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# LEGAL REPRESENTATION OF PUBLIC SECTOR EMPLOYERS AND UNIONS IN GRIEVANCE ARBITRATION

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**ABSTRACT**

This article describes a random study of 351 public sector arbitration awards decided between January 1, 1990 and July 1, 1993, and reported to the American Arbitration Association. The study reviews the use of attorneys as advocates during arbitration proceedings. It explores whether a consistent pattern exists in the use of attorneys in the public employer categories as defined by the American Arbitration Association and whether a pattern exists in the use of attorneys in contract interpretation and disciplinary case issues before arbitrators.

## INTRODUCTION

Public sector collective bargaining grew rapidly during the two decades prior to the Reagan Administration. Over the past fifteen years the bargaining process in the public sector has begun to mature. This maturing of the bargaining process has raised some of the same questions concerning collective bargaining that exist in the private sector. In the dispute settlement arena, there have been significant concerns about the increased *legalism* of the arbitration process [1, 2]. The utility of arbitration in resolving labor disputes is that it is quick, inexpensive, and lacks the complexities of courtroom litigation. However, it has been observed that advocates (and some arbitrators) have increasingly conducted their arbitration cases as though they were in a court of law [3]. There has also been a considerable body of literature concerning the growth of the use of lawyers as advocates in labor arbitration [4, 5]. An attorney, if well-trained and versed in the nature of

collective bargaining and the purposes of arbitration, will have the ability to outline the dispute clearly and simply, to come directly to the point at issue, to present the evidence in an orderly fashion, and to sum up the arguments and relate them to the record made at the hearing [6].

Criticisms of the arbitration process are that its utility is being eroded by the observed creeping legalism. Delays in issuing arbitration awards have been observed and frequently attributed to the growth in complexity of cases [7]. The complexity in turn is typically attributed to conducting arbitrations as though they were being litigated before a court.

The purpose of this study was to determine the nature of legal representation in public sector grievance arbitration cases. This study determined whether there are differences in the proportionate use of lawyers as advocates between labor and management, by category of issue, and by segment of the public sector (i.e., education, police, etc.). If proportionate differences exist by segment, issue, or party, these differences may lend some insight into the nature of the increased legalism observed in arbitration.

## THE DATA

The data for this study were obtained from the New York office of the American Arbitration Association (AAA). A total of 351 public sector arbitration cases closed between January 1, 1990 and July 1, 1993, across all AAA geographic regions, were randomly selected for use in this study. The AAA classifies public sector cases into five categories: 1) education, 2) police, 3) firefighters, 4) health care, and 5) other. These categories were used to partition the data to determine whether differences existed in the use of attorney-advocates by occupational area. The cases were further subdivided into contract interpretation matters and disciplinary cases using the AAA classifications included in the AAA Arbitrator Case Report form (copies available upon request).

The case report forms used to gather these data were completed by the arbitrator and returned to the AAA regional office with the award in the case. The regional AAA office then forwarded the arbitrator report form to the New York office. The accuracy of the arbitrator report form depended on the care the arbitrator took in completing the form; however, any partially completed forms of forms with obvious errors were eliminated from the data set.

## RESULTS

Data were classified into cells by occupational area and type of dispute (contract interpretation and discipline). Table 1 reports the raw data (number of cases for each partition). The raw data were then used to calculate the proportions of cases in which 1) both parties used lawyers, 2) neither party used a lawyer, 3) only the union was represented by an attorney, and 4) only

Table 1. AAA Arbitration Case Legal Representation, 1990-93

| Category | Both | Neither | Union Only | Employer Only | Total |
|---|---|---|---|---|---|
| Other | | | | | |
| Contract | 34 | 10 | 2 | 15 | 61 |
| Discipline | 21 | 3 | 2 | 2 | 28 |
| Firefighter | | | | | |
| Contract | 8 | 1 | 0 | 2 | 11 |
| Discipline | 3 | 0 | 0 | 1 | 4 |
| Police | | | | | |
| Contract | 19 | 2 | 4 | 3 | 28 |
| Discipline | 25 | 1 | 4 | 4 | 34 |
| Health Care | | | | | |
| Contract | 2 | 1 | 2 | 1 | 6 |
| Discipline | 4 | 0 | 1 | 6 | 11 |
| Education | | | | | |
| Contract | 37 | 15 | 4 | 81 | 137 |
| Discipline | 12 | 3 | 0 | 16 | 31 |
| All Cases | | | | | |
| Contract | 100 | 29 | 12 | 102 | 243 |
| Discipline | 65 | 7 | 7 | 29 | 108 |
| Total | 165 | 36 | 19 | 131 | 351 |

management was represented by an attorney, by case type and segment of the public sector. Table 2 reports the proportions of attorney advocacy by each type of case and sector.

From an analysis of Table 1, it is clear that the educational sector accounted for the largest number of cases, 168, or about 47.8 percent. Police cases accounted for 17.7 percent of the total sample (62 cases). Firefighting and health care together had 32 cases, or less than 10 percent of the total sample. The "OTHER" group, consisting of highway, prison, clerical, professional, sanitation, transit, and other types of employees, contained 89 cases, or about one-quarter of the sample. As can also be seen from Table 1, the majority of the cases were contract interpretation cases. Of the 351 total cases in the sample, 243, or about 69.2 percent were contract interpretation matters. Disciplinary cases accounted for only 30.8 percent of the cases examined.

Table 1 presents the number of cases in each of the categories of representation by sector and type of case (contract interpretation or discipline).

