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Chapter 13: Labor Law

William T. Sherry Jr.
CHAPTER 13

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WILLIAM T. SHERRY, JR.

§13.1. Introduction. Chapter 150E of the General Laws gives most employees of the commonwealth and its political subdivisions the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through their representatives on questions of wages, hours, and other terms and conditions of employment.\(^1\) Any collective bargaining agreement reached between a public employer and the exclusive bargaining representative of its employees must be reduced to writing and executed by the parties.\(^2\) The normal mechanism agreed on by the parties for enforcing the terms of such an agreement is final and binding arbitration. In this regard, chapter 150E, section 8, provides: “The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement.”\(^3\) Most collective bargaining agreements in the public sector, like those in the private sector, do contain such a provision.\(^4\)

In the private sector, arbitrators have tremendous authority to interpret collective bargaining agreements and to fashion remedies when a

\(^1\) G.L. c. 150E, § 2.
\(^2\) G.L. c. 150E, § 7.
\(^3\) G.L. c. 150E, § 8.
\(^4\) A public employer’s decision to agree to the inclusion of such a provision in bargaining agreements undoubtedly is influenced by G.L. c. 150E, § 8. This section provides that in the absence of a grievance procedure culminating in a final and binding arbitration, arbitration may be ordered by the Massachusetts Labor Relations Commission. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979), the cornerstone of private sector collective bargaining, does not contain a counterpart permitting the National Labor Relations Board to order binding arbitration when the bargaining agreement contains no arbitration provision. In order partially to neutralize the right to strike enjoyed by private sector unions, but not by unions in the public sector, binding arbitration clauses are most always negotiated into public sector collective bargaining agreements.
breach is found; conversely, courts reviewing such awards have very limited power.⁵ As the United States Supreme Court has recognized:

The function of the court is very limited when the parties have agreed to submit all the questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . .

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not part of the plant environment may be quite unaware.⁶

The Supreme Court has also made it clear that with respect to private sector bargaining agreements, arbitrators have great latitude in fashioning remedies when contract violations are found.⁷

Clauses mandating binding arbitration are similarly worded in both private and public sector collective bargaining agreements. The validity, enforceability, and effect of such agreements under Massachusetts law are governed by the same statute.⁸ Nevertheless, it is clear from decisions of the Supreme Judicial Court that an arbitrator's authority is more limited when he is interpreting and enforcing a public sector collective bargaining agreement than when he is dealing with a private sector agreement. The Court has recognized that there exists a "tension" between (1) the terms of a lawfully authorized collective bargaining agreement requiring a public employer to submit disputes to final and binding arbitration, and (2) the statutory authority of such public

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⁷ As the Court wrote in Steelworkers v. Warrior & Gulf,
[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring informed judgment to bear in order to reach a fair solution to a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.
363 U.S. at 597.
⁸ See G.L. c. 150C.
employers to make particular decisions. In considering problems generated by such tension, the Court has recognized that the freedom to contract in the private sector does not blanket certain public sector matters, because of the governmental interests and public concerns which may be involved. In the Court’s view, “[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither,” may limit a public employer’s ability to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it. Thus, in considering the scope of an arbitrator’s power in interpreting public sector collective bargaining agreements, the Supreme Judicial Court has held, in Berkshire Hills Regional School District Committee v. Berkshire Hills Education Association, that a court must inquire whether the matter before the arbitrator involves a decision within the sole and exclusive authority of the public employer. If so, the matter cannot lawfully be the subject of arbitration.

The above principle may be applied in various contexts—in unfair labor practice proceedings before the Labor Relations Commission, in actions to stay arbitration under chapter 150C, section 2(b), or in actions to vacate or confirm arbitral awards under chapter 150C, section 10. The Court has held that in all of these instances the analysis should essentially be the same: “whether the ingredient of public policy in the issue subject to dispute is so comparatively heavy that collective bargaining, and even voluntary arbitration, on the subject is, as a matter of law, to be denied effect.” During the Survey year, it became apparent that the “tension” that exists between certain provisions in collective bargaining agreements and public policy is not always easy to diagnose and cure.

