



AN ANALYSIS OF A GRIEVANCE PROCEDURE CLAUSE

A contract's grievance procedure is probably, from the union's point of view, the most critical clause of a collective bargaining agreement. It has been described by unions as "the heart and teeth" of the contract as this clause guarantees, to various degrees, that the agreed upon conditions of employment will be honored by the employer. The importance of a grievance clause in a labor agreement is recognized by the PERC Law, which mandates that public employers negotiate written policies setting forth grievance procedures by which "employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions"¹ which affect employees.

Grievance procedures are intended, and negotiated, for employees to have a formal procedure by which to appeal managerial decisions. The employer does not, generally, initiate grievances against the union or bargaining unit employees. The employer acts and the union or bargaining unit members react to the employer's initiative through the filing of grievances which essentially challenge the legitimacy of the employer's action. However, although the grievance procedure is intended for the employees' use and to protect employee interests, the details and format of the procedure should be of interest to the employer. The appeal procedure should not tie management's hands, it should not present administrative burdens which distract management from its primary focus nor should it prevent the administration from enforcing its rights under the negotiated agreement.

A negotiated grievance procedure should, therefore, establish a balance between the employees' rights to appeal managerial and administrative decisions and the employer's rights to administer the contract and to take actions necessary to the management of its enterprise. Boards of education must examine their negotiated grievance procedures in light of this necessary balance.

Typically, a grievance procedure establishes who may grieve, what may be grieved, how the grievance will be processed and how it will be resolved. The specifics of the procedure are negotiated by the parties and reflect their past ability to achieve their needs through negotiations. A board analysis of an existing grievance procedure, or a proposal to change the established appeal mechanism,

must consider the clause's effect on management's ability to act and to administer its schools. However, before a board assesses the effectiveness of locally negotiated provisions, it must recognize the legal requirements which establish and control the framework of school districts' grievance procedures.

Legality

The PERC Act establishes that every negotiated agreement must contain a negotiated grievance procedure. *N.J.S.A. 34:13A-29* also establishes that all school employees' grievance procedures must provide "binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act." Within these statutory parameters, the provisions of the PERC Law do very little else to guide the parties' formulation of the substance of their local grievance procedures. Court decisions, however, have further defined requirements for locally negotiated grievance procedures.

Who May Grieve

The right of individual public employees to present grievances to their employer is established in the New Jersey constitution. The Court in *Red Bank Regional Board of Education*, 78 N.J. 122 (1978) further established that a union also has a right to present grievances. The Court held that public employees cannot be limited to presenting their grievances personally and that a union could not waive its right to initiate grievances through negotiations.

The Court also struck down locally negotiated agreements which required that unions could only process grievances when they had obtained employees' consent. The Court held that the question of consensual initiation of any organizational grievance would not be a legitimate matter of concern for the public employer. Its obligation to accept organizational grievances is not conditioned on its verification that the affected employee has consented to the filing of the grievance. So far as the employer is concerned, all organizational grievances are consensual.

Locally negotiated grievance procedures must therefore allow both individual employees and their unions to present grievances. These rights cannot be negotiated away.

¹ *N.J.S.A. 34:13A-5.3.*

Further, when an individual employee processes his own grievance, the Association is entitled to information concerning the grievance. PERC has held that the Association has an interest in the proper administration of the negotiated agreement and has a right to be advised of the details of an individual grievance for the protection of the individual grievant as well as other bargaining unit employees. The Board cannot refuse to provide such information.²

It must be kept in mind, however, that employees' right to present grievances is limited to the initial presentation of grievances to the employer. Employees do not have an individual statutory or constitutional right to continue to process their own grievances through the grievance procedure's subsequent appeal steps; that right can, however, be provided through negotiations. In the absence of a specifically negotiated provision granting individual employees the right to pursue their personal grievances through binding arbitration, the right to arbitrate is presumed to belong exclusively with the union. In *D'Arrigo v. New Jersey State Board of Mediation, et al.*, 119 N.J. 74 (1990), the Court held that general contractual language is not sufficient to overcome the presumption of the union's exclusive right to invoke the negotiated arbitration procedures.

