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The Power Issue In Public Sector Grievance Arbitration

Roger I. Abrams*

I. INTRODUCTION

The success of a public enterprise is partly a function of the quality of its labor relations system. Periodic collective bargaining may make media headlines,1 but establishing and successfully administering an arbitration mechanism to resolve disputes arising under the collective bargaining agreement is an equally important measure of achievement. Public managers and labor organizations representing public employees have borrowed the private sector's method for resolving disputes in an expeditious and peaceful manner.2 Today, the use of a multi-step grievance procedure capped by a final and binding arbitration process is commonplace in the public sector3 and, in some instances, is mandated by statute.4 Surprisingly, however, commentators have given little attention to the opera-

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1. Periodic collective bargaining is also the focus of most of the literature in the public sector labor relations field. See, e.g., Edwards, The Emerging Duty to Bargain in the Public Sector, 71 MICH. L. REV. 885 (1973); Summers, Public Employee Bargaining: A Political Perspective, 83 YALE L.J. 1156 (1974).

2. Professor Tim Bornstein has offered an interesting explanation for the public sector's adoption of private sector methods of dispute resolution. In the 1970's, public sector employers and unions hired practitioners trained in the private sector to administer their labor relations activities. “As a result, these advocates quite consciously tended to mold the new and emerging institutions of the public sector in the familiar image of the private sector.” Bornstein, Legacies of Local Government Collective Bargaining in the 1970s, 31 LAB. L.J. 165, 166 (1980).

3. As of 1975, over 70% of all public sector collective bargaining agreements contained final and binding arbitration provisions. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULLETIN NO. 1833, GRIEVANCE AND ARBITRATION PROCEDURES IN STATE AND LOCAL AGREEMENTS 18, 40 (1975) [hereinafter cited as BULLETIN 1833].

tion of public grievance arbitration systems, despite their im-
portance in the public sector.5

In many ways, the practice and procedures of public sector
grievance arbitration mirror those of its private sector progeni-
tor. Union and management select a neutral arbitrator on an
ad hoc basis through the offices of an outside agency, such as
the American Arbitration Association. The arbitrator conducts
an informal hearing, receiving evidence through oral testmony
and documentary proof. Parties customarily submit posthear-
ing briefs, after which the arbitrator prepares an opinion set-
ting forth reasons in support of a final and binding award
resolving the dispute.6

In at least one important respect, however, public sector
grievance arbitration is distinctive. Public employers almost
routinely question the arbitrator's jurisdiction to hear the mat-
ter in dispute or the arbitrator's power to issue an award or
remedy in favor of the union. This Article refers to these vari-
ous attacks on the authority and capacity of the public sector
arbitrator as the "power issue." Private employers, of course,
raise similar issues in private sector arbitration, but, as is ap-
parent from even a cursory examination of published deci-
sions,7 public employers raise the power issue far more
frequently.8

5. Scholars generally have focused on court decisions in analyzing public
sector arbitration issues, see, e.g., Craver, The Judicial Enforcement of Public
Sector Grievance Arbitration, 58 Tex. L. Rev. 329 (1980), but they have not ex-
amed the primary data of arbitration opinions. While judicial decisions are of
critical importance in the development of the law of the public sector labor
agreement, judges' opinions do not always reflect an informed understanding of
the actual operation of dispute resolution systems. Academics have made little
use of the growing number of reported public sector arbitration opinions. See
infra note 7.

6. It is important in discussing public sector dispute resolution to distin-
guish between "interest arbitration," the process used to resolve disputes aris-
ing from the negotiation of a new contract, and "grievance arbitration," the
process used to resolve disputes arising during the term of an existing collec-
tive agreement, generally involving the interpretation and application of the
provisions of that agreement. For a discussion of the grievance arbitrator's de-
cisional role, see generally Abrams, The Nature of the Arbitral Process: Sub-
For an evaluation of the various forms of binding interest arbitration, see gen-
erally J. Stern, C. Rheus, J. Loewenberg, H. Kaspar & B. Dennis, Final-Of-
fer Arbitration (1975).

7. The Bureau of National Affairs publishes a representative sample of
public sector arbitration opinions in its Labor Arbitration Reports series; the
Commerce Clearinghouse does likewise in its Labor Arbitration Awards series.

8. For example, a review of the arbitration opinions published in volume
76 of the Labor Arbitration Reports (BNA) shows that arbitrability claims ap-
ppear more than three times as frequently in public sector decisions as in pri-
This Article explores the possible reasons for the prevalence of the power issue in public sector grievance arbitration and evaluates the impact of the power issue on the arbitration process and on public enterprise in general.\textsuperscript{9} First, however, the Article examines briefly how public employers have raised the power issue in arbitration. For purposes of discussion, management's arguments on the power issue are divided into four categories: 1) substantive and procedural arbitrability; 2) reserved managerial prerogatives; 3) controlling external law; and 4) limitations on remedial power.

II. THE POWER ISSUE

A. SUBSTANTIVE AND PROCEDURAL ARBITRABILITY

Public employers frequently contest whether the matter brought to arbitration by public sector unions is substantively or procedurally arbitrable.\textsuperscript{10} Public sector collective bargaining agreements often contain provisions expressly excepting certain disputes from the grievance and arbitration procedure, sometimes excluding only specific disputes,\textsuperscript{11} while other times excluding a broader class of disputes through generalized language.\textsuperscript{12} In a substantive challenge, the public employer attacks the authority of the arbitrator by arguing that the parties'
collective bargaining agreement excludes the issue raised by the union from the class of arbitrable issues, and that consequently the parties did not intend to resolve the dispute through arbitration. For the most part, arbitrators have respected contract language placing substantive limitations on their arbitral power.13

Procedural arbitrability claims typically contest the timeliness of the filing and processing of the grievance,14 or the adequacy of the written statement of the grievance.15 Arbitrators usually have rejected technical procedural objections on grounds commonly used in private sector cases.16 Arbitrators

13. In Flint Bd. of Educ., 76 Lab. Arb. (BNA) at 1080, the Teachers' Association sought to arbitrate the question whether the Board of Education had complied with the teacher evaluation procedure set forth in the collective agreement. The arbitrator accepted the Board of Education's argument that the dispute was excluded from arbitration, ruling that this challenge to the evaluation procedure was so interwoven with the excluded issue of the termination of the probationary teacher that he had no jurisdiction over the matter. Id. at 1085-86. But see Veterans Admin. Medical Center v. American Fed'n of Gov't Employees, Local 1119, 77 Lab. Arb. (BNA) 725, 728 (1981) (Weiss, Arb.); Social Sec. Admin. U.S. Dept. of Soc. Servs. v. American Fed'n of Gov't Employees, Local 3347, 77 Lab. Arb. (BNA) 136, 138-39 (1981) (Atleson, Arb.).

