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THE STEELWORKERS TRILOGY IN THE PUBLIC SECTOR

ANN C. HODGES*

I. INTRODUCTION

In the *Steelworkers Trilogy*, the United States Supreme Court endorsed the use of arbitration to resolve contractual disputes in private sector labor relations, and limited judicial involvement in the arbitration process.¹ Pursuant to the national labor policy expressed in the *Trilogy* favoring arbitration, arbitration has resolved contractual disputes between private sector employers and unions, largely without resort to the courts.²

The *Trilogy* principles have restrained court involvement in the arbitration process by imposing a policy of judicial deference to arbitration.³ The Supreme Court, however, has recognized a very limited exception to the *Trilogy's* broad deference to arbitration, holding that the courts

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1. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See Craver, *Labor Arbitration As A Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990), for a thorough discussion of the judicial application of the *Trilogy* principles in the private sector.

2. See Feuille & Leroy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 ARB. J. 35, 46 (Mar. 1990); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922-23 (1979). Getman points out that there are strong incentives for the parties to accept arbitration awards which were present even before the *Trilogy* made it more difficult to challenge the awards. These incentives include the costs of litigation, the disruptive effect of continuing disputes on the collective bargaining relationship, and the knowledge that the contract can be modified in future negotiations to eliminate the impact of an adverse award. Public management may have stronger incentives to resist arbitration initially and to avoid compliance with adverse awards, however. See Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261 (1982). Abrams notes that prearbitration and postarbitration arbitrability arguments provide an opportunity for public employers to attempt to preserve their right to consider political factors in making decisions. *Id.* at 278.

3. See *American Mfg.*, 363 U.S. at 567-68 (in deciding whether the parties to a collective bargaining agreement agreed to arbitrate a dispute the courts should not weigh the merits of the grievance, for that is the function of the arbitrator); *Warrior & Gulf*, 363 U.S. at 582 (a court should order arbitration of a grievance "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (footnote omitted)); *Enterprise Wheel*, 363 U.S. at 597, 599 (the interpretation of the agreement is for the arbitrator and courts should enforce the award so long as it draws its essence from the agreement, even if the court would have interpreted the contract differently).

should not enforce an arbitration award that violates public policy.⁴ Public policy challenges to arbitration awards have become increasingly common in the private sector,⁵ and because the Supreme Court has not defined the scope of the exception with precision,⁶ courts reviewing awards on public policy grounds have disagreed over whether an award may be set aside on public policy grounds where the award neither violates positive law nor requires the employer to violate positive law.⁷

In the thirty years since the United States Supreme Court decided the *Steelworkers Trilogy*,⁸ collective bargaining in the public sector has grown exponentially.⁹ Increasingly, collective bargaining agreements in the public sector have incorporated the grievance and arbitration model from the private sector for resolution of disputes over the meaning and

4. See *W. R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). This exception is based on the general rule that a court will not enforce a contract which is unlawful or in violation of public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

5. *Feuille & LeRoy*, *supra* note 2, at 44. See, e.g., *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (court rejected public policy challenge to award reinstating negligent auto mechanic because no established public policy was violated by the award), *cert. denied*, 495 U.S. 946 (1990); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988) (award reinstating pilot who had flown an aircraft while intoxicated was vacated because it violated established public policy), *cert. denied*, 493 U.S. 871 (1989); *Flushing Hospital and Medical Center v. Local 1199, Drug, Hospital and Health Care Employees Union*, 685 F. Supp. 55 (S.D. N.Y. 1988) (award reinstating nursing attendant who had changed an intravenous bag when a nurse was not available did not violate public policy).

6. The public policy must be "well-defined and dominant," *W. R. Grace*, 461 U.S. at 766, and "the violation of such a policy must be clearly shown," *Misco*, 484 U.S. at 43. The Court in *Misco* expressly declined to address the union's argument that a court may refuse to enforce an award only when the award violates positive law or compels an employer to engage in conduct that would violate such law, *Misco*, 484 U.S. at 45, n.12, but noted that, in *W. R. Grace*, the Court examined the award to determine whether there was an explicit conflict with existing laws, not whether the award comported with general considerations of public interests. *Misco*, 484 U.S. at 43.

7. Compare *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987) (court applied narrow scope of review for public policy, refusing to vacate arbitrator's award reinstating pilot who had served as a crew member of a plane while intoxicated since the law does not prohibit employment of reformed alcoholics as pilots), *cert. denied*, 486 U.S. 1014 (1988) and *Interstate Brands Corp. v. Chauffeurs, Local 135*, 909 F.2d 885, (6th Cir. 1990) (reinstatement of truck driver convicted of driving while intoxicated off-duty and arrested for off-duty drug possession does not conflict with any law or legal precedent), *cert. denied*, 111 S. Ct. 1104 (1991) with *Iowa Electric Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987) (court can overturn an arbitrator's award without any finding of illegality) and *Georgia Power Co. v. International Bhd. of Elec. Workers, Local 84*, 707 F. Supp. 531 (N.D. Ga. 1989) (award reinstating drug user vacated because it violated public policy against drug use by individuals who operate potentially hazardous machinery found in OSHA provisions requiring safe workplace, criminal laws against drug use, and laws that exclude drug abusers from the definition of "handicapped"), *aff'd*, 896 F.2d 507 (11th Cir. 1990).

8. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

9. Coleman, *Grievance Arbitration in the Public Sector: Status, Issues and Problems*, 17 J. COLLECTIVE NEGOTIATIONS 89, 89 (1988).

application of the agreement.¹⁰ Indeed, some state statutes authorizing collective bargaining for public employees mandate that grievance and/or arbitration procedures be included in each collective bargaining agreement.¹¹

As the use of arbitration in the public sector has increased, the applicability to the public sector of the *Trilogy's* deference to arbitration has been a recurring issue. Judicial involvement in public sector arbitration has varied by, and within, jurisdictions. In some cases, public sector employers have avoided arbitration by invoking the argument that the sovereign cannot delegate decisionmaking power.¹² In other cases, however, this argument has been rejected and the rationale supporting the presumption of arbitrability¹³ in the private sector has persuaded the courts to order public employers to arbitration.¹⁴ Similarly, in reviewing arbitration awards, some courts have been quick to overturn arbitrators' decisions with which they disagree.¹⁵ Other courts have adopted and followed the private sector policy, enforcing the arbitrator's award so long as it "draws its essence"¹⁶ from the collective bargaining agreement.¹⁷

The public policy argument for judicial involvement in arbitration

10. Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329 (1980).

11. See, e.g., ILL. REV. STAT. ch. 48, ¶ 1710(c) (1986); MINN. STAT. § 179A.20(4) (Supp. 1990); ALASKA STAT. § 23.40.210 (1984); ILL. REV. STAT. ch. 48, ¶ 1608 (1986); FLA. STAT. § 447.401 (Supp. 1990).

12. See, e.g., *Lake County Educ. Ass'n v. School Bd. of Lake County*, 360 So. 2d 1280 (Fla. Dist. Ct. App.), cert. denied, 366 So. 2d 882 (Fla. 1978); *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 50 A.D.2d 24, 376 N.Y.S.2d 672 (1975), aff'd 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976).

13. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 585 (1960) the Supreme Court created a presumption in favor of arbitrability. See *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986) ("[w]here the contract contains an arbitration clause, there is a presumption of arbitrability . . .").

14. See, e.g., *Kaleva-Norman-Dickson School Dist. No. 6 v. Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich. 583, 595, 227 N.W.2d 500, 506 (1975) (relying on the *Trilogy* principles to order arbitration where it could not be said "with positive assurance" that the arbitration clause was not "susceptible of an interpretation" that covered the dispute (quoting *Warrior & Gulf*, 363 U.S. at 582-83)).

15. See, e.g., *City of Hartford v. Local 760, Int'l Ass'n of Firefighters*, 6 Conn. App. 11, 502 A.2d 429 (1986) (award reinstating firefighter who allegedly was involved in a bank robbery was vacated because arbitrator exceeded authority); *County College of Morris Staff Ass'n v. County College of Morris*, 100 N.J. 383, 495 A.2d 865 (1985) (court vacated award because arbitrator read the contract to require progressive discipline prior to discharge).

16. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

17. See, e.g., *Ferndale Educ. Ass'n v. School Dist.*, 67 Mich. App. 637, 242 N.W.2d 478 (1976). In some states, the courts have adopted the *Trilogy* standards expressly, see *City of Des Moines v. Central Iowa Pub. Employees Council*, 369 N.W.2d 442 (Iowa 1985), aff'd, 439 N.W.2d 170 (Iowa 1989), while in others the courts use state statutory standards modeled after the United States Arbitration Act. See *Community College of Beaver County v. Community College of Beaver County, Soc'y of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977).

has played a prominent role in the public sector. It has been argued that, regardless of the scope of the public policy exception to judicial deference in the private sector, judicial deference in the public sector must be strictly limited by public policy because the public employer has a statutory mandate to supply public services.¹⁸ In addition, public sector collective bargaining exists in a complex and diverse statutory environment which provides fertile ground for arguments based on the public policy exception.¹⁹ Indeed, public policy arguments for avoiding arbitration or voiding arbitration awards have a long history in the public sector, and pervade the entire spectrum of court involvement in arbitration.²⁰

This article will examine the role of the *Trilogy* principles, including the public policy exception, in judicial enforcement of arbitration agreements in the public sector. First the article will review the applicable law in the private sector regarding judicial arbitration enforcement. Then, the article will discuss the role of the courts in public sector arbitration, concluding that while courts frequently pay lip service to the *Trilogy* principles, in reality they often fail to apply them. Finally, the article will analyze the arguments for and against application of the deferential *Trilogy* standards in the public sector in light of the distinctive characteristics of public sector labor relations, and make a recommendation as to the appropriate scope of judicial involvement in public sector arbitration.

Particular emphasis will be placed on the public policy arguments for judicial involvement in arbitration because of their significance in the public sector. In contrast to the private sector, where public policy arguments are raised primarily in the context of judicial review of arbitration awards, public policy arguments in the public sector frequently are raised

18. See *United States Postal Serv. v. National Ass'n of Letter Carriers*, 481 U.S. 1301 (1987) (Rehnquist, J., concurring); *Kearny PBA, Local No. 21 v. Town of Kearny*, 81 N.J. 208, 217, 405 A.2d 393, 398 (1979) (In the public sector, "public policy demands that inherent in the arbitrator's guidelines are the public interest, welfare and other pertinent statutory criteria.").

19. Grodin, *Judicial Response to Public-Sector Arbitration*, in PUBLIC-SECTOR BARGAINING 224, 226 (1978); Toole, *Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments*, 33 ARB. J. 6, 6 (Sept. 1978) ("[Q]uestions of public policy in the public sector are much broader than in the private.") See Feller, *The Coming End of Arbitration's Golden Age*, in ARBITRATION-1976, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97 (1976) for an argument that the judicial deference to arbitration in the private sector will be eroded by the increase in external law applicable to private sector employment.

20. The public policy argument has appeared in pre-arbitral cases in challenges to arbitrability and delegation, and has been used in post-arbitral cases as a challenge to the award. See Mastriani & Anderson, *Arbitrability in the Public Sector*, 3 LABOR AND EMPLOYMENT ARBITRATION 60-1, 60-11 (1983); *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 393 A.2d 278 (1978) (pre-arbitration challenge to arbitrability of teacher transfers based on claim of nondelegability); *Watertown Police Union, Local 541 v. Town of Watertown*, 210 Conn. 333, 555 A.2d 406 (1989) (arbitration award challenged on public policy grounds).

to avoid compliance with agreements to arbitrate. Even where public policy arguments are not expressly raised, courts appear to be influenced by their views of public policy in reviewing the merits of an arbitrator's award.²¹ Accordingly, the article includes a recommendation regarding the appropriate scope of the public policy exception in the public sector.

II. THE JUDICIAL ROLE IN PRIVATE SECTOR ARBITRATION

Arbitration of labor disputes in the private sector has a lengthy history.²² While arbitration has been used to a limited extent to resolve impasses in collective bargaining in the private sector,²³ its use to decide disputes over the meaning and application of collective bargaining agreements is, and has been, widespread.²⁴ Arbitration plays a central role in the national labor policy.²⁵ Arbitration is not a "substitute for litigation," as in the commercial context, but a "substitute for industrial strife."²⁶ Additionally, it is an extension of the collective bargaining process, the method by which meaning and content are given to the negotiated agreement.²⁷ The arbitrator functions as the parties' "contract reader", a "joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement."²⁸

The collective bargaining agreement is more than a contract; it creates a "system of industrial self-government."²⁹ The grievance and arbitration procedure is the heart of this system.³⁰ Decisions of labor arbitrators are not limited by the language of the contract. Rather, the arbitrators are chosen because of their knowledge of the industrial com-

21. See discussion of *State v. State Troopers Fraternal Ass'n*, 91 N.J. 464, 453 A.2d 176 (1982) *infra* at notes 111-14 and accompanying text.

22. See Coleman, *supra* note 9, at 89-90.

23. See DeWolf, *The Enforcement of the Labor Arbitration Agreement in the Public Sector - the New York Experience*, 39 ALB. L. REV. 393, 398 (1975). See also Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C.L. REV. 557, 557 (1980) ("The impasse resolution technique most often used in the private sector where parties are unable to resolve a bargaining impasse through regular negotiations involves resort to a work stoppage.").

24. See 2 COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) § 51:1 (Basic Patterns: Grievances and Arbitration) (Feb. 9, 1989). A survey of some 400 sample contracts by BNA revealed that approximately 98% contained an arbitration provision for resolving interpretation and application disputes.

25. "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

26. *Id.*

27. *Id.* at 578, 581.

28. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

29. *Warrior & Gulf*, 363 U.S. at 580.

30. *Id.* at 581.

mon law and they are expected to rely on that knowledge in issuing a decision.³¹

These observations about the nature of grievance arbitration and its primacy in the scheme of national labor policy led the Supreme Court, in the *Trilogy*, to limit the role of the courts in arbitration.³² When there is a dispute over whether a particular matter is subject to arbitration, it is for the court to determine whether the parties agreed to arbitrate.³³ Consistent with the policy favoring arbitration, however, the Supreme Court stated in *Warrior & Gulf*:

The judicial inquiry under section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.³⁴

The Court thus established a presumption in favor of arbitrability.³⁵ Moreover, in determining whether an agreement to arbitrate exists, the courts must avoid becoming entangled in the merits of the grievance; if there is an agreement to arbitrate, the decision on the merits is for the arbitrator.³⁶ And, according to the Court, “[t]he processing of even frivolous claims may have therapeutic values”³⁷

The courts have a similarly limited role in reviewing an arbitrator’s award. In a challenge to an arbitration award, like a challenge to arbitrability, the court must avoid review of the merits.³⁸ Such review would undermine the important goal of arbitration as a final and binding resolution of contract disputes.³⁹ So long as the arbitrator’s award “draws its essence from the collective bargaining agreement”, the award must be enforced.⁴⁰ Even where the arbitrator errs in the interpretation of the contract, it is not for the court to second-guess the arbitrator’s interpretation.⁴¹

31. *Id.* at 581-82; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960).

32. The role of the courts was defined initially in the *Steelworkers Trilogy* and further explicated in *W. R. Grace & Co. v. International Union of United Rubber Workers, Local Union 759*, 461 U.S. 757, 764-66 (1983) and *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987).

33. *Warrior & Gulf*, 363 U.S. at 582.

34. *Id.* at 582-83.

35. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

36. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568.

37. *Id.*

38. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

39. *Id.*

40. *Id.*

41. “[A]s long as the arbitrator is even arguably construing or applying the contract and acting

As noted previously, however, the Supreme Court has recognized an exception to the general rule of according finality to the arbitrator's award where the award conflicts with public policy.⁴² To date, however, the Court's decisions have not identified the precise limits of the public policy exception.⁴³

The lower federal courts have adopted two different interpretations of the public policy exception.⁴⁴ Some courts have limited the exception to situations in which the award is in violation of the law or requires the employer to violate the law.⁴⁵ These courts rely on the language from *United Paper Workers Int'l Union v. Misco* that states (referring to the Court's earlier decision in *W. R. Grace v. Rubber Workers*): "[o]ur decision turned on our examination of whether the award created any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'" ⁴⁶ Relying on this and other language from these two decisions, courts have refused to overturn arbitration awards that are not in direct violation of existing statutory or case law, asserting that any other formulation is so overbroad and unprincipled as to permit wholesale destruction of the national policy favoring arbitration.⁴⁷

Other courts have employed a broader notion of public policy. These courts will invalidate awards that conflict with policies underlying statutory or decisional law, despite the fact that neither the arbitrator's decision nor the employer's compliance with that decision would violate any law.⁴⁸ Many of the challenged cases have involved an employer's

within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

42. See *W. R. Grace v. International Union of United Rubber Workers, Local Union 759*, 461 U.S. 757 (1983); *Misco*, 484 U.S. 29.

43. See Hexter, *Judicial Review of Labor Arbitration Awards: How the Public Policy Exception Cases Ignore the Public Policies Underlying Labor Arbitration*, 34 ST. LOUIS U.L.J. 77, 93 (1989).

44. *Id.*

45. See, e.g., *United States Postal Service v. National Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987), cert. dismissed, 485 U.S. 680 (1988) (court refused to "impose [its] own brand of justice" as the narrow public policy exception did not apply since there was no legal proscription on reinstatement of letter carrier convicted of unlawful delay of the mail); *United States Postal Service v. National Ass'n of Letter Carriers*, 789 F.2d 18, 21 (D.C. Cir. 1986) (court recognized established public policy of consistent postal service operations but held that this policy was not implicated by the facts of the case); *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986) (public policy exception is designed to be narrow so as to limit intrusive judicial review of arbitration).

46. *Misco*, 484 U.S. at 43, quoting *W. R. Grace*, 461 U.S. at 766.

47. See cases cited *supra* note 45.

48. See, e.g., *Amalgamated Meat Cutters, Local 540 v. Great Western Food*, 712 F.2d 122 (5th Cir.), reh'g. denied, 717 F.2d 1399 (5th Cir. 1983) (arbitration award reinstating employee who admitted driving company truck after drinking vacated on public policy grounds); *Georgia Power Co. v. International Bhd. of Elec. Workers, Local 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd*, 896

refusal to comply with an arbitrator's award reinstating a discharged employee on the ground that reinstatement would violate public policy.⁴⁹ An example, drawn from two virtually identical cases with opposite results, will illustrate the two approaches of the courts.⁵⁰ An airline pilot is discharged by a commercial airline for serving as a member of the flight crew of an early morning commercial flight after drinking alcohol for several hours the night before the flight. A blood alcohol test administered at the conclusion of the two hour flight reveals a blood alcohol level in excess of that permitted by FAA regulations and in excess of the level that creates a presumption of intoxication under the state law that prohibits driving while intoxicated. The arbitrator orders the employer to reinstate the pilot assuming FAA certification to fly. The arbitrator's decision sets forth two bases for reinstatement. First, the employer has not terminated other employees with alcohol problems but instead offered them the opportunity to enter alcohol rehabilitation; second, the discharged pilot had an unblemished record in fifteen years of employment and successfully completed alcohol rehabilitation after the termination. The employer challenges the award claiming that reinstatement of the pilot would violate the strong public policy against operation of an aircraft while intoxicated, a policy designed to protect the public safety.

