J. COLLECTIVE NEGOTIATIONS, Vol. 28(1) 53-67, 1999

RETHINKING THE *RHODE ISLAND TRILOGY:* AN EROSION OF THE JUDICIARY'S SUPPORT FOR ARBITRATION

MATTHEW M. BODAH, **PH.**D.
University of Rhode Island, Kingston

ABSTRACT

In this article, the author examines the judiciary's treatment of the arbitration process, and, particularly, the finality of arbitrators' decisions in the state of Rhode Island. It is argued that a change in judicial philosophy reflects the policy predilections of the court as state government has grown increasingly conservative on economic and labor relations matters.

ARBITRATION: PRIVATE AND PUBLIC SECTOR VIEWS

For many years labor arbitration has been the favored means of settling disputes arising under collective bargaining agreements in the United States. The legal principles first articulated by the United States Supreme Court in *Lincoln Mills* [1] and later more fully developed by it in the *Steelworkers Trilogy* [2] have underpinned the system for forty years. These principles include a strong presumption in favor of arbitration when the parties disagree as to whether an issue is arbitrable, and very strong support for the finality of an arbitrator's decision. Although lower courts have wavered on occasion, subsequent cases at the Supreme Court level have steadfastly affirmed these principles [3].

In the private sector there is no question that management and unions are free to enter into arbitration agreements and to place virtually any issues they wish before an arbitrator [4, p. 23]. And since the parties are free to include or *not* include grievance and arbitration clauses within their contracts, the courts have held they should be bound by such agreements and bound further by the ultimate decision of the arbitrator [5]. The only issues that would be inappropri-

ate for arbitration in the private sector are those the parties have agreed not to arbitrate [6].

The situation, however, is not as clear in the public sector where management rights are usually provided for by statute [7]. Whether parties may agree to arbitrate disputes at all, which issues parties may place before an arbitrator, and whether the decision of the arbitrators is final, are more complicated matters in the public sector [8]. As would be expected, the judicial treatment of arbitration has varied across jurisdictions as state courts have applied differing statutory and case law standards.

However, as Joseph Grodin and Joyce Najita pointed out, differing legal standards may not be the only reason why interpretations vary [9]. Rather, they argued that a "statute ultimately mirrors the policy predilections of the courts" [9, p. 239]. A statute giving a school committee the right to grant tenure, for example, does not necessarily mean that tenure procedures may not be defined by collective bargaining or that tenure decisions may not be subject to arbitration. However, a court may lend a narrow interpretation to a statute in such a way as to limit bargaining or arbitration over a matter, revealing its own "policy predilection." One way to examine this proposition is to follow a court's treatment of the arbitration process under a single set of laws and within a particular jurisdiction through periods of political change.

Specifically, the purpose of this article is to examine how judicial reasoning over the standing of grievance arbitration in the public sector has changed during the past two decades in the State of Rhode Island. When these questions first appeared before the bar in the 1970s, the state supreme court largely adhered to the private sector principles enunciated in the *Steelworkers' Trilogy.* The court reasoned that the legislature had intended to amend, collaterally, existing laws governing the management of public agencies when it passed the series of public employee bargaining laws. While the earlier laws had granted public administrators broad authority to manage their organizations, the subsequent bargaining laws were intended, the reasoning went, to attenuate that authority by subjecting most employment matters to bargaining. This judicial philosophy was made explicit in a series of three cases decided between 1975 and 1983. Collectively, I refer to these cases as the *Rhode Island Trilogy* [10, 11, 12].

The contrary position is that bargaining rights must be placed within the framework of the preexisting statutory rights of public administrators. Therefore, arbitration—and in some cases bargaining itself—should be allowed only over matters specifically provided for in the bargaining laws; otherwise management rights would be reserved under the earlier statutes. The latter position, which has its seeds in the dissenting opinions of the *Rhode Island Trilogy* cases, became the controlling doctrine in 1988 [13] and with few exceptions [14] has been consistently applied since then [15]. I argue that the reason for this shift in judicial reasoning is a change in the state's policy environment and a related change in the politics of the state supreme court.