In County of Orange, 76 Lab. Arb. (BNA) at 1040, the Union brought to arbitration a grievance claiming discrimination against an employee on the basis of sexual preference. The public employer argued that the dispute was beyond the substantive jurisdiction of the arbitrator because other means of appeal were open to the aggrieved individual. Id. at 1042. Although the parties had included a list of proscribed bases for unequal treatment in their agreement's non-discrimination clause, they did not mention homosexuality. Id. The arbitrator concluded that the matter was not arbitrable, ruling that other state and federal forums were available to hear a complaint raising this substantive issue. Id. at 1043-44. See also Long Beach Naval Shipyard v. Federal Employees Metal Trades Council, 75 Lab. Arb. (BNA) 63, 66 (1980) (Gentile, Arb.) (propriety of ship commanding officer's decision not within scope of arbitrator's authority).


15. For example, an arbitrator rejected a public employer's attack on the sufficiency of the written statement on the grievance form in Nassau County School Bd. v. Nassau Teachers Ass'n, 76 Lab. Arb. (BNA) 1044 (1981) (Sweeney, Arb.). The arbitrator stated that "grievance forms are customarily not treated by arbitrators with the same cold eye a judge might consider pleadings within a court of law." Id. at 1045. Cf. NLRB v. National Labor Relations Bd. Union, 76 Lab. Arb. (BNA) 450, 456 (1981) (Gentile, Arb.) ("[t]hough grievance filings are generally not read in narrow perspective," employer successfully challenged the sufficiency of the grievance).

16. Citing a series of private sector decisions, an arbitrator ruled that a teacher's grievance objecting to the denial of a leave request was timely filed in Geneseo Community Unit School Dist. No. 288 v. Geneseo Educ. Ass'n, 75 Lab. Arb. (BNA) 131 (1980) (Berman, Arb.). According to the arbitrator, although
have not drawn any distinctions between private sector and public sector arbitration in addressing procedural arbitrability claims.

B. RESERVED MANAGERIAL PREROGATIVES

The public employer also raises the power issue by appealing to specific provisions in the collective bargaining agreement that expressly reserve managerial discretion. The employer argues that a reserved prerogatives clause written in sweeping terms allocates to public management the exclusive right to decide matters of the same nature as those in dispute. Even in the absence of a broadly worded management prerogatives clause, management can claim that the language of particular contract provisions reserves to it the discretion to make specific decisions regarding the subject raised in the grievance. The public employer thus requests the arbitrator to respect the terms of the parties' agreement by denying the grievance on its merits.

Public management tends to read management rights clauses quite broadly. Generally, public sector arbitrators have rejected extreme interpretations by management, refusing to

the grievance was initiated after the contract's 18-day period of limitations from the date of denial of her leave request, the "event" grieved was the nonpayment of salary for unauthorized leave which fell within the 18-day period. See also Elizabeth Forward School Dist. v. Elizabeth Forward Educ. Ass'n, 77 Lab. Arb. (BNA) 181, 185-87 (1981) (Hays, Arb.).


19. Unlike the arbitrability arguments, the managerial prerogatives version of the power issue does not contest directly the arbitrator's authority to hear the matter in dispute. The practical effect of the reserved management rights claim, however, is the same: to deny the arbitrator's power and authority to review the actions of the public employer. Thus, the managerial prerogatives claim can be considered an alternate version of the power issue. See, e.g., Lake Superior State College Bd. of Control v. Lake Superior State College Faculty Ass'n, 76 Lab. Arb. (BNA) 109, 112-13 (1980) (Brooks, Arb.).

20. For example, in Board of Public Utilities, 76 Lab. Arb. (BNA) 446, 449 (undated) (Grether, Arb.), the public employer argued that it could make unilateral changes in established working conditions "in the interest of economy
give a management rights clause an interpretation that negates other contractual provisions.

C. CONTROLLING EXTERNAL LAW

The public employer also raises the power issue in arbitration by invoking public statutes, ordinances, and court decisions that are claimed to control the outcome of the matter in dispute. Public law external to the collective bargaining agreement has implications for the operation of every public employer's personnel system. In these cases, management attempts to persuade the arbitrator to accept an external statute, regulation, or judicial pronouncement as determinative of and efficiency" under its management rights clause, as long as the condition was not embodied in the collective agreement. The arbitrator found that the practice in question, providing employees with free coffee, had existed for ten years and had been cited by the employer during negotiations as a "fringe benefit worth at least 3.38133 cents per hour to each employee." Id. at 450. Granting the grievance, the arbitrator ruled that the management rights clause did not give the public employer the right to decrease the compensation package. Id. See also City of Greenfield v. International Bhd. of Teamsters, Local 695, 77 Lab. Arb. (BNA) 8, 11 (1981) (Yaffe, Arb.); State of Alaska v. Alaska Pub. Employees Ass'n, 74 Lab. Arb. (BNA) 459, 467-68 (1979) (Hauck, Arb.).

21. Occasionally, the public employer will join an arbitrability claim with a complementary management rights argument. For a particularly creative example of such a strategy, see Peters Township School Dist. v. Peters Township Educ. Ass'n, 76 Lab. Arb. (BNA) 68 (1981) (Hauman, Arb.). The school board argued that a grievance protesting its failure to inform a school nurse of derogatory memos placed in her personnel file was untimely, because it was not filed "within thirty (30) days after the occurrence of the event giving rise to the grievance" as required by the contract. Id. at 70. Alternatively, the school board relied on the contractual reservation of rights "to manage the educational process . . . and to direct the working forces" as precluding substantive arbitral jurisdiction over any matter implicating these rights. Id. at 69. As to the merits, the employer proffered the generous managerial prerogatives clause to support its absolute right to determine what was or was not a derogatory memo. Id. at 70. This triple-barrelled power issue attack failed, but the primary remedy sought by the grievant, that the evaluation resulting from consideration of these derogatory memos be removed from her personnel file, was ruled to be beyond the jurisdiction of the arbitrator. Id. at 71.

22. For example, in Grand Ledge Bd. of Educ. v. Eaton County Educ. Ass'n, 76 Lab. Arb. (BNA) 81, 82-83 (1980) (McDonald, Arb.), the union grieved the school board's position that the Michigan Open Meetings Law required that third-step grievances be heard in an open session. The school board argued that it was "under a statutory mandate to conduct meetings in compliance with the" state's sunshine law. Id. at 84. The contract's grievance procedure expressly called for a closed meeting. Id. at 83. Noting that the Open Meetings Law allowed a public body to meet in closed session on an individual personnel matter when the employee so requests, the arbitrator considered the ratified contract clause calling for closed sessions as a collective request sufficient to trigger the statutory exception to the open meeting requirement. Id. at 85-86. Grievance arbitrators, however, are not always this skillful in finessing external law issues.
the grievance dispute.23

While arbitrators in the public sector generally have considered the impact of external law,24 they have not always agreed with management’s reading of how that law affects the resolution of the grievance dispute.25 Arbitrators will resort to external law to interpret ambiguous contract references on the assumption that the parties were aware of the statutory context in which they negotiated their agreement.26

D. LIMITATIONS ON REMEDIAL POWER

One final way in which public management raises the power issue is by arguing that the arbitrator lacks the remedial authority to order the relief sought by the union. For example, in a case involving a school board’s refusal to renew the contract of a probationary teacher, management may contend that the arbitrator lacks the power to order the reinstatement of the employee, since ordering the teacher’s continued employment would preempt the school board’s exclusive power under state law to award tenure.27 In other cases, public management may argue that the grievance arbitrator does not have the power to modify a disciplinary penalty unless the contract expressly


grants that power to the neutral.  

