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## THE JUDICIARY'S EFFORTS TO SAVE PUBLIC EMPLOYERS FROM THE BARGAINS THEY HAVE MADE: THE NON-DELEGABILITY AND AGAINST PUBLIC-POLICY DOCTRINES

*James A.W. Shaw\**

### I. INTRODUCTION

Among the critiques of collective bargaining in the public sector is that unions, for a variety of reasons, are able to extract too many concessions from their employers. However, this view is subject to serious challenge in the area of discipline and appointment—the subject of this article. While the vast majority of collective bargaining agreements (“CBA”) require that employees be discharged only for just cause, state courts are becoming increasingly active in helping public employers get out from under arbitration decisions, requiring either the reinstatement or appointment of employees as required by the CBA.

The primary forms that these challenges take are in the non-delegability<sup>1</sup> and against-public policy<sup>2</sup> doctrines. The theory behind the non-delegability doctrine is that an employer cannot bargain away the right or ability to personally perform its responsibilities, such as certain hiring and firing decisions.<sup>3</sup> The result is that courts will, occasionally, vacate an arbitration award that orders reinstatement of an employee on the theory that the arbitrator has exceeded her or his authority by treading upon the employer’s exclusive rights under a statute.<sup>4</sup> For example, a CBA might require a school principal to grant a transfer request to the most senior applicant, but the principal chooses to transfer

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\* This article expresses the view of the author alone, and does not necessarily represent the views of his law firm or his clients.

1. See *infra* pp. 381-88.

2. See *infra* pp. 373-81.

3. See, e.g., *City of Somerville v. Somerville Mun. Emps. Ass’n*, 887 N.E.2d 1033, 1036-38 (Mass. 2008).

4. See, e.g., *id.*; *Sch. Comm. of Newton v. Newton Sch. Custodians Ass’n, Local 454*, 784 N.E.2d 598, 608 (Mass. 2003).

the least senior applicant instead. The union grieves, and an arbitrator finds a contract violation, ordering that the position be awarded to the most senior applicant as the CBA required. A court is now more likely to vacate that arbitration decision on the ground that the award intrudes upon the employer's purported non-delegable right to determine to whom the transfer is given.

Under the public policy doctrine, a court will invalidate an award it considers to be against public policy.<sup>5</sup> Consider the example of a police officer who is accused of misconduct and fired. The union grieves, alleging clear lack of progressive discipline in violation of the just cause standard. The union wins, and the employee is ordered reinstated. A court might invalidate the award on the theory that the reinstatement of a police officer fired for misconduct violates public policy, even where the discharge breached the CBA.

The larger theme is that, for these reasons, a CBA in the public sector means less than one in the private sector. In the examples above, it is highly unlikely that a court reviewing a private sector award would disturb the award, but in the public sector, there is a constant risk that the court will take away the benefit of the bargain by refusing to enforce a decision. By contrast, there is virtually no countervailing force whereby a union can get adverse awards overturned. Thus, these two approaches, the non-delegability and public policy doctrines, are becoming more frequently litigated to employers' advantages, even in the absence of legislative efforts to minimize bargaining rights.

## II. THE POWER DYNAMICS IN REACHING ARBITRATION

The path a union must take to successfully arbitrate a grievance is fraught with peril and is typically a one-way effort to reverse the power dynamic of the workplace. The vast majority of arbitration cases are initiated by unions seeking to enforce a CBA.<sup>6</sup> This is because some CBAs are drafted such that only the union can initiate the grievance arbitration process, but in more practical terms, it is a function of the power balance in the workplace. In contrast, non-union public

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5. See *infra* pp. 373-81.

6. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 966, 1041 (2000) (stating that an arbitration agreement is included in more than 95 percent of collective bargaining agreements and that traditionally "union arbitration of workplace grievances was the primary context for American arbitration").

employers have virtually unfettered discretion to manage the workplace.<sup>7</sup> That discretion is curbed by the existence of a CBA resulting from negotiations with a unionized bargaining unit of employees.

It is fair to describe a CBA as setting forth positive restrictions on managerial discretion. Where the non-unionized employer acts with unfettered discretion, the unionized employer acts with similar discretion, except when curtailed by a CBA. For example, an employer can require drug testing or schedule employees however it sees fit unless these actions are prohibited or otherwise regulated by the CBA. A union's only power to make changes in the workplace is by achieving these positive restrictions on the employer's authority through negotiation.<sup>8</sup> Absent those victories to modify the status quo, there would be nothing to arbitrate.

By contrast, where an employer does seek to make changes, it simply exercises its power and does so. The employer does not need the union's agreement or the imprimatur of an arbitrator's decision before taking action.<sup>9</sup> Thus, it is almost always the union that finds itself in the defensive posture of filing a grievance and seeking arbitration to protest an employer's action.<sup>10</sup> It is the union that is seeking to restore the status quo that existed before the employer's action. Put differently, the employer can exercise its power to make changes even where such

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7. See Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1140-41 (2007). Certainly that discretion is circumscribed by external law, such as laws requiring a minimum wage, a safe workplace, and non-discriminatory practices. In the public sector, there are often some minimal due process rights, either constitutionally required or created by statutes, such as civil service requirements. But these factors are constant across union and non-union workplaces, and I refer to those areas that are not otherwise guided by external law.

8. See 48A AM. JUR. 2D, *Labor and Labor Relations* § 2329 (2010) (stating that an employer is restricted from making unilateral changes to the terms and conditions of employment after a union has been designated as representative of employees and has decided to bargain with the employer).

9. See Hirsch & Hirsch, *supra* note 7, at 1134 ("In today's competitive environment, the dominant form of workplace governance lacks the presence of a union; it is a governance structure under which management has unilateral, albeit constrained, discretion with respect to most aspects of the workplace.").