What is Grievable

The minimum definition of grievable subjects was established by the New Jersey Supreme Court in *West Windsor*, 78 N.J. 98 (1978). There, the Court held that every negotiated grievance procedure must provide a method of appealing the interpretation, application or violation of policies, negotiated agreements and administrative decisions affecting employees' terms and conditions of employment. Such appeals are to be automatically provided by all local grievance procedures at the first step of the grievance procedure. A local agreement cannot, therefore, prevent an employee or the union from presenting a grievance over an alleged violation of a board policy on mileage reimbursement. Such reimbursement is a term and condition of employment and, under *West Windsor*, alleged violations of this kind of policy are grievable, at least to the first step of the grievance procedure.

Terms and conditions of employment set by statute or regulation are incorporated into the parties' contract and must, therefore, also be allowed to be presented as grievances. The further processing of these grievances, however, is left to the parties' negotiations. Therefore, any grievances defined in *West Windsor* cannot be, by local agreement, prevented from being filed; further appeal, including the final step, however, is left to the parties' determination. As the Court stated:

The procedural details of the grievance mechanism remain negotiable and are to be set by

the negotiating parties. We agree with PERC that the parties are free to provide for a significantly narrower definition of the matters which are grievable beyond the initial presentation stage. Moreover, the decision whether to utilize binding arbitration as a means for grievance resolution is a procedural detail left to the parties to adopt or reject as the terminal step of the contractual grievance mechanism. The parties are free to agree to arbitrate all, some, or none of the matters as to which the employees' right to grieve is guaranteed by N.J.S.A. 34:13A-5.3. In other words, mandatory grievability does not necessarily equal mandatory arbitrability.

The Court also endorsed the concept that different types of grievances could be submitted to either different grievance procedures or could end at different levels in the same procedure. For example, a board might agree to allow grievances over administrative decisions and policies affecting terms and conditions of employment to be grieved only to the board level and no further. Grievances over the express terms of the contract might go to arbitration.

Under *West Windsor*, employees, or their unions, do not have an automatic right to present grievances over policies and administrative decisions which do not affect terms and conditions of employment. An administrative decision or policy concerning class size or student discipline are not automatically grievable because those issues are not considered to be terms and conditions of employment.

What is Arbitrable

Generally, arbitrability of all, some or none of contractually defined grievances is left to the parties' negotiations. However, the extent of the negotiability of arbitrable issues is further defined by the specific provisions of the PERC Act and by case law.

Under the PERC Law, public employees other than school employees are precluded from negotiating binding arbitration of their discipline if an alternate statutory appeal procedure is available to review their challenges to their employers' disciplinary determinations. However, under the 1990 amendment, the PERC Law mandates binding arbitration of all disciplinary determinations affecting school employees. The amendment also broadly defined discipline and excluded certain disciplinary actions, such as those arising from a statutory tenure scheme, from its binding arbitration mandate. Yet, developing case law also clarified and redefined the meaning of arbitrable discipline. As such, the scope of school employees' arbitrability has also been subject to change.³

Case law also holds that the applicability of managerial

² *Shrewsbury Board of Education*, PERC No. 81-119, 7 NJPER 12105.

³ For a specific example of this topic, please see the section on Contractual Limitation on Arbitrable Issues, later in this article. For a full discussion of the changing definition of arbitrable discipline, see the article "Discipline of School Employees Under the PERC Law" in the Selected Topics section of *The Negotiations Advisor Online*.

decisions to individual employees may not be submitted to binding arbitration. In *Bernards Township Board of Education*, 79 N.J. 311 (1979), the Court held that permitting managerial decisions to go to binding arbitration would significantly interfere with boards' exercise of non-negotiable managerial policy. While boards could agree to submit nonnegotiable policy determinations to advisory arbitration, any agreement to binding arbitration could not, and would not, be enforceable.

Neither statutes nor case law prevents the parties from extending *West Windsor's* minimum definition of grievability to allow local grievances over any imaginable issue. However, statutes and case law clearly define the topics which may be submitted to binding arbitration.

