IX. Labor Law

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A. Arbitration as an Alternative Forum under the State Personnel Act.

It was a relatively uneventful year in the Indiana appellate courts for state law matters pertaining to labor relations. However, there were two significant decisions which may severely undermine state employee access to arbitration as an alternative forum for resolution of disputes filed under the State Personnel Act.

The State Personnel Act[1] provides that an employee may file a complaint "if his status of employment is involuntarily changed or if he deems conditions of employment to be unsatisfactory."[2] Further, it provides for a complaint appeal procedure consisting of several steps leading to arbitration. Those procedural steps include complaint to the employee's immediate supervisor, intermediate supervisor, appointing authority, the state personnel director, and then to the State Employee's Appeal Commission.[3] The Act then provides as follows:

> If the recommendation of the commission is not agreeable to the employee, the employee, within fifteen (15) calendar days from receipt of the commission recommendation, may elect to submit the complaint to arbitration. . . . The commissioner of labor shall prepare a list of three (3) impartial individuals trained in labor relations, and from this list each party shall strike one (1) name. The remaining arbitrator shall consider the issues which were presented to the commission and shall afford the parties a public hearing with the right to be represented and to present evidence. The arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission.[4]

In construing this portion of the Act in *Rockville Training Center v. Peschke*,[5] the Indiana Court of Appeals distinguished between cases

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[1]IND. CODE §§ 4-15-2-1 to -43 (1982 & Supp. 1984).

[2]*Id.* § 4-15-2-35 (1982).

[3]*Id.* § 4-15-1.5-1.

[4]*Id.* § 4-15-2-35.

[5]450 N.E.2d 90 (Ind. Ct. App. 1983). In *Rockville*, the company appealed the trial

in which the Commission finds merit in the employee's complaint and issues a recommended remedy which is not to the employee's satisfaction and those cases in which the Commission finds that the employee's complaint is without merit.[6]

The court focused heavily on the language in the Act: "If the *recommendation* of the commission is not agreeable to the employee, the employee . . . may elect to submit the complaint to arbitration."[7] The court noted that "[t]he fact a recommendation is made presumes a decision that the complaint is meritorious, both procedurally and substantively."[8] The court reasoned, "if the decision is that the complaint is without merit . . ., there is, of course, no recommendation. There is only a decision. Such a decision, *i.e.*, one without a recommendation, is not subject to arbitration."[9] The court concluded that "[t]his construction of the statute fulfills our obligation to give meaning to every word."[10]

A careful look at the Act raises considerable question as to whether or not the court did give meaning to every word of the statute. The court determined that a recommendation should be distinguished from a decision.[11] Through this distinction the court restricts employee access to arbitration to only those cases in which the Commission finds merit

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court's affirmance of an arbitration award in favor of employees who were required to attend daily meetings without overtime compensation.

[6]*Id.* at 92.

[7]IND. CODE § 4-15-2-35 (1982) (emphasis added).

[8]450 N.E.2d at 92.

[9]*Id.* The *Rockville* approach to arbitration was not signaled by earlier cases where decisions that the employee's complaint was unmeritorious were taken to arbitration.

[10]*Id.* (citations omitted).

[11]*Id.* The court's narrow reading of the Act in *Rockville*, so as to exclude from arbitration those cases in which the Commission finds no merit in the employee's complaint, is not advanced by the decision cited by the court as "not inconsistent" with its reasoning. In Wagner v. Kendall, 413 N.E.2d 302 (Ind. Ct. App. 1980), the court determined that an arbitration award under the Act is subject to judicial review via the Uniform Arbitration Act. *See* IND. CODE § 34-4-2-13 (1976) (current version at IND. CODE § 34-4-2-13 (1982)). The court in *Rockville* recognized that an adverse decision on the merits, as opposed to an unsatisfactory remedy, was submitted for arbitration by employees in *Wagner*. 450 N.E.2d at 90. However, the *Rockville* court explained this inconsistency by noting that the issue was not before the *Wagner* court. *Id.* at 92-93.

Also worthy of note is Indiana Veteran's Home v. Orr, 439 N.E.2d 1374 (Ind. Ct. App. 1982). In *Indiana Veteran's Home*, decided by the same court with the same judge writing for the court as in *Rockville*, the court addressed the authority of an arbitrator to make an award in favor of state employees when the employees' complaint involved merit raises. *Id.* at 1375. After receiving an unfavorable decision on the merits from the State Employees Appeals Commission, the employees in *Indiana Veteran's Home* were allowed to submit their claim for arbitration under the Act. *Id.* at 1376. The court stated:

[W]e conclude the employees met the requirements of I.C. 4-15-2-35 and were

in the employee complaint and recommends a remedy unsatisfactory to the employee. No such distinction is apparent within the Act.

