DOCUMENT RESUME

ED 340 118 EA 023 551

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TITLE Bargaining.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 91
NOTE 30p.; In: Thomas, Stephen B., Ed. The Yearbook of Education Law, 1991, p36-64. (See EA 023 549).
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Arbitration; *Collective Bargaining; Compliance (Legal); *Court Litigation; Elementary Secondary Education; *Employer Employee Relationship; Grievance Procedures; Labor Relations; Legal Problems; Public Schools; *School Law; *School Personnel; Scope of Bargaining; Teacher Rights; Teacher Strikes; *Unions

ABSTRACT

The number of reported cases dealing with collective bargaining increased for the second consecutive year. While there was a significant amount of litigation, including one Supreme Court case, the courts relied on established precedents in deciding the many different issues confronting them. The review addresses the following topics at the K-12 level: (1) constitutional issues; (2) recognition and representation issues; (3) rights and obligations of exclusive bargaining representatives; (4) scope of bargaining; (5) grievability and arbitrability; (6) judicial review of arbitration awards and employment relations board rulings; (7) impasse and fact finding; (8) strikes and sanctions; and (9) miscellaneous decisions. (MLF)

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BARGAINING

Charles J. Russo

INTRODUCTION

The number of reported cases dealing with collective bargaining increased for the second consecutive year. While there was a significant amount of litigation, including one Supreme Court case, no new trends or developments appear to be looming on the horizon. Rather, the courts relied on established precedents in deciding the many different issues confronting them. This chapter presents cases involving K-12 settings; cases relating to higher education are reviewed in Chapter 8.

CONSTITUTIONAL ISSUES

Six of the eight cases dealing at least in part with constitutional issues addressed the closely related questions of fair share fees, representation fees, and agency fees. The two remaining cases concerned the rights of public school teachers to participate in union activities.

In a federal case dealing with fair share fees, the Sixth Circuit relied on the Supreme Court's ruling in *Chicago Teachers Union, Local No. 1 v. Hudson*[1] and its own precedent[2] to uphold fair share fee arrangements.[3] It found that these cases established the constitutional requirements related to a union's collection of agency fees and could be applied retroactively to fair share fee collections under an agency fee collection plan in a collective bargaining agreement. The court also ruled that a nonmember's failure to object to this provision did not preclude relief, but it limited recovery to only the nonchargeable portion of the unconstitutionally collected fees.

In a lengthy and complex case brought by nonunion members challenging fair share fees, an Illinois court ruled that the union had provided adequate information to those individuals who were considering whether to object to the fees.[4] In upholding the collection of fees, the court found that the state Educational Labor Relations Board had properly determined the percentage of fees attributable to union activities unrelated to collective bargaining. It also ruled that the amount deducted after nonmembers' objections were heard was not excessive and was adequately supported by the best information available to the union at that time.

The EEOC filed suit in federal district court in Ohio on behalf of two teachers who alleged religious discrimination against a union in connection with its collection of representation fees. The teachers claimed

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1. 475 U.S. 292 (1986). *See* The Yearbook of Education Law 1987 at 46 for a full discussion of this case.
2. Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).
3. Lowary v. Lexington Local Bd. of Educ., 903 F 2d 422 (6th Cir. 1990).
4. Antry v. Illinois Educ. Labor Relations Bd., 552 N E.2d 313 (Ill. App. Ct. 1990).

that the union did not allow them to be excused from the collective bargaining agreement and refused to forward their fees to a charity of their choice. In granting the union's request for summary judgment, the court concluded that the teachers failed to establish a *prima facie* case of religious discrimination since they had not been discharged, had not been threatened with discharge, and had not suffered the loss of any privileges in connection with their employment.[5]

In a representation fees case in New Jersey, teachers who were not union members in their districts filed petitions challenging the amount of representation fees they paid and the procedures used in their collection. The court affirmed the decision of the state Public Employment Relations Commission.[6] It held that the union's tender of the full amount of the disputed fees plus interest rendered the challenge moot since it afforded the maximum possible relief continuing litigation could have provided.

Two federal suits challenged the constitutionality of agency fees. In the first case the Ninth Circuit upheld the constitutionality of agency fees under *Hudson*.[7] It also relied on *Hudson* and persuasive precedent from the Sixth Circuit[8] to require the teachers' association to reduce its agency fees by the amount spent for nonrepresentational expenses prior to collection of the fees. Additionally, the court ordered the association to provide notice and adequate information about agency shop fees to all nonmembers before any fees could be deducted from their paychecks.[9]

A second federal case granted class status to nonunion teachers who challenged the procedural scheme used by a teachers' union in determining and collecting agency fees.[10] The court also ruled that the union could not deduct full union dues from all nonunion teachers who did not file objections since a significant portion of the amount collected was spent on ideological and not representational activities.

The two remaining cases in this section concern the rights of teachers to participate in union activities. The Tenth Circuit reaffirmed the principle that the first amendment protects the right of public employees who seek to join and participate in union activities.[11] It also reaffirmed the prohibition of retaliation against individuals who file grievances with a union. Accordingly, school officials were denied qualified immunity with respect to their claim that they retaliated against teachers for associating with a union other than the exclusive bargaining agent in the district.

A discharged tenured teacher in Illinois successfully brought suit against the board of education for reinstatement and damages, claiming that he

5. EEOC v. Patrick Henry Educ. Ass'n, 741 F. Supp. 670 (N.D. Ohio. 1990).
6. Daly v. High Bridge Teachers' Ass'n, 575 A.2d 1373 (N.J. Super. Ct. App. Div. 1990).
7. Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).
8. Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987).
9. Grunwald v. San Bernardino City School Dist., 917 F.2d 1223 (9th Cir. 1990).
10. Mitchell v. Los Angeles Unified School Dist., 744 F. Supp 938 (C.D Cal. 1990).
11. Morfin v. Albuquerque Pub. Schools, 906 F.2d 1434 (10th Cir. 1990).

was terminated in retaliation for his union organizing activities. The court affirmed the teacher's reinstatement, reasoning that the reason for the board's action was retaliation over the teacher's attempt at exercising his constitutionally protected right.[12] It also found that the board's claim of economic necessity as the basis for his dismissal was unsubstantiated.

RECOGNITION and REPRESENTATIONAL ISSUES

Supervisory, Managerial, and Confidential Employees

In the only case in this subsection, an Oregon court ruled that the state Employment Relations Board was required to hold a unit determination hearing after an incumbent union objected to the proposed unit description offered by a challenger union.[13] The new description was limited to classified school employees excluding supervisory, confidential, temporary, substitute, and limited-term employees and would have excluded a significant number of part-time employees eligible under the incumbent union's description. However, the court found that the Board acted within its discretion in refusing to set a hearing on the incumbent union's request for a contested case hearing over disputed votes as there was no basis for finding that the votes challenged and not counted were cast by eligible employees.

Elections

There are three cases in this subsection. The first two deal with challenges to representation elections; the third addresses the rights of teachers to petition for such an election.

The Illinois Educational Labor Relations Board (ELRB) set aside the results of a closely contested representation election for improper conduct after it was challenged by the defeated union. On appeal, the court affirmed the ELRB's findings of fact and conclusions of law that the closing of the polls for a fifteen minute break was improper where the election was decided by only two votes out of the more than 800 votes cast, that at least one employee was denied the opportunity to vote because of the break, and that more than fifty eligible voters had not cast their votes.[14]

The Supreme Court of Minnesota reinstated a ruling by the Commissioner of the Bureau of Mediation Services voiding a representation

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12. Temple v. Board of Educ. of School Dist. No. 94, 548 N.E.2d 640 (Ill. App. Ct. 1989).
13. Oregon Ass'n of Classified Employees v. Eagle Point School Dist. No. 9, 782 P.2d 432 (Or. Ct. App. 1989).
14. Decatur Fed'n of Teachers v. Educational Labor Relations Bd., 556 N.E.2d 780 (Ill. App. Ct. 1990).

election.[15] It ruled that the Commissioner had the implied power to invalidate the election where there was substantial likelihood that the deficiency in the voting procedures, namely a lack of instructions on how to obtain substitute ballots, adversely affected the election results.