A narrow view of the public policy exception would require that the court uphold the award because reinstatement of the pilot would not violate positive law. No law prohibits the employment of pilots who have previously operated aircraft while intoxicated.⁵¹ A broader view of public policy, however, would support overturning the arbitrator's award, for there is a strong public policy, and numerous laws and regulations,

F.2d 507 (11th Cir. 1990) (arbitration award reinstating drug abuser vacated on public policy grounds).

49. See, e.g., *United States Postal Service v. National Ass'n of Letter Carriers*, 810 F.2d 1239 (employer challenged award reinstating letter carrier convicted of unlawful delay of the mail asserting a violation of public policy); *Amalgamated Meat Cutters*, 712 F.2d at 122 (employer challenged arbitration award reinstating employee who drove company truck after drinking alcohol asserting a violation of public policy); *Georgia Power Co.*, 707 F. Supp. at 531 (employer challenged arbitration award reinstating drug abuser on public policy grounds).

50. Compare *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987) (arbitrator's reinstatement of airline pilot who served as copilot within 24 hours of consuming alcohol when his blood alcohol level was .13%, which violated company rules and FAA regulations, did not violate public policy), *cert. denied*, 486 U.S. 1014 (1988) with *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988) (arbitrator's reinstatement of pilot who served as pilot in command within 8 hours of consuming alcohol when his blood alcohol content was .13 grams, which violated company rules and FAA regulations, violated public policy), *cert. denied*, 493 U.S. 871 (1989).

51. Cf. *Northwest Airlines*, 808 F.2d at 83-85. In rejecting the employer's public policy argument in *Northwest Airlines*, the court noted that the employer had a policy that allowed reformed alcoholics to fly as pilots. *Id.* at 83.

prohibiting operation of an aircraft while intoxicated.⁵²

There are persuasive arguments for both views of the public policy exception. Concededly, a court should be permitted to vacate an arbitrator's award that is unlawful.⁵³ Supporters of a broad reading of the public policy exception rely on the well-established principle that a court will not enforce a contract that violates law or public policy.⁵⁴ Although public policy is expressed in the law, an award need not be in direct violation of positive law to violate public policy.⁵⁵ Further, it is the function of the courts to enforce public policy and, thus, the courts are performing an appropriate role in reviewing arbitration awards for compliance with public policy.⁵⁶

Critics of the expansive public policy exception argue that it endangers the finality of arbitration, which is crucial to national labor policy.⁵⁷ In the absence of finality of awards, the stability of labor relations sought by the policy favoring arbitration cannot be achieved.⁵⁸ Furthermore, the broad reading of the exception is so devoid of standards that it permits judges to substitute their views for those of arbitrators in direct contravention of the *Trilogy*, and encourages parties to engage in lengthy

52. *Cf. Delta Air Lines*, 861 F.2d at 668, 672-73.

53. The doctrine of refusal to enforce contracts violative of law or public policy "derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

54. *Id.* But see *Judge Easterbrook's concurrence in E. I. Dupont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 618 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986) (Easterbrook, J., concurring) ("A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law.")

55. See *Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427 n.3 (8th Cir. 1987) (court vacated award reinstating employee who had circumvented safety procedures at a nuclear power plant, holding that it need not find that the award was unlawful to vacate on public policy grounds).

56. *Daniel Constr. Co. v. Local 257, Int'l Bhd. Elec. Workers*, 856 F.2d 1174, 1181 (8th Cir. 1988), *cert. denied*, 489 U.S. 257 (1989), quoting *Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. Elec. Workers*, 834 F.2d 1424, 1427 (8th Cir. 1987). See Gould, *Judicial Review of Labor Arbitration Awards*, 64 NOTRE DAME L. REV. 464, 491-95 (1989). Professor Gould argues that arbitrators could reduce the incidence of judicial reversal of arbitration awards in discharge cases on public policy grounds in two ways. First, arbitrators should make specific findings with respect to the possibility for rehabilitation of the employee to support awards of reinstatement, and second, arbitrators should demonstrate flexibility in denying a reinstatement remedy when there is a public policy risk in reinstatement. If these practices were followed, according to Professor Gould courts would be more comfortable giving appropriate deference to the arbitrator's award. *Id.*

57. See Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 34 (1988); Hexter, *supra* note 43, at 103-05.

58. *Id.* Hexter, *supra* note 43, at 103-05.

and expensive post-award litigation.⁵⁹ Also, a sweeping public policy exception interferes with the paramount public policy of requiring collective bargaining by employers and unions to achieve the objective of labor peace.⁶⁰ A final argument against a broad public policy exception is that the court, like the arbitrator, is bound to enforce the contract unless it violates positive law.⁶¹ These two contrasting views of the public policy exception have been reflected in the private sector public policy cases decided by the lower federal courts since *W. R. Grace* and *Misco*.⁶²

III. ARBITRATION IN THE PUBLIC SECTOR

In contrast to the private sector, where the *Trilogy* principles are uniformly accepted if not always strictly followed, judicial involvement in public sector arbitration varies widely. Initially courts held that all agreements by government employers to arbitrate constituted unlawful delegations of governmental authority.⁶³ Despite increasing judicial recognition of the authority of public employers to agree to arbitrate certain disputes, this theory of nondelegability remains viable with respect to certain issues.⁶⁴ Moreover, courts historically have been less deferential

59. Edwards, *supra* note 57, at 23 and 34; Hexter, *supra* note 43, at 103-05.

60. Edwards, *supra* note 57, at 23-29. Judge Edwards notes that a court invalidating an arbitration award on public policy grounds usurps the function of the National Labor Relations Board, which is to determine which subjects of bargaining are mandatory under the National Labor Relations Act. *Id.* at 28.

61. See *E. I. Dupont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 618 (7th Cir. 1988), *cert. denied*, 479 U.S. 853 (1986) (Easterbrook, J., concurring) ("A power to set aside awards on ground of public policy, as distinct from rules of law is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law.")

62. While there was an occasional challenge to an arbitration award based on public policy prior to the Supreme Court's recent decisions in *W. R. Grace* and *Misco*, see, e.g., *Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), those two cases, in spite of what appears to be narrow language regarding the public policy exception, have spawned a number of private sector cases alleging that arbitrators' decisions violate public policy. Feuille & LeRoy, *supra* note 2, at 44. Feuille & LeRoy note, however, that despite the increase in the number of public policy challenges in the 1980s, they remain a small percentage of all appeals. *Id.* See, e.g., *Stead Motors v. Automotive Machinist Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) *cert. denied*, 110 S. Ct. 2205 (1989) (court applied narrow public policy exception), *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (court applied broad public policy exception); *Iowa Elec. Light and Power Company v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987) (court applied broad public policy exception). See Craver, *supra* note 1, at 35-44 for a thorough discussion of the judicial application of the public policy exception in cases under the National Labor Relations Act. Craver argues persuasively that courts should not invalidate arbitration awards unless "the action ordered by the arbitrator would be wholly improper if directed by the negotiating parties themselves." *Id.* at 43.

63. Craver, *supra* note 10, at 333.

64. *Id.* at 338-341; Comment, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1719-21 (1984); Mastriani & Anderson, *supra* note 20, at 60-66 to 60-67 (1983). See, e.g., *Lake County Educ. Ass'n v. School Bd.*, 360 So. 2d 1280 (Fla. Dist. Ct. App.), *cert. denied*, 366 So. 2d 882 (Fla. 1978) (elected school board has the exclusive prerogative to decide whether or not to

to arbitration of grievances in the public sector, demonstrating both a reluctance to order arbitration in the absence of a clear agreement to arbitrate the dispute at issue, and a willingness to set aside awards with which they disagree.⁶⁵

In recent years, many states have adopted the *Trilogy* principles, or standards analogous to the *Trilogy*, for arbitrability and enforcement determinations in the public sector.⁶⁶ Despite adoption of the *Trilogy* standards in theory, however, the deference suggested by these standards is often ignored in practice.⁶⁷

A. Arbitrability Determinations in the Public Sector

The issue of arbitrability may arise at any point during the arbitration process. The courts⁶⁸ may be faced with determining arbitrability

reappoint nontenured teacher); *Berkshire Hills Regional School Dist. Comm. v. Berkshire Hills Educ. Ass'n*, 375 Mass. 522, 377 N.E.2d 940 (1978) (the appointment of a school principal is nondelegable, hence not a proper matter for arbitration); *Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Special School Dist. No. 1*, 258 N.W.2d 802 (Minn. 1977) (decision to transfer a number of teachers is not arbitrable as it is a managerial decision); *Milwaukee Police Ass'n v. City of Milwaukee*, 113 Wis.2d 192, 335 N.W.2d 417 (1983) (discharge of probationary police officer is nondelegable).

65. See Mastriani & Anderson, *supra* note 20, at 60-62.

66. Craver, *supra* note 10, at 333-41.

67. This is not to suggest that courts consistently follow the deferential standards of the *Trilogy* in the private sector. See, e.g., *Torrington Co. v. Metal Prods. Workers Union, Local 1645*, 362 F.2d 677 (2nd Cir. 1966). Indeed, in recent years, court decisions overturning public sector arbitration awards may be no more common than those overturning private sector awards. Compare *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 894 F.2d 998 (8th Cir. 1990) (award vacated because it did not draw its essence from the bargaining agreement); *International Bhd. of Elec. Workers, Local 429 v. Toshiba America, Inc.*, 879 F.2d 208 (6th Cir. 1989) (court recognized the limited standard of judicial review mandated by the *Trilogy*, but vacated the award regardless because the arbitrator did not conform to the terms of the agreement); *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 944 (1st Cir. 1988) *quoting* *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrator cannot substitute "his own brand of industrial justice" for what is required by the contract) *with* *Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers*, Local 1942, 179 Conn. 184, 425 A.2d 1247 (1979) (judicial review of the legality of the award does not conflict with the scope of review explained in the *Trilogy*); *Musser v. County of Centre*, 101 Pa. Commw. 193, 515 A.2d 1027 (1986), *aff'd*, 519 Pa. 380, 548 A.2d 1194 (1988) (court purported to adhere to the *Trilogy's* "essence" test, but vacated the award because the arbitrator exceeded authority).

68. Typically, in the public sector as in the private sector, see *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), the responsibility of deciding substantive arbitrability belongs to the courts. In some states, however, the arbitrator has the initial task of deciding whether the parties have agreed to arbitrate the dispute, subject to review by the court in an action to set aside or confirm the award. See, e.g., *Taylor v. Crane*, 24 Cal.3d 442, 595 P.2d 129, 155 Cal. Rptr. 695 (1979); *Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh*, 481 Pa. 66, 391 A.2d 1318 (1978); *State v. AFSCME Council 4*, 13 Conn. App. 461, 537 A.2d 517 (1988). In some states, it is the function of the administrative agency created by the collective bargaining law to determine arbitrability. See, e.g., *Board of Educ. of Warren Township High School Dist. 121 v. Warren Township High School Fed'n of Teachers*, 128 Ill. 2d 155, 538 N.E.2d 524 (1989) (Illinois Educational Labor Relations Act divested circuit courts of power to determine the arbitrability of

before or after the arbitration.⁶⁹ One party, typically the employer, may refuse to arbitrate a grievance on the grounds that the grievance is not arbitrable. A court will confront this issue either in an action to compel arbitration by the union or an action to stay arbitration by the employer. In either case, the court must determine whether the parties agreed to

grievances); Board of Educ. of Danville Community Cons. School Dist. No. 118 v. Illinois Educ. Labor Relations Bd., 175 Ill. App. 3d 347, 529 N.E.2d 1110 (1988), *cert. denied*, 124 Ill. 2d 553, 535 N.E.2d 912 (1989) (same); Snow, *The Steelworkers Trilogy in Oregon's Public Sector*, 21 WILLAMETTE L. REV. 445, 455 (1985) ("[w]hen a party to a public sector collective bargaining agreement refuses to submit a dispute to arbitration or to implement an arbitration award, the other party may file an unfair labor practice complaint with the [Employment Relations Board in Oregon].") In contrast to substantive arbitrability claims, procedural arbitrability claims, such as arguments that a grievance was not timely filed under the contract, are left to the arbitrator in both the private and public sectors, subject to review in the same manner as the disposition on the merits. See *Town of East Hartford v. East Hartford Municipal Employees Union, Inc.*, 206 Conn. 643, 651-54, 539 A.2d 125, 130-32 (1988); Mastriani & Anderson, *supra* note 20, at 60-24 and 60-25.

69. Post-arbitration challenges to legal arbitrability differ little from pre-arbitration challenges to legal arbitrability. Cases involving appointment, promotion and nonrenewal of teachers are as common among post-arbitration judicial review cases as they are among pre-arbitration arbitrability cases. See, e.g., *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (arbitration award requiring reinstatement of nontenured teacher which would provide tenure by operation of statute void as against public policy, so court modified award to require reinstatement for additional nontenured year); *School Comm. of Peabody v. Int'l Union of Elec. Workers, Local 294*, 19 Mass. App. 449, 475 N.E.2d 410 (1985) (court set aside arbitration award holding that employer violated contract by failing to appoint two employees to positions of assistant high school principal because appointment nondelegable); *Meehan v. Nassau Community College*, 152 A.D.2d 313, 548 N.Y.S.2d 741 (1989) (award of grievance board which found that the employer violated the agreement by failing to assign courses to teachers solely on the basis of seniority unenforceable as against public policy); Board of Educ. of Danville Community Cons. School Dist. No. 118 v. Illinois Educ. Labor Relations Bd., 175 Ill. App. 3d 347, 529 N.E.2d 1110 (1988) (arbitrator's determination that school board's refusal to assign tenured teacher to extracurricular coaching position violated the collective bargaining agreement not void as against public policy of nondelegability expressed in School Code), *cert. denied*, 124 Ill. 2d 553, 535 N.E.2d 912 (1989). Compare *Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n*, 94 N.J. 9, 462 A.2d 137 (1983) (claim of discrimination in appointment not arbitrable because appointment decisions are managerial prerogatives) with *Blue Hills Regional Dist. School Comm. v. Flight*, 383 Mass. 642, 421 N.E.2d 755 (1981) (award of arbitrator compelling employer to appoint teacher to administrative position which she was denied because of her sex does not implicate the nondelegability doctrine because it is no more intrusive on managerial prerogative than the same decision by an independent commission enforcing laws against discrimination).

In post-award challenges to arbitrability the party contesting arbitrability has a concrete award to demonstrate the interference with governmental decisionmaking authority rather than a more speculative assertion that arbitration will interfere with that authority. See *School Comm. of Southbridge v. Brown*, 375 Mass. 502, 506, 377 N.E.2d 935, 937 (1978) (stay denied because a petition to stay arbitration should not be allowed simply because a possible remedy might intrude on the non-delegable authority of a school committee); *Riverhead Central School Dist. v. Riverhead Central Faculty Ass'n*, 528 N.Y.S.2d 611, 613, 140 A.D.2d 526, 527 (stay denied because in deciding an application for a stay, a court should not assume prematurely that the only remedy to be granted is an impermissible one), *appeal denied*, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658 (1988); *Enlarged City School Dist. v. Troy Teachers Ass'n*, 69 N.Y.2d 905, 508 N.E.2d 930, 516 N.Y.S.2d 195 (1987) (lower court's decision to stay arbitration was error and reversed because there was possible relief in the arbitration proceeding that would not violate public policy); *Pennsylvania Labor Relations Bd. v. Bald Eagle Area Educ. Ass'n*, 499 Pa. 62, 67, 451 A.2d 671, 673 (1982) (stay denied because courts have no reason to assume an arbitrator will ignore the law and possibly fashion an invalid award).

arbitrate the disputed issue.⁷⁰ The issue of arbitrability also may arise after arbitration, when the losing party contends that the award is unenforceable because the grievance was not arbitrable.⁷¹ The losing party also may assert other grounds for overturning the award, either as a defense to an action for enforcement of the award or in an action to vacate the award.⁷²

Determinations of arbitrability fall into two categories—contractual arbitrability and legal arbitrability.⁷³ Contractual arbitrability concerns whether the parties agreed to arbitrate the issue, while legal arbitrability concerns whether the parties lawfully could agree to allow the arbitrator

70. The first two cases in the *Steelworkers Trilogy*, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), were actions to compel arbitration.

71. The post-award challenge to arbitrability will be made in an action to vacate the award or as a defense to an action to enforce the award. See *City of Des Moines v. Central Iowa Pub. Employees Council*, 369 N.W.2d 442 (Iowa 1985), *aff'd*, 439 N.W.2d 170 (Iowa 1989) (city's petition to vacate award was denied, as court held the arbitrator had authority to decide arbitrability); *Binghamton Civil Service Forum v. City of Binghamton*, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978) (court denied city's challenge to the arbitrability as a defense in the union's confirmation action since the city had agreed to submit the question to the arbitrator in the first place). Under some circumstances, a party challenging arbitrability after issuance of an award may be held to have waived the right to contest arbitrability. See *Borough of Naugatuck v. AFSCME Council 4*, 190 Conn. 323, 460 A.2d 1285 (1983) (borough should have sought the aid of the court in determining arbitrability before submitting the question to arbitration; since it did not, it could not challenge arbitrability later); *Port Huron Area School Dist. v. Port Huron Educ. Ass'n*, 426 Mich. 143, 393 N.W.2d 811 (1986) (a party who voluntarily submits a grievance to arbitration may be precluded from later challenging the arbitrability of that grievance, although the same party does not waive the right to challenge the award on the ground that the arbitrator exceeded his authority); *Binghamton Civil Service Forum v. City of Binghamton*, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978) (once the city actively participated in the arbitration process, it waived any objection it may have had as to the issue's arbitrability); *City of New Haven v. AFSCME Council 15*, 208 Conn. 411, 544 A.2d 186 (1988) (where city submitted arbitrability issue to the arbitrators, it is as bound by the arbitrators' decision on that issue as it is on any other issue). Other states, however, encourage the parties to arbitrate the dispute and litigate arbitrability afterwards, if necessary. See *Board of Educ. of Community Unit School Dist. No. 4 v. Champaign Educ. Ass'n*, 15 Ill. App. 3d 335, 342, 304 N.E.2d 138, 143 (1973) (a timely objection to arbitrability preserves the right to challenge the award after participating in the arbitration process); *Board of Trustees v. Illinois Educ. Labor Relations Bd.*, 173 Ill. App. 3d 395, 413, 527 N.E.2d 538, 550 (1988) (consideration of nondelegability argument best postponed until after arbitration); *Pennsylvania Labor Relations Bd. v. Bald Eagle Area School Dist.*, 499 Pa. 62, 451 A.2d 671 (1982) (objections to arbitrability should be presented to the arbitrator first, subject to appropriate court review of the award). As noted by Craver, *supra* note 10, at 345, the latter is the better rule, for it eliminates potentially unnecessary court challenges. See *Firefighters Union, Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 614, 526 P.2d 971, 975, 116 Cal. Rptr. 507, 511 (1974). The disadvantage of such a rule, however, is that by proceeding to arbitration and challenging the award only if the decision is unfavorable, employers may foster unrest among the employees who perceive that the employer is undermining the grievance procedure. Some courts also have held that failure to petition the court to set aside an award as inarbitrable within the statutory time frame waives the right to raise the issue in defense of an action for enforcement. See *Burt v. Duval County School Bd.*, 481 So. 2d 55, 58 (Fla. Dist. Ct. App. 1985). This rule may serve to eliminate frivolous arbitrability arguments.

