CHAPTER 9

PROBLEMS OF SPECIFIC OCCUPATIONS

PART I. ARBITRATION OF DISPUTES OVER PROFESSIONAL STANDARDS

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May a principal discipline a teacher for showing the Madonna video, "Justify My Love," during the section on First Amendment rights in a senior government class? May a legal aid attorney rely on the ethical duty of adequate representation under the Code of Professional Responsibility to obtain relief from newly assigned cases? May a nurse invoke professional autonomy in patient care as a defense to discipline for disobeying her supervisor's instructions?

Arbitrators increasingly have addressed fascinating conflicts between employers and professional employees over the proper interpretation of professional standards. Employers have alleged deviations from professional standards as grounds for disciplining or discharging employees. Employees have also cited these standards in defending their behavior and in grieving against perceived employer impediments to competent professional performance. Some of the most interesting cases have arisen when employers labeled unprofessional behavior that employees believed justified, or even required, by professional standards.[1]

Arbitrators generally have done a good job of assessing alleged violations of professional standards. In fact, most of these cases have been surprisingly easy to resolve despite the potential complexity of professional issues. In a few difficult cases, arbitrators have demonstrated remarkable sensitivity to the special context of

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[1]The arbitration awards discussed in this essay were obtained from a computer search of reported decisions and from conversations with arbitrators, union officials, and management representatives. There was no significant difference between reported and unreported decisions.

professional employment. They have been less successful, however, when they have found that both the employer and the employee have equally reasonable, though conflicting, interpretations of professional standards. In these rare cases, arbitrators have been too willing to defer to the employer's interpretation.

The Range of Arbitrated Disputes

Employer discipline or discharge of employees for professional misconduct has generated most arbitrations over professional standards. Examples from different professional contexts illustrate the range of these cases. A group health cooperative discharged a nurse who, despite prior discipline, "repeatedly used poor professional judgment by calling physicians in the middle of the night" about matters that were not emergencies.[2] In the school setting, a high school principal issued a written reprimand to the teacher who showed the Madonna video. The principal maintained that the sexually explicit content of the video made it unacceptable for educational use.[3] Universities dismissed tenured professors for plagiarism[4] and for "academic fraud" in passing students who had not fulfilled basic course requirements.[5]

Some categories of employer charges have arisen in numerous professional contexts. Employers frequently have disciplined employees for neglect of professional responsibilities. A legal aid society suspended a staff attorney for his "unprofessional manner," accusing him of abandoning clients when he successfully asked a judge to excuse him from representation in 10 pending cases.[6] A newspaper suspended a reporter for failing to check statements in a press release that turned out to be a hoax.[7] Nurses

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[2] *Group Health Coop. of Puget Sound*, 80 LA 465, 469 (Corbett 1983).

[3] *Circleville Bd. of Educ.*, 98 LA 378 (Stanton 1991).

[4] *Temple Univ. Chapter, American Ass'n of Univ. Professors and Temple Univ.*, AAA Case No. 14 30 1314 83H (Summers 1984).

[5] *Central Mich. Univ.*, 101 LA 66 (House 1993). *See also Foothills Provincial Gen. Hosp. and United Nurses of Alberta Local 115*, 7 LAC (4th) 43 (Ponak, Surdykowski, Cassidy 1989) (hospital school of nursing disciplined instructors for misusing class time to discuss impact of recent nurses' strike on length of school semester); *Macromedia Publishing, News Tribune and Newspaper Guild Local 3 (New York)*, Case No. 88-59 (Weiss 1989) (newspaper suspended reporter for using inappropriately confrontational style with local candidate); *New York Dep't of Labor and Public Employees Fed'n*, 15 E672 0006 85 (Brand 1985) (state agency discharged administrative law judge for "highly improper and unprofessional conduct" in commenting during hearing about sexual attractiveness of witness).

[6] *Legal Aid Soc'y*, 81 LA 1065 (Nicolau 1983).

[7] *San Jose Mercury News*, 86 LA 263 (Gould 1986). *See also County of Mower*, 97 LA 378 (Scoville 1991) (county social services department reprimanded social worker for neglecting assigned cases).

were disciplined for not attending to a patient[8] and for intentionally disregarding a doctor's feeding orders.[9]

Employers have charged professional employees with impermissible conflicts of interest. United Press International (UPI) discharged an investigative reporter for refusing to show management the draft of his book about the organization. Fearing that the book contained derogatory information, UPI claimed this refusal violated the provision in the collective bargaining agreement prohibiting conflicts with company interests.[10] A state department of youth services discharged a social worker, claiming that he had compromised his independent professional judgment by accepting a loan from parents of a client.[11] A different financial issue arose when a nurse conducted a commercial business selling cosmetics and diet food to patients. In discharging her, the hospital asserted that this business could create conflicts of interest undermining the essential trust between nurses and patients.[12] Disclosure of confidential information, though not labeled a conflict of interest, also provided grounds for punishing professional employees.[13]

Rather than challenge employer definitions of professional standards, employees in many of these cases defended themselves on grounds familiar in arbitration generally. Some employees asserted that employer characterizations of the facts were simply inaccurate.[14] Others claimed that they had no knowledge of employer policy,[15] that the discipline was too harsh,[16] that the

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[8] *Public Employees Fed'n and New York Office of Mental Retardation & Developmental Disabilities (Syracuse Developmental Ctr.)*, AAA Case No. 15 E672 0013 88 (Rinaldo 1988).

[9] *New York State, Office of Mental Retardation and Developmental Disabilities, Craig Developmental Disabilities Serv. Office, Geneseo, N.Y.*, AAA Case No. 15 E672 0040 91 LRC (La Manna 1993).

[10] *United Press Int'l*, 94 LA 841 (Ables 1990).

[11] *Ohio Dep't of Youth Servs.*, 95 LA 1177 (Fullmer 1990). *See also New York Dep't of State and Public Employees Fed'n*, AAA No. 15 E672 0004 87 (Aarons 1987) (state bureau of corporate records disciplined lawyer for compromising his independent judgment by accepting fee to help organization incorporate).

[12] *Calgary Gen. Hosp. and United Nurses of Alberta Local 1* (Ponak, Neumann, Cowan 1993).

[13] *See, e.g., Doctors Hosp. of Manteca*, 98 LA 1019 (Riker 1992) (hospital discharged nurse for disclosing confidential facts about patient during strike rally elsewhere); *Veterans Affairs Medical Ctr.*, 97 LA 1038 (Caraway 1991) (medical center suspended pharmacist for using documents containing confidential patient information in grievance against supervisor).

[14] *See, e.g., Doctors Hosp. of Manteca, supra* note 13 (nurse discharged for revealing confidential information maintained that facts in her public statement could not have disclosed patient's identity); *Public Employees Fed'n and New York Office of Mental Retardation & Developmental Disabilities (Syracuse Developmental Ctr.)*, AAA Case No. 15 E672 0012 92RGR (Benewitz 1992) (nurse disciplined for directing administration of unprescribed medicine denied accusation).

[15] *Veterans Affairs Medical Ctr., supra* note 13; *San Jose Mercury News, supra* note 7.

[16] *Ohio Dep't of Youth Servs., supra* note 11; *Public Employees Fed'n, supra* note 8; *New York Dep't of State, supra* note 11; *Temple Univ. Chapter, American Ass'n of Univ. Professors, supra* note 4.

employer had not followed proper procedures,[17] or that the employer previously had disciplined the employee for the same offense.[18] Mitigating circumstances provided additional grounds for challenging discipline based on professional misconduct. Employees pointed to their otherwise excellent work records,[19] to overwork as an excuse,[20] and to their good intentions coupled with an apology.[21]

Some employees charged with professional misconduct directly challenged employer interpretations of professional standards. They frequently defended their behavior by grieving over their own rights to professional autonomy. Accused of disregarding a doctor's feeding instructions, a nurse responded that he had reasonably exercised his professional discretion by devising an alternative method of feeding in an unanticipated situation.[22] An instructor disciplined for misusing class time to discuss the impact of a recent strike on the length of the school semester similarly defended her behavior on professional grounds. She sensed an unusual air of anxiety in the class, realized that the students wanted to talk about the strike, felt that the students had legitimate interests in the strike and its aftermath, and decided that "talking to the students would defuse the situation."[23]

Defenses to charges of professional misconduct occasionally relied on more specific sources of professional standards. The teacher reprimanded for showing the Madonna video justified his professional judgment by stressing the school district's practice of affording teachers "the academic freedom to select classroom materials they deemed necessary to teach a particular lesson."[24] The legal aid attorney suspended for abandoning clients relied on the Code of Professional Responsibility to defend his application for judicial relief from representation of clients. The attorney claimed that he could not adequately represent his newly assigned

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[17] *Central Mich. Univ., supra* note 5.

[18] *New York Dep't of Labor, supra* note 5.

[19] *San Jose Mercury News, supra* note 7; *Newspaper Guild (Eugene) and Guard Publishing Co.*, (Axon 1984).

[20] *County of Mower, supra* note 7.

[21] *Public Employees Fed'n and New York Div. of Human Rights*, AAA No. 13 672 034 88 (Goldsmith 1989).

[22] *New York State, supra* note 9.

[23] *Foothills Provincial Gen. Hosp., supra* note 5, at 47; *see also Macromedia Publishing, News Tribune, supra* note 5 (reporter suspended for using "confrontational" style claimed "tough" approach to local politicians necessary for effective journalism); *Group Health Coop. of Puget Sound, supra* note 2 (nurse claimed directive to consult supervisor before calling physician an unreasonable limitation on professional discretion to apprise physician of changes in patient's condition).

[24] *Circleville Bd. of Educ., supra* note 3, at 383.

clients due to the burdens of his prior caseload. The Code of Professional Responsibility, he believed, required the very action that his employer deemed unprofessional.[25]

Some employees, rather than relying on professional standards as a defense to employer sanctions, have used these standards offensively, arguing that employers unjustifiably have interfered with the proper performance of professional work. Provisions in collective bargaining agreements designed to protect professional standards[26] often have provided the grounds for these grievances. The legal aid attorney, who eventually sought judicial relief from his caseload under the Code of Professional Responsibility, initially had complained to his employer under the provision in his collective bargaining agreement allowing grievances when a staff attorney feels that "the burden of work for which she is responsible is about to reach a point beyond which cases cannot be accepted consistent with professional responsibility."[27] A reporter, to whom a prisoner granted an interview on the condition that the story would reflect her point of view, brought a grievance when the newspaper published his story with the word "terrorist" above a photograph of the prisoner. The collective bargaining agreement stated that reporters must be informed prior to publication and be afforded the opportunity to remove a byline if the newspaper "has decided to alter the factual content of any story." The reporter claimed that the use of the word "terrorist" violated his pledge to the prisoner and constituted an alteration of his story without consultation.[28]

Professors invoked the protection of academic freedom in their collective bargaining agreement to grieve the university's refusal to process their applications for research support from an independent fund. The university president and board of regents had accepted the recommendation of a faculty committee that the university neither solicit nor accept money from the fund. The committee had found that the fund was "committed to the proposition that people of different ethnic and cultural backgrounds are on the basis of their heredity inherently unequal and can never be expected to behave or perform equally." This proposition, the committee concluded, was in "sharp conflict" with the university's

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[25]*Legal Aid Soc'y, supra* note 6, at 1071.

