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Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

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JAY E. GRENIG*

Introduction

In the usual labor arbitration, the parties authorize the arbitrator to tell them how their collective bargaining agreement should be interpreted and applied.[1] The arbitrator is ordinarily confined to the interpretation and the application of the langauge of the agreement — the "internal law"[2] — and forbidden to add to or modify the terms of the agreement.[3] How a labor arbitrator should interpret and apply statutes and regulations — the external law[4] — has been a matter of continuing debate.[5]

According to the Supreme Court, an arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agree-

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* Associate Dean for Academic Affairs and Professor of Law, Marquette University Law School, Milwaukee, Wisconsin. B.A. 1966, Willamette University; J.D. 1971, University of California Hastings College of Law.

1. St. Antoine, *Deferral to Arbitration and Use of External Law in Arbitration,* 10 IND. REL. J. 19 (1988) (hereinafter cited as "St. Antoine").

2. "Internal law" is the law of the parties' collective bargaining agreement. D. Feller, *Relationship of the Agreement to External Law,* in LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK 33 (Barreca, Miller & Zimny eds. 1983) (hereinafter "Feller").

3. Mittenthal, *The Role of Law In Arbitration,* in PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 42, 46 (Rhemus ed. 1968) (hereinafter "Mittenthal"); *see also* St. Antoine, *Discussion,* in PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 75, 77 (Rhemus ed. 1968) ("[The contract] is the source and limit of [the arbitrator's] authority, and [the arbitrator] has no license to look beyond its borders for some external standard by which to nullify or restrict its operation.") (hereinafter "St. Antoine, *Discussion*").

4. "External law" includes the law imposed by statutes, decisions of courts and administrators, regulations, and ordinances. *See* A. Zack & R. Bloch, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 27 (1983); F. Elkouri & E. Elkouri, HOW ARBITRATION WORKS 366-95 (4th ed. 1985).

5. *See, e.g.,* Cox, *The Place of Law in Labor Arbitration,* in SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 76 (McKelvey ed. 1957) (hereinafter "Cox"); PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (D. Jones ed. 1967); and PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (Rhemus ed. 1968); Kramer, *External Law and the Interpretive Process,* in PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 149 (W. Gershenfeld ed. 1986); *Arbitration and the Courts: Is the Honeymoon Over?,* in PROCEEDINGS OF THE FORTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 25 (Gruenberg ed. 1989) An excellent discussion of this debate can be found in Edwards, *Labor Arbitration at the Crossroads: The "Common Law of the Shop" v. External Law,* 32 ARB. J. 65 (1977) (hereinafter "Edwards").

ment.[6] An award draws its essence from the collective bargaining agreement if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention.[7] While an arbitrator may look for guidance from many sources, the Supreme Court has ruled that the arbitrator must not base the award solely upon the arbitrator's view of the requirements of enacted legislation.[8]

In *Alexander v. Gardner-Denver Co.*[9] the Supreme Court, quoting from *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[10] explained the source of an arbitrator's authority as follows:

> [An arbitrator's] source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.[11]

Recently the Seventh Circuit considered the authority of an arbitrator to base his or her award upon the requirements of external law.[12] The court held that an arbitrator had exceeded his authority by resolving a grievance arising under a collective bargaining agreement through consideration of external law. Although he had found the contract language to be unambiguous, the arbitrator stated that he was not only authorized, but required, "to apply applicable law in deciding issues in arbitration cases."[13]

According to the Seventh Circuit, the arbitrator was "plainly wrong" to base his decision not upon the parties' bargain, but rather upon his "view of the requirements of enacted legislation."[14] The court concluded that the arbitrator had exceeded the scope of the submission and that the award could not be enforced.[15]

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6. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

7. Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3rd Cir. 1969).

8. *Enterprise Wheel,* 363 U.S. at 597.

9. 415 U.S. 36 (1974). *See* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983) (arbitrator's award upheld although his interpretation conflicted with EEOC conciliation agreement, where award did not require employer to violate that award).

10. 363 U.S. 593 (1960).

11. 415 U.S. at 53.