10. There are exceptions to the rule. For example, employers might bring a grievance against a union alleging violation of a no-strike clause, or a clause restricting other protected, concerted activity such as picketing, leafleting or bannereting. And yet even in these situations, the employer is not left only with the option of arbitrating the dispute, but more frequently indulges in self-help by taking disciplinary action against the protesting employees, and forcing the union into the defensive posture of challenging that disciplinary action.

changes are potentially limited by the CBA, rather than by first seeking a declaration from an arbitrator that its desired course of action is proper. This is a problem that

involves whose interpretation of the contract should govern pending the arbitrator's definitive ruling. Labor law assumes that management's interpretation prevails, and employees must obey unless and until they win their case (which may be months or even years later, depending upon how backlogged the grievance process is). Nothing in the ideal of free contract or the notion that a "deal is a deal" requires this rule, which profoundly favors managerial freedom to manage at the expense of employee security. Free contract is perfectly consistent with the opposite premise, adopted in some legal regimes, namely that the employer must restore the status quo and abide by the union's interpretation of the contract, unless and until the arbitrator rules that it is free to do otherwise. That American law consistently takes the former approach reflects a choice in favor of managerial domination.<sup>11</sup>

The ability to vacate an award is functionally a one-way option. Employers can successfully convince a court to vacate pro-employee decisions, but unions are stuck with incorrect and unfair awards without judicial recourse. Although theoretically available to both labor and management, in practical terms, vacatur is an option available to management only. In Massachusetts, there are several statutory grounds for vacatur that would apply equally to both parties, such as when the award was procured by fraud or corruption, the arbitrator was evidently partial, or the arbitrator refused to hear material evidence.<sup>12</sup> Cases brought by unions seeking to vacate an employer victory on such grounds are exceedingly rare. The vast majority of courts considering whether to enforce or vacate an arbitration award involve the question of whether a union's win before the arbitrator will be upheld. The predominant challenge to a pro-union arbitration award is that the arbitrator has exceeded its authority, either by issuing an award that conflicts with a statute or that violates a state public policy.

Parallel judicial review of a union loss is not available in an overwhelming number of cases. Although an arbitration award that reinstates an employee fired for drug use might be thrown out on public policy grounds, an award that upholds the discharge cannot be

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11. Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 539, 555-56 (David Kairys ed., 3d ed. 1998).

12. MASS. GEN. LAWS ANN. ch. 150C, § 11(a) (West 2004).

challenged on the grounds that public policy requires employees to receive a second chance, or that public policy is offended when a punishment is too harsh.

In the private sector—where there is not only a national policy but a measurable practice of deference to arbitration awards—grounds for vacatur are strictly limited.<sup>13</sup> Because “[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the [arbitration] awards,” an arbitrator’s award resolving a labor dispute “is legitimate [and enforceable] only so long as it draws its essence from the collective bargaining agreement” and is not merely an exercise of the arbitrator’s “own brand of industrial justice.”<sup>14</sup> This is a highly deferential standard, one which the First Circuit has described as “nearly impervious to judicial oversight,”<sup>15</sup> and “one of the narrowest standards of judicial review in all of American jurisprudence.”<sup>16</sup> This standard originated in the *Steelworkers* trilogy—a group of three cases decided by the Supreme Court in 1960 that solidified the high deference courts were to display toward arbitration as a means of resolving labor disputes.<sup>17</sup>

Although there is no national policy that applies to the public sector, the various states tend to articulate standards similar to those embodied in the *Steelworkers* trilogy. For example, as the Massachusetts Supreme Judicial Court states:

When parties agree to arbitrate a dispute, courts accord their election great weight. The strong public policy favoring arbitration requires us to uphold an arbitrator’s decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous. Our deference to the parties’ choice of arbitration to resolve their disputes is especially pronounced where that choice forms part of a collective bargaining agreement. In such cases, the Legislature has severely limited the grounds for vacating arbitration awards. But extreme deference to the parties’ choice of arbitration does not require us to

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13. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

14. *Id.* at 596-97.

15. *Teamsters Local Union No. 42 v. Supervalu, Inc.*, 212 F.3d 59, 61 (1st Cir. 2000).

16. *UMass Mem’l Med. Ctr., Inc. v. United Food & Commercial Workers Union, Local 1445*, 527 F.3d 1, 4 (1st Cir. 2008) (quoting *Lattimer-Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990)).

17. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *Enter. Wheel & Car Corp.*, 363 U.S. at 599.

turn a blind eye to an arbitration decision that itself violates the law. We do not permit an arbitrator to order a party to engage in an action that offends strong public policy.<sup>18</sup>

Nationally, the framework provided by *United Steelworkers v. Enterprise Wheel*<sup>19</sup> and the remainder of the *Steelworkers* trilogy guides the review of arbitration decisions in the public sector.<sup>20</sup>

The reality is that a union must clear several hurdles in a quest to challenge a management decision. First, employees must organize into a union. Second, those employees and their union must successfully negotiate contract language that curbs management discretion in the desired fashion, with the final product, at best, reflecting a compromise of the union's initial goals. Third, the union must take prompt action in accordance with the procedural mechanics of the CBA.<sup>21</sup> Fourth, a union must actually prevail at arbitration and obtain a meaningful remedy from the employer. Of the four steps, the employer need only positively accomplish one—winning at the arbitration hearing. The absence of an organized workforce or the inability to negotiate contract language will not impede the employer's action. Nor, typically, will an employer's procedural failures under a collective agreement prevent the employer from attaining its goal.<sup>22</sup> It is only the final step—the arbitration hearing—where the employer must achieve a positive victory. The measure of a union's success in reversing the power dynamic of the workplace requires victory at all four steps.<sup>23</sup>

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18. *City of Bos. v. Bos. Police Patrolmen's Ass'n*, 824 N.E.2d 855, 860 (Mass. 2005) (internal quotations and citations omitted).

19. 363 U.S. 593 (1960).

20. Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 CHI.-KENT L. REV. 631, 649 (1990) ("The most commonly invoked statutory ground for review of awards is the claim that the arbitrator exceeded the contractual limitations on the authority of the arbitrator. In deciding such issues, many courts have relied on the *Trilogy* standard derived from *Enterprise Wheel*, either in interpreting the Arbitration Act or as an independent standard of review.").