Summary

New Jersey's public sector labor law imposes certain requirements on locally negotiated grievance procedures. These requirements can be summarized as:

- the grievance procedure must allow the presentation of grievances over terms and conditions of employment that are set by the contract, by board policy, by administrative decisions or by statute or regulation. These grievances must be allowed at least to the first step of the procedure;
- grievance procedures must permit both individual employees and their union to initiate grievances;
- all other steps and components of the grievance procedure are negotiable, except for the legal limitations on the negotiability of arbitration. For example, in accordance with the Act, school employees cannot negotiate over binding arbitration of disciplinary grievances as the law mandates that terminal procedure for these employees' specific grievances; however, parties to school negotiations may locally agree to submit all, some, or none of the grievances arising out of any other disputed terms and conditions of employment to binding arbitration; and
- in areas other than disciplinary determinations, negotiated grievance procedures cannot include agreement to submit nonnegotiable managerial prerogatives to binding arbitration.

Locally negotiated grievance procedures which are in conflict with these legal requirements cannot be enforced.

Components

The components of a locally negotiated grievance procedure should not only be in accord with legal requirements but should also provide a balance between the rights of employees and the rights of boards of education. The typical major components of a grievance procedure, discussed below, will be examined in light of what is most effective and protective for boards of education.

Definition of a Grievance

This component establishes which issues will be considered grievable in your district. Is your definition in accordance with the legal minimum or does it restrict or expand the Court's definition? A typical *West Windsor* definition is as follows:

A grievance is a claim by a teacher or the Association based upon the interpretation, application, or violation of this agreement, policies or administrative decisions affecting terms and conditions of employment.

This definition excludes policies and administrative decisions which deal with educational issues or non-terms and conditions of employment from the grievance definition and thus from the grievance process. This definition, therefore, automatically precludes an arbitrator from reviewing board or administrative actions which do not involve discipline of school employees and do not affect terms and conditions of employment.

A strict *West Windsor* definition is a desirable contractual definition for boards of education. A local definition which exceeds the court's definition by omitting the "affect on terms and conditions of employment" and allows the grievance to be over issues which simply "affect the employee," expands grievability to include almost all board and administrative decisions. An expanded *West Windsor* definition is legal, since it meets the legal minimum, and is thus enforceable. If your definition is more expansive than the legal minimum, you may be encouraging an overutilization of the grievance procedure and allowing every issue which causes employee concern or dissatisfaction to rise to the level of a grievance. Further, unless another component of the clause clearly limits arbitration (see below), your expanded definition may allow an arbitrator to review and resolve disputes over non-terms and conditions of employment.

On the other hand, if your local definition is more restrictive than the legal minimum, your clause is legally unenforceable. If your contract simply defines a grievance as "an alleged violation of the terms of this agreement," you may believe that you have the right to refuse to process a grievance over a policy which deals with a term and condition of employment. Since the Court has held that this type of grievance is legitimate, your refusal to process such a grievance may incur unnecessary and avoidable litigation. If your local definition of a grievance is more restrictive than the *West Windsor* standard, your definition is legally void and unenforceable. In spite of your assumptions and of your negotiated agreement, you must allow grievances over board policies and administrative decisions which affect terms and conditions of employment to be presented by either an employee or the union.

Boards that have a contractual definition which is narrower than *West Windsor* frequently recognize their obligation under the law and process any grievance that is filed, regardless of its concurrence with the local definition. Although this may avoid litigation, it also automatically

extends the terminal procedure negotiated for contractual grievances to all grievances, including those challenging board policies. This approach results in a board waiver of its right to negotiate the contents and procedures of its local grievance procedure and, particularly if the procedure ends in binding arbitration, this approach may not be protective of the board's interests.

A well-defined delineation of a grievance is, therefore, a critical element of the grievance procedure. Your local definition can have a significant effect on your contract administration, your labor relationship, and your ability to retain your right to exercise your managerial authority without arbitral review.

Who May File a Grievance

This component identifies the local parties who may initiate and process grievances. Does your contract concur with the legal framework and permit both unit employees and their bargaining representatives to initiate grievances? Remember that, regardless of your contractual provisions, both employees and unions have a legal right to initiate grievances and that right may not be negotiated away.

That right, however, extends only to the presentation of grievances. The right to continue to process the grievance through the appeal procedure is a matter for negotiations. Your negotiated procedure for grievants' respective ability to process grievances is therefore the result of local negotiations. You may agree to different processing procedures for individual and organizational grievances.