12. Roadmaster Corp. v. Production & Maintenance Employees' Local 504, 851 F.2d 886 (7th Cir. 1988).

13. *Id.* at 889.

14. *Id.*

15. *See* Bennett v. Meader, 208 Conn. 352, 545 A.2d 553, 559 (1988) (written submission setting

With respect to the proper application of external law to the construction and interpretation of collective bargaining agreements, some arbitrators contend that the arbitrator is limited by the four corners of the collective bargaining agreement and by stepping beyond those boundaries the arbitrator is acting outside his or her authority.[16]

Some arbitrators assert that every contract is deemed to embody the law, and since the arbitrator interprets and applies the agreements, the arbitrator must interpret and apply all the law.[17] Where the contract and the law conflict, Prof. Cox contends that an arbitrator should respect the law and ignore the contract, because an award in violation of the law demeans the arbitration process by inviting noncompliance and judicial intervention.[18]

Finally, there is the view that an arbitrator's award may permit conduct forbidden by law although sanctioned by contract, but it should not require conduct forbidden by law even though sanctioned by contract.[19]

This article examines the question of when an arbitrator can consider external law in the arbitration of public education labor disputes.

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forth arbitrable issues gives arbitrator his or her authority and controls parties rights on judicial review).

16. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. CHI. L. REV. 30, 33 (1971) ("[A]rbitrator should respect the agreement and ignore the law. There is no reason to credit arbitrators as a class with any special competence with respect to the law."); St. Antoine, *supra* note 1, at 20 (if there is a conflict between the arbitrator's notion of what the contract requires and the arbitrator's view of what a particular statute requires, the arbitrator should follow the contract because the parties have asked the arbitrator to interpret and apply the contract — not the law). *See also* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration,* in PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 1, 16 (D. Jones ed. 1967) (hereinafter "Meltzer, *Ruminations*"); Feller, *supra* note 2, at 37; Edwards, *supra* note 5, at 90.

17. Howlett, *The Arbitrator, the NLRB, and the Courts,* in PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 67, 83, 85 (D. Jones ed. 1967). *Accord* Morris, *Comment,* in PROCEEDINGS IN THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 65, 71-72 (Somers & Dennis eds. 1971). *See, e.g.,* Wausau Dist. Pub. Schools, 64 LA 187, 192 (Marshall, 1975) (applicable provisions of state and federal law "impress" themselves upon labor contract and necessarily must be considered in arbitration proceeding); Warren Consolidated Schools, 67-1 ARB ¶ 8228 at 3800 (Howlett, 1967) ("every contract includes all applicable provisions of the law and arbitrators . . . are bound by the law applicable to the contract being construed"). *See also* Van Huffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866) ("the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of [the contract], as if they were expressly referred to or incorporated in its terms.")

18. Cox, *supra* note 5, at 82.

19. Mittenthal, *supra* note 3, at 50.

Discussion

Express Incorporation of External Law in Contract or Submission Agreement

Some collective bargaining agreements specifically incorporate external law.[20] If the parties are clear that they want the arbitrator to interpret and apply external law, either by the words in the agreement or in the statement of the issue to be arbitrated, the arbitrator has no choice but to interpret and apply the external law.[21] Of course, if the collective bargaining agreement explicitly provides that an arbitrator cannot consider external law, there is no justification for an arbitrator to ignore that limitation.[22]

At the hearing an arbitrator may ask the parties whether they want the arbitrator to have the authority to consider external law should a conflict between external law and the labor agreement occur.[23] If the parties stipulate that the arbitrator may consider external law, there should be no dispute as to whether an arbitrator has applied external law rather than working within the "four corners" of the collective bargaining agreement.[24] As long as the arbitrator rules within the parameters of the submission and provides the parties with a fair hearing, the award should not be set aside on judicial review.[25]

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20. O. Fairweather, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 447 (2d ed. 1983) (hereinafter "Fairweather"). *See* Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration,* 40 ARB. J. 55, 62 (June 1985) (hereinafter "Scheinholtz").