The final case in this subsection concerns the dismissal of a petition for an election to certify a bargaining representative for adult education teachers in a school district. The Michigan Court of Appeals upheld the State Employment Relations Commission's dismissal of the petition.[16] It reasoned that since the teachers were employees of a consortium of two districts organized to provide an adult education program on a cooperative basis, they were not employees of either constituent district even though each of the teachers taught in only one school district.

RIGHTS and OBLIGATIONS of EXCLUSIVE BARGAINING REPRESENTATIVES

There are seven cases in this section. The first three deal with a union's right to collect dues while a fourth addresses the right of a union to act in its capacity as the exclusive bargaining representative of its members. The last three cases concern a union's duty of fair representation.

Union Rights

A Kentucky court ruled that a school board had a statutory duty to honor union members' requests for payroll deduction of their dues.[17] However, it also held that the union was not entitled to recover damages in the amount of back dues since the board's failure to allow the payroll deduction did not relieve the union members of their obligation to pay dues.

Where a local school board intended to seek reauthorization from teachers before deducting union dues from their salaries, a Louisiana teachers' association filed a motion for summary judgment. The court granted a preliminary injunction directing the board to implement a voluntary payroll deduction plan under which the union could collect dues.[18] It also dismissed the school board's appeal for mootness since the board had voluntarily implemented the payroll deduction plan.

The Supreme Court of New Hampshire was asked to rule in a controversy over the collection of union dues where a local teachers' union

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15. *In re* Investigation of Unfair Election Practices Objections, 461 N.W.2d 215 (Minn. 1990).
16. *In re* Grand Haven Pub. Schools, 454 N.W.2d 116 (Mich. Ct. App. 1990).
17. Clevinger v. Board of Educ. of Pike County, 789 S.W.2d 5 (Ky. 1990).
18. Davis v Terrebonne Parish School Bd., 563 So. 2d 1278 (La. Ct. App. 1990).

changed its affiliation from one labor organization to another. It held that the local union was entitled to have dues collected by the school district prior to the date that it changed its labor affiliation.[19]

A teachers' union negotiated a settlement over a class size proposal that resulted in the loss of jobs by several of its members rather than continue court action to enforce an arbitrator's award on its behalf. Subsequently, one of the teachers who lost her job had her motion to intervene denied. An appellate court in Massachusetts affirmed this denial.[20] It reasoned that the union, in its capacity as the exclusive representative of the bargaining unit, acted properly as it alone had the right to bring suit to enforce the agreement, and that an individual member was not entitled to intervene. It pointed out that while the union could not be unmindful of its duty to fairly represent the interests of individual members, it accepted a compromise in this dispute since it was in a tenuous position and because it had a responsibility to secure a settlement that would be advantageous to the largest part of its membership. Moreover, it suggested that the teacher had other avenues of recourse available if she wished to pursue her allegation that the union breached its duty of fair representation.

Obligations of Exclusive Representatives

A school employee who was demoted brought an action against her union for a breach of its duty of fair representation based on allegations that it failed to assist her in her efforts to seek reinstatement. The Supreme Judicial Court of Massachusetts reversed a ruling of summary judgment in favor of the union.[21] It ordered the case to trial when it found that issues of material fact as to whether her claims were meritorious precluded summary judgment for either side.

A former school secretary in New York brought an action for monetary damages against her union for an alleged breach of its duty of fair representation. An appeals court upheld this dismissal.[22] It ruled that recovery was barred by the doctrine of *res judicata* since the merits of her underlying grievance against the union had been fully litigated and resulted in a ruling against her.

In a second New York case, a dismissed probationary teacher brought suit against her union alleging a breach of its duty of fair representation. A trial court found that because her dismissal was supported by evidence of

19. Appeal of Hinsdale Fed'n of Teachers, 575 A.2d 1316 (N.H. 1990).
20. Peabody Fed'n of Teachers, Local 1289 v. School Comm. of Peabody, 551 N.E.2d 1207 (Mass. App. Ct. 1990).
21. Graham v. Quincy Food Serv. Employees Ass'n, 555 N.E.2d 543 (Mass. 1990).
22. Botkin v. United Fed'n of Teachers, 561 N.Y.S.2d 730 (App. Div. 1990).

her unsatisfactory performance, the union did not breach its duty. An appellate court affirmed.[23] It further reasoned that since the union had investigated her claim and exercised its independent judgment not to pursue it in light of a state commissioner's investigation which found her claim to be without merit, the union did not breach its duty of fair representation.

SCOPE of BARGAINING

This section includes ten cases primarily concerned with the scope of bargaining. Four cases dealt with mandatory topics, four involved permissive topics, and two addressed prohibited topics of bargaining.

Mandatory Topics of Bargaining

The only United States Supreme Court case in 1990 dealing with collective bargaining involved a controversy over mandatory topics of bargaining. In affirming a decision of the Eleventh Circuit[24] and the Federal Labor Relations Authority, the Court ruled that the United States Army is required to bargain with the labor union representing elementary school teachers who provide a public education to the children of military personnel.[25] More specifically, the Court held that the Army was required to bargain over such topics as proposals relating to mileage reimbursement, various types of paid leave, and a salary increase.

A bus drivers' union in Pennsylvania filed an unfair labor practice claim, alleging that the district's attempted unilateral implementation of work rules violated the collective bargaining agreement. In affirming a lower court ruling and a determination by the state Labor Relations Board, the court held that rules relating to such matters as absences from work, insubordination, and violations of safety rules impacted on working conditions and were subject to mandatory bargaining.[26] However, it also found that rules dealing with such topics as falsification of district records, removal of district property without authorization, or willful damage of district property were inherent managerial prerogatives and not subject to bargaining.

An educational association in Illinois sought review of a determination by the state ELRB that the school district acted within the scope of its authority when it reduced the number of teachers it employed for economic reasons without first submitting the matter to bargaining. In

23. Gordon v. Board of Educ., City of N.Y., 562 N.Y.S.2d 180 (App. Div. 1990).
24. Fort Stewart Schools v. Federal Labor Relations Auth., 860 F.2d 396 (11th Cir. 1988). *See* The Yearbook of Education Law 1989 at 39 for a full discussion of this case.
25. Fort Stewart Schools v. Federal Labor Relations Auth., 110 S. Ct. 2043 (1990).
26. Abington Transp. Ass'n v. Pennsylvania Labor Relations Bd., 570 A.2d 108 (Pa. Commw. Ct. 1990).

reversing the ELRB's decision,[27] an appellate court held that the lay off was subject to mandatory bargaining. It reasoned that decisions affecting terms and conditions of employment, particularly where the economic burden to the district had not been established beyond mere inconvenience and speculation, are properly subject to mandatory bargaining.

The New York Court of Appeals was asked to determine whether public interest in detecting and deterring official corruption prohibited bargaining over employee disclosure requirements imposed on high ranking officials by the New York City Board of Education. The court disagreed with a lower court's ruling that public policy bars all negotiation on the subject.[28] In so doing, it reinstated a decision of the Public Employment Relations Board (PERB) and concluded that since the negotiation of disclosure requirements would not amount to an impermissible restriction of the Board's responsibility, they are subject to mandatory bargaining.[29]

Permissive Topics of Bargaining

When the Illinois ELRB determined that a local school district violated state law by failing to bargain over the content of a teacher evaluation plan, the district appealed. An appellate court reversed and held that the substantive criteria for the teacher evaluation plan, including who conducts the evaluation, were subject to permissive, not mandatory, bargaining.[30] It also ruled that the mechanical procedures involved in the evaluation process and the remediation plan pursuant to it were subject to mandatory bargaining.

Similarly, the Supreme Court of Kansas was asked to rule on the bargaining status of teacher evaluation criteria and procedures. In affirming a trial court's judgment, it found that the evaluation criteria, which the local school board was statutorily required to adopt, were not subject to mandatory bargaining.[31] Thus, it held that the district did not commit a prohibited practice by refusing to bargain over the criteria and that the evaluation procedures themselves were subject to mandatory negotiations.