Individual employees do not have an automatic right to pursue binding arbitration, as that right of contractual enforcement has been seen by the courts to belong to the union.⁴ However, specific contract language may provide individuals with the right to initiate arbitration. In the absence of specific contractual authorization for individual initiation of arbitration, the exclusive right to initiate arbitration rests with the union. Some teachers' contracts in New Jersey provide that an individual demand for arbitration is valid only if the Association agrees that the "grievance is meritorious."

Limitations on individual employees' right to initiate binding arbitration do not affect individuals' right to initiate grievances. However, limitations on individuals' pursuit of arbitration may be beneficial to boards of education who find that a number of groundless grievances have been brought to arbitration by a few disgruntled individual employees. Frivolous "losing" grievances may not be pursued if a responsible union's grievance or executive committee approval is necessary to proceed to arbitration. This is a negotiable procedure which may meet some boards' needs.

Processing the Grievance

The majority of the grievance procedure is devoted

⁴ See, for example, *D'Arrigo v. New Jersey State Board of Mediation, et al.*, 119 N.J. 74 (1990) and *Lullo v. International Association of Firefighters, Local 1066*, 55 N.J. 409 (1970).

to establishing the mechanism for grievance processing. These procedures include:

Filing of a Grievance When must the grievant initiate his appeal? Does the contract specify a time line and is that deadline realistic?

It is important that a reasonable time limit be imposed on the ability to initiate a grievance. Generally, this time limit is framed in terms of "when the grievant knew or should have known" of the alleged violation. Without this type of language, grievances can be filed a year or more after the action was taken. This situation does not benefit management as: the practice may now be well-entrenched and difficult to change if found to be a contractual violation; or the practice is now forgotten and difficult to remedy; or a once innocuous occurrence is resurrected to add fuel to a current problem. Under any of these circumstances, the issue may have festered for a long period of time and may have complicated the daily teacher-administration interaction. Your ongoing labor relationship is indeed best served by the prompt resolution of disputes.

Typically, unions will attempt to achieve long time limits for the initial filing of a grievance while employers prefer tight restrictions on this deadline. The negotiated time line should represent a reasonable balance between the needs of employees to determine the validity of initiating a grievance, the administration's need to be informed quickly of the problem and your mutual need to resolve the dispute as quickly as possible.

Identifying the Grievance What is the issue being grieved? What is the basis for the grievance? And what remedy is being sought? These are crucial issues in processing grievances and boards are well-served by contract language that requires grievants to consistently identify the nature of the dispute. Some contracts include a sample grievance form. Others simply require that the following information be provided in all written grievances: the date the grievance was initiated; the date the incident occurred; a brief description of the incident; a specific cite of the contractual clause(s), or policies, alleged to be violated; and the specific remedy sought by the grievant.

This information is obviously important to school management's ability to assess the merits of the grievance. In addition, requiring a written identification of the grievance can prevent the grievant from changing the nature of his complaint during the processing of the grievance.

Time Lines Most grievance procedures impose a time line for appeal to a higher level and for the administrator's response. If time lines are reasonable and clear, they can be in both the grievant's and the board's interest. To protect their interest in the time line component, boards should first determine that the time lines for administrative responses provide sufficient time for the administration to properly and fully consider the grievance within the district's requirements and expectations for contract administration. Boards should also assess the grievant's time lines for pursuing the grievance to a higher level; does the provision allow the union sufficient time for a

thorough assessment without causing a significant delay in the resolution of the grievance?

The clarity of the time line is also a matter for consideration. Is the time frame expressed simply in terms of “days” or does it specify “calendar” days or “school” days? Generally, a clear delineation of the type of day eliminates different interpretations and is therefore preferable. Be sure that in all time lines, your intention is clearly and consistently defined.

Clear, unambiguous time lines become important since most contracts define the implication of a violation of time lines. Generally, a union’s failure to proceed to the next level within the specified time frame is seen as an acceptance of the administrator’s decision and a waiver of further processing. However, an administrative failure to respond in accordance with contractual time lines can be defined to mean one of two things: 1) the grievance may proceed to a higher level or 2) the grievance is considered granted. Boards need to be careful of the second contractual provision as it may, inadvertently or because of a miscalculation of the time frame, constitute a waiver of the administration’s or the board’s right to deny the grievance on substantive grounds. Boards would be well-served to avoid language which defines an administrative failure to meet contractual time lines as an automatic support of the grievant’s position.

