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Municipal Lawyer

A joint publication of the Municipal Law Section of the New York State Bar Association and the Edwin G. Michaelian Municipal Law Resource Center of Pace University

A Message from the Chair

Ten years ago, Section Chair Gerry Jacobowitz's goal was to invigorate the Section Committee structure. He envisioned committees headed up by current sitting members of the Section's Executive Committee that met, at a minimum, during our fall conference. He selected me to head up a "special projects" committee; essentially, if it was interesting to the membership but didn't fall under any of the four basic substantive groups, it went to me. Communication amongst my committee members was sporadic—we were geographically dispersed, not all members had access to e-mail and my conference-calling abilities were primitive to say the least.

Today, we have the ability to work around geography with technology. Most of us are e-mail efficient. NYSBA is capable of setting up listserves for instant communication amongst our colleagues and I don't know about your phone, but I can conference in more than two people these days. We have more committees today than we did in 1993. Not all of them are chaired by Executive Committee members. I am hoping to entice you to sign on to at least one committee by telling you about each of them and their chairs in this message and the next one. Once again, feel free to e-mail me at rminarik@courts.state.ny.us if you're interested, or I invite you to contact the chair directly.

Ethics and Professionalism

The committee's three main goals are: 1) Post Article 18-related articles, links and sample ethics laws on our Section's Web site; 2) Present CLE classes on government ethics and attorney ethics for government lawyers; and 3) Write a column for the *Municipal Lawyer* on government ethics and attorney ethics for government lawyers. Committee Chair Mark Davies is Executive Director and Counsel of the New York City Conflicts of Interest Board. He previously served as Executive Director of the New York State Temporary State Commission on Local Government Ethics, where he drafted the Commission's bill to completely revamp New York State's ethics law for local government officials, and as a Deputy Counsel to the New York State Commission on Government Integrity. During 15 years in private practice (first with a major New York City law firm and then with a Westchester firm), he specialized in litigation and municipal law, serving as counsel at numerous ZBA, planning board, and trustees meet-

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ings and representing a number of towns and villages in Article 78 proceedings. He has lectured extensively on civil practice and on ethics and has authored some two dozen publications, including a number of articles on governmental ethics laws, the municipal ethics chapter for *Ethical Standards in the Public Sector* (ABA 1999), the governmental ethics chapter for an international work on *Ethics and Law Enforcement: Toward Global Guidelines* (Praeger 2000), and a chapter on adopting local government ethics laws for a recent New York State Bar Association book, *Ethics in Government*. He is the directing editor and revision author of West's McKinney's Forms for the CPLR and the directing editor and lead author of *New York Civil Appellate Practice* (West 1996). You can reach Mark at mldavies@mldavies@aol.com.

Government Operations

Kathleen Gill, Deputy Corporation Counsel for the city of New Rochelle, graciously responded to my call for volunteers in my last column. She views the exploration of the following two issues as her committee's most pressing charge. One, the implications of e-mail on public officials, including document retention requirements, open meetings laws, and freedom of information laws; and two, the siting of telecommunications towers on state land and the circumvention of local regulations. If either of these issues is of particular interest to you, or perhaps you have a suggestion regarding other issues for the committee, you can contact me at rminarik@courts.state .ny.us. Or contact Kathleen directly at kgill@ ci.new-rochelle.ny.us. Kathleen is an experienced litigator who presently counsels the Mayor and the city of New Rochelle council. She also advises the city's zoning and planning boards. A former Editor for *Pace Environmental Law Review*, she is a welcome addition to our committee leadership.

Municipal Finance and Economic Development

Kenneth W. Bond and his committee have been busy. Ken conducted the program on deficit financing at the Municipal Law Section Fall Meeting in Albany on October 24th. Under Ken's stewardship, an article on pension bonds is in this issue of the *Municipal Lawyer*. This prolific committee is planning on submitting another article for publication at the end of the year. Besides authoring articles, I count on Ken and his committee to review legislation in their area of expertise; their review assists in determining whether or not the Section would like to comment on any bills pending before our state legislature.

Ken is a partner of Squire, Sanders & Dempsey L.L.P., a major United States-based international law firm. He concentrates in the firm's Public Securities Practice and is resident in the New York office. He has nearly 30 years of experience as bond counsel for local and state government issuers in financing infrastructure and environmental facilities. His experience includes serving as transaction counsel and underwriters counsel for financial institutions. He is a nationally recognized expert in the law of investing and managing deposits of public sector moneys. He has extensive experience as bond counsel with tax-supported general obligation, economic development and special revenue obligation financing. He also has substantial experience on behalf of public sector clients in such areas as deficit financing, urban renewal, community development and renewal, industrial development, and pooled environmental financing. Ken serves as the Eastern Region Offices Coordinator for the firm's Financial Services Practice. His financial services practice includes assisting in regulatory and transactional matters for Chinese-based commercial banks with branches in or doing business in the New York area. Ken also represents regional and community banks in acquisition and merger activities. He has written several articles and lectures frequently on topics relating to the law of municipal finance and financial services, including applicable federal tax and securities law. In 2002 his publications included the following: *Predatory Lending—Trap for the Unwary*, ABA Bank Compliance, July/August, 2002, Vol. 23, No. 7; and *Local Government Finance After the WTC Attack*, Empire State Report, February 2002, Vol. 28, No. 2. If you have any interest in this subject area, Ken can be reached at kbond@ssd.com.

Legislation

Connie Cahill is a graduate of Siena College (B.B.A.) *magna cum laude*; Albany Law School of Union University (J.D.) *cum laude*; and New York University School of Law (L.L.M., Tax Law). In addition to her membership in the New York State Bar Association, she is also a member of the National Association of Bond Lawyers and the Capital District Executive Women's Forum.

She is a shareholder at Girvin & Ferlazzo, P.C., a firm of twenty-two lawyers located in Albany, and practices in the firm's municipal finance group. Girvin & Ferlazzo, P.C. represents school districts, municipalities, 501(c)(3) organizations, developers, industrial development agencies, underwriters and trustees in connection with the issuance of tax-exempt bonds.

Because we are starting with a virtual blank slate with our Legislation Committee, Connie will be counting on the assistance of Ron Kennedy, NYSBA's Associate Director of the Governmental Relations Department. She anticipates that the Legislative Committee will become very active this year and will rely on the committee members who hale from diverse practice areas and therefore have the backgrounds to review legislation in a variety of areas. Connie welcomes new committee members and any comments or suggestions about pending or possible legislation. She can be reached at mcc@girvinlaw .com.

Bylaws

Owen B. Walsh has been very active with the New York State Bar Association, is a Fellow of the Bar and a former Chair of the Municipal Law Section. He is a member of the House of Delegates for the New York Bar as well as the Nassau County Delegate to the House of Delegates of the American Bar Association. He has agreed to serve as chair of an ad hoc committee I established to review the Section's bylaws, in particular, the role of ex-officio members of the Section's Executive Committee.

Presently, Owen practices in the labor and employment area as a mediator, fact-finder and arbitrator for New York State and the American Bar Association. Prior to entering private practice, the Nassau County Executive appointed him to the position of County Attorney where he practiced Municipal Law from 1994 to 1999. During this time, he was an active member of the Nassau County Bar Association, and in fact, was President of the Nassau County Bar Association in 2001, Chair and Member of its Professional Ethics Committee (where he received the Nassau Bar Association Directors' Award) and was a member of the Municipal Law, Grievance, Labor and Employment Law, Alternate Dispute Resolution and other committees. Owen is also Past Dean of the Nassau Academy of Law as well as Past Chair of the WE CARE Advisory Board (the charitable arm of the Nassau Bar). Owen also was the Nassau County Bar designee to the 10th Judicial District Grievance Committee between 1992 and 2000. Prior to 1994, Owen was in private practice with numerous clients in the municipal field.

Owen is a "committee of one" at present. He has reviewed other Sections' bylaws and is focused on the treatment of Past Chairs on the various Executive Committees regarding quorum and the right to vote. Anyone interested in assisting with the bylaws' review can contact me or Owen at obwdvw@aol .com.

As always, I am grateful to our chairs and committee members for the time and effort expended on behalf of our Section. I will have more in my next column about the Land Use and Environmental, Employment Relations, Website, and Membership Committees.

If you missed our Fall Meeting in Albany, your next opportunity to take advantage of our programming and meet our members will be in New York City on January 26, 2004. We are meeting on a Monday this year to go "back to back" with our colleagues in the Committee on Attorneys in Public Service. Look for the details on the programs soon.

Renee Forgensi Minarik

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *Municipal Lawyer* Editor

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Save the Dates!!!

January 26-31, 2004

127th NYSBA

Annual Meeting

New York Marriott Marquis

Monday, January 26, 2004

Municipal Law Section Annual Meeting

Topics:

- Disabled Employees and the Law
- Eminent Domain:Taking and Valuation
- Land Use Update
- Telecommunications Franchises
- Non-Traditional Revenue Opportunities for Municipalities
- Competitive Bidding

Tuesday, January 27, 2004

- Issues Relating to Home Land Security

(This program is being presented in conjunction with the Committee for Attorneys in Public Service.)

From the Editor

This is the third quarterly issue of the *Municipal Lawyer*. Our new format has attracted in-depth articles on a broad range of municipal practice issues written by leading practitioners in the fields of labor law, telecommunications law, land use, municipal finance and government ethics. Broadening our coverage, articles in the pipeline for future issues will address, among other topics, agricultural districts and public employee safety and health issues. Your submission of articles for publication and your feedback on the new direction of our publication will further enhance and enrich the *Municipal Lawyer*.

In this issue, NYSBA President A. Thomas Levin shares his thoughts on the significant home rule implications of the recent ruling by the Court of Appeals in *Cohen v. Board of Appeals of the Village of Saddle Rock*.[1] Laying to rest "practical difficulty" as a standard for area variances in New York, the Court ruled that 1992 state legislation replacing practical difficulty with a five-factor test for area variances impliedly preempted inconsistent local legislation which sought to reinstate that standard. As discussed by Mr. Levin, the decision calls into question the validity of any local law which deviates from the statewide standards established when the legislature recodified the planning and zoning enabling legislation for cities, towns and villages during the 1990s.

Sharing her extensive experience as a labor arbitrator, NYSBA Labor Law Section Chair Jacquelin F. Drucker provides a primer on the methodologies and tools of contract interpretation and illuminates the need for greater diversity in the pool of arbitrators. Additionally, Ms. Drucker discusses the labor arbitrator's obligation to make disclosures to the parties and to counsel to ensure that the arbitrator has no direct interest in the outcome of the proceeding, to avoid any appearance of bias, and to enable the parties to make an informed selection of their decision-maker.

Douglas Rohrer assesses the impact of the legislature's recent efforts to reform the ailing New York State and Local Retirement System, the second largest pension plan in the nation. Focusing on the component of that legislation that allows local governments a one-time window to finance 2004-2005 pension costs, Mr. Rohrer questions whether such legislation, or future extensions of that legislation, represents an impermissible mechanism to finance ordinary, recurring operating expenses in violation of article VIII, section 2 of the New York State Constitution.

Debuting a regular feature on local government ethics, Bonnie Beth Greenball, Special Counsel to the New York City Conflicts of Interest Board, provides an overview of that Board's operation and a template for constructing a model ethics law.