RHODE ISLAND

As a small state with several unusual industrial and demographic attributes, Rhode Island is rarely an ideal subject for a case study. It does, however, possess several characteristics that favor its investigation here. Like many northern, industrial states, Rhode Island passed a series of broad public employee bargaining statutes in the 1960s. Separate acts gave bargaining rights to firefighters, municipal police officers, teachers, general municipal employees, state police, and general state employees [16]. Except for the fairly standard public sector prohibition on striking, the Rhode Island statutes require bargaining over nearly all matters relating to wages, hours, and terms and conditions of employment.

Also like many northern, industrial states, the political climate at the time the acts were passed was rather "liberal" with Democrats, particularly, and moderate-to-liberal Republicans dominating most levels of government. Organized labor was a major—if not *the* major—influence on policy formation. During this period, the senate majority leader was an international vice president of the United Textile Workers of America, and the lieutenant governor would become the executive director of Council 94 of the American Federation of State County and Municipal Employees [17]. But as with most other northern, industrial states, the dominant political paradigm began to shift in the 1980s as a result of the economic and political changes that swept the nation, including deindustrialization and the conservative philosophy of the Reagan administration [18].

While the political changes in Rhode Island have not been as dramatic as, for example, in the Great Lakes region where Republican governors represent the conservative vanguard, there has clearly been a drift—if not a shift—to the right on economic and labor relations matters. The signal event may have been the 1985 repeal of unemployment benefits for striking workers [19]. Much of the debate over the issue had more to do with the alleged perception of Rhode Island as a "labor state" than with the direct economic impact of the legislation. The repeal was largely an attempt to show out-of-state business owners that organized labor no longer controlled policy making, but that Rhode Island was becoming a more "business-friendly" state [20]. Since then lawmakers have been much less timid in addressing labor-related issues, including prevailing wage requirements, workers' compensation, unemployment insurance, and Sunday work rules. Several years ago, the Democratic chairman of the senate labor committee held a hearing on his own "right-to-work" bill—something that would have been unimaginable just several years earlier. A recent bill concerning "charter schools" passed the legislature over the strong protests of teachers' unions [21].

As mentioned, the drift to the right on labor relations matters has not been confined to the legislature. During the 1980s, the state supreme court as well began retreating from its earlier position of strong support for public sector collective bargaining. More recently, a Republican governor has elevated to chief justice an individual who was a dissenter in several of the early

"pro-bargaining/pro-arbitration" cases. This move along with the appointment of another individual who has supported a strong "nondelegable management rights" position in several cases has resulted in a judicial forum that is much less favorable to a broad reading of the state's bargaining and arbitration statutes, in sharp contrast to the late-1960s through the early 1980s. In recent years, public employee unions have had very little success before Rhode Island's supreme court.

A change in the law regarding judicial selection may mean that the current philosophy of the court will be maintained for some time. Until a constitutional amendment in 1994 [22], supreme court justices were chosen by the state legislature meeting in "grand committee" (i.e., joint session). Legislators nominated individuals from the floor, and the candidate securing a plurality of the 150 votes of representatives and senators was elected to the court. Now, a list of candidates is forwarded to the governor by a judicial nominating committee. The governor then selects a candidate whose nomination must be approved by the house and senate.

Although speculative, it is possible this change will ensure that the court maintains a relatively strong view of management rights in the bargaining and arbitration processes. For one thing, the governor is the state's chief executive, and therefore may favor candidates who have expressed support for management rights in their lower court opinions or in writings or speeches, or who are simply known for holding such views. Second, even when one accounts for the philosophical changes that have occurred in legislature, the labor movement is still relatively influential in the legislative process, though perhaps less so than in the past. However, its influence—particularly the influence of public sector unions—with the governor's office is more tenuous and depends more immediately on the individual occupying the office. Many seats would have to turn over in the house and senate before labor completely lost its grip on the general assembly, but a single governor can change the power dynamic quickly.