Public management also has questioned whether an arbitrator has the power to order the public employer to pay monetary damages to the grievant. Public management has taken the position that statutes forbid the issuance of a "make whole" remedy. Arbitrators generally have considered statutory limitations on their remedial power, but have divided over whether to recognize these limitations as controlling.

III. THE SOURCES OF THE POWER ISSUE

This Article has addressed the variety of forms in which management has raised the power issue in public sector grievance arbitration. What can explain its ubiquity? On the most basic level, public management may see the power issue as a "winner" argument. A party to an adversarial proceeding naturally will raise its best arguments in the hope of prevailing in the forum. If public management can persuade the arbitrator that he or she lacks the power to hear the case or grant the requested relief, the argument obviously will prove useful. This bare utilitarian hypothesis, however, cannot account for the greater frequency of the power issue in public sector cases. Private sector management certainly would assert power issue


32. The reported cases do not support the assumption that the power issue is a sure "winner." Arbitrators regularly dismiss objections based on procedural arbitrability and remedial power grounds. Claims based on reserved managerial prerogatives, external law and substantive arbitrability enjoy a greater measure of arbitral acceptance, but hardly universal success.
arguments routinely if such contentions had some chance of success.

One possible explanation for the greater frequency of the power issue in the public sector is that the typical public sector arbitration clause is usually drawn more narrowly than the typical private sector arbitration clause. The standard private sector arbitration clause customarily bestows jurisdiction on the arbitrator to resolve all disputes concerning the interpretation or application of the provisions of the agreement. By comparison, a public sector arbitration clause often contains exceptions to the arbitration promise, either by specifically listing arbitrable issues or by excluding certain matters from the process.\textsuperscript{33}

While not fully elastic, public sector clauses delimiting the scope of arbitration do give public management a firmer foundation upon which to construct its substantive arbitrability argument.\textsuperscript{34}

Similarly, public sector collective bargaining agreements generally contain managerial prerogatives clauses couched in plenary language that can support legitimate arguments based on reserved power.\textsuperscript{35} Although private sector collective agreements often contain management rights provisions phrased in similarly sweeping terms, arbitrators have not applied the clauses as broadly as their actual language might permit.\textsuperscript{36} In the current inchoate state of public sector arbitral jurisprudence, however, the full import of management rights clauses remains unclear. Thus, since an expansive reading of such clauses has not yet been rejected in the public sector context, public managers will continue to assert the reserved rights version of the power issue as long as they have reason to believe that it might succeed.

\textsuperscript{33} Almost 27\% of the sample public sector arbitration provisions studied by the Bureau of Labor Statistics in 1975 contained significant exclusions from the arbitration procedure. BULLETIN 1833, \textit{supra} note 3, at 38.

\textsuperscript{34} Contract content, however, does not explain fully the frequency of procedural arbitrability claims in public sector cases, since public sector and private sector agreements typically contain similar time limits and other procedural requirements.

\textsuperscript{35} The enabling collective bargaining legislation often mandates reservation of managerial prerogatives over a broad class of issues. See, e.g., 5 U.S.C. § 7106 (Supp. IV 1980). Sometimes public management will point directly to statutory references as the source of its discretionary power even though such power is not expressly reserved in the terms of the parties' agreement. See, e.g., Immigration & Naturalization Serv. W. Regional Office v. National Border Patrol Council, Am. Fed'n of Gov't Employees, Local 1613, 77 Lab. Arb. (BNA) 638, 640 (1981) (Weckstein, Arb.).

Alternatively, the immaturity of public sector labor relations may explain the frequency of the power issue in public sector arbitration. While the organization of public employees dates back to the early nineteenth century, widespread collective bargaining in the public sector arose only in the 1960's. Final and binding arbitration as a mechanism for resolving grievance disputes in the public sector was not generally accepted until the 1970's. By comparison, private sector arbitration was a deeply rooted phenomenon by the 1940's and was virtually enshrined as labor-management orthodoxy by the Supreme Court in 1960 in the Steelworkers' Trilogy. The power issue, therefore, is arguably a characteristic of the infancy, or at best the adolescence, of the dispute resolution mechanism.

Public managers, having agreed to binding arbitration—perhaps under statutory compulsion—may remain uncertain as to its scope and skeptical as to its benefits. How can an outsider appreciate the real problems faced by the insiders? Will the arbitrator resolve the dispute in a manner consistent with management's operational needs? Why is this system of dispute resolution preferable to the old one, where public management had the last word? While private sector grievance arbitration arguably substitutes for the costly in-term strike, public union self-help during the term of a collective agreement is universally illegal and, in fact, rarely occurs. Understandably, public management has difficulty identifying what it receives in exchange for its promise to arbitrate. Uncertainty as

39. It might be added that some public managers are unskilled in the techniques of arbitration. They have been accused of lacking "sufficient expertise and experience" at the negotiating table, see, e.g., Bierman, Freedom of Contract and Public Sector Labor Relations, 12 Rut. L.J. 513, 537 (1981), and of not being motivated to meet "the militant union challenge." Shaw & Clark, The Practical Difference Between Public and Private Collective Bargaining, 19 U.C.L.A. L. Rev. 867, 873 (1972).
40. While told that arbitration brings peace and harmony to the public sector workplace, public management sees only a new set of disputes brought on by the unionization of its employees and by the establishment of a grievance and arbitration system. The promise of enhanced productivity and boosted morale may appear to be the phantom pot of gold. What is clearly visible, however, is a final and binding order of a grievance arbitrator reached through a risk-laden process of review of management's action.