72. See *infra* notes 101-04 and accompanying text.

73. These two categorizations were used by Mastriani & Anderson, *supra* note 20, at 60-6 and 60-22.

to decide the issue at hand. Legal arbitrability issues are rare in the private sector but relatively common in the public sector, primarily because of the nondelegability issue.⁷⁴ Pre-arbitration issues of legal arbitrability implicate many of the same public policy questions faced by the courts in reviewing awards for consistency with law and public policy.⁷⁵ A review of several cases dealing with each type of arbitrability issue will demonstrate the various standards used by public sector courts deciding arbitrability questions.

1. Contractual Arbitrability

In deciding issues of contractual arbitrability, many public sector courts have adopted the private sector presumption of arbitrability set forth in the *Steelworkers Trilogy*.⁷⁶ For example, in *Kaleva-Norman-Dickson School District v. Kaleva-Norman Dickson School Teachers' Ass'n*,⁷⁷ the Michigan Supreme Court held arbitrable a teacher's claim that the school board's refusal to renew her contract was a breach of the collective bargaining agreement, stating "[t]he policy favoring arbitration of disputes arising under collective bargaining agreements, as enunciated by the United States Supreme Court in the *Steelworkers' Trilogy*, is appropriate for contracts entered into under the PERA."⁷⁸ Despite the fact that the agreement contained a strong management rights clause, the court looked solely at the arbitration clause and found no evidence of exclusion of nonrenewal claims from arbitration. The issue of whether nonrenewal was a right reserved to management was an issue of the merits, according to the court, and the decision on the merits was committed to the arbitrator not the courts. In reversing the lower courts, which had enjoined arbitration based on their interpretation of the management rights clause, the Michigan Supreme Court heeded the admonition of the United States Supreme Court that a court "should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."⁷⁹

74. See *supra* note 69 and accompanying text.

75. See *infra* notes 125-61 and accompanying text, for discussion of review of awards on public policy grounds.

76. Mastriani & Anderson, *supra* note 20, at 60-22 to 60-23.

77. 393 Mich. 583, 227 N.W.2d 500 (1975).

78. 393 Mich. at 590-92, 227 N.W.2d at 503-04 (citations omitted). The PERA is the Michigan Public Employment Relations Act. *Id.* at 590, 227 N.E.2d at 503.

79. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960). The decision in *Kaleva-Norman-Dickson* was based solely on contractual arbitrability. The court did not deal with the question of legal arbitrability which frequently is raised in cases involving nonrenewal

Although many courts purport to have accepted the *Trilogy* principles for resolving arbitrability disputes in the public sector, in actual practice some courts have demonstrated less willingness to refrain from involvement in the merits than the Michigan Supreme Court showed in *Kaleva-Norman-Dickson School District*. In *Policemen's & Firemen's Retirement Board v. Sullivan*,⁸⁰ the Connecticut Supreme Court quoted with approval *Warrior & Gulf's* counsel that any "[d]oubts [concerning arbitrability] should be resolved in favor of coverage."⁸¹ Nevertheless, the court held that a grievance regarding the disability provisions of the pension plan was not arbitrable. The court reached this conclusion despite the fact that the arbitration clause applied to the interpretation and application of the articles of the agreement and Article 15 of the agreement expressly stated that the two police pension plans would continue to be the pension plans for specified groups of employees. According to the court, because the pension plans were created by the legislature and were neither set forth verbatim in the agreement nor expressly incorporated in the agreement, the parties could not have intended to arbitrate disputes over pensions. In a dissenting opinion in *Sullivan*, Justice Loisselle criticized the majority for weighing the merits of the dispute in the guise of determining arbitrability.⁸²

Similarly, in *Portland Association of Teachers v. Portland School District No. 1*,⁸³ the Oregon Appellate Court affirmed a decision by the Oregon Employment Relations Board ("ERB") denying an order to arbitrate. The ERB found that the collective bargaining agreement unambiguously provided that the use of a certain procedure for teacher evaluation was permissive, not mandatory as contended by the union in its grievance, and therefore arbitration was not required.⁸⁴ In making this determination, both the ERB and the court engaged in contractual interpretation of the dispute's merits, violating the principles of *Warrior & Gulf* while purporting to rely on that decision.⁸⁵

While the *Sullivan* and *Portland* courts paid lip service to the *Tril-*

of probationary teachers. See *infra* notes 94-96 and accompanying text. Cf. *Brown v. Holton Pub. Schools*, 401 Mich. 398, 258 N.W.2d 51 (1977) where the court was faced with a legal arbitrability challenge to a grievance over nonrenewal of a probationary teacher, but found it unnecessary to rule on the issue because the grievance was not based on any specific contract language, rendering it contractually inarbitrable.

80. 173 Conn. 1, 376 A.2d 399 (1977).

81. *Id.* at 7, 376 A.2d at 403, quoting *Warrior & Gulf*, 363 U.S. at 583.

82. *Id.* at 14, 376 A.2d at 406.

83. 51 Or. App. 321, 625 P.2d 1336 (1981).

84. *Id.* at 324-26, 625 P.2d at 1338-39.

85. See *Snow*, *supra* note 68, at 464-69 for a criticism of the case and others in which the courts and the ERB become involved in the merits of the dispute in determining arbitrability.

ogy, other courts have explicitly found the *Trilogy* presumption of arbitrability inappropriate. In *Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association*,⁸⁶ the New York Court of Appeals found the policy favoring arbitration in the private sector inapplicable to the public sector because of the lack of both widespread acceptance and demonstrated efficacy of arbitration. Thus, the court inferred that the parties intended the arbitration clause to have a narrow scope "in the absence of clear, unequivocal agreement to the contrary."⁸⁷ Despite purporting to apply the *Liverpool* rule, however, New York courts, including the Court of Appeals, frequently have ordered arbitration and affirmed arbitration awards challenged on the basis of lack of arbitrability.⁸⁸ Like the *Trilogy* principles, the *Liverpool* rule often has been honored in the breach.

2. Legal Arbitrability

Legal arbitrability claims, unlike contractual arbitrability claims, are relatively unique to the public sector.⁸⁹ The legal arbitrability argument is based on the theory that the parties could not lawfully agree to arbitrate the contested issue, and therefore, the court cannot order arbitration or, if arbitration has occurred, cannot enforce the award.⁹⁰ Most legal arbitrability claims are based on the nondelegability theory, i.e., that the government cannot delegate its powers to an outside authority.⁹¹ While the theory has passed its zenith, it still operates to preclude arbitration of certain subjects, either because the legislature has expressly excluded those subjects from arbitration⁹² or because the court interprets

86. 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977).

87. *Id.* at 514, 369 N.E.2d at 749, 399 N.Y.S.2d at 190. See also *Service Employees Int'l Union, Local 614 v. County of Napa*, 99 Cal. App. 3d 946, 160 Cal. Rptr. 810 (1979) where the California Appellate Court held that the employer was not required to arbitrate a dispute over denial of merit increases, citing its "doubt" that the *Steelworkers Trilogy* principles applied to public sector agreements while holding that even if the principles applied, arbitration must be denied.

88. Craver, *supra* note 10, at 337-38 and cases cited therein.

89. See Mastriani & Anderson, *supra* note 20, at 60-6 to 60-8.

90. *Id.* at 60-6 to 60-8, 60-10 to 60-11.

91. See, e.g., *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (board of education cannot give up the authority to make tenure determinations); *Paterson Police PBA, Local No. 1 v. City of Paterson*, 87 N.J. 78, 432 A.2d 847 (1981) (award vacated because as a general rule, a public employer may not relinquish any of its managerial prerogatives); *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233 (1978) (court reversed PERC's decision in a scope of negotiations determination as a public employer may not bind the discretion of the Civil Service Commission). The nondelegability argument may contest the authority of the public employer to delegate decisionmaking authority to an arbitrator or the authority of the employer to limit its discretionary power by the provisions of a collective bargaining agreement. Perkovich & Stein, *Challenges to Arbitration under Illinois Public Sector Labor Relations Statutes*, 7 HOFSTRA LAB. L.J. 191, 198 (1989).

92. See, e.g., N.J. REV. STAT. ANN. § 34:13A-5.3 (1990) (collective bargaining agreement can-

the legislative enactments to restrict delegation.⁹³

In the latter category, disputes involving tenure for teachers are frequently the subject of nondelegability arguments. The New York Court of Appeals in *Cohoes City School Dist. v. Cohoes Teachers Association*⁹⁴ held that the Board of Education could not relinquish the responsibility to make tenure decisions.⁹⁵ Therefore, the court refused to enforce an arbitration award that reinstated a probationary teacher discharged without just cause, a remedy which would confer tenure on the teacher by operation of the statute.⁹⁶ Nevertheless, the court found that the school board could negotiate supplemental procedural steps to be followed prior to a tenure decision and the arbitrator could order reinstatement without tenure for an additional year as a remedy for failure to follow such procedures.

Legal arbitrability issues are intertwined inextricably with issues of negotiability. Many of the decisions on arbitrability in the public sector turn on the question of whether the subject of the arbitration is negotiable.⁹⁷ Some courts have held, however, that once the employer has negotiated about a subject, it must arbitrate issues relating to that subject, regardless of whether it had the authority to negotiate about the subject

not provide for binding arbitration of disputes involving discipline of employees with statutory tenure or civil service protection).

93. See, e.g., cases cited *supra* at note 91. This interpretation may be based on limitations regarding negotiability. See *infra* notes 97-100 and accompanying text.

94. *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 503 (1976).

95. *Accord* Lake County Educ. Ass'n v. School Bd. of Lake County, 360 So. 2d 1280, 1285 (Fla. Dist. Ct. App.), cert. denied, 366 So. 2d 882 (Fla. 1978) ("[i]t is the public policy of Florida as expressed by statute that our elected school boards shall have the exclusive prerogative to decide whether to reappoint nontenured teachers.") Cf. *Ferndale Educ. Ass'n v. School Dist.*, 67 Mich. App. 637, 242 N.W.2d 478 (1976) (court upheld arbitrator's award reinstating probationary teacher for violation of provisions of Teachers Tenure Act incorporated by reference in collective bargaining agreement, although reinstatement had the effect of awarding tenure by operation of statute.) *But see* *Brown v. Holton Pub. Schools*, 401 Mich. 398, 258 N.W.2d 51 (1977) where the court found that there was no contractual basis on which to arbitrate a probationary teacher's grievance based on nonrenewal, thereby avoiding the necessity of ruling on the question of legal arbitrability.

96. N.Y. Educ. Law § 2509 (McKinney 1981) grants the school board the sole authority to confer tenure on those persons who have been found competent, efficient and satisfactory at the end of the probationary period. Yet persons who have served the full probationary period and continue to teach are entitled by statute to retain their positions absent just cause for removal, which confers tenure without confirmation by the school board. *Cohoes*, 40 N.Y.2d at 779, 358 N.E.2d at 881, 390 N.Y.S.2d at 56. Thus, if the court confirmed the arbitrator's award reinstating the teacher in *Cohoes*, the teacher would be tenured by virtue of continuing to teach beyond expiration of the probationary period. *Id.* at 777, 358 N.E.2d at 879, 390 N.Y.S.2d at 54.

97. See, e.g., *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 161, 393 A.2d 278, 286 (1978). For a critical discussion of the role that scope of bargaining determinations play in arbitrability determinations, see Toole, *Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments*, 33 ARB. J. 6 (Sept. 1978).

in the first instance.⁹⁸ In addition, where there is a category of permissive subjects for negotiation, as in the private sector,⁹⁹ the fact that a grievance does not concern a mandatory bargaining subject may not be dispositive of the arbitrability issue. Several courts have held that once the employer has chosen to negotiate about a permissive subject, it must arbitrate grievances alleging violations of the provisions of the agreement relating to permissive subjects of bargaining.¹⁰⁰

B. Judicial Review of Arbitration Awards in the Public Sector

Typically, judicial review of arbitration awards is limited to grounds specified in the state's Uniform Arbitration Act¹⁰¹ and to legal challenges

98. See, e.g., *Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh*, 481 Pa. 66, 74, 391 A.2d 1318, 1322 (1978). ("To permit an employer to enter into agreements and include terms such as grievance arbitration which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain.")

99. See *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958) in which the court defines three categories of bargaining subjects under the National Labor Relations Act, mandatory, permissive, and illegal. The parties are free to bargain about permissive subjects if they choose to do so and, if agreement is reached, the resulting contract is enforceable. *Id.* at 349.

100. See, e.g., *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139, 141 (Iowa 1983) (grievance over denial of salary increase for unsatisfactory performance arbitrable since "restrictive interpretation of mandatory bargaining topics does not inhibit voluntary bargaining and agreement on permissive topics"); *Susquehanna Valley Central School Dist. v. Susquehanna Valley Teachers' Ass'n*, 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975) (employer that voluntarily bargained about staff size, a nonmandatory subject of bargaining, was required to arbitrate a grievance over a staff reduction.) The Supreme Court of New Jersey, however, in *Paterson Police PBA Local No. 1 v. City of Paterson*, 87 N.J. 78, 432 A.2d 847 (1981), narrowed the scope of permissive subjects in denying enforcement of arbitration awards finding violations of the promotion clause of the collective bargaining agreement. The court stated that no issue is permissively negotiable unless it leaves the government's policymaking powers "essentially unfettered." *Id.* at 93, 432 A.2d at 854. The court further cautioned PERC that "the category of permissive subjects we have delineated is not broad." *Id.* According to the court, the narrow definition was necessary to ensure that bargaining did not "defeat the public's right to participate in the making of governmental policy, or to bypass the predominant duty of public employers to promote the public welfare." *Id.* at 93, 432 A.2d at 854-55. Clearly, the court's decision was motivated by the same view of public policy which led the court to construe narrowly the scope of bargaining under the New Jersey Employer-Employee Relations Act and to hold that there is no classification of permissive bargaining subjects under that statute. See *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233 (1978) and *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 393 A.2d 278 (1978). The *Paterson* case dealt with the existence of a permissive category of subjects for police and firefighters who are covered by distinct statutory provisions which expressly refer to permissive subjects. See *Paterson*, 87 N.J. at 87, 432 A.2d at 851; *Ridgefield Park*, 78 N.J. at 158, 393 A.2d at 284. For a thorough discussion of *Ridgefield Park* and *State Supervisory Employees*, see Comment, *After Ridgefield Park and State Supervisory Employees: The Scope of Collective Negotiations in the Public Sector of New Jersey*, 10 SETON HALL L. REV. 558 (1980).

101. *Mastriani & Anderson*, *supra* note 20, at 60-32. See, e.g., *Board of Educ. of the Findlay City School Dist. v. Findlay Educ. Ass'n*, 49 Ohio St. 3d 129, 551 N.E.2d 186 (1990) (court upheld award of restoration rights to former teacher based on OHIO REV. CODE ANN. § 2711.10 (Anderson 1981) which permits a court to vacate an award only for fraud or misconduct or if the arbitrator exceeded his or her authority); *Port Authority of Allegheny County v. Amalgamated Transit*

to either arbitrability, as discussed previously, or to the legality of the award. The most commonly invoked statutory ground for review of awards is the claim that the arbitrator exceeded the contractual limitations on the authority of the arbitrator. In deciding such issues, many courts have relied on the *Trilogy* standard derived from *Enterprise Wheel*,¹⁰² either in interpreting the Arbitration Act¹⁰³ or as an independent standard of review.¹⁰⁴

Although most courts, in accordance with the *Enterprise Wheel* standard,¹⁰⁵ purport to eschew review of arbitration awards on the merits, some courts have engaged in merits review in the guise of determin-

Union, Div. 85, 492 Pa. 494, 424 A.2d 1299 (1981) (42 PA. CONS. STAT. ANN. § 7314 (Purdon 1989)), patterned after the Arbitration Act of 1927, allowed an award to be vacated only for a showing of fraud or misconduct, or if the arbitrator exceeded his or her authority, so the court upheld the award which granted benefits to injured employees). See also Uniform Arbitration Act, MINN. STAT. §§ 572.08-.30 (1988).

102. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). (The award is legitimate so long as it "draws its essence" from the agreement.)

103. See, e.g., *Port Authority of Allegheny County v. Amalgamated Transit Union*, 492 Pa. 494, 424 A.2d 1299 (1981); *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977).

104. See, e.g., *City of Des Moines v. Central Iowa Pub. Employees Council*, 369 N.W.2d 442 (Iowa 1985), *aff'd*, 439 N.W.2d 170 (Iowa 1989); *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa S. Ct. 1983); *Ferndale Educ. Ass'n v. School Dist.*, 67 Mich. App. 637, 242 N.W.2d 478 (1976). In states in which awards are reviewed initially by the administrative agency rather than the courts, the standards of review applied are similar to those under the Uniform Arbitration Acts and the *Trilogy*. See Snow, *supra* note 68, at 473-80. (Oregon uses the test first articulated in *Willamina Educ. Ass'n v. Willamina School Dist. No. 30-44-63J*, 4 P.E.C.B.R. 2571 (1980), *remanded*, 50 Or. App. 195, 623 P.2d 658 (1981), *aff'd on rehearing after remand*, 60 Or. App. 629, 655 P.2d 189 (1982), which "established that an award would be discarded if it was clear 1) that the parties had not contractually agreed to accept the award as final and binding or 2) that enforcement of the award would be contrary to public policy." Snow, *supra* note 68, at 474. This test resembles the *Trilogy* standard and has resulted in challenges based on allegations that arbitral authority was exceeded or that public policy was violated by the award.) In *Board of Educ. of Danville Comm. Cons. School Dist. No. 118 v. Illinois Educ. Labor Relations Bd.*, 175 Ill. App. 3d 347, 353, 529 N.E.2d 1110, 1114 (4th Dist. 1988), *cert. denied*, 124 Ill. 2d 553, 535 N.E.2d 912 (1989), the Illinois Appellate Court affirmed a decision by the Illinois Educational Labor Relations Board ("IELRB") finding that an employer committed an unfair labor practice by refusing to comply with an arbitration award which was valid since there was "no evidence of fraud, dishonesty or serious error" and "the arbitrator was at least arguably acting within the scope of his authority." The IELRB has exclusive jurisdiction to review arbitration awards under the Illinois Educational Labor Relations Act. *Bd. of Educ. of Community School Dist. No. 1 v. Compton*, 123 Ill. 2d 216, 526 N.E.2d 149 (1988).