Taken together, the changes that have been occurring in Rhode Island mirror the trends that have been developing in many larger northern states as well. An examination of changes in judicial reasoning may, therefore, reveal a logic that is broadly applicable to states where similar political changes are occurring.

THE STATUTORY BASIS FOR ARBITRATION IN RHODE ISLAND

In 1955, the Rhode Island General Assembly passed Public Law 3517 covering the arbitration of "labor controversies." The act and its subsequent amendments are codified under Title 28, chapter 9 of the *Rhode Island General Laws.* Section 28-9-1 stipulates that a contract provision requiring the settlement of disputes by arbitration "shall be valid, irrevocable, and enforceable." Section 28-9-5 states that

"[a] party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, may petition the superior court, or judge thereof, for an order directing that the arbitration proceed. . . ." The superior court judge "shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith . . . shall . . . [direct] the parties to proceed to arbitration" [23]. Section 28-9-6, in turn, requires that "[i]f evidentiary facts are set forth raising a substantial issue . . . the court, or the judge thereof, shall proceed immediately to the trial thereof."

The 1955 act was passed approximately a decade before public employees were granted full bargaining rights, and hence the applicability of the act to the public sector was not certain. In the late 1960s, the Providence school committee challenged the grievance arbitration clause agreed to by a previously seated school committee. The school committee claimed that the School Teachers' Arbitration Act (i.e., the collective bargaining act) [24], unlike similar acts covering police and firefighters, contained no specific provision for the arbitration of disputes. It argued that the earlier committee had no legislative authority to agree to an arbitration clause. The school committee, however, drew no distinction between interest and grievance arbitration, which the supreme court quickly did in dismissing the case. But more important, the supreme court looked to other legislation in *pari materia* and found the 1955 act on the arbitration of labor controversies (i.e., P.L. 3517, [24]) applied in this public sector case [25]. Since *Providence Teachers' Union* most cases under section 28-9 have arisen in the public sector.

THE RHODE ISLAND TRILOGY: A STRONG AFFIRMATION OF ARBITRATION

Not long after *Providence Teachers' Union,* the supreme court began considering the series of cases I have referred to as the *Rhode Island Trilogy: Belanger v. Matteson* (1975) [10], *Jacinto v. Egan* (1978) [11], and *Rhode Island Council 94 v. State* (1983) [12].

A key issue in the *Belanger* case was whether an arbitration decision could stand if a union had failed in its duty to represent a grievant fairly. However, perhaps more important, the court had to determine an arbitrator's authority in light of Rhode Island law granting power to school committees to manage public schools [26]. Plaintiff Belanger sought to overturn an arbitration panel's decision that a more senior teacher, Matteson, be given the chair of a high school business department after Belanger had already been appointed to the position by the school committee. The union refused to take Belanger's grievance in this matter since the settlement he sought, reappointment to the chair, would have undone its arbitration victory on behalf of Matteson. Belanger, therefore, appealed to the courts to have the decision set aside.

The supreme court agreed the union had failed in its duty to represent Belanger, but refused to set aside the arbitration decision either for that reason or for the reason that the panel had exceeded its authority. The court used *Belanger* [10] to provide a broad affirmation of the grievance arbitration process, based primarily on the *Steelworkers' Trilogy* [2]. The court wrote:

> Within recent years we observed that the General Assembly, when it authorized the teachers to organize and bargain collectively with the respective committees, intended to confer on [them] many of the rights enjoyed by those who work in the private sector . . . including the right to have binding arbitration of grievances [10, at 135].

The court then went on to note [10, at 136] that the reasons for overturning an arbitration award are limited under law [27] to instances where: 1) the award was procured through fraud, 2) the arbitrators have exceeded their powers or have so imperfectly executed them that no mutual, final, and definite award was made, and 3) there was no valid submission or contract to arbitrate.