By comparison, the public sector union readily can identify what it receives
to the scope of arbitration, as well as doubt as to its value, breeds managerial resistance to this comparatively new process, which manifests itself in attacks on the capacity of the arbitral institution.\(^4\)

A third possible explanation for the pervasiveness of the power issue in the public sector is the complex legal superstructure within which the public labor relations system has developed. Consider, for example, the perplexing legal environment that a school board faces. Although bound by a promise to arbitrate contained in a collective bargaining agreement with its teachers, the board also is controlled by a myriad of state statutes governing teacher contracts, tenure, minimum school days, etc.\(^4\) As a public body, the school board must comply with all existing legal regulations, not merely those embodied in its collective agreement with the union.\(^4\) The board owes an independent duty to its constituency to fulfill all its public obligations. In arbitration, the board faces the risk that the neutral will resolve the grievance dispute in a vacuum, devoid of external law considerations, or will misread those legal

from the arbitration undertaking—a final and binding adjudication of rights by a neutral to the controversy. If management's action is upheld, the union has suffered no added detriment other than the transaction costs of the arbitration process. Without arbitration, a union is left with the choice of accepting management's decision, or seeking relief through the cumbersome civil service or civil court systems. The availability of arbitration should force the government employer to respond more meaningfully to union complaints in the grievance procedure. While public management can still simply answer "no" through the steps of the grievance procedure, the ultimate availability of an arbitrator who can say "yes" should cause management to evaluate the merits of a union claim at an earlier stage of the dispute.


In the field of public employment, as distinguished from labor relations in the private sector, the public policy favoring arbitration—of recent origin—does not yet carry the same historical or general acceptance, nor... has there so far been a similar demonstration of the efficacy of arbitration as a means for resolving controversies in government employment.

Id.

42. The school board also must comply with constitutional strictures in personnel matters. See Finkin, The Limits of Majority Rule in Collective Bargaining, 64 Minn. L. Rev. 183, 239-73 (1980).

43. "The distinction between the public and private sector cannot be minimized.... The employer in the private sector is constrained only by investors who are most concerned with the return for their investment whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise." Pennsylvania Lab. Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 499-500, 337 A.2d 262, 264 (1975).
regulations to the detriment of the school board. By raising the power issue, the public school board seeks to avoid the potential constraint of an award that might bind it to a course of action inconsistent with what it perceives to be its other obligations under the law.\footnote{44} 

While all the reasons discussed so far probably explain, to some extent, the prevalence of the power issue in public sector arbitration proceedings, a more fundamental explanation must be considered. The power issue may reflect the basic conundrum of public sector labor relations: How can an elected public official share public power?\footnote{45} In the first instance, the very process of public sector collective bargaining with a labor organization raises the same basic question.\footnote{46} Public sector bargaining differs from private sector labor relations essentially because the employer is an elected governmental body, rather

\footnote{44} Courts generally will vacate an arbitration award that ignores or misreads external law. See Craver, supra note 5, at 348-50. Public management, however, would not be deterred from raising the external law version of the power issue in arbitration by the availability of ultimate vindication in court. The failure to raise the issue in arbitration may constitute a waiver of rights. Id. at 345 n.82. In addition, the transaction costs of perfecting an appeal are high and court review involves a delay in the implementation of management action. Therefore, public management will assert the power issue before the arbitrator to avoid the necessity of litigation.

\footnote{45} Sometimes this question is phrased in terms of the indivisible nature of government sovereignty, "an article of faith, not capable of being empirically tested." Feuille, Selected Benefits and Costs of Compulsory Arbitration, 33 INDUS. & LAB. REL. REV. 64, 66 (1979).

\footnote{46} To this day, public sector collective bargaining is unauthorized in a number of jurisdictions without enabling legislation. See, e.g., Commonwealth of Va. v. County Bd., 217 Va. 558, 578-79, 232 S.E.2d 30, 43 (1977). Some observers have suggested that public sector bargaining is incompatible with the democratic process. See R. Summers, Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique 3-9 (1976); Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 YALE L.J. 1107, 1123 (1969). While the era when the organization of public sector employees was considered un-American may have passed, the belief lingers that the activities of public sector unions are contrary to the public interest.

There is nothing new about taxpayer resistance to taxes or to taxpayer complaints about public employees. What may be quite new, however, is that hard times have created need for a villain; the taxpayers' poorly focused, half-articulated anxiety over rising costs of living, rising unemployment, and the problems of modern life are being focused sharply on a visible, slowly moving target: public employees and public employee collective bargaining.

than a private entrepreneur.\textsuperscript{47} One would expect that public sector grievance arbitration, as a product of that bargaining process, would be affected by the fact that one party is a governmental body. The prevalence of the power issue may be the consequence of transplanting a labor relations dispute resolution mechanism developed in the private sector into the distinctively different public sector environment.\textsuperscript{48}

Like their private sector counterparts, public sector bargainers leave gaps in their collective agreements. Some rules for ordering the public sector workplace are not expressed in the text of the parties' agreements; others are expressed in ambiguous language either by design or by inadvertance.\textsuperscript{49} The grievance arbitrator must determine the parties' intent, even if the language of their agreement provides no clear direction.\textsuperscript{50} While public managers may have adjusted to the process of bilateral ordering involved in periodic collective bargaining, the interstitial and supplementary contract-writing process inherent in grievance arbitration\textsuperscript{51} presents yet another challenge to the authority of the public employer. Although public officials may be willing to live with the product of their own negotiation, they may be more reluctant to accede to a process wherein an outsider to the collective arrangement draws a "bargain."\textsuperscript{52}

\textsuperscript{47} The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. Summers, \textit{Public Sector Bargaining: Problems of Governmental Decisionmaking}, 44 U. Cin. L. Rev. 669, 670 (1975).

\textsuperscript{48} The basic and bitter battle over the sovereignty issue, which so long barred the way to acceptance of unionism in the public service, has by no means been terminated with the now-widespread pattern of recognition and written agreements. \ldots [T]he battle \ldots often moves to the arena of the arbitrator and his scope of authority under the contract arbitration clause.


\textsuperscript{50} An arbitrator referred to the grievance arbitrator's customary role as "gap filler" in City of Fairmount v. United Steelworkers of Am., Local 12811, 73 Lab. Arb. 1259, 1262 (1979) (Lubow, Arb.). The phrase is as unseemly as the customary designation of the arbitrator as the "creature of the parties' collective bargaining agreement," see, e.g., City School Dist. Bd. of Educ., v. Mayfield, Ohio Educ. Ass'n, 71 Lab. Arb. (BNA) 1044, 1046-47 (1978) (Siegel, Arb.), but the "gap filler" appellation does describe the function performed by both the private and public sector grievance arbitrator.


