BYU Law Review

Volume 1977 | Issue 2 Article 5

5-1-1977

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Recommended Citation

Gerrit M. Steenblik, *Arbitration Awards in Federal Sector Public Employment: The Compelling Need Standard of Appellate Review*, 1977 BYU L. Rev. 429 (1977).
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Arbitration Awards in Federal Sector Public Employment: The Compelling Need Standard of Appellate Review

Executive Order 11,491,[1] the current touchstone for labor-management relations in federal sector public employment,[2] allows federal government agencies and unions representing federal employees to include provisions for binding arbitration as an employee grievance[3] resolution technique in their collective bargaining agreements.[4] Binding third party arbitration and other "bargained-for" techniques are referred to as "negotiated grievance procedures."[5] Disputants in an arbitration proceeding may

1. 3 C.F.R. 861 (1966-1970 Compilation). Exec. Order 11,491 has been amended by Exec. Order No. 11,616, 3 C.F.R. 605 (1971-1975 Compilation), Exec. Order No. 11,636, 3 C.F.R. 634 (1971-1975 Compilation), Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975 Compilation), and Exec. Order No. 11,901, 41 Fed. Reg. 4807 (1976).

2. For a general background of labor-management relations in the federal service, see Seidenberg, *Federal Sector Overview: Collective Bargaining—An Address Before the 1975 Seminar on "Employee Relations in the Federal Government,"* 34 FED. B.J. 229 (1975).

3. The term "grievance arbitration" refers to resolution of disputes regarding the interpretation of the already negotiated collective bargaining agreement and should be distinguished from the "interest arbitration" that denotes that resolution of disputes during the negotiation of a new agreement. In federal sector labor-management relations, interest arbitration is generally provided by the Federal Mediation and Conciliation Service. When this mediation is not successful, the Executive Order authorizes the Federal Services Impasse Panel to consider the negotiation impasse. Exec. Order No. 11,491, § 17, 3 C.F.R. 861, 871 (1966-1970 Compilation) (as amended). For a discussion of the functions of the Federal Mediation and Conciliation Service and the Federal Service Impasse Panel, see Seidenberg, *supra* note 2, at 232-33.

4. Exec. Order No. 11,491, § 13(a)-(b), 3 C.F.R. 861, 870 (1966-1970 Compilation) (as amended).

5. Certain grievances may not be covered by negotiated grievance procedures but must be resolved through the statutory appeals procedure of the Civil Service Commission. Grievances subject to the statutory appeals include equal opportunity complaints and grievances pertaining to promotions, adverse personnel actions, changes in the status of employees, and methods for making personnel appointments. *See* R. SMITH, H. EDWARDS, & R. CLARK, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 878, 882-83 (1974) (quoting *Pickets at City Hall: Report and Recommendations of the Twentieth Century Task Fund Force on Labor Disputes in Public Employment*); Ullman & Begin, *The Structure and Scope of Appeals Procedures for Public Employees*, 23 INDUS. & LAB. REL. REV. 323 (1970). In actual practice, there may be some overlap between the types of grievances covered by the negotiated grievance procedures and the statutory appeals rules. *See id.* at 325, 333. It has been urged that this overlap is undesirable because it leads to confusion and failure of employees to assert all of their rights and because it may produce conflicting interpretations and unequal treatment of cases that should be treated similarly. *Id.*

Where the parties disagree as to whether a particular grievance should be resolved through the negotiated grievance procedure or the statutory appeals procedure, the parties can mutually agree to submit the question to a neutral arbitrator. The decision of the arbitrator can be appealed by either of the parties to the Assistant Secretary of Labor for Labor-Management Relations. This procedure was established by Exec. Order No. 11,838,

appeal from the arbitrator's award to the Federal Labor Relations Council,[6] a quasi-judicial panel authorized to review arbitration awards that allegedly violate "applicable law, appropriate regulation," or Executive Order 11,491.[7] In examining awards challenged as violative of federal agency regulations, the Council's practice has been to determine whether a conflict exists between the challenged arbitral award and the agency regulations, but the Council has not evaluated the underlying necessity for the existence of the regulations in the first place.[8]

This comment will analyze when and to what extent an arbitrator's award should be set aside when a party appeals to the Council on the ground that the decision conflicts with an agency policy or regulation. The intent of this comment is to outline the need for a standard by which the propriety of those policies and regulations can be tested and to suggest a workable and reliable standard which the Federal Labor Relations Council can employ to meet that need.

I. Scope of Grievance Arbitration in the Federal Sector

Federal agencies are required by Executive Order 11,491 to bargain collectively with federal employee unions to develop negoitated grievance procedures.[9] A brief historical review of the Executive orders dealing with negotiated grievance procedures in the federal sector reveals an increasing acceptance by the federal government of binding arbitration as the final procedural step.[10]

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3 C.F.R. 957 (1971-1975 Compilation). *See* Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding*, 51 Ore. L. Rev. 134, 141-43 (1971).

An interesting question was raised by City School Dist. v. Poughkeepsie, 35 N.Y.2d 599, 324 N.E.2d 144, 364 N.Y.S.2d 492 (1974), where the court held that an employee was allowed to proceed to arbitration even after losing his statutory claim.