It is wise for boards to seek language which permits extensions of deadlines by mutual agreement. It is also beneficial for boards to check the impact of contractual deadlines on administrative decisions with their administrators. If time lines are realistic, clear, and protect the right to reject the grievance on its merits, time lines can be beneficial to the board and to the administration.

Number of Steps A grievance procedure involves a progressive appeal of an administrative action within the district’s chain of command. Small districts may have two or three steps in the procedure, while larger districts may have as many as six steps. The first step usually involves an informal discussion between the grievant and the immediate supervisor and, depending on the agreement, a union representative may or may not be present at this meeting. If the effort to resolve the problem at this informal step fails, then it is normally required that the grievance be reduced to writing and presented at the next step in the process, usually a higher level of management authority. The grievance normally proceeds up the district’s chain of command on the assumption that a higher level of authority may overturn a lower administrative decision.

In reviewing the number of steps established in the agreement, a board of education should look for a logical progression for the disposition of the grievance. It may be a waste of time to require that grievances which challenge the Superintendent’s determination be first submitted to the immediate supervisor when that administrator does not have the authority to modify or rescind a directive from the chief school administrator.

The Board’s Role in the Procedure Almost all teachers’

contracts in New Jersey provide for the board’s review of the superintendent’s grievance determinations. However, boards may want to assess their involvement in the grievance process. Board involvement in the handling of grievances is not mandated by law but is a negotiable topic and boards can determine that they do not wish to be involved in the administration of the contract.

Boards should, however, anticipate a negative union reaction to a proposal to delete the board’s involvement in grievance processing. Unions and employees frequently view the board’s review as a valuable opportunity to let the board know “what really goes on in the schools” and how the administrators are interpreting the terms and conditions that were negotiated, in good faith, between the union and the board. Unions also look at the board’s involvement as an opportunity for the board to reverse an unpopular administrative decision and to side with the employees.

Board review of grievances, within the progressive appeal mechanism of the contract, is indeed intended to allow the Board to reverse administrative decisions. If boards are to be involved in the process, they must seriously consider the purpose of their review and its impact on district operations. If a reversal of administrative decisions is necessary, it is important that the board’s decision does not appear to repudiate or to undermine the administration.⁵

Most boards will probably determine that their continued involvement in the grievance process, even when their decisions are reviewable by an arbitrator, is desirable and beneficial. Contractual terms governing that involvement should, however, also be reviewed.

Does the contract mandate that the board hold a hearing for every grievance that reaches the board level or does it give the board the discretion to determine whether a hearing is required? Must the meeting be held with the full board or can the board hold a committee hearing? Are the contractual time lines for the board’s processing of the grievance adequate for the board to research the issue and contact its resources?

Your board’s goals for its involvement in the process and your history with grievance processing should guide you in analyzing your current contractual requirements. If your provisions meet your needs and have not presented any difficulties, then your contract works for you. If, on the other hand, your current contractual involvement presents difficulties, propose a change. All of these issues are negotiable.

The Final Step of the Procedure

The final step of a grievance procedure establishes the mechanism that will be used to bring a final resolution to the dispute. Other than the mandated binding arbitration for school employees’ grievances over the imposition of reprimands and other forms of minor discipline, the

5 For a complete discussion of this and other aspects of grievance processing, please consult the NJSBA publication *Administering the Negotiated Agreement*.

determination of the final step of the negotiated grievance procedure is left to negotiations. The parties are free to agree, or not to agree, to provide binding arbitration for grievances other than disciplinary disputes; as long as the agreement does not contradict the provisions of the Act or case law decisions concerning the nonarbitrability of managerial decisions, the agreement is legal and enforceable. Thus, some school districts' locally negotiated grievance procedure provide that grievances, over issues other than discipline, will be resolved through advisory arbitration and still others have established that the board will retain final determination over nondisciplinary grievances.

A Multi-Track Approach An increasing number of contracts have negotiated different final steps for different kinds of grievances. For example, while all school employees' grievances over discipline must, by law, be submitted to binding arbitration:

- grievances over statutory and regulatory terms and conditions of employment end with an appeal to the appropriate agency;
- grievances arising from an alleged violation of board policies or administrative regulations affecting terms and conditions of employment end at the board level or in an advisory arbitration; while
- grievances arising from an alleged violation of the express written terms of the negotiated agreement proceed to binding arbitration.