\textsuperscript{52} "The employers are generally loath to surrender their traditional pre-
prevalence of the power issue therefore may be due to public management’s reluctance to cede control to arbitrators over the establishment and administration of the terms and conditions of employment of public workers.53

Public sector collective bargaining is essentially a political process.54 Public officials are politically accountable for their labor relation policies—and for other policies as well—at the next election.55 An incumbent’s continuation in office is dependent upon his or her ability to accommodate the conflicting interests of a heterogeneous constituency comprising taxpayers, public service users, and providers of public services.56 This

rogative of determining conditions of employment and some are not yet strongly committed to public employee collective bargaining.” Anderson, Mac-Donald & O’Reilly, Impasse Resolution in Public Sector Collective Bargaining—An Examination of Compulsory Interest Arbitration in New York, 51 St. John’s L. Rev. 453, 509 (1977). After discussing court decisions accepting grievance arbitration as the preferred method of dispute resolution in the public sector, one commentator concludes that “we have witnessed the nearly unabated loss of control by the public body over the management of its affairs and . . . this assault will continue.” Vaccaro, Is Public Sector Grievance Arbitration Different from the Private Sector: A Management Perspective, 7 J. L & Educ. 543, 552 (1978). He recommends “a more aggressive challenge” by management on arbitrability issues to recapture “government prerogatives, authority and power.” Id. at 552-53.

53. This concern about the delegation of decision-making power to an ad hoc neutral is the central focus of attacks on the constitutionality of binding interest arbitration. See, e.g., Dearborn Firefighters Union Local No. 412 v. City of Dearborn, 394 Mich. 229, 242-72, 231 N.W.2d 226, 228-43 (1975); Note, Binding Inter- est Arbitration in the Public Sector: Is It Constitutional?, 18 WM. & MARY L. Rev. 787, 797-804 (1977). Although the process of interest arbitration generally has passed constitutional muster, the delegation argument still raises a considerable policy question for designers of public sector labor relations schemes. See generally Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C.L. Rev. 557, 561-68 (1980) (discussion of the common constitutional challenges to public sector interest arbitration statutes).

54. “Collective bargaining in the public sector is ‘political’ in any mean- ingful sense of the word.” Abood v. Detroit Bd. of Educ., 431 U.S. 209, 257 (1977) (Powell, J., concurring). Professor Clyde W. Summers has explored thoroughly many implications of the political nature of public sector collective bargaining in his seminal article, Public Employee Bargaining: A Political Perspective, supra note 1. He does not address the impact of the political context on the public sector grievance arbitration process, but the conclusions reached in this essay are generally consistent with Summers’s premise that labor relations in the public sector are “shaped . . . by political forces.” Id. at 1156.

55. “We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions.” Summers, supra note 47, at 670.

56. “The officials who represent the public employer are ultimately respon-sible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters—taxpayers, users of particular government services, and government employees.” Abood v. Detroit Bd. of Educ., 431 U.S.
polycentric problem of responding to competing demands in a manner that achieves a sufficient measure of constituent approval is solved by public officials through political means.57 In negotiating with unions representing the employee-providers of public services, public managers seek to achieve a cost and service level commensurate with their countervailing obligations to those who use and pay for government operations. Officials are subject to lobbying and other exercises of political pressure by groups not directly involved at the bargaining table.58 A manager's failure to accommodate these conflicting political demands can lead to his or her defeat at the polls.59

By comparison, labor arbitration decisionmaking is not a political process; it is fundamentally ill-suited to achieve politically acceptable outcomes. Established principles of contract interpretation, not political considerations, control the arbitrator's decisions.60 An arbitrator is inexperienced in the art of political compromise; the purely adjudicative aspects of the arbitrator's traditional role in resolving disputes do not include the accommodation of constituent interests.61 Furthermore,

209, 228 (1977). One commentator has suggested that retribution at the polls by dissatisfied union members is the greatest threat to the public manager. Clark, Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem, 44 U. Cin. L. Rev. 680, 682-83 (1975). Other than a few anecdotes, however, he supplies no empirical support for his theory. Id.

57. The problem, of course, may not always be solved. Officials do lose elections. But the point is that public managers employ political strategies in order to avoid that fate. See Haefele, A Utility Theory of Representative Government, 61 AM. ECON. REV. 350, 350-66 (1971).


59. As Professor Summers describes the political perspective, "Decision-making in government . . . is a highly complex process in which a variety of procedures, structures, and pressures interact in countless permutations to produce a decision. It is less principled than pragmatic, less an orderly system than a patchwork of processes." Summers, supra note 1, at 1158.

60. See Abrams, supra note 6, at 564. As part of his defense of interest arbitration, one commentator characterizes grievance arbitration as "an arm's length adjudication" as compared with the "process of adjustment and accommodation" involved in interest arbitration. "In grievance . . . arbitration, two plus two equals four, or at least should equal four in most situations. But in interest arbitration . . . two plus two may equal three and a half, or five, or seven, or nine or some other number—possibly four, but not likely." Anderson, Arbitration and the Law: "A Better Way," 30 LAB. L.J. 259, 262 (1979). The variable calculus of interest arbitration may very well be the result of political considerations. The predictable addition of grievance arbitration is the result of applying established principles of arbitral jurisprudence to the facts of the case at hand.

61. In discussing interest arbitration, Arbitrator Peter Seitz points to the deficiencies in evidence that make it difficult, if not impossible, for the neutral to assume the "quintessentially governmental" function of "the allocation of sparse public funds among services and needs of a community":
the apolitical nature of arbitration decisionmaking inhibits traditional opportunities available to constituent groups—including other public sector unions—to influence policymaking through political means.\textsuperscript{62} The public cannot lobby or threaten an arbitrator with political retaliation.\textsuperscript{63} Although the resolution of grievance disputes does have an unavoidable political impact,\textsuperscript{64} arbitrators lack sufficient information and expertise to

Although the city's case may include evidence concerning many matters, \textsuperscript{65}[the interest arbitrator] is not likely to have in that record a full adversary showing as to the fiscal problems of the community; an evaluation, on a priority basis, of the claim in the case as compared with allegedly essential services that might be affected thereby; a comparison of the relative inequities suffered by the . . . unions whose contracts were coming up for renegotiations; et cetera.

Seitz, \textit{The Gotterdammerung of Grievance Arbitration}, \textit{2 EMPL. REL. L.J.} 386, 394-95 (1977). While the grievance arbitrator does not enjoy the interest arbitrator's broad quasi-legislative charter in making allocative decisions, resolving a single important dispute may have a broad impact on governmental resources and policy choices. The public sector grievance arbitrator rarely is given enough information to make those larger choices.

\textbf{62.} One might argue that grievance arbitration should be condemned broadly as inconsistent with a democratic form of government. \textit{See} R. DAHL, \textit{A PREFACE TO DEMOCRATIC THEORY} 145 (1956). Binding review power over personnel decisions exercised out of the public view by an unelected, unaccountable private person certainly sounds suspect. If one assumes, as a normative premise, that "our political system should be structured to reflect the will of the governed, as expressed through a pluralistic diffusion of interests, by allowing for active and legitimate groups to make themselves heard during the public decision processes," \textit{Feuille, supra} note 45, at 71, then the apolitical grievance arbitration process, insulated from nonparty input, might fail the test. \textit{Compare} Greeley Police Union v. City Council, 191 Colo. 419, 422-23, 553 P.2d 790, 792 (1976) (provision of constitutional amendment providing for binding arbitration between police and city held an unconstitutional delegation of legislative authority) \textit{with} Local 1226, Rhinelander City Employees' AFSCME v. City of Rhinelander, 35 Wis. 2d 209, 220, 151 N.W.2d 30, 36 (1967) (binding arbitration clause not an unlawful infringement on the legislative power of the city). Court adjudication, equally insulated from the rough-and-tumble of lobbying politics, would also fail the test. An apolitical judicial system certainly is viewed as consistent with our national political system.