6. Exec. Order No. 11,491, § 13(b), 3 C.F.R. 861, 870 (1966-1970 Compilation) (as amended).

7. 5 C.F.R. § 2411.32 (1977). Parties may also challenge an arbitrator's decision "on other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations." *Id.*

8. *See, e.g.*, Professional Air Traffic Controllers Organization v. FAA, 5 F.L.R.C. No. 76A-10 (Jan. 18, 1977) (Rep. No. 121); Francis E. Warren Air Force Base v. American Fed'n of Gov't Employees, Local 2354, 4 F.L.R.C. No. 75A-127 (Sept. 30, 1976) (Rep. No. 114); Wing Commander, 29th Flying Training Wing, Craig Air Force Base v. American Fed'n of Gov't Employees, Local Union No. 2574, 4 F.R.L.C. No. 75A-121 (Sept. 14, 1976) (Rep. No. 112).

9. Exec. Order No. 11,491, § 13(a), 3 C.F.R. 861, 870 (1966-1970 Compilation) (as amended).

10. Under Exec. Order 10,988, the original order dealing with federal labor management relations, arbitral awards were merely advisory—always subject to approval by the federal agency that was involved. Exec. Order No. 10,988, § 8(b), 3 C.F.R. 521, 525 (1959-

Executive Order 11,491, however, indirectly imposes substantive limitations on the scope of an arbitrator's discretion in fashioning remedies in grievance disputes. Section 13 of the order covers grievance and arbitration procedures and directs the parties to negotiate their own grievance resolution techniques. This section, however, mentions no express limitations on the arbitrator's authority; it merely prohibits the grievance procedures from conflicting with other portions of the order. The limitations are found elsewhere in the order[11] and are incorporated into section 13 by reference.[12]

The prominent limitations on the scope of arbitration derive from sections 11(b) and 12(b) of the order. Section 11(b) extends to the federal agencies certain "discretionary management rights." By virtue of this section, agency officials have the discretion to refuse to negotiate with the employee unions during collective bargaining with respect to any of the following matters: "[T]he mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices."[13] These discretionary management rights represent an exception to the general mandate for the agencies to negotiate with unions.

Section 12(b) enunciates six management rights that cannot

1963 Compilation); *see* Kagel, *supra* note 5, at 135-36.

Although binding arbitration was prohibited, advisory arbitration was widely employed under Exec. Order 10,988. According to one survey, nearly 75% of the negotiated collective bargaining agreements provided for advisory arbitration of grievances. *See* Comment, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment,* 54 CORNELL L. REV. 129, 134 (1968) [hereinafter cited as *Legality and Propriety of Arbitration*].

Exec. Order 11,491 as amended now permits parties to provide for binding arbitration. Moreover, the history of Presidential task force recommendations leading up to the present order demonstrates that binding arbitration is not only allowed but encouraged. *See* U.S. FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 42-44 (1975) (reporting the Council's January 1975 recommendations for amending Exec. Order 11,491); *id.* at 73-74 (reporting a Presidential study committee's August 1969 recommendations on Exec. Order 10,988).

As of September 1975, 28 states permitted grievance mechanisms culminating in arbitration for public service employees. *See* Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation,* 89 HARV. L. REV. 752, 753 n.11 (1976).

11. *See, e.g.,* Exec. Order No. 11,491, §§ 11(b), 12(b), 3 C.F.R. 861, 868-69 (1966-1970 Compilation) (as amended); Tobias, *The Scope of Bargaining in the Federal Sector: Collective Bargaining or Collective Consultation,* 44 GEO. WASH. L. REV. 554, 555 (1976).

12. Exec. Order No. 11,491, § 13(a), 3 C.F.R. 861, 870 (1966-1970 Compilation) (as amended).

13. *Id.* § 11(b), 3 C.F.R. at 868-69.

be subject to collective bargaining, even at an agency's discretion. Specifically, these "mandatory management rights" include the right to do the following:

> (1) to direct employees of the agency; (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of the Government operations entrusted to them; (5) to determine the methods, means, and personnel by which such operations are to be conducted; and (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency . . . .[14]

The mandatory management rights language of section 12(b) is designed to control the bargaining parties. First, the language tends to reduce the number of demands made by the union and thus prevents the union from meddling with management prerogatives. Additionally, it prevents unwitting or overly conciliatory management officials from yielding rights that might infringe on the power of a subsequent official of the same agency.

The protected management rights provisions[15] in sections 11(b) and 12(b) not only place limits on negotiations in collective bargaining, but also effectively circumscribe the actions and authority of the arbitrator. The logical extension of limiting the bargaining parties is to restrict the arbitrator. For if the parties are prohibited from interfering with these management rights, then the parties cannot empower an arbitrator to do their meddling for them.[16] These limitations on the arbitrator are also dictated by the langage in section 13 that prohibits grievance procedures from conflicting with other portions of the order. Thus, the scope of arbitration is limited by the management rights sections and can be no more extensive than the scope of collective bargaining.[17]

Although the mandatory and discretionary management rights are enumerated in the order, the full scope of these rights

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14. *Id.* § 12(b), 3 C.F.R. at 869-70.

15. At least 20 states have adopted management rights limitations in public employment collective bargaining. Seidenberg, *supra* note 2, at 239. *See* Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 865-66 (1970).

