

1973

# Public Sector Grievance Arbitration: Right or Privilege Commentary

Arthur S. Leonard  
*New York Law School*

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)

---

## Recommended Citation

9 *Indus. & Lab. Rel. F.* 91 (1973)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

COMMENTARY:

## PUBLIC SECTOR GRIEVANCE ARBITRATION:

## RIGHT OR PRIVILEGE?

by Arthur S. Leonard\*

Arbitration by a neutral party is now firmly established as the preferred method for resolving grievances over the interpretation of contract terms which arise in the private sector. As public sector collective bargaining has increased in recent years, this private sector mechanism for rights dispute settlement has been adapted to the new sphere, frequently at the express urging of state legislatures in their public employee labor relations statutes. Grievance arbitration is normally the final step in an extended grievance procedure, and it is invoked when the parties to the dispute cannot come to terms through direct negotiation on several levels. Unions, of their own volition, do not process every unresolved grievance through to arbitration. Some grievances are redundant (i.e., similar grievances have been lost so many times that pressing them appears to be futile), some represent a clear misunderstanding of contract language by the employee, and some are frivolous or petty complaints that do not seem to the union to justify the expense of arbitration. Also, unions occasionally decide not to press a grievance as a bargaining tactic or in response to the internal political situation of the union. The argument is occasionally heard that public sector employees should have a right to have their grievances pressed to arbitration, due mainly to their lack of a right to strike in most jurisdictions. Should every individual employee in the public sector have the right to press his grievance to arbitration?

In deciding whether such a right ought to exist, this writer finds four questions of major importance, and will deal with each of them in turn. (1) Do private sector employees have such a right, and if not why not? (2) Is there a qualitative difference between public and private sectors which would justify different treatment? (3) Is such a right necessary to effectuate the purposes of public sector collective bargaining? (4) Does the individual employee have a binding claim on the union to process all his grievances as a matter of fairness or equity?

\*Arthur S. Leonard, a senior in the New York State School of Industrial and Labor Relations, is Editor of this journal.

### The Private Sector<sup>1</sup>

The federal courts have held that a union may refuse to process an employee's grievance for a variety of reasons, including the union's judgment that the grievance cannot be won, that the case is without merit, or that pursuit of the grievance would not be in the best interests of the union. There are, however, special circumstances in which an individual can compel grievance arbitration. The individual has a special burden to show that the union's refusal to process the grievance was due to discrimination of the sort made illegal by federal law. A union may settle a grievance short of arbitration by compromising the claims of the individual grievant, as long as this settlement, once again, does not single the employee out to lose rights guaranteed him by federal law. Under the Labor Management Relations Act (1947), individual employees have a right to approach the employer on their own initiative to present a grievance, but they cannot compel arbitration due to the legal status of arbitration. Arbitration is a binding device created by the contract between the union and the employer; since the employer's obligation under the contract is to enter into arbitration only with the union, the individual employee must persuade the union to process his case if he is to compel the employer to honor this obligation.

The courts have developed an Exhaustion of Remedies Doctrine which requires that employees covered by a collective bargaining agreement utilize the grievance machinery established by that contract, thus delaying access to arbitration even in those cases where an employee can prove a wrongful refusal of the union to process his grievance. Thus, an employee is obliged to give the union a chance to decide whether to process the grievance and even to settle the grievance short of arbitration before the employee can sue in federal court to compel the union to process his grievance.

In sum, then, individual employees in the private sector have no absolute right to have their grievances processed, although in a limited variety of cases involving alleged violations of the union's duty to fairly represent all employees in a unit the federal courts will entertain suits to compel unions to process individual grievances.

