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Judicial Review of Labor Arbitration Awards in Rhode Island

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I. INTRODUCTION

This Article examines the current state of judicial review of labor arbitration awards, with a special emphasis on recent case law emerging from the Rhode Island Supreme Court. The focus of this Article is judicial review of arbitration awards; however, with the increasing use of arbitration as a dispute-resolution mechanism, the experience in the labor-arbitration field may have relevance to other areas of law which increasingly utilize arbitration.

A review of the federal case law in the labor-arbitration field indicates a continuing application of a deferential standard of review first enunciated by the United States Supreme Court over thirty years ago. The First Circuit, however, has demonstrated a willingness to vacate awards which violate public policy. By contrast, recent decisions of the Rhode Island Supreme Court indicate a more aggressive approach to the review of arbitration awards. The Rhode Island Supreme Court appears to be engaged in an effort to reign in arbitrators who exceed their authority under collective bargaining agreements. While it still gives substantial

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deference to arbitration awards, the court has indicated an increasing willingness to examine carefully awards of arbitrators and overturn them in appropriate circumstances. With these recent decisions, the Rhode Island Supreme Court has significantly altered the playing field with respect to judicial review of labor arbitration awards. The long-term impact of these rulings will be significant in terms of the authority of arbitrators to interpret terms of collective bargaining agreements in the public sector, as well as the role of the courts in overseeing this function.

Part II of this Article will first address several procedural issues which a practitioner must be aware of in bringing a motion to vacate or overturn an arbitration award. Second, Part III will turn to the substantive law in the area, looking first at the federal decisional law and then to the law, both statutory and decisional, of Rhode Island. Finally, in conclusion, Part IV of the Article will provide some opinions and suggestions on the future developments of the law and practice in this field.

II. PROCEDURAL ISSUES

Before discussing the law surrounding the judicial review of labor arbitration awards in substance, a number of important procedural issues exist which an attorney should recognize before moving to vacate or overturn an arbitration award.[1]

First, it is important to understand that parties may bring actions to vacate or overturn arbitration awards in either federal or state court,[2] depending upon whether the collective-bargaining relationship is governed by the National Labor Relations Act (NLRA)[3] or the Rhode Island State Labor Relations Act.[4] Generally speaking, private-sector labor contracts are governed by the NLRA, which vests jurisdiction in the federal courts under section

1. The scope of this Article does not include issues of "procedural arbitrability" under either federal, state or arbitral law. Rhode Island law provides the statutory framework for enforcement of agreements to arbitrate under state law. *See* R.I. Gen. Laws §§ 28-9-1 to -26 (1956) (1995 Reenactment). For general information on the procedural arbitrability issue, see Frank Elkouri & Edna Aspen Elkouri, How Arbitration Works (BNA 4th ed. 1985).

2. This Article places special emphasis on Rhode Island labor-arbitration law. As such, any reference to "state law" and/or "state courts" indicate a reference to Rhode Island state law and/or Rhode Island state courts.

3. 29 U.S.C.A. §§ 151-85 (West 1973 & Supp. 1997).

4. R.I. Gen. Laws §§ 28-7-1 to -46 (1956) (1995 Reenactment).

301.[5] However, an action to vacate an award resulting from a contract covered by the NLRA may be brought in state court;[6] nonetheless, it is likely that such an action would be removed to federal court under 28 U.S.C. § 1441.[7] Public-sector contracts, by contrast, are governed solely by state law, and parties may bring actions to vacate arbitration awards in the public sector only in state court.[8]

A. *Motions to Vacate*

A challenge to an arbitration award is made in the form of a motion to vacate when brought in state court. Typically, the losing party at arbitration files a motion to vacate, and in most cases the prevailing party will file a motion to confirm the award. Occasionally, a prevailing party will file a motion to confirm an arbitration award where no motion to vacate has been filed in order to ensure that the award has more enforceability in the future. The obvious reason for obtaining a confirmation order from the court is to gain a vehicle for enforcement if the losing party fails to comply. Section 28-9-21 of the Rhode Island General Laws establishes the time

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5. Originally, the state labor relations act was designed to apply to both private- and public-sector labor relations. However, with the passage of the NLRA in 1939, Congress preempted the field with respect to companies engaged in interstate commerce. *See* 29 U.S.C. § 152(7), (8) (1994); *see, e.g.*, Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967) ("The [NLRA] is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that states are prohibited from regulating activities that are within the purview of the NLRA).