105. See, e.g., *AFSCME v. State*, 158 Ill. App. 3d 584, 588, 511 N.E.2d 749, 751 (1987), *aff'd*, 124 Ill. 2d 246, 529 N.E.2d 534 (1988) (award which reduced discipline of employee from discharge to suspension was reinstated, as an award is not subject to review on the merits), *Ferndale*, 67 Mich. App. at 643, 242 N.W.2d at 480 (*Trilogy* theory that the merits of an award are irrelevant in subsequent review was adopted by the Michigan Supreme Court in *Frazier v. Ford Motor Co.*, 364 Mich. 648, 112 N.W.2d 80 (1961)); *Metropolitan Airports Comm'n v. Metropolitan Airports Police Fed'n*, 443 N.W.2d 519, 524 (Minn. 1989) (arbitrator is the judge as to the facts and law, and award cannot be vacated if it draws its essence from the contract); *Jacinto v. Egan*, 120 R.I. 907, 912, 391 A.2d 1173, 1176 (1978) (as long as the award draws its essence from the contract, it is within the arbitrator's authority and the court's review must end).

ing whether the arbitrator exceeded contractual authority.¹⁰⁶ In *Board of Education of the City of New Haven v. AFSCME Council 4*,¹⁰⁷ the court reviewed an arbitration award that reinstated an employee because the employer violated the contract by the manner in which it served the notice of termination. The arbitration panel's decision relied on a stipulated arbitration award in another case, which was introduced into evidence. The court, while quoting *Enterprise Wheel*, found that the panel exceeded its authority by relying on a document that was not a part of the contract. In a strong dissent, Justice Parsky pointed out that the stipulated award was the parties' interpretation of the agreement and therefore, a legitimate basis for the arbitration award.¹⁰⁸ Similarly, in *State of Connecticut v. AFSCME Council 4*,¹⁰⁹ the court vacated an arbitration award on the basis that it was inherently inconsistent with the agreement. Again, while purporting to apply *Trilogy* principles, the court interpreted the agreement differently than the arbitrator and on that basis, overturned the award.¹¹⁰

106. Such an approach is not unique to the public sector although it may be more common there. *Torrington Co. v. Metal Prods. Workers Union, Local 1645*, 362 F.2d 677 (2d Cir. 1966) is frequently criticized as a case in which the court did precisely that. See, e.g., St. Antoine, *supra* note 28, at 1152-53. In *Torrington*, the arbitrator sustained the union's grievance which alleged that the employer breached the contract by unilaterally eliminating a long-standing practice of paying employees for one hour to vote on Election Day. The court refused to enforce the award, stating that by relying on past practice where there was no language in the collective bargaining agreement, the arbitrator added to the agreement in violation of the common contractual reservation on the arbitrator's powers which prohibits adding to, modifying or altering the agreement. As ably stated by Professor St. Antoine, "any time a court is incensed enough with an arbitrator's reading of the contract . . . , it is simplicity itself to conclude that the arbitrator must have 'added to or altered' the collective bargaining agreement." *Id.* at 1153.

107. 195 Conn. 266, 487 A.2d 553 (1985).

108. *Id.* at 274, 487 A.2d at 557. The Connecticut Supreme Court's ruling is analogous to the decision of the Second Circuit Court of Appeals in *Torrington*. See *supra* note 106. Cf. *Ramsey County v. AFSCME Council 91*, 309 N.W.2d 785 (Minn. 1981) where the Supreme Court of Minnesota held that the arbitrator did not exceed his powers in issuing an award based on past practice despite the fact that the past practice conflicted with the contract language. The *Ramsey* court applied the "essence" test, recognizing that the contract is not the sole evidence of the parties intent. In contrast to the Connecticut Supreme Court in *New Haven*, the Minnesota Supreme Court stated that "the concept of judicial deference to arbitral authority must encompass the recognition that the arbitrator is the reader of the contract. As the parties' chosen 'reader', he is authorized to consider matters outside the written agreement in resolving disputes arising out of the continuing employment relationship." *Id.* at 793. The dissent in *Ramsey* strongly argued that the arbitrator exceeded his authority by using past practice to modify the unambiguous provisions of the collective bargaining agreement. *Id.* at 795 (Peterson, J., dissenting).

109. 13 Conn. App. 461, 537 A.2d 517 (1988).

110. The arbitrator in this case decided an issue of arbitrability, which may have contributed to the court's more intrusive review. Nevertheless, the court cited *Enterprise Wheel* and purported to apply the *Enterprise* standard. *Id.* at 467, 537 A.2d at 520. The court further justified its decision by asserting that the award conflicted with public policy because it allowed a probationary employee to grieve her dismissal by finding that she had completed the working test period because her time as a provisional employee was part of the working test period. According to the court such a conclusion was contrary to civil service law which limited appointment to employees determined by examina-

Connecticut courts are not the only courts that engage in merits review of the public sector arbitrator's determination. The New Jersey courts explicitly apply a different standard of contract review in the public sector, *i.e.*, "whether the interpretation of the contractual language is reasonably debatable."¹¹¹ In *State of New Jersey v. State Troopers Fraternal Association*,¹¹² the collective bargaining agreement provided for the employees to participate in a prescription drug program which required a co-payment of \$1.25 for each prescription. During the term of the agreement the legislature appropriated funds for the prescription drug program based on a co-payment of \$2.50, which prompted the employer to change the co-payment for the employees covered by the contract.¹¹³ Based on language in the agreement stating that the employer "shall provide" the funds necessary to maintain the program, the arbitrator found that the change in the co-payment violated the agreement. The court ruled that a separate section of the contract, which stated that all terms of the agreement were subject to legislative changes, controlled all contract clauses, and held that the arbitrator's interpretation was not reasonably debatable. The opinion suggests that the court's beliefs that co-payment plans are reflective of an important governmental policy of cost sharing and that benefits for all employees should be uniform for ease of administration, significantly influenced its decision.¹¹⁴ Like the Connecticut courts, the New Jersey Supreme Court, ignoring the *Trilogy* principles, found a rationale to justify overturning an arbitration award with which it disagreed.¹¹⁵ Notably, while the attack on the award in *State*

tion and working test period to be fit and competent. *Id.* See *infra* notes 125-61 and accompanying text, for further discussion of the public policy exception.

111. See *State v. State Troopers Fraternal Ass'n*, 91 N.J. 464, 468-69, 453 A.2d 176, 178-79 (1982).

112. 91 N.J. 464, 453 A.2d 176 (1982).

113. *Id.* at 466, 453 A.2d at 177.

114. *Id.* at 470, 453 A.2d at 180.

115. See also *Musser v. County of Centre*, 101 Pa. Commw. 193, 515 A.2d 1027 (1986), *aff'd*, 513 Pa. 380, 548 A.2d 1194 (1988) where the court reversed the arbitrator's determination that there was no just cause to discharge two prison guards who abused a prisoner because the type of abuse in which they engaged had long been tolerated by prison officials without discipline. Despite the fact that arbitrators commonly rely on such condonation to reverse discharge actions, see F. ELKOURI & E. A. ELKOURI, *HOW ARBITRATION WORKS* 683-84 (4th ed. 1985), the court, which was justifiably outraged by the grievants' conduct, found that the arbitrator's award did not draw its essence from the agreement because he found just cause for discipline, but not discharge, and reduced the penalty to a suspension. Had the court followed the *Trilogy* as it purported to do, it would not have overturned the award. While the court suggested that the arbitrator imposed "his own brand of industrial justice" contrary to the limitation of *Enterprise Wheel*, 363 U.S. at 596, in fact, the court substituted its brand of industrial justice for the arbitrator's award. See Jones, '*His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration*', 30 U.C.L.A. L. REV. 881 (1983) where the author, a distinguished arbitrator, suggests that the parties to a contract bargain for arbitrator's brand of industrial justice, and thus, application of industrial justice by the arbitrator is not grounds for setting aside awards.

Troopers was not based expressly on public policy, the court appeared to be influenced by perceived public policy considerations in overturning the award.

Public sector courts, like courts in the private sector,¹¹⁶ occasionally set aside awards based on the common contractual restriction that arbitrators cannot add to, subtract from, or modify the contract.¹¹⁷ Employers have used this limitation to overturn awards reinstating discharged employees. For example, in *Board of Control of Ferris State College v. Michigan AFSCME, Council 25*,¹¹⁸ the arbitrator relied on the grievant's remorse for hitting his supervisor and his promise not to repeat the violation to reduce the discharge to a suspension. The court found that the arbitrator improperly modified the agreement because he found just cause for discharge, but reinstated the employee. Similarly, the arbitrator in *County College of Morris Staff Association v. County College of Morris*¹¹⁹ stated that just cause for dismissal existed, but because the employer failed to use progressive discipline, which was a prerequisite to discharge, the employer was required to reinstate the employee. Despite the fact that arbitrators frequently interpret just cause to require progressive discipline, the court found that the arbitrator added to the contract by requiring progressive discipline.¹²⁰

116. See *supra* note 106; *Morgan Services, Inc. v. Local 323, Chicago & Cent. States Joint Bd.*, 724 F.2d 1217, 1222 and n.8 (6th Cir. 1984). The court in *Morgan* vacated the arbitrator's award reinstating an employee, finding that the arbitrator modified unambiguous language in the agreement when he reduced a discharge to a suspension. In the court's view, the agreement clearly gave the employer the right to determine the appropriate sanction for insubordination.

117. *Morris, Twenty Years of Trilogy: A Celebration*, PROCEEDINGS OF THE 33RD ANN. MEETING OF THE NAT'L ACAD. OF ARBITRATORS 331, 364 (1981).

118. 138 Mich. App. 170, 361 N.W.2d 342 (1984).

119. 100 N.J. 383, 495 A.2d 865 (1985).

120. See ELKOURI AND ELKOURI, *supra* note 115, at 653-54. See also *City of Hartford v. Local 760, Int'l Ass'n of Firefighters*, 6 Conn. App. 11, 502 A.2d 429 (1986) (The Connecticut Appellate Court reversed an arbitration board award where the board found that the grievant was suspended for just cause, but reduced the period of suspension. The court held that the board exceeded the scope of the submission to arbitration by addressing the question of the remedy after finding just cause); *State v. National Ass'n of Gov't Employees, Local No. 79*, 544 A.2d 117 (R.I. 1988) (The arbitrator exceeded authority by reducing termination to suspension. Where the agreement allowed the employer to discharge for just cause and the arbitrator found that just cause for discipline existed, the arbitrator could not reduce the penalty to a suspension.); *Contra Drivers Union Local 695 v. County of Sauk*, 103 Wis. 2d 691, 310 N.W.2d 652 (Wis. Ct. App. 1981) (arbitrator's award which found good cause for discipline but overturned the discharge of an employee where progressive discipline and a predischarge interview were not provided, was upheld against a challenge that arbitrator exceeded authority and violated public policy).

Employees have asserted the same semantic argument in reverse. See *McDonald v. Hardee County School Bd.*, 448 So. 2d 593 (Fla. Dist. Ct. App.), *cert. denied*, 456 So. 2d 1181 (Fla. 1984). The arbitrator sustained a teacher's grievance because the employer did not comply with predischarge procedures, and reduced the discharge to a suspension. The court rejected the employee's argument that it must vacate the award as to suspension and reinstate the employee with full back pay because the arbitrator's award stated that the grievance was sustained. *McDonald*, 448 So. 2d at 593.

The courts in these cases interpreted the arbitration awards as holding that just cause for discharge existed, but nevertheless reducing the penalty imposed by the employer. Consequently, the courts vacated the awards on the ground that the arbitrators exceeded contractual authority. Each of the awards is also susceptible to an interpretation which would warrant upholding the award, however, since each could be read to hold that while the actions of the employee normally would provide just cause for discharge, in the circumstances of the case, just cause did not exist.¹²¹ Thus, at most there is an ambiguity in the language of the arbitration awards that might suggest that the arbitrator exceeded contractual authority. Had the courts followed the dictates of *Enterprise Wheel*,¹²² they would have enforced rather than vacated the awards. In *Enterprise Wheel*, the Court emphasized the importance of relying on the arbitrator's informed judgment in the formulation of remedies because of the need for flexibility.¹²³ The Court further cautioned that ambiguity in the opinion that would allow an inference that the arbitrator may have exceeded contractual authority does not justify a refusal to enforce the award.¹²⁴ Accordingly, in light of the policy favoring arbitration, courts

121. As ably stated by the dissenting justice in *County College of Morris*:

The majority is obviously convinced that this employee should have been fired. What the majority has forgotten is that when the employer and the employees' association agreed upon arbitration of the wrongful discharge issue, it was the arbitrator's conclusion that became important and the court's conviction irrelevant.

The majority finds that the arbitrator decided that there was "just cause" for discharge and that the issue, therefore, is whether the arbitrator, having found "just cause" has the power, despite that finding, to deprive the employer of its consequent clear right to discharge the employee. One would think the Court would hesitate to attribute to a presumably experienced, intelligent, and impartial arbitrator such a ludicrous decision, namely, that even though he found the employer had "just cause" to discharge plaintiff, and even though the contract explicitly allowed discharge under such circumstances, the employer nevertheless could not discharge this employee.

That is not, however, what the arbitrator found. A fair, common sense, reading of his opinion is that he found that *ordinarily* ("normally") this employee's conduct would constitute "just cause" for discharge, but given the particular circumstances surrounding that conduct, including the employer's accompanying acts, "just cause" did not exist.

County College of Morris, 495 A.2d at 873-74. (Wilentz, C.J., dissenting).

After discussing the court's interpretation of the award, Chief Justice Wilentz went on to say:

This interpretation by the Court drains the arbitrator's opinion of its true meaning and, having thus drained it, the Court can go on to conclude that the arbitrator's award does not "draw its essence from the parties' agreement."

Id. at 874.

122. Notably, several of these courts purported to rely on the *Trilogy*. See *Board of Control*, 138 Mich. App. at 173-74, 361 N.W.2d at 343-44; *National Ass'n of Gov't Employees v. State of Rhode Island*, 544 A.2d at 119.

123. The Supreme Court recently reemphasized the importance of arbitral flexibility with respect to remedies in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41 (1987).

124. 363 U.S. at 598. As noted by the Court, arbitrators have no obligation to write opinions and to require the absence of ambiguity for enforcement might discourage written opinions, which would be detrimental to the arbitration process. *Id.* Despite this clear direction from the Supreme Court, the court decisions in *Board of Control*, *County College of Morris*, and other cases cited at

should decline the invitation to interpret ambiguous awards to conflict with the authority of the arbitrator and, in accord with *Enterprise Wheel*, enforce the awards so long as they are susceptible to an interpretation which is consistent with the arbitrator's authority.

C. Public Policy Challenges to Arbitration Awards

In addition to reviewing awards based on the contract, courts frequently are faced with public policy challenges to arbitration awards. The arbitrability arguments discussed previously are a form of public policy argument, for the theory of legal inarbitrability is analogous to the public policy exception recognized by the Supreme Court in *W.R. Grace* and *Misco*, *i.e.*, public policy as expressed by statutory or constitutional law prohibits arbitration of the issue. The *Misco* public policy exception is broader than the legal inarbitrability theory, however, because it allows a court to invalidate an arbitration award which violates public policy even where arbitration of the issue was legally permitted. As in the private sector,¹²⁵ cases in the public sector reflect a range of views on the scope of the public policy exception. Some courts have applied a narrow public policy exception,¹²⁶ some have applied a broad public policy exception,¹²⁷ and others, like the United States Supreme Court in *Misco*, have avoided deciding the scope of the exception.

1. The Narrow Public Policy Exception

Public sector employers, like employers under the National Labor Relations Act,¹²⁸ have urged that arbitration awards reinstating dis-

note 120, *supra*, suggest that arbitrators should write their opinions with care for the language chosen may determine the enforceability of the award. Arbitrators should avoid language that suggests that just cause for discipline exists when the decision alters the penalty imposed by management.

125. See *supra* notes 4-7, 42-62 and accompanying text.

126. The narrow public policy exception invalidates only awards that violate positive law or require the employer to violate positive law. See *supra* note 45 and accompanying text. For further discussion of the narrow exception in the public sector, see *infra* notes 128-54 and accompanying text.

127. The broad public policy exception invalidates awards that conflict with policies underlying statutory or decisional law although the award itself neither violates the law nor requires the employer to violate the law. See *supra* note 48 and accompanying text. For further discussion of the broad exception, see *infra* notes 155-57 and accompanying text.

128. See *supra* notes 4-7 and accompanying text. The Postal Service is covered by the National Labor Relations Act although it is a public employer. See 29 U.S.C. § 1209(a) (1988); Respondent's memorandum at 4, *United States Postal Service v. National Ass'n of Letter Carriers*, 810 F.2d 1239 (D.C. Cir.), *cert. dismissed*, 485 U.S. 680 (1988) (87-89). The Postal Service has argued in several cases that arbitration awards reinstating discharged employees should be overturned based on the public policy exception to the *Trilogy*. See *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984) (award requiring Postal Service to reinstate employee convicted of embezzling postal funds was vacated because the public policy concerns were not only defined by positive law, but were also the clear dictates of common sense); *American Postal Workers*

charged employees be overturned on public policy grounds.¹²⁹ In *AFSCME v. State of Illinois*,¹³⁰ two employees of a residential center for the disabled were terminated for patient mistreatment after a patient died while they were absent from the facility without authorization. The arbitrator found insufficient cause for discharge because the employees had excellent work records and there was no relationship between their absence and the death of the patient, who was on a different wing from the one in which the employees worked. The employer challenged the award, arguing that it was against public policy to reinstate employees who engaged in mistreatment of patients. While recognizing an important public policy against mistreatment of the mentally disabled, the court found that

[t]here is simply no public policy that mandates the discharge of all employees found guilty of mistreatment of a service recipient when the arbitrator expressly finds that the grievants were exemplary mental health employees, when punishment has been imposed, and where no nexus [sic] exists between the infraction and the patient's tragic death.¹³¹

While *AFSCME* exemplifies a relatively narrow reading of the public policy exception, the opinion suggests that the decision may be fact specific. The court noted that the misconduct of the employees did not involve abuse of, or injury to, any residents, intimating that reinstatement of an employee who engaged in such conduct might be set aside, despite the absence of any legal prohibition on employing an individual who mistreated a resident.¹³²

In another public policy discharge case, *Binghamton Civil Service*

Union v. United States Postal Service, 682 F.2d 1280, 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (since it is unlawful for an individual to hold a government position once that person has participated in a strike against the government, arbitrator's award reinstating a postal worker who participated in a strike was vacated). The Postal Service has urged adoption of a broad public policy exception to enforcement of arbitration awards for the public sector. Brief for the United States Postal Service at 8, *United States Postal Service v. National Ass'n of Letter Carriers*, 810 F.2d 1239 (D.C. Cir.), *cert. dismissed*, 485 U.S. 680 (1987) (87-89).

129. See, e.g., *Amalgamated Meat Cutters & Butchers Workmen, Local 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir.), *reh'g. denied*, 717 F.2d 1399 (5th Cir. 1983) (award reinstating truck driver who had wrecked a company rig and was cited by the police for drunk driving was vacated as against public policy) and cases cited *supra*, at note 49.

130. 124 Ill. 2d 246, 529 N.E.2d 534 (1988).

131. *Id.* at 264, 529 N.E.2d at 541. The court reversed the lower court which had set aside the arbitrator's award on public policy grounds. See *infra* notes 204-09 and accompanying text.

132. The court was also careful to distinguish the case factually from *Board of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Union*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979), in which it had vacated an award on the basis that the decision rewarded illegal strikers at the expense of nonstrikers by requiring the employer to count time worked during the strike as extra time worked for priority in the assignment of summer employment. In that decision, the same court had employed a broad view of public policy, vacating the award despite the absence of any legal prohibition against providing benefits to teachers who had engaged in an unlawful strike.