16. *See* Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CALIF. L. REV. 678, 697 (1976); Kagel, *supra* note 5, at 137-38.

17. The pattern of private sector experience indicates that attempts to limit the scope of collective bargaining will likely prove unproductive. *See* Grodin, *supra* note 16, at 696.

is not articulated in the broad, general language of the Executive Order. Rather, the scope is more fully expressed in the myriad policies and regulations issued by the executive branch and its various federal agencies to govern agency operations.[18] The policies and regulations related to these broadly stated management rights are so numerous and comprehensive that some commentators have suggested that few matters can be subject to negotiation or arbitration.[19]

Such a broad reading, however, would be contrary to a widely respected policy in public and private sector labor-management relations—the policy of encouraging the use of collective bargaining, including third party grievance arbitration.[20] Generally, the presence of binding arbitration as the final dispute resolution technique promotes more serious collective bargaining.[21] Arbitration is a more rational[22] and democratic[23] method for resolving disputes than retaliatory tactics that rely on economic muscle.[24] Evidence of the wide respect for binding arbitration can be found in the fact that 95 percent of all recently negotiated private sector labor-management agreements provide for binding arbitration of grievance disputes.[25] Thus, when an arbitrator's award in a fed-

18. Decisions of the Federal Labor Relations Council also play a significant role in defining the scope of the management rights. *See, e.g.,* National Treasury Employees Union Chapter No. 010 v. IRS, 4 F.L.R.C. No. 74A-93 (Feb. 24, 1976) (Rep. No. 98) (construing § 11(b) of the order).

19. *See* Tobias, *supra* note 11, at 566-70; Kagel, *supra* note 5, at 143. *But see* Aronin, *Collective Bargaining in the Federal Service: A Balanced Approach,* 44 GEO. WASH. L. REV. 576, 601 (1976).

20. Congress has established a national policy of encouraging collective bargaining in the private sector. 29 U.S.C. § 151 (1970). The history of the Executive orders demonstrates a desire to encourage collective bargaining in the federal sector of public employment. *See* notes 9-10 and accompanying text *supra.*

21. *See* McAvoy, *Binding Arbitration of Contract Term: A New Approach to the Resolution of Disputes in the Public Sector,* 72 COLUM. L. REV. 1192, 1209-13 (1972); *Legality and Propriety of Arbitration, supra* note 10, at 136.

22. *See* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, LABOR RELATIONS LAW—CASES AND MATERIALS 761, 764 (5th ed. 1974); Grodin, *supra* note 16, at 679.

23. *See* McAvoy, *supra* note 21, at 1209; Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999, 1002 (1955).

Arbitration provides experience in conflict resolution through representatives. It provides a forum in which the dispute can receive a full and fair hearing. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); *Legality and Propriety of Arbitration, supra* note 10, at 136.

24. It is also generally assumed that arbitration deters strikes. *See* McAvoy, *supra* note 21, at 1210-11. *But see* Grodin, *supra* note 16, at 701 (ability of arbitration to deter strikes over long periods of time still undetermined).

25. Cohen & Eaby, *The Gardner-Denver Decision and Labor Arbitration,* 27 LAB. L.J. 18 (1976); *see Legality and Propriety of Arbitration, supra* note 10, at 129-30. By contrast, prior to 1940 grievance arbitration was rarely employed. Cohen & Eaby, *supra* at 18.

eral sector grievance dispute infringes on a management right, the Executive Order comes into sharp conflict with the policy of encouraging collective bargaining and binding arbitration.

When one of the parties to a grievance arbitration alleges that the arbitrator's decision has infringed on a management right or violated an applicable regulation, appeal can be made to the Federal Labor Relations Council.[26] The significance of the Council's decisons is apparent because it serves as the final appellate tribunal for the majority of these appeals.[27] In developing a standard that the Council can apply to balance management rights with the general policy favoring arbitration, it is useful to examine private sector appellate treatment of arbitral awards and the common arguments against and for binding public sector arbitration.

II. Applicability of Private Sector Grievance Arbitration Practices to the Federal Sector

A. *Appellate Treatment of Private Sector Arbitral Awards*

The judiciary had dignified the role of binding arbitration in the private sector by subjecting arbitral awards to very limited appellate review.[28] Although a private sector arbitral award will be set aside if the arbitrator was biased or acted capriciously,[29]

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26. This interagency council is composed of the Secretary of Labor, the Chairman of the Civil Service Commission, and the Director of the Office of Management and Budget. To these regular members may be added other officials from the executive branch as may be designated by the President. Exec. Order No. 11,491, § 4(a), 3 C.F.R. 861, 864 (1966-1970 Compilation) (as amended).

27. There is considerable controversy over the appealability of federal sector arbitration awards to the federal courts. This subject is beyond the scope of this comment. The principles, however, developed in this comment regarding the standard of review to be applied by the Federal Labor Relations Council could be adopted by the federal courts in the event that the courts are called on to review federal sector arbitration awards. For a brief discussion of the problem of appealability to the courts, see Kagel, *supra* note 5, at 145-46, and Seidenberg, *supra* note 2, at 235-36.

When the appeal to the Council concerns the expenditures of government funds, the Comptroller General, the congressional watchdog, reserves the right to review the decision. Kagel, *supra* note 5, at 146-49.