Why this restriction on rights? The answer is at least partly financial. Grievance arbitration is an expensive process; in addition to hiring an arbitrator (whose fee may run from \$100 to over \$400 a day), unions and employers routinely hire legal counsel to prepare and present their cases due to the increasingly legalistic quality of grievance arbitration. The courts have found that requiring unions to process all the grievances they

receive would impose a severe financial burden on the unions. In terms of dispute settlement, it is preferable that the bulk of grievances be resolved at a lower step than arbitration; informal resolution of grievances may avoid the bitter polarizing effect of hiring lawyers and arguing a case before a neutral, and will also result in a speedier resolution of the grievance, since a shortage of trained arbitrators has resulted in substantial delays between the decision to go to arbitration and the actual hearing of cases. Additionally, the union's chief responsibility is to the welfare of the bargaining unit as a whole. To require the union to process a grievance which might in its opinion be detrimental to the collective interests of the employees in the unit would be to require the union to purposely abrogate its overall responsibility. This consideration takes into account the internal political nature of the union; the elected union officials who make decisions on whether to process a grievance have constituencies to think about, and the theory of union democracy implicit in our national labor policy holds that the interests of the unit are best served when the union is at the same time sensitive to the interests of the majority without discriminating unduly against the interests of the minority. This policy of placing majority interests first is part of the definition of union democracy; it assumes that in the absence of the union neither the majority nor the minority would enjoy many union-won privileges and benefits. Thus, it is only right that the courts have allowed individual to compel arbitration of their own grievances only in a narrowly defined class of cases in which a heavy burden is placed upon the individual to show that failure to compel arbitration in his case would seriously interfere with his rights under federal law.

#### Public Sector v. Private Sector

There are differences in the nature of the employment relationship between the public and private sectors, but this writer does not find them to be such as to require a different treatment for public sector grievants demanding arbitration.

As in the private sector, the tool of grievance arbitration becomes part of a public sector collective bargaining relationship as a result of its inclusion in an agreement between union and employer, from which the same legal obligations flow as were present in the private sector. The individual employee is a concerned party in the relationship, but it is the union rather than the individual which establishes a mutual obligation with the employer to settle unresolved grievances through arbitration. Despite differences as to methods of hiring, assignment, and discharge, or tenure, promotion, and scope of contract bargaining, the essential nature of this triangular relationship between employee, union, and employer remains relatively constant as between

the public and private sectors in terms of grievance settlement; private sector rulings as to the responsibilities of unions to their members carry the same force of logic when applied to the public sector. Additionally, the argument about the lack of a right to strike in the public sector seems, in the opinion of the writer, to have little relevance to the problem at hand, since it is the union as a whole rather than the individual employee that makes a strike determination in either sector; wildcat strikes over individual grievances would have no more legality in the private sector than they do in the public sector.

The existence of alternative routes to grievance settlement in the public sector also weakens the case for automatic access to jurisdiction. Many jurisdictions give employees access to civil service review procedures for their job-related complaints. Thus, an employee whose union representative has decided against pressing his grievance may not have to give up the grievance entirely. Of course, in many jurisdictions collective agreements, with their dispute settlement procedures, have been held by statute or court determination to supercede conflicting or overlapping state legislation, so that this alternative route is limited to only those jurisdictions where no such limitation exists.

Additionally, collective bargaining in the public sector is a relatively new phenomenon. Many public sector unions are not far past the organizing and recognition phases. Treasuries are relatively small and experience and resources more limited than in the private sector labor movement. These unions frequently are less able to afford the expense and diversion of time represented by arbitration than are private sector unions. In addition, many issues regarding arbitrability and remedy are as yet unsettled in the public sector, and unions may prefer to concentrate on bringing grievances in those areas where they have a special interest in obtaining clarification of the law. Since their resources are limited, they cannot be expected and should not be forced to diffuse those resources on every grievance that comes along. As in the private sector, it is undoubtedly better from an industrial relations perspective that the bulk of grievances be settled short of arbitration, and the union is probably the best mechanism available for screening grievances and selecting those to be processed all the way through the procedure. Since the overriding interest of union officials will be in satisfying the majority of their constituents, the broad representative responsibilities given to unions by law are best served if the unions are free to make representative decisions without having to shoulder excessive financial burdens which could undermine the effectiveness of the unions in representing the collective interests of unit employees.