[26]Rabban, *Is Unionization Compatible With Professionalism?*, 45 Indus. & Lab. Rel. Rev. 97 (1991), provides examples of such provisions in a variety of professional and organizational contexts.

[27]*Legal Aid Soc'y, supra* note 6, at 1066.

[28]*Pacific Press and Newspaper Guild Local 115 (Vancouver-New Westminster)* (Munroe 1986).

"express commitment to the equal treatment" of all groups and with university policy on affirmative action. The professors protested that the university had used "political or ideological" grounds for refusing to support their research, in direct violation of their contractual right to academic freedom.[29]

Not all grievances attempting to enforce professional standards relied on specific provisions in collective bargaining agreements. In their grievance for a meal allowance, nurses who worked in an emergency room claimed that the hospital's recent reduction in staffing during the night shift precluded the one remaining nurse from leaving the hospital during a meal break. The nurses maintained that they had special skills and experiences for work in the emergency room. Fearing that other nurses might not be able to handle potential crises, the emergency room nurses stated that "professional and ethical considerations" compelled them to remain at the hospital for meals.[30]

Arbitral Assessment of Professional Standards

The relative ease with which most arbitrators resolved disputes between employers and employees over professional standards provided my strongest reaction to these cases. Some decisions, though a distinct minority, were frustrating because arbitrators did not sufficiently explain their acceptance or rejection of the parties' competing interpretations of professional standards. But most decisions clearly identified the sources of these standards and applied them plausibly to the arbitrated dispute.

General Approaches

Following familiar methods, arbitrators derived relevant professional standards primarily from provisions in collective bargaining agreements, but also from employee handbooks,[31] state

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[29] *University of Del. Chapter, American Ass'n of Univ. Professors and University of Del.*, AAA Case No. 14 390 1935 90 A, at 4–5, 7 (Strongin 1991). Teachers have also used specific provisions of collective bargaining agreements to challenge the administration for failing to maintain professional standards. *See, e.g., Racine Unified Sch. Dist.*, 100 LA 1020, 1021 (McAlpin 1993) (art teacher, claiming insufficient space, grieved under contractual provision requiring school board to "make every reasonable effort to provide an adequate place in which to teach"); *Bradford County Sch. Bd.*, 95 LA 158 (Byars 1990) (teacher invoked provision of agreement on teacher authority and student discipline in attempt to suspend student who made obscene gesture).

[30] *Mineral Springs Hosp. and United Nurses of Alberta Local 3* (Ponak, Cassidy, West 1993).

[31] *Veterans Affairs Medical Ctr., supra* note 13; *Temple Univ. Chapter, American Ass'n of Univ. Professors, supra* note 4.

legislation,[32] codes of professional associations,[33] employer past practice,[34] and evidence of generally accepted standards within a profession.[35] Arbitrators assumed that professional employees have working knowledge of professional ethics[36] and allowed employers to enforce reasonable professional standards in the absence of explicit written policies.[37]

To my surprise, the vast majority of cases did not require arbitrators to wrestle with complex technical issues. Rather straightforward factfinding resolved many disputes over professional standards, as two university cases illustrate. An arbitrator upheld the discharge of a tenured professor upon finding that he had committed "academic fraud" by assigning passing grades to Middle Eastern students in his class "when the only evidence of their performance in the course was one plagiarized paper." All other students, by contrast, had to take exams and complete the work required by the syllabus.[38] Another arbitrator found that a university had relied on the contents of professors' research, work on "racial and ethnic differences as a function of heredity and eugenics," as the basis for refusing to process their applications for outside funding.[39] Based on this finding, the arbitrator had no trouble concluding that the university had violated the professors' contractual right to academic freedom and ordered the university to process the applications.

Arbitrators have applied familiar techniques to disputes over professional standards. They frequently calibrated employee discipline to the severity of the infraction. In upholding discipline, they observed that the penalty was relatively mild or that the grievant

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[32] *Veterans Affairs Medical Ctr., supra* note 13; *Public Employees Fed'n, supra* note 8.

[33] *Veterans Affairs Medical Ctr., supra* note 13; *Public Employees Fed'n, supra* note 8.

[34] *Public Employees Fed'n, supra* note 8; *Pacific Press, supra* note 28.

[35] *Central Mich. Univ., supra* note 5; *Michigan Catholic Co. and Newspaper Guild Local 22 (Detroit),* Case No. 54 30 0128 90 (Beitner 1990); *San Jose Mercury News, supra* note 7; *Temple Univ. Chapter, American Ass'n of Univ. Professors, supra* note 4.

[36] *Central Mich. Univ., supra* note 5; *Doctors Hosp. of Manteca, supra* note 13; *Veterans Affairs Medical Ctr., supra* note 13.

[37] *Central Mich. Univ., supra* note 5; *Macromedia Publishing, News Tribune, supra* note 5; *Newspaper Guild (Eugene), supra* note 19.

[38] *Central Mich. Univ., supra* note 5, at 72.

[39] *University of Del. Chapter, American Ass'n of Univ. Professors, supra* note 29, at 11. *See also New York State, supra* note 9 (arbitrator found nurse's disregard of doctor's feeding instruction not an exercise of professional judgment in an unanticipated situation because crisis would not have arisen had nurse followed standard procedures); *Public Employees Fed'n, supra* note 14 (arbitrator found employer had not met factual burden of proving nurse had directed administration of unprescribed medicine); *Gary Community Sch. Corp.,* 95 LA 744 (Eagle 1990) (convincing testimony that student committed battery on teacher justified teacher's reliance on academic freedom provision in refusing principal's order to readmit student to class).

had engaged in prior misconduct. In reducing discipline, they correspondingly cited the grievant's excellent work record or concluded that the infraction was not serious. Following the typical practice of requiring employees to exhaust the procedural requirements of collective bargaining agreements, an arbitrator denied the grievance of the legal aid attorney who invoked the Code of Professional Responsibility to obtain judicial relief from representation. The arbitrator stressed that the attorney had not appealed his case load through the contractual grievance mechanism and had failed to inform the judge about the grievance's procedural status.[40]

In professional disputes, as in arbitration generally, arbitrators exercised discretion in reaching creative results not suggested by either party. A good example involved the case of a reporter charged with a conflict of interest when she became president of an organization dedicated to promoting the rights of working women through the union movement. The arbitrator allowed the grievant to remain a reporter, but also let the employer limit her assignments to matters that did not involve labor issues.[41]

Case Studies

Arbitrators performed well in the relatively few cases that required special sensitivity to professional norms, as examples from three different professional contexts illustrate. Exonerating the nursing instructor who used class time to discuss the impact of a recent strike on the length of the school semester, the majority of the arbitration panel concluded that the instructor had responsibly exercised her professional judgment. According to the panel majority, it was reasonable for an instructor to conclude that the strike had upset many students in ways threatening the learning process. Spending a few minutes at the beginning of class to address these student concerns, they reasoned, was a defensible professional response. The instructor provided additional evidence of sound professional judgment by terminating the "off-topic" discussion of the strike within 20 minutes and by covering her planned lecture in the remaining class time. The panel majority were also impressed by the absence of any evidence that this exercise of professional judgment harmed the students or the employer. Nor was there any evidence that the instructor had a

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[40] *Legal Aid Soc'y, supra* note 6.

[41] *Toronto Star and Newspaper Guild (Southern Ontario)* (Shime 1986).

history of inappropriate class discussions or that the employer had a rule prohibiting the use of class time for material that did not cover the topic of a formal lecture.

Going beyond their findings in this case, the panel majority indicated that they would have reached the same result if hindsight had suggested a better response or if other instructors might have acted differently. Even an error in judgment, they added, "does not necessarily provide just cause for discipline."[42] The panel majority seemed to believe that professional employment requires the exercise of independent judgment and that some employer toleration of errors in judgment is a necessary price to pay for the benefits of professional autonomy.

Another arbitrator demonstrated sensitivity to professional values even while denying the grievance of the journalist who objected to the use of the word "terrorist" in the "overline" above a photograph accompanying his story.[43] The arbitrator took great pains to present the background of the dispute in ways that made clear the reporter's professional concerns. Over a lengthy period, the reporter had developed contacts with, and ultimately the confidence of, members of the "urban underground" in his community. A woman imprisoned after pleading guilty to a series of illegal sabotage attacks called the reporter with an offer to grant him an interview on her life in the underground if he told the story from her perspective. The reporter refused as "unprofessional" her demand to see and have a right to change his story prior to publication. He proposed an alternative arrangement, which both the prisoner and his editor accepted: the reporter would review his edited story and would guarantee to the prisoner that the published version would reflect her point of view.

The reporter and the editor followed this agreement, and the story appeared under the reporter's byline on the front page. Although the reporter approved the final text of his story, he did not see prior to publication the "overline" above the picture of the prisoner: "Julie, 21: Terrorist." According to the reporter, the use of this overline without his permission violated the provision of the collective bargaining agreement granting him the opportunity to remove his byline if the newspaper altered the "factual content" of his story.

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[42] *Foothills Provincial Gen. Hosp., supra* note 5, at 51.
[43] *Pacific Press, supra* note 28.

The arbitrator understood that a byline is "a professional asset to the reporter" as well as "a valuable business asset to a publisher." Although bylines often provide favorable public recognition for reporters, they may inflict professional harm if they accompany bad stories or prompt possible future sources to withhold information. In this case, the arbitrator observed, the overline's use of the word "terrorist" was inconsistent with the reporter's promise to present the prisoner's point of view and had in fact undermined the underground community's trust in the reporter. He rejected the publisher's position that the use of the word "terrorist," even if it had appeared in the text of the story, would not have been an alteration of "factual content" prohibited by the collective bargaining agreement.