As aptly stated by our Section Chair, active committees are vital to the success of the Municipal Law Section. To entice Section members to join committees, Judge Minarik profiles the activities, goals and leaders of the Ethics and Professionalism, Government Operations, Municipal Finance and Economic Development, Legislation and Bylaws Committees. Future articles will spotlight the Land Use and Environmental, Employment Relations, Website, and Membership Committees. I join the call to our membership to become more actively involved in Section activities.

Given our publication schedule, you may not receive the Winter issue of the *Municipal Lawyer* until January of 2004. Accordingly, I would like to take this opportunity to wish you all a healthy and happy holiday season.

Lester D. Steinman

Endnote

1. 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003).

"Practical Difficulty" Is Dead: What About Home Rule?

By A. Thomas Levin

On July 2, 2003, the Court of Appeals issued its decision in *Cohen v. Board of Appeals of the Village of Saddle Rock*[1] finally laying to rest the "practical difficulty" standard for area variances used in New York for many years. Unfortunately, in doing so, the Court may also have put in doubt much local legislation enacted pursuant to home rule legislative authority vested in towns and villages by Municipal Home Rule Law § 10.

In 1991, the legislature enacted Village Law § 7-712-b(3),[2] which purported to codify area variance standards. This law required Boards of Appeals to apply a balancing test in considering whether to grant or deny such variances. In enacting that 1991 legislation, the legislature purported to merely "codify" the existing case law, but the statutory language omitted any reference to "practical difficulty." By doing so, the legislature left open the question whether "practical difficulty" remained a consideration for area variances.

This question was resolved by the Court of Appeals in 1995, in *Sasso v. Osgood*,[3] when the Court concluded that there no longer was a requirement that an applicant seeking an area variance show "practical difficulty." In *Sasso*, the Court of Appeals concluded that the only relevant standard for area variances under the new legislation was the balancing of the five factors set forth in the Village Law.

The villages of North Hills and Saddle Rock (and many other Nassau County municipalities) concluded that the new state legislation unduly intruded upon their authority to regulate the use of land within municipal boundaries. Knowing that the legislature had acted many years prior, in furtherance of the state Constitution to grant local governments the right to amend or supersede provisions of the Village Law, they enacted legislation to utilize that authority. The source of that authority is Municipal Home Rule Law § 10(1)(ii)(e)(3),[4] which states

> every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government . . .
>
> e. a village . . .
>
> [t]he amendment or supersession in its application to it, of any provision of the village law relating to the property, affairs or government of the village or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, *unless the legislature expressly shall have prohibited the adoption of such a local law*. (emphasis supplied)

"[When it issued its decision in Cohen*] the Court may . . . have put in doubt much local legislation enacted pursuant to home rule legislative authority vested in towns and villages by Municipal Home Rule Law § 10."*

The 1991 state legislation establishing standards for area variances clearly was part of the Village Law, a general law, and clearly contained no express prohibition against local legislation to the contrary. North Hills and Saddle Rock concluded under such circumstances that they had authority pursuant to the Municipal Home Rule Law to amend or supersede the new state law as it applied in their villages. Each village adopted a local law which expressly stated an intention to amend or supersede the Village

Law provisions. Each village law enacted the old "practical difficulty" language formerly contained in the Village Law, and required that the "practical difficulty" standard be applied in conjunction with the five factors established in the 1991 revision to the Village Law.

Property owners in each village applied for area variances to the local Boards of Appeals, and each Board applied the locally adopted area variance standard instead of the standards stated in the 1991 revision to the Village Law. The Cohen and Russo variance applications each were denied, and Article 78 proceedings ensued at the instance of each property owner.

The Nassau County Supreme Court first considered the *Cohen* case, and invalidated the local legislation. The court reasoned that even though the state legislature had not expressly prohibited the enactment of such legislation, the local legislation was precluded because the legislature had pre-empted the regulatory field by enacting a uniform statewide standard for area variances. Shortly thereafter, the same result was reached in *Russo*.

The Appellate Division, Second Department, affirmed in each case,[5] agreeing that the local laws were unauthorized because the legislature had intended to preclude any contrary local legislation, and had pre-empted the regulatory field, notwithstanding that the Municipal Home Rule Law authorized the local legislation so long as the legislature had not included any express prohibition.

These determinations all relied upon the 1989 Court of Appeals companion decisions authored by (now Chief) Judge Kaye in *Kamhi v. Town of Yorktown*[6] and *Albany Area Builders Assoc. v. Town of Guilderland*.[7]

In *Albany Area Builders*, the Court had reviewed a town local law which sought to impose a transportation impact fee on new development, to fund new highways. The law was found invalid, because the state had enacted a comprehensive scheme for regulation of development approvals in the Town Law, and for funding of highway improvements, part of which was contained in the Highway Law. The Court found that regardless of any supersession authority with respect to the Town Law, the town had no Municipal Home Rule Law authority to amend or supersede the Highway Law. Thus, the local legislation was found to be in excess of the town's authority, and invalid. This was apparently the first case in which the Court of Appeals had hinted that the pre-emption doctrine was applicable in examining the validity of local laws enacted pursuant to Municipal Home Rule Law supersession authority.

In *Kamhi*, the Court considered a town local law which imposed a requirement for contribution of parkland or money in lieu of parkland as a condition of site plan approval. There was no provision of the Town Law, or any other state law, which expressly provided otherwise. The Court noted that the supersession authority in the Municipal Home Rule Law clearly authorized this local legislation, which supplemented the regulatory authority contained in the Town Law. The Court made clear that analysis of such local legislative authority required not only a resolution whether the legislature had expressly restricted the adoption of such a local law, but also whether the legislature had pre-empted the field of regulation. In *Kamhi*, the Court concluded that there was no such prohibition, and no pre-emption, so that the town had authority to enact the challenged legislation. Ironically, the Court nevertheless invalidated the local law, on the basis of procedural errors in the enacting process.

In *Kamhi*, the Court engaged in an extensive discussion of the nature and extent of local government supersession authority, including the history of the Municipal Home Rule Law provisions. The Court agreed that the supersession power granted by the Municipal Home Rule Law presumed that local legislation enacted under that authority would be inconsistent with the Village Law, or Town Law, and that this was an exception to the general rule that a local law could not be inconsistent with a general state law. Specifically, the court acknowledged that "local laws that are inconsistent with the Town Law may be valid. Indeed, inconsistency is a premise of the supersession authority, for there is otherwise little need of the power to amend or supersede state law."[8]

However, even where such inconsistency was permitted, the *Kamhi* majority also found that the validity of the local legislation also depended upon whether the state had pre-empted the regulatory field. Thus, even where the Municipal Home Rule Law clearly vested legislative authority unless the legislature expressly provided otherwise, the Court of Appeals found that the legislature also could deprive local legislatures of authority to act by implication, where the legislature had established a statutory scheme the objectives of which were defeated by the local legislation.[9]

This was the relevant history of the issue when the Court of Appeals granted leave to appeal in *Cohen* and *Russo*.

In each of those appeals, the villages argued that the Municipal Home Rule Law provisions were clear, and that the local laws were valid in the absence of any express statement in the state legislation that prohibited contrary local legislation. The villages argued that the prior cases involving the pre-emption principle should not apply to local laws amending or superseding the Village Law, in light of the clear statutory language of the Municipal Home Rule Law. Further, the absence of an express prohibition by the state legislature[10] clearly evinced an absence of intention on the part of the state legislature to pre-empt the regulatory field. Lastly, the villages argued that the legislative history[11] demonstrated only an intent to codify existing case law on area variances, and no intent to require a uniform statewide standard.

"The Court's decision in Cohen *will no doubt be cited in support of future challenges to a myriad of village and town local laws which create local variation in governmental structure or procedures."*

At the oral argument, counsel for the Russos[12] argued that the state had intended a uniform statewide standard for area variances, and that to permit each village to enact its own variance standards would generate confusion among developers. The villages responded that every local government already has different zoning regulations, establishing different permissible uses in each municipality, and that having local variance standards which differed from village to village would be no more confusing. The villages also argued that the Municipal Home Rule Law test for amendment of the Village Law was clear and unequivocal: the legislation was permitted unless expressly prohibited. To also apply the pre-emption test to such legislation would eliminate this clarity, and would substitute confusion and uncertainty.

A majority of the Court of Appeals concluded that the local laws were invalid. Although the laws were conceded to be authorized by the Municipal Home Rule Law, and notwithstanding that there was no express prohibition in the Village Law against such legislation, the Court found that the legislature implicitly prohibited such laws by enacting a comprehensive scheme of regulation. Thus, despite the clear language of Municipal Home Rule Law § 10(1)(a)(ii)(e)(3) permitting local legislation in the absence of an express prohibition, the local legislation was found to be barred by an implied pre-emption.

A strong dissent by Judge Rosenblatt pointed out that the language of the Municipal Home Rule Law was clear: absent an express prohibition from the state legislature, a village was expressly authorized to enact local legislation amending or superseding the provisions of the Village Law with respect to village property, affairs or local government, and no implied pre-emption could divest that authority. Judge Rosenblatt also agreed with the argument made by the villages that the majority decision would place a cloud over every local law adopted by any local government in the exercise of its home rule authority to amend or supersede certain state laws. Unfortunately, this view failed to gather any support from other members of the Court.[13]

The Court's decision in *Cohen* will no doubt be cited in support of future challenges to a myriad of village and town local laws which create local variation in governmental structure or procedures. The argument accepted by the Court, that the provisions of Village Law § 7-712-b are intended to establish a standard scheme of considering variance applications throughout the state, is equally applicable to nearly every other provision of the Village Law. After all, the entire purpose of the Village Law is to set out a basic and standard structure for village governments throughout the state. Every part of that statute can be argued to be intended to be a comprehensive and complete regulatory scheme for a particular area of governance.

Municipal Home Rule Law § 10(1)(a)(ii)(b)(3), which was intended to authorize local adaptation and experimentation in every such area, except where the legislature had expressly provided otherwise, is now of dubious effect, particularly in the area of zoning regulation. The effects of *Cohen* are likely to be long-lasting, and extensive, as the decision provides the elements of an argument to challenge any local law which differs from the Village Law provisions, even where the legislature has not prohibited such local laws.

At this point, it would appear that Municipal Home Rule Law § 10(1)(a)(ii)(b)(3) will be effective only if the legislature recognizes the serious impact *Cohen* will have on home rule authority. This impact can be remediated, and the original statutory intent rehabilitated, by amendment of the Municipal Home Rule Law to provide that the local government amendment and supersession authority is applicable, whether or not the legislature has pre-empted the field of regulation, unless the legislature shall expressly provide otherwise.

Such an amendment would again give meaning to the term "expressly" as so clearly and carefully used by the legislature.