Table 2. Proportion of Cases Where Parties Were Represented by an Attorney

| Category | Both | Neither | Union Only | Employer Only | Total (Percent)[a] |
|---|---|---|---|---|---|
| Other | | | | | |
| Contract | 55.7 | 16.4 | 3.3 | 24.6 | 100 |
| Discipline | 75.0 | 10.7 | 7.1 | 7.1 | 100 |
| Firefighter | | | | | |
| Contract | 72.7 | 9.1 | 0 | 18.2 | 100 |
| Discipline | 75.0 | 0 | 0 | 25.0 | 100 |
| Police | | | | | |
| Contract | 67.9 | 7.1 | 14.3 | 10.7 | 100 |
| Discipline | 73.4 | 2.9 | 11.8 | 11.8 | 100 |
| Health Care | | | | | |
| Contract | 33.3 | 16.7 | 33.3 | 16.7 | 100 |
| Discipline | 36.4 | 0 | 9.1 | 54.6 | 100 |
| Education | | | | | |
| Contract | 27.0 | 11.0 | 2.9 | 59.1 | 100 |
| Discipline | 38.7 | 9.7 | 0 | 51.6 | 100 |
| All Cases | | | | | |
| Contract | 41.2 | 11.9 | 4.9 | 42.0 | 100 |
| Discipline | 60.2 | 6.5 | 6.5 | 26.9 | 100 |
| Total | 47.0 | 10.3 | 5.4 | 37.3 | 100 |

[a]Totals may not sum to 100 percent due to rounding.

From Table 1, it can be observed that the educational area accounts for the majority of the sample, with 168 cases. Both health care and firefighting have relatively small representation within the sample.

Table 2 presents the proportion of cases for each occupational category at each level of legal representation in rights arbitration cases administered through the American Arbitration Association.

## DISCUSSION

The proportion of cases that fall under each category of attorney representation portray an interesting pattern. In the firefighter, police, and "other" categories, the proportion of cases in which both parties were represented by attorneys was more than double the proportion of cases in which both sides used lawyers in health care and education. In firefighting, police, and "other,"

three-quarters of all discipline cases had lawyers representing both parties. In education and health care, slightly over one-third of the discipline cases had attorneys representing both sides.

These data suggest that blue-collar units and public safety units rely more on attorney advocacy than do white-collar units. There are several possible explanations for this. The public safety personnel must deal with attorneys in their day-to-day work and may feel more comfortable with attorney advocacy. It is also plausible that the white-collar units are comprised of professionals who feel more comfortable with members of their own profession representing them. In the case of education, the National Education Association has "UniServ" directors who serve several local unions, in part, by routinely fulfilling advocacy roles in both rights and interest arbitration matters. In examining the Employer Only represented category and the Union Only represented category for education, the evidence is consistent with the observation that UniServ directors represent unions in the arbitration, but it is also clear that school boards rely heavily on lawyer advocates.

The generalizations that appear to apply to education do not extend to health care. Unions use attorney advocates more frequently in contract interpretation cases than do employers. Unions employ lawyer advocates in two-thirds of their contract interpretation cases, while employers used lawyers in only half of their contract interpretation cases. These results, however, may not be reliable because of the low number of total cases in the contract interpretation category for health care (see Table 1). In disciplinary matters, employers used lawyers in 91 percent of disciplinary cases, while unions used lawyers less than half the time.

With disciplinary cases there appears to be a greater reliance on lawyer advocates. In all sectors, unions were represented by lawyers in exactly two-thirds of the cases. On the other hand, employers used attorney advocates in over 87 percent of the discipline cases. In both health care and education, the majority of all discipline cases had lawyers representing only the employer. In contract matters, the unions used lawyers in less than half of the cases, but employers employed attorneys over 83 percent of the time. Clearly, some of the attorneys representing employers were full-time employees that employer, while few unions have the financial ability to retain full-time lawyers on the payroll. However, the data clearly demonstrate that employers used lawyers in over 80 percent of the cases, while unions used lawyers in just over half of theirs.

Finally, Table 2 shows a complete absence of attorney advocates in only 10.3 percent of all cases. The concern over the increased legalism in arbitration appears to have some basis in fact, if the proportion of cases advocated by attorneys is a reliable indicator. However, there are clear differences by sector and type of case, demonstrating that generalizations concerning legalism in public sector arbitration may be made only with caution.

## CONCLUSIONS

The AAA data analyzed in this study suggest several generalizations can be made concerning the use of an attorney in advocating arbitration cases. Attorney advocates are more likely to be utilized in cases involving firefighting, police, and blue-collar occupations than with employers of health care or education occupations. This may be due to the fact that police and fire employees feel more comfortable with lawyers because they often have routine contact with them through their work. Also, some white-collar unions, such as the National Education Association, use a system of regional representatives who routinely assist local unions in technical matters, including arbitration advocacy.

There is also a greater presence of attorney advocates in disciplinary matters than for contract interpretation matters. It may be that the risk associated with suits for fair representation, due process, or wrongful discharge evokes a perception by both parties that legal representation may minimize the risk of litigation, external to the collective bargaining agreement.

When only one party is represented by an attorney, it is three times more likely that the employer will be represented than the union. This observation may be a function of government agencies and school districts having sufficient legal work to hire staff attorneys as full-time employees. Most unions have neither the quantity of legal work nor the financial resources to keep full-time attorneys on their payroll.

Nearly 90 percent of all arbitration cases in the public sector have at least one attorney representing a party. This evidence suggests there is substantial legalism to be observed in public sector arbitration, if the use of attorney advocates is predictive of observed legalism in the proceedings. Because significant variation exists in the use of attorneys observed by case type and sector, generalizations across all portions of the public sector concerning legal representation must be made with caution.

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