This approach, known as a "multi-track" grievance procedure, is particularly advantageous for boards of education whose unions are insistent on having a neutral's review of managerial decisions. The multi-track grievance procedure assures expert determinations of grievances.

Labor arbitrators are experts in interpreting contract language and in uncovering the intent of the parties when they negotiated the written agreement. However, arbitrators are not experts in settling disputes which arise from the interpretation of statutes and regulations; further, most arbitrators do not understand the context of school policies.

Arbitration, therefore, seems to be the wrong process for settling disputes over anything but negotiated contract language. Many arbitrators agree with this and, unless given a clear mandate by the parties, will avoid rendering a decision based on the interpretation of statutes, policies, or administrative decisions that are related to, or referenced in, the negotiated agreement. These arbitrators realize that their skills and knowledge are the outcome of years of arbitration over two-party contracts, and were never intended to apply to statutes, management policies, or administrative decisions.

A multi-track grievance procedure is thus preferable to a single final step of binding arbitration for all grievances permitted under law and under the contract.

A negotiated limited, narrow scope of negotiations has become even more important with the January 2006 amendment to the PERC Law. This new addition to the bargaining law, imposes a "presumption in favor of arbi-

tration" when there are doubts as to the interpretation of a negotiated contract's arbitration clause. It is therefore most advantageous for boards to negotiate careful restrictions on arbitrators' contractual authority.

Negotiating Limits On Contractual Arbitrability

In grievances other than those involving discipline as clearly defined by the PERC and the courts, an arbitrator is strictly a creature of the contract. The arbitrator derives his authority from the pages of the negotiated agreement and thus must be guided by the limitations that have been placed within its four corners. Therefore, in all non-disciplinary grievances, the arbitrability of all other school employee grievances remains completely negotiable. The parties to local negotiations can agree to submit some or all grievances to arbitration. Limiting the issues that can be contractually submitted to arbitration is advantageous to school management. Boards should therefore consider the options, and combination thereof, listed below.

Limitations on the Arbitrator's Review Authority

The extent of an arbitrator's authority to review and to enforce the contract is generally negotiable. A multi-track procedure, such as the one described earlier, places an automatic limitation on the issues that can be reviewed by an arbitrator. These procedures provide that:

The only grievances which may be arbitrated are those alleging that there has been a violation of the express written terms of the locally negotiated agreement.

or

The arbitrator shall not have the authority to rule on grievances which concern the interpretation, application, or alleged violation of board policies and administrative decision affecting terms and conditions of employment, or of statutes and regulations setting terms and conditions of employment.

These provisions restrict the arbitrator's authority under the contract and prevent the neutral from reviewing those issues that do not arise directly from the written terms of the contract.

Contractual Limitations on the Arbitrator's Remedial Authority

The extent of an arbitrator's authority to fashion a remedy is also a negotiable topic. The most obvious example of this type of contractual restrictions can be found in negotiated provisions which establish the "advisory" or "binding" nature of the arbitrator's award.

While the 1990 amendments to the PERC Law require binding arbitration of disciplinary grievances, the PERC Law does not, in any way, further limit boards' ability to negotiate limits on arbitrators' remedies even in the area of discipline. Thus, arbitrators' authority to award a remedy can be limited for all issues that are submitted to arbitration.

The most common limitation on arbitrators' authority provides:

The arbitrator shall be limited to the issues submitted and shall consider nothing else. The arbitrator can add nothing to nor subtract anything from the Agreement between the parties.

However, boards can also raise proposals that place additional and less prevalent forms of restricted remedial authority. The possibilities of negotiating restrictions on arbitrators' remedial authority are limited only by the parties' creativeness and their ability to reach a mutual agreement on the issue. For example, some boards have successfully obtained limitations on arbitrators' economic remedies by specifically preventing awards that exceed a specific amount. Boards can also seek the union's agreement to clauses such as:

The arbitrator's decision cannot contradict any negotiated provision, replace the discretion of the Superintendent or reverse the board's substantive assessment of the employee's qualifications to remain employed by the district.

or

The arbitrator cannot modify or reverse the board's employment decision but can award monetary damages which, in no circumstances, can exceed \$_____.

or

The arbitrator may supplement the record, but under no circumstances, can the award remove or delete any documents pertaining to the grievance from the employee's file.

