law, a union may process an employee's grievance under a contractual grievance procedure, but it appears to be barred from doing so by the wording of CSL Section 75.2, where the disciplinary proceeding is conducted under CSL Section 75. The law now reads as if an employee who is the subject of such a proceeding has the right to be represented only by an attorney (*viz.*, "counsel"). The proposed amendment would allow the union the option of using its own representative, instead of legal counsel, in such a proceeding.

In general, it is apparent that in the absence of a federal law broadly applicable to the bargaining rights and duties of employees, unions, and employers in the public sector, it is unlikely that in the present crazy-quilt pattern of state legislation and decisional law we shall ever reach a point where the U.S. Supreme Court will have occasion to hand down a number of

[68]OER-L-78-7.

related decisions that would clear the fog that now envelops arbitrability concepts in the public sector in the numerous jurisdictions across the country. The state courts will continue to be, for the foreseeable future, the locus of action on such issues.

We may now be in a phase of public-sector grievance handling in which the scope of arbitrable issues faces further narrowing under decisional law, should existing statutory law fail to provide sufficiently explicit guidance on the scope of arbitrability. The primary hope for clarity rests at present with state legislatures. The patterns of diversity in court and board decisions on grievance arbitration in such matters as the scope of bargainable issues, the order of precedence when conflicts with external law occur, and the subjects which are not arbitrable serve to highlight ambiguities that can best be resolved by refinement of our statutory law. In the absence of prompt and precise legislative clarifications of public policy, arbitrators will simply have to continue to display the resourcefulness and expertise with which we have been credited by Justice William O. Douglas in areas where the minefields are still many and inadequately charted.