21. *See* Mittenthal at 42-43; *see also* Meltzer, *Ruminations, supra* note 16, at 34-35; Feller, *supra* note 2, at 36; Scheinholtz, *supra* note 20, at 62; *see, e.g.,* Southbridge Plastics v. Local 759, Int'l Union of United Rubber Workers, 565 F.2d 913 (5th Cir. 1978) (contract expressly provided that company agreed to abide by the provisions of Title VII of the Civil Rights Act of 1964); San Francisco Unified Sch. Dist., 87 LA 1751 (Wilcox, 1986) (issue before arbitrator expressly provided that arbitrator was to determine whether employer's action discriminated against the grievant "in violation of law" and contract provided that employer shall not discriminate "in violation of the law").

22. Scheinholtz, *supra* note 20, at 56; St. Antoine, *Discussion, supra* note 3, at 76. *See also* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (party cannot be required to submit to arbitration any dispute which he has not agreed so to submit).

23. Fairweather, *supra* note 20, at 454-55. *See also* Basic Vegetable Prods., Inc., 64 LA 620, 624-25 (Gould, 1975) (parties stipulated that arbitrator had authority to resolve the issue under both a conciliation and settlement agreement under Title VII and the collective bargaining agreement).

24. Fairweather, *supra* note 20, at 457. *See* Board of Educ. v. AFSCME, Local 287, 195 Conn. 266, 487 A.2d 553, 556 (1985) (authority to arbitrate pursuant to a collective bargaining agreement is strictly limited by provisions of the agreement and scope of the matter to be considered is limited by the submission); Board of Educ. v. Bridgeport Educ. Ass'n, 173 Conn. 287, 291, 377 A.2d 323, 325 (1977) (judicial review of unrestricted submissions is limited to a comparison between the submission and the award to see whether the arbitrator's award conforms to the submission).

25. Bennett v. Meader, 208 Conn. 352, 545 A.2d 553, 559 (1988). *See generally* Darien Educ. Ass'n v. Board of Educ., 172 Conn. 434, 374 A.2d 1081, 1083 (1977); *see also* Board of Educ. v. Champaign Educ. Ass'n, 15 Ill. App.3d 335, 350, 304 N.E.2d 138, 142 (1973) (if an arbitrator exceeds

External Law as an Interpretive Aid

When the parties have used language identical to a statute or regulation, it is appropriate for an arbitrator to use the interpretation of that statute or regulation as an interpretive aid in ascertaining the parties' intent.[26] For example, when a nondiscrimination provision is involved, applicable provisions in state and federal law have been considered by arbitrators in interpreting the contract.[27] How identical language has been construed is obviously of some influence, but not if it contradicts other language in the agreement.[28]

In addition, it is a basic principle of contract interpretation that where a provision is susceptible to two interpretations — one lawful and the other unlawful, the lawful interpretation is preferred.[29] This principle is based on the assumption that the parties did not intend to negotiate a provision that is unreasonable, unlawful, or ineffective;[30] however, if a term is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation.[31]

External Law as an Implied Part of the Contract

As discussed above, some arbitrators are of the opinion that every collective bargaining agreement embodies the external law by implication,[32] but this position has been strongly criticized.[33] Leading scholars of con-

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the power granted by the agreement between the parties, the arbitrator's decision is void and unenforceable to the extent such powers are exceeded). *But see* notes 62, *infra.*

26. Feller, *supra* note 2, at 38; Scheinholtz, *supra* note 20, at 63; St. Antoine, *Discussion, supra* note 3, at 77.

27. *See e.g.,* Minnesota Dept. of Corrections, 88 LA 535, 538 (Gallagher, 1987); Capital Dist. Transit System, 88 LA 353, 356 (La Manna, 1986); California Sample Service Co., 70 LA 338, 341 (Draznin, 1978).

28. Feller, *supra* note 2, at 38.

29. St. Antoine, *Discussion, supra* note 3, at 76. *See, e.g.,* Owens-Illinois Co., 85 LA 957, 970 (Feldman, 1985). *See also* RESTATEMENT (2D) OF CONTRACTS § 203(a) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); Mittenthal, *supra* note 3, at 43; Meltzer, *Ruminations, supra* note 16, at 15-16.