6. *See* Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 511 (1962) (holding that under § 301, "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations").

7. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Exquisito Servs., Inc. v. Bartenders, Motel, Hotel and Restaurant Workers Local Union No. 222, 579 F. Supp. 873 (S.D. Ohio 1983).

8. The NLRA specifically exempts state and local government labor contracts from its coverage. 29 U.S.C.A. § 152(2) (West 1973 & Supp. 1997); *see also* Chapparro-Febus v. International Longshoremen Ass'n, Local 1575, 983 F.2d 325, 329 (1st Cir. 1992) (defining the term "political subdivision" as it is used in 29 U.S.C.A. § 152(2)).

frame and the procedure for filing a motion to vacate.[9] Section 28-9-21 provides:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party, or his attorney, within three (3) months after the award is filed or delivered, as prescribed by law for service of notice of a motion upon an attorney in an action; except that in opposition to a motion to confirm an award, any of the grounds specified in § 28-9-18 may be set up. For the purpose of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.[10]

In federal court, an action to vacate the award is brought as an action under section 301 of the Labor Management Relations Act (LMRA).[11] Jurisdiction may also exist pursuant to the Federal Arbitration Act (FAA).[12] While the FAA does not apply to "contracts of employment of workers . . . engaged in foreign or interstate commerce,"[13] the federal courts have taken varying views on its applicability to labor arbitration awards, which necessarily arise under labor contracts.[14]

Labor contracts are clearly "contracts for employment." The United States Supreme Court, in *United Paperworkers International Union v. Misco, Inc.*,[15] seems to have clarified this conclusion when it acknowledged that federal courts have looked to the LMRA as guidance in reviewing labor arbitration awards under section 301. The Court then proceeded to refer to the LMRA in analyzing the case before it.[16] There is no statute of limitations contained in section 301. Courts have disagreed as to the appropriate limitations period to be "borrowed" in these actions. Several

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9. R.I. Gen. Laws § 28-9-21 (1956).
10. *Id.*
11. 29 U.S.C. § 185 (1994).
12. 9 U.S.C. §§ 1-14 (1994).
13. *Id.* at § 1.
14. *Compare* Hotels Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistar Local 901, 763 F.2d 34 (1st Cir. 1985) (applying the FAA in the labor context) *and* Bell Aerospace Co. v. Local 516 Int'l Union, UAW, 500 F.2d 921 (2d Cir. 1974) (same), *with* Sine v. Local No. 992, Int'l Bhd. of Teamsters, 644 F.2d 997 (4th Cir. 1981), *cert. denied*, 454 U.S. 965 (1981) (holding that the FAA does not apply to labor contracts that are contracts of employment).
15. 484 U.S. 29 (1987).
16. *See id.* at 40 n.9.

circuit courts have borrowed the three-month limitation period provided in the FAA.[17]

B. *Motions to Stay*

In order to bring a motion to vacate an arbitration award in a Rhode Island state court, the moving party must either comply with the arbitrator's award pending the motion to vacate or move the court for a stay of the arbitration award pending consideration of the motion to vacate.[18] Generally, but not in all cases, the Rhode Island Superior Court will grant the motion to stay the award. This is particularly true in cases which require the payment of monies or other significant steps by the employer which would be difficult, if not impossible, to undo once the remedy is implemented.

C. *Attorney Fees*

If the moving party loses a motion to vacate brought in state court pursuant to section 28-9-1 of the Rhode Island General Laws, then that party must pay the attorney fees of the prevailing party.[19] By contrast, actions to vacate arbitration awards brought in federal court under section 301 are not subject to a similar "loser-pays" provision. Federal courts may award attorney fees where they find that the action is frivolous or brought in bad faith to harass the other party.[20] Parties to an action in federal court may also be liable for fees under Rule 11 of the Federal Rules of Civil Procedure.[21] Of course, the standard under Rule 11, while it

17. *See, e.g.*, Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Power City Plumbing & Heating, Inc., 934 F.2d 557 (4th Cir. 1991) ("borrowing" the three-month limitation period where no state-law analogue is present). Similar to the FAA, the limitations period in Rhode Island is three months. *See* R.I. Gen. Laws § 28-9-21.