The Act subdivides cases decided by the Commission into two categories: (1) cases in which the Commission finds action taken on the basis of politics, religion, sex, age, race, or membership in an employee organization and (2) all other cases.[12] Regarding all other cases, the Act provides that "the appointing authority shall follow the recommendation of the commission . . . ."[13] which could include a recommendation that the complaint be dismissed for lack of merit. Consequently, there is no basis for the court's critical premise that "[t]he fact [that] a recommendation is made presumes a decision that the complaint is meritorious . . . ."[14] Such a premise gives no meaning to the unambiguous statutory language which groups "all other cases"[15] together and requires the appointing authority to follow the Commission's recommendation whether or not the complaint is found to be meritorious.

The Act further provides that "[i]f the recommendation of the commission is not agreeable to the employee, the employee . . . may elect to submit the complaint to arbitration."[16] Recommendations to dismiss the complaint as unmeritorious would clearly fall within the scope of recommendations not agreeable to the employee and should therefore be subject to the employee's election to submit the complaint to arbitration. Contrary to the appellate court's decision, the Act places no limitation on the employee's access to arbitration based on the type of unfavorable recommendation made by the Commission.

Allowing submission of unmeritorious complaints to arbitration would seem to comply with the Indiana Supreme Court's outline of the Act's complaint process in *State ex rel. Pearson v. Gould*.[17] The court described the process as a step-by-step progression through "the state employees appeals commission . . . and finally binding arbitration."[18] The court

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entitled to submit their complaint to the State Employees Appeals Commission. Thereafter, by the provisions of that same statute, the employees were entitled to submit their complaint to arbitration, *i.e.*, the arbitrator had "jurisdiction."439 N.E.2d at 1376; *see also* State v. Martin, 460 N.E.2d 986 (Ind. Ct. App. 1984) (court noted the *Rockville* decision but refused to allow the state to contest the arbitration award because the issue was not raised in a timely manner).

[12]IND. CODE § 4-15-2-35 (1982).

[13]*Id.*

[14]450 N.E.2d at 92.

[15]"All other cases" are those in which discrimination is not at issue. *See supra* note 12 and accompanying text.

[16]IND. CODE § 4-15-2-35 (1982).

[17]437 N.E.2d 41 (Ind. 1982). Although the court outlined the Act's complaint procedure, the main thrust of the opinion concerned alleged unauthorized practice of law before the State Employees Appeals Commission.

[18]*Id.* at 42.

stated that "if the *decision* of the commission is not agreeable to the employee, the employee may elect to go further and submit the complaint to arbitration *which is the last step in the complaint process.*"[19] Although the court in *Gould* did not specifically address the construction of the Act's complaint process, the decision acknowledged an appeal to arbitration from unsatisfactory Commission decisions, not just unsatisfactory Commission remedy recommendations in decisions in which the Commission found merit in the employee's complaint.[20]

A statutory construction allowing arbitration of unmeritorious complaints, as well as meritorious complaints which are disagreeable to the employee, is also a common sense construction. While, as an arbitrator, I confess to a bias in favor of the arbitration process,[21] arbitration has become widely accepted as a desirable procedure for the relatively quick, inexpensive, and equitable resolution of labor disputes.[22] It makes little sense to afford employees the option to chose arbitration over the more expensive and slower judicial review process only in cases in which the Commission has found merit in their complaints. Clearly, employees have at least as great an interest in a quick, inexpensive, and equitable resolution of cases in which the Commission has found no merit in their complaints as they have for cases in which merit has been found but only an unsatisfactory remedy has been offered.

The problems raised by *Rockville*[23] are compounded by *State v. Van Ulzen*.[24] The Indiana Court of Appeals in *Van Ulzen* noted the opinion in *Rockville* and used the decision to even further restrict state employee election of the arbitration forum under the Act.

In *Van Ulzen*, the Commission had rejected the employee's complaint as having "'failed to state a claim upon which relief [could] be granted.'"[25] The court found that the Commission's determination that the complaint

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[19]*Id.* (emphasis added).

[20]*Id.*

[21]The author is a member of the National Academy of Arbitrators and he is included on the panels of the Federation of Mediation and Conciliation Service and the American Arbitration Association.