28. The leading cases are known as the "Steelworkers Trilogy": United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

29. 9 U.S.C. § 10(a)-(c) (1970); *see* Grodin, *supra* note 16, at 698-99; Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. Rev. 936, 957 (1976) [hereinafter cited as *Judicial Deference to Arbitration*].

awards are rarely overturned on other grounds.[30] As the test now stands, the factual findings of a private sector arbitrator will not be set aside unless they are found to be clearly erroneous,[31] a procedural error will be disregarded unless it has prejudiced the outcome,[32] and jurisdictional ambiguities will be resolved in favor of the arbitral process.[33] Even legal issues that the parties have authorized for arbitral decision will not be disturbed.[34]

B. Arguments Against Binding Public Sector Arbitration

Notwithstanding the judicial deference toward binding arbitration in the private sector, there are at least three significant arguments for protecting certain management rights of federal agencies. First, there is a constitutional argument based on the closely related concepts of sovereignty[35] and illegal delegation of powers.[36] This constitutional argument asserts that the policy of

30. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrier & Gulf Nav. Co. 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). For examples of exceptions to this general rule, see Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), and Coulson, Vaca v. Sipes' *Illegitimate Child: The Impact of* Anchor Motor Freight *on the Finality Doctrine in Grievance Arbitration,* 10 GA. L. REV. 693, 694 (1976).

Recently, in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), Justice Rehnquist argued that the Court had "cast aside the policy of finality of arbitration decisions and established a new policy of encouraging challenges to arbitration decrees." *Id.* at 574 (Rehnquist, J., dissenting). *Anchor Motor Freight* can, however, be distinguished on the ground that the arbitration panel was not in fact a neutral, impartial, third party panel. Rather, the arbitration panel was a bilateral committee organized on a geographical area basis and composed solely of an equal number of representatives of the union and management. *See* Coulson, *supra,* at 697-98. The absence of a neutral third party raises a significant question about the adequacy of the representation, for the union may be induced to reach a settlement that protects its interests more adequately than the interests of the particular grieved employee.

31. *See* Grodin, *supra* note 16, at 698-99. *See also* Federal Employees Metal Trades Council v. Mare Island Naval Shipyard, 1 F.L.R.C. 557 (1973).

32. *See Judicial Deference to Arbitration, supra* note 29, at 957.

33. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960); *Judicial Deference to Arbitration, supra* note 29, at 936-37.

34. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); Grodin, *supra* note 16, at 697; *Judicial Deference to Arbitration, supra* note 29, at 960-61.

Rulings in state courts support this same deference to arbitral awards. *See id.* at 950.

35. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment,* 78 YALE L.J. 1107, 1108-11 (1969); Comment, *Public Employee Labor Organization,* 21 LOYOLA L. REV. 911, 912. The sovereignty doctrine is discussed in Railway Mail Ass'n v. Murphy, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 267 App. Div. 470, *aff'd,* 293 N.Y. 315, 56 N.E.2d 721 (1944), *aff'd,* 326 U.S. 88 (1945).

36. The illegal delegation of power doctrine can be thought of as closely related to the sovereignty doctrine; indeed, it has been called the offspring of the sovereignty doctrine. Wellington & Winter, *supra* note 35, at 1107. For a discussion of the illegal delegation of power doctrine, see *id.* at 1109-10.

deferring to arbitration in public sector employment encroaches on the sovereign prerogative by delegating important governmental functions to nongovernmental officials. Because an arbitrator, unlike elected or appointed officials, is not answerable to the public, this argument also demonstrates the tension between arbitration and the fundamental democratic premise that governmental decisions are to be made by persons who are directly or at least indirectly responsible to the electorate.[37] Although this constitutional argument has generally been rejected by state courts,[38] it is unclear whether it will be accepted by the federal courts. The management rights sections of Executive Order 11,491, however, clearly attempt to preserve the sovereignty of the federal government by expressly limiting the powers that can be delegated to an arbitrator.

A related argument, also based on political considerations and referred to as "inordinate political leverage," defends the democratic ethic that broad social issues should not be resolved until contrasting viewpoints are adequately represented, especially when ethnic, racial, religious, or political heterogeneity exists.[39] Partly because federal employees produce services that may be altered by an arbitral award and that may be socially or politically sensitive,[40] grievance disputes over working conditions and other personnel matters in public employment can require an arbitrator to confront issues involving significant elements of social planning.[41] Even elected officials acting with the advice of legislatures, boards, and committees find it difficult to adequately assess the interests of the community at large. On the other hand, an arbitrator does not receive input from all interests that might be affected by a change in the quality or character of a governmental service. Realistically, an arbitrator only attempts to accommodate the disputants—the aggrieved employee, the union, and the management.[42] Competing political interest of the public at large and of other interest groups are excluded.[43] The arbitrator serves at the pleasure of the parties and interprets their agreement. Thus, undue emphasis on arbitral finality in public employment arguably might provide unions with inordinate le-

37. Grodin, *supra* note 16, at 680.
38. *See id.* at 682-83.
39. Wellington & Winter, *supra* note 15, at 816, 870.
40. *Id.* at 858.
41. *See* Grodin, *supra* note 16, at 682.
42. *See* Wellington & Winter, *supra* note 15, at 826-27.
43. Grodin, *supra* note 16, at 681.