The arbitrator, however, agreed with the publisher that the overline was not part of the story. He reached this conclusion by looking at the "industrial context" of the newspaper profession, which traditionally had viewed overlines as a management function performed by editors. Not a single witness, the arbitrator emphasized, could recall even one instance of an editor calling a reporter at home about an overline. Many witnesses, by contrast, remembered such calls to discuss the text of a reporter's story. The arbitrator was confident that this traditional division of labor and accountability between editors and reporters would be obvious not only to other journalists, but to most members of the general public. While the arbitrator conceived of situations when special arrangements between an editor and a reporter might give the reporter atypical authority to review overlines before publication, he found no evidence for such an arrangement in this case. The arbitrator, therefore, refused the reporter's request for an order requiring the newspaper to publish a letter in which he dissociated himself from the overline. Yet he also expressed sympathy for the reporter's professional concerns and criticized the senior editors' dogmatism in refusing to publish the letter.

Had I arbitrated this case, I might have found the lengthy discussions about presenting the story from the prisoner's perspective sufficient evidence of a special arrangement giving the reporter a right to review the overline as well as the text of his story. Even if I had not found such an arrangement, I might have required the newspaper to publish the reporter's subsequent explanatory letter. Yet I find the arbitrator's opinion an admirable effort to understand the distinctive professional context of the dispute.

In arbitrating a grievance protesting the dismissal of a tenured professor for plagiarism, Arbitrator Clyde Summers developed a particularly inventive and challenging approach to the evaluation of disputes over professional standards.[44] Upon reading an article by his professor in a leading scholarly journal, a former graduate student claimed that it plagiarized from the seminar paper he had written for the professor five years previously. An ad hoc faculty hearing committee of five persons, selected according to provisions of the collective bargaining agreement, held hearings to determine possible sanctions against the professor. The committee majority found that the publication constituted plagiarism and recommended sanctions, including a public correction in the journal and a public censure by the faculty senate. The majority identified as mitigating factors the professor's "unblemished prior record" and his "potential for future productivity in his field." Two members of the committee concluded that the publication was wrong but did not constitute plagiarism.

The president of the university, after reviewing the committee's report, concluded that the recommended sanctions were too lenient. The board of trustees agreed and asked the ad hoc committee to reconsider its sanctions. The committee subsequently recommended the further penalties of reduction in rank and benefits, but it refused to endorse the "extreme sanction of dismissal." The board of trustees nevertheless voted to dismiss the professor.

In a novel approach with broad implications, Summers maintained that his very function must be reconceived in the university context. He emphasized that the collective bargaining agreement and its "coordinate document," the faculty handbook, reflected the "dominant principle" in American universities that "faculty members are to be judged by their peers." Consistent with the principle of peer review, the collective bargaining agreement and the faculty handbook provided that faculty recommendations about granting or revoking tenure should be rejected by the president and the board of trustees only for compelling reasons that must be stated in detail. In contrast to a typical case, where the arbitrator decides "whether the charges are proven and whether the sanction imposed is reasonable," the arbitrator of a case

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[44] *Temple Univ. Chapter, American Ass'n of Univ. Professors, supra* note 4. *See also Newspaper Guild Local 35 (Washington-Baltimore) and The Washington Post Co.*, AAA Case No. 14 30 0722 67 (Stein 1968) (arbitrator upheld discharge of reporter charged with plagiarism).

emerging from a university system of peer review must decide "whether the President and the Board of Trustees gave the required deference to the recommendations of the Faculty Hearing Committee."

Summers interpreted "required deference" to mean that the faculty committee's recommendations must be accepted unless they are unreasonable. He emphasized that the president and board had made no such showing, indeed had made no such claim. Nor did any evidence indicate that the president and board had given any deference to the faculty committee. Rather, they simply substituted their own view of appropriate discipline for the recommendation of the committee, thereby violating the fundamental principle of peer review embedded in the collective bargaining agreement.

Summers proceeded to examine the committee's recommendation and concluded that it had acted reasonably, more reasonably in fact than the president and the board. He cited the substantial help the professor had provided when the student first wrote the seminar paper and the fact that the professor had urged the student to revise and publish it. This advice and encouragement, he observed, "was certainly not the conduct of a professor seeking to steal his student's work."

Summers was also impressed that the professor shared with his former student, and withdrew at the student's request, the first version of the paper that the professor ultimately published under his own name. Although Summers agreed that the subsequent publication of the revised and translated article was a "serious breach of professional conduct" that violated "the canons of academic scholarship," he did not consider it an "ordinary act of plagiarism." In addition to his important contributions to the original seminar paper, the professor, according to the testimony of several scholars at the hearing, had made extensive and substantial revisions. Summers concluded that the professor, honestly but mistakenly, could have persuaded himself that these revisions, coupled with his translation of the article into French, provided legitimate bases for calling the work his own.

While making clear that he would have reached the same result had he used arbitral standards traditional in discharge cases, Summers emphasized throughout his opinion that the university tradition of peer review "significantly changes the arbitrator's function and the questions which he must decide." This persuasive reasoning easily could apply beyond faculty disputes in universi-

ties. Collective bargaining agreements, informed by coordinate documents and professional traditions, provide many groups of professional employees with significant roles in organizational decision making.[45] In other professional contexts, as in the university, arbitrators should respect these roles.

When Reasonable Interpretations Conflict

Arbitrators occasionally have concluded that in a dispute over the proper interpretation of professional standards the employer and the employee have conflicting, but equally reasonable, positions. In such circumstances, they generally have been unwilling to give the reasonable positions of individual professional employees the deference Summers afforded the faculty committee in the plagiarism case. Instead, arbitrators typically have deferred to the employer.

In a dispute over the proper penalty for a student who "shot the bird" to a teacher, for example, the arbitrator found that the issue was one about which "reasonable people may disagree." The principal categorized the offense as "disrespect" and suspended the student for one day. The teacher, by contrast, claimed that the obscene gesture constituted "grossly abusive or vulgar language," conduct for which governing regulations required a seven-day suspension. Because the administration's position was not "unreasonable," the arbitrator rejected the teacher's "reasonable" position.[46]

Similarly, in resolving the claim by emergency room nurses that it would be unethical and unprofessional for them to leave the hospital for meal breaks during the night shift, the majority of the arbitration panel reasoned that the nurses had a substantial evidentiary burden to demonstrate that their absence would jeopardize adequate emergency service.[47] In reflecting subsequently about this case, Allen Ponak, the neutral member of the panel, viewed it as pitting "the professional judgment of one group of nurses representing management against the professional judgment of another group of nurses doing the work." Justifying the majority's finding that the grieving staff nurses did not meet their burden of proving entitlement to pay for remaining available during meal periods, he explained that "a tie goes to

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[45] *See* Rabban, *supra* note 26.
[46] *Bradford County Sch. Bd., supra* note 29, at 161.
[47] *Mineral Springs Hosp., supra* note 30, at 6.

management."[48] The union member of the panel, in a dissenting opinion, relied in part on the lack of any evidence that the employer had a written policy regarding meal breaks during the night shift.

I believe these cases exhibit too much deference to the employer in situations where conflicting interpretations of professional standards are equally reasonable. Professional employees are hired to exercise independent judgment, as Allen Ponak recognized in another context while observing that even their mistakes should not necessarily provoke discipline.[49] Arbitrators who find against the reasonable judgment of professional employees whenever the employer has an equally reasonable, or simply not unreasonable, conflicting judgment, frustrate legitimate expectations of professional autonomy. I disagree with an absolute rule of arbitral deference to employers whenever conflicting professional judgments are both reasonable.

More refined standards could be developed for these relatively rare cases. Arbitrators often rely on the absence of employer rules or policies as a factor favoring the position of employees.[50] The same principle could apply in this context, as the dissenting panelist suggested in supporting the emergency room nurses. Just as a clear employer rule should be a factor in trumping an equally reasonable professional interpretation by employees, the employees' interpretation should be entitled to presumptive deference if no such rule exists.[51] One arbitrator deferred to the position of a nurse in a dispute with her supervisor over the need to bathe a patient prior to a transfer. The arbitrator emphasized that the management rights provision in the collective bargaining agreement specifically disclaimed any intent to "interfere with the nurses' professional judgment in the performance of nursing functions where there is not established policy."[52] According to the arbitrator, bathing a patient is a nursing function, and the

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[48]Letter from Allen Ponak to David Rabban (Jan. 17, 1994).

[49]*See supra* text accompanying note 42.

[50]*See Michigan Catholic Co., supra* note 35, at 14; *Foothills Provincial Gen. Hosp., supra* note 5, at 50.

[51]Other factors might be used to "break a tie." For example, in the conflict over student discipline, the arbitrator refused to rely on a faculty handbook that addressed the issue, reasoning that the collective bargaining agreement did not explicitly cite it but did refer to a disciplinary code. Yet, as the arbitrator found, the provision in the disciplinary code was subject to equally plausible but inconsistent interpretations. *Bradford County Sch. Bd., supra* note 29. At least in this situation, it seems sensible to refer to the faculty handbook, whose language would have resolved the dispute over how to classify the student misconduct.

[52]*Deaconess Medical Ctr.*, 88 LA 44, 47 (Robinson 1986).

employer had not introduced any evidence of an established policy. The arbitrator, therefore, directed the hospital to adhere to the requirements of the disclaimer in the management rights clause. In my opinion, arbitrators should give similar deference to the reasonable professional judgments of employees even if there is no such contractual provision.

The existence or absence of established employer policy is only one issue that should influence the resolution of cases in which reasonable interpretations conflict. Possible factors favoring the employer could include legitimate concerns about cost, legal liability, or community relations. Yet a tie should not go to management whenever its interpretation of professional standards is as reasonable as the conflicting views of employees.

A Postscript on Professional Standards and the Public Policy Exception to Judicial Deference

Disputes over professional standards highlight the continuing debate over the important issue the Supreme Court left unresolved in the *Misco*[53] case: May a court refuse to enforce an arbitration award on public policy grounds only when the award itself violates positive law or compels unlawful conduct by the employer? Cases involving professional misconduct indicate that the answer to this question should be "no." Professional standards can be a legitimate source of public policy justifying judicial refusal to enforce an arbitration award. This issue merits at least brief treatment in an essay about the arbitration of professional disputes.

As the Supreme Court repeatedly has emphasized, labor arbitration provides the speed, flexibility, and finality that advance the important public policy of avoiding strikes. Judicial review of the merits of an arbitration award undermines this public policy. Because the parties bargained for the arbitrator's construction of their collective bargaining agreement, courts must uphold this construction as long as it "draws its essence" from the agreement.[54]

The extraordinary judicial deference to labor arbitration is limited by the principle, derived from the common law, "that a court may refuse to enforce contracts that violate law or public

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[53] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 45 n.12, 126 LRRM 3113 (1987); *id.* at 46 (concurrence).