Arbitrators' authority can also be limited by the contract's specific and explicit definition of issues that are subject to arbitral review.

Limitations Through Specific Exclusion Of Selected Topics

Many contracts specifically exclude specific topics from proceeding to binding arbitration. These exclusions can appear in the grievance procedure or in other areas of the negotiated agreement. For example, some sabbatical leave articles clearly specify that denials of leaves shall not be subject to the final step of the grievance procedure.

It is not necessary for boards to seek a contractual exclusion of issues which are, by law, not permitted to proceed to arbitration⁶ as these grievances can be restrained by filing a scope petition with the Public Employment Relations Commission (PERC). However, it can be most advantageous to obtain a contractual exclusion over issues which are deemed to be terms and

conditions of employment that would not otherwise be precluded from arbitration.

In addition, a series of court decisions have held that a topic that is not specifically and expressly included in a negotiated contract can affect the scope of an arbitrator's authority to review some grievances. For example, the conditions leading to contractual arbitrability of a number of the following issues have been addressed by the courts:

The withholding of noncertificated staff's increments: While finding that the PERC Law clearly precludes arbitration of certificated staff's increments withheld for evaluative reasons, PERC held that this exclusion did not apply to withholdings affecting schools' noncertificated staff. Rather, PERC held that all those withholdings were disciplinary actions, regardless of their underlying motives, and were all subject to the Law's mandated arbitration. However, in its *Randolph* decision⁷, the court reversed PERC's prior approach to hold that mandated arbitration of noncertificated staff withholdings applied only when that action was predominantly based on disciplinary reasons. According to the court, withholdings of support staff based predominantly on reasons of performance were subject to the locally negotiated grievance procedure and could be arbitrated only if that step was included in the parties' negotiated contract. Therefore, boards of education may be well-served by negotiating provisions that would bar an arbitrator from reviewing grievance challenges to increment withholdings based on an evaluation of a noncertificated employee's performance.

The nonrenewal of noncertificated staff: In interpreting the 1990 amendments, PERC also held that all nonrenewals of noncertificated staff were subject to the mandated binding arbitration of disciplinary grievances. However, in the *Marlboro* decision⁸ the court held that, absent a contractual tenure provision, a contract could specifically exclude binding arbitration of decisions to not renew noncertificated staff's fixed-term contracts. Under this decision, the following types of clauses were seen to be most beneficial to boards of education:

The board retains its complete discretion to renew employment contracts. An arbitrator shall not have the authority to review disputes involving the nonrenewal of employees.

or

A grievance occasioned by lack of appointment to, or a nonrenewal in, any position shall not be grievable beyond the Board of Education and shall not be reviewable by an arbitrator.

However, subsequent court decisions further defined the extent of arbitrability under the terms of a locally

6 For a full discussion of legal arbitrability, please see the article "Scope of Negotiations" in The Structure of Negotiations section of *The Negotiations Advisor Online* and the NJSBA publication *The Public Employment Relations Law*.

7 *Randolph Township Board of Education*, 328 NJ Super 540, cert. den. 165 N.J.132

8 *Marlboro Township Board of Education*, 299 N.J. Super. 283 (1997), cert. den. 151 N.J. 71 (1997).

negotiated agreement.

Limitations Through The Absence of Specific Authorization In a series of decisions, the courts further ruled that exclusions could be interpreted even in the absence of specific contractual language. These rulings have addressed the non-renewal of noncertificated staff's fixed term contracts and the mid-contract termination of all school employees, in accordance with the terms of their individual employment contracts.

Nonrenewals of Noncertificated staff: As part of an overall statutory tenure scheme, PERC consistently restrained binding arbitration of boards' decisions to not renew the employment of school employees who were eligible for tenure status.⁹ However, PERC also consistently found that the nonrenewal of noncertificated staff always constituted discipline that was subject to the Law's mandated binding arbitration. This Commission approach was rejected by the courts in two significant decisions.