Endnotes

1. 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003).
2. Parallel provisions are found in Town Law § 267, both as to the prior law and the current law.
3. 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995).
4. A virtually identical authority is granted to towns by Municipal Home Rule Law § 10(1)(a)(ii)(d)(3).
5. *Cohen v. Board of Appeals of the Village of Saddle Rock*, 297 A.D.2d 38, 746 N.Y.S.2d 506 (2d Dep't 2002); *Russo v. Black*, 297 A.D.2d 381, 746 N.Y.S.2d 605 (2d Dep't 2002).
6. 74 N.Y.2d 423, 548 N.Y.S.2d 144 (1989).
7. 74 N.Y.2d 372, 547 N.Y.S.2d 627 (1989).
8. *Kamhi* at 430.
9. *Id.* at 432.
10. The villages pointed out that the legislature clearly knew that it had authority to enact such prohibitions, and had done so in the past. *See* Village Law §§ 5-532, 9-916, 10-1006(14).
11. It was an interesting side point that in concluding that the Legislature did intend a uniform statewide standard, the lower courts had relied upon a memorandum from the Association of Towns to the Governor, prepared after the Legislature had adopted the 1991 legislation and urging that the legislation be signed. It apparently was of no moment that the cited memorandum was not from the Legislature, that it indicated only that the 1991 legislation was intended to codify existing law, and contained no indication that there was an intention that a uniform statewide standard be mandated. It was particularly noteworthy that in the Court of Appeals the same Association of Towns, joined by the New York Conference of Mayors, had submitted an *amicus curiae* brief in support of the villages, urging that no pre-emption and no statewide standard was intended.
12. There was no brief or argument on behalf of Cohen, as he had sold the subject property prior to the Court of Appeals argument, and there no longer was an application pending for the requested variances.
13. Judge Wesley, whose comments at oral argument seemed in accord with those of Judge Rosenblatt, left the Court to assume a seat on the United States Court of Appeals for the Second Circuit before the decision was issued. His position on the issue may never be known.

A. Thomas Levin is a member of Meyer, Suozzi, English & Klein PC, in Mineola, New York. He is currently President of the New York State Bar Association, and is Village Attorney or special counsel for more than a score of Long Island communities, including the villages of North Hills and Saddle Rock.

The View from the Head of the Table: An Arbitrator's Observations and Suggestions

By Jacquelin F. Drucker

I. Introduction

After sitting at the head of the table for the first 1,000 cases of his or her career, a labor arbitrator begins to form some impressions that may be worth imparting to those who sit at the sides of the table and advocate on behalf of management or unions. This article offers a few observations from that perspective.

II. Burdens: They Might Not Be as Simple as They Seem

A. Introduction

The burdens of proof in labor arbitration usually are stated in simple terms: the employer bears the burden of proof in discipline cases, and the union bears the burden in cases alleging non-disciplinary breaches of contract ("contract cases"). Neither situation, however, is quite as simple as it seems.

B. Disciplinary Cases

In discipline cases, the principle is fairly forthright, but there often is confusion regarding the requisite components of the employer's case in chief and the quantum of proof. At a minimum, the principle of just cause requires that the employer prove that the employee engaged in the conduct for which he or she is being disciplined. The general rule is that this proof must be established by a preponderance of the evidence. This is the standard of proof commonly understood when the parties agree to incorporate principles of just cause, and, unless they have specified some other standard of proof, a preponderance should be sufficient. Even in those cases in which the employee is alleged to have engaged in an act of moral turpitude or misconduct which, in another forum, would be found to be criminal, the majority of arbitrators use the preponderance as the requisite quantum of proof. With such offenses, however, unions often argue that the arbitrator should require clear and convincing proof or proof beyond a reasonable doubt, and a minority of arbitrators will adopt such a standard.[1] Other arbitrators eschew use of any legalistic quantum of proof and take the position that the applicable standard is, simply, "convince the arbitrator."

With regard to proof of other aspects of an employer's disciplinary case, some employers and unions zero in on that unfortunate enumeration of the "seven tests of just cause"[2] and proceed as if the employer has the burden of proving that they have met each of the seven elements regardless of the basis for the union's challenge to the discipline. This seldom is necessary. For example, one of these seven tests is whether the rule being enforced through the discipline is reasonable.[3] Yet, unless the union challenges the reasonableness of the rule the employee is accused of violating or unless the rule departs from common workplace expectations, the employer need not dwell on evidence to establish the reasonableness of the rule. Many rules and requirements, such as one that an employee be regular in attendance, are so fundamental that employers rarely should have to prove that such a rule is reasonable.[4]

Similarly, management need not prove, in its case in chief, that it treated all similarly situated employees in the same manner. The issue of disparate treatment does not arise unless the union adduces some evidence to identify instances in which employees alleged to have been similarly situated were treated differently. If the union does this, then management in its rebuttal case will offer whatever evidence it has to challenge the union's contentions or to establish the basis for the differing treatment. In some instances, of course, management wishes to highlight at the outset its rigorous enforcement of the policy at issue and therefore will want to proceed with at least basic information about consistent application. This is common in cases involving zero-tolerance policies regarding violence or theft.

The important point for management when considering the elements of just cause and due process is to be aware that, although the employer has the burden of proof, it need not adduce evidence to prove those aspects of just cause or due process that are not being challenged. Pre-hearing communications between counsel in this regard often help expedite the process and prevent simple cases from expanding into multi-day proceedings. In fact, if procedural issues crystallize before the hearing, counsel should consider seeking a conference call with the arbitrator to examine the possibility of resolving preliminary procedural issues in advance of the hearing. Such a step often helps ensure that time at hearing is used as productively and efficiently as possible.

C. Contract Interpretation Cases

In cases alleging a non-disciplinary breach of contract,[5] the employer should not allow itself to be lulled into evidentiary complacency by the general concept that the union carries the burden of proof. Management occasionally comes to a contract-interpretation arbitration thinking that it can sit back, watch the union struggle to adduce sufficient evidence to prove its case, and then close. Contract cases may not be that simple, however, and the issues of the burden must be watched very carefully. The union begins with the burden, but the burden does not always stay with the union.

When a contract proscribes certain managerial action but creates exceptions under which the action may be permitted, the employer arguably assumes the burden of proving the facts that would support application of the exception.[6] Contract language often creates a set of burdens, with a threshold requirement that may not be difficult for a union to meet. An example is found in the common collective bargaining agreement provision that precludes supervisors from performing bargaining unit work except in highly specific situations, such as an emergency, training, or the protection of the safety of persons or property. In arbitrating a grievance alleging breach of such a provision, the union must prove (again by a preponderance of the evidence) only that a supervisor was performing bargaining unit work. Although there sometimes is substantial dispute about whether a particular task is bargaining unit work, the union's initial case under such a provision often is not a complicated matter. Once the union has shown that a supervisor performed certain tasks and that those tasks constituted bargaining unit work, the burden then falls to management to establish that this generally impermissible act was appropriate under one of the exceptions or perhaps that it was *de minimis* in nature.[7] A few arbitrators adopt the view that, under such a contractual provision, the union also carries the burden of proving that none of the exceptions could have applied. For example, the union must prove that there was no emergency, there was no training underway, or there was no safety issue. Therefore, the careful union will be prepared to address these elements as well, but the employer should be prepared to prove that it was operating under one of the exceptions. If the union has proved that the generally proscribed action occurred, and the employer has not presented proof to justify application of an exception, the grievance may well be sustained.

When attempting to apply conventional burdens of proof, disputes regarding ambiguous language are especially problematic. In such a case, the arbitrator is attempting to identify whether there was a meeting of the minds and, if so, what it was. In such instances, burdens begin to blur as the arbitrator searches for something, anything, that may indicate the intent of the parties or may offer some basis of clarification. (See discussion below regarding approaches to analysis of ambiguous language.)

III. Contract Interpretation: An Analytical Structure

A. Introduction

The most far-reaching and also the most intellectually challenging of cases an arbitrator decides are those that involve the interpretation of a collective bargaining agreement. When the parties cannot agree on what the contract requires and they call upon an arbitrator to interpret contract language, most arbitrators follow a rough three-part analytical structure. It involves the following: (1) careful scrutiny of the language in the context of the entire contract and with an application of principles of interpretation; (2) consideration and evaluation of bargaining history that may provide insight into the parties' joint intent; and (3) examination of the parties' accepted practice under the provision at issue. This analysis is based upon a logical assessment of the various indicia of the parties' joint intention. The examination starts with parties' most direct statement of their intent: the written terms of the contract. If that is not clear, illumination may be found in what the parties spoke, wrote, exchanged, discussed, or rejected at the bargaining table. Further clarity may be demonstrated by the way the parties conducted themselves under the contract, if that behavior carries the qualities essential to finding a meaningful past practice. Counsel presenting a case involving contract interpretation wisely will cover all three of the foregoing elements as thoroughly as the evidence permits.

B. The Plain Meaning Rule

The plain meaning rule has a prominent place in arbitration and dictates that, if there is no ambiguity when the language is read in the context of the whole agreement, the arbitrator should not entertain or consider evidence of bargaining history or practice, nor should the arbitrator admit extrinsic evidence that would reveal a latent ambiguity. Some parties and arbitrators, however, see ambiguity when others see clarity. Indeed, the concept of ambiguity carries with it an assessment of reasonableness, which itself may be subject to debate. Thus, a party's choice to rest its argument solely on contract language, staying within four corners of the document, sometimes is a risky, albeit logical, strategy. Even

when language is completely and undeniably clear, some arbitrators will conclude that they have discretion to allow evidence "to prove that the apparently clear and unambiguous [language] was in fact intended to mean something totally different."[8] The possibility of using such discretion, of course, must be contrasted with the undesirability of accepting and giving weight to evidence "that merely reflected one party's internal, uncommunicated understandings of contract terms. . . ."

Arbitrators vary in the degree to which they will allow admission of or be persuaded by evidence that may indicate an intent contrary to the clear language. Certainly, an important public policy supports the plain meaning rule; it promotes care in drafting, stability under the contract, predictability in the relationship, and efficiency in the hearing. Arbitrators who depart from those principles must do so with caution. Still, many believe that language, standing alone, cannot convey an unambiguous meaning without reference to the context. Chief Justice Traynor of the California Supreme Court stated in 1968 as follows:

> . . . the meaning of a writing ". . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended."
>
> Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. [Citations omitted.][9]

Certainly, however, departure from clear language should not be based on evidence or arguments indicating only that one party wishes, in retrospect, that it had negotiated something different. In any event, even if an arbitrator is willing in an appropriate case to step away from the plain meaning rule, the arbitrator's analysis nonetheless always must start with the language itself, as addressed in the next section.

C. Evaluating the Language Itself

1. Is the Language Clear or Is It Ambiguous?

Every contract claim must begin and some will end with an analysis of the wording of the contract. There should be no better indicator of the parties' joint intent than the words with which they chose to express it. Thus, many arbitrators take the position that, under the plain meaning rule as discussed above, a determination that the language is clear and unambiguous ends the analysis and obligates the arbitrator to render a determination in keeping with the clear terms. When those words appear to be ambiguous, however, the parties and arbitrator turn to other sources for illumination. In addition, as noted above, even when the words are clear, other arbitrators will consider evidence that may create an ambiguity or establish circumstances that suggest that the parties intended to adopt an interpretation different from the seemingly plain meaning of the words. Thus, under any approach, the first step in contract interpretation is an examination of whether the provision at issue is ambiguous on its face.

Language in a collective bargaining agreement is ambiguous "if it is reasonably susceptible to more than one reasonable interpretation."[10] The element of reasonableness is critical, for even the most crystalline language may be made to seem ambiguous if viewed in a contorted or unusual way. Assume, for example, that a collective bargaining agreement, created and applied only in New York, uses a term that is perfectly clear in common North American English but has a different meaning in Great Britain. In this situation, an arbitrator is unlikely to find ambiguity based solely on the interpretative spin that would be provided by the British definition of the same term.