The New York Court of Appeals addressed two cases dealing with whether specific topics were subject to mandatory or permissive bargaining. In the first case, a teachers' union appealed a lower court's ruling

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27. Central City Educ. Ass'n v. Illinois Educ. Labor Relations Bd., 557 N.E.2d 418 (Ill. App. Ct. 1990).
28. Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 542 N.Y.S.2d 53 (App. Div. 1989). *See* The Yearbook of Education Law 1990 at 47 for a full discussion of this case.
29. Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 555 N.Y.S.2d 659 (N.Y. 1990).
30. Board of Educ. LeRoy Community Unit School Dist. No. 2 v. Illinois Educ. Labor Relations Bd., 556 N.E.2d 857 (Ill. App. Ct. 1990).
31. Board of Educ., U.S.D. No. 352 Goodland v. NEA-Goodland, 785 P.2d 993 (Kan. 1990).

that a school board's decision not to apply for funds under the state's Excellence in Teaching Apportionment Program (EIT) was not subject to mandatory bargaining.[32] The program was enacted by the state legislature to provide funds to improve teachers' salaries, but the district decided against taking part in EIT because it would have been required to make additional expenditures for social security and fringe benefits. The judgment of the lower court was affirmed as the court of appeals concluded that a school district's decision whether to participate in EIT was one that the legislature intended should be left to the discretion of the local board.[33]

In the second case, the court was asked to decide on the bargaining status of a school district's decision to participate in an academic summer school program sponsored by the Board of Cooperative Educational Services (BOCES) rather than conduct its own program using teachers from the district. The teachers' union argued that this was a mandatory subject of negotiation while the district contended that it was permissive or prohibited. The court of appeals reversed a lower court's judgment which held that this was a mandatory subject of bargaining. It reasoned that since the statutory scheme authorizing BOCES specifically addressed the issue of job protection for teachers, the legislature clearly intended to withdraw a local board's decision to contract for a BOCES program from the mandatory bargaining process, thereby rendering it a permissive topic.[34]

Prohibited Topics of Bargaining

In the first of two cases dealing with prohibited subjects of collective bargaining, a local school board challenged an arbitrator's decision to reinstate two special education teachers to their previous positions after the board changed the complement of special education students to be instructed by the teachers. The New York State Court of Appeals affirmed a lower court's judgment and found that the arbitrator had exceeded his authority.[35] The court ruled that as a matter of public policy the school board and teachers' union were statutorily prohibited from bargaining over topics such as teacher qualifications and assignments since these were subject to the exclusive discretion of the school board.

In the final case in this section, the Supreme Court of Oklahoma was asked to decide whether a binding grievance arbitration provision in a collective bargaining agreement impermissibly delegated the board's authority to reprimand a teacher. After the trial court issued a *writ of mandamus* to compel the board's compliance with the arbitration provision, the board

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32. City School Dist. of Elmira v. State Pub. Employment Relations Bd., 536 N.Y.S.2d 214 (App. Div. 1988). *See* The Yearbook of Education Law 1989 at 40 for a full discussion of this case.
33. City School Dist. of Elmira v. State Pub. Employment Relations Bd., 547 N.Y.S.2d 820 (1989)
34. Webster Cent. School Dist. v. Public Employment Relations Bd., 555 N.Y.S.2d 245 (1990).
35. *In re* Board of Educ. of Arlington Cent. School Dist., 557 N.Y.S.2d 661 (App. Div. 1990).

appealed. In reversing the judgment of the trial court, the court ruled that since the power to admonish, suspend, dismiss, or reemploy a teacher is vested in a school board as a matter of state law, a board's abdication of these responsibilities is repugnant to the statutory policy implicit in the law.[36] Thus, it held that a school board's authority to discipline a teacher is nondelegable and not bargainable.

GRIEVABILITY and ARBITRABILITY

Cases are discussed under "Presumption and Arbitrability" where the courts considered whether the underlying dispute was within the scope of the collective bargaining agreement or where they interpreted public policy as it relates to arbitration. Decisions are presented under "Who Determines" rather than "Judicial Review" where, regardless of the underlying dispute, the courts addressed the jurisdictional question of the appropriate forum within which the dispute should be resolved. Cases presented under "Procedural Issues" and "Managerial Prerogatives as a Bar" speak for themselves.

Presumption and Arbitrability

All but one of the ten cases in this subsection support the general judicial presumption favoring arbitration in disputes over the meaning of collective bargaining agreements.

The first four cases are examples of New York's strong presumption in favor of arbitration. In another suit dealing with the Excellence in Teaching Program, the court of appeals was asked to determine how funds available under the program were to be distributed. The teachers' association sought arbitration, but the school board received a stay based on its contention that the funds were not subject to the substantive provisions of the bargaining agreement. The court reversed the stay, ruling that where there is a dispute as to the coverage of the substantive provisions of a contract, it is properly subject to arbitration.[37]

In the second case, the court of appeals did not address the facts of the underlying dispute. It ruled that even where an arbitrator was required to examine an entire bargaining agreement rather than a specific section, the plaintiff was not barred from the arbitration process.[38] It reasoned that whether the employee who was the subject of the dispute was covered by the collective bargaining agreement was a matter of contractual

36 Raines v. Independent School Dist. No. 6 of Craig County, 796 P.2d 303 (Okla. 1990).
37 Board of Educ., Watertown City School Dist. v. Watertown Educ. Ass'n, 549 N.Y.S.2d 652 (1990).
38 *In re* Sachem Cent. School Dist., 549 N.Y.S.2d 75 (App. Div. 1989).

interpretation and therefore was properly subject to arbitration.

Another New York case involved a dispute over a school district's attempt to assign a custodial worker to bus duty. After the aggrieved employee completed the fourth of five steps under the operative provisions of the arbitration clause, the district unsuccessfully sought to stay a move to the final step. In affirming the denial of the stay, an intermediate appellate court pointed out that since public policy was not offended by arbitration over the scope of an employee's work duties, it was the appropriate means to resolve the dispute.[39]

After a probationary teacher was denied tenure, she requested that her teaching association submit to arbitration a grievance alleging a violation of the procedural evaluation provisions of the district's collective bargaining agreement. When the association's application for a stay was denied, it appealed. In affirming the lower court's decision, a New York appellate court ruled that in the absence of either strong public policy prohibitions or language in the bargaining agreement excluding a matter from arbitration, grievance matters must be referred to arbitration.[40] Therefore it held that since arbitration was neither prohibited as a matter of public policy nor explicitly excluded under the terms of the contract, this dispute was to be referred to an arbitrator.

An arbitrator in Pennsylvania determined that a school violated its collective bargaining agreement when it unilaterally attempted to change its sabbatical leave policy. A trial court reversed in favor of the school and the teachers' association appealed. In reinstating the arbitrator's decision, an appellate court pointed out that state labor policy not only favored arbitration, but mandated that employee grievances arising out of the interpretation of a collective bargaining agreement had to be submitted to arbitration. Consequently, the court refused to question the arbitrator's discretion.[41]

When a school district chose not to rehire a teacher because of its serious concerns about her attendance record, she enlisted the assistance of her teachers' association to seek review of the board's decision through the grievance procedure of the collective bargaining agreement. The Public Employee Labor Relations Board decided that the teacher had a grievable issue subject to arbitration, and the district appealed. The ruling of the New Hampshire Supreme Court reflected a presumption in favor of arbitration.[42] The court stated that it would not set aside a Board order unless the arbitration clause in the bargaining agreement was not susceptible to

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39. Copaigue Union Free School Dist. v. Local 852, Civil Serv. Employees Ass'n, 556 N.Y.S.2d 725 (App. Div. 1990).
40. *In re* Clarkstown Cent. School Dist., 558 N.Y.S.2d 704 (App. Div. 1990)
41. York County Area Vocational-Technical Educ. Ass'n v. York County Area Vocational-Technical School, 570 A.2d 105 (Pa. Commw. Ct. 1990).
42. Appeal of City of Nashua, School Dist. No. 42, 571 A.2d 902 (N.H. 1990).

a reading that would cover the dispute. The court then upheld the Board's decision and noted that the only issue the Board considered was whether the parties were required to proceed to arbitration.