30. Grenig, *Contract Interpretation,* in LABOR AND EMPLOYMENT ARBITRATION § 14.02[3][b] (1988).

31. *Id.*

32. *See* note 17, *supra. But see* Flood v. Country Mutual Ins. Co., 41 Ill. 2d 91, 94 242 N.E.2d 149, 151 (1968) (parties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication).

33. Feller, *supra* note 2, at 39. *See* St. Antoine, *Discussion, supra* note 3, at 77-79 ("I just can't see any source of arbitral power to exercise more extended jurisdiction unless the parties themselves have so provided."); *See also* General Telephone Co. of Pennsylvania v. Locals 1635, 1636, 1637, 427 F. Supp. 398, 399 (W.D. Pa. 1977) (arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties); Teachers Ass'n v. Board of Educ., 61 Misc. 2d 492, 305

tract law have also questioned the theory of implied inclusion of external law in contracts.[34]

Arbitrators derive their powers from the contract — not from state or federal law.[35] External law does not grant arbitrators any authority beyond that which is provided by the parties themselves.[36] The preference for arbitration as a means of settling labor disputes is preferred for the settlement of contract questions — not statutory questions.[37]

Even if judges, as an arm of the state, have a rational basis for implying that the law is part of a contract, arbitrators, who derive their powers from the contract, have no justification for doing so.[38] If the contract forbids the arbitrator from adding to or modifying the terms of the agreement, a ruling by the arbitrator that the external law is a part of the agreement is an addition to the terms of the contract and in excess of the limitations on the arbitrator's authority.[39]

Some arbitrators contend that a savings clause[40] in the collective bargaining agreement means that an arbitrator must decide which provisions of the agreement are in violation of external law.[41] Asserting that the inclusion of this provision is a recognition by the parties that they do not want to be bound by an invalid provision, proponents of this theory argue that the implication drawn from this clause is that the arbitrator should not enforce a provision which is clearly unenforceable under the law.[42] This view is probably incorrect, because the parties have simply indicated that they want to preserve or protect whatever parts of the agreement are

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N.Y.S.2d 724, 727 (1969) (determination that a contract is illegal in that its performance would violate a statute or public policy is not within the arbitrator's jurisdiction).

34. *See, e.g.,* Williston, CONTRACTS § 615, note 10 (rev. ed. 1961) (the implication is too broad to be accepted without qualification); Corbin, CONTRACTS § 551 (rev. ed. 1960) (an implication in such general terms cannot be accepted as correct).

35. Mittenthal, *supra* note 3, at 53.

36. *See, e.g.,* Gary Teachers Union Local No. 4 v. Gary Comm. Sch. Corp., 512 N.E.2d 205, 206-07 (Ind. Ct. App. 1987) (arbitrators draw their authority from the terms of the agreement). *See* Mittenthal, *supra* note 3, at 53.

37. Mittenthal, *supra* note 3, at 53.

38. *Id.* at 45.

39. *Id.* at 46.

40. For example: "If any part of this agreement shall be held invalid, the remainder shall continue in force and effect." "Any provision in this agreement that is found to be in violation of any law shall be of no further effect, but it will not affect the balance of the agreement."

41. *See Mittenthal, supra,* note 3, at 49; Fairweather, *supra* note 20, at 447-48. *Cf.* Bucks County Vocational Tech. Sch. Educ. Ass'n, 91 Pa. Cmwlth. 463, 497 A.2d 943, 946 (1985) (contract provision that agreement shall not be interpreted so as to conflict with any statute supported incorporating statute in agreement).