Language sometimes appears ambiguous only when isolated from the rest of the collective bargaining agreement. Thus, the entire contract must be explored to ascertain if the ambiguity is resolved by reference to other provisions. The obvious example is where the clear meaning of an otherwise vague term has been set forth in a definitional section in the contract. Less apparent but also meaningful may be provisions elsewhere in the collective bargaining agreement in which one party's reading is stated in explicit language, thus indicating that the parties knew how to and presumably did express the concept precisely when they intended it to be used in that precise manner. This then leads to the conclusion that, in the absence of the precise language, the parties intended a meaning different from that which was expressed with the precise term.[11] Similarly, consistent use throughout the contract may indicate that the phrase or word at issue reasonably could have but one specific meaning. Counsel should be aware,

however, that arbitrators are chary of browsing through a contract on their own and relying on provisions that neither party has cited. An arbitrator who ventures unescorted into uncited parts of the contract might unwittingly affect other aspects of the contractual relationship between the parties. Therefore, if there are other portions of the contract which shed light on the provisions at issue, it is imperative that counsel call them to the arbitrator's attention either in hearing or through briefs.

2. Maxims of Contract Interpretation

Traditional principles of contract interpretation, which often spring from ancient theories of contract law and are not peculiar to labor law, may be used to lend clarity to language that otherwise would be ambiguous. Such maxim-based clarification usually is found without departing from the four corners of the collective bargaining agreement. Drafters are presumed to operate in accordance with these principles, because the maxims reflect time-honored theories developed through the ages of the law as reliable tools for discerning the parties' joint intent.

The United States Supreme Court in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.* stated, "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." [12] This emphasis on the departure from traditional contract law, however, does not preclude the consideration and use of principles of interpretation. The maxims cited herein are not binding rules of law but, rather, are tools of construction which may be of use but do not supplant traditional labor-relations theory in contract interpretation. These principles of interpretation are built largely upon foundations of logic such that, even if a maxim did not exist, common sense often would lead to the same conclusion. Set forth below are several of the maxims that are used most frequently in labor arbitration. The first few are ones that this arbitrator has found to be of particular help in interpreting contracts. Those at the end provide significantly less persuasive value.

1. The Contract Is to Be Construed as a Whole. As noted above, clarity often may be obtained by reading a contractual provision in conjunction with terms found elsewhere in the agreement. The best example, as noted above, is reference to definitional sections. Other clarification may be obtained from examination of how the parties treated the issue or the term in other parts of the contract. Further, a general intent or overriding purpose may be discerned from consideration of the contract in full.

2. Language Will Be Construed So as to Give Meaning to All Terms. This important and frequently used principle is based on the idea that the parties would not include meaningless provisions in their contract and that they intend that all terms be given meaning. As stated by the Second Circuit in *Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines, Local Union No. 550,* an interpretation "that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect."[13]

3. Words Are to Be Given Their Ordinary and Popular Meaning Unless the Contract or Practice of the Parties Indicates Otherwise. The parties are assumed to have used language in a manner that is consistent with common parlance. As a typical example, in *In re Stacey*,[14] the Supreme Court of Vermont interpreted the word "may" as being a permissive rather than mandatory term, consistent with the word's common meaning. In using this theory, dictionary definitions sometimes are useful when cited by the parties, although they seldom are dispositive. Discussions and holdings set forth in court decisions and arbitration awards also sometimes are persuasive, especially with regard to legal or labor relations vocabulary. On occasion, definitions or peculiar use within an industry will indicate that something other than the common or ordinary meaning of a word was intended. In such cases, of course, the arbitrator is likely to give weight to the indication that it was the parties' joint intention to adopt a meaning different from the popular understanding of a word. As a variation of this principle, technical terms are to be given meaning consistent with their technical and trade usage.

4. *Ut Res Magis Valeat Quam Pereat.* "An agreement should be interpreted in such fashion as to preserve, rather than destroy, its validity."[15] Thus, if an arbitrator is faced with two readings of the contract, and one would require the doing of an unlawful thing or would render the clause invalid, the arbitrator is guided to select the other reading. Similarly, if one reading would lead to the clause being rendered meaningless, the arbitrator assumes that the parties did not intend this result and will adopt the other reading. (In addition, an award that requires a party to perform an unlawful act would invite vacatur on the grounds of being contrary to public policy.[16])

5. *Expressio Unius Est Exclusio Alterius.* Even those who never studied Latin discover that they are able to translate this: "The expression of one thing is the exclusion of others." This means that if the parties chose to set forth a list of items or factors, the specification of the stated items reflects an intention

to exclude any items not stated.[17] The effect of this maxim is avoided by inclusion of a statement that the list is not intended to be exclusive, such as "including, but not limited to. . . ."

6. ***Ejusdem Generis*.** This principle means "of the same kind" and instructs that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" [18] This maxim highlights the importance of context in the interpretation of language.

7. Specific Language Controls over General Language. Where a broad principle has general application but a particular situation has been carved out for different treatment, the specificity indicates the parties' particular intent regarding a precise point or subset. Therefore, the specific prevails over the general.[19] The general terminology then applies to those instances that have not received specific treatment.

8. Absurd or Nonsensical Results Are to Be Avoided. If one reading of a contract would lead to ridiculous, absurd, or nonsensical results, that reading is disfavored. Adopting a particular reading in *Rockwell Spring and Axel Co. and UAW Local 1037*,[20] the arbitrator observed, "To hold otherwise would lead to an absurd and untenable result, and it is an established rule of construction that where one interpretation of the language of the contract would lead to an absurd result, while an alternative interpretation would lead to a just and reasonable result, the latter interpretation will be used." An arbitrator, however, must decide if what one party is describing as an absurd result actually is absurd or is just an exaggerated version of the results the party now disfavors.

9. Handwritten Terms Agreed by Both Parties Generally Control over Printed Provisions. As stated in *The Common Law of the Workplace: The Views of Arbitrators*, "Arbitrators reason that the more attention parties give to a negotiated term, the more likely it is to reveal their intent. Handwritten terms are presumed to have been the subject of greater scrutiny or at least the latest consideration by the parties, hence to manifest their actual final intent, absent evidence to the contrary. This assumes, of course, that the handwriting is established through initials or otherwise to be a part of the contract." [21]

10. The Law Abhors a Forfeiture. If one interpretation of ambiguous language would result in the loss of a right or benefit, especially one on which a party has relied, whereas another reasonable reading would avoid the forfeiture, arbitrators are likely to adopt the latter. As stated in *Mode O'Day Corp. and ILGW Local 384*, "a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible."[22] Thus, the party claiming the forfeiture or penalty should be able to establish that "such is the unmistakable intention of the parties." This theory also occasionally surfaces, inappropriately in this arbitrator's analysis, in efforts to excuse time-barred grievances.

11. ***Contra Proferentum*.** This principle, which seldom is meaningful in the interpretation of labor contracts, provides that language is to be construed against the drafter. "If language has two or more possible readings, this maxim instructs an arbitrator to prefer the interpretation that is less favorable to the party who drafted the disputed language. That party had an opportunity to resolve the ambiguity and failed to do so."[23] The principle promotes care in drafting and is important for those who are nondrafting parties to contracts of adhesion, but it is of little use in the interpretation of the labor contracts. Given the dynamic nature of collective bargaining, many arbitrators conclude, as did the Ninth Circuit in *Northwest Administrators, Inc. v. B.V. and B.R., Inc.*, that "caution must be exercised when applying this doctrine to a labor contract."[24]

D. Assessing the Forms of Bargaining History

When no clarity may be obtained by consideration of the words in the context of the entire collective bargaining agreement, the next most useful indicator of the parties' intention usually is bargaining history. The common types of evidence used to establish bargaining history, in ascending order of value, are:

a. Testimony of Those Who Were at the Bargaining Table. While useful, this is ranked lowest among the sources because bargainers' perceptions and recollections of exactly was said often are unreliable. Moreover, witnesses often testify to what they intended or thought rather than what they actually said or heard. In establishing joint intent, what a witness thought is far less probative than what a witness and others at the table actually said to each other. Testimony of this nature is most persuasive when it is crisp and precise, unmuddled by the witness's recollections of what he or she "would have," "would not have," or "probably" said.

b. Minutes and Other Notes Relating to the Bargaining Process. Notes that were made contemporaneously with the negotiation sessions are extremely persuasive. They must be introduced, of course, through a witness who will be able to establish the proper foundation and authentication. Other forms of notes, such as post-session memoranda to file or to

party representatives who were not at the table are less persuasive, for these records have been adjusted with the interference of hindsight and have not been responded to by the other side. Newsletters or announcements prepared by only one party regarding what was accomplished in bargaining tend to establish only that party's view or hope and are not indicative of a jointly held intent.

c. The Evolution of Contract Proposals. Often, this is the most helpful form of evidence in a contract interpretation case. Documentation regarding proposed language will require foundational testimony unless the parties stipulate, as they often do, to a package of documents that create the paper trail establishing the disposition of proposed language. The fact that a particular clause was suggested and then rejected generally indicates to the arbitrator that the parties did not jointly intend the agreement to have the effect that would have been produced by the rejected language. The arbitrator will be disinclined to interpret the contract in a way that would give life to a concept the parties abandoned. Rejected language often constitutes powerful evidence of a party attempting to obtain through arbitration that which it tried but failed to obtain at the bargaining table. There are times, however, when parties have made proposals draped in disclaimers that may blunt the effect of rejection. A party, for example, may take the position that the contract already provides what is sought and that the new language is being offered only for emphasis. Such caveats, when well documented, might preclude the conclusion that otherwise would be drawn by an arbitrator presented with evidence of a rejected proposal.

The foregoing analysis of bargaining history emanates from the theory that, if the parties did not state their intent with clarity of words, the next most significant source for discerning their joint intent would be the communications in which they engaged at the table. Such evidence also may be of value to the arbitrator who is willing to consider evidence that might create ambiguity where otherwise there would be none or to indicate that a joint intention is different from what is stated in the explicit words of the contract. For these purposes, bargaining history, being verbal in nature, tends to carry more weight than the next source from which intent might be discerned: practice, or the accepted manner in which the parties conducted themselves.

E. Past Practice as a Source of Clarification or Binding Obligation

Past practice is widely accepted as being applicable in two situations: (a) when the contract is ambiguous and the practice under the contract lends clarity because it is evidence of the parties' joint intent; and (b) where the contract is silent and a party argues that the practice has given rise to a contractually binding obligation. (The latter use of past practice is beyond the scope of this paper. Thus, the discussion which follows relates only to the use of past practices as indicia of the parties' joint intent when language is ambiguous.) There is, however, a third instance in which past practice is used which must at least be mentioned. The general rule is that past practice is not relevant when the language is clear, but this principle is subject to dispute. A number of arbitrators have concluded that past practice may be used as evidence of a joint intent which is contrary to the clear language or of an agreed modification of clear language. The leading commentary on past practice was penned by Richard Mittenthal, former president of the National Academy of Arbitrators in "Past Practice and the Administration of Collective Bargaining Agreements."[25] While Arbitrator Mittenthal takes the more controversial approach to the applicability of past practice where language is clear, his analysis of past practice in general and identification of the characteristics needed for a practice to be a useful indicator of intent when a contract is ambiguous or silent continue to be regarded as the definitive statement in arbitral literature.