§13.2. Arbitral Authority in Public Sector Disputes—Teacher Salaries. In School Committee of Burlington v. Burlington Educators Association, the school committee brought an action to stay arbitration of two grievances filed by the Burlington Educators Association, the collective bargaining representative of the teachers. The following facts underlay these grievances. Having begun the 1972-73 school year

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11 Id.
13 Id. at 1718-24, 377 N.E.2d at 943-44.
14 Id. at 1724, 377 N.E.2d at 945.

without a collective bargaining agreement, a majority of the teachers in the association voted to go on strike to enforce its contract demands.\(^2\) The strike commenced on September 20, 1972. Not all of the teachers followed the strike vote, and the committee was able to keep the schools open. On September 29, the eighth scheduled school day following the commencement of the strike, a superior court judge, acting at the behest of a group of parents of Burlington students, issued a temporary restraining order requiring the committee to close the schools for the duration of the strike.\(^3\) As a result of this order, schools were closed on October 2 and 3. On October 3, the association and the committee entered into a two-year collective bargaining agreement, effective retroactively to September 1, 1972.\(^4\) The restraining order was dissolved on that day, and normal operation of the school system resumed on October 4.\(^5\)

In January of 1973, the committee docked the pay of each teacher who had participated in the strike in an amount equivalent to ten days' pay.\(^6\) The association subsequently filed two grievances relating to this action. The parties were unable to resolve these grievances informally, and they were taken to binding arbitration by the association under the terms of the bargaining agreement.\(^7\)

In its first grievance, the association complained of the committee's holding back of ten days' salary from the striking teachers. It sought a decision: (1) allowing teachers to work their guaranteed number of days; (2) allowing each teacher to obtain his guaranteed annual salary as specified in the bargaining agreement; and (3) mandating the committee and the association to negotiate a rescheduling of a sufficient number of days to accommodate the first two remedies.\(^8\)

A superior court judge granted the school committee's application to stay the arbitration of this grievance.\(^9\) On appeal by the association,

\(^2\) Id. at 166, 385 N.E.2d at 1015.
\(^3\) Id.
\(^4\) Id. The agreement provided, *inter alia*, that the work year of teachers covered by the agreement's salary schedule should be no more than 185 work days, and that in calculating deductions for unauthorized absences, one day would be considered 1/185 of the annual contract amount. *Id.* at 167, 385 N.E.2d at 1016. In a supplement, the agreement further provided that all questions concerning the number of days a Burlington school should be opened must be submitted to the State Board of Education and that the parties must abide by the Board's determinations on this issue. *Id.* Finally, the agreement established a four-step grievance procedure, culminating in binding arbitration under the auspices of the American Arbitration Association. *Id.*
\(^5\) Id. at 166-67, 385 N.E.2d at 1015.
\(^6\) Id. at 168, 385 N.E.2d at 1016.
\(^7\) Id. at 169, 385 N.E.2d at 1016.
\(^8\) Id. at 169-70, 385 N.E.2d at 1017.
\(^9\) Id. at 166, 385 N.E.2d at 1015.
the Appeals Court, after a careful recitation of the facts, found that the first and third remedies sought by the association asked the arbitrator, in effect, to determine the number of days which striking teachers should be permitted to work, and thus the number of school days that the schools should remain open.\(^{10}\) The court noted that the power to determine the number of days that school should be open in any school year is statutorily reserved to a school committee.\(^{11}\) Citing the general rule set forth in *Berkshire Hills*\(^{12}\) that "matters of educational policy which are committed or reserved to a school committee by [chapter 71, section 37] cannot be lawfully delegated to an arbitrator for a decision by him,"\(^{13}\) the Appeals Court concluded that the arbitrator was without power to grant the first and third remedies sought by the association under its initial grievance.\(^{14}\)

With respect to the second remedy sought by the association under the first grievance—an order allowing each teacher to obtain his guaranteed annual salary as specified in the bargaining agreement—the Appeals Court noted that it could be interpreted in two different ways. It could be construed either as a request that the arbitrator order the school committee to pay teachers for scheduled school days during which they were on strike, \textit{or} as a request that the arbitrator order the committee to pay them for days that were added on to the end of the school year by the committee in order to complete the state-mandated minimum number of school days.\(^{15}\) With respect to the first interpretation, the court noted that strikes by public employees are illegal under the laws of the commonwealth; thus, it would be against public policy for a school committee to compensate teachers for days that they were on strike.\(^{16}\) The court observed that for the same reason it would be unlawful for an arbitrator to order the committee to make such a payment. The Appeals Court concluded that under the association's second request, the lower court judge did not err in staying the arbitra-

\(^{10}\) *Id.* at 170, 385 N.E.2d at 1017.