verage on governmental and social policy.[44]

Economic distinctions between the private and public sectors provide the third major argument against adopting private sector deference when a public sector arbitral award interferes with a management right.[45] In the private sector, individual economic interests of management, investors, and employees each compete with other such interests. The extent to which any group can prevail is limited by powerful market constraints that exert pressures on wages and prices.[46] Because of these external market constraints, private sector employers will vigorously resist grievance awards that may decrease the value of the product or service to the consuming public or that may increase costs or compensation without correspondingly increasing productivity. Otherwise, the product or service will become less competitive and the employer and investors will probably find it advantageous to invest their efforts or capital elsewhere.[47] In public employment, however, the economic interests of employees compete with societal interests. Furthermore, because there are few close substitutes for governmental services,[48] the extent to which the employees' interests can prevail is not limited by external market constraints.[49] Consequently, federal administrators arguably will find it easier to forego hard bargaining in favor of mutually acceptable compromises.[50] Moreover, if the public sector employers are less zealous in defending the agency position, the arbitrator will be less likely to scrutinize union demands and to evaluate carefully the public interests that might be affected.

C. Arguments For Binding Public Sector Arbitration

However formidable these constitutional, political, and economic arguments are, they must be balanced against the vital public interest in securing and preserving peaceful labor-

44. Wellington & Winter, *supra* note 15, at 860.

45. *See* Aronin, *supra* note 19, at 577.

46. Wellington & Winter, *supra* note 35, at 1119.

47. *Id.* Moreover, the investor's choice to invest his capital elsewhere will not constitute an unfair labor practice in this circumstance. *See* Textile Workers Union v. Darington Mfg. Co., 380 U.S. 263 (1965).

48. *See* Wellington & Winter, *supra* note 15, at 846. In the private sector, where there are no close substitutes and the demand is inelastic, unions also accrue greater power to bargain for the benefits they desire without threat of layoffs and unemployment. Wellington & Winter, *supra* note 35, at 1120.

49. Wellington & Winter, *supra* note 35, at 1120-21.

50. Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation,* 38 U. CHI. L. REV. 826, 835 (1971).

management relations. Federal employees have no legal right to strike. Their de facto right to strike, however, can be as effective, and thus as threatening, as the legalized right to strike of private sector employees. A "sick-out" by air traffic controllers or a slowdown by mail carriers can be as frustrating and as potentially damaging to commerce as a strike by employees of a private industry. In 1973 alone, federal, state, and local employees initiated 386 work stoppages and caused approximately two and one-half million work days idle.[51] Moreover, unionization of federal employees has flourished during the past decade until today unions represent more than 60 percent of all nonpostal federal employees.[52] Thus, there is a real possibility of overt economic warfare and considerable public inconvenience due to work stoppages in the federal sector.

Binding arbitration, however, provides a fair and reasonably expedient alternative to overt economic warfare.[53] Arbitration is more than a sophisticated strikebreaker who has exchanged his derby hat and brass knuckles of a half century ago for a pinstriped suit and an attache case.[54] Experience with arbitration suggests that its availability as the final step for resolving disputes can influence public employees to refrain from using economic sanctions because the employees recognize that a strike will not be viewed sympathetically by the public if binding arbitration is available.[55]

In addition to protecting the public interest in peaceful labor-management relations, binding arbitration also promotes the public interest in reducing litigation. Each overturned arbitral award invites other appeals, and the number of appeals from federal sector arbitration awards is already increasing.[56] If excepting to an award becomes the rule, a backlog will develop and justice will be administrated less effectively.[57]

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51. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1975, at 374 (1975).

52. SUBCOMM. ON CIVIL SERVICE, HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS PROGRAM, 95TH CONG., 1ST SESS. 2 (Comm. Print 1977). Postal employees are organized independently. 5 U.S.C. §§ 7101-7102 (1970). Certainly, it cannot be denied that federal employees possess significant economic muscle.

53. *See* Grodin, *supra* note 16, at 679-80; McAvoy, *supra* note 21, at 1210-11; Kagel, *supra* note 5, at 149. *But see Legality and Propriety of Arbitration, supra* note 10, at 142 (no guarantee that arbitration will prevent strikes).

54. *See* Meany, *Common Sense in Labor Law*, 27 LAB. L.J. 603, 604 (1976).

55. Wellington & Winter, *supra* note 15, at 832.

56. Seidenberg, *supra* note 2, at 233.

57. Labor leaders already vigorously contend that employees suffer because manage-

Thus, when an arbitral award interferes with a management right, it may be unwise to completely adopt the standards of arbitral finality that prevail in the private sector;[58] the scope of review of these awards, however, must be narrow.[59] Conclusiveness is at the heart of the arbitration process[60] because arbitration is only as fair and expedient as it is final.[61] Without conclusiveness, the grievance can continue indefinitely, the parties may seek other remedies, and the number of appeals will swell. Therefore, a standard of review must be developed to protect essential management rights while preserving peaceful labor-management relations and discouraging unmeritorious appeals. The standard must be fair. Moreover, it must be easy to apply in order to assure that grievance resolution will be reasonably expedient.