\textbf{63.} Ex parte communications to the public sector arbitrator, of course, are censurable acts for which a court can vacate a favorable ruling. Similarly, threats of retaliation voiced in terms of the continued acceptability of the arbitrator are equally deplorable. The established protocols of labor arbitration do not allow for the use of such traditional political tools. \textit{See} Abrams, \textit{The Integrity of the Arbitral Process}, \textit{76 MICH. L. REv.} 231, 244-51 (1977).

\textbf{64.} While most personnel matters—such as seniority, protection against unjust disciplinary action, and scheduling of vacations—involv limited issues of the kind that labor arbitrators are experienced in resolving, in the public sector these can take on a political dimension. . . . [T]he political implications of a system that subjects such disputes to binding decision by an arbitrator are . . . direct and substantial. It means that an arbitrator is to be given the political task of assessing the impact of proposed rules on the interests of the broader community as well as those of employees.

Grodin, \textit{Political Aspects of Public Sector Interest Arbitration}, \textit{1 INDUS. REL. L.J.}
assess the political implications of their actions.\textsuperscript{65}

The following three scenarios demonstrate the difference between political decisionmaking by public officials and adjudicatory decisionmaking by grievance arbitrators:

1. The City discharges an employee after the local newspaper reveals that the employee is an active leader in the local branch of the American Nazi Party. Representatives of citizens groups in the City have called upon City officials to remove the worker from the payroll. Although no proof exists that the employee's Nazi activities have interfered with job performance, City officials are concerned about retaliation at the polls. The employee's union contests the discharge in arbitration. Assuming the collective bargaining agreement requires "just cause" for discharge, a grievance arbitrator probably would not uphold management's politically motivated decision on the basis of private sector interpretations of that contract

\textsuperscript{1}, 12-13 (1976). Although Professor Grodin's comments were directed toward interest arbitration, they are equally applicable to the grievance arbitration process.

\textsuperscript{65} Professor Eric Schmertz, an experienced and talented labor arbitrator, has suggested a more expansive role for the grievance arbitrator as protector of the public interest. In \textit{The Public Safety and Personnel Cuts in the New York City Fire Department: The Role of the Impartial Chairman}, 2 EMPL. REL. L.J. 155 (1976), Schmertz defended his decision in City of New York Fire Dept. v. Uniformed Firefighters Ass'n, 66 Lab. Arb. (BNA) 261 (1976) (Schmertz, Arb.), which upheld the City's contractual right to reduce staffing levels in the Fire Department, while enjoining further layoffs that the arbitrator determined would endanger public and firefighter safety. Schmertz argues that the grievance arbitrator must represent the public interest and welfare, since there is no other forum ready to assume that role. \textit{Id.} at 159. The State Supreme Court, on review of Schmertz's decision, vacated that portion of the award barring the city from future layoffs, ruling that such an award constituted an "intrusion into the powers . . . of the executive and usurpation of the legislative function." \textit{Id.} at 162.

The practical difficulty with the Schmertz model is not that certain experienced and wise arbitrators could not do a better job at protecting the public interest than the parties to a collective agreement, but that the grievance arbitrator has no source of reliable information as to what that public interest is. \textit{Cf.} Seitz, \textit{supra} note 61, at 394-95. The legal difficulty with the Schmertz model is that no statute authorizes the public protector-grievance arbitrator model. Schmertz reads the New York City collective bargaining law as contemplating a new layer of public authority in the creation of an arbitration mechanism. There is no indication, however, that the enabling legislation was designed to accomplish this goal. Authorization of this expansive conception of the role of the public grievance arbitrator would have to come through explicit legislative grant, rather than through reliance on arguments addressed to the inescapable necessity of this model.
standard.66
2. City officials decide to lay off a number of City workers to reduce taxes substantially before next year's election. Although the City currently has enough money to pay the existing work force, officials believe that it is politically wiser to lower taxes. The union contests the City's action in arbitration. Assuming the City's decision fundamentally undermines the integrity of the collective bargaining agreement, the grievance arbitrator might very well censure the action under established principles of adjudication developed in the private sector.67

3. City officials decide to contract out a government service. The reason for the decision—although not its public justification—is to allow elected officials to pay off a political debt to a crony. The union representing the laid-off employees attacks the decision in arbitration. Assuming the collective bargaining agreement is silent on the issue of subcontracting, an arbitrator, applying established private sector principles, would review the reasonableness of management's action.68 Public management would defend its action on grounds other than political spoils, but absent a showing of some independent economic justification for the decision, the arbitrator might grant the grievance.

The point to be emphasized is not that political decision-making is better or worse than principled adjudicative decision-making, but simply that the two processes are different. Since the arbitration process is insulated from political pressure orchestrated by public officials, public management has no option other than to raise the power issue in order to defend its right to consider political factors in making decisions affecting personnel.69

69. Marshalling political power may be useful in collective bargaining, Summers, supra note 47, at 676-77, but that strategy is unavailing in persuading a grievance arbitrator. Of course, complete disenchantment with the arbitration process, combined with adequate political muscle, ultimately could lead to
The prevalence of the power issue in the public sector may be the result of public management's concern that the arbitrator will not, and cannot, render a judgment maximizing, or even contemplating, political considerations. Were the arbitrator to administer his or her own brand of "political" justice, the award certainly would be subject to judicial reversal. The power issue stands as the public employer's front line of defense against encroachment by the apolitical grievance arbitration process upon the essentially political nature of labor relations decisionmaking in the public sector.

IV. IMPACT OF THE POWER ISSUE

Although this Article has identified some of the reasons why the power issue arises so frequently in public sector grievance arbitration, reaching broad normative judgments concerning its effect on the arbitral mechanism is more difficult. Conceivably, public management's routine invocation of the power issue could undermine the effectiveness and legitimacy of public sector arbitration. If that occurs, the public sector would lose the salutary effect that the grievance arbitration system has had on worker productivity and labor-management relationships in the private sector. On the other hand, the arbitration process is a flexible mechanism; it may be able to ab-
sorb the "slings and arrows" of the power-issue attack and adapt to the public sector context.