\(^{11}\) *Id.*. G.L. c. 71, § 37, provides in part that the school committee "may determine, subject to this chapter, the number of \textit{weeks} and the \textit{hours} during which such schools shall be in session, . . ." (emphasis added). The Appeals Court specifically cited this provision to support its conclusion that the number of school days per year was a decision reserved to the committee. *Id.* at 170 n.4, 385 N.E.2d at 1017 n.4. This being the case, it would appear to follow that the hours when school is in session (and thus the hours during which teachers work) is also a matter reserved to the committee. \textit{But see} G.L. c. 150E, §§ 2 and 10, which require the committee to bargain about hours of work.

\(^{12}\) 1978 Mass. Adv. Sh. 1715, 377 N.E.2d 940; see § 1, text and notes at notes 12-14, \textit{supra}.


\(^{14}\) *Id.* at 170-71, 385 N.E.2d at 1017.

\(^{15}\) *Id.* at 171-72, 385 N.E.2d at 1017-18.

\(^{16}\) *Id.*
The court then addressed the other possible interpretation. It noted that there is no statutory provision evidencing a public policy against paying teachers for work done on days tacked onto the end of a school year to satisfy minimum day requirements imposed by the state. In the court’s view, if an arbitrator were to accept this interpretation, there would be no obstacle to arbitrability of that claim.

The association’s second grievance was directed specifically toward the committee’s action in docking the striking teachers’ pay for the two days schools were closed pursuant to the temporary restraining order. Based on the record before the Appeals Court, it was unclear whether the association was asking the arbitrator to order the committee to reschedule those two days or whether the teachers were asking the arbitrator to order the committee to pay them for those two days because they were not on strike on either day, but rather were the “unwilling victims of a court-ordered lockout.” The court explained that under either interpretation, the arbitration properly was stayed. Under the former interpretation, the association was asking the arbitrator to infringe on the number of days school should remain open. As it had revealed in its discussion of the association’s first grievance, the Appeals Court refused to permit such an infringement. With respect to the second interpretation, the court held that there was no genuine dispute concerning whether the teachers were on strike on October 2 and 3. Again, as it had held earlier, the court concluded that it was proper to stay the arbitration, since the remedy sought—an order to pay the teachers for the days they were on strike—would be against public policy and illegal.

Based on the foregoing discussion, the Appeals Court remanded the case to the superior court to determine whether there was a “controversy” under chapter 150C, section 2(b)(2). If such a controversy were found to exist, the lower court would have to modify its judgment to require arbitration concerning that controversy. The Appeals Court made it clear that only the second remedy sought in the association’s

17 Id. at 172-73, 385 N.E.2d at 1018.
18 Id. at 173-74, 385 N.E.2d at 1018-19. The then effective regulations of the State Board of Education required every school committee to schedule not less than 185 days per school year. Id. at 167 n.2, 385 N.E.2d at 1016 n.2.
19 Id. at 174, 385 N.E.2d at 1019.
20 Id. at 174-75, 385 N.E.2d at 1019.
21 Id.
22 Id. at 175, 385 N.E.2d at 1019.
23 Id.
24 Id. at 176, 385 N.E.2d at 1019.
25 Id.
26 Id. at 176-77, 385 N.E.2d at 1019.
first grievance arguably presented such a controversy.27 Presumably, only if the remedy sought was interpreted to be an order requiring the committee to pay the teachers for days added on to the end of the school year, could the issue be considered arbitrable.

§13.3. Arbitral Authority in Public Sector Disputes—Employee Fringe Benefits. The decision in School Committee of Burlington evidences the major problem created by Berkshire Hills. Following Berkshire Hills, a court must examine in great detail (1) an often incomplete set of facts that might be submitted to the arbitrator,1 (2) the collective bargaining contract, (3) the statutes of the commonwealth, and (4) public policy. The court must then determine whether an arbitrator can, pursuant to his power to identify and define grievances, construe the moving party’s demand for arbitration as permitting an award that could possibly be consistent with statutes and public policy. Such an analysis of “possibilities” is an extremely time consuming and difficult duty for the courts.