[54] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97, 46 LRRM 2423 (1960), *cited in Paperworkers v. Misco, Inc.*, *supra* note 53, at 36.

policy."[55] As the Court observed in *Misco*, "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements."[56] The Court has not clearly defined when considerations of public policy justify judicial refusal to enforce arbitration awards, although it has reiterated that there is no "broad judicial power" to do so and that public policy cannot be derived merely from "'general considerations of supposed public interests.'"[57]

While an overly broad conception of public policy grounds for setting aside arbitration awards would undermine the important principle of arbitral finality, an overly narrow conception would jeopardize other public interests. Threats to public safety posed by employees reinstated by arbitrators, such as a drunk airline pilot[58] and a negligent employee of a nuclear power plant,[59] have provided powerful examples for those who maintain that the public policy exception to arbitral finality should extend beyond actual violations of law.

Misconduct by professional employees reinforces these examples. One arbitrator reinstated a respiratory therapist who, despite previous warnings, used the same syringe in drawing blood from several critically ill patients. The arbitrator agreed that this conduct violated hospital procedure and threatened the health of the patients. The arbitrator nevertheless reduced the penalty from discharge to two months suspension without pay because the therapist had not otherwise fallen short of "professional performance" during his eight prior years of employment at the hospital.[60] In another case, an arbitrator, after finding that an employee of a state psychiatric center had intercourse with a patient, similarly reduced the penalty from dismissal to two months suspension without pay. While recognizing that "it is wrong for staff people to have sex with patients," the arbitrator observed that the "intercourse was consensual" and reasoned that "an employee with 18 years of good service who is guilty of having intercourse

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[55] *Paperworkers v. Misco, Inc.*, *supra* note 53, at 42.

[56] *Id.*

[57] *Id.* at 43 (quoting *W.R. Grace Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766, 113 LRRM 2641 (1983)).

[58] *Compare Delta Air Lines v. Air Line Pilots*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988) (vacating arbitration award) *with Northwest Airlines v. Air Line Pilots*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987) (enforcing arbitration award).

[59] *Iowa Elec. Light & Power Co. v. Electrical Workers (IBEW) Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987) (vacating arbitration award).

[60] *State Univ. of N.Y. v. Young*, 566 N.Y.S.2d 79, 80 (App. Div. 1991).

with a willing patient should have an opportunity to redeem himself."[61]

These cases persuade me that courts should be able to formulate the public policy exception to arbitral finality so that it extends beyond actual violations of law but remains relatively narrow. The emerging limitation of employment at will based on considerations of public policy supports this conclusion. An important decision by the Supreme Court of New Jersey, which has influenced the law in other jurisdictions, held that an employee at will "has a cause of action for wrongful discharge when a discharge is contrary to a clear mandate of public policy." The court did not limit its definition of public policy to legal obligations. While identifying legislation, administrative regulations, and judicial decisions as sources of public policy, the court also observed that professional employees have a duty to follow "the recognized codes of ethics of their professions," which may require professional employees to refuse compliance with employer demands. The court therefore held that in at least some instances "a professional code of ethics may contain an expression of public policy."[62] Just as a court can invoke public policy based on professional standards to reinstate a wrongfully dismissed employee at will, a court should be able to invoke public policy based on professional standards to vacate an arbitration award under section 301.[63]

Defining the public policy exception as encompassing more than unlawful conduct need not unduly undermine arbitral finality. Wrongful discharge cases themselves suggest some limitations on the use of professional standards to define public policy. The Supreme Court of New Jersey, while recognizing that a professional code of ethics can be a legitimate source of public policy, refused to grant such status to code provisions that simply serve the selfish interests of employees or contain administrative regulations of technical matters. The more general the provision of a code, the court added, the less likely that it can establish a public policy.[64] The court emphasized that the individual conscience or personal morals of a professional employee should not be

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[61] *Ford v. Civil Serv. Employees Ass'n*, 464 N.Y.S.2d 481, 483 (App. Div. 1983), *motion for leave to appeal dismissed*, 477 N.Y.S.2d 331 (Ct. App. 1984).

[62] *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512, 115 LRRM 3044 (1980).

[63] *Accord* Meltzer, *After the Arbitration Award: The Public Policy Defense*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 39, 50, 53.

[64] *Pierce v. Ortho Pharmaceutical Corp.*, *supra* note 62, 417 A.2d at 512.

construed as sources of a public policy.[65] In the very case recognizing a cause of action for wrongful discharge in violation of public policy, the court denied the claim of a physician employed by a drug manufacturer that the general provisions of the Hippocratic Oath justified her refusal to work on the development of a drug she feared might be dangerous.[66] Other cases have rejected claims by professional employees that codes of professional ethics and other sources of professional obligations provided a public policy exception to employment at will.[67]

Arbitrators themselves should be able substantially to insulate their decisions from judicial review by incorporating considerations of public policy, including those based on professional standards, into their evaluations of just cause and remedies. Arbitrators traditionally have considered the potential impact of employee misconduct on the general public in determining appropriate discipline, particularly in cases involving public safety.[68] Arbitrators similarly are able to evaluate issues of public policy in cases involving professional misconduct. Judges, who must guard

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[65] *Id.* at 514.

[66] *Id.*

[67] *See, e.g., Birthisel v. TriCities Health Servs. Corp.*, 424 S.E.2d 606, 8 IER Cases 199 (W. Va. 1992) (neither state social work code of ethics nor state licensing statute contains public policy upon which social worker can maintain challenge to dismissal for refusing supervisor's order to transfer data); *Free v. Holy Cross Hosp.*, 505 N.E.2d 1188 (Ill. Ct. App. 1987) (neither state nursing act nor state right of conscience act contains public policy upon which nurse can maintain action for wrongful dismissal based on her refusal to remove patient from hospital; contractual claim based on personnel policy manual remanded); *Warthen v. Toms River Community Hosp.*, 488 A.2d 229 (N.J. Super. Ct. 1985) (code of ethics of American Nursing Association does not contain public policy precluding hospital from dismissing nurse for refusing to administer kidney dialysis to terminally ill patient; cited code provision benefits nurse, not general public); *Lampe v. Presbyterian Medical Ctr.*, 41 Colo. App. 465, 590 P.2d 513 (1978) (broad, general statement of policy in statute giving disciplinary power to state board of nursing does not provide public policy upon which head nurse can challenge dismissal for refusing employer's request to reduce overtime for nurses in her unit).

Some courts have reversed trial court decisions dismissing wrongful discharge claims by professional employees who invoked public policy. *See, e.g., Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 8 IER Cases 522 (Mo. Ct. App. 1993) (state nursing practice act provides public policy for wrongful discharge claim by nurse alleging retaliation for attempting to correct improper treatment of dying patient); *Sides v. Duke Hosp.*, 328 S.E.2d 818, 1 IER Cases 512 (N.C. Ct. App. 1985) (nurse's allegation that she was discharged for refusing to testify untruthfully or incompletely at medical malpractice trial sufficient on grounds of public policy to state claim for wrongful discharge and for breach of employment contract); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728, 115 LRRM 4803 (1982) (code of ethics of American Pharmaceutical Association provides public policy for suit by pharmacist alleging wrongful discharge for asserting that pharmacy in store should remain open on holiday).

[68] *See* Brief of the National Academy of Arbitrators, as amicus curiae, at 4, 11, 15, in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987) (hereinafter NAA *Misco* brief); *see also* Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L. Rev. 217, 220–27 (1960).

the public interest while interpreting private agreements, have a broader role in construing public policy than arbitrators, who must always find their authority in the agreement itself.[69] In performing their role, judges may even have to review arbitral findings of fact on issues that cannot be separated from the evaluation of public policy,[70] such as whether intercourse with a psychiatric patient is "consensual."[71] Judges must also make sure that arbitrators have not exceeded their contractual authority by invoking their own conceptions of public policy in assessing the validity of the collective bargaining agreement itself.[72] But, to the extent that arbitrators legitimately consider public policy while construing agreements, courts will probably be even less likely than they already are to vacate arbitration awards under their broader responsibility to protect the public.

Just as most arbitrators have been sensitive to professional standards in construing collective bargaining agreements, judges in the context of professional employment have been sensitive to the importance of arbitral finality in determining whether to vacate arbitration awards on grounds of public policy. Judges, in vacating the awards that had reinstated the multiple user of the syringe and the psychiatric worker who had intercourse with a patient, appropriately found that professional misconduct violated public policy.[73] But other judges, in cases where arbitrators did not uphold the dismissal of professional employees, rejected claims by employers that considerations of public policy should

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[69]Meltzer, *supra* note 63, at 48–49; Blumrosen, *supra* note 68, at 218, 246–47; *see* NAA *Misco* brief, *supra* note 68, at 25.

[70]As the Seventh Circuit observed, the judicial duty to refuse enforcement of arbitration awards that violate public policy "would be impaired if a court had to defer to clearly erroneous findings of fact." *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n of E. Chicago*, 790 F.2d 611, 617, 122 LRRM 2217 (7th Cir.), *cert. denied*, 479 U.S. 853, 123 LRRM 2592 (1986). Judicial review of "constitutional facts," which allows federal courts to exercise independent judgment about facts that could decide issues of constitutional law, seems analogous. *See* Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

[71]See *supra* text accompanying note 61.

[72]*See Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 54, at 597; NAA *Misco* brief, *supra* note 68, at 25.

[73]See *supra* notes 60 and 61. I have found one case involving a professional employee that, in my opinion, mistakenly relied on the public policy exception to vacate an arbitration award. The arbitrator, though finding that a nurse had negligently failed to dispense cardiac medication after prior warnings about other misconduct, did not consider the infractions sufficiently serious to justify dismissal for cause. *Russell Memorial Hosp. Ass'n v. Steelworkers*, 720 F. Supp. 583, 132 LRRM 2642 (E.D. Mich. 1989). Although I am unconvinced that the public policy of providing competent nursing care required the court to vacate this award, I do not find this single decision reason to doubt the general ability of courts to apply the public policy exception with appropriate deference to arbitral authority.

preclude enforcement.[74] These cases suggest that judges are able to consider sources of public policy in addition to law while maintaining the traditional judicial deference to arbitration.