21. For example, the union must meet the filing timelines that exist in the contract. *See Vencel v. Int'l Union of Operating Eng'rs, Local 18*, 137 F.3d 420, 426 (6th Cir. 1998) (dismissing an employee's grievance because of the union's untimely filing).

22. Typically, the procedural mechanics of a CBA's grievance and arbitration procedure will cause a union to waive its rights should it fail to adhere to the stated timelines. Rare is the CBA, however, that imposes such a default on the employer when it fails to meet such timelines; the result is almost always that the union can process its grievance to the next step.

23. The fact that a public-sector employer is subject to political processes is a limited exception to this assumption. *See, e.g., Clyde Summers, Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 446-47 (2003) (describing how non-union teachers can petition a school board for better working conditions). Employees without a union generally lack the political clout to effect meaningful workplace change, however, and this lack of power is the typical

The unilateral ability of an employer to seek vacatur after losing an award<sup>24</sup> not only means that the employer can delay implementation of an arbitrator's decision with further legal action, but amounts to a second bite at the apple for the employer. To the extent that these second bites are becoming more viable, it is undermining unions' ability to change the status quo of the workplace. Despite most states' explicit deference to the principles of the *Steelworkers* trilogy, a growing number of states are vacating awards in the public sector more frequently than in the private sector.<sup>25</sup> These cases are arising under an enhanced public policy exception and argue that an arbitrator's award impermissibly treads on an employer's non-delegable right to make workplace decisions.<sup>26</sup>

### III. THE PUBLIC POLICY EXCEPTION

The public policy exception emerged in the private sector with the Supreme Court's decision in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*.<sup>27</sup> The facts in *W.R. Grace* were a bit unusual, as the company was caught between the contradictory obligations of an Equal Employment Opportunity Commission ("EEOC") conciliation agreement and its CBA with the union.<sup>28</sup> The Court found that the "[c]ompany was cornered by its own actions, and it cannot argue now that liability under the collective bargaining agreement violates public policy."<sup>29</sup>

The doctrine evolved more fully in *United Paperworkers International Union v. Misco, Inc.*,<sup>30</sup> where the Court firmly announced the circumstances in which a conventional arbitrator's decision would be

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motivation behind employees' desire to organize and bargain collectively.

24. See Hodges, *supra* note 20, at 631-32. The Supreme Court has recognized a limited public policy exception to the *Trilogy's* preference to defer to an arbitrator's judgment in arbitration awards. *Id.* The employer is the party that can use this limited exception to its advantage, as many times an arbitration award in favor of an employer does not lend itself to a public policy challenge. See discussion *supra* pp. 370-71.

25. See discussion *infra* pp. 377-81.

26. See Hodges, *supra* note 20, at 633.

27. 461 U.S. 757, 766 (1983) ("If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it."). See Hodges, *supra* note 20, at 640 n.62.

28. 461 U.S. at 759.

29. *Id.* at 770.

30. 484 U.S. 29 (1987).



vacated as against public policy.<sup>31</sup> In short, a court will vacate an award where enforcement would otherwise violate a “well defined and dominant” policy that is “ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>32</sup>

The public-sector approach formally follows *Misco*. For example, in Massachusetts, notwithstanding a stated public policy favoring arbitration, this “extreme deference to the parties’ choice of arbitration does not require us to turn a blind eye to an arbitration decision that itself violates the law. We do not permit an arbitrator to order a party to engage in an action that offends strong public policy.”<sup>33</sup> The question of public policy is one for the courts, not the arbitrator.<sup>34</sup> Massachusetts applies a three-prong test. First, like *Misco*, there must be a “well defined and dominant” public policy that can be “ascertained ‘by reference to law and legal precedents.’”<sup>35</sup> Second, the question of public policy must apply to disfavored conduct that is “integral to the performance of employment duties.”<sup>36</sup> Finally, there must be a showing that “the arbitrator’s award reinstating the employee violates public policy to such an extent that *the employee’s conduct would have required dismissal*.”<sup>37</sup> The public policy exception is a one-way street, and there is no recognition of the potential for countervailing public policies, such as a need to rehabilitate employees, to provide second chances, or to favor continuity of employment over rash discharges that strain the public welfare system.

When contrasting *Misco* with the recent Pennsylvania Commonwealth Court decision in *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Ass’n*,<sup>38</sup> the notion that the public policy exception in the public sector is a more potent weapon than in the private sector is exemplified.

Both cases involved an employee who was fired for a drug-related offense, and whose discharge was subsequently reversed by the

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31. *Id.* at 43.

32. *Id.* at 44 (citations omitted).

33. *City of Bos. v. Bos. Police Patrolmen’s Ass’n*, 824 N.E.2d 855, 860 (Mass. 2005).

34. *Id.*

35. *Id.* (citations omitted).

36. *Id.* (citations omitted).

37. *Id.* (emphasis added) (citations omitted).

38. 977 A.2d 1205 (Pa. Commw. Ct. 2009).

arbitrator as being without just cause.<sup>39</sup> Nominally, the *Westmoreland* case was decided under the *Misco* standard, but in fact, while *Misco* affirmed the award,<sup>40</sup> *Westmoreland* vacated,<sup>41</sup> even though arguably a court strictly applying *Misco* would have affirmed.