The difficulty of such an analysis was further evidenced in School Committee of Holyoke v. Duprey,3 where the Appeals Court relied on School Committee of Burlington in affirming the judgment of the superior court vacating an arbitrator’s award found to be against public policy. In School Committee of Holyoke, the committee had signed a bargaining agreement with the teachers under which it agreed to contribute sixty-five percent of the teachers’ health insurance premiums. This contribution was fifteen percent higher than that permitted by the General Laws.4 During the term of the contract, the city treasurer, following orders of the mayor, reduced the school committee’s contribution to fifty percent. As a result of this reduction, the teachers commenced grievance proceedings pursuant to the collective bargaining contract.5 After a hearing, the arbitrator found in the teachers’ favor and ordered

27 Id.

§13.3. 1 The Appeals Court in School Committee of Burlington noted that the record was silent on a critical issue, whether the striking teachers were paid for working on days which the committee may have tacked onto the originally scheduled school closing dates. 1979 Mass. App. Ct. Adv. Sh. at 168, 173, 385 N.E.2d at 1016, 1018.
4 G.L. c. 32B, § 7a, as then in effect, provided that the public employee pay 50% of the health insurance premium, while the governmental unit was required to pay the remaining 50%. The statute contained a provision permitting the governmental unit to contribute a higher percentage if so voted by the city. 1979 Mass. App. Ct. Adv. Sh. at 1424, 391 N.E.2d at 927-28. The city of Holyoke had never accepted this provision.
5 Id. at 1419, 391 N.E.2d at 926.
the school committee to reimburse the teachers the fifteen percent additional contribution.\(^6\) The school committee commenced an action under chapter 150C, section 11(a)(3), seeking to vacate the arbitrator’s award, and a superior court judge granted the requested relief.\(^7\)

On appeal, the association argued to the Appeals Court that there was a crucial distinction in this case between an arbitrator’s award of money damages and an arbitrator’s order to perform an illegal act.\(^8\) The association contended that School Committee of Burlington was not controlling, because the arbitrator had not specifically ordered the school committee to pay the higher premiums, but rather had only ordered it to reimburse the teachers for the difference between the fifty and sixty-five percent contribution rates. The court disagreed:

The public policy limitation upon contracts concerning governmental contributions to insure premiums must prevail, and it cannot be frustrated by awarding the contributions but under a different label. “This case exemplifies a well understood principle—that mere characterization of a feature of a collective bargain or an arbitration award as ‘compensation,’ or ‘terms or conditions of employment’ or some other subject conventionally or by law within the scope of either process, will not save the provision if in substance it defeats a declared legislative purpose.”\(^9\)

The association also maintained that the arbitrator’s award of monetary damages was proper because the school committee had breached its duty under the bargaining agreement to “take such other action as may be necessary in order to give full force and effect to the provisions of this contract.”\(^10\) The association noted that the arbitrator had found that the record did not indicate that the committee had made any effort to secure acceptance by the city of Holyoke of the higher contribution rate. In support of its argument, the association cited Mendes v. City of Taunton,\(^11\) where the Supreme Judicial Court found that the mayor of Taunton was required to seek an appropriation in order to fund a collective bargaining agreement for employees of that city. The Appeals Court distinguished Mendes as involving a purely “ministerial” act involving no exercise of a policy-making function.\(^12\) The court characterized the issue subject to arbitration in School Committee of Holyoke—whether the city should vote to accept the statutory provision

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\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id. at 1424-25, 391 N.E.2d at 938.
\(^{9}\) Id. at 1427-28, 391 N.E.2d at 929 (citation omitted).
\(^{10}\) Id. at 1426, 391 N.E.2d at 928.
allowing a higher contribution to premiums—as a matter of municipal policy. The Appeals Court concluded that Mendes was not controlling, since the issue in the present case, involving a matter of public policy which has been enunciated by statute, was one on which the school committee could not agreed to be bound.