To add meaning to ambiguous language, a practice must carry certain attributes. These are clarity, constancy, continuity, and acquiescence. As stated eloquently by Israel Ben Scheiber in *Great Atlantic and Pacific Tea Company and American Bakery and Confectionery Workers, Local 484*, "Just as the proverbial swallow does not make a spring or a summer, so a past practice, to be binding, must be long-continued, well understood, and mutually concurred in by the parties."[26] A practice which cannot be clearly identified and described will not be useful. The purpose of the practice is to add precision where there is ambiguity. Thus, if the practice cannot be identified with precision, it does not serve the purpose for which it is cited. Similarly, the practice becomes meaningful only if engaged in with consistency. If an issue has been handled occasionally one way and occasionally another way, there is nothing to indicate that either way is the manner in which the parties jointly wanted and expected the issue to be handled. It follows, therefore, that the more frequently this consistent treatment occurred, the more persuasive the practice will be. If a matter was handled in a certain way only once or twice and not over an extended period of time, the experience is merely anecdotal and is unlikely to be a reflection of intent. Finally, it is imperative that the party promoting the practice establish that both parties were aware of the practice and that neither party challenged it. Without this

final element, the practice cannot be considered an indication of what both parties intended, for if one party was not aware of the practice, it cannot be deemed to have acquiesced in the conduct as a contractually appropriate action. In addition, and as an interpretive overlay, any analysis of past practice must incorporate a healthy respect for and awareness of the management rights of the employer.

F. Approaches that Are Unnecessary in Contract Interpretation Cases

Of minimal value (and sometimes of annoyance) to an arbitrator hearing a contract interpretation case is the following query posed by the employer to a manager or by the union to a steward: "What does this provision require in this case?" An objection that the question calls for an opinion on the ultimate issue in the case usually will be sustained, with the arbitrator inquiring, "Isn't this the question you are asking me to answer?" A subtly different and more appropriate approach is to ask the manager why he or she handled a situation in the manner at issue.

A similar line of inquiry which is unnecessary and generally not well tolerated by arbitrators is posing a question to the opposing side's witness for the purpose of making a point that the attorney just as effectively could make in argument. The classic example arises when the union steward who initiated the grievance is handed the contract during cross-examination. Both counsel and the arbitrator are aware that the contract is silent as to XYZ, but the opposing counsel nonetheless asks the steward, "Where in the contract does it say that the employer must do XYZ?" There is nothing of evidentiary value that will come out of this witness's mouth. Eventually, the steward probably will acknowledge that the contract does not say that the employer must do XYZ, but the steward also will attempt to restate the union's argument in support of the grievance. The steward will not say, "Gee, I guess we were wrong to bring this grievance in the first place. Sorry to have taken up everyone's time." Still, some counsel simply cannot pass up the opportunity to try. Of course, arbitrators understand that they are not the only persons present at the hearing and that witnesses may be asked a few questions for reasons other than building an evidential record. In general, however, in a situation such as this, counsel should simply note in opening and argue in closing that the contract is silent. The arbitrator will not miss the point. The contract is in evidence, and there is no need to send a witness leafing through the document to establish that it is silent on a particular point. The purpose of the arbitration hearing is not to quiz the steward on the depth or precision of his or her recollection of the contract or to test a witness's ability to read while everyone watches.

IV. Disclosure: The Labor Arbitrator's Obligations

A. Importance of Arbitral Disclosures

A labor arbitrator has a significant obligation regarding the disclosures that he or she must make to the parties and counsel. This obligation is based not only on the necessity of ensuring that the arbitrator has no direct interest in the outcome of the proceeding and that there is no appearance of bias but also on the importance of the parties' right to make an informed selection of their decision-maker. Indeed, choice of decision-maker is one of the grand, albeit often unspoken, advantages of arbitration. The parties generally are free to seek an arbitrator who has specialized knowledge, attributes, or experience and to avoid those who possess certain characteristics or connections. Such considerations in the selection process are fully appropriate and help to maximize the level of satisfaction with the process. Thus, the arbitrator's disclosure of professional background and of those connections which might introduce doubt about fairness or fitness are imperative to the protection of the process.

When selecting arbitrators, parties have access to formal and informal sources of information about the candidates. Among the most important of the formal sources of information is what the arbitrator says about himself or herself in the official biography maintained by the provider agency. Arbitrators usually are required by the provider entities to place certain information, such as current employment, in their biographies. In addition, however, when an arbitrator learns that he or she has been selected to serve, the arbitrator has an obligation to disclose any connections specific to the parties or the counsel which might be perceived as conflicts of interest or might taint the appearance of impartiality. Such disclosures, noted the court in *Parks v. Sombke*,[27] give complete effect to the right of the parties to make a fully informed choice of decision-maker.

In AAA-administered labor cases, the arbitrator's oath[28] includes a statement from the arbitrator indicating whether he or she has any matters to disclose. If the arbitrator does, the disclosure is stated in writing to the AAA, and the case administrator conveys the information to the parties. Use of the provider as a buffer spares the arbitrator from an awareness of the source of an objection to continued service, should one arise, and spares the parties from the awkwardness of having to communicate directly to the arbitrator about reservations or requests for elab-

oration relating to disclosures. Disclosable matters which arise in the course of the hearing often are handled by the arbitrator directly with counsel, but, for the reasons set forth above, the arbitrator may choose to have the disclosure conveyed through the provider's case administrator instead.

Labor arbitrators are bound by the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* ("the *Code*") as well as principles of law, the contracts under which they are serving, and, of course, personal ethics. Rule 2(B) of the *Code* provides as follows:

> B. Required Disclosures
>
> 1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.
>
> a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.
>
> 2. When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, such activities must be disclosed before accepting appointment as an arbitrator.
>
> An arbitrator must disclose such activities to an administrative agency if on that agency's active roster or seeking placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.
>
> * * *
>
> 3. An arbitrator must not permit personal relationships to affect decision-making.
>
> Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.
>
> a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.
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> 4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.
>
> 5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties.

In addition, the AAA's *Labor Arbitration Rules, Amended and Effective December 1, 2002,* provide in Rule 17, as follows:

> No person shall serve as a neutral arbitrator in any arbitration under these rules in which that person has any financial or personal interest in the result of the arbitration. Any prospective or designated neutral arbitrator shall immediately disclose any circumstance likely to affect impartiality, including any bias or financial or personal interest in the result of the arbitration. . . .
>
> Upon objection of a party to the continued service of a neutral arbitrator, the AAA, after consultation with parties and the arbitrator, shall determine whether the arbitrator should be dis-

qualified and shall inform the parties of its decision, which shall be conclusive.

B. Disclosure of Relationships and Familiarity

In functioning under these rules, the question for the labor arbitrator often is whether a particular connection might be "likely to affect impartiality" or "might reasonably appear to impair impartiality." While the arbitrator knows the limits of his or her ability to disregard connections, the question of appearance is more difficult to assess. There is no dispute within the labor relations community about the obligation of an arbitrator to disclose, for example, past employment by a party or counsel, regardless of how remote in time, or any financial interest, such as the ownership of stock in a corporate employer. It is in the area of personal and professional contacts, however, that some debate arises.

A general rule by which all arbitrators should function is that, if a circumstance is such that the arbitrator thinks perhaps a disclosure should be made, then he or she should make the disclosure and sleep well for having done so. The labor relations community, however, is relatively small and, in many regions, professionally interactive and congenial. With those characteristics sometimes arises a general expectation that everyone knows everyone else; it becomes absurd to make disclosures of certain professional organizational contacts, such as when an arbitrator and counsel both are active in a particular section of a bar association. In fact, Rule 2(B)(2) of the *Code*, cited above, indicates that the listing by the arbitrator of certain items on the biography on file with the administering agency may be sufficient disclosure. When a direct connection is present, however, it is advisable for the labor arbitrator to make a specific written disclosure upon selection rather than assuming that the parties or counsel have reviewed the biography.

Rule 2(B)(3) of the *Code* addresses personal relationships developed through professional organizations and provides that "disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." A pertinent inquiry, however, is whose perception is being assessed. In view of that concern, it is better for the arbitrator to err on the side of full, even excessive, disclosure. Arbitrators and counsel must remember that those who may be most directly affected by the proceeding (i.e., the grievant, the supervisor, the department head, etc.) usually are not part of the professional labor relations community and may not understand an arbitrator's familiarity with counsel unless it is explained to them and they are reassured by their own representatives. Hence, disclosure by the arbitrator followed by the attorney's discussion of the disclosure with the client will help to protect the essential appearance of fairness which engenders both faith in the process and acceptance of its outcome. If the client, after reassurance from counsel, remains apprehensive about the arbitrator, then, to enhance trust in the process, another arbitrator should be selected.

Indeed, the Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[29] advised that arbitrators should err on the side of disclosure. Although the Court was addressing financial and business relationships in the commercial context, the following passage from Justice White's concurring opinion in *Commonwealth Coatings* nonetheless is apt:

> And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.

The New York Court of Appeals in *J. P. Stevens & Co. v. Rytex Corp.*[30] set forth similar reasoning in a commercial arbitration case, stating, "Because arbitration is at bottom a consensual arrangement, resolution of this delicate question of disqualification, which has proved so vexing to the courts, ought to be resolved in the first instance by the parties to the agreement. . . . This can only be achieved if prior to the commencement of the arbitration, the arbitrator discloses to the parties all facts which might reasonably cause one of them to ask for disqualification of the arbitrator."

Even taking a very broad view of disclosure in the labor context, it is unlikely that parties and arbitrators would feel that an arbitrator is obligated to disclose the number and nature of prior cases he or she has had with any of the parties or their counsel or the fact that a considerable volume of the arbitrator's practice is derived from one of the parties or its law firm. In fact, Formal Advisory Opinion No. 22 (1991) by the NAA's Committee on Professional Responsibility and Grievances states as follows:

> Previous or current service as a neutral arbitrator for a particular employer and/or union is not a relationship requiring disclosure under the Code. Absent some personal relationship or other special circumstance mandating

> disclosure, such service is not a "circumstance . . . which might reasonably raise a question as to the arbitrator's impartiality."

In contrast, disclosures of this nature specifically are required in employment (non-collective bargaining) cases administered by AAA.[31]

Periodically, there have been debates about whether such disclosures should be required in labor arbitration. Some who have observed labor arbitration in comparison with arbitration in other fields have suggested that labor arbitrators, parties, and counsel may have become "too chummy." While expanded disclosure of prior service may not be the answer to such a perceived problem, it is wise for counsel, parties, and arbitrators to remember that grievants and many witnesses are not fully familiar with the process. They may not understand that, in the relatively small world of labor relations, there is a high level of professional collegiality which does not affect the fairness of the process, the adequacy of the representation, or the impartiality of the arbitrator. Counsel and arbitrators therefore should consider these factors and assess whether, in a given case, the perception of and trust in the process may be enhanced by expanded disclosure.

C. Disclosures Regarding Party Communications

It is imperative that counsel advise the client and witnesses not to make any attempt to communicate with the arbitrator other than in response to formal questioning during the hearing. The occasional hearing has been complicated and muddled by a party or witness who has approached an arbitrator in the hall (in spite of the skill arbitrators develop in artful avoidance of such interactions), has tried to contact the arbitrator by telephone, or has sent a personal letter directly to the arbitrator. Such communications must be disclosed to both counsel, and, depending upon the nature of the communication and the stage of the hearing, the arbitrator may have to recuse herself or himself if asked by one of the parties, even if the arbitrator is unaffected by the communication.