A union representing cooks formerly employed by a school district sought binding arbitration over the district's decision to subcontract out its food services operations. After a trial court denied the union's motion to compel arbitration, the Minnesota Court of Appeals reversed. It ruled that this dispute was subject to arbitration in so far as it was reasonably debatable whether the board's decision to subcontract fell within the scope of the arbitration clause of the bargaining agreement in effect between the parties.[43]

A second Minnesota case was the only reported decision not favoring arbitration. Here six of eight probationary teachers whose contracts were not renewed were placed on unrequested leaves of absence. One of two remaining teachers appealed a lower court's order which denied her motion to compel arbitration over her purported right to be placed on leave. In affirming the denial, an appellate court reasoned that since neither the general language of the agreement nor the specific arbitration clause in the applicable bargaining agreement expressed an intent to arbitrate such a dispute, there was no presumption in favor of arbitration.[44]

A school district in Illinois brought an unfair labor relations charge against its teachers' association due to its attempt to seek arbitration over a part-time teacher's grievance seeking full-time status. The ELRB dismissed the district's complaint on the grounds that the collective bargaining agreement in effect between the parties did not exclude the subject of the grievance from arbitration. When the school district sought further review, an appellate court agreed with the ELRB that the initial decision over whether the matter was arbitrable was for the ELRB and not the arbitrator.[45] Moreover, it affirmed the ELRB's finding that since the collective bargaining agreement did not expressly exclude any subject matter from arbitration, the association acted properly when it sought to bring the dispute to arbitration.

In a Michigan case an arbitrator determined that a school board was required to pay a part-time teacher's additional child care expenses due to a change in her teaching schedule. After a trial court reversed in favor of the board, an appellate court reinstated the arbitration award. It reasoned that since the arbitrator's decision was drawn from the language of the

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43. School Serv. Employees Local Union No. 284 v. Independent School Dist. No. 88, 459 N.W.2d 336 (Minn. Ct. App. 1990).
44. Columbia Heights Fed'n of Teachers Local 710 v. Independent School Dist. No. 13, Columbia Heights, 457 N.W.2d 775 (Minn. Ct. App. 1990).
45. Staunton Community Unit School Dist. No. 6 v. Illinois Educ'al Labor Relations Bd., 558 N.E.2d 751 (Ill. App. Ct. 1990).

contract, which required the board to enforce its rules and policies equitably, he did not exceed his authority.[46]

Who Determines

This subsection contains eight cases. In the first case three teachers filed suit alleging that their school district failed to provide them with a duty free lunch period as required by state law. After also claiming that a number of teachers in the district were similarly deprived of their rights, they were granted class status. The school district successfully motioned for dismissal on the ground that the ELRB had exclusive jurisdiction over the matter. In its reversal, an Illinois appellate court found that the ELRB lacked jurisdiction to hear the teachers' complaint as it was not covered by the provisions of the collective bargaining agreement.[47] Therefore, the court ruled that this dispute fell within the jurisdiction of the trial court and not the ELRB.

A teacher who had been employed by her district for thirteen years resigned but returned to work a year later. Subsequent to her return, she followed the procedures set forth in the collective bargaining agreement with the district and filed a grievance seeking to compel the school board to place her at the highest salary step and to provide back pay for the periods during which she was improperly classified. The board rejected her demand and her request for a *writ of mandate* ordering the board to act was denied on the ground that she failed to exhaust administrative remedies. When the board refused to accept an arbitrator's nonbinding decision in favor of the teacher, she returned to court and was ultimately granted a petition for a *writ of mandate*. On further review a California appellate court ruled that under state law the PERB lacked jurisdiction in determining the teacher's appropriate salary step.[48] Accordingly, the grant of the *writ of mandate* was affirmed.

A second California case dealt with the same statutory provisions relating to the appropriate placement of teachers on salary schedules. After the state teachers' association and individual teachers filed a *writ of mandate* seeking an order to adjust salary schedules to permit negotiations regarding increased salary based on criteria other than credits earned and years of experience, a trial court dismissed their petition on the ground that they failed to exhaust their administrative remedies by not taking their case to the PERB. In reversing this ruling, the appeals court held that a determination over whether the salary scale in question violated state law was

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46. Byron Center Pub. School, Bd. of Educ. v. Kent County Educ. Ass'n, 463 N.W.2d 112 (Mich. Ct. App. 1990)
47. Semmens v. Board of Educ. of Pontiac Community Consol. School Dist. No. 429, Livingston County, 546 N.E.2d 746 (Ill. App. Ct. 1989)
48. Dixon v. Board of Trustees of Saugus Unified School Dist., 265 Cal. Rptr. 511 (Ct. App. 1989).

not within the initial exclusive jurisdiction of PERB and so was properly subject to the jurisdiction of the courts.[49]

In the first of two 1988 Ohio cases that took almost two years to reach the reporters, a suit was brought by twelve teachers who retired under an incentive program incorporated in their collective bargaining agreement. When the school board adopted a resolution creating a new, more favorable plan under the same contract, the teachers filed an unfair labor practice claim with the State Employment Relations Board (SERB) against the board and their union. Before the SERB reached its decision to dismiss their claims, the teachers brought suit. After the teachers appealed a grant of summary judgment against them, an Ohio appellate court affirmed the trial court's ruling.[50] It held that even though the union arguably breached its duty of fair representation and the board's adoption of the new retirement plan was arguably a violation of the statutory duty to bargain collectively, the trial court lacked jurisdiction to hear the teachers' claims since they were within the exclusive jurisdiction of SERB.

In the second Ohio case, a tenured teacher who was denied tenure as a guidance counselor filed suit seeking declaratory judgment that she was entitled to tenure after her counseling contract was not renewed. The trial court's dismissal of her complaint for a lack of subject matter jurisdiction was affirmed.[51] The appellate court reasoned that since the underlying dispute was covered by the collective bargaining agreement, it was subject to the exclusive jurisdiction of the SERB.

Three teachers who were suspended without pay for two and one half days filed a grievance which was not arbitrated and a petition seeking a *writ of mandate* which was denied. A trial court granted summary judgment in favor of the district in the suit for lost wages and other damages and the Montana Supreme Court affirmed.[52] It reasoned that since the issues surrounding the short term disciplinary suspension of teachers are grievable under the collective bargaining agreement, they were not properly subject to consideration by a trial court.

The two final cases in this subsection were handed down together by a New York appellate court and arose out of a single dispute between a school district and its teachers' union. In the first case the court upheld the dismissal of the union's motion to compel arbitration on two of three memoranda of agreement between the parties.[53] It ruled that because there was no express and unequivocal agreement to submit the dispute to

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49. California Teachers' Ass'n v. Livingston Union School Dist., 269 Cal. Rptr. 160 (Ct. App. 1990).
50. Gunn v. Board of Educ. of Euclid City School Dist., 554 N.E.2d 130 (Ohio Ct. App. 1988).
51. State *ex rel.* Ramsdell v. Washington Local School Bd., 556 N.E.2d 197 (Ohio Ct. App. 1988).
52. Debar v. Trustees, Yellowstone County Elementary School Dist. No.2, 796 P.2d 1081 (Mont. 1990).
53. Board of Educ. of Depew Union Free School Dist. v. Depew Teachers Org., Inc., 562 N.Y.S.2d 274 (App. Div. 1990).

arbitration, the court had jurisdiction to determine the matter. The second case involved the third memorandum of agreement. Here the court affirmed summary judgment in favor of the board.[54] It ruled that since a purported agreement to expand the recall rights of teachers who had been laid off contravened the express terms of the New York State Education Law, it was null and void so that the court properly exercised its authority in granting summary judgment against its enforcement.

Procedural Issues

Although they are not often dispositive, the procedural aspects of arbitration hearings can have a significant impact on their outcome. Over the past year eight cases were primarily concerned with procedural matters: two cases applied the exhaustion of remedies doctrine; three dealt with methods of obtaining evidence to be used in arbitration proceedings; and three were concerned with filing requirements.

