



# bulletin

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## HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"I am not determining a point of law; I am restoring tranquility"

Edmund Burke (1729-1797)  
Speech on Conciliation with  
America 1775

"I have never been happy with the title of this monthly column. It is at best pedestrian and uninspired. Further, it is hardly descriptive. I rarely predict anything. Now, without fear that the crystal ball will, indeed, prove to be cloudy, I can predict that apart from the standard disputes on money, the chief issue in negotiations (especially in school districts) in the next round will be job security. Public employee unions will seek overall protections against mass layoffs and will at the same time try to push through job security clauses to maximize individual protections.

"In her excellent monograph on the language of public sector bargaining agreements, June Weisberger<sup>1</sup> has written, 'In the private sector, the largest single group of grievance arbitration cases involves the imposition of some measure of discipline including discharge for reasons of alleged personal fault on the part of the employee. It was originally thought that the public sector would be significantly different from the private sector in this area since various aspects of public employee discipline are covered by legislation and, thus, presumably beyond the reach of collective bargaining and grievance arbitration.<sup>2</sup> This prediction has not been accurate. More and more collective bargaining agreements in the public sector contain some provisions relating to aspects of disciplinary action not covered by statute or provide safeguards and standards which are in addition to or in lieu of, those provided by law. More and more public sector grievance arbitration awards relating to discipline cases are being issued and published, thus proving that public and private sector differences are rapidly disappearing.

"Not only is the comparative quantity of public sector grievance arbitration cases concerning discipline becoming substantially similar to private sector cases, but the public sector discipline cases are also being decided by applying and interpreting rules and concepts relating to discipline that have been developed in the private sector.'

"Discipline' cases as June Weisberger points out frequently involve situations in which the employee is threatened with dismissal. Space limitations do not permit me to discuss in detail the major court cases that impact heavily on the challenges we face in job security negotiations. But it would be well to note the decision by Judge Lyman H. Smith in a Monroe County Supreme Court case (matter of Antinore vs. New York State).<sup>3</sup> The plaintiff, Donald Antinore, had been advised through his union (CSEA) that as a result of charges against him, he had fourteen days to invoke the arbitration procedures under the union contract or



he would be permanently terminated. (Antinore was a 'tenured civil servant' in the Division for Youth.) Antinore sought through an action for declaratory judgment, judicial clarification of his statutory rights vis-a-vis his contractual rights, including his ultimate right to judicial review. Judge Smith held that the amendment to the Civil Service Law (Section 76) which permitted the procedures set forth in both Section 75 and Section 76 to be 'replaced' by a subsequent collective bargaining agreement was 'constitutionally impermissible'. Further, Judge Smith held that the agreement between the parties denied the employee due process and equal protection of the laws. Finally, Judge Smith held that the employee had not waived his constitutional or statutory rights, including his rights under Civil Service Law. The decision is being appealed to the Appellate Division.

"In his decision in the Antinore case, Supreme Court Justice Smith did not express uneasiness regarding the plaintiff or similarly situated persons at the hands of a professional arbitrator. The judge, as I have indicated, ruled on quite different grounds. Nevertheless, we should perhaps note the Antinore case together with the landmark decision of the United States Supreme Court in the 'Alexander vs. Gardner-Denver' case early this year.<sup>4</sup> The court held that 'an employee's statutory right to a trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement.' The court's language is worth repeating - at least in part.

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation.... But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.' And thus, the United States Supreme Court which sanctified arbitrators and arbitration in the 'trilogy' and since, has now tarnished the halo. Believe, Perbians, that public employees separated from employment or threatened with such separation will cry havoc and unleash themselves in all of the courts - state and federal.

"In any event, our panels will, I suspect, be very busy indeed with mediation and fact-finding on 'fair dismissal' clauses and arbitration of rights cases involving dismissal. Look at the courts and heavens for guidance and remember, 'l'homme c'est rien, l'oeuvre c'est tout', as Gustave Flaubert wrote to George Sand."

<sup>1</sup> Weisberger, June, Examples of Language and Interpretation in Public Sector Collective Bargaining Agreements. Institute of Public Employment, Monograph #3, New York State School of Industrial and Labor Relations, Ithaca: Cornell University, 1974.

<sup>2</sup> Tracy, Estelle R., ed., Arbitration Cases in Public Employment. New York: American Arbitration Association, 1969, p. xi.

<sup>3</sup> 79-Misc Rpts-2nd

<sup>4</sup> 415-US-36