18. *See* R.I. Gen. Laws § 28-9-18(b).

19. *See* R.I. Gen. Laws §§ 28-9-18(c).

20. *See generally* Chrysler Motors Corp. v. International Union, Allied Indust. Workers of Am., 959 F.2d 685, 689-90 & n.5 (7th Cir. 1992) (refusing to award attorney fees when the court found that the action was not frivolous); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1167-68 (7th Cir. 1984) (same).

21. *See* Chicago Newspaper Publishers Ass'n v. Chicago Web Printing Pressmen's Union No. 7, 821 F.2d 390, 397 (7th Cir. 1987); *see also* Local Union 879 Allied Indus. Workers of Am. v. Chrysler Marine Corp., 819 F.2d 786, 791 (7th Cir. 1987) (stating that Rule 11 requires an objective test and a showing of bad faith is not essential).

does not require a showing of bad faith, does present a significant hurdle to any prevailing party seeking attorney fees.

D. *Finality*

In order for an award to be ripe for review by a court, it must be a final award. An arbitration award is final only if the arbitrator intends that the award be a complete determination of every issue submitted.[22] An arbitration award is not final when an arbitrator retains jurisdiction so that he may decide a substantive issue that the parties have not resolved.[23] In a recent case decided by the United States District Court for the District of Massachusetts, the court stated:

> As a general matter, federal courts decline to review an arbitrator's decision under section 301 of the LMRA until the award is final. "To be considered 'final,' an arbitration award must be intended by the arbitrator to be a complete determination of every issue submitted. . . ." "Where an arbitrator retains jurisdiction in order to decide a substantive issue the parties have not yet resolved, this retention of jurisdiction 'indicates that the arbitrator did not intend the award to be final.'" As with the finality doctrine governing appeals from district court orders, this "complete arbitration rule" preserves judicial resources by preventing piecemeal litigation.[24]

An arbitration award cannot be considered final if a determination of damages requires the taking of evidence to resolve significant issues.[25] When an arbitrator retains jurisdiction over a remedy, his award is final *only* if determination of the remedy amounts to mere ministerial detail.[26]

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22. *See* Millmen Local 550, United Bhd. of Carpenters and Joiners of Am. v. Wells Exterior Trim, 828 F.2d 1373, 1376 (9th Cir. 1987) (quoting Anderson v. Norfolk & Western Ry. Co., 773 F.2d 880, 883 (7th Cir. 1985)).

23. *See* Orion Pictures Corp. v. Writers Guild of Am., West, Inc., 946 F.2d 722, 724 (9th Cir. 1991).

24. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union 501 v. Burtman Iron Works, Inc., 928 F. Supp. 83, 86 (D. Mass. 1996) (citations omitted).

25. *See* Local 36, Sheet Metal Workers Int'l Ass'n v. Pevely Sheet Metal Co., 951 F.2d 947, 949-50 (8th Cir. 1992) (holding that the award was not final and that the statute of limitations for filing the motion to confirm did not begin running until the arbitrator issued an order determining damages).

26. *See id.* at 949 (citing Dreis & Krump Mfg. Co. v. International Ass'n of Machinists and Aerospace Workers, 802 F.2d 247, 251 (7th Cir. 1986)).

III. SUBSTANTIVE ISSUES

The substantive law of judicial review of arbitration awards starts with federal decisional law, beginning with the early cases decided by the United States Supreme Court. These early cases remain, to this day, the foundation of the law in this area. In reviewing the federal decisions in this Part, particular focus is given to recent decisions of the First Circuit and United States District Court for the District of Rhode Island. The second section of this Part deals with the statutory and decisional law of Rhode Island and the Rhode Island Supreme Court, respectively. This section includes a brief review of the court's early decisions, but focuses largely on several recent decisions which suggest an important shift in the court's approach to the review of arbitration awards. Finally, this Part provides a discussion of several pending cases, legislative efforts to reverse some of the court's recent holdings and some commentary from the author.