[22]In a series of cases in 1960, the United States Supreme Court examined the validity of arbitration as opposed to litigation. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Specifically, in *Warrior & Gulf*, the Court found that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-83 (footnote omitted). *See also* Wagner v. Kendall, 413 N.E.2d 302 (Ind. Ct. App. 1980). In dictum the *Wagner* court noted that the purpose of arbitration is to allow disposition more expeditiously and with more facility than litigation.

[23]450 N.E.2d at 90.

[24]456 N.E.2d 459 (Ind. Ct. App. 1983).

[25]*Id.* at 462 (quoting from the Commission's decision).

was unmeritorious was appealable under the Administrative Adjudication Act (AAA)[26] and went on to state:

> If the decision of the Commission was arbitrary and capricious, contrary to constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, or unsupported by substantial evidence, then the trial court has the power to remand the case and compel the Commission to (1) conduct a hearing; and (2) possibly, to allow arbitration of the claim.[27]

Considering the court's finding, it apparently restricted employee access to the arbitration forum to those cases in which the employee exhausts the appellate procedures under the AAA and obtains an order allowing arbitration of the claim. If such a restriction was the court's intention, it is totally unsupported by the State Personnel Act.[28] The Act clearly affords the employee the option of electing to submit the complaint to arbitration "[i]f the recommendation of the commission is not agreeable to the employee."[29] The Act provides no requirement that an employee exhaust AAA appeal procedures or obtain a court order to arbitrate.[30] Such a construction of the Act would be inconsistent with its requirement that the employee elect to submit his claim to arbitration "within fifteen (15) calendar days from receipt of the commission recommendation."[31] Clearly, the appeal process could not be exhausted within such a short period. Thus, it is logical to conclude that the legislature intended that the employee have the right to make a timely election either to appeal adverse Commission decisions or recommendations under the AAA, or to submit the complaint to arbitration.[32]

Perhaps the *Van Ulzen* court did not intend its decision to restrict employee access to arbitration to only those cases in which court orders are obtained through the judicial review process under the AAA. The court cites the *Rockville* case to bolster its decision.[33] If the *Rockville* decision is correct, Van Ulzen was properly denied access to arbitration because the Commission decided that the complaint had no merit, not because a meritorious complaint was submitted and the employee deemed the remedy unsatisfactory.[34]

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[26]IND. CODE §§ 4-22-1-1 to -30 (1982 & Supp. 1984).

[27]456 N.E.2d at 462.

[28]IND. CODE §§ 4-15-2-1 to -43 (1982 & Supp. 1984).

[29]IND. CODE § 4-15-2-35 (1982).

[30]*Id.*

[31]*Id.* The court's decision renders the legislature's temporal limitation superfluous. *See* Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981); Lugar v. New, 418 N.E.2d 248 (Ind. Ct. App. 1981) (cited by the court in *Rockville* as standing for the proposition that every word in a statute should be given meaning).

[32]*See supra* text accompanying notes 17-20.

[33]456 N.E.2d at 462-63.

[34]*Id.* at 461.

The *Van Ulzen* court accepted the *Rockville* court's construction of the Act as a "practical result" and explained:

> [I]f the complaints were termed legally insufficient at the outset by the Commission, then that legal insufficiency is not cured simply by taking the matter to arbitration. For example, if the Commission was in error in its ruling, then the complaint will be reviewed by the trial court pursuant to the AAA, and it will remand the matter and compel the Commission to conduct a hearing. If the employees' grievances are deemed meritorious by the Commission, it will make a recommendation to the appointing authority; then, if the employees are dissatisfied with the recommendation, they may submit the complaint to arbitration. On the other hand, if, on judicial review, the trial court sustains the Commission's decision, then a pointless arbitration proceeding is avoided.[35]

This complicated procedure, flowing from the *Rockville* and *Van Ulzen* decisions, does not appear more practical than the procedure seemingly provided by the Act, where an employee may elect the expedient of arbitration when any unsatisfactory decision is rendered by the Commission.[36] Under *Van Ulzen*, the aggrieved employee may be required to pursue the appellate process under the AAA from trial court to court of appeals and possibly to the Indiana Supreme Court before the complaint can finally be resolved. Moreover, the review of the Commission decision which is available in these courts is very restricted.[37]

The *Van Ulzen* court rationalized that under its statutory interpretation, if the trial court sustains the Commission's decision, then a pointless arbitration proceeding is avoided. This rationale ignores the lengthy and cumbersome judicial appeal procedure. A more reasonable approach would allow arbitration. When the arbitrator rules in an arbitration proceeding, according to the Act, the arbitrator's findings and recommendations are binding on both parties, thus circumscribing what would then be the pointless appellate procedure.