PART II. REFORMING BASEBALL SALARY ARBITRATION

JOHN B. LAROCCO*

During spring and summer 1994, the Major League Baseball Players' Association (MLBPA) and the baseball owners, through their Player Relations Committee, are conducting the next round of bargaining. Salary arbitration is a prime topic on the agenda.[1] The current collective bargaining agreement contains a salary arbitration clause currently covering 25 percent of the employees in the bargaining unit.[2]

In recent years the owners have voiced dissatisfaction with salary arbitration even though the system governs only a limited number of players. It is somewhat ironic that the owners are complaining about a system where they have won 56 percent of the arbitrations since its inception in 1974. The owners' major gripe is that arbitration inflates the level of salaries so that salaries paid to many players exceed their true market value. This view fuels the owners' fear that salaries will continue to escalate while revenues either remain stable or decline.[3] In 1994 the owners prevailed in 10 of 16 decisions in arbitration, but the aggregate salary for the 91 players invoking arbitration increased from $1,069,944 to $2,091,187

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[74] *See, e.g., Brigham & Women's Hosp. v. Massachusetts Nurses Ass'n*, 684 F. Supp. 1120, 128 LRRM 2320 (D. Mass. 1988) (refusing to vacate on grounds of public policy arbitration award reinstating nurse dismissed by hospital; no basis to reject arbitrator's finding that nurse was not incompetent); *State, County & Mun. Employees v. Illinois Mental Health Dep't*, 529 N.E.2d 534, 130 LRRM 2183 (Ill. 1988) (refusing to vacate on grounds of public policy arbitration award that reduced discipline; no nexus between mental health technicians' unauthorized absence from work and death of unattended patient and no threat that reinstatement will harm third persons).

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[1] The owners and players are also talking about other important subjects, such as revenue sharing, a team salary cap, roster size, playoffs, and expansion.

[2] Aaron, Feller, Goldmark, & Volcker, *Report of Independent Members of the Economic Study Committee on Baseball* (Dec. 3, 1992), 15 (hereinafter Study Committee Report). Article XXIV of the current collective bargaining agreement provides for a Study Committee to examine and report on the "overall economic condition of the industry . . . ."

[3] Study Committee Report, *supra* note 2, at 14. The players contend that salary increases are direct responses to the rapid growth of revenues, and salaries will accordingly respond (decrease) if revenues decline.

(a 95 percent rise).[4] From the owners' perspective they lose even when they win.

Neither are the baseball players and their union happy and content with salary arbitration. Some younger star players who are shuttled into arbitration are barred from selling their services to the highest bidder via free agency. Through free agency young stars might command salaries higher than they attain in salary arbitration although the owners might debate this proposition. Over the years the MLBPA endorsed salary arbitration as a satisfactory substitute for free agency because of constant concern about flooding the market with free agents. Creating an oversupply of labor depresses salaries.[5] The MLBPA trusts the free agent market only as long as average salaries continue to climb each season. If revenues decrease substantially causing salary deflation, the union might prefer salary arbitration. Nevertheless, salary arbitration is the logical, intermediate step between the reserve clause and free agency.[6]

At the bargaining table the parties are to discuss the effects of and possible alternatives to salary arbitration. There is a chance that salary arbitration, in any form, will not survive this round of bargaining. The Report of the Independent Members of the Economic Study Committee on Baseball (Study Committee) recommended that the players now subject to mandatory salary arbitration be afforded free agency.[7] Peter Gammons and Jack Sands, in their 1993 book, favor unrestricted free agency in lieu of salary arbitration.[8]

The purpose of this paper is to examine the present salary arbitration system in baseball, to discuss its attributes (both advantageous and disadvantageous), and to suggest amendments making it more palatable to both owners and players. The proposed reforms leave some underlying principles of the system intact but instill more fairness and predictability. I neither endorse nor reject the Study Committee's recommendation to abolish

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[4]Sacramento Bee, Feb. 21, 1994, at D2.

[5]Sands & Gammons, Coming Apart at the Seams (Macmillan 1993), 218.

[6]Many players believed that salary arbitration was the necessary first step to eventually eliminate the reserve clause. Dworkin, Owners Versus Players (Auburn House 1981), 142.

[7]Study Committee Report, *supra* note 2, at 16–17. Stated differently, the Committee recommended that "the season level at which players become free agents be reduced from six to three years."

[8]Sands & Gammons, *supra* note 5, at 219. Unrestricted free agency means that the club losing a free agent does not receive any compensation, such as another player or a draft choice, from the team signing the free agent.

mandatory salary arbitration. This determination is left to the negotiators.

This paper does not consider the microeconomics of the baseball industry except for the direct effect of arbitration on the players' salaries. There is no doubt that baseball salaries have substantially increased over the last two decades. Their recent, rapid rise forces the owners to find ways to increase revenues. Revenues are not limitless. Fans will pay only so much for a ticket to a baseball game. Clubs share little revenue; therefore, some teams supplement ticket sales with lucrative television/radio contracts, while others derive less revenue from media services. Nevertheless, media ability to pay is constrained as demonstrated by ESPN's buyout of its long-term television broadcasting arrangement with Major League Baseball. The MLBPA is confident that the game will attain even greater popularity and that, if they utilize new marketing strategies, the owners will enjoy greater revenues. The owners point to the alleged financial instability of several clubs and question the long-term health of all clubs in small population markets. On the other hand, the Study Committee found all franchises financially viable, primarily because their values have appreciated even though each year operating expenses exceed revenues.[9] To ensure future financial stability, the Study Committee recommended that Major League Baseball adopt a revenue-sharing arrangement.[10]

Later, this paper will explore how arbitration influences players' salaries. First, we must understand the system.

Applicable Provisions in the Current Collective Bargaining Agreement

Article XX of the Basic Agreement between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and the Major League Baseball Players' Association (Agreement) sets forth the reservation rights of the club, as well as the extent of the free agency. The reserve clause ties a player to a single club until he becomes a free agent, when he may sell his labor to the highest bidder.

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[9]Study Committee Report, *supra* note 2, at 9–10.

[10]Study Committee Report, *supra* note 2, at 12. The revenue sharing would be greatly increased from the current 25 percent. The Study Committee wrote "significant increments in this percentage should be achieved promptly."

Pursuant to Article XX(B)(1), any player with six or more years of major league service who has completed the term of his uniform player's contract (the individual contract) is a free agent, provided that he has not executed a contract for the next season. During the term of an individual contract, the player is bound to a single club.[11] There are also restrictions on the right of a free agent to repeat as a free agent.[12] Article XX(D)(2) contains the voluntary salary arbitration provision for free agents. If the club offers and the player accepts, the player's salary is determined by arbitration.

A player with a minimum of three years but less than six years of Major League service is eligible for mandatory salary arbitration.[13] Under certain circumstances a player with two years of service is eligible for salary arbitration if he accumulated 86 days of service in the immediately preceding season and was in the top 17 percent of all second-year players in terms of total service. Prior to eligibility for salary arbitration, a player is tied to the club holding his contract. Thus, he can be traded at will. Unlike most collective bargaining agreements, the baseball Agreement sets only the minimum salary, leaving the player to individually negotiate his salary with the club.[14] However, his salary cannot be reduced in excess of 20 percent of his prior year's salary or 30 percent of the salary he received two years ago.[15]

Salary arbitration is compacted into January and February of each calendar year. While the Agreement does not provide justification for this compression, the parties presumably wanted the process completed before spring training in late February and at the same time wanted to give the players and clubs time to settle their differences after conclusion of the prior championship season (late October).[16] Pursuant to Article VI(F)(5), the parties exchange their respective submissions between January 5 and January 15. The arbitration hearings are scheduled from February 1 to February 20. The arbitrator has an advisory time limit of 24 hours to issue a decision. In their submissions the player and the club submit a salary figure. The amounts are submitted simultaneously, exchanged by the parties, and then provided to the arbitrator. Neither the player nor the club is aware of the other's

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[11]The contract contains a clause governing trading the player to other clubs.
[12]Article XX(D).
[13]Article VI(F)(1).
[14]Article VI(B).
[15]Article VI(D).
[16]The clubs also deal with their free agents during this period.

salary figure when submitted. After the salary figures are exchanged, the parties are free to negotiate. If they arrive at a settlement before the arbitration decision, the arbitration is deemed withdrawn.[17] Settlements fall somewhere between the two amounts; the player is guaranteed, as a minimum, the club's proffered salary figure.

The ostensibly private and confidential hearings are limited to a total of three hours: one hour for each initial presentation and one-half hour each for rebuttal.[18] The Agreement provides that the parties may submit any relevant evidence as to whether the player should be paid his or the club's salary figure. The Agreement directs that the arbitrator give "particular attention" to comparative salary evidence, consisting of the contracts of players with Major League service not exceeding one annual service group above the player's annual service group, when the arbitration involves a player with two to four years of service.[19] Stated differently, the key factor is the salaries of other players with comparable statistics.[20] The Agreement then specifies that the arbitrator consider salaries of all players comparable to the player involved and not merely the salary of a single player or the average salary of a group of players.[21]

Article VI(F)(12)(b) enumerates the following items as *inadmissible* during the arbitration:

(i) The financial position of the Player and the Club;
(ii) Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded;
(iii) Offers made by either Player or Club prior to arbitration;
(iv) The cost to the parties of their representatives, attorneys, etc.;
(v) Salaries in other sports or occupations.

Testimonials include the manager's laudatory remarks to the press about how the player is a team player and how important the player

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[17]Article VI(F)(4).

[18]Article VI(F)(9) provides that the arbitrator may extend this time limit if there is good cause or "in the event of lengthy cross-examination of witnesses." In these hearings, witnesses are normally not examined in the same manner as a traditional labor arbitration.

[19]Article VI(F)(12)(a). Ostensibly, this section excludes a fifth-year player in salary arbitration from comparison with a sixth-year agent. But, the Agreement also states, that any salary comparison is valid regardless of years of service.

[20]Sands & Gammons *supra* note 5, at 61.

[21]Article VI(F)(13).

is to the club. Testimonial and press accounts exclude recognized achievements, such as batting title, All-Star selection, the Cy Young Award, and other annual outstanding player awards.

Article VI(F)(12)(a) sets forth the criteria the arbitrator is to use when making a decision:

> The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries (see paragraph (13) below for confidential salary data), the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance (subject to the exclusion stated in subparagraph (b)(i) below).

Salary arbitration in baseball is high/low arbitration. Nothing in the Agreement requires either the player or the owner to submit, as their respective salary figures, their last and final offers. For example, a player who was willing to accept $2 million from the club during negotiations is free to ask for $3 million or any other figure in salary arbitration. Similarly, the club may retreat from the final offer made to the player before its arbitration offer is submitted. The submitted figure may be lower than the prior final offer. Settlement discussions continue after the exchange of submissions and before arbitration. However, if the case goes to decision, the parties are bound to stand on and advocate previously submitted figures. Applying the evidence to the criteria set forth in the Agreement, the arbitrator selects one figure or the other and enters that figure in the player's uniform contract. Article VI(D)(5) expressly forbids the arbitrator from rendering a verbal or written opinion. The salary figure is effective during the next championship season.