A. *Federal Decisional Law and Standards of Review*

1. *The United States Supreme Court: From the* Steelworkers Trilogy *to* Misco *and the Policy of Judicial Deference to Arbitration*

Any analysis of the federal standard of judicial review of arbitration awards necessarily begins with three cases—*United Steelworkers of America v. American Manufacturing Co.*,[27] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[28] and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*[29] These three cases, decided on the same day and known collectively as the *Steelworkers Trilogy* (*Trilogy*), set forth the general standard of review for cases brought in United States district courts pursuant to section 301(a) of the LMRA.[30] Although later cases

27. 363 U.S. 564 (1960).
28. 363 U.S. 574 (1960).
29. 363 U.S. 593 (1960).
30. Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a) (1988), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

prescribe the application of this general standard, the deferential standard of review contained in the *Trilogy* remains the benchmark for judicial review of arbitral decisions.[31]

In *United Steelworkers of America v. American Manufacturing Co.*,[32] the Court confronted, among other issues, the question of the arbitrability of a grievance that the union filed against the company.[33] The Sixth Circuit affirmed the district court's decision to grant summary judgment on the grounds that the union's grievance was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement."[34] Reversing the Sixth Circuit, the Court concluded that the LMRA embraced a policy favoring the dispute-resolution mechanism chosen by the parties.[35] In rejecting the analysis employed by the court of appeals, Justice Douglas, author of the majority opinion, stated:

> The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. . . . The function of the court is very limited when the parties have agreed to submit all 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. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.[36]

Id.

31. *See, e.g.*, El Mundo Broading. Corp. v. United Steelworkers of Am., 116 F.3d 7, 9-10 (1st Cir. 1997) (citing United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (stating that generally, arbitration awards are not subject to judicial review)).

32. 363 U.S. 564 (1960).

33. *See id.* at 566.

34. *Id.* at 566 (quoting United Steelworkers of Am. v. American Mfg. Co., 264 F.2d 624, 628 (6th Cir. 1959)).

35. *See id.* Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1988), states in pertinent part that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ." *Id.* (quoting Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) (1988)).

36. *American Mfg. Co.*, 363 U.S. at 567-68.

In the second *Trilogy* case, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[37] the Court, again speaking through Justice Douglas, expanded the scope of the arbitrator's power to interpret the terms of a collective bargaining agreement.[38] The Court stated:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. . . . The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts. . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[39]

Having concluded that the arbitrator's power to interpret the contract and the disputes arising from the contract was plenary, the Court went on to establish a corresponding standard of review in the final installment of the *Trilogy*. In this final installment, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[40] the Court addressed the issue of whether it is appropriate for a federal court to review the merits of an arbitrator's award pursuant to a collective bargaining agreement between the parties.[41] The United States Court of Appeals for the Fourth Circuit had held that the arbitrator's award was unenforceable because it was both indefinite and beyond the scope of the collective bargaining agree-

37. 363 U.S. 574 (1960).

38. *See id.*

39. *Id.* at 581-82.

40. 363 U.S. 593 (1960).

41. *See id.*

ment.[42] Emphasizing that the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of [arbitrator's] awards,"[43] Justice Douglas propounded a deferential standard of review for purposes of the LMRA.

Drawing on principles articulated in the Court's prior two rulings, the majority stated:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations . . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[44]

The Court went on to hold that courts must be deferential to arbitrators' holdings, stating that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[45] Moreover, the Court noted that a reviewing court may not overturn an arbitrator's award simply because it disagrees with the arbitrator's construction of the collective bargaining agreement.[46] The parties bargained for the arbitrator's interpretation of the agreement, and thus, the "courts have no business overruling [the arbitrator]" simply because they might arrive at a different interpretation of the contractual language.[47]

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42. *See id.* at 595-96. The court of appeals held that the arbitrator's failure to specify the amount of certain back payments rendered the award unenforceable. Moreover, the court of appeals found that the expiration of the collective bargaining agreement precluded the arbitrator from requiring the company to reinstate employees as part of the remedy in the case. *See id.* at 596.