§13.4. Arbitral Authority in Public Sector Disputes—Police Commissioner Authority to Withhold Service Revolver. The association’s argument in City of Holyoke is indicative of a trend toward defending an arbitration award by asking the courts to analyze the remedy rather than the issue submitted to the arbitrator. Another example during the Survey year of the use of such an argument is found in City of Boston v. Boston Police Patrolmen’s Association, where the city of Boston commenced an action pursuant to chapter 150C, section 11, seeking to vacate an arbitrator’s award ordering the police commissioner to reissue a service revolver to a police officer. In 1972, after he had threatened three civilians with his service revolver while intoxicated and off duty, a police officer was suspended by the commissioner for a period of one year, followed by a one-year probationary period. During the probationary period, the officer conducted himself in an exemplary manner while serving in an administrative clerical capacity. It also appeared that he had overcome his problem with alcohol. Based on the foregoing, upon completion of the probationary period, the officer requested police officials to reissue his service revolver so that he would be eligible for overtime assignments and paid details. The police commissioner refused to return the service revolver to the officer, asserting that it was his statutory prerogative and responsibility to control the issuance of a weapon to a police officer.

An arbitrator found that the decision not to reissue the service revolver to the police officer at the completion of his suspension and probationary period constituted extended punishment and that the collective bargain-

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13 Id.
14 Id. at 1427, 391 N.E.2d at 929.
15 Id.

2 Id. at 1645, 392 N.E.2d at 1204.
3 Id.
4 Id.
5 Id. at 1645-46, 392 N.E.2d at 1204. Paid private details and certain overtime duties are assigned only to armed police officers.
6 Id. The officer had agreed to a physical examination, and the physician referred him to a psychiatrist for evaluation. The officer refused this psychiatric examination.
7 Id. Under the Acts of 1906, c. 291, § 11, the police commissioner has general control over the administration of the police department, while section 14 specifically provides that he shall have the power to determine which weapons police officers shall carry. Id. at 1647 n.3, 392 N.E.2d at 1204 n.2.
ing agreement did not provide for such a sanction in this case. The arbitrator concluded that the commissioner lacked authority to withhold the revolver, and he ordered the commissioner to return the gun to the officer. The arbitrator also found that the bargaining agreement required a fair and equitable distribution of overtime assignments and paid details among those officers within a district who requested such work. He ordered the city to pay the officer an amount equal to what he would have earned by participating in such extra work from the date his probationary period ended.

Following the arbitrator’s decision, the Patrolmen’s Association, the bargaining representative of the police officer, moved to confirm the award in superior court. The superior court judge entered an order allowing the motion for confirmation, and the city appealed. No judgment had been entered by the lower court, however, and the Appeals Court dismissed the appeal. Because the issue had been fully briefed and argued, and in view of the possibility that the city might move for a rehearing on an association’s motion, the Appeals Court decided to express its views regarding the matters.

The Appeals Court framed the issue as one of whether the police commissioner’s denial of a weapon to an officer, which concomitantly resulted in the deprivation of overtime assignments and paid details for the officer, was a proper dispute for arbitration. Citing Fiberboard Paper Products Corp. v. NLRB, the court initially noted that “[f]ew subjects, if any, in the realm of labor relations present themselves singularly or unattached to other concerns.” The court then reasoned that when an arbitral award mandates actions by an employer, and those actions touch upon both subjects of arbitration and subjects of “policy,” then a court should employ a balancing test to determine the legal effect of the award. The court noted that an arbitration award cannot stand if the “policy ingredient” in the issue subject to arbitration is so comparatively heavy that collective bargaining on the subject is to be denied