How the Salary Arbitration System Works

The salary arbitration represents a compromise between the reserve clause and free agency. When a player is subject to the reserve clause, his only other choice is to hold out.[22] This is not an appealing alternative unless the player is a superstar, who can command a high salary or achieve a long-term contract. The club

[22]If a player who is not yet eligible for salary arbitration holds out, he postpones his eligibility for salary arbitration, because eligibility is premised on years of service.

has the greater bargaining power, perhaps absolute power, under the reserve clause.[23] At the other end of the spectrum, free agency allows the player to sell his skills and abilities in a supposedly open market. The player can select his employer from among the clubs extending an offer to the player. If a club invested substantial funds in the player while he was developing into a good player, the club may never achieve an acceptable return on investment if the player leaves the club via free agency before reaching his full potential or stardom.[24] Retaining the reserve clause in conjunction with salary arbitration during the player's first five years of service permits a club to recoup some of its training investment. Even if the player did not come up through the club's farm system, the owners, as a group, spend much money on minor league salaries and bonuses, although they may not have a capital investment in minor league clubs. Salary arbitration eliminates the hold-out option, and thus the club gets the benefit of the player's uninterrupted service. In other words, salary arbitration binds a player to a single club and creates an artificial market for athletes by providing an impartial determination of the player's salary without requiring the player to withhold his services.

The arbitration process contains some interesting characteristics. Some aspects work remarkably well while others do not. As already discussed under the high/low arbitration process, neither party is bound to submit its last final offer to the arbitrator. In fact, there is usually no relationship between the submitted figures and the final offers made after the submissions and before arbitration. This raises the question of whether the parties should be allowed to amend their submitted figures before arbitration. In the normal give and take of bargaining, one party responds to the other's offer. Here there is no offer and counteroffer process. The salary figures are submitted bilaterally. The parties are not completely in the dark because they presumably have previously held salary discussions.

The most frequent observation made about baseball salary arbitration is that the high/low characteristic is designed to induce the parties to settle short of arbitration. James Dworkin, in his early study of baseball salary arbitration, found that, during the

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[23]For an excellent discussion on the history of the reserve clause in professional baseball, see Hopkins, *Arbitration: A Major League Affect on Player Salaries*, 2 Seton Hall J. Sport L. 301 (1992).

[24]The investment consists of signing bonuses, support of minor league franchises, and wages paid while the player is honing his skills.

first seven years of the system, only 8 percent of the eligible players had salaries determined by arbitration and concluded that the settlement inducement aspect of high/low arbitration worked very well.[25] He stated that both parties rightly viewed salary arbitration as a potential self-destruct mechanism, because without the high/low attribute arbitrators could not resist the temptation to split the difference. Parties would expect a compromise solution, tending to discourage good-faith bargaining.[26] In 1992 another study predicted that over time the high/low technique would cause the disparity between the two salary figures to subside.[27] The implication is that the narrower the disparity, the more likely the club and player will settle. Conversely, the greater the disparity, the more likely the parties will need an arbitrator.[28]

Trying to generalize how arbitrators reach their decisions is risky in labor arbitration. All arbitration involves personal judgment. The risk is not lessened even where the arbitrator's authority is limited to choosing one of two salary submissions. The speculative aspect is more pronounced in baseball salary arbitration where the arbitrator does not write an opinion justifying the result. In a perfect world the arbitrator carefully sifts through comparable wage data and judiciously applies other criteria set forth in the Agreement to arrive at a salary for the player. The arbitrator does not focus on the salary figures provided by the two parties. Rather, a prudent arbitrator settles upon a dollar figure reflecting the *player's true value* (PTV) and then chooses whichever submitted figure is closer to the PTV.[29]

Other commentators are not so sure that salary arbitrators engage in this kind of decision-making process. Based on analysis of the first 81 arbitrations, Dworkin concluded that "arbitrators seem to be requiring the clubs to be quite a bit more reasonable than the players before adopting their positions as the final

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[25]Dworkin, *supra* note 6, at 154–55. Dworkin also remarked that baseball had low utilization of salary arbitration when compared with other industries using conventional interest arbitration.

[26]*Id.* at 146, 149.

[27]Fredrick, Krempfer, & Wobbekind, *Salary Arbitration as a Market Substitute*, in Diamonds Are Forever, ed. Sommers (Brookings 1992), 47.

[28]Citing his self-destruct theory, Dworkin might quarrel with this proposition.

[29]If the arbitrator arrives at a figure exactly between the club's offer and the player's requested amount, a tie occurs. The traditional allocations of the burden of proof do not apply here because salary arbitration is analogous to interest arbitration and the Agreement implicitly requires both parties to submit evidence supporting their salary figures. Therefore, the arbitrator cannot presumptively state that a tie should be resolved in favor of the club. In a tie situation, the arbitrator must reevaluate the evidence and find a reason to warrant the addition or the deduction of a penny from the PTV.

settlement."[30] He observed that players still had a 50 percent chance of winning even when the arbitrator found the player's true worth to be less, albeit not substantially less, than the midpoint between the two submissions. This seemingly built-in bias in the player's favor is baffling. Ironically, Kenneth Jennings believes that arbitrators exhibit more conservative, pro-club tendencies as the divergence between the two salary figures grows.[31]

If my analysis of arbitral decision making is correct, the salary arbitration system *does* encourage the parties to increase the disparity between their salary submissions. Both the player and the club know that the midpoint is the decisive figure. The midpoint remains unchanged if the player exaggerates his request and the club plays low ball with its offer. For example, the midpoint is 1 million dollars whether the player requests $1.6 million and the club offers $400,000, or the figures are $1.1 million and $900,000, respectively. Even if only the player decides to exaggerate his request, the midpoint does not increase dollar for dollar with the amount of the excessive request. Therefore, the club's chances of prevailing do not improve much. It is not surprising that the data, which will be introduced later, show that the percentage disparity between the two submissions is increasing.

The high/low mechanism distorts salaries if my analysis of the arbitrator's decision-making process is accurate. Where the player and the club submit salary figures of $3 million and $2 million, respectively, and the arbitrator decides the PTV is $2.475 million, the player is harmed because he will receive a salary about 20 percent below his PTV. The club gets a bargain. The reverse is equally true. If the evidence shows that the PTV is $2.55 million, the player will reap a windfall of $450,000. He will receive a salary that is 118 percent of his PTV. The club will pay the player far more than his worth as established by the criteria in the Agreement. Since the arbitrator does not write an opinion, it is impossible to measure the extent and effect of this phenomenon because it is not known how much the PTV differs from the awarded salary for all the players who have gone through salary arbitration. One study suggests that this is a minor problem. If the spread between the submitted salary figures is 10 percent and the arbitrator places the

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[30]Dworkin, *supra* note 6, at 171.

[31]Jennings, Balls and Strikes (Praeger 1990), at 203–04. Jennings is correct that the percentage disparity between the submitted salary figures is growing, contrary to the prediction of earlier commentators and the purpose of the system. However, the clubs' winning percentage stood virtually unchanged.

PTV at approximately the midpoint, the player's market value represents only a 5 percent deviation from the awarded salary.[32] However, many player requests are 150 percent or more of the club's offer, so the deviation from the PTV could be greater than 25 percent. The deviation inflates or understates the player's salary and when the inaccurate salary figure (the awarded figure) is used in subsequent salary comparisons among players with similar performance statistics, this distortion is exaggerated and perpetuated.

Compressing salary arbitration into a single month is designed to expedite decisions, but the one-day deadline for issuing a decision limits due process and creates minor havoc. Possible due process problems arise when the arbitrator is given a plethora of evidence, especially complex statistics, but has a mere 24 hours for study and evaluation. If the parties file briefs, the arbitrator is inundated with material that cannot be digested in the allotted time. Because of the uncertainty of high/low arbitration, the parties overprepare.[33] The question becomes whether the compressed schedule engenders inconsiderate and imprudent arbitral judgment. Due to the tight time lines, the parties are unable to convey to a new, nonfan arbitrator rudimentary knowledge about the baseball industry. Every profession, including baseball, has special lingo and concepts. The arbitrator may not grasp fundamental matters or know enough about baseball to distinguish the material from the immaterial. There is the old joke about the salary arbitrator who at the end of the hearing was asked by the parties if he had any questions. The arbitrator replied that he understood most of the materials but wondered how the Equal Rights Amendment (ERA) was relevant to determining the pitcher's salary.

Since awards are issued during the first three weeks of February, happenstance often works to the benefit or detriment of a party. The parties might be in the midst of a hearing when an arbitration decision on another, comparable player is rendered. The party whose position the award supports is certain to place this latest, fortuitous information before the arbitrator. However, a single decision can be misleading. The Agreement emphasizes aggregate comparability. Using the latest arbitration award has an advantage presumably as the best evidence of current comparability, but it is easy for an arbitrator to give it too much weight.

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[32]Fredrick, Krempfer, & Wobbekind, *supra* note 27, at 47.
[33]Jennings, *supra* note 31, at 206.

The Artificial Labor Market

Because salary arbitration represents a compromise between free agency and a strictly applied reserve clause, the process creates a hybrid labor market without the traditional operation of supply and demand. This artificial market has some of the elements of a truly competitive marketplace and simultaneously retains the essential characteristics of the reserve clause. When a player reaches free agency, his salary is determined by the demand for his skills as well as the available supply of skilled free agents at the particular position. An overabundance of journeyman outfielders, for instance, will depress the market price for all these players. If there is a shortage of catchers, even a catcher with average skill will command an unusually high salary. Salary arbitration is not merely a substitute for market forces but is actually an attempt to construct a fictional labor market, especially on the demand side. It emphasizes salary comparability from which the going rate for a particular class of players supposedly can be derived. The Agreement criteria attempt to emulate market forces but are vague about how the free agent market intermingles with the arbitration market to determine the salaries of players. Aside from years of service, a player in arbitration could be comparable to a player in free agency (e.g., in terms of batting average and fielding). While the Agreement instructs the arbitrator to pay "particular attention" to the salaries of players with length of service up to one year more than the player in arbitration (excluding players of five or more years of service) in making the salary comparison, the Agreement still allows many comparisons without regard to service. Despite the "particular attention" language, a five-year player could be compared with a six-year free agent or, for that matter, a free agent of any service length. Thus, free agent salaries can play an instrumental role in salary arbitration.[34] Should this comparison be made? If so, how does the arbitrator account for the two distinct labor markets: one real, the other artificial?