A teacher, who reported an incident in which she witnessed a superior abuse a student, allegedly became subject to a harassment campaign. Several years after the joinder of issue and the denial of the defense's motion to dismiss, she sought to amend her complaint by deleting a libel cause of action and adding claims for breach of contract and harassment. After her motion was denied, she appealed. A New York appellate court reasoned that she could not amend by alleging new facts because it would have caused prejudice to the defendants. Moreover, it ruled that to the extent that she wished to allege contractual violations, she was precluded from judicial relief as she had failed to exhaust administrative remedies available under her collective bargaining agreement.[55]

In a factually complex case, a county superintendent of schools dismissed the complaint of a nonrenewed teacher who alleged that the reasons for her dismissal were not true. While continuing to seek administrative review, she filed suit in November of 1986. The state superintendent affirmed the dismissal of her complaint in April of 1987. In December of 1987 she amended her complaint by alleging breach of contract over the district's failure to comply with the notice and layoff-rehire provisions of its bargaining agreement. However, she failed to seek administrative review over this new allegation. On the same day that the trial court ruled in favor of the district, the state high court handed down a decision requiring county superintendents to hear and decide all controversial decisions of local school boards. Relying on its own precedent,[56] the

54. Board of Educ. of Depew Union Free School Dist. v. Depew Teachers Org., Inc., 562 N.Y.S.2d 275 (App. Div. 1990).
55. Lebow v. Kakalikos, 548 N.Y.S.2d 686 (App. Div. 1989).
56. Throsell v. Board of Trustees of Gallatin County School Dist. No. 7, 757 P.2d 348 (Mont. 1988).

Montana Supreme Court remanded the case for dismissal by applying the exhaustion of remedies doctrine.[57] It concluded that since the teacher had not exhausted administrative review by an appeal to the county superintendent, the lower court lacked jurisdiction to hear her breach of contract claim.

During a labor strike a local teachers' association and school district cross-filed bad faith bargaining charges with the state ELRB. At the subsequent hearing, the association requested specific documentary evidence relating to the district's bargaining strategies. The district's motion to bar the information from discovery on the ground that it was privileged information was denied and the ELRB issued a subpoena to compel production of the evidence. After the association obtained a court order to enforce the subpoena, the district was granted a reversal. On further appeal, the Illinois Supreme Court upheld the ban against enforcing the ELRB's subpoena.[58] It reasoned that since a decision regarding whether the materials were privileged was the most critical procedural phase in the resolution of this dispute and was more an issue of evidence than labor law, it would be more appropriate for a trial court and not the ELRB to make the decision concerning the extent to which the subpoena should be enforced.

In a second disclosure case, an intermediate New York appellate court was asked to determine whether a school district violated its collective bargaining agreement by failing to pay a teacher her regular salary for one day following her refusal to sign an affidavit to confirm that her absence on a given day was on account of illness. In affirming a ruling against the district, the court held that since the district was unable to establish that the disclosure of information from a nonparty, who was located outside of the state, was necessary for it to present a viable case, it was not entitled to a stay of arbitration.[59]

When an Employment Relations Board (ERB) dismissed an allegation of unfair labor practices brought against a school district over its refusal to provide a school employees association with information in connection with a grievance filed by a terminated employee, the association appealed. An Oregon appeals court affirmed the ERB's dismissal.[60] It reasoned that the association's discovery request was too broad for two reasons. First, it would have involved the files of at least 700 bargaining unit employees; second, the records it sought were not relevant due to the fact that the other employees whose records were sought were not subject to the same statute as the grievant.

A teachers' association filed an unfair labor practice against its school

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57. Canyon Creek Educ. Ass'n v. Board of Trustees, Yellowstone County School Dist. No. 4, 785 P.2d 201 (Mont. 1990).
58. Illinois Educ. Labor Relations Bd. v. Homer Community School Dist. No. 208, 547 N.E.2d 182 (Ill. 1989).
59. *In re* Flood, 550 N.Y.S.2d 379 (App. Div. 1990).
60. Oregon School Employees Ass'n v. Salem-Keizer School Dist., 797 P.2d 375 (Or. Ct. App. 1990).

district alleging that it failed to bargain in good faith over a teacher evaluation plan. The state ELRB held that by failing to file a timely answer, the district was deemed to have admitted the material facts alleged in the complaint. An Illinois appeals court affirmed the ELRB's ruling.[61] It held that the district's motion requesting a deferral to arbitration notwithstanding, it would not grant an exception to the general requirement of strict enforcement of administrative agency rules since this was "not the case of an unsophisticated layman lost in a maze of administrative rules,"[62] but was one of a large governmental unit which should have known better.

In March of 1986 three business teachers were told that their colleagues in the district's vocational education center received a pay supplement; they then wrote to their superintendent in an effort to find out more about the alleged discrepancy. However, it was not until they returned to work that fall and met with their union representative that their suspicions were confirmed. The teachers' grievance for back pay to 1982 was filed within the appropriate statutory time limits, but the superintendent awarded the supplement for only 1986 on the ground that their petition for the previous years had not been timely filed. After a hearing officer affirmed this decision, the teachers appealed. A trial court reversed and held that the grievance had been filed in a timely fashion; it thus awarded the teachers back pay to 1981. The Supreme Court of West Virginia affirmed that part of the award granting the teachers back pay to 1982, reasoning that once the event giving rise to the grievance became known to the teachers, they were not precluded from claiming more than one year. The court reversed the award of back pay to 1981 since it found that the supplements did not begin until 1982.[63]

After a school district refused to rehire a first year teacher at the end of the 1983-84 school year, he filed a grievance. An arbitration award ordering his reinstatement was issued in September of 1984 but was reversed by a grant of summary judgment in October of 1985. In June of 1987 the trial court was reversed on the ground that the ELRB, and not a trial court, had the jurisdiction to review arbitration awards;[64] this ruling was affirmed by the Illinois Supreme Court in 1988.[65] In November of 1987, almost three years after the district first refused to comply with the arbitration award, the unfair labor charge giving rise to this action was filed with the ELRB; in October 1989 the ELRB issued an order finding that

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61. Mattoon Community Unit School Dist. No. 2 v. Illinois Educ. Labor Relations Bd., 550 N.E.2d 610 (Ill. App. Ct. 1990).
62. *Id.* at 614.
63. Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).
64. Board of Educ. of Community School Dist. No. 1, Coles County v. Compton, 510 N.E.2d 508 (Ill. App. Ct. 1987). *See* The Yearbook of Education Law 1988 at 58 for a full discussion of this case.
65. Board of Educ. of Community School Dist. No. 1, Coles County v. Compton, 526 N.E.2d 149 (Ill. App. Ct. 1988). *See* The Yearbook of Education Law 1989 at 54 for a full discussion of this case.

the district had committed an unfair labor practice. On further appeal, an intermediate appellate court reversed the ELRB's order.[66] It reasoned that since the six-month period within which to file a finding of an unfair labor practice was not tolled by the district's attempts to set the award aside, the ELRB lacked the jurisdiction to issue such an order.

Management Prerogatives as a Bar

As strong as the judicial presumption favoring arbitration ordinarily is, matters dealing with managerial prerogatives are excluded from the scope of bargaining and arbitration. This was the situation in a ruling handed down by the Supreme Judicial Court of Maine. In this case a teachers' association alleged that its school board violated the collective bargaining agreement when it sought to hire a department head even though the hiring did not comply with the board's own policy. After the board denied a grievance, it was granted a stay of arbitration by the trial court. On further appeal, the stay was affirmed. Relying on its own precedent,[67] the court reasoned that since the responsibility for filling teaching positions rests with the school board and superintendent, the board could not limit its own statutorily imposed authority through an agreement to arbitrate such a grievance.[68]

JUDICIAL REVIEW

Propriety of Arbitral Awards and Agency Decisions

The deference accorded decisions of arbitrators and state employment relations boards was illustrated in a recent opinion of a New York appellate court. It reasoned that a determination by an arbitrator who has the power to interpret the contract will only be set aside if the decision is "completely irrational . . . or where the document expressly limits or is construed to limit the powers of the arbitrators . . . ."[69] This deference notwithstanding, a large number of arbitral awards and employment relations board rulings were appealed. The cases here are grouped into nine categories: salary and benefits; the use of certified employees; seniority rights;

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66. Charlestown Community School Dist. No. 1 v. Illinois Educ. Labor Relations Bd., 561 N.E.2d 331 (Ill. App. Ct. 1990).
67. Board of School Directors of Maine School Admin. Dist. No. 36 v. Maine School Admin. Dist. No. 36 Teachers Ass'n, 428 A.2d 419 (Me. 1981). *See* The Yearbook of Education Law 1982 at 104 for a full discussion of this case.
68. Maine School Admin. Dist. No. 61 Bd. of Directors v. Lake Region Teachers Ass'n, 567 A.2d 77 (Me. 1990).
69. Ploen v. Monticello Cent. School Dist., 554 N.Y.S.2d 311, 312 (App. Div. 1990), *citing* Rochester City School Dist. v. Rochester Teachers Ass'n, 394 N.Y.S.2d 179, 181 (N.Y. 1977), *quoting* Lentine v. Fundaro, 328 N.Y.S.2d 418, 422 (N.Y. 1972).

promotion; retirement benefits; discipline; suspension; dismissal; and reinstatement.