III. THE COMPELLING NEED STANDARD

Presently, the Federal Labor Relations Council grants considerable deference to arbitration awards. Like the courts in the private sector, the Council will reverse an award if the arbitrator was biased or capricious of if the fact findings are clearly erroneous.[62] With respect to those awards that allegedly interfere with

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ment can commit unfair labor practices and yet delay justice for years. *See, e.g.*, Meany, *supra* note 54, at 603, 606. A backlog of exceptions to arbitral awards in the federal sector would add to the already significant problem of delay that results from the inability of a party to force a recalcitrant party to comply with the arbitrator's award. Presently, there is no summary and sure method to secure compliance. Unless the recalcitrant party obtains a stay pending appeal, failure to comply with the award may be an unfair labor practice, even if the award is subsequently declared to be invalid. In the federal employment system, however, the unfair-labor-practice method of settling disputes is time consuming. The method consists of "informal procedures, formal Regional Administrators' actions, hearings before hearing officers, and appeals to the Assistant Secretary of Labor for Labor-Management Relations, who can, if the question is one of 'major policy,' refer it to the Federal Labor Relations Council." Kagel, *supra* note 5, at 143. *See* 29 C.F.R. § 203.1- .27 (1976).

58. *Cf.* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *supra* note 22, at 752-53 (quoting *Great Lakes Assembly, Report on Collective Bargaining in State and Local Government*) (public sector employment should not "slavishly follow" precedents from the private sector); Wellington & Winter, *supra* note 35, at 1111 (complete adoption of private sector practices is inappropriate).

59. After reviewing the experience with arbitration under Exec. Order 10,988, the Study Committee recommended that advisory arbitration should be discontinued and that "arbitrators decisions should be accepted by the parties." Exceptions to arbitral awards "should be sustained *only* on grounds similar to those applied by the courts in private sector labor-management relations," and the exceptions should be handled "*expeditously.*" *See* U.S. FEDERAL LABOR RELATIONS COUNCIL, *supra* note 10, at 74 (emphasis added). These recommendations were incorporated into Exec. Order 11,491.

60. *Judicial Deference to Arbitration, supra* note 29, at 949, 961-62.

61. *See* Coulson, *supra* note 30, at 693-94.

62. *See* 5 C.F.R. § 2411.37(a) (1977).

mandatory or discretionary management rights, however, the Council has not enunciated a clear or consistent standard. The Council has simply stated that it will reverse an award that violates a law, the Executive Order, or an appropriate agency policy or regulation.[63]

For example, in *Francis E. Warren Air Force Base v. American Federation of Government Employees, Local 2354*,[64] the Council reviewed an agency's appeal from an arbitral award in which the arbitrator determined that the grievant employee had been wrongfully denied a promotion. The employee had been previously demoted from a higher grade, but not for personal cause. By the terms of the collective bargaining agreement, the employee was entitled to special consideration for future employment vacancies at the grade he previously occupied. When a vacancy occurred, the employee was passed over and consequently a grievance was filed. The arbitrator determined that the terms of the collective bargaining agreement governed the situation, that the employee had been wronged, and that the position should now be made available to him. Although the Council's opinion does not expressly refer to interference with the management rights set forth in the order, the arbitrator's award did restrict section 12(b) rights, including the right to "promote, transfer, assign, and retain employees."[65] The Council found that the award interfered specifically with two Civil Service Commission regulations,[66] and therefore concluded that the award should be set aside.

This case typifies the Council's decisions that have reviewed arbitration awards and illustrates the approach that the Council has employed in those reviews. If the award does interfere with a management right by conflicting with the order itself or with a published policy or regulation issued by either an agency headquarters or a primary national subdivision of an agency, then the Council will reverse the award. If the award does not interfere, the Council will sustain the award.[67]

This approach is inadequate to fully achieve the purposes of arbitration in the federal sector. The approach fails to adequately

63. *Id.* § 2411.32.

64. 4 F.L.R.C. No. 75A-127 (Sept. 30, 1976) (Rep. No. 114).

65. Exec. Order No. 11,491, § 12(b)(2), 3 C.F.R. 861, 869 (1966-1970 Compilation) (as amended).

66. 4 F.L.R.C. No. 75A-127, at 6.

67. Defense Commercial Communications Office v. National Ass'n of Gov't Employees, Local Union No R7-23, 5 F.L.R.C. No. 75A-87 (Jan. 19, 1977) (Rep. No. 121).

restrain an agency's tendency to protect as much of its own discretion as possible by issuing policies and regulations covering virtually every aspect of management. Moreover, the approach focuses simply on whether the award conflicts with a published policy or regulation and fails to evaluate the justification for the policy or regulation. Finally, this approach subjects agency policies and regulations to less scrutiny when they are examined because of an alleged conflict with an arbitral award than when they are examined in the context of union-management contract negotiations.