In *Misco*, the employer was a paper mill, and Isiah Cooper, the employee, “operated a slitter-rewinder machine, which uses sharp blades to cut rolling coils of paper.”<sup>42</sup> After Cooper had been disciplined for poor performance on the machine, the police searched Cooper’s home and discovered a “substantial amount” of marijuana.<sup>43</sup> That same day, the police found Cooper sitting inside a car in the employer’s parking lot with marijuana smoke inside the car and a lit joint in the ashtray.<sup>44</sup> Cooper later pleaded guilty to possession of marijuana.<sup>45</sup> When apprised of the incident, the employer fired Cooper.<sup>46</sup> At the time it terminated Cooper, the employer was aware only of his arrest for possession and did not know he had been found inside a car on company property where marijuana was present.<sup>47</sup> Cooper filed a grievance, and the matter proceeded to arbitration.<sup>48</sup>

After the hearing, the arbitrator found there was no just cause to terminate Cooper, and ordered his reinstatement with back pay.<sup>49</sup> Among his findings, the arbitrator declined to consider the presence of the marijuana cigarette in Cooper’s car because the employer was unaware of this when it made its decision to fire Cooper, and the arbitrator decided the employer’s decision to discharge must be based only on what the employer knew at the time it fired Cooper.<sup>50</sup> The employer sought to vacate the award on numerous grounds, including that public policy precluded reinstatement of an employee who was found on company property with marijuana.<sup>51</sup>

The Fifth Circuit had vacated the arbitrator’s award, finding the existence of a public policy “against the operation of dangerous

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39. *Misco*, 484 U.S. at 34; *Westmoreland*, 977 A.2d at 1206.

40. 484 U.S. at 34-35.

41. 977 A.2d at 1212.

42. 484 U.S. at 32.

43. *Id.* at 33.

44. *Id.*

45. *Id.* at 33 n.3.

46. *Id.* at 33.

47. *Id.*

48. *Id.*

49. *Id.* at 34.

50. *Id.*

51. *Id.*

machinery by persons under the influence of drugs or alcohol” and that “the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.”<sup>52</sup> The Supreme Court reversed.<sup>53</sup> Even assuming that there was such a well-defined and dominant view public policy,<sup>54</sup> the Court held that “no violation of that policy was clearly shown in this case.”<sup>55</sup> The Court wrote:

To conclude from the fact that marijuana had been found in Cooper’s car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is *an exercise in factfinding* about Cooper’s use of drugs and *his amenability to discipline*, a task that exceeds the authority of a court asked to overturn an arbitration award. . . . Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge *because he found as a factual matter that Cooper could be trusted not to use them on the job*, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.<sup>56</sup>

One significant point is worth highlighting. The Court found that the question of an employee’s amenability to discipline was a *question of fact* for the arbitrator.<sup>57</sup> The Court also considers it a question of fact whether an employee could be trusted in the future.<sup>58</sup> The notion here is that discipline exists for the purpose of correcting employee behavior, not for the sake of punishment. If an arbitrator finds that discipline less than discharge is sufficiently likely to correct an employee’s behavior in the future, discharge is unnecessary; only where discipline is unlikely to

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52. *Misco, Inc. v. United Paperworkers Int’l Union*, 768 F.2d 739, 743 (5th Cir. 1985).

53. *Misco*, 484 U.S. at 45.

54. While acknowledging that the workplace safety policy “is firmly rooted in common sense,” the Court clarified that “a formulation of public policy based only on ‘general considerations of supposed public interests’ is not the sort that permits a court to set aside an arbitration that was entered in accordance with a valid collective-bargaining agreement.” *Id.* at 44.

55. *Id.*

56. *Id.* at 44-45 (emphasis added).

57. *See id.* at 45 & n.11.

58. *See id.* at 45. *See, e.g.*, *Red Cross Blood Serv.*, 90 LA 393, 398 (Dworkin, Arb. 1988) (noting that in an arbitration case where Red Cross fired an employee for spoiling blood collected during a blood drive, heightened discipline was unjustified where it did not “add[] any corrective influence to what was accomplished” by lesser discipline); *Huntington Chair Corp.*, 24 LA 490, 491 (McCoy, Arb. 1955) (noting that the just cause standard requires an employer to implement “some milder penalty aimed at correction” rather than summary discharge). Nonetheless, a finding of just cause can, at times, be inferred from the seriousness of the offense.

correct future behavior should an arbitrator uphold a discharge.<sup>59</sup> Thus, it is a factual question as to how the employee is likely to respond to the discipline. The federal courts' application of *Misco* has led to a highly deferential standard of review, and cases that vacate an arbitrator's decision in the private sector on public policy grounds are relatively rare.<sup>60</sup>

However, *Westmoreland* stands in stark contrast to *Misco*. There, Sherie Vrable was a classroom assistant in an elementary school with an unblemished 23-year tenure.<sup>61</sup> One day, Vrable was found unconscious in a school restroom, suffering from a drug overdose caused by her wearing a Fentanyl patch.<sup>62</sup> Vrable was fired from her job, and her union sought arbitration.<sup>63</sup>

The arbitrator found that the discharge was without just cause, relying on Vrable's lengthy and unblemished tenure.<sup>64</sup> The arbitrator "concluded that this single error of judgment did not amount to such a grievous offense that it would offend the morals of the community."<sup>65</sup> The arbitrator made his order of reinstatement conditional on continued drug abstinence and successful completion of a drug treatment program.<sup>66</sup> As a factual matter, the arbitrator, who heard the evidence and saw the witnesses' live testimony, considered Vrable amenable to discipline.<sup>67</sup> Nonetheless, the school moved to vacate the award.<sup>68</sup>

59. That finding can also, at times, be inferred from the seriousness of the offense.

60. See, e.g., *E. Associated Coal Corp. v. United Mine Workers*, Dist. 17, 531 U.S. 57, 59 (2000) (holding that public policy did not prevent enforcing an arbitration award ordering the employer to reinstate truck driver who had twice tested positive for marijuana); *Bos. Med. Ctr. v. Serv. Emps. Int'l Union, Local 285*, 260 F.3d 16, 19 (1st Cir. 2001) (reversing the district court that vacated an arbitrator's award based on public policy grounds and affirming the reinstatement of a nurse involved in death of an infant patient); *Local 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 119 (2d Cir. 1999) (holding that an arbitration award ordering the reinstatement of a nuclear safety officer who had not properly responded to alarm and then provided false information in ensuing investigation did not violate public policy).

61. *Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educ. Support Person. Ass'n*, 977 A.2d 1205, 1206-07 (Pa. Commw. Ct. 2009).