Concocting a demand for players subject to salary arbitration unnaturally restricts the artificial market to a one-year wage term. The free agent market considers the value of a player over a number of years and sometimes over his entire expected career. The club and players may and frequently do agree to multiyear contracts. A multiyear deal in free agency gives the player and the

[34]Article VI(F)(12)(a).

club flexibility to formulate a total compensation package. They can agree upon incentives, bonuses for individual or team performance, deferred compensation, and other benefits. Thus, a free agent's salary, when translated into annual compensation, can be misleading. Comparing the one-year wage of a free agent who signed a multiyear pact with a comparable player in salary arbitration is too speculative. Since salary arbitration covers only one year, it is merely a single snapshot in the total picture of a player's career.

Other factors highlight the difference between the free agent market and the artificial salary arbitration market. A professional athlete often suffers an "off" year or subpar performance during a particular year due to an injury. Predicting a baseball player's performance during the ensuing year is more difficult than predicting his performance over the long run. Over five years a player can hit .300 even though he batted only .250 during one injury-riddled season. Another problem disregarded by the artificial salary arbitration market is the true supply of labor at a position. There may be a reserve outfielder on a team with three superlative starters. The benchwarmer who could become a free agent could start on most other teams. Yet, this short supply of outfielders is not reflected in the artificial market. Lack of playing time is not a relevant consideration since only conjecture could conclude how the second-string outfielder would perform if he were reserved to another club. Salary arbitration takes into account only the supply of labor on a team as opposed to the aggregate supply at a particular position in both leagues.

The foregoing observations highlight many of the defects in the current salary arbitration process. Before considering recommendations to correct these problems, it is desirable to examine the effect of salary arbitration on the wage rates of the players involved.

Arbitration's Influence on Salaries

While the theory is unprovable, the players probably need to win only approximately 10 percent of the arbitration cases to ensure an annual escalation of the average salary for players within the salary arbitration service range. The system seems to induce inflation. The free agent market drove up salaries. Therefore, when these salaries were used in the salary comparison analysis in arbitration,

awarded salaries escalated at a rapid rate.[35] Jennings found that players sharply increased their salaries through arbitration. Even losers attain salary increases over their prior year's salaries. For example, in 1988 arbitration losers enjoyed a 65 percent increase over their prior year's salaries, while winners received an average increase of only 44 percent. Between 1983 and 1988, of all players invoking arbitration (settlements and awards), the annual average salary increase ranged from 35 percent to 78 percent over the prior year's salaries.[36]

Analysis of salary arbitration awards shows that, although the clubs won a majority of cases, the overall effect was an average awarded salary near the average midpoint as opposed to an average award closer to the clubs' average offer.[37] The average award including a majority of losing players falls close to the average midpoint salary. In 6 of 19 years, the average award exceeded the average midpoint between requests and offers even though in one year (1992) the clubs won more arbitrations than the players. Since the clubs won 209 of 375 arbitrations (a 56 percent win rate) during the first 19 years of salary arbitration, the average award for the 20-year period should reflect the club's win percentage. When the club wins about 11 out of every 20 cases, the average award should be about 10 percent below the average midpoint salary. Table 1 illustrates that the average award is only 2 percent off the average midpoint salary. Stated differently, the average award is 98 percent of the average midpoint salary. One of the clubs greatest margins of victory (67 percent) came in 1993, yet the average award was 93 percent of the average midpoint salary. In 1980, when the clubs prevailed in only 42 percent of the cases and the players won 58 percent, the average award was 107 percent of the average midpoint salary. For 9 of the 14 years in which the clubs won more cases than the players, the average award was 95 percent or more of the average midpoint salary. The data suggest that the players do well even when they lose although obviously they do better when they win.

More important, the average difference of player requests to club offers is 142.83 percent (see Table 2). When clubs win, the

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[35]Sands & Gammons, *supra* note 5, at 61. The rapid growth in the salaries of free agents is partially attributable to the removal of the reserve clause. Without doubt, the reserve clause operated for years to depress salaries way below the players' PTVs.

[36]Jennings, *supra* note 32, at 200–03.

[37]In the long run, we would expect the average awarded salary to equal the average midpoint if the parties win and lose the same number of cases. Where the clubs hold a sizable lead in wins, the average awarded salary would be likely to substantially depart from the average midpoint. This has not occurred.

Table 1

Baseball Salary Arbitration: Clubs' Win Record, Midpoint Averages, and Award Averages, 1974–1994

Year	*Clubs' Win Record*	*Clubs' Win Percentage*	*Midpoint Average*	*Award Average*	*Award as % of Midpoint*
1974	16-13	55.2	$53,575	$53,555	100
1975	10-6	62.5	$72,669	$69,906	96
1976*					
1977*					
1978	7-2	77.8	$75,222	$68,611	91
1979	5-8	38.5	$63,750	$65,231	102
1980	11-15	42.3	$135,375	$145,327	107
1981	10-11	47.6	$222,688	$225,333	101
1982	14-8	63.6	$302,568	$284,455	94
1983	17-13	56.7	$345,892	$331,650	96
1984	6-4	60.0	$422,950	$394,500	93
1985	7-6	53.8	$507,269	$494,923	98
1986	20-15	57.1	$492,771	$485,543	99
1987	16-10	61.5	$680,856	$670,769	99
1988	11-7	61.1	$676,725	$646,108	95
1989	5-7	41.7	$734,750	$764,583	104
1990	10-14	41.7	$892,708	$903,958	101
1991	11-6	64.7	$1,448,015	$1,339,853	93
1992	11-9	55.0	$1,674,250	$1,716,250	103
1993	12-6	66.7	$1,807,083	$1,674,444	93
1994	10-6	62.5	$2,120,313	$2,077,813	103
Totals	209-166	Averages 55.7	$669,970	$653,306	98

*No arbitrations recorded for 1976 and 1977.

Source: Author compiled tables and conducted statistical analysis based on data supplied by Ron Blum of the Associated Press and Leon J. Battista, Jr.'s dissertation (Salary Determination and Collective Bargaining in Major League Baseball—1965 Until 1990 (1995), unpublished Ph.D. dissertation, New School for Social Research).

average disparity is 145.94 percent, only slightly above the middle. This suggests that, even though the clubs win 56 percent of the arbitrations, they win fewer of those cases with large disparities at the high end of the salary scale. For example, in 1986 the clubs won 57 percent (20-15) of the cases, yet the average award was 99 percent of the average midpoint salary because the clubs won 10 of the 16 cases when the player was requesting less than $500,000 (see Table 1). Of the 19 players seeking $500,000 or

Table 2

Baseball Salary Arbitration: Average Percentage Differences Between Requests and Offers When Each Party Wins, 1974–1994

Year	*Average Percentage Difference Between Players' Requests and Clubs' Offers*	*Average Percentage Difference Between Players' Requests and Clubs' Offers*	
		When Player Wins	*When Club Wins*
1974	119.49	119.75	119.27
1975	120.21	117.85	121.63
1978*	141.64	134.60	182.11
1979	135.21	134.66	136.07
1980	143.08	142.85	143.39
1981	147.18	145.85	148.64
1982	152.92	152.82	152.98
1983	148.65	143.65	152.47
1984	144.56	157.34	136.04
1985	142.81	143.32	142.37
1986	143.17	145.29	141.58
1987	128.99	126.52	130.52
1988	137.12	127.46	143.26
1989	133.70	132.44	135.46
1990	147.62	150.52	143.56
1991	151.05	146.04	153.79
1992	161.39	161.15	161.60
1993	163.21	145.55	172.03
1994	151.74	144.67	155.99
Averages	142.83	140.65	145.93
Percentage win record		44.3	55.7

*No arbitrations recorded for 1976 and 1977.

Source: Author compiled tables and conducted statistical analysis based on data supplied by Ron Blum of the Associated Press and Leon J. Battista, Jr. (see *Source*, Table 1).

more, the clubs won only one more case (10-9) than the players. In 1992 the clubs eked out a winning margin of 2 cases. The clubs won 11 cases while the players won 9 cases, yet the average award was 103 percent of the average midpoint salary. This evidence confirms

that the win-loss percentage is a deceptive indicator of success. In years like 1986 and 1992 players have been awarded salaries that are 98 percent of the midpoint although they have lost 209 of 375 arbitrations.

Why do the players end up with average salaries close to or above the average midpoints? Suppose a player determines his PTV is $2 million based on review of salaries of players with comparable statistics. He may seek $2.5 million hoping that the midpoint is less than $2 million. If the player wins, he has inflated his salary by $500,000. Even if he loses, it was because the club offered more than $1.5 million. If the club goes with a low ball offer of $1.2 million, the player can win with a $2.7 million request. The next year an arbitrator will use $2.7 million in the salary comparison although the more accurate figure is $2 million, that is, the PTV.

This analysis shows the ever-widening spread between the two submitted figures. In the early years of arbitration, the players' requests were about 120 percent of the clubs' offers. In recent years the percentage disparity hovered around 150 percent and reached a high of 163 percent in 1993. Indeed, one player's request in 1993 was 312 percent of the club's offer. Table 2 illustrate the gradual rise in the percentage spread between the two salary figures from 1974 through 1993. (The disparity went down in 1994 for the first time since 1987.) Contrary to most predictions, high/low salary arbitration has led to a greater disparity instead of narrowing the spread between requests and offers.

This analysis ignores the influence of settlements on salary levels. The data are based on the assumption that the average salary in settlement equals the average midpoint. If this assumption is true, these settlements can place upward pressure on aggregate salaries. The greatest limitation of the analysis is its failure to include correlations between years of service and salaries and between playing position and wages.[38]

Arbitration has led to increases in the salaries of eligible ballplayers far greater than the inflation rate or wage increases in other occupations. It should be noted, however, that ball players were probably grossly underpaid before the advent of salary arbitration and some catch-up was warranted. Salary arbitration was also the first step toward free agency. Whether the escalation in

[38]For example, these two correlations show whether pitchers do better in arbitration than ballplayers at other positions.

salaries is justified or not, the arbitration system needs more due process to make it fairer. Below are suggested reforms that might be satisfactory to both the clubs and MLBPA.

Recommended Changes in the Salary Arbitration System

Advocates to abolish salary arbitration disagree on whether the reserve clause or free agency should fill the void. This paper does not speak to this controversy. The following recommendations are designed to remedy the identifiable defects in the present system, assuming that the club owners and the MLBPA allow salary arbitration to survive:

1. Retain the High/Low System

A commonly suggested reform is to abandon the high/low system and adopt conventional interest arbitration, permitting the arbitrator to set the appropriate salary figure. By disregarding extreme offers and requests in high/low arbitration, the arbitrator can award the player his PTV. Nevertheless, elimination of high/low arbitration is likely to cause more problems than it would rectify. The high/low system encourages settlement because both parties fear that they can lose big. It is better to gain something than lose all. Thus, doing away with the high/low salary figures would encourage more utilization of and greater reliance on arbitration. Suppose that a player submits a figure that he knows exaggerates his PTV. Under the high/low system the arbitrator would choose the club's figure. Without the high/low system the arbitrator would no longer be bound to select the club's figure. The great disparity caused by the player's unreasonable demand could easily convince the arbitrator to award a salary above the club's offer but far below the midpoint.