The trial judge felt the arbitration panel *had* exceeded its powers because the law governing school committees states that the "selection of teachers and the entire care, control, and management of public schools is vested in the school committee [28]. According to the judge, the committee had illegally delegated its responsibility to the arbitration panel. The supreme court, however, noted that in an earlier case concerning school committee power [29], it held the school committee law would be controlling "in absence of legislative authority to the contrary" [29, at 735]. The court's majority argued that the School Teachers' Arbitration Act, which was passed in 1966, constituted legislative authority to the contrary. The court stated:

> . . . it is obvious that the tightfisted grip which a school committee in 1903 (when the school committee law was passed) might have held over the day-to-day operations of its schools has been relaxed somewhat when in 1966 the Legislature directed such committees to act as responsible public employers; otherwise the goal of affording the advantage of collective bargaining procedures to this particular group of public employees could never be realized [10, at 137].

However, one justice offered a lengthy dissent [10, at 138-144], in which he argued that the School Teachers' Arbitration Act should not be interpreted as "legislative authority to the contrary" [10, at 100]. He noted, for example, that nothing in the bargaining law specifically addressed the issues of selection and appointment. Therefore, school committees should retain those rights as "non-delegable" since they were given to them by the earlier statute. The court's task, he argued, is "to accommodate contractual provisions for grievance arbitration to statutes vesting management and control of educational matters in local

school boards" [10, at 140]. In this case, he would have done that by finding that the school committee had the exclusive and nondelegable power to appoint Belanger. Although the Belanger case clearly affirmed the process of grievance arbitration and the finality of arbitrators' decisions, the lone dissenting opinion planted the seed for an alternative philosophy that would grow over the years.

The second part of the *Rhode Island Trilogy* is *Jacinto v. Egan* [11]. In the case, a school teacher with three years on the job applied for an unpaid leave of absence to pursue graduate studies. The school committee denied her request. While the collective agreement provided for sabbatical leaves after five years and for unpaid leaves of absence for reasons other than graduate studies, it did not have a specific provision that addressed a third-year teacher's wish to attend graduate school. Nonetheless, after reviewing the issue in light of several contractual articles which appeared to give the superintendent some latitude in granting leaves of absence for "valid reasons," and the past practices of the school committee, which included allowing a football coach time off to run a political campaign, the arbitrator ordered that the grievant be given her requested leave.

The school committee moved to have the decision overturned, arguing that the arbitrator had no authority to award a leave of absence that was not provided for in the contract. It further pointed to a clause stating that the arbitrator may not "add to, subtract from, or modify" the contract. But the supreme court upheld the award, saying, "As long as the award `draws its essence' from the contract, it is within the arbitrator's authority and our review must end [11, at 1176]. The court noted that the arbitrator had cited three articles of the agreement, and hence the decision was "sufficiently grounded in the contract." The court also noted that even if the arbitrator had misinterpreted those provisions of the contract, its power is review was still limited to cases where there was a "manifest disregard" for the contract or where the arbitrator arrived at a "completely irrational result" [11, at 1176]. Neither was the situation here.

Two justices dissented. One of the dissenting justices, Joseph Weisberger would be appointed chief justice in 1995. In writing the dissent, Justice Weisberger, like the dissenting justice in *Belanger,* noted the "extensive statutory scheme" [11, at 1181] for governing public schools contained in Rhode Island law. He further noted that clauses in teacher contracts sometimes make reference to the statute, putting an arbitrator in the position of interpreting educational law. He wrote: "If this court should choose to abdicate from any meaningful review of such determinations, the practical enforcement of a large body of public law would be left to the untrammeled and unreviewable discretion of arbitrators [11, at 1181].

The final part of the *Rhode Island Trilogy* is *Rhode Island Council 94 v. State*, [12] decided in 1983. In the case, three correctional officers were terminated following the escape of nine youths from a juvenile detention facility. The dismissals were grieved and the arbitrator reduced the discipline and ordered reinstatement of the three officers. One officer's reinstatement was made retroactive to the date of his dismissal on December 22, but with a reprimand placed in

his file. The other two grievants were reinstated as of June 20, with the period from December 22 to June 20 marked "leave without pay." In effect, the arbitrator was giving the grievants six-month suspensions.