62. *Id.* at 1206. Fentanyl is a narcotic analgesic that is similar to, but significantly more potent than, heroine and morphine. *Id.* at 1206 n.1. It is a misdemeanor to possess Fentanyl in Pennsylvania without a prescription. *Id.*

63. *Id.* at 1206.

64. *Id.* at 1206-07.

65. *Id.* at 1207.

66. *Id.*

67. See *id.* at 1211.

68. *Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educ. Support Pers. Ass'n*, 939 A.2d 855, 860 (Pa. 2007), *remanded to 2008*

On initial review, the Pennsylvania Supreme Court held that the arbitrator's award could rationally be derived from the CBA and was not subject to vacatur for failing to draw its essence from the CBA.<sup>69</sup> However, the court also recognized the possibility that even an award that was rationally derived from the CBA could still be subject to vacatur on public policy grounds.<sup>70</sup> Citing to *Misco* and other federal precedents, the court wrote that "the federal public policy exception is appropriately applied to arbitrator's awards arising under" state law as well.<sup>71</sup> The court declared this to be "a reasonable accommodation of the sometimes competing goals of dispute resolution by final and binding arbitration and protection of the public weal."<sup>72</sup> The court remanded for consideration of "the issue of whether Ms. Vrable's reinstatement contravenes a well-defined, dominant public policy that is ascertained by reference to the laws and legal precedents and not from mere general considerations of supposed public interests."<sup>73</sup>

Following remand, the public policy question was ultimately heard by an intermediate appellate court, which held that the award must be vacated on policy grounds.<sup>74</sup> The court found the existence of a public policy "against allowing a person to be in possession of drugs or be under the influence of drugs while caring for, supervising or having custody of children."<sup>75</sup> The court continued,

[T]he public policy of educating our children about the dangers of illicit drugs and drug abuse and protecting children from exposure to drugs and drug abuse is compelling. Simply put, an elementary classroom is no place for a recovering addict. It demonstrates a tolerance, rather than intolerance for illicit drug use, and is in direct contravention of public policy.<sup>76</sup>

Although the case ostensibly arises under a public policy doctrine that is derived from the federal policy created by *Misco*, the case comes

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WL 7005883, (Pa. Com. Pl. Aug. 6, 2008), *rev'd*, 977 A.2d 1205 (Pa. Commw. Ct. 2009).

69. *Id.* at 866.

70. *Id.* at 865.

71. *Id.* (referring to Pennsylvania's Public Employee Relations Act, 43 PA. STAT. ANN. § 1101 (West 2011)).

72. *Id.*

73. *Id.* at 866-67.

74. *Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educ. Support Pers. Ass'n*, 977 A.2d 1205, 1212 (Pa. Commw. Ct. 2009).

75. *Id.* at 1209.

76. *Id.* at 1211.

out differently than it likely would have under a straight application of *Misco*. Both cases involved employees fired for a drug offense, but reinstated by arbitrators.<sup>77</sup> Most significantly, the *Westmoreland* court moved in a more extreme direction, ignoring the arbitrator's factual finding about the amenability of discipline, and instead deciding the case on what is arguably a stereotypical view about drug abuse and recovery, which in any event is a view imposed without any consideration of evidence.

Many courts applying the public policy exception "require[] a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal."<sup>78</sup> In principle, that is a useful curb on the temptation of judges who cannot stomach tolerance of some employee conduct, even where an arbitrator has concluded that discharge for the conduct was without cause. But it is at times easy for courts to yield to this temptation. The Connecticut Supreme Court has deviated from this concept, where it vacated an award of reinstatement even upon acknowledging that the grievant's conduct did not require discharge.<sup>79</sup>

We emphasize that we do not hold that, in imposing discipline on an employee who has been established to have embezzled his employer's funds, the employer is required by law to terminate the employee. The degree of discipline that the employer imposes is, in the first instance, within the discretion of the employer, subject to those standards set forth in the applicable personnel rules, collective bargaining agreement, and any other relevant materials.<sup>80</sup>

To emphasize that discharge is not required begs the question, why does it violate public policy for an arbitrator to require the employer to take an action the employer has the discretion to take? This presents a logical inconsistency, which can best be reconciled by recognizing that the public policy under consideration is something different; it is about whether the court believes an employer violates public policy by delegating the discretion to discharge to an arbitrator. As the court describes it, "the public policy against theft also would include the

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77. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 45 (1987); see also *Westmoreland*, 977 A.2d at 1207.

78. *City of Bos. v. Bos. Police Patrolmen's Ass'n*, 824 N.E.2d 855, 860 (Mass. 2005) (emphasis added) (internal quotation marks and citations omitted).

79. *Town of Groton v. United Steelworkers of Am.*, 757 A.2d 501, 509-10 (Conn. 2000).

80. *Id.* at 509 n.11.

policy that an employer should not be *required* to retain in a position of financial trust an employee who has been established to have stolen.”<sup>81</sup> Perhaps retention may not be required, but it is allowable. Implicit here is the assumption that the public employer cannot delegate his decision whether to discharge to an arbitrator. This is something different than public policy altogether.

In another example that is currently on appeal in Massachusetts, a Superior Court judge vacated an award that ordered the reinstatement of two prison guards who were fired because they allowed racially and sexually offensive and violent comments to remain posted on a union website.<sup>82</sup> The comments on the union’s website were certainly offensive, and would be seen as highly offensive by many. Analyzing the first two prongs of the public policy exception, the court found the existence of a public policy against racial and sexual harassment, and that the harassment was integral to the workplace.<sup>83</sup> In turning to the third prong—whether the employees’ conduct required dismissal—the court said it did.<sup>84</sup> The problem was, as the arbitrator had explained in detail, that the employer had tolerated the conduct for three years before taking action.<sup>85</sup> Evidently, the conduct did not require discharge, or any discipline at all, for several years.<sup>86</sup> This did not convince the court, but the court offered nothing other than circular reasoning in defense, pointing out that the employees’ conduct was offensive. Also,

That [the employees] did not receive any prior written notice that their lack of monitoring and editing the electronic bulletin board could result in their discharge is not sufficient to override the public policy concerns in this case. This is especially true since the CBA contains no requirement of advance verbal or written notice. The character of the postings, both by Enos and Thompson themselves, and by others, not only violate the dominant public policy and laws against sexual and racial harassment, but they are egregiously offensive to any notion of human decency. . . . Two supervisory correctional officers who use their position to publicly post and encourage others to post offensive, threatening, sexist and racist material corrodes the public’s confidence

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81. *Id.* at 509-10 (emphasis added).