Forum v. City of Binghamton,¹³³ the arbitrator found insufficient cause for termination of a city building superintendent who had admitted accepting bribes. The arbitrator converted the discharge to a six month suspension.¹³⁴ New York law prohibited any municipal officer from accepting a gift where it could be inferred that the gift was intended to influence the officer in the performance of official duties. As noted by the court, however, the statute "[did] not inflexibly mandate the discharge of an employee in violation of its proscriptions."¹³⁵ Accordingly, the court found that the reinstatement did not violate public policy, stating: "[t]he fact that we may disagree with the wisdom and advisability of the arbitration award, gives us no license, as a court of law, to impose what we may feel is a more appropriate remedy. The bargain, having been struck, must now be honored."¹³⁶

The approach of the New York Court of Appeals mirrors the narrow interpretation of public policy adopted by some private sector courts.¹³⁷ If the award does not contravene an explicit statute or constitutional provision, then it will be upheld under this narrow reading of the exception.¹³⁸

The Wisconsin Supreme Court relied on a similar public policy argument to set aside an arbitrator's award in *Wisconsin Employment Relations Commission v. Teamsters Local No. 563*.¹³⁹ The arbitrator there found that the employer did not have just cause to terminate an employee for nonresidency, despite an ordinance which required employees to be city residents. The court found that the matter was not arbitrable

133. 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978).

134. *Id.* at 28, 374 N.E.2d at 381, 403 N.Y.S.2d at 483.

135. *Id.* at 31, 374 N.E.2d at 383, 403 N.Y.S.2d at 485.

136. *Id.* A strong dissent by Judge Wachtler asserted that the government has a responsibility to set a moral tone by maintaining the integrity of government and thus the arbitrator could not restrict the employer's power to discharge an employee for violation of the public trust. *Id.* at 30-32, 374 N.E.2d at 383-84, 403 N.Y.S. at 485-86 (Wachtler, J., dissenting).

137. See *supra* notes 7, 45 & 54 and accompanying text.

138. *Accord De Paulo v. City of Albany*, 49 N.Y.2d 994, 995-96, 406 N.E.2d 1064, 1065-66, 429 N.Y.S.2d 171, 172 (1980) (arbitration award reinstating with suspension a police officer found guilty of releasing an impounded car without authority and filing a false report would not be set aside on public policy grounds where conviction was for disorderly conduct and statute required discharge for conviction of a felony or crime involving a violation of the oath of office).

In *Ford v. Civil Service Employees Ass'n*, 94 A.D.2d 262, 464 N.Y.S.2d 481 (1983), *motion for leave to appeal dismissed*, 68 N.Y.2d 782, 498 N.E.2d 148, 506 N.Y.S.2d 676 (1985), however, the court set aside an arbitrator's award reinstating an employee who induced a patient of the mental health facility in which he worked to have sexual intercourse with him. The court relied on the state's duty to protect the patients as expressed in various statutory provisions, as well as the criminal statutes defining sexual intercourse with a female who is incapable of consent as rape, to find that the award violated public policy. As in the two foregoing cases, however, there was no explicit statutory prohibition on continued employment of the grievant.

139. 75 Wis. 2d 602, 250 N.W.2d 696 (1977).

because the contract provision was void as conflicting with the ordinance. Although the majority found a direct conflict with the ordinance, the dissent, citing the *Trilogy* and relying on the public policy favoring arbitration, argued that the award did not violate public policy since the ordinance authorized exceptions to the residency requirement and both the ordinance and the agreement were adopted by the city council. Accordingly, the dissent argued, the arbitrator interpreted the agreement to give effect to both by ruling that nonresidency was just cause for discharge only if it related to job performance. Thus, the majority should have upheld the award.¹⁴⁰ The majority opinion can be read as a narrow application of the public policy exception,¹⁴¹ but the dissent points out the importance of the court's interpretation of the statute that forms the basis of the public policy argument.¹⁴² If the court gives weight to the public policy in favor of arbitration in deciding whether the arbitration award is unlawful, it may be able to accommodate the award and the allegedly conflicting statute.¹⁴³

Two recent cases from the Connecticut Supreme Court further illustrate the narrow view of the public policy exception. In *Watertown Police*

140. *Id.* at 620-24, 250 N.W.2d at 705 (Abrahamson, J., dissenting). Indeed, eleven years later, the Wisconsin Supreme Court was faced with another challenge to an arbitration award based on the allegedly conflicting ordinance requiring residency for city employees. See *City of Madison v. Madison Professional Police Officers Ass'n*, 144 Wis. 2d 576, 425 N.W.2d 8 (1988). The arbitrator there held that a union contract which exempted bus system employees from the residency requirement triggered a "me too" clause in the police officers' contract which exempted them from the requirement also. The court refused to set aside the award, finding no manifest disregard of the law, particularly in light of the fact that the city had agreed to the "me too" clause which expressly contemplated exceptions to the ordinance. *Id.* at 594, 425 N.W.2d at 14-15. In addressing *WERC v. Teamsters*, the court held that it was overruled to the extent that it could be understood to set forth a broad rule that ordinances always control over conflicting contracts. *Id.* at 595, 425 N.W.2d at 15. The court also distinguished *WERC v. Teamsters* on the facts. *Id.* at 590, 425 N.W.2d at 13.

141. The majority purports to invalidate the award on the ground that the award required the employer to violate the law. 75 Wis. 2d at 612-13, 250 N.W.2d at 701.

142. See *id.* at 621, 250 N.W.2d at 705.

143. The California Supreme Court upheld an arbitration award in a discharge case against claims that the city charter, which gave the city manager power to discipline and remove employees subject to an appeal to the personnel board, prohibited arbitration. The court construed the city charter to permit the city manager to agree to arbitral review of disciplinary decisions and to allow arbitration as an alternative to civil service appeal, harmonizing the city charter with the public policy favoring arbitration. See *Taylor v. Crane*, 24 Cal. 3d 442, 595 P.2d 129, 155 Cal. Rptr. 695 (1979). See also *Social Services Union, Local 535 v. Alameda County Training and Employment Bd.*, 207 Cal. App. 3d 1458, 255 Cal. Rptr. 746 (1989) where the court reviewed an arbitration award holding that the employer must offer a job to the grievant because it failed to give consideration for promotion to current employees before hiring a nonemployee. While recognizing a strong public policy that a government agency has the right to administer its own civil service system and make discretionary promotion decisions, the court found that the discretion must be exercised in accordance with the collective bargaining agreement which, consistent with the policy favoring negotiations, superseded conflicting agency rules. Accordingly, the remedy did not violate public policy. *Id.* at 1465, 255 Cal. Rptr. at 745-50.

Union, Local 541 v. Town of Watertown,¹⁴⁴ the union challenged an arbitration award upholding the discharge of a probationary police officer for violating an order prohibiting him from making traffic stops. The union argued that peace officers had a duty to protect the citizens of the community, based on a Connecticut statute stating that they "shall arrest" without a warrant any person committing a crime within their jurisdiction.¹⁴⁵ Therefore, the order to refrain from motor vehicle stops, which formed the basis for the employee's discharge, violated public policy. The court held that the statute applied to serious crimes, not to traffic violations, and further found no statute creating a duty to stop and investigate every violator of traffic laws. Indeed, the court observed that police departments with limited resources lawfully could adopt a policy of selective enforcement of minor traffic violations. Citing *Misco*, the court found that the award did not contravene any "well-defined and dominant" public policy "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" ¹⁴⁶ A broader view of public policy, however, could support overturning the award, for certainly a court could find that an order to a police officer to avoid enforcement of traffic laws violated public policy.¹⁴⁷ The court's decision in *Watertown* is defensible on another ground, however. Under the narrow view of public policy, the award, rather than the conduct that leads to the grievance, must violate public policy.¹⁴⁸ The union argued that the discharge violated public policy, which is insufficient to warrant vacating the award under the narrow public policy exception.

Similarly, in *City of New Haven v. AFSCME, Council 15*,¹⁴⁹ the court refused to vacate an arbitrator's decision that awarded back pay to a police officer for the period between his termination for a criminal conviction and his reinstatement after the conviction was reversed on appeal. The city claimed that because the officer's dismissal was based on the statutory provision that an officer convicted of a violation "shall be dis-

144. 210 Conn. 333, 555 A.2d 406 (1989).

145. *Id.* at 341, 555 A.2d at 410.

146. *Id.* at 340, 555 A.2d at 410 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

147. The dissent in *Watertown* asserted that even under a narrow view of the public policy exception, the arbitration award should be set aside. 210 Conn. at 348-49, 555 A.2d at 413-414 (Healey, J., dissenting).

148. See Edwards, *supra* note 57, at 18; *Fraternal Order of Police v. Bensingler*, 122 Mich. App. 437, 448, 333 N.W.2d 73, 78 (1983); *Interstate Brands Corp. v. Teamsters Local 135*, 909 F.2d 885, 893 (6th Cir. 1990).

149. 208 Conn. 411, 544 A.2d 186 (1988).

honorably discharged,"¹⁵⁰ an award of back pay for the period of discharge violated public policy. Relying on the narrow scope of the public policy exception, the court found that there was no direct violation of the statute; further, the arbitrator's construction of that statute as not precluding a back pay award was reasonable.¹⁵¹ "In the absence of a clear arbitral misreading of statutory mandates or other egregious arbitral violation of public policy, the city has failed to prove that the arbitral award should be vacated."¹⁵² Despite the narrow construction of the public policy exception in these two cases, however, the court's language leaves open the possibility of vacating an award based on public policy where the award is not unlawful.

The New York Supreme Court, Appellate Division considered a public policy challenge to an arbitration award based on asserted interference with the legislative and executive powers of the employer in *County of Rockland Department of Social Services v. Rockland County Unit, Local 844*.¹⁵³ The union argued that the contract provision obligating the county to maintain a working environment that served the "comfort, well-being and safety" of its employees required the employer to insure that sufficient personnel and county vehicles were available to transport clients. The arbitrator upheld the grievance and the county asked the court to vacate the award. Quoting the New York Court of Appeals, the court declined, stating, " 'arguably every controversy has at its core some issue requiring the application, or weighing, of policy considerations' but the court will intervene for reasons of public policy only where a policy 'prohibit[s], in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator.' "¹⁵⁴

2. The Broad Public Policy Exception

The broader view of public policy has been applied by several courts. In *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union, Local 1600*,¹⁵⁵ the Illinois Supreme

150. 208 Conn. at 413, 544 A.2d at 188 (quoting CONN. GEN. STAT. § 29 (1967)).

151. *Id.* at 417-19, 544 A.2d at 190-91. As in the *Watertown* case, the court, using a broader view of public policy could have held that where the statute directed discharge, it would violate public policy to pay the employee for the period of termination. Underlying the court's decision in this case may be a feeling that the city should have awaited the outcome of the appeal before making the discharge decision.

152. 208 Conn. at 419, 544 A.2d at 191.

153. 140 A.D.2d 441, 528 N.Y.S.2d 142 (1988).

154. *Id.* at 443, 528 N.Y.S. 2d at 144 quoting *In re Sprinzen*, 46 N.Y.2d 623, 630, 631, 389 N.E.2d 456, 459, 460, 415 N.Y.S.2d 974, 977, 978 (1979). Under the broader public policy view, the court could have found that the award interfered with the county's budgetary and taxing authority.

155. 74 Ill. 2d 412, 386 N.E.2d 47, 24 Ill. Dec. 843 (1979).

Court set aside an arbitration award as contrary to public policy where the impact of the award was to give priority in assignment of extra paid assignments to teachers who had participated in an illegal strike. Although the award drew its essence from the agreement and violated no statutory or constitutional provision, the court found it repugnant to public policy because it allowed the teachers to benefit from their unlawful strike.¹⁵⁶ In *Board of Education, Great Neck Union Free School District v. Areman*,¹⁵⁷ the New York Court of Appeals, citing public policy concerns, stayed arbitration of a grievance regarding a contractual provision that denied members of the Board of Education access to teacher personnel files. The court found that the duty to employ qualified teachers and to make tenure decisions required the board to have access to personnel files and therefore, the board could not bargain away that right. Again there was no express statutory bar to such a provision and the board had not unlawfully delegated a duty exclusively committed to it by law. Nevertheless, the court relied on the statutory duty to employ and retain only qualified teachers to restrict the board's authority to negotiate contract provisions that the court believed affected the board's ability to perform that duty. Under a narrow view of public policy, both of these cases would have been decided differently.

3. Avoiding the Issue of the Scope of the Exception

The Connecticut Supreme Court's decision in *City of Hartford v. Connecticut State Board of Mediation and Arbitration*,¹⁵⁸ provides an example of a case where the court decided the public policy issue, but avoided determining the scope of the exception. There, the arbitration board found that the city violated the agreement by denying the grievants the opportunity to take an examination for promotion. As a remedy, the arbitrators ordered the city to administer the exam to both grievants, and to promote the more qualified of the two. The city argued that the remedy violated the "rule of three"¹⁵⁹ which was a component of the merit selection process allowing the department head to choose any of the three most qualified candidates for promotion. Citing *United Paperworkers v. Misco*, the court found that the city did not show "the required nexus between the failure of the arbitrators to abide by the rule of three and a violation of the claimed public policy of merit selec-

156. *Id.* at 425-26, 386 N.E.2d at 53, 24 Ill. Dec. at 849.

157. 41 N.Y.2d 527, 362 N.E.2d 943, 394 N.Y.S.2d 143 (1977).

158. 211 Conn. 7, 557 A.2d 1236 (1989).

159. *See* R. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 185 (1984).

tion."¹⁶⁰ Indeed, the court felt that the policy of merit selection would be furthered by the arbitration award since inclusion of a third candidate would risk selection of *that* candidate on a basis unrelated to qualifications. Like *Misco*, the *City of Hartford* case gives no clear indication of the limits of public policy, but suggests that the court will scrutinize public policy arguments carefully to insure that the award directly violates public policy.¹⁶¹

IV. THE APPROPRIATE STANDARDS FOR ARBITRATION ENFORCEMENT IN THE PUBLIC SECTOR

The review of various judicial decisions in arbitration cases in the public sector illustrates that some courts apply the deferential standards from the private sector while others do not, even where purporting to do so. The question that must be addressed is whether differences between the private and public sectors require greater judicial involvement in arbitration in the latter. Further, with respect to the public policy exception to arbitral deference, the issue is which of the two private sector standards is most appropriate for judicial review in the public sector.

There are four primary arguments for a less deferential judicial approach to arbitration in the public sector. First, it is asserted that the limited history of arbitration in the public sector precludes an inference that the parties intended a broad arbitration clause.¹⁶² Proponents of this argument assert that because arbitration has not been widely used in the public sector, it has neither the acceptability nor the demonstrated efficacy "as a means for resolving controversies in government employment."¹⁶³ Second, it is argued that arbitration in the public sector must be narrowly circumscribed by the courts to protect the public interest.¹⁶⁴ Supporters of this argument note that public sector employers are responsible to voters, not stockholders.¹⁶⁵ Union demands in negotiations are not limited by market forces to the same degree as in the private sector.¹⁶⁶ Thus, the argument goes, decisionmaking authority must be exercised by those accountable to the public, which requires limiting col-

160. 211 Conn. at 17, 557 A.2d at 1240.

161. 211 Conn. at 17-18, 557 A.2d at 1241.

162. Acting Superintendent of Schools of Liverpool Central School Dist. v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 513-14, 369 N.E.2d 746, 749, 399 N.Y.S.2d 189, 192 (1977).

163. *Id.* at 513, 369 N.E.2d at 749, 399 N.Y.S.2d at 192.

164. See Iowa City Community School Dist. v. Iowa City Educ. Ass'n, 343 N.W.2d 139, 146-53 (Iowa 1983) (Reynoldson, C.J. dissenting) and sources cited therein; Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 217, 405 A.2d 393, 397-98 (1979).

165. *Iowa City*, 343 N.W.2d at 146.

166. Hortonville Educ. Ass'n v. Joint School Dist. No. 1, 66 Wis. 2d 469, 485, 225 N.W.2d 658, 666-67 (1975), *rev'd*, 426 U.S. 482 (1976) (quoting COX & BOK, LABOR LAW 970-71 (7th ed. 1969)).

lective bargaining and arbitration to protect the political process.¹⁶⁷ In essence, this is the nondelegability argument, extended beyond limiting negotiations. Even if the subject in general is negotiable, the employer is precluded from agreeing to limit its discretion in certain areas by giving up its authority to make final decisions to an arbitrator.

The third argument is closely related to the second. It contends that the standard of review of arbitration awards in the public sector should be broader than in the private sector because of the statutory responsibilities imposed on public employers to provide public services.¹⁶⁸ According to this theory, any decision that would interfere with the ability of the public employer to perform its statutory functions would violate public policy.¹⁶⁹

The fourth argument for a more extensive review of arbitration awards in the public sector is the prevalence of employment-related law which governs employers and employees in the public sector.¹⁷⁰ Because of the pervasive statutory regulation of the employment relationship, issues presented for arbitration frequently are intertwined with statutory issues.¹⁷¹ Advocates of a stringent standard of review assert that because of this interrelationship between statutory and contractual issues, the

167. *Charles City Community School Dist. v. Public Employment Relations Bd.*, 275 N.W.2d 766, 770-71 (Iowa 1979); *DePaulo v. City of Albany*, 49 N.Y.2d 994, 996-97, 406 N.E.2d 1064, 1066, 429 N.Y.S.2d 171, 172 (1980) (Wachtler, J., concurring) ("In view of the singular responsibility and trust necessarily reposed in our police it would seem essential that the determination as to whether an officer should remain on the force, at least in cases where the conduct in question concerns a violation of the officer's oath, should be made only by those persons entrusted by the public with that responsibility. Only those persons may be assumed to have in mind the public interest of the community, and only they are directly answerable to that community.")

168. *Brief for the United States Postal Service on Petition for Writ of Certiorari* at 8, *United States Postal Serv. v. National Ass'n of Letter Carriers*, 810 F.2d 1239 (D.C. Cir.) (*per curiam*) cert. dismissed, 485 U.S. 680 (1987). See also *United States Postal Service v. National Ass'n of Letter Carriers*, 107 S. Ct. 2094 (1987) (Rehnquist, J., On Application for Stay of the Mandate of the Court of Appeals); *Niagara Wheatfield Administrators Ass'n v. Niagara Wheatfield Central School Dist.*, 44 N.Y.2d 68, 73, 375 N.E.2d 37, 40, 404 N.Y.S.2d 82, 84 (1978) ("The restraints imposed by public policy on the scope of the public employment collective bargaining process stem from the need 'to protect the public by assuring, at all times, the orderly and uninterrupted operation and functions of government.' (Civil Service Law, § 200.) A public employer may not, through a collective bargaining agreement, jeopardize its effectiveness by relinquishing control of essential facets of its operation.")

169. See cases cited at note 168 *supra*.

170. See *Jacinto v. Egan*, 120 R.I. 907, 922-23, 391 A.2d 1173, 1181 (1978) (Weisberger, J., dissenting) ("If this court should choose to abdicate from any meaningful function in the review of such determinations, the practical enforcement of a large body of public law would be left to the untrammelled and unreviewable discretion of arbitrators. I think that the interest of the people of this state in the enforcement and application of laws relating to education and the rights and responsibilities of those who carry out the educational function is far too compelling in nature to warrant such abstention on our part. Even the most rudimentary demands of consistency and consonance would be set at nought by such a system, since arbitrators have no obligation even to provide reasons for their determinations.")