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[35]*Id.* at 463.

[36]*See supra* notes 21, 28 and accompanying text.

[37]Under the AAA, IND. CODE § 4-22-1-14 (1982), in order to grant an aggrieved employee relief from an agency decision, the reviewing court must sustain the employee's allegation that the agency's action was

> (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
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> (2) Contrary to constitutional right, power, privilege or immunity; or
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> (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
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> (4) Without observance of procedure required by law; or
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> (5) Unsupported by substantial evidence.

Id.

B. Teacher Bargaining

The Certificated Educational Employee Bargaining Act (CEEBA)[38] provides that if no agreement is reached between a school board and the union representing teachers as the budget submission date draws near, "the parties shall continue the status quo and the employer may issue tentative individual contracts and prepare its budget based thereon."[39] In *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers Association*,[40] the teachers' contract for the 1977-78 school year contained a salary schedule which listed salary levels based upon length of service and type of degree held by the teachers.[41] The parties were unable to reach an agreement upon a salary schedule for the 1978-79 school year by the school board's budget submission date.[42] The school board concluded that its teachers should be paid the same amounts they had received for the 1977-78 school year, with no increases as provided in the 1977-78 school year schedule for an additional year of service and the attainment by some teachers during the prior year of a master's degree.[43]

An unfair labor practice charge was filed by the teachers with the Indiana Education Employment Relations Board (IEERB).[44] The IEERB ultimately sustained its Hearing Examiner's finding that the school board had maintained the status quo as required by the collective bargaining statute and, therefore, had not committed an unfair labor practice.[45] The trial court overruled the IEERB, only to be reversed by the Indiana Court of Appeals. The appellate court held that the parties' achievement of a negotiated settlement in the meantime, which included the increases previously agreed upon under the 1977-78 salary schedule, rendered the case moot.[46]

The Indiana Supreme Court then reversed the court of appeals on the mootness question.[47] The court stated "that although this issue is moot with respect to the parties in the instant case, it is an issue which does recur whenever negotiation on a new contract continues after the start of a new school year and also recurs in many school districts

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[38]Act of Apr. 24, 1973, Pub. L. No. 217, § 1, 1973 Ind. Acts 1080, 1080 (codified at IND. CODE § 20-7.5-1-1 to -14 (1982)).

[39]IND. CODE § 20-7.5-1-12(e) (1982).

[40]456 N.E.2d 709 (Ind. 1983). For a discussion of the procedural aspects of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 121 (1985).

[41]456 N.E.2d at 710.

[42]*Id.* at 710-11.

[43]*Id.* at 711.

[44]*Id.*

[45]*Id.*

[46]*Id.*

[47]*Id.*

throughout the state."[48] In addition, although the appellate court denied that the issue was of great public interest, the Indiana Supreme Court found the question to be "an issue of great public interest since violations of the statute governing collective bargaining between school corporations and their certified employees would necessarily undermine the bargaining relationship between school corporations and teachers and have a detrimental effect upon the overall educational environment."[49]

On the merits, the court noted that the experience-based salary increases and master degree adjustments were a part of the prior contract and held that, "In order to maintain the status quo of that contract, the school board was required to maintain the status quo both as to the salary schedule and the increments which were a part of that schedule."[50] The court noted that not requiring school boards to pay the increases would enable the school corporations to withhold the increases as a bargaining tool.[51] In support of its decision, the court cited authority from other jurisdictions in which pay increases were required to maintain the status quo.[52]

In short, the *Mill Creek* case lays to rest the troublesome question as to the meaning of "status quo" under the CEEBA when the parties' prior agreement contains a salary schedule with incremental increases for years of service and/or advanced academic degrees. Because salary schedules of the type considered in *Mill Creek* are common throughout the teaching profession, resolution of this issue should provide much-needed guidelines in the area. The *Mill Creek* requirement that school employers who have such salary schedules pay teachers increases in accordance with the former contract salary schedules while bargaining continues is an equitable one. This requirement should assist the parties in reaching a new agreement by eliminating the need to bargain concerning increases which the parties had already agreed to and by eliminating the use of those previous increases as a bargaining tool.

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[48] *Id.*

[49] *Id.*

[50] *Id. at 712.*

[51] *Id.*

[52] *Id.* The court relied on authority from Florida, New Jersey, California, Illinois, and the Sixth Circuit Court of Appeals.