82. *Essex Cnty. Sheriff’s Dep’t. v. Essex Cnty. Corr. Officers Ass’n*, No. 10-00590, 2010 WL 5135895, at \*1 (Mass. Super. Ct. Dec. 1, 2010).

83. *Id.* at \*10.

84. *See id.* at \*11.

85. *See id.* at \*4.

86. *See id.* at \*4-5.

in its correctional force and institutions. Indeed, such pernicious conduct by those responsible for the safe incarceration and rehabilitation of inmates tends to fray the very essence of our social compact.<sup>87</sup>

Thus, the public policy exception has found more traction in the public sector since the courts can rarely refuse to enforce problematic awards. The public policy exception is susceptible to abuse by courts that do not wish to challenge the judgment of public employers (*Town of Groton*), wish to engage in implicit fact-finding about employees' amenability to discipline (*Westmoreland*) or simply cannot stomach the alleged misconduct (*Essex Sheriff*). The result is that, as a practical matter, public-sector unions are finding that the courts are eroding their collective bargaining agreement, and undermining the positive change they have made through negotiations, by application of the public policy exception.

#### IV. THE NON-DELEGABILITY DOCTRINE

Another ground used by public employers seeking to vacate arbitration awards is the claim that the arbitrator has, in effect, usurped the employer's exclusive authority to make the decision under review.<sup>88</sup> Such cases typically involve a collision between a collective bargaining statute and other statutory provisions related to an employer's authority.<sup>89</sup> There is no comparable doctrine in the private sector.

In the private sector, courts will affirm a labor award "so long as it draws its essence *from the collective bargaining agreement*" under which it was decided.<sup>90</sup> Thus, a court confines its review of a private-sector award by reference to the CBA. The question of whether an employer has delegated away its authority matters only to the extent that a court will consider whether the CBA in fact authorized an arbitrator to hear the dispute.<sup>91</sup> But that question is one of contract interpretation and

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87. *Id.* at \*11.

88. *See id.* at \*6-7.

89. *See infra* text accompanying notes 98-99.

90. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (emphasis added) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.").

91. *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986) ("It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.").



is without reference to external law.<sup>92</sup> In the public sector, not only is “arbitration . . . a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,”<sup>93</sup> but it is *also* a matter of whether an additional layer of state law allows the dispute to be arbitrated.

Massachusetts is a useful case study. In negotiations for a collective bargaining agreement, an employer generally agrees to undertake discipline only with just cause. Obviously a public employer can voluntarily elect to act fairly and in accordance with the traditional notions of just cause. The question is whether an employer can agree to allow a neutral arbitrator to decide whether the employer has abided by that commitment, and whether the arbitrator can fashion a remedy where the employer is found to have breached its agreement to act fairly.

The right of public employees to bargaining collectively is a creature of statute. In Massachusetts, the Legislature enacted a comprehensive statute, chapter 150E,<sup>94</sup> that granted employees these rights.<sup>95</sup> As the law stands now, “[e]mployees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment.”<sup>96</sup> When employees have formed that union, the law requires that

[t]he employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer’s budget-making process and shall negotiate in good faith with respect to *wages, hours, standards or productivity and performance, and any other terms and conditions of employment*, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within

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92. *Id.* at 648-49 (noting that “arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration”).

93. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)

94. MASS. GEN. LAWS ANN. ch. 150E (West 2010).

95. *Id.* § 2.

96. *Id.*

the scope of negotiation.<sup>97</sup>

The question of whether an employee remains employed is the quintessential term and condition of employment.

The courts in Massachusetts, for instance, are slowly eroding away the ability of unions to arbitrate discharge cases, finding that the omnibus right to collectively bargain embodied in chapter 150E is trumped by a series of older and scattered statutes throughout the state's general laws that purportedly vest various public employers with the non-discretionary authority to appoint, reappoint, and discharge employees.<sup>98</sup> The cases emerged at first in the teacher context, where courts sought to harmonize a conflict between the then new collective bargaining statute with the older teacher tenure statutes that conferred the power to grant tenure exclusively to local school committees.<sup>99</sup>

Cases continued to emerge, and the doctrine expanded. But where the non-delegability principle at first precluded arbitrators from infringing on the authority of school committees in granting tenure, it began to creep into other aspects of the school relationship. The Massachusetts Supreme Judicial Court dramatically expanded the doctrine in *School Committee of Newton v. Newton School Custodians*

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97. *Id.* § 6 (emphasis added).

98. *See, e.g., City of Somerville v. Somerville Mun. Emps. Ass'n*, 887 N.E.2d 1033, 1038 (Mass. 2008) (finding that the arbitrator was without power to direct city to appoint grievant as director of veterans' services in light of statute vesting specific authority in city's mayor to appoint director, and therefore the arbitrator's award was vacated); *Sch. Comm. of Natick v. Educ. Ass'n of Natick*, 666 N.E.2d 486, 489-90 (Mass. 1996) (holding that the superintendent's decision not to reappoint grievant as coach was not subject to arbitration, and that the appointment authority vested exclusively in superintendent); *Mass. Coal. of Police, Local 165 v. Town of Northborough*, 620 N.E.2d 765, 767 (Mass. 1993) (giving town selectmen power to appoint such police officers "as they deem necessary" for terms of fixed duration established non-delegable managerial prerogative in selectmen to decide not to reappoint particular officer); *Berkshire Hills Reg'l Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n*, 377 N.E.2d 940, 945 (Mass. 1978) (holding that the stay of arbitration was properly granted where appointment of school principal was within non-delegable management authority of school committee and not subject to arbitration); *City of Leominster v. Int'l Bhd. of Police Officers, Local 338*, 596 N.E.2d 1032, 1036 (Mass. App. Ct. 1992) (holding that arbitrator exceeded authority in ruling that a probationary police officer's discharge was subject to just-cause standard).