171. See, e.g., *Faculty Ass'n of Dist. 205 v. Illinois Educ. Labor Relations Bd.*, 175 Ill. App. 3d

courts must monitor arbitration closely to insure that arbitrators are not usurping the court's role as interpreter of legislative enactments.¹⁷² A review of each of these arguments demonstrates that none adequately supports a more stringent standard of review for arbitration awards in the public sector than the review applied in the private sector.

A. *The Acceptability and Efficacy of Arbitration in the Public Sector*

The argument that the presumption of arbitrability should not apply in the public sector because of the lack of acceptability and efficacy of arbitration is least persuasive and therefore, will be disposed of initially.¹⁷³ Arbitration provides the same advantages in the public sector as it offers in the private sector. Arbitration is a fast, inexpensive method of resolving disputes as to the meaning and interpretation of the contract.¹⁷⁴ Additionally, it reduces the workload of the courts.¹⁷⁵

In states where arbitration is statutorily mandated, the public policy favoring arbitration may be even stronger than the federal labor policy underlying the *Trilogy*.¹⁷⁶ As the Pennsylvania Supreme Court has

880, 530 N.E.2d 548, 1251 Ill. Dec. 390 (1988); Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers, Local 1942, 179 Conn. 184, 425 A.2d 1247 (1979).

172. See *supra* note 167 and accompanying text. An extensive debate has taken place among professional arbitrators and academicians about the extent to which arbitrators' should decide questions of external law, particularly where there is an arguable conflict between the law and the contract. See Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (1967); Howlett, *The Arbitrator, the NLRB, and the Courts*, PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67 (1967); Meltzer, *The Role of Law in Arbitration: Rejoinder*, PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 58 (1968); Howlett, *The Role of Law in Arbitration, A Reprise*, PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 64 (1968); Mittenthal, *The Role of Law in Arbitration*, PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42 (1968); St. Antoine, *Discussion*, PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 75 (1968); Sovern, *When Should Arbitrators Follow Federal Law?*, PROCEEDINGS OF THE 23RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 29 (1970); Feller, *The Coming End of Arbitration's Golden Age*, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97 (1976).

173. While this argument was articulated by the New York Court of Appeals in *Acting Superintendent of Schools of Liverpool Cent. School Dist. v. United Liverpool Faculty Ass'n*, 42 N.Y. 2d 509, 369 N.E.2d 746, 399 N.Y.S. 2d 189 (1977), a case which has not been overruled, New York courts have not strictly applied *Liverpool's* presumption against arbitrability. Craver, *supra* note 10, at 337. Some New York courts have applied the standard, however, so the arguments supporting *Liverpool* retain some force. *Id.* at 337 n.44. In addition, other courts have denied arbitration on the basis of their view as to the merits of the grievance, which may well indicate unarticulated acceptance of the views of the *Liverpool* court. See cases cited *supra* at notes 80-85 and accompanying text. See also Craver, *supra* note 10, at 336 where he suggests that the decision in *Sullivan*, *supra* notes 80-82 and accompanying text, may have been motivated by distrust of grievance arbitration in the public sector.

174. Mahoning County Bd. of Mental Retardation and Developmental Disabilities v. Mahoning County TMR Educ. Ass'n, 22 Ohio St. 3d 80, 83, 488 N.E.2d 872, 875 (1986).

175. *Id.*, 488 N.E.2d at 875.

176. Board of Educ. v. Philadelphia Fed. of Teachers, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975).

declared:

[i]t is not difficult to perceive the reason for the statutory requirement that grievances be submitted to arbitration. If a dispute arises as to the interpretation or application of the agreement there must be a mechanism for resolving the dispute or the agreement is meaningless. Historically, the primary means of resolving such disputes was the strike and many agreements in the private sector retain this mechanism for at least some types of dispute. However, resolution of all disputes by resort to economic force is costly to the parties, and more importantly to the public. The General Assembly therefore chose to make the widely used procedure of labor arbitration mandatory under the PERA. This brings the special expertise of labor arbitrators to bear on the often difficult problems of administering the collective bargaining agreement while assuring parties that their agreement will be effective and guaranteeing both the parties and the public that such disputes will not disrupt peaceful labor relations or interrupt public service.¹⁷⁷

Thus, as in the private sector, grievance arbitration in the public sector serves as a substitute for strikes and other disruptions of harmonious labor relations.¹⁷⁸ Arbitration of even frivolous grievances has a therapeutic effect, not only in the private sector, but also in the public sector.¹⁷⁹ Moreover, arbitration encourages consistent administration of management policy by providing an impartial review of management decisions with the power to reverse those decisions which are inconsistent with articulated policy.¹⁸⁰

177. *Id.* at 100, 346 A.2d at 39 (footnotes omitted).

178. While strikes in the public sector are illegal in many states, they do occur. "With no sound mechanism for resolving such disputes [about contractual rights] available, the frequent use of economic force . . . becomes a strong possibility." Baird & McArthur, *Constitutional Due Process and the Negotiation of Grievance Procedures in Public Employment*, 5 J. L. EDUC. 209, 229 (1976). Even in the absence of economic force, the employee frustration which results from the inability to resolve disputes can destroy the harmonious relationship between employers and employees that collective bargaining laws seek to achieve. *Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh*, 481 Pa. 66, 70, 391 A.2d 1318, 1320. Because of the absence of the right to strike in many jurisdictions, the grievance and arbitration procedure, which enforces collectively bargained rights, will serve to establish employee faith in the bargaining process, furthering the goal of industrial peace. Comment, *Defining the Scope of Grievance Arbitration in Public Education Employment Contracts*, 41 U. CHI. L. REV. 814, 822 (1974); Comment, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1721 (1984) [hereinafter *Developments in the Law*]. ("By ensuring protection of employees' rights under bargaining agreements, mandatory grievance arbitration would compensate public employees for denial of the right to strike.")

179. "Even frivolous grievances are to be sent to arbitration because of arbitration's therapeutic value in providing a safety valve for the ventilation of issues which might spill over in wildcat strikes or job actions." *Pittsburgh Joint Collective Bargaining Comm.*, 481 Pa. at 71, 391 A.2d at 1320 (citing *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)). While public employees have other avenues of redress for certain types of complaints, Baird and McArthur, *supra* note 178, at 227, those avenues are not available for all disputes and may be less desirable than arbitration because of perceptions about their viability. See Stanley, *What Are Unions Doing to Merit Systems?*, 31 PUB. PERSONNEL REV. 108, 111-12 (1970); Hayford & Pegnetter, *Grievance Adjudication for Public Employees: A Comparison of Rights Arbitration and Civil Service Appeals Procedures*, 35 ARB. J. 22, 26-27 (Sept. 1980).

180. Coleman, *supra* note 9, at 97-98.

The increasing use of grievance arbitration in the public sector since *Acting Superintendent of Schools v. United Liverpool Faculty Association* has established the viability of arbitration as a dispute resolution mechanism.¹⁸¹ The increase in the number of states that statutorily mandate arbitration procedures is further evidence of the recognition of the benefits of arbitration in the public sector.¹⁸² These benefits make the presumption of contractual arbitrability as appropriate for governmental collective bargaining agreements as it is for agreements of private employers.

B. The Government as Employer and Arbitration Enforcement

The second and third arguments for greater scrutiny of public sector grievance arbitration by the courts focus on the fact that the government is the employer. Proponents of these contentions urge that the public interest implications of arbitration in governmental employment require both judicial review of arbitration awards on the merits and careful scrutiny of both pre-arbitration and post-arbitration public policy claims. If there is no public policy violation, however, then it is difficult to understand why the fact that the government is the employer justifies overturning an arbitration award based on disagreement with the decision on the merits. The same policies that favor judicial deference to arbitration awards in the private sector support deference in the public sector. As declared by the Ohio Supreme Court:

[arbitration] provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets. The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator's award. Thus, this court has stated, "[i]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts."¹⁸³

181. See F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 17 (Supp. 1985-87) ("Legislative and judicial preference for grievance arbitration has significantly increased in the public sector."); Comment, *Developments in the Law, supra* note 178, at 1720.

182. States that mandate grievance arbitration in order to resolve labor disputes peacefully include Alaska (ALASKA STAT. § 23.40.210 (1990)), Florida (FLA. STAT. ANN. § 447.401 (West 1981 & Supp. 1991)), Illinois (ILL. REV. STAT. ch. 48, ¶ 1608 (1989) (public employees) and ILL. REV. STAT. ch. 48, ¶ 1710(c) (1986) (educational employees)), Minnesota (MINN. STAT. § 179.38 (Supp. 1991)), Ohio (OHIO REV. CODE ANN. § 4117.10 (Anderson 1980 & Supp. 1989)), and Pennsylvania (PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1991)). The two Illinois statutes and the Ohio statute are the most recently enacted comprehensive collective bargaining statutes, in 1983 and 1984 respectively. In addition to the states with mandatory grievance arbitration, many state statutes authorize grievance arbitration. Comment, *Developments in the Law, supra* note 178, 1720 n.23. See, e.g., KAN. STAT. ANN. § 75-4330 (1989); N.J. STAT. ANN. § 34:13A-7 (West 1988).

183. Mahoning County Bd. of Mental Retardation and Developmental Disabilities v. Mahoning

As in the private sector, the collective bargaining agreement creates a system of self-government and empowers the arbitrator to resolve disputes based on the intent of the parties as reflected in the contract language, the practices of the parties and the industry, and the effect of a decision on morale and productivity.¹⁸⁴ It is the arbitrator, not the court, who is the designated interpreter of the parties' intent.¹⁸⁵ Enforcement of the arbitrator's award, within the limits set by the *Trilogy* standards, is enforcement of the bargain of the parties.¹⁸⁶ Thus, courts reviewing public sector awards should avoid review on the merits in the guise of deciding whether the arbitrator exceeded his or her authority. The courts should enforce awards despite their disagreement with the results, so long as there is no violation of public policy and the *Enterprise Wheel*,¹⁸⁷ or corresponding statutory standards, are met.¹⁸⁸ A public employer unhappy with an arbitrator's decision can, and should resolve the problem in subsequent contract negotiations.¹⁸⁹

At first blush, the fact that the government is the employer suggests a heightened public interest in arbitrator's decisions that might provide a justification for an expansive review of arbitrator's awards on grounds of public policy. A broad public policy exception to arbitral deference would permit the court to void awards or deny arbitration on public policy grounds, regardless of whether there was any direct conflict with a statute or constitutional provision. Thus, the court could confine arbitration consistent with its determination of the public interest.

County TMR Educ. Ass'n, 22 Ohio St. 3d 80, 83-84, 488 N.E.2d 872, 875 (1986) (citing *Campbell v. Automatic Die & Products Co.*, 162 Ohio St. 321, 329, 123 N.E.2d 401, 405 (1954)).

184. See *Ramsey County v. AFSCME Council 91*, 309 N.W.2d 785, 790-91 (Minn. 1981) which cites the *Trilogy* extensively to support its interpretation of the Minnesota Uniform Arbitration Act. The *Ramsey* court stated that "[t]he arbitrator plays a key role in the continuing interaction between and among the citizens of the industrial community. In resolving industrial strife, his function is to ascertain the parties' intended standard of behavior." *Id.* at 791.

185. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for.").

186. See *Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh*, 481 Pa. 66, 70, 391 A.2d 1318, 1320 (1978); *Jacinto v. Egan*, 120 R.I. 907, 912, 391 A.2d 1173, 1176 (1978).

187. 363 U.S. at 597, 599 (the courts should enforce the arbitration award so long as it draws its essence from the collective bargaining agreement).

188. For cases in which the result would have been different had the court applied the limited standard of review advocated here, see *City of Hartford v. Local 760, Int'l Ass'n of Firefighters*, 6 Conn. App. 11, 502 A.2d 429 (1986); *Board of Control of Ferris State College v. Michigan AFSCME Council 25*, 138 Mich. App. 170, 361 N.W.2d 342 (1984); *County College of Morris Staff Ass'n v. County College of Morris*, 100 N.J. 383, 495 A.2d 865 (1985); *Musser v. County of Centre*, 101 Pa. Commw. 193, 515 A.2d 1027 (1986), *aff'd*, 513 Pa. 380, 548 A.2d 1194 (1988).

189. As the Iowa Supreme Court stated in response to an argument for a broader standard of review for public sector collective bargaining cases "[i]f public bodies are unfairly hamstrung by decision of arbitrators, the remedy is either meticulous contracting or statutory change in the scope of our review." *City of Des Moines v. Central Iowa Pub. Employees Council*, 369 N.W.2d 442, 445 (Iowa 1985).

Application of a broad public policy exception, however, gives insufficient weight to the established public policy favoring arbitration. Where the state has enunciated a policy favoring arbitration, either by statute or case law, that policy must be recognized as a significant factor in the decisionmaking process of a court faced with a challenge to arbitration. In adopting a policy favoring arbitration, the state has recognized the benefits of arbitration as a method of resolving disputes.¹⁹⁰ These benefits will be largely illusory if the scope of arbitration is severely limited, not by contract but by the courts, and the finality of awards is diminished by extensive court review.¹⁹¹ In deciding public policy based challenges to arbitration, courts must recognize and consider the important public policy favoring both collective bargaining¹⁹² and dispute resolution by final and binding arbitration.¹⁹³

In addition to statutory provisions mandating or authorizing grievance arbitration, statutory provisions regarding the relationship of the collective bargaining agreement to other laws indicate a policy favoring collective bargaining and arbitration that must be taken into account by courts faced with challenges to arbitration. Connecticut,¹⁹⁴ Ohio,¹⁹⁵ and Illinois,¹⁹⁶ for example, have provisions giving the collective bargaining agreement priority over other laws under certain conditions. In *City of*

190. The benefits of arbitration are enumerated *supra* notes 174-86 and accompanying text.

191. See Edwards, *supra* note 57, at 34; Ray, *Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1, 11 (1988). As stated by Professor Ray, "[t]he problem of delay cannot be overstated." *Id.* at 12. "Delay caused by judicial review can cause uncertainty, interfere with the bargaining process and undermine the union." *Id.*

192. Judge Edwards emphasizes that a broad public policy exception undermines the "explicit public policy underlying the duty to bargain." Edwards, *supra* note 57, at 5. See discussion of this issue *infra* notes 201-23 and accompanying text.

193. In *AFSCME v. State*, 124 Ill. 2d 246, 262, 529 N.E.2d 534, 541, 124 Ill. Dec. 553, 560 (1988), the court properly recognized the importance of the "public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards." See further discussion of *AFSCME supra* and *infra* notes 130-32 and 204-21 and accompanying text.

194. CONN. GEN. STAT. ANN. § 7-474(b) (West 1989) provides that once the collective bargaining agreement has been approved by the appropriate legislative body, it takes precedence over charters, special acts, ordinances, and rules and regulations of the civil service commission or the employer.

195. OHIO REV. CODE ANN. § 4117.10 (Anderson 1980 Supp.) provides that agreements negotiated pursuant to the bargaining law prevail over other laws except as otherwise specified by the legislature. In *State ex rel Rollins v. Board of Education*, 10 Ohio St. 3d 123, 532 N.E.2d 1289 (1988), the Ohio Supreme Court held that the collective bargaining agreement prevailed over the conflicting statute governing teacher tenure.

196. ILL. ANN. STAT. ch. 48, § 1615 (Smith-Hurd 1986), which covers public employees other than educational employees, provides that in the event of conflict between the bargaining statute and any other law, executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the bargaining statute and agreements negotiated thereunder control and prevail. *Id.* § 1615 (a). The statute further states that the contract supersedes contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the employer. *Id.* § 1615 (b).

DeKalb v. IAFF Local 1236,¹⁹⁷ the Illinois Appellate Court declined to consider the argument that the statutory provision giving the collective bargaining agreement priority over other laws mandated upholding the arbitrator's award against a claim that it conflicted with the Pension Code, because the collective bargaining statute did not cover firefighters at the time the grievance arose.¹⁹⁸

Similarly, the Connecticut Supreme Court found that the statutory provision for contractual supersedure of other laws upon approval of the contract by the legislature was inoperative where the letter submitting the contract for approval did not point out to the legislature the conflict that was the basis for setting aside the arbitrator's award.¹⁹⁹ While these statutory supersedure provisions have not frequently been a factor in court decisions reviewing arbitration awards to date, they indicate a legislative intent that collective bargaining agreements and arbitration awards interpreting those agreements prevail over other laws to the extent indicated in the particular statute. These provisions further support deferential judicial review and may play an increasingly significant role in court decisions reviewing arbitration awards.²⁰⁰

Not only do statutory provisions regarding arbitration support a narrow reading of the public policy exception, but invalidation of arbitration awards on public policy grounds where no statute is violated subverts the public policy favoring collective bargaining, for it allows the employer to ignore contractual provisions and take unilateral action without regard to the duty to bargain.²⁰¹ Furthermore, in deciding such cases, the courts are usurping the duty of the National Labor Relations Board to determine mandatory subjects of bargaining.²⁰² Judge Edwards illustrates these arguments with a private sector case,²⁰³ but a public sector case, *AFSCME v. State of Illinois*,²⁰⁴ equally exemplifies the problems.

197. 182 Ill. App. 3d 367, 538 N.E.2d 867, *appeal denied*, 545 N.E.2d 106 (Ill. 1989).

198. The court did suggest, however, that the collective bargaining statute should not be broadly read to supersede other laws. *Id.* at 375-76, 538 N.E.2d at 872-73.

199. *Board of Trustees v. Federation of Technical College Teachers, Local 1942*, 179 Conn. 184, 197-98, 425 A.2d 1247, 1253-54 (1979).

200. The Illinois and Ohio statutes are relatively recent enactments, 1983 and 1984 respectively. See ILL. ANN. STAT. ch. 48, § 1601-27 (Smith-Hurd 1986 & Supp. 1987); OHIO REV. CODE ANN. § 4117.01-.23 (Anderson 1980 & Supp. 1989).

201. Edwards, *supra* note 57, at 28. Judge Edwards analyzes this problem in the private sector context, but it is equally applicable to the public sector.

202. *Id.* at 28. This argument applies equally to public sector administrative agencies charged with the task of enforcing public sector collective bargaining laws.

203. Judge Edwards uses *Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987), to illustrate his point. Edwards, *supra* note 57, at 28.

204. 124 Ill. 2d 246, 529 N.E.2d 534 (1988).