This arbitrator recused herself, as did several other arbitrators, in a number of New York Education Law § 3020-a proceedings after correspondence was sent by a party to most of the arbitrators who handled such cases with the relevant school district. The letter, sparked by a completely legitimate concern about late awards, went beyond that topic and addressed matters such as future selection and the nature of decisions. This arbitrator wrote that she was unaffected by the letter and it therefore had no effect upon the actual fairness of the process. She concluded, however, as follows:

> Still, it is not only actual fairness which must be protected. The appearance of fairness also is essential, and arbitrators must ensure that such appearances are not impaired. Matters of appearance are critical to the faith and respect of those who are most profoundly affected by the process. Counsel are far more conversant and comfortable with the concept of neutrality and the depths of professional integrity which drive the system than are the people whose direct interests are being adjudicated. It is for the latter's benefit that the attorneys who present the cases and the arbitrators who decide them must remain vigilant in protecting the appearance of the process and in giving full meaning to the parties' opportunity to make an informed selection of their decision maker.

This case provides an example of a case in which communication from a client directly to arbitrators created a series of problems that could have been avoided had the sender checked first with labor counsel, who would have explained that such direct communication was not appropriate.

V. The Pool of Arbitrators: A Need for More Diversity

By gazing around at bar association meetings, at conferences, or in the halls at AAA, one might conclude that the demographics of the pool of labor arbitrators gradually are moving away from the concentration of white men aged 60 and older. It is difficult to track such perceived movement because of the unavailability of directly comparable numbers covering an appropriate span of time, but a comparison of studies within the past two decades suggests slight but slow movement toward increased diversity but little movement toward a more youthful corps of labor arbitrators (perhaps, as will be discussed below, for good cause).

The National Academy of Arbitrators' Research and Education Foundation a few years ago sponsored a survey in which the National Academy of Arbitrators (NAA) and the Cornell Institute on Conflict Resolution produced a profile of the NAA's 1998 membership.[32] In assessing the findings, however, it is important to bear in mind that the study was limited to the 1998 membership of the NAA, an organization which admits only experienced arbitrators who perform no advocacy work and maintain established labor arbitration practices.[33] Because of the NAA's processes and selectivity, one might speculate that

the changes in the characteristics of the NAA membership lag a number of years behind any changes in the characteristics of the entire population of active labor arbitrators, for trends and diversity which may be present in the pool of newer arbitrators will not be reflected in NAA membership until the newer arbitrators become ready for NAA membership. Nonetheless, the NAA does have within its ranks the busiest and most prominent of labor arbitrators and thus its membership is reflective of the pool of arbitrators who are at the height of the profession and perform a substantial portion of the country's labor arbitration. In that regard, the statistics remain highly useful as a profile not only of the NAA membership but also of the country's most active labor arbitrators.

The NAA study reports, "The average NAA member is 63 years old, has been an arbitrator for 26 years, has been a member of the Academy for 16 years, and earned 76 percent of his or her income during 1996–1998 from work as a neutral."[34] When only full-time arbitrators are examined, the average age drops to 61. A much higher percentage of female than male arbitrators are full-time neutrals: 66.1% of women in the NAA devote themselves to neutral work on a full-time basis, while only 47.4% of the men in the NAA do. The female members also are younger, with a mean age of 56, as compared to men, who have a mean age of 64.

Looking to the past, in 1982, the average age of NAA members was 59.2, and, in 1987, it was 59.8.[35] As the authors of the 1987 study observe, labor arbitrators "are elderly and may be getting more so."[36] Given the conventional pathway and the desirable experience levels required for movement into a career in arbitration, however, it is doubtful that the average age will change significantly. Indeed, one would question whether it should, beyond efforts necessary to increase diversity. In the field of labor arbitration, there is little that may substitute for the actual, preferably in-depth, experience in labor relations or labor and employment law that arbitrators are expected to bring to the profession. Such experience carries a price in years.

In assessing education levels, the survey indicated that the majority of NAA members are attorneys. Of all NAA members, 61.4% hold law degrees and, among those who are full-time neutrals, an even greater number—66.5%—have law degrees.[37] Twelve and one-half percent (12.5%) have doctorates and 26.8% have a master's degree as the highest level of education completed.[38] By contrast, the 1987 survey reports that 58.6% of NAA members had law degrees.[39]

With regard to gender and race, the study indicates that fewer than 6% of NAA members are what the study classified as "nonwhite," and only 12% are female. The 1987 study reported that 96.4% of NAA members were male and 99.49% were "white, non-Hispanic."[40] Thus, while some improvement might be perceived in gender distribution, racial and ethnic diversity does not appear to have improved. General observation indicates that women are moving into the field with promising speed and that the proportion of women in the NAA reasonably is expected to increase steadily throughout the coming years. The greater concern, from this arbitrator's viewpoint, is the lack of ethnic and racial diversity within the pool of active labor arbitrators. Programs such as the NYSBA Labor and Employment Law Section's Arbitrator Mentoring Program may help to draw greater diversity into the profession, as will targeted efforts by providers such as AAA, the New York Public Employment Relations Board, and FMCS, especially if they hear from the parties that they, the users of the service, want to see greater diversity within the labor panels. Also, parties who maintain permanent rotating rosters are encouraged to consider diversity issues when assembling such rosters. Enhanced diversity within the pool of established and experienced arbitrators will help to ensure that labor arbitration retains the respect, trust, and acceptability it has enjoyed for more than half a century.

Endnotes

1. Discipline and Discharge in Arbitration, 335 (BNA 1998); The Common Law of the Workplace: The Views of Arbitrators § 6.10 (BNA 1998).
2. For a discussion of the history of the "seven tests," particularly the investigation requirement as set forth by Arbitrator Carroll Daugherty in *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (1966), and elaborated upon in Koven & Smith, Just Cause: The Seven Tests, Second Edition (BNA 1992), see Zack, Arbitrating Discipline and Discharge Cases, page 161 (LRP Publications 2000).
3. Specifically, the test on this point is as follows: "Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?" *Enterprise Wire Co.*, 46 LA at 363 (Daugherty, 1964).
4. When there has been little activity in the lower stages of the grievance procedure and little discussion between counsel prior to the hearing, the employer may not have a sense of the basis upon which the union is challenging the discipline. In such a situation, of course, the employer's counsel must attempt to anticipate any potential procedural weaknesses upon which the union might seize. Such matters are made more difficult when the union indicates at the commencement of the hearing that it wishes to defer its opening statement until the close of the employer's case. Deferral of the opening statement usually is ill-advised, and many arbitrators will deny or will strongly discourage such a request. By

insisting that both parties present their openings before the evidentiary presentations, the arbitrator ensures far greater efficiency in the process and enhances his or her own ability to assess the case and to rule on objections as the matter progresses.

5. The shorthand term, "contract case," generally is used to describe non-disciplinary cases in which the union alleges that the employer has breached a contractual obligation. Many disciplinary cases involve interpretation of contract provisions, but the two broad categories—discipline and contract—reflect the fact that the former originates with a disciplinary action taken against an employee whereas the latter relates to implementation of the contract in cases that usually do not involve proof of employee misconduct. Technically, of course, all labor arbitrations conducted under a collective bargaining agreement are contract cases. Matters become more precise when the contract case involves a dispute regarding the meaning of the applicable contractual provisions. These cases are considered "contract interpretation" cases.
6. Fairweather's Practice and Procedure in Labor Arbitration, Third Edition, page 194 (BNA 1991) ("In effect, the contract itself places the burden of proof on the company.")
7. *See, e.g., Minnesota Mining & Mfg. Co. and Local 6-75, Oil, Chemical and Atomic Workers International Union*, 49 LA 474 (Solomon, 1967).
8. St. Antoine, "Presidential Address: Contract Reading Revisited," *Arbitration 2000: Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the Fifty-Third Annual Meeting of the National Academy of Arbitrators*, page 14 (BNA, 2000).
9. *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc.* 69 Cal. 2d 33, 442 P.2d 641, 643 (Cal. 1968).
10. *Central States, Southeast & Southwest Areas Pension Fund v. Kroger Co.*, 73 F.3d 727, 732 (7th Cir. 1996), *rehearing en banc denied*, 1996 U.S. App. Lexis 3951 (7th Cir. 1996).
11. *See, e.g., Brackett v. Easton Boot & Shoe Co.*, 388 S.W.2d 842 (Mo. 1965).
12. *Transportation-Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 160–61 (1966), *rehearing denied,* 385 U.S. 1032 (1967). The court further noted that a collective bargaining agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578–579 (1960). "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."
13. 167 F.3d 764 (2d Cir. 1999), *cert. denied*, 528 U.S. 822 (1999).
14. 138 Vt. 68, 411 A.2d 1359 (Vt. 1980).
15. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).
16. *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17*, 531 U.S. 57 (2000).
17. *Columbia County v. Local 2698 B*, 159 Wis. 2d 429, 464 N.W.2d 679 (Wis. App. 1990).
18. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), citing 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991), and *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).
19. *Bristol Steel and Iron Works*, 73 LA 573, 578 (Nicholas, 1979).
20. 23 LA 481, 486 (Dworkin, 1954).
21. The Common Law of the Workplace: The Views of Arbitrators § 2.8 (BNA 1998).
22. 1 LA 490 (Cheney, 1946). *See also Northrup Worldwide Services and IAM District 37*, 90 LA 70 (Bankston, 1987).
23. The Common Law of the Workplace: The Views of Arbitrators, § 2.6, Comment f (BNA 1998).
24. 813 F.2d 223 (9th Cir. 1987).
25. *Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators*, pages 30–58 (BNA, 1961).
26. 46 LA 372 (Scheiber, 1966).
27. 127 Md. App. 245, 732 A.2d 907 (Cir. Ct., Calvert Co., Md., 1999).
28. The arbitration statutes of many states, including New York, provide for an arbitrator's oath. New York CPLR 7506(a) requires that, before hearing any testimony, "an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath."
29. 393 U.S. 145 (1968), *rehearing denied*, 393 U.S. 1112 (1969).
30. 34 N.Y.2d 123, 356 N.Y.S.2d 278 (1974).
31. Rule 11(b) of the *AAA National Rules for the Resolution of Employment Disputes, As Amended and Effective on November 1, 2002*. See also the sweeping disclosure requirements applicable under California law to arbitrators of employment disputes. California Rules of Court, Appendix Division VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (2002). The provisions do not apply to labor arbitrations.
32. Picher, Seeber, & Lipsky, *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators*, Cornell Studies in Conflict and Dispute Resolution (2000).
33. The process by which an applicant for membership is evaluated includes the NAA Membership Committee's examination of the nature, duration, and volume of the applicant's arbitration practice, verification of the arbitrator's body of work, review of references from party representatives, and consideration of input from NAA members. Membership is conferred by a two-thirds vote of the Board of Governors. Constitution of the National Academy of Arbitrators, art. V, § 1 and bylaws, art. VI, § 4.
34. Picher, at 11–13 (2000).
35. Bognanno & Coleman, Labor Arbitration in America: The Profession and Practice, 23, 45 (Praeger 1992).
36. *Id.*
37. Picher, at 27–28 (2000).
38. *Id.*
39. Bognanno, at 47.
40. *Id.* at 45.