8 Id. at 1648, 392 N.E.2d at 1205.
9 Id.
10 Id.
11 Id. The city’s appellate brief did not address the issue pertaining to the award of overtime assignment and paid-detail earnings. The Appeals Court, therefore, treated this issue as waived and focused exclusively on the power of the arbitrator to order the reissuance of the officer’s revolver. Id.
12 Id. at 1644, 392 N.E.2d at 1203.
13 Id.
14 Id.
15 Id. at 1645, 392 N.E.2d at 1203-04.
16 Id. at 1649, 392 N.E.2d at 1205. See note 11 supra.
19 Id. at 1650, 392 N.E.2d at 1206.
effect as a matter of law.\textsuperscript{20} Analyzing the facts of the case at bar, the court concluded that policy considerations concerning the issuance of a weapon far outweigh any other concern.\textsuperscript{21} The Appeals Court explained that the Massachusetts legislature had determined that decisions concerning who shall carry a firearm and under what conditions should be made by the heads of law enforcement agencies.\textsuperscript{22} The court observed that “[t]he concerns of public officials should reflect those of the public, and its safety cannot be placed on the bargaining table as if it were a subject open to compromise and negotiation.”\textsuperscript{23} The Appeals Court concluded that in this case the commissioner was motivated by a legitimate concern for public safety.\textsuperscript{24} Accordingly, the court held that the arbitrator’s award that the officer’s service revolver be returned to him was in excess of his powers within the meaning of chapter 150C, section 11(a)(3).\textsuperscript{25}

Shortly after its decision in \textit{Boston Police Patrolmen’s Association}, the Appeals Court had occasion to consider the limitations of that decision. In \textit{Mayor of Somerville v. Caliguri},\textsuperscript{26} the police chief denied a black officer a service revolver and then assigned him to foot patrol in an area where he had previously met with open hostility from the residents. The officer refused these assignments; consequently, he was listed as “absent without leave,” thereby losing his salary, benefits, and seniority.\textsuperscript{27} This matter was eventually submitted to binding arbitration under the applicable collective bargaining contract, and the arbitrator awarded the officer his back pay and ordered his reinstatement with full accumulated seniority.\textsuperscript{28} The city moved to vacate the award pursuant to chapter 150C, section 11. The superior court judge denied the city’s motion and confirmed the award. The city appealed.\textsuperscript{29}

Noting that its review of an arbitration award is limited, the Appeals Court determined that the only issue before it was whether the arbitrator ordered relief which was beyond his power to grant.\textsuperscript{30} The city con-

\begin{itemize}
  \item \textsuperscript{20} \textit{Id.} at 1650-51, 392 N.E.2d at 1206.
  \item \textsuperscript{21} \textit{Id.} at 1651, 392 N.E.2d at 1206.
  \item \textsuperscript{22} \textit{Id.} (citing several statutes reflecting the legislature’s determination on this issue).
  \item \textsuperscript{23} \textit{Id.} at 1652, 392 N.E.2d at 1206.
  \item \textsuperscript{24} \textit{Id.} at 1654, 392 N.E.2d at 1207. The court indicated that it would have reached a different result if it had found that the commissioner’s action was “a pretense or device activated by personal hostility,” rather than an action motivated by a legitimate concern for safety. \textit{Id.}
  \item \textsuperscript{25} \textit{Id.} Since there was no judgment in the case, however, the court dismissed the appeal. \textit{Id.} See text at notes 14-15 \textit{supra}.
  \item \textsuperscript{26} 1979 Mass. App. Ct. Adv. Sh. 1802, 393 N.E.2d 958.
  \item \textsuperscript{27} \textit{Id.} at 1802-03, 393 N.E.2d at 959.
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 1803, 393 N.E.2d at 959.
\end{itemize}
tended that *Boston Police Patrolmen's Association* \(^{31}\) controlled and that on the basis of that decision, the arbitrator had exceeded his authority. The court rejected the city's argument for two reasons. First, the court conceded that *Boston Police Patrolmen's Association* prohibits an arbitrator from disturbing a police chief's legislative grant of authority to determine which officers shall carry what weapons.\(^{32}\) The court explained, however, that the arbitral award in the present case did not require the chief to issue a service revolver to the officer.\(^{33}\) It merely awarded the officer lost compensation and benefits and ordered him reinstated with full and accumulated seniority.\(^{34}\) The court thus held that the award was not in conflict with the authority vested by the statute in the police chief.\(^{35}\)