42. Mittenthal, *supra* note 3, at 49.

valid, should any part of the contract be found to be invalid by an appropriate tribunal.[43]

Likewise, a contract provision providing that an arbitator's award "shall be final and binding" is usually not intended to be an incorporation of external law into the contract.[44] Where the agreement defines an arbitrable grievance in terms of a violation of the contract, it would appear that the parties intended that only the arbitrator's interpretation of the contract — not of the external law — be final and binding.[45] The fact that the parties specify the areas in which external law is to affect their relationship suggests that they do not intend to be bound by statutory obligations not mentioned in the contract.[46]

Thoughtful arguments have been propounded in support of the theory that an arbitrator's award should not require conduct forbidden by law even though sanctioned by the agreement, regardless of the arbitrator's express authority.[47] This theory of the arbitrator's authority does not appear to be supported by the authority conferred on the arbitrator by the parties.[48]

While it may be praiseworthy for an arbitrator to solve the whole problem in a fashion compatible with the pertinent regulatory framework, the arbitrator can expressly state that the arbitrator's mandate is contingent

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43. Feller, *supra* note 2, at 39. *See* General Electric Co., 32 LA 769, 772 (Kleinsorge, 1959) (arbitrator refused to interpret external law under a savings clause).

44. *See* St. Antoine, *Discussion, supra* note 3, at 79 ("the language means no more than that the arbitrator's reading of the contract is to be conclusive on the parties as to their intent"). *Contra,* Mittenthal, *supra* note 3, at 50.

45. *Cf.* WERC v. Teamsters Local No. 563, 75 Wis.2d 602, 250 N.W.2d 696, 701 (1977) (where contract provided that "[t]he decision of the arbitrator shall be final and binding" and "the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement," arbitrator did not have authority to construe city residency ordinance), distinguished in City of Madison v. Madison Prof. Police Officers Ass'n, 144 Wis. 2d 576, 425 N.W.2d 8 (1988).

46. Mittenthal, *supra* note 3, at 46, 52.

47. *See* Board of Educ. v. AFSCME, Local 287, 195 Conn. 266, 487 A.2d 553, 555-56 (1985) (arbitration is a creature of contract; if the parties choose to set limits on the arbitrator's powers, then the parties will be bound by those limits); *see also* Mittenthal, *supra* note 3, at 50.

48. City of Hartford v. Local 760, Int'l Ass'n of Firefighters, 6 Conn. App. 11, 502 A.2d 429, 431 (1986) (submission defines scope of entire arbitration proceedings by specifically delineating issues to be decided and no matter outside submission may be included in award); Goodyear Tire & Rubber Workers, Local 200, 42 Ohio St.2d 516, 330 N.E.2d 703, 706 (1975) (arbitrator's authority is limited to that granted to him by the contract parties and does not extend to the determination of the wisdom or legality of the bargain). *See* Meltzer, *Rejoinder,* in PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 58, 60 (Rhemus ed. 1968). *Cf.* WERC v. Teamsters Local No. 563, 75 Wis.2d 602, 250 N.W.2d 696, 701 (1977), rehearing denied (arbitrator did not have authority to determine that the discharge of a city employee for moving from the city was not for just cause, where a city ordinance required all employees to be residents of the city). *Cf.* Teachers Ass'n v. Bd. of Educ., 61 Misc.2d 492 305 N.Y.S.2d 724, 737 (1969) (it is not within the

on the legality of the contractual provision in question.[49] After all, an arbitrator can only bind the parties on issues that they have agreed to submit to arbitration.[50] An arbitrator lacks the power to resolve an issue not presented for arbitration.[51]

In administrative law, the general rule is that only the courts, not administrative agencies, have the authority to decide constitutional issues.[52] Arbitrators can accord a similar respect to the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law, unless the parties expressly grant the arbitrator power to determine the external law.[53]

Furthermore, an arbitrator's interpretation of a statute may not, in fact, be final and binding on the parties. Claims involving some statutes (such as Title VII of the Civil Rights Act of 1964[54] or the Fair Labor Standards Act[55]) may be submitted to the courts for determination, even after the claim has been the subject of final and binding arbitration under a collective bargaining agreement.[56] In addition, court proceedings have been

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jurisdiction of an arbitrator to determine that a contract is illegal in that its performance would violate a statute or public policy), *rev'd* 34 A.2d 351, 312 N.Y.S.2d 252 (1970).