### Policy and Equity

A primary goal of public sector collective bargaining is peaceful labor relations. This is especially important in the public sector because of the essential nature of many public services to the general health and welfare of the jurisdiction; thus the prohibition of strikes in most public sector jurisdictions as compared to the right to strike in the private sector limited only by national emergency situations. Integral to this goal is the expeditious settlement of grievances through a procedure mutually acceptable to the public employer and the employees with whom it deals collectively. Avoidance of bitterness and polarization in this relationship are ideal considerations to achieve in the public interest. Thus, peaceful settlement of grievances should be achieved whenever possible short of arbitration. Incorporating guaranteed arbitration into the present dispute settlement system might have the effect of reducing the willingness of grievants to compromise and settle short of arbitration. If every individual knows that he can pursue his case through to arbitration -- and one assumes that every grievant believes he has a meritorious case -- then there is no incentive to compromise; the individual could reasonably believe that by holding out until arbitration he will score a complete victory in his case. The absolute number and the relative number of cases going to arbitration would likely increase, further straining the resources of unions and increasing the demands for arbitrators, which already outpace the supply. As a result, a severe backlog of polarizing, divisive grievances might accumulate, poisoning collective bargaining relationships in the public sector and militating against peaceful labor relations. Thus, a requirement that all grievants be guaranteed arbitration might have an effect running directly counter to public policy.

Finally, one turns to the morality of the situation. Is there a persuasive argument that individuals have a claim on the union to process all their grievances to arbitration? This writer thinks not, for such a claim would run counter to the best interests of the unit as a whole. We have shown that such a right could severely tax the resources of the union and would thus endanger its effectiveness and even its existence. Absent a union, the individual has no chance of arbitration, as the arbitration mechanism exists as a legally enforceable device in the context of a functioning collective bargaining relationship. With a union, the individual has a chance to have his grievance processed to arbitration if the unions finds that the grievance is meritorious and worth pursuing. Thus, the individual is better off in this sense with a union than without a union. Since an individual would have less protection for his rights without a union, an argument that he should be entitled to pursue his individual grievance when such pursuit might undermine the overall functioning of the union falls under its own

weight of illogic. The individual's rights must be balanced against the rights of all individuals in the unit; the majority have an equitable claim to union representation. Public policy authorizes the negotiation of grievance procedures with a view to improving the situation of two collectivities -- the public and the employees acting collectively. Since the costs of pursuing arbitration are far out of proportion to the individual's own financial contribution to the union in terms of dues, the unit as a whole has an equitable collective claim to be able to make the decision whether to process the grievance. Allowing individuals to finance the processing of their own grievances is not a reasonable solution to the cost problem because the high costs of grievance arbitration would result in denying access to arbitration on the basis of individual income rather than the merits of the case. In the small number of cases where the individual employee can show that he is suffering the loss of substantial rights guaranteed by law due to the union's refusal wrongfully to process his grievance, the individual can equitably claim that the union should be compelled to process the grievance. Absent this sort of claim, there is no equitable claim by an individual that his collective representative should cater to the whims of each employee acting as an individual.

### Conclusion

We have argued that there should not be an absolute right to arbitration of grievances for public sector employees. Such a right might work against public policy by undermining the ability of unions to pursue their statutory functions; further, no such right exists in the private sector and this writer finds no evidence that the union-employee-employer relationship in this respect is different in the public sector in a way that would justify preferential treatment for public sector employees. Finally, we have shown that claims based on equity fall in the face of the combined claims of the collective interests of the public and of the whole body of employees in the unit, as represented by the union. Of course, parallel to this denial of a right to grievance arbitration goes the imposition of a duty to represent equally and fairly all employees in the unit, whose breach should result in waiving the union's right to decide not to process a grievance. Taken as a whole, however, grievance arbitration of individual disputes in the public sector is indeed a privilege rather than an individual right, and this is as it should be.

Note

1. This admittedly brief and rough summary of individual rights to grievance arbitration in the private sector is based on the following court decisions:

Decisions of U. S. Courts of Appeals:

Black-Clawson Co. v. I.A.M., 313 F.2d 179 (2nd Cir., 1962)

NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir., 1963)

Local 12 v. NLRB, 368 F. 2d 12 (5th Cir., 1966), cert. den.,  
389 U.S. 837 (1967)

Decision of the U. S. Supreme Court:

Vaca v. Sipes, 386 U.S. 171 (1967)