The Appeals Court determined that *Boston Police Patrolmen's Association* did not compel staying the award for a second reason. The court explained that in its earlier decision, it had held that the decision of an official who is legislatively vested with the power to determine who shall carry firearms shall not be disturbed by an arbitrator, *in the absence of a showing that the official has abused his managerial powers.*\(^{36}\) The court's review of the facts, as found by the arbitrator, revealed that the Somerville police chief had abused his managerial authority. The chief had assigned the officer to an area where his safety would be endangered without his service revolver, despite the chief's determination that the revolver was equipment necessary for the performance of that assignment.\(^{37}\) These facts had led the arbitrator to characterize the chief's actions as "arbitrary, capricious and blatantly discriminatory," and in violation of the bargaining agreement.\(^{38}\) In the view of the Appeals Court, the chief's action was an "imposition of a sentence rather than an exercise of his managerial powers to issue weapons and make job assignments."\(^{39}\) The court further found that the chief's asserted use of statutory power was nothing more than "a pretense of device activated by a concern which is far removed from the efficiency and integrity of the police department."\(^{40}\) Since the police chief had abused his managerial powers, and since the arbitral award did not


\(^{33}\) Id. at 1806, 393 N.E.2d at 960.

\(^{34}\) Id. at 1807, 393 N.E.2d at 961.

\(^{35}\) Id. at 1807, 393 N.E.2d at 961.

\(^{36}\) Id. at 1803-04, 393 N.E.2d at 959.

\(^{37}\) Id. at 1806, 393 N.E.2d at 960.

\(^{38}\) Id.

\(^{39}\) Id. at 1807, 393 N.E.2d at 961.

\(^{40}\) Id.
order the chief to return the gun to the prosecutor, the court allowed the award to stand.41

A review of the analysis adopted in School Committee of Holyoke, Boston Police Patrolmen's Association, and Mayor of Somerville, illustrates some of the additional problems confronting the courts when they determine the validity of arbitration awards interpreting public sector collective bargaining agreements. Not only must a court analyze the issue submitted to the arbitrator to determine whether it conflicts with public policy,42 but it also must analyze the arbitrator's award for the same purpose.43 If the award does not on its face require the public employer to perform an act contrary to public policy, it does not necessarily follow that the award must be enforced. A court must further examine the award to determine whether it "frustrates" public policy by affording improper relief under a "different label." 44 Thus, in many cases a court, under a rubric of "public policy," must engage in an analysis of matters that are very similar to those that arbitrators historically have examined.

§13.5. Arbitral Authority in Public Sector Disputes—School Committee Examination Policy. In School Committee of Boston v. Boston Teachers Union, Local 661 the Supreme Judicial Court again was asked to consider the legal barriers imposed on judicial enforcement of arbitration awards arising from public sector collective bargaining agreements. In School Committee of Boston, the union and the committee were parties to a collective bargaining agreement effective from September 1, 1976, through August 31, 1978. Article X of that agreement provided that "[w]ith respect to matters not covered by this Agreement which are proper subjects for collective bargaining the Committee agrees it will make no changes without prior consultation and negotiation with the union." 2 In May of 1977, without prior consultation and negotiations with the union, the committee implemented a new policy of holding elementary school final examinations.3 As a result of the committee's unilateral action, the union processed a grievance in accordance with the collective bargaining agreement and eventually presented its case to binding arbitration.4 The arbitrator determined that the final examination proposal was a proper subject for bargaining and, therefore, subject to the advance consultation requirement under Article X of the

41 Id.
42 See § 2 supra.
43 See § 3 supra.
44 See § 3, at note 9, supra.
2 Id. at 1239, 389 N.E.2d at 971.
3 Id. at 1239-40, 389 N.E.2d at 971.
4 Id. at 1240, 389 N.E.2d at 971.
labor agreement. He ordered the committee to bargain with the union. The parties concurrently filed motions to vacate and confirm the arbitral award. A superior court judge deemed that the award was invalid as a matter of law on the ground that it would unduly infringe on the exclusive prerogative of the committee to establish or change educational policy. The union appealed, and the Supreme Judicial Court granted its application for direct appellate review.