Arbitrators are personally sensitive to attacks on their power and do not want to be seen as usurpers, aggrandizing authority not bestowed by the contracting parties. Chilled by threats to their continued acceptability, some arbitrators might be inclined to accept power arguments in inappropriate situations. The risk to the future of public sector arbitration would then be substantial.\(^7\)

The habitual invocation of the power issue can be criticized on grounds of efficiency, at least in those cases where the issue is raised without a legitimate contractual basis. Burdening the arbitration process with spurious arguments of any kind is dysfunctional. On the other hand, raising even meritless power questions might have a positive therapeutic effect for public managers, much like the catharsis employees experience by arguing frivolous claims to the private sector arbitrator.\(^7\) On balance, however, public management gains little in the long run by raising worthless power issue claims in the increasingly expensive and time consuming arbitration procedure.\(^7\)

Predicting future developments with regard to the prevalence of the power issue in public sector grievance arbitration is exceedingly difficult. If the routine assertion of the power issue is simply a product of the immaturity of public sector labor relations systems, their continued development and increasing stability should eliminate the habitual invocation of the issue. The mere passage of time and the accumulation of labor relations experience, however, will not eliminate the more fundamental sources of the power issue. A complex matrix of surrounding laws and judicial decisions will continue to bind public bodies, and public managers will continue to raise the power issue in arbitration in an attempt to discharge these coexisting responsibilities. Public officials will remain obligated to heterogeneous constituencies and may continue to believe that apolitical decisionmaking cannot satisfy the political demands of their offices. Thus, increased familiarity with the

\(^7\) "There is little point in having arbitration if the arbitrator acts solely, or primarily, as a rubber stamp for predetermined management decisions." Grodin, supra note 64, at 9.


\(^7\) See BULLETIN 1833, supra note 3, at 29, Veglahn, Arbitrations Costs/Time: Labor and Management Views, 30 LAB. L.J. 49, 49-57 (1979) (labor arbitration process is expensive and time consuming).
processes of collective labor relations is unlikely to make public management less disposed to raise the power issue.

In one important area, a shift is foreseeable in the determinants contributing to the prevalence of the power issue in the public sector. Experience with arbitration should engender a greater degree of confidence in the men and women who administer the process as neutrals. In general, arbitrators are a talented group of skilled adjudicators. To foster this confidence and enhance the legitimacy of the arbitration mechanism, the corps of arbitrators must develop a distinctive public sector arbitral jurisprudence consistent with the special characteristics of the arena. There is every reason to believe that public sector arbitrators can meet this challenge.\(^7\)

The arbitrators' task is to develop a distinctive mode of decisionmaking in harmony with the public sector context. Since statutes and ordinances are often part of the record of a public sector case,\(^7\) public sector arbitrators will have to perform the generally unfamiliar task of interpreting public law.\(^7\) Managerial rights clauses and substantive benefit clauses will have to be interpreted, to borrow Justice Reed's phrase, "with as little destruction of one as is consistent with the maintenance of the other."\(^7\) Creating a distinct public sector arbitral jurisprudence does not mean establishing a set of principles

76. Referring to public sector grievance arbitration, Arbitrator Richard Bloch recently stated, "The good news is that it will become more sophisticated. The bad news is that it will have to be." Speech, Labor-Management Relations Service, U.S. Conference of Mayors—American Arbitration Association Conference, quoted in 897 GOV'T EMPL. REL. REP. (BNA) 16, 16 (1981) [hereinafter cited as Speech].

77. Statutes and ordinances often are incorporated expressly into the collective agreements that arbitrators are asked to interpret and apply. See, e.g., Indiana Army Ammunition Plant v. National Fed'n of Fed. Employees, Local 1581, 64 Lab. Arb. (BNA) 1021, 1024-25 (1975) (Render, Arb.).

78. A serious question has been raised concerning the ability of private sector arbitrators to interpret the laws:

There is . . . no reason to credit arbitrators with any competence, let alone any special expertise, with respect to the law, as distinguished from the agreement. [Many] arbitrators lack any legal training at all, and even lawyer-arbitrators do not necessarily hold themselves out as knowledgeable about the broad range of statutory and administrative materials that may be relevant in labor arbitrations.


To serve well as adjudicators in the public sector, grievance arbitrators must learn to interpret the law as well as they have learned to interpret the contract. There is simply no way to avoid the task when statutory provisions are part of the record of the case.

under which public management wins every case. What it does mean is that public sector arbitral decisionmaking must take account of the fundamentally different context within which the arbitral mechanism must operate.

Adapting the apolitical private sector grievance arbitration system to the politically dominated labor relations system in the public sector presents the most difficult challenge. Some might suggest that accommodation to the political side of public sector labor relations would taint the pristine atmosphere of principled dispute resolution. Under this view, the nonpolitical resolution of grievances is seen as a laudable characteristic of private sector arbitration deserving protection at all costs in the public sector. This view, however, ignores the essentially political nature of grievance resolution in the public sector. To remain blissfully ignorant of the political implications of the process deserves the parties and undermines acceptability of the process in the public sector.

While the dissonance between political and principled decisionmaking cannot be ignored, the path of reconciliation is not obvious. One alternative would be to enhance the political credentials of the grievance arbitrator through popular election or through periodic appointment by a politically accountable elected official. This strategy, however, would alter fundamentally the adjudicatory nature of the process as now practiced. Under this alternative, a grievance arbitrator would have a direct or indirect constituency to consider in resolving disputes. If the grievance arbitrator and the public employer shared the same constituency, the arbitration process would lose its neutral character. Even if this were not the case, a politician/arbitrator would lose any claim to objectivity. If, for example, the grievance arbitrator were politically accountable to a state-wide or regional constituency, the arbitrator might resolve disputes according to a set of political considerations differing materially from those of a particular local public employer. Moreover, there is no indication that public employers—or public unions, for that matter—would prefer a system

80. But see Summers, supra note 47, at 672 ("The major decisions made in public employee bargaining not only are political, but in my view must be, and ought to be, political.").

81. Professor Grodin rejects this solution to the problem of politically irresponsible interest arbitrators because of its impact on the "neutral character" of the arbitrator. Grodin, supra note 64, at 16. He adds that "to the extent that the arbitrator's constituency is the same as the legislative body that would otherwise exercise authority over the policy questions posed, the process becomes redundant." Id.
in which grievance arbitrators play a purely political role in resolving disputes. The problem, therefore, is to preserve the neutral and objective character of private sector grievance arbitration, while recognizing that the system must operate within a distinctive political context.

Unelected public sector arbitrators cannot substitute their personal hierarchy of political values for those of elected officials, and the established protocols of grievance arbitration do not allow for considering the political acceptability of an award as a decisional norm. Nevertheless, public sector arbitrators do have a source through which some political realities are revealed: the public sector collective bargaining agreement, a product of a political accommodation of conflicting interests. The agreement, read in light of the political context within which it was negotiated, must stand as the definitive and unalterable text in the public arena. By exercising a full measure of self-restraint, the public sector arbitrator can remain true to that political bargain. Expansive principles of grievance resolution developed in the private sector should not be imported wholesale into the public sector without careful consideration of their relevance. A distinctive public sector arbitral jurisprudence with decisional principles finely tuned to the context should be the arbitrator's best guide to resolving grievance disputes in the public sector.