The high/low system also encourages the arbitrator to look at the Agreement criteria as a package rather than item-by-item. The fact that the player may be exemplary in one item but quite below average in other items should not persuade the arbitrator that the player is entitled to a salary above what the club is offering. Similarly, if a player ranks poorly in one item while his performance is outstanding under the other criteria, one low mark is insufficient to warrant a deduction from the player's figure. In essence, high/low arbitration alleviates the parties' expectation that the arbitrator will be tempted to split the difference (even though we all know that good, acceptable arbitrators never split

the difference in an effort to satisfy both parties). Without the high/low system the arbitrator may not decide for the club or the player. Those arbitrators who succumb to the temptation to split the difference (or those who want to give a little something to the loser) are thwarted by the high/low mechanism.

The high/low system should be retained with one important modification. Because the most intense and fruitful settlement negotiations occur after the high/low salary figures are exchanged, the parties should be given an opportunity to convert their figures to their last, final offer, provided that the final offer narrows the high/low disparity. Permitting the substitution of final offers for the original high/low salary figures would promote settlement, minimize the difference between the parties, and provide the arbitrator with a more realistic choice. However, this conversion must be optional. If a party believes the submitted figure reflects the PTV, then the original figure may stand.

The mechanics of this modification are set forth in the following example. Suppose the player submits $3.2 million and the club submits $2.1 million. During settlement negotiations the club eventually raises its offer to $2.5 million, while the player is willing to settle at $2.95 million. Then, 48 to 72 hours before the arbitration hearing, either or both parties opt to substitute the last, final offer for the previously submitted figure. If both parties exercise this option, the arbitrator must choose between $2.5 and $2.95 million, which is a narrower range than the disparity between the submitted figures. The parties may settle their differences since the player's final request is only 118 percent of the club's final offer, while the player's original request was 152 percent of the club's figure. If one party exercises the option and the other does not, the former will have one final chance to do so up to 24 hours before the start of the hearing. If the player decides to substitute $2.95 for $3.2 million and the club elects to stand on $2.1 million, the club would have an additional 24 hours to opt for $2.5 million. Offers made less than 48 hours before the start of arbitration would not be communicated to the arbitrator, and any final offer not substituted for a submitted figure would be inadmissible at the hearing.

2. Determine and Publish the PTV

The most important recommendation is to require the arbitrator to determine the PTV although the award would still be either

the player's or the club's final figure. Using the example in the previous paragraph, assume that both parties opt to substitute their final offers, $2.5 million and $2.95 million, respectively, for their submitted figures. The range is now $450,000 with the midpoint at $2.725 million. If the arbitrator sets the PTV at $2.8 million, the player will be awarded $2.95 million, but the parties now know the PTV.[39] Furthermore, for salary comparison purposes subsequent arbitrations would use the PTV rather than the awarded figure. Thus, when this player is used as a benchmark for other comparable players, his PTV of $2.8 million will be used in lieu of the awarded salary ($2.95 million). The PTV is the most accurate indicator of a player's true worth. Using the award, whether the team's offer or the player's request, skews comparative salary analysis. Requiring the arbitrator to determine the PTV substantially enhances the credibility of the system especially in the case of a great disparity between the high/low figures.

Assume the parties in the hypothetical had both opted to remain at their original, submitted figures, that is, $3.2 million and $2.1 million. The difference is $1.1 million with a midpoint of $2.65 million. Since the PTV is $2.8 million, the player is awarded $3.2 million. The problem arises the next year, when other players use the awarded salary of $3.2 million in the salary comparisons. The awarded salary is 114 percent of the PTV. Using the $3.2 million figure distorts salary comparisons and in this instance inflates salaries by 14 percent. Similarly, when the club's offer is the awarded figure, the PTV accurately reflects the player's true value. For future salary comparisons it will make a significant difference whether the PTV is near the midpoint, the club's offer, or the player's request.

This a novel recommendation. No other arbitration process compels the arbitrator to render a decision that is not implemented. However, this reform involves only a minor deviation from the present process. As discussed earlier, during the decision-making process the arbitrator determines the PTV to ascertain if it is above or below the midpoint. The only change is that the PTV is published and replaces the award in future salary comparisons. Over time identifying the PTV should result in a predictable, justifiable salary schedule for players subject to arbitration. The

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[39]The arbitrator could find a PTV lower than the club's final offer or higher than the player's request.

PTV is untainted by the extremes of a pure high/low system (which is important inasmuch as the percentage disparity between the two submitted figures is increasing) because the PTV is predicated entirely on evidence at the hearing. Under the current system nobody knows how much evidence supported the award. Salary comparisons with PTVs are fair to both parties.

3. Ease the Time Constraints

The next recommendation is to lengthen the hearing time limits and extend the time between the hearing and the decision to permit the arbitrator to carefully evaluate the evidence and write a short opinion justifying the PTV determination. The current 24-hour rule for issuing a decision encourages hip-pocket, baseless, or coin-flip decisions. Some cases need more time than others. Let the arbitrator decide on the length of the hearing.

Because the arbitrator will write an opinion, the hearings should be scheduled during the last two weeks in January, with all decisions due on February 27 and published at once on February 28. Publishing all the decisions on one day would eliminate the fortuitousness of receiving a favorable or unfavorable precedent on the eve of a hearing. Under this time line the parties can simultaneously submit their respective salary figures in early January. If they desire more time for settlement discussion, they can move that time to early or mid-December.

4. Establish Tripartite Tribunals

The parties should institute tripartite arbitration tribunals and terminate the single ad hoc arbitrator system. For years labor relations professionals in the airlines and railroads have relied on tripartite panels consisting of one employer representative, one labor representative, and a neutral. The system has worked remarkably well because the neutral has a chance to frankly discuss the case in a confidential executive session with the partisan board members. The club's representative or advocate and the player's agent could be the partisan board members. The neutral could learn idiosyncrasies about the industry from the partisan board members and might be less apprehensive about asking embarrassing questions during a private board session as opposed to during a public hearing. More specifically, the parties would have an opportunity to stress the strongest parts of their case. In the executive session as a quasi-mediatory

process, the neutral could determine the possibility of settling the case.

Two executive sessions would be held: the first, immediately after the hearing; the second, when the neutral presents a proposed decision. During the first session the neutral could ask questions, hear confidential comments, and determine whether settlement is possible. The second session would let the parties make comments on and discuss the proposed opinion and award. The primary purpose of this meeting is not to reargue the case but to rid the opinion of glaring factual errors and permit reconsideration in the event a partisan member convinces the neutral that evidence has been misconstrued. (For instance, the neutral might reconsider the proposed decision if it relied on a testimonial to determine the PTV.) Presentation of the proposed decision is an essential part of the tripartite arbitration process to ferret out mistakes and to require the neutral to obtain the vote of a partisan member. The neutral would then have a few days to render a final decision.

Through the panel the parties would gain insight into the competency of neutral arbitrators. Tripartite arbitration panels permit parties to intimately participate in the decision-making process even though the neutral makes the final determination.

5. Require a Written Opinion

Regardless of the system, the arbitrator should issue a written opinion to engender careful decision making and give guidance to the parties concerning the player's PTV. Absent a written opinion, the parties have no guarantee that the arbitrator prudently exercised good judgment and properly applied the criteria in the Agreement. Even the best arbitrator knows that a written opinion forces in-depth thought about the decision to justify it. An opinion is also therapeutic. When the arbitrator decides that the PTV was at or near the player's submitted figure, the club receives justification as to why its submitted figure was too low. Similarly, if the arbitrator decides that the club's figure more accurately reflects the player's value, the player will be told why his figure was too high.

Finally, a written opinion gives the parties needed guidance as in other industries. Certainly, written opinions help the parties make proper salary comparisons. The opinion need not be lengthy but could simply be a paragraph or sentence on each of the criteria enumerated in the Agreement.

6. Segregate the Free Agency Market

The last reform is to revise the Agreement criteria to sever the free agent market from the salary arbitration market. As discussed earlier, the two markets are distinct. Because one is real and the other is artificial, commingling the markets leads to absurd salary comparisons. In some years the free agent market bolsters a club's case while in other years (especially during the early years of salary arbitration) the free agent market works in the player's favor. Regardless of how the free agent market operates, the salary arbitration labor market is independent of and inequitable to the free agent market. The differences between a one-year salary and a multiyear contract of a free agent militate against integrating the two labor markets for salary comparison purposes. Therefore, comparative salary analyses should be relegated to players with comparable statistics and comparable contracts in a comparable market.

Some of the inherent defects in the artificial salary arbitration market may not be correctable. The reserve clause prevents a benchwarmer from leaving a club, so it is speculative to conclude that the player would be in the everyday lineup if he could sign with another club. Perhaps the parties could give more weight to a player's contribution to his particular team in the salary criteria. Thus, the benchwarmer might prove that he would be a starter on another team if, for example, he batted .325 as a pinch hitter and ably filled in for the starters when they were rested. There is no discernible hypothetical formula to create an artificial leaguewide supply for players still tied to a club. Unfortunately, salary arbitration reflects the supply of labor on a single team.

Conclusion

In summary, inducing settlements and preventing split decisions are the major advantages of high/low baseball salary arbitration. Therefore, if the parties elect to keep salary arbitration, they should retain the high/low mechanism. Nonetheless, baseball high/low salary arbitration contains some defects, including salary distortion perpetuated by subsequent salary comparisons. The present system inadvertently results in (1) an ever greater spread between the players' requests and clubs' offers, (2) commingling the free agent market with the artificial labor market for players in salary arbitration, (3) insufficient time for the arbitrator to evalu-

ate the probative value of the evidence, (4) lack of arbitral guidance on the player's true value, and (5) absence of safeguards against imprudent decision making and inability to amend high/low figures. None of these defects, standing alone, is fatal. Cumulatively, they undermine due process and conceal a player's true value.

The above recommendations for reform could bring greater fairness to the process and greater accuracy to the substantive determinations made in salary arbitration. The major substantive reforms are to charge the arbitrator with determining a player's true value and to permit the parties to amend their submitted salary figures. The primary procedural reforms include the establishment of three-member arbitration boards, a written opinion requirement, and relaxation of the tight deadlines for the arbitrator's decision. Rehabilitating both the procedure and the substance of salary arbitration would engender more confidence in the system.