At the outset, the Court noted that the issue before it was a narrow one: whether the arbitrator's award directing the committee to consult with the union prior to implementing the final examination policy substantially interfered with the school committee's ability to formulate and administer educational policy. Thus, the Court reasoned, it was not called upon to determine whether the union's grievance was arbitrable under the labor agreement, or whether the arbitrator erred in his interpretation of the relevant contractual provisions. The Court assumed, arguendo, that the decision to hold final examinations was a management prerogative and thus beyond the scope of collective bargaining. The Court then explained:

However, even where certain ultimate decisions may have been deemed to be so laced with educational policy as to be beyond the reach of bargaining and arbitration, we have upheld arbitral awards which have merely involved questions of adherence by the school committee to procedures set forth in the collective bargaining agreement for resolving such determinations.

The Court went on to examine the question submitted to the arbitrator, emphasizing that it was not whether the committee could unilaterally institute the final examinations, but rather merely whether there had been a violation of agreed-to procedures in implementing the examinations without consulting the union. The Court explained that the arbitral award did no more than order the committee to refrain from

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5 Id. at 1242, 389 N.E.2d at 972.
6 Id.
7 Id.
8 Id.
9 Id. at 1238-39, 389 N.E.2d at 971. "Because there are subjects which no school committee is free to bargain away to a union or delegate to an arbitrator, arbitral awards concerning these issues are subject to judicial examination. If an award violates this principle, it should be vacated." Id.
10 Id. at 1242, 389 N.E.2d at 972.
11 Id. at 1243, 389 N.E.2d at 972.
12 Id. at 1246-47, 389 N.E.2d at 947.
13 Id. (emphasis in original).
14 Id. at 1248, 389 N.E.2d at 975. The Court indicated that this question is "heavily laden" with policy considerations. Id.
15 Id.
implementing the final examination policy without first consulting with the union; it in no way prohibited the committee from ultimately instituting such a policy. Based on the foregoing, the Court reversed the judgment of the lower court and remanded the case with instructions that the award be confirmed.

While Boston School Committee evidences the previously-discussed difficulties courts have in analyzing public sector arbitration awards, it also highlights a further problem. The Court in that case examined the arbitral award in detail and concluded that it was enforceable since it did not substantially affect the committee's ultimate prerogative to institute a final examination policy, but rather only mandated adherence to agreed-on procedures. The Court, however, noted in this regard that:

[w]hile we do not foreclose the possibility that a clause of this nature might in some instances improperly obstruct the freedom of a school committee to promulgate and administer educational policy, nothing in this record suggests that adherence to its minimal bargaining obligation poses any threat to the committee's ability to freely develop policy here.

It thus would appear that not only must the courts examine an arbitration award to determine whether it is consistent with the statutes of the commonwealth and its public policy. They also must analyze an award that on its face is enforceable to determine whether it "poses any threat" to prerogatives reserved to the public employer. If it does, it appears that the court must further analyze the award to determine whether the intrusion into those prerogatives is likely to benefit the employer or hinder it.

§13.6. Conclusion. It is clear from these cases decided during the Survey year that because of the "tension" that exists between the terms of a collective bargaining agreement requiring a public employer to submit disputes to final and binding arbitration and the statutory authority of such public employer to make particular decisions, the courts of the commonwealth have substantial power to review arbitration awards issued under such agreements. During such review, a court does not pass on the correctness of the arbitrator's interpretation. Instead, it determines whether there is a non-contractual legal barrier to the enforcement of the award.

This detailed review by the court would, at first glance, seem to be in direct conflict with the United States Supreme Court's Steelworkers

16 Id.
17 Id. at 1249, 389 N.E.2d at 975.
18 Id. at 1248-49, 389 N.E.2d at 975.
19 Id.
trilogy.\textsuperscript{1} Because freedom to contract in the private sector does not blanket public sector matters and because governmental interests and public policy are involved, it follows that in those cases where the arbitrator's interpretation of the bargaining agreement intrudes into an area specifically reserved by statute to the public employer or is in conflict with public policy, review by the courts is warranted. In these instances, the court determines whether the award of the arbitrator is consistent with governmental interests and public concerns. The court essentially is interpreting the law of the commonwealth, rather than the contract itself. As long as that review does not include a weighing of the merits of the grievance or a reinterpretation of the bargaining agreement, but rather is limited to a determination of whether there is a non-contractual bar to the enforcement of the award, there would seem to be no conflict with the \textit{Steelworkers} trilogy.

\textsuperscript{1}See § 1, text and notes at notes 5-7, \textit{supra}.  

\section*{13.6}