49. Meltzer, *Ruminations, supra* note 16, at 18.

50. Board of Educ. v. AFSCME, Local 287, 195 Conn. 266, 487 A.2d 553, 555-56 (1985); Port Huron Area Sch. Dist. v. Port Huron Educ. Ass'n, 426 Mich. 143, 152, n. 8, 393 N.W.2d 811, 815 (1986).

51. Lansing Sch. Dist. v. Lansing Schools Educ. Ass'n, 142 Mich. App. 664, 669, 370 N.W.2d 11, 14 (1985).

52. *See* Moore v. City of East Cleveland, 431 U.S. 494, 497-98 (1977). *See also* B. Schwartz, ADMINISTRATIVE LAW 518 (1984); Meltzer, *Ruminations, supra* note 16, at 16-17. *But see* Mittenthal, *supra* note 3, at 49-50 (arbitrator should refuse to enforce a particular contract if enforcement would require action forbidden by law).

53. Meltzer, *Ruminations, supra* note 16, at 16.

54. 42 U.S.C. § 2000 et seq.

55. 29 U.S.C. § 201 et seq.

56. *See, e.g.,* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (employee's statutory right to trial de novo under Title VII not foreclosed by prior submission of claim to final arbitration); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) (employee could bring wage claim under FLSA after having unsuccessfully submitted claim to joint grievance committee pursuant to collective bargaining agreement); Hopkins v. City of Midland, 158 Mich. App. 361, 404 N.W.2d 744 (1987) (employee's failure to raise Michigan Whistleblowers' Protection Act in prior arbitration did not bar its consideration by court); *see also* Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct. 1877 (1988) (employee whose discharge had been overturned by an arbitrator was entitled to litigate wrongful discharge claim based on Illinois Workers' Compensation Act in state court); McDonald v. City of West Branch, 466 U.S. 284, 288 (1984) (unappealed arbitration award cannot be given res judicata or collateral estoppel effect in an action under 42 U.S.C. § 1983). *Cf.* Stratford v. Local 134, IFPTE, 201 Conn. 577, 585, 519 A.2d 1 (1986) (arbitrators may decide legal issues that have constitutional implications, but they exceed their authority when they address the constitutional validity of a statute). For an excellent discussion of this subject, *see* St. Antoine, *Judicial Review of Labor Arbitration Awards,* in PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (Dennis & Somers eds. 1977).

permitted after arbitration where an employee's discharge allegedly violated an important public policy of the state.[57]

Recently the Supreme Court addressed the role of the courts in reviewing arbitration decisions involving federal statutes which create causes of action.[58] After an adverse arbitral decision, a discharged city employee filed an action under 42 U.S.C. § 1983, alleging that city officials had discharged him for exercising his rights to free speech, freedom of association, and freedom to petition the government for redress of his grievances. On appeal from a verdict against a city official, the Sixth Circuit reversed, reasoning that the arbitrator had considered the reasons for the employee's discharge and that his first amendment claims were barred by res judicata and collateral estoppel.[59] A unanimous Supreme Court reversed the Sixth Circuit, holding that when Congress created a cause of action it intended the cause of action to be judicially enforced.[60]

Contract Provisions in Violation of External Law or Public Policy

The Supreme Court has ruled that in unrestricted submissions, the interpretations of the law by the arbitrators are not subject to judicial review for error in interpretation.[61] However, the courts generally refuse to uphold awards which direct a party to commit an act or engage in conduct clearly prohibited by law or which is found to be contrary to a strong public policy.[62]

A court should accept the arbitrator's award as the definitive interpretation of the parties' agreement (absent fraud or capriciousness). However, persuasive reasons have been offered as to why a court should be free to enforce or reject the award on the basis of the principles of external law.[63] First, a union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support even meritorious employee claims in arbitration after the union balanced individual and collective interests.[64] Second, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.[65] Third, even when competent to address complex statutory issues, an arbitrator

57. Garibaldi v. Lucky Food Stores, 726 F.2d 1367, 1374-75 (9th Cir. 1984) (arbitrator's decision not a bar to employee's wrongful discharge action, because the lawsuit involved the protection of a statutory right to report suspected violation to public health officials).