The superior court overturned the arbitrator's remedy with regard to the latter two grievants, noting there was no provision in the contract for the punishment of "leave without pay." On remand, the arbitrator changed the words of his award to "suspension without pay." The trial court again vacated the award, this time arguing there was nothing in the contract to allow the arbitrator to make the suspension retroactive.

Again, holding to *Jacinto,* the supreme court reversed the superior court, stating that the decision "drew its essence from the contract" [12, at 775]. Although the contract did not provide for retroactive suspension, neither, the court noted, did it prohibit it. The supreme court ended by warning the trial court: "We once again emphasize that judicial review of an arbitration award solely on a reviewing court's disagreement with the arbitrator's interpretation of a contract is prohibited" [12, at 775].

After *Rhode Island Council 94*, the template had been created for the court to examine further challenges to arbitrators' decisions. In fact, by 1984, it seemed the court was growing bored with this issue. A 1984 decision began: "Many who read the title of this litigation will surmise that it is another case involving a dispute over an arbitrator's award, and they will be correct" [30, at 200]. The court then went on to find an arbitrator's reduction of discipline and somewhat controversial method of calculating backpay liability were acceptable because, "an arbitrator has the inherent power to fashion an appropriate remedy as long as the award draws its essence from the contract and is based on a passably plausible interpretation of the contract" [30, at 200].

Together, the cases of the *Rhode Island Trilogy* established the following principles: First, where there is tension between statutes authorizing collective bargaining and previously enacted statutes governing the management and control of public agencies, deference on personnel matters goes to the bargaining statutes. Second, an arbitration award will be upheld as long as it "draws its essence" from the contract, even if it is difficult to find precise contract language to justify the award. Hence, for example, arbitrators have some leeway in crafting appropriate discipline, even if the type of discipline given is not among the types specifically enumerated in a contract. Finally, the court may not substitute its own interpretation of the contract for that of the arbitrator, even if the court feels that the arbitrator has erred in his interpretation, unless the error produces a completely irrational result.

A REVERSAL OF STANDARDS

If everything seemed clear by 1984, things starting becoming much less certain in 1988. In the case of the *State of Rhode Island v. National Association of*

Government Employees, known commonly as the *NAGE* case, the supreme court upheld the vacation of an arbitration award, even though the facts of the case—as the dissenting justice argued—were no different from those in some earlier cases in which awards had been upheld [31].

In *NAGE,* a nurse at the state-run hospital had been terminated for patient abuse. But after reviewing all the facts surrounding the incident and in light of the grievant's long period of service, the arbitrator reduced the discipline to a three-month suspension. The court ruled, however, that under the NAGE contract the arbitrator could determine only whether just cause for discipline existed. If the arbitrator determined just cause for discipline existed, the employer had the exclusive power to determine what the discipline would be. This was a startling case. The court was voiding an arbitrator's power to modify discipline, contrary to standards that had developed for disciplinary cases over decades [31].

Indeed, three years later the court repeated this assertion in *Rhode Island Laborers District Council v. State*, better known as the *Kando* case [32]. Although recognizing the insubordination of the grievant, the arbitrator commuted Kando's discipline from discharge to a six-month suspension. The court, citing *NAGE*, referred to the arbitrator's decision as a "manifest disregard of the contract provisions and a violation of his power as set forth in [the General Laws]" [32, at 146].

This particular issue has been resolved by the general assembly, which amended the law in 1990 to state that unless there is contract language to the contrary, "the arbitrator shall have the authority to modify the penalty imposed by the employer and/or otherwise fashion an appropriate remedy" [33].

Although the particular issue of modifying discipline has been resolved, a broader question remains. The earlier standard, clearly, was that the arbitrator had to draw his/her decision from the "essence of the contract," based on a "passably plausible interpretation" of the agreement. And even if that interpretation was arguably inaccurate, the decision would stand absent a "manifest disregard" or "completely irrational result." But since 1988, the court seems to have become much more attentive to precise contract language and much less flexible with regard to the "essence of the contract."