99. *See Sch. Comm. of Danvers v. Tyman*, 360 N.E.2d 877, 881 (Mass. 1977) ("We do not find in legislative authorization for schoolteachers to bargain collectively concerning 'wages, hours, and other terms and conditions of employment' and to arbitrate grievances, an intent to permit a school committee to bargain away its traditional authority to make tenure decisions if it so wishes. Whenever the Legislature has limited the powers of school committees, it has done so in express terms, and it is expected that a radical departure from prior policy would be clearly indicated, and not left to doubtful implication.") (citations omitted).

*Association, Local 454 ("Newton")*.<sup>100</sup> In *Newton*, the school district had a CBA with a bargaining unit of nutrition workers, employees who worked in the school cafeteria.<sup>101</sup> The CBA required that open positions in the bargaining unit be granted to the most senior employee when the principal believed the candidates' credentials to be equal.<sup>102</sup> Under these conditions, the employer selected a less senior employee for an open position in the cafeteria.<sup>103</sup> The union grieved, and the arbitrator agreed with the union, ordering the school to award the position to the grievant pursuant to the terms of the collective bargaining agreement.<sup>104</sup> The school sought to vacate the award, and the court agreed.<sup>105</sup>

The court analyzed chapter 71, section 59B of the Massachusetts General Laws, which states that principals "shall be responsible . . . for hiring all teachers, athletic coaches, instructional or administrative aides, and other personnel assigned to the school, and for terminating all such personnel, subject to review and prior approval by the superintendent and subject to the provisions of this chapter."<sup>106</sup> The statute does not reference collective bargaining, and certainly nowhere does it state that such hiring decisions are non-delegable.<sup>107</sup> Nonetheless, the *Newton* court concluded that "the arbitrator's order that [the grievant] be offered the cafeteria manager position in effect substituted the arbitrator's discretion for that of the school principal, in contravention of § 59B."<sup>108</sup>

Because the court overturned the arbitrator's decision, notwithstanding the fact that section 59B did not include any explicit language that isolated a principal's right to make internal appointments from other working conditions negotiable under chapter 150E, the effect of the *Newton* decision was to recognize an implied exception to the omnibus collective bargaining regime of chapter 150E.<sup>109</sup> Since then, the doctrine has expanded further.

The Supreme Judicial Court took one of its more dramatic turns in *City of Somerville v. Somerville Municipal Employees Association*

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100. 784 N.E.2d 598 (Mass. 2003).

101. *Id.* at 601.

102. *Id.*

103. *Id.* at 602.

104. *Id.* at 602-03.

105. *Id.* at 600-01.

106. *See id.* at 604-06 (referencing MASS. GEN. LAWS ch. 71, § 59B (2009)).

107. MASS. GEN. LAWS ch. 71, § 59B (2009).

108. *See Newton*, 784 N.E.2d at 608.

109. *See id.* at 607-08.

(“*Somerville*”).<sup>110</sup> In *Somerville*, the city had appointed a non-union candidate to the position of veteran’s services director, even though the collective bargaining agreement required the city to show preference for union members.<sup>111</sup> According to the arbitrator, the collective bargaining agreement allowed the city to bypass a union member only where the non-union candidate was “head and shoulders” above the union candidate.<sup>112</sup> The arbitrator ordered that the appointment be made according to the requirements of the collective bargaining agreement.<sup>113</sup>

In its analysis, the court acknowledged the “strong public policy favoring collective bargaining between public employers and employees over certain conditions and terms of employment.”<sup>114</sup> However, the court reiterated its view that an arbitration award may be vacated where it “usurps a discretionary power granted by the Legislature to a public authority that, by statute, cannot be delegated to another.”<sup>115</sup> The support relied on by the court included cases that arise in the police context, and statutes that appear to more explicitly curb the rights of management to bargain over certain subjects.<sup>116</sup> Here, however, the court engaged in highly inferential statutory interpretation.

When chapter 150E was enacted, it included in section 7(d) the following statement:

If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any . . . of the following statutory provisions or rules or regulations made thereunder: [numerous statutes listed], the terms of the collective bargaining agreement shall prevail.<sup>117</sup>

In *Somerville*, the court reviewed section 7(d) and found no conflict with G.L. c. 115, section 10—which expressly directs municipalities to

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110. 887 N.E.2d 1033 (Mass. 2008).

111. *See id.* at 1035.

112. *See id.*

113. *See id.*

114. *Id.*

115. *See id.* at 1036.

116. *See generally* Mass. Coal. of Police, Local 165 v. Town of Northborough, 620 N.E.2d 765 (Mass. 1993) (holding that appointment of a police officer for a specific term and then subsequently not reappointing the officer is not an arbitrable decision); Bd. of Selectmen of Ayer v. Sullivan, 558 N.E.2d 1 (Mass. App. Ct. 1990) (holding that statutes stating that appointment of a police officer for a specific term does preclude arbitration of a decision not to reappoint the officer).

117. MASS. GEN. LAWS ch. 150E, § 7(d) (2004).

operate a veteran's services department, and authorizes the mayor (with city council approval) or board of selectmen (depending on the town's charter) to appoint the veteran's director.<sup>118</sup> The court then found a material conflict between the CBA and the veteran's statute, in that the CBA purportedly "usurps the authority specifically conferred on a mayor by legislative directive" to appoint the veteran's director.<sup>119</sup> The court also argued that the CBA denied a city council of its right to approve the appointment.<sup>120</sup> Lost in that analysis, though, is the fact that it was the mayor and city council that entered into the CBA in the first place.<sup>121</sup> It was not as though the union in *Somerville* had sought to enforce a contract between it and a third-party that waived the mayor's right.