58. McDonald v. City of West Branch, 466 U.S. 284 (1984).

59. 709 F.2d 1505 (6th Cir. 1983).

60. 466 U.S. at 290-292.

61. Wilko v. Swan, 346 U.S. 427, 436 (1953). *But see* cases discussed at note 57 et seq., *supra.*

62. *See* United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987).

63. St. Antoine, *Discussion, supra* note 3, at 82.

64. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 742 (1981).

65. *Id.* at 743.

may be limited by the collective bargaining agreement to rule in a fashion inimical to the public policies underlying the statute in question.[66] Finally, arbitrators are often powerless to grant the range of relief available under many statutory schemes.[67]

The courts have been notably active in reviewing arbitration decisions involving public schools.[68] The relationship between a public school employer and its employees is not the same as the relationship between private employers.[69] A public school system is operated to insure the citizens rights guaranteed them by state law.[70] The state legislature delegates to the public school employer the duty to carry out the public educational duty.[71] Public school officials are trustees of the powers vested in them and cannot divest themselves of the powers which have been conferred upon them for a public purpose.[72]

Taking note of this special relationship, courts have ruled that an arbitrator exceeds his or her powers if the arbitrator reaches a particular result in response to a question put to the arbitrator and one of the parties is a governmental agency lacking the power to bind itself to that result or to delegate the power to bind itself.[73] Decisions representing a matter of educational policy within the exclusive managerial prerogative of a school board have been held not to be delegable to an arbitrator under a collective bargaining agreement.[74]

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66. *Id.* at 744.

67. *Id.* at 744-45.

68. *See* Comment, *Defining the Scope of Grievance Arbitration in Public Education Employment Contracts,* 41 U. CHI. L. REV. 814 (1974).

69. Gary Teachers Union Local No. 4 v. Gary Comm. Sch. Corp., 512 N.E.2d 205 (Ind. Ct. App. 1987) (citing IC 20-7.5-1-1(d)).

70. *Id.* at 207. *See* Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L. J. 1156, 1193 (1974) ("The private employer's prerogatives are his to share as he sees fit, but the citizen's right to participate in governmental decisions cannot be bargained away by any public official."); *see also* Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations,* 30 MD. L. REV. 179, 192-93 (1970).

71. Gary Teachers, 512 N.E.2d at 207.

72. State College Educ. Ass'n v. Pennsylvania Labor Rel. Bd., 9 Pa. Cmwlth. 229, 404 A.2d 404, 412 (1973); *see also* West Harford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 538 (1972) (board of education cannot delegate to an arbitrator its stautory authority as to matters of policy nor agree to binding arbitration matters as to which a statutory duty rests on the board alone).

73. *See, e.g.,* School Comm. v. Korbut, 4 Mass. App. 743, 358 N.E.2d 831 (1976) *vacated* 373 Mass. 788, 369 N.E.2d 1148 (1977); *see also* Onteora Central Sch. Dist. v. Onteora Non-Teaching Empls. Ass'n, 79 A.D.2d 415, 438 N.Y.S.2d 386, 388 (1981) (scope of arbitration is limited by plain and clear prohibitions found in statute or decisional law and may be further restricted by consideration of objectively demonstrable public policy).

74. School Comm. of Hanover v. Curry, 3 Mass. App. 151, 325 N.E.2d 282, 287 (1975); *see also* School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 784, 199 N.E.2d 752 (1972); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 29-30, 311 A.2d 737, 743 (1973); Matter of Carmel Central Sch. Dist., 76 Misc.2d 63, 66-67, 348 N.Y.S.2d 665, 669 (1973).