In *AFSCME*, the circuit court vacated an arbitration award that reinstated two employees who were discharged for patient abuse based on an unauthorized absence from the mental health facility in which they worked, during which a patient in an area in which they did not work died.²⁰⁵ The circuit court held that the award “represented a severe and extreme departure from the public policy of Illinois, which is to protect not to endanger mental patients.”²⁰⁶ If the employer refused to bargain about the disciplinary penalty for employees accused of patient abuse, the employer would have violated the statutory duty to bargain, for disciplinary penalties are within the scope of mandatory bargaining subjects.²⁰⁷ Yet the employer in *AFSCME* accomplished the same result as if it had refused to bargain altogether when it negotiated limitations on its right to discipline for patient abuse but refused to comply with them, instead legally challenging the arbitrator’s award. The employer’s refusal to comply with the contract not only did not violate the law, but was accomplished with the aid and sanction of the court. In effect, disciplinary penalties for patient abuse were removed from the scope of required bargaining because the court gave the employer “an unfettered right (attained outside of collective bargaining) to discharge employees who [engage in patient abuse]”,²⁰⁸ despite the fact that the parties’ contract as interpreted by the arbitrator limited that right. Since the employer was effectively given the right to take unilateral action with respect to disciplinary penalties for patient abuse, disciplinary penalties have been removed from the scope of required bargaining.²⁰⁹ This violates the public policy favoring collective bargaining.

“The employer is left holding all the cards”,²¹⁰ for the employer can retain the employees if it so chooses, despite the court decision that their reinstatement would violate public policy. Retention would not violate the collective bargaining agreement or any express statutory provision, and thus there would be no basis for any legal challenge to the employer’s decision. Therefore, the enforcement of public policy is not allocated to the courts, as supporters of a broad public policy exception would urge. Instead, the employer retains control over whether or not the public policy is enforced, thereby defeating the purpose of the public

205. *Id.* at 250-51, 529 N.E. 2d at 536. The circuit court’s decision was reversed by the Illinois Appellate Court. *Id.* at 250, 529 N.E.2d at 535.

206. *Id.* at 252, 529 N.E.2d at 536.

207. See *City of Decatur v. AFSCME, Local 268*, 122 Ill. 2d 353, 522 N.E.2d 1219.

208. Edwards, *supra* note 57, at 27.

209. See *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971) (employer can lawfully make unilateral changes with respect to permissive subjects of bargaining).

210. Edwards, *supra* note 57, at 28.

policy exception. Accordingly, the circuit court in *AFSCME* thwarted the public policy favoring collective bargaining to uphold a public policy, protection of mental patients, which is enforceable only at the will of the employer. The employer, and not the court, retains the right to decide which public policy will be enforced and in what manner.

Because arbitration is "part and parcel of the collective bargaining process,"²¹¹ the arbitrator is merely reading the contract for the parties, giving meaning to the negotiated provisions or, if necessary, striking a "supplementary bargain."²¹² Accordingly, the arbitrator's award should not be deemed to violate public policy unless the parties could not lawfully have negotiated contract provisions identical to the terms of the award.²¹³ Put another way, "[t]he courts should only set aside arbitration awards where the award requires the employer to take some action which, if taken by an employer on its own with no arbitral compulsion, would violate the law."²¹⁴

It might be argued that in the public sector, the legislative body has delegated to the employer, the Department of Mental Health in *AFSCME* for example, the authority to determine public policy with respect to its mission, care of the mentally ill.²¹⁵ Thus, the arbitrator should not be permitted to reject the employer's determination that public policy requires the discharge of employees. This argument, however, ignores the countervailing public policy favoring collective bargaining and arbitration.²¹⁶ So long as the legislature has authorized, indeed required, the employer to negotiate about the subject, and the employer has agreed to binding arbitration, the arbitrator's judgment about the propriety of discharge should be respected unless it conflicts with positive law or requires the employer to violate the law. The employer can reserve to itself the power to discharge employees without arbitral review through negotiation. If it does not do so, then it has exercised its authority by making employee terminations subject to the review of an arbitrator, as permitted by law. Having made the decision, the public employer, like the private employer should be bound by it so long as it violates no stat-

211. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

212. *St. Antoine*, *supra* note 28, at 1140; *Warrior & Gulf*, 363 U.S. at 578, 581.

213. *See Craver*, *supra* note 1, at 43; *Edwards*, *supra* note 57, at 33; *Hexter*, *supra* note 43, at 107.

214. *Hexter*, *supra* note 43, at 107.

215. This argument was not addressed in *AFSCME*.

216. The validity of this argument also will depend on whether the statute on which the employer is relying is susceptible to an interpretation that the legislature committed to the employer the discretion to make the relevant determinations of public policy. If the statute is sufficiently explicit in committing the issue to the *exclusive* determination of the employer, then the award will be subject to rejection under the narrow public policy exception.

ute, decisional law, or constitutional provision.²¹⁷

The example of *AFSCME* illustrates that broad public policy review of arbitration awards in the public sector impinges on the collective bargaining policy in the same manner as in the private sector. While in some states the scope of bargaining in the public sector may be narrower than under the National Labor Relations Act, this difference does not support a broader public policy standard for review of arbitration awards. If the arbitration award interferes with the employer's decision on a matter which, by statute, the employer is prohibited from delegating, (*i.e.*, an illegal subject of bargaining), then the award will be vacated under a narrow public policy exception as contrary to law.²¹⁸ If the award deals with a mandatory bargaining subject, denial of enforcement will interfere with the public policy favoring collective bargaining and arbitration, as noted above, and the award should be upheld unless it is contrary to law. If the award deals with a permissive subject of bargaining,²¹⁹ the same result should obtain. While overturning such an award would not interfere with the duty to bargain over mandatory subjects, it would frustrate the policy favoring arbitration, inviting "discord and distrust and creat[ing] an atmosphere wherein a harmonious relationship would virtually be impossible to maintain."²²⁰ So long as there is no express legal prohibition, the employer should be held to its bargain.²²¹

217. See *Mahoning County Bd. of Mental Retardation & Developmental Disabilities v. Mahoning County TMR Educ. Ass'n*, 22 Ohio St. 3d 80, 84, 488 N.E.2d 872, 876 (1986) where the court stated:

The board argues, and the court of appeals decided, that collective bargaining agreements are not as binding upon public employers as they are upon private employers. It is time to put an end to that notion and categorically reject the argument. Today's decision gives notice that negotiated collective bargaining agreements are just as binding upon public employers as they are upon private employers.

218. See, *e.g.*, *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 777, 358 N.E.2d 878, 880, 390 N.Y.S.2d 53, 55 (1976) (in reviewing arbitration award, court held that the provision in the collective bargaining agreement which purported to relinquish the right of the school board to terminate a probationary teacher without reasons was void as against public policy).

219. In some states, there is no permissive category of bargaining subjects. See, *e.g.*, *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 162, 393 A.2d 278, 287 (1978) (arbitration of grievances including transfers and reassignments was enjoined because the court did not find the existence of a permissive category of negotiable matters in public employment labor relations).

220. *Pittsburgh Joint Bargaining Comm. v. City of Pittsburgh*, 481 Pa. 66, 74, 391 A.2d 1318, 1322 (1978). See *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139, 141 (Iowa 1983).

221. In *Drivers Union Local 695 v. County of Sauk*, 103 Wis. 2d 691, 310 N.W.2d 652 (1981), the Wisconsin Supreme Court, in refusing to vacate an arbitration award on public policy grounds, noted:

It appears that the county's true complaint is that discipline and discharge of deputy sheriffs is subject to arbitration. This is a matter for the bargaining table or for the legislature, and is not within the province of the court to decide in the course of reviewing an award under ch. 788, Stats.

Not only does a broad public policy exception interfere with collective bargaining policy, but it invites the court to substitute its views as to the meaning of the contract for those of the arbitrator.²²² Such judicial activism is directly contrary to the principles underlying the policy favoring arbitration as a method of dispute resolution, and will negate the benefits of arbitration.²²³

These same considerations support a narrow view of public policy in deciding pre-arbitration disputes about legal arbitrability, for such disputes are, in actuality, public policy challenges to arbitration presented before, rather than after the award. Where a matter unequivocally has been committed by the legislature to the exclusive determination of the employer, arbitration should be denied as contrary to law. Courts must engage in careful reading of statutory provisions, however, with particular attention to those dealing with matters of governmental policy that affect the mission of the agency,²²⁴ to insure that the policy in favor of arbitration is not unnecessarily trammled by vague and archaic notions of sovereignty.²²⁵ A broad application of the nondelegability doctrine, which results in a court holding inarbitrable grievances over issues addressed by other legislation regardless of whether such legislation evidences a clear legislative commitment to exclusive governmental decisionmaking, produces a broad public policy exception to judicial deference to arbitration.²²⁶ For all of the reasons set forth, the broad public

222. Ray, *supra* note 191, at 34; Edwards, *supra* note 57, at 23. As Judge Edwards notes, "[a]ny result-oriented judge who has a modicum of intelligence can find a perceived conflict between an arbitrator's award and the judge's own notions of public policy." *Id.* at 34.

223. See *supra* notes 25-41, 174-80, 183-88 and accompanying text.

224. Craver, *supra* note 10, at 341.

225. By enacting a statute requiring government employers to bargain, the legislature has eliminated the argument that the doctrine of sovereignty precludes compelling the employer to negotiate an agreement and comply with the agreement negotiated. See K. HANSLÖWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 14-15 (1967).

226. While a complete discussion of the nondelegability doctrine is beyond the scope of this article, the suggested approach to arbitrability determinations and arbitration enforcement requires that the nondelegability doctrine be applied with care, in light of the negative consequences of broad application for the system of collective bargaining and arbitration. Under this approach, the scope of nondelegable subjects would be much narrower than many courts have found to date. Only an unequivocal legislative declaration that a subject is committed exclusively to governmental determination should exempt a subject from negotiation and arbitration. Compare *Board of Educ. v. Areman*, 41 N.Y.2d 527, 362 N.E.2d 943, 394 N.Y.S.2d 143 (1977) (Court affirmed trial court's decision granting stay of arbitration where union sought to enforce contract clause which limited the right of the Board of Education to inspect teacher personnel files based on the court's determination that, despite the absence of any statutory prohibition on negotiation of such a clause, the Board of Education had no authority to bargain away its right to review personnel files) with *Board of Educ. v. Philadelphia Fed'n of Teachers, Local No. 3*, 464 Pa. 92, 96, 97, 101, 346 A.2d 35, 37, 40 (1975) (Court affirmed the trial court's decision to compel arbitration of a dispute over the dismissal of a nontenured teacher, holding that statutory provisions authorizing the school board to adopt and enforce regulations regarding the conduct of teachers and to remove employees for various causes did not create nondelegable duties that would prevent arbitration of the dismissal).

policy exception is inconsistent with an effective system of collective bargaining. Thus, courts faced with pre-arbitration challenges to arbitrability should order arbitration, applying the presumption in favor of arbitrability, unless it is unquestionably clear that the arbitrator could enter no award that would be consistent with the law.²²⁷ The risk of such a decision is small, for if the award issued conflicts with the law, post-arbitration review of the award is available under the public policy exception.

If the presumption of arbitrability causes a court to err, holding arbitrable a dispute that the legislature intended to commit to the exclusive determination of a public body, the error is subject to correction by the legislature or the employer in negotiations. Subjects that in some states have been held to be nondelegable duties of governmental bodies, in others have been found to be proper subjects for arbitration.²²⁸ While it is the role of each state's legislature to make such determinations, and differences are to be expected, these differences demonstrate that irreparable damage to the public interest is unlikely to result from an erroneous decision about legislative intent.

The governmental nature of the employer does not alone warrant imposition of more stringent review of arbitration awards, because the public interest may be implicated equally by the decision of a private or public sector arbitrator.²²⁹ An arbitral decision reinstating a bus driver

227. See, e.g., *Board of Trustees, Prairie State College v. Illinois Educ. Labor Relations Bd.*, 173 Ill. App. 3d 395, 413, 527 N.E.2d 538, 550 (1988) (determination of possible conflicts with the doctrine of nondelegability is best postponed until after the arbitration). For example, in cases involving tenure and appointment determinations, several courts have held that considerations of whether proper procedures have been followed in making such determinations are arbitrable, although the ultimate decision is statutorily nondelegable. See, e.g., *Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976); *School Comm. of Peabody v. International Union of Elec. Workers, Local 294*, 19 Mass. App. Ct. 449, 475 N.E.2d 410 (1985). In states where this is the law, a court should avoid enjoining arbitration over a tenure or appointment decision on the assumption that the arbitrator will intrude improperly into the area of nondelegable authority. Rather, the court should assume that the arbitrator will issue a lawful decision and allow the arbitration to proceed, subject to post-arbitration review if the arbitrator exceeds his or her authority or violates the law by usurping the nondelegable power of the employer.

228. Compare *Lake County Educ. Ass'n v. School Bd. of Lake County*, 360 So. 2d 1280 (Fla. Dist. Ct. App.) (arbitrator did not have the authority to evaluate a teacher's performance to determine if he had been fired for just cause because that determination was committed to the exclusive authority of school board), *cert. denied*, 366 So. 2d 882 (Fla. S. Ct. 1978) with *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa 1984) (arbitrator did not exceed authority or violate public policy by evaluating a teacher's performance in order to award a salary increase) and compare *Kaleva-Norman-Dickson School Dist. v. Kaleva-Norman-Dickson School Teachers Ass'n*, 393 Mich. 583, 227 N.W.2d 500 (1975) (dispute involving nonrenewal of a probationary teacher's contract was arbitrable) with *Cohoes City School Dist.*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (dispute involving nonrenewal of a probationary teacher's contract not arbitrable).

229. "A railroad or a dock strike may be more damaging to a community than a 'job action' by police". H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 25 (1971). There has been

employed by a private company creates a greater risk to the public than a decision reinstating a file clerk in the state department of transportation, when both were discharged for coming to work intoxicated. In addition, almost all employers, public and private, operate under one or more statutory mandates that might be implicated by an arbitration decision.²³⁰ Thus an argument that public employment per se requires a different standard for arbitration enforcement because of the level of the public interest cannot be sustained.

C. The Effect of the Statutory Context of Public Sector Employment Law on Arbitration

The complex web of statutory regulation of the employment relationship in the public sector provides a more persuasive justification for a greater court role in arbitration, for limited court involvement in arbitration may leave statutory interpretation to private decisionmakers. While statutory regulation of employment in the private sector is increasing,²³¹ public sector arbitration occurs in the context of an extensive network of preexisting laws, ordinances, and regulations. When deciding an arbitration case, an arbitrator may be faced with statutory²³² considerations in several ways. First, the statute may be urged as informing the arbitrator as to the meaning of the contractual provision which he or she is being asked to interpret.²³³ Second, the statute may be incorporated in the

considerable scholarly commentary regarding the differences between collective bargaining in the public sector and collective bargaining in the private sector. Much of the debate has focused on the power of the union and the employees in the political decisionmaking process. See, e.g., Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 427 (1970); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); H. WELINGTON & R. WINTER, *supra*, at 7-32; Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 OR. L. REV. 177 (1971). By enacting a collective bargaining statute and prescribing the appropriate scope of bargaining, however, each state legislature has determined the nature and extent of power it is willing to give to unions and employees.

230. Edwards, *supra* note 57, at 32. Judge Edwards suggests, quite correctly, that a statute like the Occupational Safety and Health Act which requires the employer to provide a safe work environment could provide the basis for setting aside numerous arbitration awards. *Id.*

231. D.E. FELLER, *The Impact of External Law Upon Labor Arbitration in THE FUTURE OF LABOR ARBITRATION IN AMERICA* 83, 89 (1976).

232. For the sake of simplicity the article will refer to employment-related statutes, but ordinances, rules and regulations also affect the arbitrator's decision in the same manner. Statutes pose perhaps the most difficult legal issues for they have equal weight with the collective bargaining statute. See *supra* notes 194-200 and accompanying text.

233. This argument may take the form of an assertion that the provision was negotiated to be consistent with the statute and therefore has a particular meaning, or an assertion that, if the arbitrator interprets the contract as urged by the other party, it will be unlawful. See, e.g., *City of Miami v. Fraternal Order of Police Lodge 20*, 94 Labor Arb. (BNA) 734 (1990) (Richard, Arb.) for an arbitration decision reflecting various arguments about the relationship of external law to the contract.

contract and form the basis of the grievance.²³⁴ Third, the parties may ask the arbitrator for a decision based on the statute even where it is not incorporated in the contract.²³⁵ Fourth, the arbitrator may consider and decide a statutory issue even where not expressly authorized by the parties.²³⁶ And finally, the arbitrator's decision may implicate a statute in a manner that was neither argued by the parties nor considered by the arbitrator.²³⁷

If the arbitrator relies on a statute to determine the meaning of the contract, the arbitrator's award is an interpretation of the agreement, and regardless of whether the arbitrator is correct about the meaning of the statute, the award should be affirmed if it comports with the *Trilogy* standards and is not unlawful.²³⁸ Similarly, where the award implicates a statute but does not consider and interpret the statute, the arbitrator is not interpreting public law.²³⁹ The arbitrator in these situations is not interpreting public law.

If the arbitrator is interpreting a statute directly, however, there are different concerns because a private party's interpretation of public law will be binding on the litigants. If the arbitrator's interpretation of the statute results in an award that is contrary to law or requires the employer to violate the law, under either standard of review the award will be vacated on public policy grounds. But it is certainly possible for an arbitrator to interpret the law erroneously in a manner that leads to an award that is not itself unlawful. Under these circumstances, review under a narrow public policy standard would permit the arbitrator's erroneous view of the law to bind the parties.

*City of Saginaw v. Michigan Law Enforcement Union*²⁴⁰ is an example of such a case. In *Saginaw*, the arbitrator considered a grievance

234. See Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 79 (1977).

235. *Id.*

236. Feller, *The Coming End of Arbitration's Golden Age*, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97, 110 (1976).

237. See Edwards, *supra* note 234, at 79.

238. Craver, *supra* note 10, at 349 & n.105. So long as the award does not violate the law, erroneous conclusions of law do not warrant a refusal to enforce an award on public policy grounds. See *Fraternal Order of Police v. Bensinger*, 122 Mich. App. 437, 448, 333 N.W.2d 73, 78 (1983). *Jones Dairy Farm v. Local No. P-1236, UFCW*, 760 F.2d 173 (7th Cir.), *cert. denied*, 474 U.S. 845 (1985) applies this rule in a private sector case.

239. For example, if a city inspector is discharged for accepting a bribe, but reinstated by the arbitrator on grounds of employer condonation, the arbitrator is not required to interpret a criminal statute that makes acceptance of a bribe by an inspector a misdemeanor. While the employer may urge the relevance of the statute as a basis for overturning the award on public policy grounds, a narrow review of the award by the court does not abdicate to the arbitrator a question of statutory interpretation.