In the process of negotiating a collective bargaining agreement, an agency administrator may determine that an issue is nonnegotiable and the agency may refuse to bargain with the union about that issue. To test the negotiability of the issue, the union may appeal to the Federal Labor Relations Council.[68] In this circumstance, as with appeals from arbitration awards, the Council has stated that it will sustain the position of the federal agency if the union proposal violates the law, the executive order, or an appropriate agency policy or regulation.[69] But with regard to negotiability disputes, the Council has additionally enunciated an appellate standard by which it will test the union proposal that allegedly interferes with an agency policy or regulation. Applying this standard, the Council will sustain the agency's refusal to negotiate based on the alleged conflict *only* if the applicable policy or regulation is issued from a federal agency headquarters or a primary national agency subdivision and is supported by a "compelling need."[70] The Council has explained that a policy or regulation is supported by a compelling need if it meets one or more of the following five illustrative criteria:

> [1] The policy or regulation is *essential,* as distinguished from helpful or desirable, to the accomplishment [of the] mission of the agency or the primary national subdivision;
>
> [2] The policy or regulation is *essential,* as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;

68. Exec. Order No. 11,491, § 11(c), 3 C.F.R. 861, 869 (1966-1970 Compilation) (as amended).

69. *Id.* § 11(c)(4).

70. *Id.* § 11(a), 3 C.F.R. at 868; *see, e.g.,* National Ass'n of Gov't Employees, Local No. R14-87 v. Kansas Nat'l Guard, 5 F.L.R.C. Nos. 76A-16, -17, -40, -43, -54 (Jan. 19, 1977) (Rep. No. 120) (National Guard Bureau regulations not supported by a "compelling need").

> [3] The policy or regulation is *necessary* to insure the maintenance of basic merit principles;
>
> [4] The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is *essentially nondiscretionary* in nature; or
>
> [5] The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is *essential* to the effectuation of the public interest.[71]

The thesis of this comment is that the Council could and should also apply this compelling need standard when it reviews an arbitral award that is challenged because it allegedly conflicts with an agency policy or regulation. This test provides a multifaceted approach that can be applied to most union proposals which might interfere with management rights. Moreover, because the Council defines the criteria as illustrative, the test can be expanded to fit unforeseen situations. According to this standard, the Council would sustain the award unless the Council found that the applicable policy or regulation was supported by a compelling need.

The Council's analysis could proceed as follows. First, the Council would consider whether the arbitrator's award actually conflicts with an agency policy or regulation that protects a mandatory or discretionary management right. If it did not conflict, the award would be sustained. Similarly, if the interference were merely de minimus, the award would be sustained. If, however, the award did conflict with the policy or regulation, then the Council would proceed to categorize the interference according to the interest or interests protected by the policy or regulation. The illustrative criteria identify five such interests: (1) accomplishment of the agency mission, (2) management of the agency, (3) maintenance of basic merit principles, (4) implementation of nondiscretionary mandates, and (5) uniform treatment of employees where such uniformity is in the public interest. After categorizing the interest affected, the Council would apply the relevant test or tests specified in the criteria. Generally, in order to apply the relevant test, the Council will be required to define the parameters of the specific interest with which the award interferes. For example, the test for the first category will require

71. 5 C.F.R. § 2413.2 (1977) (emphasis added).

the Council to define the "agency mission;" for the third category, "basic" merit principles; for the fourth category, the congressional, executive, or judicial "mandate;" for the fifth category, the "public interest" in uniform personnel policies.[72] From the illustrative criteria it is clear that a need is not compelling unless it is essential or nondiscretionary. Thus, this final inquiry should include an evaluation of whether there are less restrictive alternatives that still protect the essential management right but diminish the restrictive impact on the arbitrator's discretion in fashioning a remedy.

Implementing the compelling need standard for reviewing arbitration awards would bring numerous benefits to federal sector labor-management relations. First, the compelling need standard introduces greater certainty regarding the outcome of an appeal from an arbitrator's award. In so doing, the compelling need standard may adequately respond to the constitutional challenge to the use of binding arbitration in the federal sector. Most state courts considering the propriety of arbitration in public employment have held that the problems of sovereignty and illegal delegation of powers are satisfied if the arbitrator is directed to exercise his power in accordance with unambiguous decisional standards supplied by the proper governmental authority.[73] Executive Order 11,491 as amended contains some decisional standards for the arbitrator.[74] Standing alone these decisional standards are rather ambiguous; however, the compelling need standard adds greater certainty to the review process. For this reason, the compelling need standard should also promote more serious negotiations by the parties before they refer the matter to the arbitrator.

Second, although the compelling need standard may not completely satisfy the inordinate-political-leverage challenge by

72. The second category, unlike the others, covers a nonspecific interest—management—the parameters of which are difficult to define. Because it too is subject to the final requirement of the test—that the particular policy or regulation be supported by a compelling need, the category should not become a loophole through which agency officials can subvert the arbitration process.

73. Staudohar, *Constitutionality of Compulsory Arbitration Statutes in Public Employment*, 27 LAB. L.J. 670, 675-76 (1976); McAvoy, *supra* note 21, at 1205-06; Wellington & Winter, *supra* note 15, at 835.