Salary and Benefits

When an arbitrator took past practices between a teachers' union and school district into consideration in her interpretation of the salary provisions of the collective bargaining agreement in question, the district appealed its unsuccessful effort to have the award vacated. An appellate court in New York upheld the arbitration award and the trial court's confirmation of it. It reasoned that the arbitrator's reliance on past practices did not render her decision irrational.[70]

A trial court in Ohio granted a school board's motion to vacate an arbitrator's award of lost earnings to a nonrenewed teacher as a result of the board's failure to provide him with restoration rights. After this decision was affirmed by an appellate court, the Supreme Court of Ohio reversed.[71] In reinstating the award the court found that it was properly drawn from the essence of the collective bargaining agreement in effect between the parties which required the board to provide restoration rights in the form of any lost earnings traceable to the board's failure to provide these rights. Therefore, the award was held to be enforceable because it was not unlawful, arbitrary, or capricious.

Voters in a local school district failed to approve and fund an increase in teacher salaries called for by the second year terms of a three-year collective bargaining agreement in effect between the teachers' association and the school district. After the state Public Employee Labor Relations Board dismissed the district's charge of unfair labor practices against the association for its refusal to reopen negotiations over salaries, the district appealed. The New Hampshire Supreme Court reversed and remanded.[72] It ruled that in the absence of any evidence that the voters in the district had any knowledge of the financial terms relating to all three years of the bargaining agreement, the district was not bound to fund the remaining two years of salary increases.

An arbitrator in Pennsylvania relied on past practices to rule that a school district was required to include military service payments in the salaries of employees who began working in the district subsequent to the adoption of its collective bargaining agreement. After a trial court affirmed the arbitration award, the district appealed. On further review, an appellate court ruled that an arbitration decision is permitted to draw its essence

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70. Board of Educ. of North Babylon Union Free School Dist. v. North Babylon Teachers' Organization, 548 N.Y.S.2d 38 (N.Y. 1989).

71. Board of Educ. of Findlay City School Dist. v. Findlay Educ. Ass'n, 531 N.E.2d 186 (Ohio 1990).

72. Appeal of Sanborn Regional School Bd., 579 A.2d 282 (N.H. 1990).

from an underlying collective bargaining agreement if the arbitrator bases his conclusions on past practices.[73] Accordingly, it affirmed both previous rulings and concluded that the district was required to continue to make the payments even though they were not explicitly mentioned in the agreement.

An arbitrator in Montana ordered a school district to pay the entirety of health insurance premiums for all employees in a school district rather than only for those district employees who were married one another. He reasoned that if the district did not treat all employe equally, it risked violating state and federal antidiscrimination laws. After a trial court vacated this award, the teachers' association appealed. The Supreme Court of Montana reversed the lower court's judgment and reinstated the arbitration award.[74] It ruled that since the arbitrator's decision to compel payment of the insurance premiums was within the limits of his contractual authority and not unlawful, the lower court was without power to set his decision aside.

Use of Certified Employees

A school district in New York required its physical education teachers to supervise the classes of their absent colleagues that were taught by uncertified substitutes. A grievance filed by the teachers' union was resolved by entering into a settlement agreement ensuring that only certified substitutes would be permitted to cover classes when any of the physical education teachers were absent. Subsequently, the district reverted to its practice of permitting teachers who were not certified to conduct the classes. After the union received an arbitration award in its favor, the district appealed. An appellate court confirmed the arbitrator's ruling.[75] It rejected the district's arguments and held that the arbitrator's award directing compliance with an agreement over the use of certified substitute teachers did not impermissibly infringe on the district's authority to determine the curriculum and teacher qualifications.

Seniority Rights

Four individuals who resigned from their teaching positions in a Pennsylvania school district and later returned to work agreed to be placed on the same salary step as newly hired teachers. The teachers' association filed grievances alleging that they had been placed at a lower level than

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73. McKeesport Area School Dist. v. McKeesport Area Educ. Ass'n, 566 A.2d 1283 (Pa. Commw. Ct. 1990).

74. Glasgow Educ. Ass'n v. Board of Trustees, Valley County School Dist. 1 and 1A, 791 P.2d 1367 (Mont. 1990)

75. Board of Educ., Yonkers City School Dist. v. Yonkers Fed'n of Teachers, 562 N.Y.S.2d 318 (App. Div. 1990).

required under their bargaining agreement. After the grievances were denied, an arbitration award was entered granting the teachers credit for their past years of experience in the district. When a trial court upheld the award, the district sought further review. An appellate court found that although the bargaining agreement was silent on the question of seniority rights, both parties had agreed that state law on point was incorporated by reference into the contract. Thus, it affirmed the arbitration award since it was drawn from the essence of the agreement and was not manifestly unreasonable.[76]

In a case from the state of Washington, school bus drivers and their union appealed the denial of a contract grievance arising out of their district's restoration of seniority rights to a driver who returned to her former position two years after being promoted out of the bargaining unit. On appeal the Supreme Court of Washington affirmed a grant of summary judgment in favor of the district.[77] It ruled that since resignation within the meaning of the collective bargaining agreement applied only to resignation from the district and not the bargaining unit, there was no basis for a grievance over the bus driver's seniority rights.

Promotion

The New York State PERB found that a city board of education committed unfair labor practices by failing to promote applicants for the position of associate staff analyst on the basis of their membership in a collective bargaining unit. In so doing, it reversed an administrative law judge's dismissal of the charge and ordered a *de novo* review of all of the candidates. A New York appellate court affirmed the PERB's ruling.[78] It held that substantial evidence supported the finding that the board improperly excluded the applicants from consideration for promotion.

Retirement Benefits

A school district offered a special benefits package to teachers who participated in a three-year early retirement program. After taking part in the first year, a teacher retired and the school district determined that because he did not complete the entire program, he was not entitled to benefits. The teacher's association filed a grievance on his behalf which resulted in an arbitration award reinstating him as a full participant in the program. The district appealed and had the arbitrator's award vacated. On

76. Centennial School Dist. v. Centennial Educ. Ass'n, 576 A.2d 99 (Pa. Commw. Ct. 1990).
77. Wheeler v. East Valley School Dist., 796 P.2d 1298 (Wash. 1990).
78. Board of Educ., City School Dist. of N.Y. v. State Pub. Employment Relations Bd., 560 N.Y.S.2d 873 (N.Y. 1990).

further review, an appellate court in Pennsylvania reinstated the award.[79] It upheld the arbitrator's conclusion that the teacher did not violate the intent of the program, he merely retired earlier than he originally projected and was therefore entitled to the retirement benefits.

Discipline

A grievance filed by teachers who were docked a days pay for not taking part in a field trip that extended past the end of the school day was denied by their school board. An arbitrator found that while there were sufficient grounds to impose some discipline on the teachers, the loss of a days pay was too severe. He thus modified the penalty to a formal letter of warning which had already been placed in their personnel files. In an unsuccessful action brought by the teachers to require the board to accept the arbitrator's ruling, a trial court granted the board's petition to hold the teachers and their union liable for legal fees arising out of their suit. In a review limited to the propriety of the court ordered sanctions, an appellate court in Illinois reversed.[80] It reasoned that since the teachers' suit was based on the results of an arbitrator's decision, the statute permitting the recovery of fees from par[illegible]brought suit without reasonable cause was inapplicable.

Suspension

A permanent teacher was suspended for two days without pay by his school board after he removed the glossaries from 146 text books owned by the district. The teacher was granted summary judgment but this was reversed on further review. An Indiana appellate court affirmed.[81] It ruled that the board's decision to suspend the teacher did not violate the master agreement with the teacher's union or the teacher's individual contract because it was appropriate under the circumstances.