240. 136 Mich. App. 542, 358 N.W.2d 356 (1984).

alleging that the city's unpaid day off program, which was implemented as a cost reduction measure, violated the collective bargaining agreement.²⁴¹ The arbitrator found that the reduction in work for each employee was a reduction in the work force, because fewer employees were scheduled to work.²⁴² Thus the arbitrator held that the city had reduced the work force for reasons of economy, and was required by the collective bargaining agreement to follow the specific provisions of the Michigan civil service statute to implement the reduction. By failing to follow the statute, the city breached the contract.²⁴³ While the arbitration proceeding was pending, the county prosecutor filed an action in court to enjoin the unpaid day off program on the ground that it violated the civil service statute.²⁴⁴ In a decision directly contrary to the subsequent decision of the arbitrator, the judge found that the unpaid day off program was not a reduction in the work force within the meaning of the statute, and denied the injunction. After issuance of the arbitration award, the city asked the same court that denied the injunction to vacate the arbitration award on the grounds that the arbitrator exceeded his authority and the award violated public policy. The court applied the deferential standard of the *Trilogy*, despite its prior contrary holding as to the meaning of the statute, finding that the parties empowered the arbitrator to interpret the statute by incorporating it in the agreement, and the court was not authorized to substitute its judgment as to the interpretation of the law for that of the arbitrator. The court also rejected the argument that, by requiring layoffs to implement cost reductions, the award violated public policy.²⁴⁵ The court correctly concluded that the award merely held that the unpaid day off program violated the contract and mandated nothing with respect to other cost cutting actions by the city.²⁴⁶

The court in *Saginaw* was appropriately deferential to the arbitrator's decision, despite the fact that the interpretation of public law was arguably erroneous.²⁴⁷ The award was not contrary to law even though the arbitrator may have erred in his interpretation of the statute. Accordingly, the court was not asked to enforce an unlawful contract. The arbitrator's interpretation of the law was binding only on the parties to

241. 358 N.W.2d 357.

242. *Id.* at 358.

243. *Id.*

244. *Id.* at 359.

245. *Id.*

246. *Id.* at 362.

247. The arbitrator's interpretation of the law may be correct, but given the court's contrary interpretation of the same law with respect to the same facts, there is at least a plausible argument that the arbitrator erred as to the law.

the dispute and had no precedential effect.²⁴⁸ While the court's published decision enforcing the arbitration award might be cited by parties in other cases as an authoritative statutory interpretation, the case is easily distinguished because it is based on arbitral deference. Any slight increase in litigation that might be encouraged by the arbitrator's legal interpretation is more than offset by the benefits of encouraging final resolution of contractual disputes by arbitration. As for the parties, any misinterpretation by the arbitrator can be corrected through negotiations for a subsequent collective bargaining agreement.²⁴⁹

It is not uncommon in our legal system to allow a decisionmaking body other than a court to rule on issues of law, subject to deferential court review. Congress has entrusted to administrative agencies the authority to interpret statutes, subject to limited court review.²⁵⁰ Like judicial deference to arbitration decisions, judicial deference to administrative agency decisions is not consistent,²⁵¹ but both the Administrative Procedure Act and Supreme Court precedent support substantial deference to agency decisions which are not contrary to the statute or

248. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 680 (1986).

249. See Ray, *supra* note 191, at 12. Encouraging the parties to resolve the issue in negotiations is consistent with the policy underlying collective bargaining statutes. Given the short term of most labor agreements in the public sector, see Mitchell, *The Impact of Collective Bargaining on Compensation in the Public Sector*, in PUBLIC SECTOR BARGAINING 130 (B. Aaron, J. Grodin & J. Stern, eds. 1979), it is unlikely that the parties will have to live with a highly objectionable award for any length of time. Professor Ray points out, however, that resolution of the issue in collective bargaining negotiations may be more difficult if extensive court review of arbitration awards results in court proceedings that are not resolved prior to negotiations. Ray, *supra* note 191, at 12.

250. See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45, *reh'g denied*, 468 U.S. 1227 (1984); Administrative Procedure Act, 5 U.S.C. § 706 (1988); DAVIS, 5 ADMINISTRATIVE LAW TREATISE 332 (1984); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 217 (1983). Agencies may interpret the law in the course of rulemaking or adjudication. *Id.* at 214 & n.115. While there is considerable scholarly and legal debate about the appropriate and constitutional level of deference to administrative agency decisions, see *Dole v. United Steelworkers*, 110 S. Ct. 929, 938-39 (1990) (White, J. dissenting); Redish, *supra*; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985), courts currently, although not consistently, defer to agency legal interpretations where such interpretations are not contrary to the statute. See, e.g., *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986) (FDA's decision not to enforce poisonous substance limit as to a crop of corn to be used to feed livestock was not contrary to the Federal Food, Drug & Cosmetic Act); *Heckler v. Chaney*, 470 U.S. 821 (1985) (FDA's refusal to bring an enforcement action to prohibit state use of unapproved drugs for lethal injections was within its discretion).

251. See, e.g., *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (Court declared that the interpretation of Section 504 of the Rehabilitation Act of 1973 by the Secretary of Health & Human Services, which prohibited health care providers from discriminating against handicapped children, was invalid); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Court held invalid the Secretary of Labor's decision to reduce a toxic substance standard because it believed the evidence linking the substance (benzene) to leukemia was insufficient).

in excess of the authority delegated to the agency by Congress.²⁵² Similar deferential review of agency decisions by courts occurs at the state level.²⁵³

The rationale for deference to agency decisionmaking is similar to the rationale for deference to arbitration. Both the agency and the arbitrator are chosen as decisionmakers because of their expertise.²⁵⁴ Both administrative adjudication and arbitration provide, at least in theory, a method for resolving disputes that is less costly and quicker than litigation.²⁵⁵ Judicial review of administrative agency decisions is often deferential; it can be more intrusive than review of arbitrators' decisions under the *Trilogy* standards, however.²⁵⁶ Were administrative adjudication and arbitration completely analogous, the administrative review standard might be most appropriate for reviewing arbitration decisions, particularly where such decisions involve legal as well as contractual ques-

252. See *Atkins v. Rivera*, 477 U.S. 154 (1986) (Court upheld the Mass. Dep't of Public Welfare's interpretation of the Medicaid Program of the Social Security Act because the Secretary of Health & Human Services had granted the states flexibility in determining resource criteria for benefits); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866, *reh'g denied*, 468 U.S. 1227 (1984) (Court deferred to EPA's interpretation because it is not the courts' responsibility to "assess the wisdom of policy choices"); cases cited *supra* at note 250; Administrative Procedure Act, 5 U.S.C. § 706 (1988).

253. See, e.g., *Buckley v. Muzio*, 200 Conn. 1, 3, 509 A.2d 489, 490 (1986) (judicial review of the decision of the Commissioner of the Department of Motor Vehicles is very restricted and the court may not retry the case or substitute its own judgment); *Barone v. Department of Human Services*, 107 N.J. 355, 526 A.2d 1055 (1987) (court deferred to agency's decision to deny benefits to petitioners as they exceeded the maximum allowable income).

254. See *Redish*, *supra* note 250, at 217; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). It might be argued that arbitrators have no expertise in statutory interpretation and therefore, their statutory interpretations, unlike their contractual interpretations should be entitled to no deference. Many of the statutes that arbitrators are required to interpret, however, are quite similar to collective bargaining provisions, e.g., civil service rules and regulations regarding discipline, and are not outside the competence of most arbitrators. See Edwards, *Commentary, Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680 (1986) (citing *Devine v. White*, 697 F.2d 421, 438-39 (D.C. Cir. 1983) and noting that under the Civil Service Reform Act arbitrators are authorized to decide grievances based on laws, rules and regulations covering federal employees). Furthermore, the parties who choose the arbitrator can select an arbitrator with legal expertise when the grievance deals with a legal issue. See *Jones*, *supra* note 115, at 889-93.

255. See Edwards, *The Rising Workload and Perceived 'Bureaucracy' of the Federal Courts: A Caution-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 930-31 (1983).

256. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (an order by the NLRB for petitioner to reinstate an employee was vacated and the case remanded, because the Court found the evidence insufficient to support the Board's decision). In *Universal Camera*, the Court held that the Board's decisions are to be judicially reviewed in the same manner as other administrative decisions, allowing the courts to examine the evidence and to determine whether the agency's decision is supported by substantial evidence on the record as a whole. *Id.* at 480-90. Twenty years later, the Court decided in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), that in addition to evidentiary review, the Court also must determine whether the administrative decision to construct a highway through a city park was arbitrary, capricious or an abuse of discretion. *Id.* at 416.

tions.²⁵⁷ There are important differences between arbitration and adjudication, however, which justify less expansive court review of arbitration awards.

First, the strong public policy in favor of arbitration supports more limited court review of arbitration awards. Second, in arbitration the forum for decision is chosen by the parties; in administrative adjudication the forum is chosen by the legislature. Even when a collective bargaining statute requires that each contract contain an arbitration procedure, the parties remain free to define the scope of arbitration and limit arbitral determinations of external law. Thus, when the union and the employer have chosen to commit the interpretation of a statute as it relates to their particular dispute to an arbitrator, the court should respect that choice in the absence of a decision which is clearly unlawful. Third, as previously noted, the statutory interpretation in arbitration is binding only on the parties to the dispute, who retain the power to correct the interpretation of the statute in any subsequent collective bargaining agreements,²⁵⁸ while a determination by an administrative agency as to the meaning of the statute has much broader implications. Thus, there is limited risk in allowing the arbitrator to interpret the law, subject to limited court review, if the parties authorize such an interpretation.

The currently popular use of arbitration as a method of alternative dispute resolution offers another example of a situation where issues of law are decided in a nonjudicial forum. Arbitration is used to decide issues of law in two related contexts—by agreement of the parties²⁵⁹ or through mandatory court-annexed arbitration.²⁶⁰ The United States Supreme Court has held that agreements to arbitrate statutory claims are enforceable unless the statute creating the cause of action precludes waiver of a judicial forum.²⁶¹ In considering this issue most recently, in

257. Judge Edwards suggests that where arbitration is used as an alternative dispute resolution mechanism outside the labor relations context and the arbitrator is deciding issues of law, a standard of review analogous to administrative law would be more appropriate than the traditional deference to arbitration in the labor arena. Edwards, *supra* note 255, at 931. See also Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290, 98 L.R.R.M. 2526 (1978) where the court held that the administrative review standard should apply to judicial review of an arbitration award where arbitration was compelled by statute. The award at issue, however, was an interest arbitration award which set the terms and conditions of employment rather than a grievance arbitration award.

258. In *City of Saginaw v. Michigan Law Enforcement Union*, 136 Mich. App. 542, 358 N.W.2d 356 (1984), for example, the employer could negotiate for the express authority in the collective bargaining agreement to implement an unpaid day off program.

259. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) where the Supreme Court approved the use of arbitration to decide a claim under the Age Discrimination in Employment Act.

260. See, e.g., *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 570 (E.D. Pa. 1979).

261. See, e.g., *Gilmer* 111 S. Ct. at 1653, 59 U.S.L.W. 4407, 4409 (1991); *Mitsubishi Motors*

Gilmer v. Interstate/Johnson Lane Corporation, the Court relied on the "liberal federal policy favoring arbitration agreements"²⁶² to force an employee to arbitrate his statutory claim of age discrimination.²⁶³ As a registered securities representative with the New York Stock Exchange ("NYSE"), the employee had agreed to arbitration when required by the NYSE rules. In enforcing the arbitration agreement, the Court noted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."²⁶⁴ The Court in *Gilmer* evidenced little concern about private interpretation of public law where there was no expressed intent by Congress to preclude arbitral resolution of disputes under the statute. Further, the Court admonished that in seeking Congressional intent regarding arbitration, "it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'²⁶⁵ Similar considerations of policy should influence courts to enforce collective bargaining agreements providing for arbitration of statutory disputes in the public sector.²⁶⁶

The use of mandatory court-annexed arbitration of legal disputes also supports enforcement of labor arbitration agreements in the public

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (court upheld enforcement of agreement to arbitrate claims based on antitrust law, interpreting the arbitration agreement to resolve doubts regarding the scope of arbitrable claims in favor of arbitration); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (court enforced agreement to arbitrate claims under the Securities Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (court enforced agreement to arbitrate claims arising under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO)).

262. *Gilmer*, 111 S. Ct. at 1651 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

263. *See id.* at 1657.

264. *Id.* at 1652 (quoting *Mitsubishi*, 473 U.S. at 628).

265. *Id.* at 1652 (quoting *Moses H. Cone*, 460 U.S. at 24). The Court also relied on *Moses H. Cone* and on *Warrior & Gulf* in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* 473 U.S. 614 (1985), to support its conclusion that doubts regarding whether a party agreed to arbitrate an issue "should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 626 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25).

This policy favoring enforcement of agreements to arbitrate, which is codified in the United States Arbitration Act, 9 U.S.C. § 2 (1988), preempts the authority of the states to require a judicial forum for resolution of claims that the parties agreed to arbitrate, even where those claims are brought in state court and based on state statutory law. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). While the United States Arbitration Act applies only to maritime contracts or contracts "evidencing a transaction involving commerce", 9 U.S.C. § 2, the policies favoring arbitration contained in state collective bargaining statutes should be given equal weight.

266. The Court in *Gilmer* rejected the argument that the inequality of bargaining power between an employee and the employer required a determination that agreements to arbitrate employment disputes should not be enforced. 111 S. Ct. at 1655. Where the employees are represented by a union, the inequality of bargaining power should be diminished, further supporting enforcement of arbitration agreements contained in collective bargaining agreements.

sector. Like labor arbitration, court-annexed arbitration programs provide a rapid, inexpensive alternative to litigation²⁶⁷ and reduce the workload of the courts.²⁶⁸ Although court-annexed arbitration procedures typically provide for a trial de novo upon request of either party,²⁶⁹ in the absence of appeal the arbitrator's decision interpreting the law is binding on the parties.²⁷⁰

Thus, like the labor arbitrator, the arbitrator in a court-annexed system makes a binding determination of law that may well be erroneous, but stands in the absence of appeal. There is an apparent difference in the finality of the arbitrator's decision in the two systems, however. The decision in court-annexed arbitration becomes final only if the parties decide to accept the arbitrator's determination and file no appeal. In labor arbitration, the award is rendered final and binding by the court's deferential review, over the objection of the party urging the court to set aside the decision. Thus, one party to the labor arbitration is forced by a deferential standard of review to accept a disputed private determination of a legal issue. This difference is more apparent than real, however, for there is no certainty that the parties' acceptance of the arbitrator's decision in court-annexed arbitration is based on satisfaction, rather than on the inability to fund the cost of a second trial²⁷¹ or the threat that a lesser judgment in the trial would subject the party to paying the costs of the arbitration²⁷² or the appeal.²⁷³

267. See *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 570 (E.D.Pa. 1979). Notably, the *Kim-brough* court rejected the defendant's argument that arbitration constituted an improper delegation of judicial functions to a nonjudicial officer, stating "[c]learly administrative agencies with similar adjudicative responsibilities as the arbitration board have long been recognized as not only proper but essential to the functioning of an efficient judicial system." *Id.* at 574 n.18.

268. *In re Smith*, 381 Pa. 223, 229, 112 A.2d 625, 629, *appeal dismissed*, 350 U.S. 858 (1955). The utility of the labor arbitration model for alternative dispute resolution in other contexts has been the subject of debate. See Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 917, 933-34 (1979) (the success of labor arbitration is dependent on the unique aspects of the system of collective bargaining and the role of unions in that system and cannot be transplanted successfully to other arenas without significant alteration); Edwards, *supra* note 255, at 930-36 (while a wholesale transfer of labor arbitration to other contexts may be inappropriate, the model is suggestive of the possibilities for successful arbitration of disputes in other areas).

269. The provision for a trial de novo upon request protects the right to jury trial. See *Kim-brough*, 478 F. Supp. at 567-71; *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

270. *Kimbrough*, 478 F. Supp. at 567.

271. See *Parker*, 483 Pa. 106, 394 A.2d 932 (by requiring the plaintiff to pay for two expensive medical malpractice actions, frivolous appeals might be discouraged); *Strykowski*, 81 Wis. 2d 491, 261 N.W.2d 434 (despite the expense involved in appearing before the patient compensation board, the plaintiff still must bear the cost of a jury trial).

272. See *Kimbrough*, 478 F. Supp. at 570 (requiring the challenger to pay for arbitration would not penalize appeals).

273. See *In re Smith*, 381 Pa. 223, 229, 112 A.2d 625 (1955) (initially, arbitration costs are paid by the county, but must be repaid by the party that challenges the award). Significantly, a party also may be bound by the result of the arbitration by refusal to participate in the hearing. New England

Moreover, court-annexed arbitration is a compulsory pretrial step,²⁷⁴ while the parties to labor arbitration have voluntarily submitted their disputes to an arbitrator. The willingness to accept a compulsory arbitration system which permits but discourages de novo trials should indicate a corresponding willingness to defer to decisions of arbitrators voluntarily chosen to decide contractual and legal issues, in the absence of a decision which is clearly contrary to law.²⁷⁵ Both systems allow an arbitrator to interpret statutes in resolving a dispute between two parties and to issue a decision that is neither binding on, nor precedential for, other litigants. The risk of erroneous interpretation of the law is thus limited, and, in the case of labor arbitration is accepted willingly by the parties.²⁷⁶

Based on the limited risk of an error of law, the narrow public policy exception should be applied in reviewing decisions where the arbitrator was required to consider and decide a statutory issue by the contract or by the parties. Different considerations are implicated when the arbitrator decides an issue of law without authorization from the contract or the parties, however, because the authority of the arbitrator to decide any issue is drawn solely from the parties. The appropriate judicial response is not to broaden the public policy standard of review, however, but rather to determine whether the arbitrator exceeded his or her authority pursuant to the traditional *Trilogy* or statutory standards.

This review of the various situations in which a public sector arbitrator might interpret the law demonstrates that no broader public policy

Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (refusal barred party from requesting a trial de novo).

274. See *New England Merchants Nat'l Bank*, 556 F. Supp. at 712; *Kimbrough*, 478 F. Supp. at 566; *Parker*, 483 Pa. at 106, 394 A.2d at 932. See also N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1990); OHIO REV. CODE ANN. § 15 (Anderson 1981 & Supp. 1989). Notably, in *New England Merchants Nat'l Bank*, the court stated that a party who fails to participate in the arbitration forfeits the right to demand a trial de novo. 556 F. Supp. at 715. Thus, the arbitration is not only compulsory, but a party is bound by its result when he or she fails to attend the hearing.

275. See also *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985) where the Supreme Court upheld against constitutional challenge based on Article III, a statutory scheme under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The statute provided for arbitral determinations of compensation for pesticide registrants by follow-on registrants using the same data, with limited judicial review. As in the case of court-annexed arbitration, participation in the arbitration proceeding under FIFRA is not voluntary. In order to resolve compensation disputes which cannot be settled by negotiation, the registrant must participate in arbitration.

276. A concern has been raised that subjecting statutory rights to arbitration might deprive individuals of their rights under statutes such as Title VII of the Civil Rights Act. See, e.g., *Edwards*, *supra* note 234, at 76. This problem is not unique to the public sector, but applies in the private sector as well. The solution is not broad judicial review of arbitration awards, but rather permitting the individual to choose a statutory forum for vindication of those rights without requiring exhaustion of the grievance procedure and without holding that arbitration bars subsequent litigation where the statutory right cannot be vindicated appropriately in arbitration. This is the solution reached by the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

standard is necessary in the public sector. Arbitration decisions that violate the law or require a party to violate the law can and should be vacated, but in the absence of such illegality, public policy supports judicial deference to arbitration.

V. CONCLUSION

Restricted judicial involvement in labor arbitration in the public sector has the same benefits as in the private sector and poses no greater risk to the public interest. Courts that are faced with arbitration issues in public sector employment settings must put aside their reservations about grievance arbitration and apply the *Trilogy* standards, including the narrow public policy exception, in both pre-arbitration and post-arbitration enforcement actions. Appropriate judicial deference to arbitration will insure that the full benefits of collective bargaining are realized in the public sector.