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Bonding Public Sector Pension Contributions Revisited

By Douglas S. Rohrer

I. Introduction

The New York State and Local Retirement System (NYSLRS), consisting of the New York State Employees' Retirement System (ERS) and the Police and Fire Retirement System (PFRS), is the second largest public pension plan in the country, with membership exceeding 944,000 and over $100 billion in assets.[1] While the assets of the NYSLRS doubled over the last decade, in recent years system benefit payments have outpaced asset growth due to an increasing percentage of retired members drawing benefits and negative or nominal returns on invested plan assets.[2]

In response to the ailing condition of the NYSLRS, Alan G. Hevesi, State Comptroller, moved quickly to implement Assembly Bill A.08352 (the "Act"), passed by both houses of the legislature on May 2, 2003 and signed into law by Governor Pataki on May 14. The Act, aimed at reforming the NYSLRS, consists of four components: (1) bill all participating employers at a minimum rate of 4.5% of pensionable salaries in years where the actual rate would otherwise be less than 4.5%, (2) realign the billing cycle to match local governments' budget cycles to enable them to more accurately budget for annual contributions to the system, (3) prevent New York State (the "state") from postponing pension contributions when retirement fund payments exceed budgeted amounts, and (4) allow local governments one-time financing of 2004-2005 pension costs.[3]

The focus of this article is on the fourth component of the reform measure. Specifically, the Act authorizes employers to finance NYSLRS contributions due for the 2004-2005 fiscal year in excess of 7% of payroll (estimated aggregate salaries paid to NYSLRS participants in a given year), either through the state (at 8% annual rate of interest over five years), or by issuing general obligation bonds on a one-time basis to mature in not more than five years.[4] By assigning a 5-year period of probable usefulness (PPU) to pension contributions, as if they were capital improvements, the current year contribution amount may be financed over future years from the proceeds of such bonds or bond anticipation notes. This bonding of current expenses risks being challenged as providing a mechanism for local governments to finance current operating expenses of an ordinary, recurring nature in contravention of section 2 of article VIII of the New York Constitution.

II. Prior Legislation Addressing Shortfalls in Funding of NYSLRS Liabilities

This is not the first instance where the legislature has enacted measures approving the financing or amortization over future years of employers' current year pension fund contributions. Of note, in 1965, legislation was adopted empowering the Mayor of New York to issue bonds to pay for the city's pension obligations for that year.[5]

In another instance, the city of Buffalo attempted to solve its budgetary problems through a 1969 amendment to the Local Finance Law which provided a PPU of three years for amounts paid for retirement liabilities, allowing Buffalo to exclude from the 2% constitutional tax limitation the taxes required to meet the annual budgetary appropriations for city retirement liabilities.[6] The exclusion effectively brought the city's tax levy below the constitutionally imposed ceiling, which but for such amendment would have been exceeded.[7] In 1974 this outcome under the Local Finance Law was held unconstitutional in *Hurd v. City of Buffalo*.[8]

The legislature responded to the *Hurd* decision with a revised act calculated to allow Buffalo, Rochester and certain school districts to again except a portion of taxes from the constitutional taxation limit by establishing a PPU of three years for the costs of retirement payments. The primary difference from the prior 1969 legislation was the new act's characterization as a "temporary emergency relief" measure.[9] Concurrently, the legislature adopted a standby companion plan were the first act held unconstitutional. The standby plan provided that state aid, equal to the amount that would have been excluded when calculating the "constitutional cap," based on a three-year PPU for retirement liability payments, would flow to the municipalities with the reimbursement for such state aid coming from state real property taxes not subject to the constitutional cap.[10] Nevertheless, both of the foregoing measures were ruled unconstitutional in *Bethlehem Steel Corp. v. Board of Education of the City School District of Lackawanna*[11] as being in violation of section 10 of article VIII of the New York Constitution (the "Constitution").

Again, in 1989 the legislature incorporated a provision into the state's Retirement and Social Security Law that allowed the amount owed to the state employees' pension and life insurance plans for 1988 and 1989 to be amortized over seventeen years and paid from funds appropriated for such purpose in each successive year—essentially financing the amount internally by deferring payments to future years.[12] Alternatively, the legislature assigned a PPU in section 85 of the Local Finance Law allowing the bonding of these pension liabilities.

III. Constitutionality of Financing Pension Liabilities

Historical and constitutional underpinnings of the Local Finance Law and other measures enacted to limit the contracting of debt by municipalities are helpful to assess the constitutional implications of financing current pension liabilities. Following the national financial crisis of 1873, precipitated by collapsing real estate values and the consequent reduction in real property tax revenues coupled with prior unrestricted borrowing by municipalities, many municipal obligations went into default and state legislatures, including New York's, adopted measures to limit municipal debt offerings.[13] The state approved a constitutional amendment in 1884 that imposed a 10% debt limitation and a 2% tax limitation as a percentage of the average full valuation of taxable real estate within the respective county, city, town, village or school district.[14] Thus, with the enactment of constitutional debt limits and statutory procedures for authorizing debt, forms and term of issue, and methods of repayment along with the constitutional directive that all government debt must be for a public purpose, a body of case law has emerged which defines the nature and limits of permissible objects and purposes, the payment of which may be financed by municipalities and school districts.

Why have some but not other legislative attempts to circumvent the constitutionally imposed tax and debt limitations been successful and what is the likely outcome should the recently enacted legislation be challenged as to its constitutionality? An answer to these questions emerges upon a closer review of each court's decision concerning the various pension funding measures enacted over the last four decades beginning with the 1965 legislation which enabled New York City (the "City") to finance its retirement liabilities for that year.

The 1965 legislation providing for the City to issue bonds for payment of its retirement liabilities was challenged on the basis that it represented an unconstitutional exercise of legislative power with respect to its object and means. The object of the legislation—the payment of mandatory retirement liabilities—was viewed by the court as a matter of state concern, providing the basis for legislative action, because should the City fail to make such payments, the City would be unable to maintain an efficient, modern civil service system critical to the City and state's welfare.[15] In addition, issuing bonds to satisfy payment of pension liabilities was also viewed as a matter of state concern for which the Constitution provides that the legislature may enact laws affecting the power of local governments to finance such obligations—namely by establishing a PPU for the object or purpose being financed.[16] Ultimately the constitutionality of the 1965 legislation turned on whether the object and purpose held only an ephemeral usefulness. The legislature need not precisely determine the PPU for an exact number of years of unquestionable project usefulness. Rather, the legislature need only determine the duration over which financing is appropriate based on the object or purpose's *probable* usefulness—the degree of "futurity" assigned need not be precisely determined. In *Bugeja v. City of New York*[17] the court held that, "the Constitution prohibits a city from incurring debts payable in the future for objects or purposes of *purely transient usefulness*." The *Bugeja* court did not characterize the payment of current retirement liabilities as of purely transient usefulness and the legislation was therefore affirmed.[18] The rationale offered by the court was that such payments preserve the recruitment and employment of civil service employees and prevent the collapse of the civil service system and thus the financed payments have a usefulness beyond the year in which the payment was owed.[19]

While *Bugeja* affirmed as constitutional the one-time financing of current pension obligations, the *Hurd* court addressed the constitutionality of an ongoing exemption of real property taxes from the constitutionally imposed limit based on a cap at 2% of the average full valuation of a city's taxable real estate. The Constitution provides an exemption for taxes levied for payment of direct budgetary appropriations for objects or purposes which have a PPU determined by law.[20] The legislation at issue in *Hurd* assigned a PPU to pension liabilities resulting in taxes levied for payment of this ordinary and recurring expense being continually exempt from inclusion when calculating the constitutional real property tax limit. Such an exemption the court held to be an evasive measure which was "palpably in violation of" the Constitution's "unified and interdependent plan to control the taxing and debt contracting power of subdivisions of the State."[21]

Distinguishing the outcome in *Bugeja* from that of *Hurd* rests on the one-time funding of pension

obligations while determining a means of obtaining sources of additional revenue to meet this liability versus a continuing evasion of the constitutional tax limit. In *Bugeja*, the legislation at issue was viewed as properly addressing an extraordinary matter of state concern and as such, the means were neither arbitrary nor without rational basis. In contrast, the *Hurd* court characterizes the challenged legislation as an attempt to "exempt ordinary periodic pension payments [from the constitutional tax limit] on the theory that their usefulness outlives the fiscal year when they are made."[22] If this outcome were condoned, the court reasoned, such an exemption could be had for almost any government expenditure, thereby rendering meaningless the constitutional tax limit.

In response to the *Hurd* decision, the legislature modified the 3-year PPU determination for financing pension liabilities by adding three additional characteristics to the 1976 Emergency Relief Act with the hope that they would withstand a constitutional challenge—or at least provide a stopgap measure until an anticipated revision to article VIII of the Constitution subject to voter approval was effected in 1977. The three additional characteristics included (i) the measure being of temporary duration limited to 1976 and three subsequent fiscal years, (ii) a cap on the amount to be excluded in the three subsequent fiscal years to that excluded in the first year, and (iii) premising the act as being a "temporary emergency solution . . . in order to avoid fiscal and social chaos."[23]

The *Bethlehem Steel* court found the revised act and its standby companion plan to be a thinly veiled attempt at recasting legislation previously ruled unconstitutional in *Hurd*. The court found as unpersuasive the argument that the exclusion of certain taxes would be limited to four fiscal years rather than of perpetual duration.[24] Even this limited exclusion was viewed as a plan to evade the constitutionally imposed tax limitations.[25] While the Emergency Relief Act incorporated a greater element of "futurity" by capping the amount to be excluded, and consequently provided a more compelling argument for finding a "rational basis in the legislative determination that pension benefits may have a PPU of 3 years," the court was not persuaded that providing for a subsequent capped amount somehow remedied the amount that may be excluded in the first fiscal year without limitation.[26] The *Bethlehem Steel* court found the same constitutional infirmity with respect to the exclusion in the first fiscal year under the Emergency Relief Act as it found in the perpetual exclusion under the legislation addressed in *Hurd*. Finally, the court did not give credence to the argument that the fiscal crisis facing certain cities was tantamount to periods of emergency caused by enemy attack or by disasters (natural or otherwise) that would allow the suspension of the constitutionally imposed tax limitations through the exercise of the police power.[27]

The 1989 legislation, providing a PPU of five years for retirement liabilities owed in fiscal years 1988 and 1989, was not challenged as usurping the constitutional limitations on the taxing and debt-contracting power of subdivisions of the state. Had a challenge been brought, viewed in the context of the *Bugeja*, *Hurd* and *Bethlehem Steel* decisions, it would likely have failed for the following reasons. First, the 1989 legislation provided for a one-time financing of a previously determined liability (not unlike a judgment or settled claim which may be financed under the Local Finance Law) and did not amount to an exemption of perpetual duration from the debt contracting-limits. Second, a rational basis would likely be found to exist for the assigned PPU based on the state interest in supporting the proper functioning of the civil service system coupled with an element of futurity found in funded pension plans where annual contributions support the payment of future plan benefits and are not solely for current benefit payouts. Third, because the 1989 legislation did not provide a recurring exemption from the constitutional strictures relating to the taxing and debt-contracting powers for certain operating expenditures, the authorizing legislation would not be viewed as rising to the level of being a calculated effort to evade the constitutional limitations and therefore would not likely be characterized as "*palpably in violation*" of the Constitution's plan and purpose.