Dismissal

A state ERB's denial of an allegation of an unfair labor practice against a school district for its attempted dismissal of a school maintenance worker due to his "habitual tardiness" was reversed on appeal.[82] On remand,

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79. Upper St. Clair Educ. Ass'n v. Upper St. Clair School Dist., 576 A.2d 1176 (Pa. Commw. Ct. 1990).
80. Hazel Crest Fed'n of Teachers, Local 2077 v. Board of Educ. of School Dist. 152 ½, Cook County, 563 N.E.2d 1088 (Ill. App. Ct. 1990).
81. Board of Trustees of Hamilton Heights School Corp. v. Landry, 560 N.E.2d 102 (Ind. Ct. App. 1990).
82. Oregon School Employees Ass'n, Chapter 89 v. Rainier School Dist. No. 13, 754 P.2d 9 (Or. Ct. App. 1988). *See* The Yearbook of Education Law 1989 at 52 for a full discussion of this case.

the ERB affirmed its earlier ruling. In a second appeal the association representing the worker alleged that the district had committed an unfair labor practice by its failure to follow the agreed upon procedures in their collective bargaining agreement prior to seeking the worker's discharge. An Oregon appeals court agreed with the association.[83] It reversed and remanded the case for reconsideration.

A Pennsylvania case illustrates one of the few 1990 cases where an arbitrator was found to have gone beyond the bounds of his authority. Mitigating personal circumstances notwithstanding, a tenured male high school teacher-coach who sent love letters to two female students was immediately dismissed by the school board on the grounds of immorality. An arbitrator agreed that the teacher's conduct was immoral, but found that immediate termination was too harsh. He entered an order calling for suspension without pay and counseling. A trial court's vacation of the award was affirmed.[84] An appellate court ruled that once the arbitrator determined that the district had just cause in dismissing the teacher for immorality, he was without authority to alter its penalty.

Reinstatement

A number of school bus drivers were placed on involuntary administrative leave and pre-termination hearings were scheduled when a school board became aware of the fact that they had felony convictions on their records. After the drivers' union instituted grievance proceedings, a tentative settlement was reached under which all of the drivers were reinstated. However, none of the three plaintiffs in this action agreed to the terms of the settlement even though they were reinstated. The bus drivers filed suit alleging that they had not been afforded appropriate pre-termination hearings or an opportunity to present reasons why they should not have been suspended. A federal district court in Ohio found that they were given notice and an opportunity to respond and so rejected their first claim. However, it also ruled that the board's post-termination grievance procedure failed to comply with state law and concluded that they were entitled to back pay with interest for the time they were out of work.[85]

A part-time school custodian who failed a physical examination due to his inability to lift certain objects was suspended by the superintendent. While his grievance was pending, the school board changed the suspension to a dismissal based on its allegation that he had misrepresented his physical condition at the time he was hired. An arbitrator determined

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83. Oregon School Employees Ass'n, Chapter 89, v. Rainier School Dist. No. 13, 786 P.2d 1311 (Or. Ct. App. 1988).

84. Manheim Cent. Educ. Ass'n v. Manheim Cent. School Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990).

85. Sutton v. Cleveland Bd. of Educ., 726 F. Supp. 657 (N.D. Ohio 1989).

that the record did not support the district's actions and ordered reinstatement with full seniority and back pay. A trial level and intermediate appellate court in Pennsylvania both affirmed the arbitration award. Subsequently, the board offered to reinstate the custodian but did not mention back pay. The custodian refused the district's offer and an arbitrator ordered the district to comply with the terms of the earlier award. The district filed another appeal but in the interim, between its filing and oral argument, it complied with the arbitrator's ruling. Hence an appellate court granted the district's motion to dismiss for mootness.[86]

A New York case affirmed decisions by an arbitrator and a lower court.[87] It held that an arbitration order reinstating a grievant's position as a teaching assistant with back pay less an offset for any outside earnings could not be set aside because of a poorly drafted sentence dealing with the pay offset, since the remainder of the award was clear, unambiguous, final, and definite.

A social studies teacher placed on unrequested leave of absence due to declining enrollment, changes in curriculum, and financial limitations in her district, requested a hearing pursuant to state law. After a hearing examiner found that neither the bargaining agreement, past practices, nor the bargaining history between the parties suggested an interpretation that included a realignment of positions to allow her to retain her job, she appealed. On further review, a Minnesota appellate court reversed in favor of the teacher.[88] It reasoned that since the school board had a statutory duty to realign, the teacher was entitled to reinstatement; it also ordered a hearing to determine the full amount of back pay plus interest due to her.

A school committee directed the bus company which served its students to terminate a number of drivers. One of the discharged workers went to arbitration and won reinstatement as the arbitrator found that the committee lacked sufficient cause to direct the driver to be discharged. The arbitrator also awarded the driver back pay less any adjustments for income he might not have earned if driving. Although it had agreed to be bound by arbitration, the committee brought suit to vacate the award. A judge confirmed the award of back pay but vacated the reinstatement portion of the order. A Massachusetts appeals court ruled that even if the arbitrator had exceeded her authority by ordering the school committee to reinstate a driver who was never its employee, her decision could be understood to have meant that the committee was required to instruct the bus company to reinstate the driver. Thus, it ruled that the arbitration award could be enforced in its entirety.[89]

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86. Minersville Area School Dist. v. Commonwealth Labor Relations Bd., 568 A.2d 979 (Pa. Commw. Ct. 1990).
87. *In re* Vermilya, 550 N.Y.S.2d 516 (App. Div. 1990).
88. *In re* Bristol, 451 N.W.2d 883 (Minn. Ct. App. 1990).
89. School Comm. of Boston v. United Steelworkers of Am., Local 8751, 557 N.E.2d 51 (Mass. App. Ct. 1990).

The plant engineer of a school district was dismissed for allegedly sharing marijuana with a student. When an arbitrator found that the decision maker who imposed this penalty was not only not impartial, but also deprived the engineer of due process, she reduced the penalty to a one-year suspension without pay; she also ordered him to participate in an employee's assistance program after reinstatement. The district succeeded in having the award vacated and the engineer's union appealed on his behalf. A Wisconsin appellate court reversed.[90] It ruled that a court can vacate an arbitrator's decision only if it misconstrues or disregards the law or if it is illegal or violates strong public policy. And, concluding that none of these grounds was present, it affirmed the arbitrator's decision to reinstate the engineer.

After a school district dismissed two school bus drivers who were at a PERB hearing rather than transporting students, the New York State PERB found that the district's action constituted an unfair labor practice. The district appealed and a New York appellate court affirmed the PERB's determination.[91] It reasoned that since the union established that the drivers' attendance at the hearing was a protected activity and other similarly situated employees received less severe penalties, there was substantial evidence to support the PERB's determination. Therefore, the court ordered that the drivers be reinstated with back pay.

A teacher, who was furloughed when his school district experienced a decrease in enrollment, sought the help of his association to gain reinstatement. Although the teachers' association initially filed a grievance on his behalf, it later withdrew its support because of his involvement in another proceeding that ultimately had an adverse effect on his seniority rights as they related to the furlough. Thus, his grievance was denied without a hearing. After a court ordered school board hearing upheld the furlough, the same court ruled that his seniority should not have been reduced by the earlier arbitration proceeding and ordered his reinstatement with full seniority. On further review an appellate court in Pennsylvania affirmed his reinstatement.[92] It reasoned that the school board was precluded from using the results of the arbitration hearing against the teacher since he was not a party to it.

The final case in this section deals with a teacher who, because of a history of visual and mobility problems, was assigned to teach mathematics to small groups of students in a specially designed support skills program. While acting in his capacity as the grievance coordinator for his teacher's association, he advised his colleagues that they were not obligated

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90. Racine Unified School Dist. v. Service Employees' International Union, Local 152, 462 N.W.2d 214 (Wis. Ct. App. 1990).

91. Board of Educ. of Deer Park Union Free School Dist. v. State Pub. Employment Relations Bd., 561 N.Y.S.2d 810 (App. Div. 1990).

92. Arcurio v. Greater Johnstown School Dist., 582 A.2d 402 (Pa. Commw. Ct. 1990).

to attend an after school meeting called by the principal. Subsequently, he was informed that the support skills program was being discontinued and that he would be reassigned as a regular classroom teacher. After the state PERB found this to be an unfair labor practice, the school district filed suit. An appellate court in New York found that not only was the PERB's determination supported by evidence that the program was improperly eliminated due to anger over the teacher's advice to his colleagues, but also that its decision to order his reinstatement was neither arbitrary nor capricious.[93] Thus, it affirmed the PER's ruling and ordered the teacher's reinstatement to his previous position.