In *Wayne Township Board of Education*¹⁰, the court held that if a contract did not include a contractual provision guaranteeing reemployment of staff hired on a fixed-term contract, then a specific provision excluding arbitration of those decisions was not necessary. Rather, the court held that the absence of a contractual job security clause was, in itself, sufficient to bar arbitration. This interpretation was reaffirmed by the New Jersey Supreme Court's decision in *Camden Board of Education*¹¹

Midcontract Terminations of All School Employees' Fixed-Term Contracts: In two significant decisions¹², the court found that boards' fixed-term individual employment contracts generally gave boards the right to terminate employees during the life of the contract upon giving appropriate notice of its intent. The courts held that these board actions, whether affecting certificated or noncertificated employees, did not constitute discipline but were simply exercises of clearly specified board authority. The courts also held that a negotiated grievance procedure ending with binding arbitration did not automatically result

in authorizing binding arbitration of those termination decisions. Rather, the courts held that arbitration under the terms of the collectively negotiated agreement could occur *only* if the parties' agreement clearly and expressly stated that those decisions were subject to binding arbitration.

Keep in mind, however, that the aforementioned 2006 amendment to the PERC Law could modify future court decisions.¹³ The new law's required presumption in favor of arbitration may be interpreted by the courts as a directive to see a contract's silence as creating a doubt that would compel authorization of an arbitrator's review. Be alert to expected developments in this new area of the law and check with your legal and labor resources, including the NJSBA Labor Relations Department and postings on the NJSBA website at www.njsba.org <<http://www.njsba.org>> and continuous updates in the NJSBA subscription service *The Negotiations Advisor Online*.

Summary All of the provisions establishing limitations on an arbitrator's authority are beneficial to boards of education. Boards need to carefully assess the specific provisions of their negotiated contract and the benefits of contractual silence. They also need to recognize that their unions will be eager to expand the scope of arbitrators' review. Thus, boards should be most critical of association proposals that seek to delete current exclusions or to add specific references to job security and express inclusion of the arbitration of grievances challenging nonrenewals and mid-contract terminations of fixed-term contracts.

The Result of Your Analysis

An analysis of the major components of a grievance clause clearly identify a board's needs in a grievance procedure. Legal definitions of a grievance and of the grievants, clear time lines, ease of administration, and limitations on any necessary arbitration provision clearly bring the board's needs into balance with the employees' right to appeal management decisions. If your current contractual grievance procedure is found to be lacking in many of these protective elements, consider drafting board proposals to improve your procedure through negotiations. Achieving union agreement, however, may not be easy especially if your proposals represent a "give back" of benefits currently enjoyed by unit members and their union. If achieving these improvements becomes a board priority, be prepared to communicate your commitment to your association and to consider concessions in some union proposals that you would be willing to "trade" to obtain an improved grievance procedure.

Your analysis has also helped you to identify areas

9 See, for example, *Englewood Board of Education*, PERC No. 92-78, 18 NJPER 23040.

10 *Wayne Township Board of Education*, App. Div. Docket No. A-2749-97T5, decided January 19, 1999, cert. den., 3/31/99.

11 *Camden Board of Education*, 181 N.J.187 (2004) For a full discussion of the Marlboro, Wayne, and Camden decisions, please see the article "Discipline of School Employees Under the PERC Law" in the Selected Topics section of *The Negotiations Advisor Online*.

12 *Northvale Board of Education*, App. Div. Dkt No. A-2778-04T2, decided October 2005; *Pascack Valley Regional Board of Education*, App. Div. Dkt No. A-2599-04T5, decided October 2005. Please note, both of these decisions have been appealed to the N.J. Supreme Court.

13 See, *Board of Education of the Borough of Alpha*, 188 N.J. 595 (2006) and *Lenape Regional High School District*, Appellate Division Docket No. A-5095-04T1 (2006). Please note *Lenape* has been appealed to the N.J. Supreme Court.

within your local grievance procedure that are protective of the board's ability to manage its schools. This will alert you to the possibility of union proposals that seek to modify your existing procedures. Some union proposals, such as clarification of time lines, may be most acceptable. Others, such as proposals to expand the scope of arbitration under the contract, will be seen as totally unacceptable intrusion into your managerial functions. Under all scenarios, your analysis will help you to prepare an appropriate response that continues to support your board's mission. You are ready to negotiate over a grievance clause proposal in a knowledgeable manner which can assure that you too will gain from this round of negotiations.