This progression escalated in 2010, in *Department of State Police v. Massachusetts Organization of State Engineers & Scientists* ("MOSES").<sup>122</sup> In that case, the head of the state police (the colonel) had fired a laboratory chemist, and the union sought arbitration on numerous grounds, including that the discharge was without just cause in contradiction to the CBA.<sup>123</sup> The state police sought a stay of arbitration, stating that it had the non-delegable authority to discharge the grievant because of a statute that stated: "The colonel may appoint, transfer and remove experts, clerks and other assistants as he may deem necessary for the operation of the department."<sup>124</sup> Because this statute also was not among those listed in section 7(d), the court assumed that the statute must trump any bargaining agreement to the contrary.<sup>125</sup>

The problem with assuming that a waiver of collective bargaining rights inheres in section 9, despite no specific reference to such a waiver, was that it radically shifted what had been, until the *MOSES* decision, a well-understood collective bargaining landscape that included just-cause protections for state employees. The fact that section 9 was not listed in section 7(d) should have been irrelevant, as there are at least sixty-nine

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118. See *Somerville*, 887 N.E.2d at 1036-37.

119. *Id.* at 1037.

120. See *id.*

121. *Id.*; see also MASS. GEN. LAWS ANN. ch. 150E, § 1 (West 2004) (granting bargaining authority to the mayor as "chief executive officer," with subsequent approval by the city council, "which has the power of appropriation").

122. 924 N.E.2d 248 (Mass. 2010). In the interest of full disclosure, the author notes that he represented the Massachusetts Organization of State Engineers and Scientists in this case.

123. See *id.* at 250-51.

124. *Id.* at 251 n.4 (citing MASS. GEN. LAWS ch. 22C, § 9 (2010)).

125. *Id.* at 254 n.11.

other such appoint-and-remove statutes covering public employees that are similarly not listed in section 7(d).<sup>126</sup> Most of the employees subject to those appoint-and-remove statutes (though not all) are union-represented state employees and covered by collective bargaining agreements with just-cause protections. In an amicus brief to the court, the Massachusetts AFL-CIO and other unions wrote that the court, “unless [it] seeks to differentiate [the Colonel’s] right of ‘removal’ from the right conferred on many others, must explain a legislative intention to exempt hundreds of public employees from job security protections.”<sup>127</sup> The court offered no such justification.

The *MOSES* decision affected thousands of employees, including those in the Department of Transitional Assistance, Department of Youth Services, Department of Social Services, Department of Mental Retardation, the Department of Corrections—just to identify some of the largest affected state agencies covered by CBAs.<sup>128</sup> The notion that the appoint-and-remove language of section 9 destroys just-cause protections is astounding, and came as a surprise to those employees, their unions, and their employers.<sup>129</sup> Whether the courts will reverse this error remains to be seen.

Some common sense by the court could have provided context to its analysis of this statutory question. The Legislature conferred collective bargaining rights on state employees in 1974 when it passed chapter 1078 of the Acts of 1973.<sup>130</sup> In the thirty-six years before the *MOSES* case, the court had never decided that state employees are employed pursuant to their employer’s non-delegable authority to fire without just cause simply by virtue of an appoint-and-remove statute.<sup>131</sup>

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126. See, e.g., G.L. c. 18, s. 9 (Commissioner of Dept. of Transitional Assistance); G.L. c. 12, s. 11D (Division of Environmental Protection); G.L. c. 22, s. 6 (Commissioner of Public Safety).

127. Brief for Mass. AFL-CIO, et al. as Amici Curiae Supporting Respondents-Appellants at 41 n.20, *Commonwealth Dep’t of State Police v. Mass. Org. of State Eng’r and Scientists*, 924 N.E.2d 248 (Mass. 2010) (No. SJC-10453).

128. *Id.* at 3 n.1.

129. See *id.* at 41-43.

130. 1973 Mass. Acts ch. 1078, § 4 (1973).

131. In *Dwyer v. Comm’r of Ins.*, 376 N.E.2d 826 (Mass. 1978), the court considered whether the Insurance Commissioner had the authority to lay off fifty of fifty-four fraud examiners whose work became unnecessary by the advent of no-fault automobile insurance. The court stated, without analysis, that the “Commissioner’s statutory power to appoint and remove was not supplanted by the collective bargaining agreement covering these examiners” *Id.* at 831. However, the question of the Commissioner’s authority to lay off employees where their work was no longer necessary is not the same as whether this authority effectively abrogates a just-cause promise in a CBA. *Dwyer* is far too slim a reed upon which to void the rights of thousands of employees who have labored under what they believed were just-cause protections in the thirty-two years since *Dwyer*.

The Commonwealth and the unions representing its employees have arbitrated hundreds, if not thousands, of cases since that time. Thousands of employees had agreed to a CBA (governing wages, and the like) under the assumption that just-cause protections sheltered them from arbitrary dismissal, only to have this Court, unintentionally, nullify that bargain. The effect of this change on the expectations of state employees and their employers cannot be overstated. Given the substantial passage of time, the better position was that a decision to strip thousands of public employees of the right to just-cause protections was one decision that should belong to the Legislature.

## V. CONCLUSION

Unions in the public sector are criticized for being political, yet arbitration is a way to depoliticize public-sector employment actions by bringing a conclusion to the workplace problems that “raise inherently political issues.”<sup>132</sup> However, when a court vacates an award, this tends to re-politicize the workplace, because the asserted dispute is left unresolved and often exacerbated. Where the union trusted that the employer would abide by its promise to abide by the contract and arbitrate disputes where it allegedly failed to do so, the union finds itself back at square one. The negotiated agreements it thought it had reached are becoming less and less meaningful, whether this is because a court has found a public policy that precludes the union from enjoying the benefit of the bargain or because of courts finding statutory conflicts where none have before existed. The result is that a collective bargaining agreement in the public sector is meaning less and less than a collective bargaining agreement in the private sector.

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132. Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1372 (2009).