In *Town of Conventry v. Turco,* for example, the court held an arbitration panel "rewrote the contract" when it ordered a lump-sum, sick-leave payout to be included in a pension calculation, even though the panel cited five other categories of pay that were not part of base pay, but which the town had previously included in pension calculations [34]. Again, as in *NAGE,* the dissent argued for the same deference to the arbitration process that the court offered in the *Rhode Island Trilogy* cases [34].

In *Rhode Island Court Reporters' Alliance v. State,* the court again upheld the vacation of an award [35]. This time the issue concerned whether the closing of an employee parking lot due to a construction project was a negotiable term and condition of employment. The arbitrator determined that the past practice of the

employer had been to provide parking and ordered that employees be reimbursed for expenses incurred as a result of the parking lot's closing. The court argued that the arbitrator could not enforce a past practice in this case since there was no explicit past practice clause in the contract. The court took particular note that a previous past practice clause had been bargained out of the contract a few years earlier [35].

Perhaps the more interesting aspect of *Court Reporters* is that the supreme court delved wholeheartedly into the merits of the case—a breach of the most basic tenet of the judiciary's traditional deference to arbitration. Toward the end of the decision, the court stated, "Even if we were to include past practice as grounds for arbitration under this agreement, we would not include this particular past practice" [35, at 378]. The court enumerated the typical past practice standards, and then stated, "In our present case free parking was fortuitously available to a select group (of employees) simply because the parking was there. This did not create a binding past practice" [35, at 379]. The court clearly assumed the role of arbitrator in this case.

THE NEW ORDER

Recall that in *Belanger v. Matteson,* [10] one of the key issues concerned the prerogatives of the arbitration panel in light of Rhode Island law. This issue has reappeared recently, but with a much different result. In *Council 94 v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals,* the court reversed an arbitrator's decision based on a conflict between arbitrability and the statute governing the control of state medical facilities [36]. The issue involved the maximum number of shifts an employee could work. The department attempted unilaterally to limit employees to two consecutive shifts, although in the past it had allowed employees to volunteer for as many as three consecutive shifts. The union grieved this unilateral implementation, and the arbitrator agreed such a move violated the collective bargaining agreement. Although the superior court upheld the arbitration, the supreme court reversed, stating,

> We are of the opinion not only that the arbitrator exceeded his powers in this case because the dispute at issue was nonarbitrable but also that the submission of such a dispute to arbitration constituted a usurpation of the exclusive statutory authority of the department and its director to insure the comfort and promote the welfare of the patients [36, at 321].

The court buttressed its position in this case, in part, by referring to *Vose v. Brotherhood of Correctional Officers* [37]. That case also involved balancing an issue concerning the assignment of overtime with a director's statutory prerogative to "promulgate necessary rules and regulations . . ." [37, at 914]. The state had argued that all matters involving an interpretation of a statute should be

considered, *per se,* nonarbitrable. The court disagreed, but stated ". . . when the scope of a governmental officer's statutory authority is questioned, that officer must be entitled to a judicial determination regarding the nature and extent of that authority" [37, at 913].

Taken together, the recent *Council 94* case, *Vose, Kando,* and *Pawtucket School Committee v. Pawtucket Teacher Alliance* [38], which I did not discuss but which treats a similar issue, suggest that in Rhode Island collective bargaining statutes are no longer going to be granted the deference they were in *Belanger.* However, the current standard seems even to go beyond the wishes of the dissent in *Belanger,* where it was noted that the controlling bargaining act was silent regarding matters of selection and appointment. *Vose* and *Council 94* both involved issues of hours of work, which is a bargaining subject specifically mentioned in the acts. Nonetheless, even with the specific language of the bargaining acts, the current doctrine seems to be that such matters (at least in terms of their arbitrability) will be preempted by broad language concerning the management of public agencies. Issues that may at one time have been considered routine matters for arbitration may now be considered "nondelegable." Very recently, the supreme court has taken its reasoning one step further.