82. Robert Coulson, President of the American Arbitration Association, recently stated with regard to interest arbitration, "Parties do not trust even the best motivated, most sophisticated of labor arbitrators to stumble around in their collective cabbage patch, dispensing personal concepts of industrial justice." Speech, supra note 76, at 14. A grievance arbitrator dispensing personal concepts of political wisdom would be equally unappealing. Given the choice, it appears unlikely that parties would opt for purely political decisionmaking over principled grievance adjudication.

83. The public sector arbitrator also must recognize the distinctive character of some of the functions performed in the public service and absorb them into the process of dispute resolution. For example, while no arbitrator in the private sector would uphold a disciplinary suspension of an employee for failure to wear a uniform hat while off duty, a public officer's cap and uniform serve "special purposes." City of Erie, Pa. v. Fraternal Order of Police, Hass Memorial Lodge, 73 Lab. Arb. (BNA) 605, 606 (1979) (Kreimer, Arb.). In City of Erie, the arbitrator upheld a five-day disciplinary suspension of a law officer who failed to wear his uniform hat off duty, recognizing that "[a] police force is a quasi-military organization which differentiates it from the usual industrial or governmental group of workers." Id. Accord City of Rochester, Mich. v. City of Rochester Police Employees, Local 3075, 76 Lab. Arb. (BNA) 285, 289 (1981) (Lipson, Arb.). But see Adjutant Gen. v. National Ass'n of Gov't Employees, Local R8-22, 77 Lab. Arb. Rep. (BNA) 203, 207 (1981) (Lipson, Arb.) Similarly, in State Univ. v. Civil Serv. Employees Ass'n, Inc., 74 Lab. Arb. (BNA) 293, 301 (1980) (Babiskin, Arb.), which upheld the termination of an employee for selling drug capsules to an undercover agent on campus, the arbitrator could not
Returning to the three grievance scenarios discussed above, a public sector arbitrator should respond to such grievances in a way that both respects the political nature of public sector labor relations and also protects the neutrality and objectivity of the arbitration process:

1. The arbitration should review the discharge of the public worker for activity on behalf of the American Nazi Party under a distinctly public sector gloss of what is meant by "just cause." The arbitrator should consider not only the first amendment implications of the termination, but also the government's right to exclude from public service those whose conduct raises serious questions about their loyalty to the established form of government.

2. The layoff of City workers to allow for a reduction of taxes would violate no express provision of the

"ignore the special responsibility the State University has to its students and their parents." Id. See also City of Wilkes-Barre v. International Bhd. of Teamsters, Local 401, 74 Lab. Arb. (BNA) 33, 36 (1980) (Dunn. Arb.) (city employee could not be discharged for drug use if it did not interfere with job performance).

On the other hand, the public sector arbitrator must not confuse self-restraint with obeisance to managerial pronouncements. In a scholarly and thoughtful opinion setting aside the termination of a public employee for "whistle-blowing," one arbitrator reminded the public employer, "A citizen does not lose his rights as a citizen simply because he goes to work for the government." Town of Plainsville, Conn. v. American Fed'n of State, County & Mun. Employees, Local 1303, 77 Lab. Arb. (BNA) 161, 170 (1980) (Sacks, Arb.).

84. For example, the arbitrator applied a distinctly public sector gloss on the "just cause" standard in Delaware River Port Auth. v. Independent Bridge Workers, 76 Lab. Arb. (BNA) 350 (1981) (Raffale, Arb.). The Authority had discharged a toll collector for seriously assaulting a motorist after the motorist spit at him. Noting that "spitting is serious provocation," the arbitrator stated that a discharge would be too severe a penalty were the employer not "a public institution and . . . consequently, responsible for public safety in those areas under its jurisdiction." Id. at 354.

The reaction of the public to the outrage committed by the employee is a valid standard for determining just cause. The public is unlikely to tolerate a public authority treating with restraint any atrocity committed on an individual member of the public, no matter what the provocation. . . . The idea that the public should react differently is irrelevant. The reaction of the public is relevant when dealing with an organization accountable to the public.

Id. at 355. But see City of Portland Bureau of Police v. Portland Police Ass'n, 77 Lab. Arb. (BNA) 820, 830 (1981) (Axon, Arb.) (arbitrator rejects public management's argument that discharge of policemen was warranted because of effect on "public trust and confidence").


collective agreement. Therefore, considering the contract as the controlling guide, the arbitrator should respect the literal terms of the parties' agreement and deny the grievance.87

3. The subcontracting of a governmental function to a political crony violates no express contract prohibition. Under this suggested model of the arbitrator's appropriate role in resolving public sector disputes, the arbitrator should deny the grievance.88 While this outcome may sound unappealing, redress might be available in other fora. The subcontract may violate state law, and a criminal action may lie against the responsible public officials. In any case, the electorate will hold the public officers politically accountable for their decision. A public sector arbitrator's role is only to interpret and apply the collective agreement, not to right all public wrongs through an institution ill-designed to achieve such a goal.89

V. CONCLUSION

One cannot conclude that public management is wrong in raising the power issue. The power issue is the natural and foreseeable result of adopting arbitration as the means of


88. Again, an express contract prohibition on subcontracting would mandate the granting of the grievance.

89. Professor Grodin has suggested that interest arbitration decisions should be subjected to "[s]ome form of meaningful review . . . to ensure" that the bounds set by law on the interest arbitrator's power "are not overstepped." Grodin, supra note 64, at 21. See also Comment, Judicial Review of Labor Arbitration Awards Under Pennsylvania's Public Employee Relations Act, 83 Dick. L. Rev. 795, 816 (1979) (because the public interest is directly implicated as a result of the wide-reaching effects of an arbitrator's decision in a public sector grievance arbitration, a broad standard of court review is appropriate). While judicial review of grievance arbitration decisions can serve to check overreaching by arbitrators, courts cannot act on a regular basis as a substitute forum for the input of political considerations into the resolution of grievance disputes. The courts, even when operated by popularly elected judges, are institutionally incapable of ad hoc political decisionmaking. Cf. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 58-59 (1973) ("[T]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.").
resolving labor disputes in the public sector. Grievance arbitration must therefore be tailored to the distinctive task at hand—the resolution of disputes between the government and a union representing public workers. The process will flourish in the public sector only if grievance arbitrators appreciate the reasons for the prevalence of the power issue and accommodate the distinctive needs of the public sector. Public enterprise, and the public it serves, will benefit from a successful reconciliation of the principled decisionmaking of the arbitration process and the political decisionmaking inherent in the public sector labor relations system.