74. The order provides that the administration of the collective bargaining agreement is subject to "existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual," to "published agency policies and regulations in existence at the time the agreement was approved," and to "subsequently published agency policies and regulations." Exec. Order 11,491, § 12(a), 3 C.F.R. 861, 869 (1966-1970 Compilation) (as amended).

involving all interested parties, the standard does substantially decrease the likelihood that an arbitrator will intrude into areas where there are significant policy questions. Overcoming this argument by involving all interested parties in the dispute resolution process would be extremely difficult. The need for an expeditious resolution virtually precludes the possibility that all interest groups can be effectively represented. The compelling need standard, however, will force the arbitrator to focus on the agency's mission, and that mission will generally be defined in terms of the public interest, at least the public interest as it is perceived by the President and Congress. Thus, although all interest groups cannot be represented, the public interest in general is not neglected.[75]

Third, the compelling need standard also provides at least one method for dealing with the economic argument against adopting private sector deference to arbitration. The compelling need standard cannot supply competition; nor can it provide traditional external market constraints. But the need to remain within overall agency budget limitations as well as the need to adequately fund alternative agency programs could serve as compelling needs.[76] This will be particularly true when the President and Congress require that federal agencies employ tighter fiscal accountability and justify increased expenditures by cost-benefit analysis.

Fourth, the compelling need standard is already familiar to union representatives and management officials who are participating in federal sector collective bargaining. Recently, because the compelling need test had been applied to negotiability disputes, several federal agencies have begun to systematically review their regulations and to identify those regulations that the agency considered to be justified by a compelling need.[77]

Fifth, the compelling need standard permits the Federal Labor Relations Council to delineate federal standards through a case-by-case approach. The Council has expressed a desire to

75. Experience suggests, moreover, that despite the pressure from the bargaining parties, arbitrators are not likely to subordinate public interests, especially if the decison might create disruptive political or social reactions. *See Legality and Propriety of Arbitration, supra* note 10, at 141.

76. It has been suggested that the decisional standards which the federal sector arbitrator must employ should be amended to require the arbitrator to specifically consider the agency budget constraints. *See* Grodin, *supra* note 16, at 684-85 & 687 n.31.

77. Telephone conversation with Maj. Dennis Coupe, Instructor in Labor Law at the Judge Advocate General's School in Charlottesville, Virginia (March 10, 1977).

use case-by-case, individualized analysis so that it can proceed carefully as it makes new law in the federal sector.[78]

Sixth, the compelling need standard is flexible enough to accommodate changing circumstances. National priorities change in response to international and domestic development, including changes in the administration. The executive branch must maintain the ability to respond. The compelling need standard permits management rights to expand or contract in accordance with national priorities and redefinitions of agency missions. From the unions' perspective, this flexibility introduces a disquieting ambiguity into the review process. The flexibility, however, is in the public interest and is not unpredictably extensive.

Finally, and perhaps the most importantly, employing the compelling need standard for reviewing appeals from arbitration awards would adequately implement the intent of Executive Order 11,491. The order is intended to make the scope of review narrow enough to protect the public interest by promoting collective bargaining and arbitration and by discouraging unmeritorious appeals, but broad enough to account for the exigencies of public employment. Moreover, the order expressly requires management to retain only those rights that accord with applicable policies and regulations.[79] When tested on appeal in negotiability disputes, it is clear that "applicable policies and regulations" are only those which are supported by a compelling need.[80] Only these policies and regulations define the scope of collective bargaining; only the same policies and regulations should define the scope of an arbitrator's discretion.

IV. Conclusion

As has been noted,

> A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis, modified, of course, to meet the exigencies of the public service.[81]

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78. U.S. Federal Labor Relations Council, *supra* note 10, at 38 (1975 Council recommendations).

79. The mandatory management rights section is prefaced with these words: "management officials of the agency retain [these rights] in accordance with applicable laws and regulations," Exec. Order No. 11,491, § 12(b), 3 C.F.R. 861, 869 (1966-1970 Compilation) (as amended).

80. *See* note 73-75 and accompanying text *supra.*

81. ABA Section of Labor Relations Law, Report of Committee on Labor Rela-

By accounting for the exigencies of the public service, the compelling need standard provides the Federal Labor Relations Council, federal agencies, and unions with an appropriate standard for reviewing arbitral awards. Its application in arbitration appeals would end the present dissimilar treatment for negotiability disputes and grievance disputes.[82] Moreover, the compelling need standard is reasonably similar to the standard employed in the private sector.

Undoubtedly, collective bargaining in federal sector labor-management relations is here to stay,[83] and binding third party arbitration will continue to play a vital role in federal sector grievance dispute resolution. The compelling need standard recommends itself as a standard that can help federal sector collective bargaining to work more effectively by protecting essential governmental interests while accommodating significant employee rights.

TIONS OF GOVERNMENTAL EMPLOYEES 89, 90 (1955), *reprinted in part in* R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *supra* note 22, at 711 (emphasis added).

82. Parties to a grievance dispute cannot circumvent an unsupported regulation, whereas a regulation in a negotiability contest can be challenged. A modification to the present appealability standards may be necessary to enable a disputant to raise the compelling need issue before the Council in an arbitration dispute. Currently, appellate review may be obtained only if grounds are shown that the "award violates applicable law, appropriate regulation, or the order or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations." 5 C.F.R. § 2411.32 (1977). If, for example, an arbitrator denies a grievance because of a regulation, then the decision does not "violate" the regulation and it cannot be appealed. The regulation, however, should nevertheless be challengable if not supported by a compelling need.

83. Aaron, *Reflections on Public Sector Collective Bargaining*, 27 LAB. L.J. 453, 458 (1976).