IV. Conclusion

Should the Act be challenged based on its perceived violation of the constitutionally imposed taxation and debt-contracting limits, a similar analysis as that applied to the 1989 legislation above would likely yield a similar conclusion. The court would consider and the outcome would depend on whether the assignment of a PPU of five years for the financing of NYSLRS payments could be rightly viewed as arbitrary and without rational basis, and whether the Act presented a plan or scheme to purposefully evade the constitutional limitations. The legislative assignment of a PPU for the financing of retirement system liabilities may carry with it the presumption of constitutionality; however, "[d]ue process demands that a law be not unreasonable or arbitrary."[28] The *Bugeja* court affirmed the finding of a rational basis for the assignment of a PPU for the financing of retirement system liabilities. The *Hurd* court affirmed the *Bugeja* decision while at the same time limited its reach to the one-time funding of pension obligations. The

Hurd decision, amplified by *Bethlehem Steel*, identifies the extent to which measures exempting or extending the taxing and debt-contracting powers of state subdivisions will be permitted and not viewed as legislative attempts to thwart constitutional limits.

The legislation at issue in both *Hurd* and *Bethlehem Steel* provided an ongoing mechanism to sidestep constitutional limitations. A one-time provision for financing a current operating expense by assigning such object or purpose a PPU, coupled with some rational basis to support the designated period of time assigned, would be permissible. The one-time character of such a provision would not likely be seen as shifting to a future taxpaying generation a burden not appropriate to them. Such a shift is precisely what the Constitution's limitations are designed to prohibit. In all likelihood, viewed alone, the Act does not shift to another generation a burden more appropriate for current taxpayers to bear. Instead, as was the case in *Bugeja*, the Act addresses an issue of state concern and provides a targeted solution for the current funding and rebalancing of payments into the state employers' pension funds.

Should municipalities successfully petition the legislature to extend the Act to include the funding of subsequent years' pension payments, the judicial analysis discussed above would likely tip in favor of such legislation being in violation of the constitutional limits. Where exactly the fulcrum point is located along the constitutional continuum between an appropriately narrow measure and one palpably in violation of constitutional limits has not yet been clearly defined by the courts. Accordingly, municipalities and others paying into the NYSLRS should exercise caution in relying on the Act's continuing effect in future years as annual pension contribution increases challenge responsible budget planning.

Endnotes

1. New York State and Local Retirement Systems 2002 Annual Report, p. 12. (figures as of Dec. 31, 2002).
2. *Id*. at 28.
3. An Act to amend the retirement and social security law, in relation to implementation of a structural reform program for payment of employer contributions (Part A); to amend the local finance law and the retirement and social security law, in relation to the manner of paying employer contributions (Part B), L. 2003, ch. 49.
4. Current estimates provided by the State Comptroller for contribution amounts in the 2004-2005 fiscal year are 11% of payroll for ERS and 15% of payroll for PFRS. Press release, May 15, 2003, Office of the New York State Comptroller.
5. L. 1965, ch. 440.
6. L. 1969, ch. 1105.
7. N.Y. Const., art. VIII, § 10.
8. 34 N.Y.2d 628, 355 N.Y.S. 369 (1974).
9. Emergency City and School District Relief Act, L. 1976, ch. 349, § 2.
10. State Real Property Tax Act, L. 1976, ch. 349, § 3.
11. *Bethlehem Steel Corp. v. Board of Educ. of the City Sch. Dist. of Lackawanna*, 61 A.D.2d 147, 402 N.Y.S.2d 655 (4th Dep't 1978), *aff'd,* 44 N.Y.2d 831, 406 N.Y.S.2d 752 (1978).
12. L. 1989, ch. 62.
13. Stephen M. Lounsberry, Esq., *The Scope and Basis of the Local Finance Law*, Book 33 Local Finance Law, McKinney's Consolidated Laws of New York (1987).
14. N.Y. Const., art. VIII § 4 (limitation originally enacted at the Constitutional Convention of 1883, approved by vote of the people in 1884, current § 4 derived in part from former art. VIII, § 10, renumbered § 4 and amended by Constitutional Convention of 1938 and approved by vote of the people Nov. 8, 1938; amended and approved Nov. 6, 1951, eff. Jan. 1, 1952).
15. *Bugeja v. City of New York*, 24 A.D.2d 151, 266 N.Y.S.2d 80 (2d Dep't 1965), *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 514 (1966).
16. *Id*. at 152.
17. *Id*. at 152–153, *quoting Cherey v. City of Long Beach*, 282 N.Y. 382 (1940) (holding the financing of the payment of judgments against the city, while not a capital expense, is for a public purpose and the object has a definite PPU and is therefore constitutional).
18. *Id*. at 152.
19. *Id*. at 152.
20. NY Const., art. VIII, § 11(b).
21. 34 N.Y.2d at 629.
22. *Hurd v. City of Buffalo*, 41 A.D.2d 402, 403, 343 N.Y.S.2d 950, 953 (4th Dep't 1973), *aff'd,* 34 N.Y.2d 628, 355 N.Y.S.2d 369 (1974).
23. Legislative Findings, L. 1976, ch. 349, § 1.
24. 61 A.D.2d 147 at 156–157.
25. *Id*.
26. *Id*. at 157–158.
27. *Id* at 158–159.
28. *Defiance Milk Prods. Co. v. Du Mond*, 309 N.Y. 537, 541 (1956).

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A Brief Overview of New York City's Conflicts of Interest Board: A Model Government Ethics Law

By Bonnie Beth Greenball

What Is the New York City Conflicts of Interest Board?

Some may say that "government ethics" is an oxymoron, particularly in the country's largest and most diverse metropolitan area, New York City. Yet, for the past thirteen years, a small city agency, the New York City Conflicts of Interest Board (the "Board"), has been below the general public's radar screen carefully administering the government ethics law in New York City. The Board successfully monitors the work of over 300,000 city employees—a government workforce that is among the largest in the nation. The agency, on a small budget with minimal staff, has during its short history addressed the ethics issues of thousands of city employees. Last year, the Board's attorneys responded to approximately 2,500 phone calls through the agency's "attorney of the day" hotline; wrote 500 opinions; achieved a resolution of 179 enforcement matters; and trained over 12,000 employees. The Board is well regarded in New York City government and in recent years has become a "first stop" for City Hall in implementing many of its new initiatives.

Why Do We Need Government Ethics Laws?

In common parlance when we refer to government ethics, we are essentially talking about a system by which government has placed a check upon itself and public officials aimed at the *prevention* of unethical conduct. Quite simply, in order for government to function and for the people governed by the system to accept the decisions public officials make, the system must be built on trust. Once the citizens have faith in the system, the theory is that they will obey the rules and laws created by that system. Therefore, it is important not only for integrity in government *actually* to exist but also for it to *appear* to the public that it exists and for the public to have confidence in the government system. For example, if a public official accepts an expensive gift from a contractor, even though he or she may not actually be influenced by that gift, it may appear to a member of the public who becomes aware of that gift that the public official may be setting up a "sweetheart deal" for that contractor. If there are no repercussions for the public official accepting such a gift, even if the contract itself was fair, the system fails. It is crucial to the success of government that the public does not lose faith in those who govern them.

How Do Government Ethics Laws Work?

If a public official is truly corrupt, then government ethics laws will not deter that public official, and those cases become matters for criminal prosecution. However, by and large, the average government official enters the field to serve the public and merely needs guidance for carrying out his or her official duties fairly and impartially. Most public servants want to do "the right thing," and ethics laws exist so that the average public servant can model his or her conduct to be in compliance with the law's requirements. With a straightforward, easily comprehensible ethics law, a government official can navigate the difficulties of public service armed with information about how best to conduct himself or herself with integrity. In fact, should public officials feel pressured by an outside interest, such as a vendor, an outside employer, a relative, a superior, or even a not-for-profit for which they volunteer, to take official actions, those officials may rely upon the ethics law to help them out of a difficult situation. They may simply tell the party that they are subject to public censure and fines should they violate the ethics law.

How Are the Ethics Laws Administered?

In New York City, the Board itself is the independent body charged with interpreting the city's ethics law, and the Board's *staff* administers the law. The city's conflicts of interest law is contained in Chapter 68 of the New York City Charter. Chapter 68 requires that the Board be made up of five part-time public servants, who themselves must comply with Chapter 68, and who "shall be chosen for their independence, integrity, civic commitment, and high ethical standards."[1] A Board member may not hold other public office, seek election to public office, be a public employee in any jurisdiction, hold any political party office, or appear as a lobbyist before the city.

The staff to the Board is made up of fewer than twenty full-time public servants, eight of whom are attorneys. The staff is comprised of four operating units: financial disclosure, training and education, legal advice, and enforcement. The financial disclosure unit accepts financial disclosure reports from approximately 13,000 high-level officials, as well as from employees with contracting authority, and makes those reports available to members of the public, including the press, who search for possible conflicts of interest. The training and education unit provides training sessions to employees in agencies throughout the city and handles the agency's publications. The goal of that unit is to get out the message about government ethics to those who are covered by the law.

Roughly half of the staff attorneys provide legal advice to public servants who are seeking to understand the ethics law and determine how it applies to them. These attorneys provide legal advice only *prospectively*. All written requests for advice receive a formal written reply from a staff attorney or a response from either the Chair of the Board or the full Board, depending on the circumstances. Most importantly, all requests for advice are strictly confidential. Only waiver letters and orders (permitting otherwise prohibited ownership interests), which are issued by either the Chair or the full Board, are made public. For example, a public servant may have an outside teaching position and need to know whether the law prohibits such a position. If that public servant teaches for a university that does business with the city, such as Columbia University or New York University, he or she would require a waiver of the law. Staff and the Board, in determining whether to issue the waiver, will consider whether that public servant has any official responsibilities in his or her city job that relate to that university. Once the Chair signs the waiver letter, which provides for appropriate recusal requiring that the public servant stay out of all city matters pertaining to the university, it will then become a matter of public record.

Past conduct by public servants is largely the domain of the other half of the Board's staff attorneys, who work in the enforcement unit. Those attorneys prosecute cases against public servants who violate the conflicts of interest law. The enforcement attorneys generally learn of violations of the conflicts law when a concerned citizen or an aggrieved coworker forwards a complaint to the Board. In addition, by law, city agencies, in particular the Department of Investigation (DOI), must inform the Board when they learn of a possible ethics violation by a public servant. The enforcement attorneys will typically send the allegations to the Board's investigators at DOI so that the Board can determine if a violation has occurred. Once the case has been investigated, the Board will determine whether there is probable cause to believe that the law has been violated and then will notify the public servant of this finding. The public servant then has the opportunity to respond and may choose either to settle the case or to dispute it in an official proceeding at the Office of Administrative Trials and Hearings, which issues a confidential non-binding recommendation to the Board. If the Board finds that the public servant violated the ethics law, or if the public servant settles the case and admits a violation, than he or she usually will be required to pay a fine, and the disposition, by law, will be made public. If, on the other hand, there is insufficient proof, the case will be dismissed, and the matter will remain confidential. The Board's enforcement decisions are widely disseminated and are used for training purposes so that other public servants will avoid taking any such actions in the future. For example, the former city sheriff, who ran, out of his public office, a private law practice, even using his subordinates, paid the Board's largest fine—$84,000.

How Can Other Municipal Governments Get Started?

The most important element in a municipal ethics scheme is a clear, easily understandable code of ethics, which must be tailored to the size, structure, and location of the municipality. Ideally, the legislation should establish an independent board that is charged with interpreting, administering, and enforcing the law. That agency must provide quick and confidential advice, training and education, public disclosure of the private interests of public servants, and reasonable enforcement where there have been violations of the law.

Endnote

1. N.Y.C. Charter, sec. 2602(b).

Ms. Greenball is Special Counsel to the New York City Conflicts of Interest Board.

Section Committees and Chairs

The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on the back page) or Committee Chairs for information.

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