IMPASSE and FACT-FINDING

Following an impasse in bargaining over salary and fringe benefits, a school district and teachers' association submitted their differences to mediation and fact-finding. When the board rejected the recommendations of the fact-finder and the association refused a counter proposal, the district unilaterally imposed a contract that failed to make the proposed compensation package retroactive. The association challenged the board's actions as a prohibited labor practice. A trial court found that a board had the right to offer a unilateral contract. This right notwithstanding, an appellate court in Kansas ruled that the board had committed an unfair labor practice where its contract offer was reduced by the costs it incurred in mediation and fact-finding.[94] The court rejected the argument that it would be unfair for the teachers to receive the same amount of increase offered prior to the impasse. However, it also ruled that since most of the teachers had accepted the board's unilateral contract offer, the association did not have the right to request or receive reimbursement on behalf of its members.

When a school board rejected the salary schedule in a proposed bargaining agreement, a teachers' association petitioned for fact-finding under the impasse procedures of Iowa law. The board rejected the fact-finder's recommendation that the salary scale under the tentative agreement be adopted and the parties went to arbitration before the state PERB. The PERB concluded that since the tentative agreement was the result of good faith bargaining, it should not be disturbed. A trial court accepted the board's petition for review and affirmed the arbitration panel's award. An appeals court in Iowa ruled that since there was substantial evidence to support

92. Arcurio v. Greater Johnstown School Dist., 582 A.2d 402 (Pa. Commw. Ct. 1990).
93. Uniondale Union Free School Dist. v. Newman, 562 N.Y.S.2d 148 (App. Div. 1990).
94. Unified School Dist. No. 279, Jewell County v. Secretary, Dep't of Human Resources, 788 P.2d 867 (Kan. Ct. App. 1990).

the PER's conclusion that the fact-finder's recommendation was the most reasonable under the circumstances, it would not disturb that finding.[95]

STRIKES and SANCTIONS

A school board was found to have violated the terms of its collective bargaining agreement in its implementation of a RIF when it gave preference to less senior teachers who had not participated in a strike against the district. After a Louisiana court remanded on the question of whether some of the teachers would have been laid off under any circumstances,[96] several teachers were reinstated by the trial court. When the court permitted the board to deduct an amount equal to the unemployment benefits received by the teachers in their award of back pay, the teachers appealed. On further review, a Louisiana appeals court upheld the offset.[97] It reasoned that since nothing in public policy supports double recovery in the form of unemployment benefits and a full award of back pay, the board's offset was proper.

In a second Louisiana case, the union representing striking teachers and other school employees filed suit seeking an injunction prohibiting the school board from firing the striking workers after court ordered mediation failed to resolve the issue of whether collective bargaining would take place. The board cross filed for injunctive relief to enjoin the strike. A trial court denied relief to either party, but an appellate court ordered the trial court to grant injunctive relief to the board. The Louisiana Supreme Court reversed. It reasoned that the lower court incorrectly interpreted the state's "Little Norris-Laguardia Act"—this Act was patterned after federal legislation and prohibits strikes only where they endanger public health and safety. The court held that since the grounds on which to prevent a strike did not apply, they had a right to strike over their demand for collective bargaining.[98]

Conversely, the West Virginia courts ruled against the right of teachers to strike. When teachers engaged in a work stoppage to protest the failure of the governor and state legislature to enact a satisfactory wage and benefits package, a trial court held that the strike was illegal as it would result in irreparable harm to the public school system. On further review, the West

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95. Moravia Community School Dist. v. Moravia Educ. Ass'n, 460 N.W.2d 172 (Iowa Ct. App. 1990).

96. St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Bd., 503 So. 2d 69 (La. Ct. App. 1987). *See* The Yearbook of Education Law 1988 at 63 for a full discussion of this case.

97. St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Bd., 556 So. 2d 157 (La. Ct. App. 1990).

98. Davis v. Henry, 555 So. 2d 457 (La. 1990)

Virginia Supreme Court affirmed.[99] It ruled that in the absence of legislation, the common law rule recognized in both federal and state courts denying public employees the right to strike remained in effect.

MISCELLANEOUS DECISIONS

While many of the cases in this chapter can fit into more than one section, some cases seem to defy classification altogether. The four cases that follow present issues that do not readily fall within the preceding sections.

The first case deals with a school district's challenge to the authority of the Pennsylvania Labor Relations Board (PLRB). The district filed suit seeking to enjoin any hearings on, or adjudications of, two unfair labor practices filed by its teachers' association. It claimed that because the legislative action that extended the life of the PLRB had been declared unconstitutional by the Pennsylvania Supreme Court, it lacked authority to act. The court disagreed, pointing out that the unconstitutionality of the law notwithstanding, the court's ruling was handed down several years after the PLRB's reauthorization and was only to be applied prospectively. It ruled that the district "won the battle but lost the war" because it failed to state a clear right to relief.[100] Therefore, the court dismissed the district's motion for a preliminary injunction.

After several years of compliance with a term in its collective bargaining agreement under which a school system agreed to pick up and deliver mail of its teachers' association, a decision of the United States Supreme Court called the legality of this practice into question.[101] The system, then, found itself on the horns of a dilemma. If it stopped delivering the mail it risked breaching its contract with the association, but if it complied it risked violating federal law which granted the Postal Service a monopoly over mail delivery. After an arbitrator ordered a limited resumption of mail delivery, the Postal Service apprised the parties of their potential civil and criminal liability. In order to protect itself from liability to either side, the school system sought declaratory judgment from a federal district court in Indiana, asking it to declare the rights of the parties and to indicate which, if any, mail it could lawfully deliver. The teachers' motions to dismiss and abstain were denied as the court ruled that the district had stated a sufficient case for relief.[102]

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99. Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 393 S.E.2d 653 (W. Va. 1990).
100. West Shore School Dist. v. Pennsylvania Labor Relations Bd., 570 A.2d 1354 (Pa. Commw. Ct. 1990).
101. Regents of the Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589 (1988).
102. Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, 735 F. Supp. 907 (N.D. Ind. 1990).

A local newspaper sought access to a copy of a tentative bargaining agreement between a school district and the unions representing school personnel. After a trial court dismissed a motion of summary judgment against the newspaper, it appealed. The Michigan appellate court pointed out at the outset that while the newspaper had obtained a copy of the contract after it was ratified, thus rendering the issue moot, it would affirm the lower court's ruling.[103] It reasoned that since the lower court correctly found that the tentative bargaining agreement was exempt from disclosure under the state's Freedom of Information Act, its judgment would be left undisturbed.

The final case in this chapter deals with another state Freedom of Information Act. Here a union brought suit against the state's Teacher Retirement System in an effort to compel the disclosure of names and other pertinent information concerning its enrollees. The union explained that since 96% of all public school teachers in the state were under collective bargaining agreements, the retirement system alone had the information it needed if it wished to reach prospective members in a bid to convince them to change union affiliation. The trial and appellate courts in Indiana both denied the union's motion for summary judgment in light of the system's refusal to disclose the names of its enrollees. The appeals court reasoned that the information sought by the union was per se exempt from disclosure under the Act and so the union had no right to obtain it.[104]

CONCLUSION

The number of cases dealing with collective bargaining continues to be large and is likely to remain so. Thus, while bargaining has brought a measure of tranquility to labor relations in education, it has not obviated the need to seek judicial resolution to labor conflict. The differences between management and labor notwithstanding, the courts continue to apply well established principles in settling labor disputes and do not appear to be anxious to usher in new trends any time soon.

Although no new trends emerged in 1990, the down turn suffered by the national and local economies may have a significant impact on bargaining over the next few years. That is, as economic woes afflicting the federal and state governments reduce the amount of aid provided local school districts, the potential for economic strife between districts and their employees can be expected to increase. As the economic and other issues surrounding collective bargaining are not likely to disappear any time soon, 1991 promises to be an interesting year.

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103. Traverse City Record Eagle v. Traverse City Area Pub. Schools, 459 N.W.2d 28 (Mich. Ct. App. 1990).

104. Healey v. Teachers Retirement Sys., 558 N.W.2d 766 (Ill. App. Ct. 1990).