Courts have also held that an arbitrator exceeds his or her authority if the award orders a party to engage in conduct that is patently illegal or in clear violation of public policy.[75] A contractual provision conferring upon a third party (*e.g.*, an arbitrator) the power to interpret a contract in such a manner that a violation of public policy will occur may also be void.[76]

Public policy exceptions to arbitral authority should be narrowly construed.[77] Where the public policy is substantial, the issue will be barred from arbitration.[78] However, when a limited public policy is involved, courts should be reluctant to override an arbitrator's award even if the award were premised upon mistaken law.[79]

In *Misco* the Supreme Court concluded that a policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol, while "firmly rooted in common sense" did not permit a court to set aside an arbitration award.[80] The Court stated that

> [A] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests.[81]

Conclusion

In *Roadmaster Corp. v. Production & Maintenance Employees' Local 504,* the Seventh Circuit rejected the argument that an arbitrator must in-

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75. Board of Trustees v. Federation of Tech. College Teachers, 179 Conn. 184, 195, 425 A.2d 1247, 1252 (1979); Board of Trustees v. Cook County College Teachers Union, Local 1600, 74 Ill.2d 412, 386 N.E.2d 47, 52 (1979); City of New York v. Uniformed Firefighters Ass'n, Local 94, 87 A.D.2d 255, 450 N.Y.S.2d 829, 832 (1982) *rev'd,* 58 N.Y.S.2d 521, 447 N.E.2d 69 (1983); Upper Bucks County Area Vocational-Technical Sch. Jt. Comm. v. Upper Bucks County Vocational Tech. Sch. Educ. Ass'n, 91 Pa. Cmwlth. 463, 497 A.2d 943, 946 (1985) (if an arbitrator's award against the Commonwealth or its subdivisions conflicts with a fundamental policy of the Commonwealth expressed in statutory law, the judicary has express statutory authority to review and correct or modify that award in the same manner as jury verdicts on a motion for judgment notwithstanding the verdict); *see also* Board of Educ. v. WERC, 52 Wis.2d 625, 634-35, 191 N.W.2d 242, 247 (1971) (a labor contract term that violates public policy or a statute is void as a matter of law).

76. *See* Teachers Ass'n v. Board of Educ., 34 A.D.2d 35, 312 N.Y.S.2d 252 (1970); WERC v. Teamsters Local 563, 75 Wis.2d 602, 250 N.E.2d 696 (1977).

77. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987). *Accord* City of New Haven v. AFSCME, Local 530, 208 Conn. 411, 544 A.2d 186, 190 (1988).

78. Board of Educ. v. Yonkers Fed. of Teachers, 533 N.Y.S.2d 761 (1988).

79. Associated Teachers of Huntington, Inc. v. Board of Educ., 33 N.Y.2d 229, 351 N.Y.S.2d 670, 306 N.E.2d 791, 795 (1973).

80. Misco, 108 S. Ct. at 374.

81. 108 S. Ct. at 373. *See also* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 766 (1983) (award of back pay did not violate public policy mandating obedience to judicial orders because the award did not compel the employer to violate a district court order, but merely required the payment of retrospective damages).

terpret and apply all the law, regardless of the terms of the collective bargaining agreement or the scope of the submission agreement. By ruling that an arbitrator's decision cannot be based solely upon the arbitrator's view of the requirements of enacted legislation, the Seventh Circuit was following nearly thirty years of Supreme Court precedent. These decisions are based on the fundamental principle that an arbitrator lacks the power to resolve an issue not presented for determination.

Although in the absence of express authority to do so an arbitration award based solely on external law will not be enforced, external law will continue to play an important role in labor arbitration. It is undisputed that an arbitrator may consider external law where it is expressly incorporated in the contract or in the submission agreement. In addition, consideration of external law may be used in the interpretation of ambiguous contract language.

Even where external law is expressly incorporated in the contract or submission agreement, courts may be unwilling to enforce arbitration awards which direct a party to commit an act or engage in conduct clearly prohibited by law or a strong public policy. In addition, the courts will not be bound by arbitration awards involving certain statutory rights where the legislative body has provided a judicial enforcement procedure.

Furthermore, state courts have displayed a readiness to overturn arbitration awards involving public schools, where the issue encompasses matters deemed to be nondelegable, or found to be patently illegal or to be in clear violation of a substantial public policy.