Most collective bargaining agreements in state government allow union officials paid time off to attend to labor relations matters. In a few large bargaining units, the practice had developed of union officials reporting directly to their union offices and spending their entire work time on union business. In 1995, a newly elected Republican governor issued a memorandum requiring union officials to report first to their state jobs and then to seek permission from their supervisors to attend to union business. The Rhode Island Brotherhood of Correctional Officers grieved the governor's action as a violation of its contract, particularly the clause that reads:

> Except as otherwise expressly provided herein, all privileges and benefits which employees have hereto enjoyed shall be maintained and continued by the State during the term of this Agreement [39].

The union was successful in arguing its case before the arbitrator, who ruled the governor's action was a violation of the cited clause. The state quickly sought vacation of the arbitrator's award, but was denied relief by the superior court.

The supreme court, however, reversed the lower court finding, first, that the clause was *not* a past practice clause since "privileges and benefits" are nowhere defined in the contract to include "past practices." Relying on *Court Reporters,* [35] the court determined no agreement to arbitrate past practices existed. And as in *Court Reporters,* the court decided to consider the merits of the case. In doing so, it developed a new standard regarding past practices:

> [T]he past practice can be no broader than the circumstance in which it arose: an unwritten agreement with one or more subordinate officials of one or more administrations *that is subject to change when a new Governor is elected* and takes steps within a reasonable amount of time to carry out his or her reserved management prerogatives (my emphasis) . . .
>
> Indeed, because the [collective bargaining agreement] is signed by the Governor and because the Governor is the state's chief executive officer, an agreement to establish an employee privilege or benefit would first have to obtain the Governor's approval to be enforceable [39, at 1235].

In *Brotherhood of Correctional Officers* [39] the court maintained its narrow reading of the arbitrability of past practices, but also added that a new governor should be granted wide latitude to change, unilaterally, practices that had developed under previous administrations. As case law develops further, it will be interesting to see how the court stretches this point. Some of the language in *Brotherhood of Correctional Officers* suggests that new governors will be treated similarly to successor employers in the private sector who must bargain with an incumbent union, but who are not bound by an existing collective bargaining agreement (absent a successor clause) [40].

CONCLUSIONS

In comparison to the standards in place in Rhode Island in the mid-1980s, the following changes have occurred: First, where there is tension between statutes, deference will no longer be given so easily to the bargaining statutes, but will more likely be given to the statutes concerning management of the agencies. Second, the court is more concerned today with actual printed language and is less likely to leave undisturbed decisions based merely on the "essence of the contract." This is particularly true with regard to past practices. Today, there must be very explicit contract language stating that past practices are arbitrable matters. Third, the court has become much less timid about reviewing the merits of arbitration cases and in substituting its own interpretation of clauses for the arbitrator's. It has formally opened the door to broad review when possible questions of statutory interpretation of directors' powers exist. But since statutes governing the control of public agencies usually give directors broad powers to promulgate "necessary rules and regulations," and since the entire purpose of collective bargaining is to limit the unilateral power of management, it is not clear when the rights employees gain under bargaining laws would not conflict, at least in part, with such statutes. And, hence, it is not clear what other matters in the future will be considered "nondelegable."

Twenty years ago in his dissent in *Jacinto*, now-Chief Justice Weisberger quoted a passage from a law review article that read: "The ordinary judge has ordinarily nothing to teach the ordinary arbitrator in the adjudication of an

ordinary grievance under an ordinary collective bargaining agreement." Justice Weisberger derided this passage, writing, "The theory seems to be that arbitrator's expertise is so great, and a judge's lack of expertise is so dangerous . . . that it is better to suffer an occasional egregious error than to submit the outcome of arbitration to the dangers even of limited judicial review [11]." Clearly, during the past decade, as the political climate has changed and the court itself becomes more conservative, it has taken the road that Justice Weisberger's words portended in 1978.

ACKNOWLEDGMENTS

The author wishes to thank Mark M. Grossman, Esq., Charles T. Schmidt, Jr., Ph.D., and Maureen F. Moakley, Ph.D. for their help and encouragement.

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Matthew M. Bodah is assistant professor and research coordinator of the Labor Research Center.

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Direct reprint requests to:

Matthew M. Bodah, Ph.D.
University of Rhode Island
Hart House
36 Upper College Road
Kingston, RI 02881