43. *Id.* at 596.

44. *Id.* at 597.

45. *Id.* at 596.

46. *See id.* at 599.

47. *Id.*

The *Trilogy*, and in particular the holding of *Enterprise Wheel & Car Corp.*, set forth the Court's early statement favoring judicial deference to arbitration awards, except in cases where the award does not "draw its essence" from the parties' agreement.

The question of whether an arbitration award draws its essence from the labor contract has been the source of considerable litigation over the years since the *Trilogy*. As the years passed, the Court recognized that judicial deference should not be unlimited. In the 1980s, the Court appeared to recognize the need for reviewing courts to scrutinize arbitration awards in order to ensure that the awards remained within the bounds of the contract, the law and public policy. In 1987, the Court dealt specifically with a public-policy "exception" to judicial deference. In *W.R. Grace & Co. v. Local Union 759*,[48] an employer laid off various male employees pursuant to a conciliation agreement that it had reached with the Equal Employment Opportunity Commission (EEOC).[49] The affected employees immediately filed grievances against the company, and, after protracted legal proceedings, the court of appeals forced the company to arbitrate the grievances.[50] At the arbitration, the company acknowledged that it had violated various seniority provisions in the collective bargaining agreement, but argued that it had done so in a good faith effort to comply with the conciliation agreement it had reached with the EEOC.[51]

During the course of the proceedings between the company and the union, the district court entered an order affirming the company's duty to comply with the conciliation agreement.[52] In spite of the conciliation agreement, the arbitrator found that the company had violated the seniority provisions of the collective bargaining agreement and issued an award in the union's favor. The district court vacated the award as contrary to public policy, and the United States Court of Appeals for the Fifth Circuit reversed.[53]

48. 461 U.S. 757 (1983).

49. *See id.* at 759-61.

50. *See id.* at 761-62.

51. *See id.* at 763. The conciliation agreement required the company to maintain a certain proportion of women as members of the plant's bargaining unit. The displaced male workers filed grievances claiming that the company had violated the seniority provisions of the collective bargaining agreement notwithstanding the conciliation agreement. *See id.* at 760-61.

52. *See id.* at 761.

53. *See id.* at 763-64.

After restating the standard of review set forth in the *Trilogy*, the Court proceeded to the argument that the arbitrator's award subverted well-established public policies. The Court stated:

> As with any contract, . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[54]

First, the Court addressed the important public policy of obedience to judicial orders.[55] Noting that the policy was an important one, the Court nevertheless refused to overturn the arbitrator's award because the company's desire to reduce its work force was the sole reason that the company decided to abide by the conciliation agreement and to ignore the collective bargaining agreement.[56] Given this choice by the company and the "sufficient contempt powers"[57] of the district court to ensure compliance with its injunctions,[58] the Court refused to vacate the award on this public-policy ground.

Second, the Court dismissed the contention that the arbitrator's award violated a public policy favoring voluntary compliance with Title VII.[59] The Court reasoned that a decision to vacate the arbitrator's award might actually encourage the contracting parties to use Title VII conciliation agreements to escape their obligations under the terms of a collective bargaining agreement.[60] The Court stated that "[p]ermitting such a result would undermine the federal labor law policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will

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54. *Id.* at 766 (citations omitted) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

55. *See id.*

56. *See id.* at 767.

57. *Id.* at 769.

58. The Court's opinion notes that the district court's order might have resulted only in a declaratory judgment against the company, and not a mandatory injunction against actions that violated the conciliation agreement. For purposes of the decision, the Court assumed that the latter set of circumstances was true. *See id.* at 768 n.11.

59. *See id.* at 771.

60. *See id.*

be honored."[61] After *W.R. Grace & Co.*, it appeared that the public-policy exception was limited, indeed.

Four years later in 1987, the Court clarified its dicta from *W.R. Grace & Co.* In *United Paperworkers International Union v. Misco, Inc.*,[62] the Court refined its definition of the "well defined and dominant public policy" that would justify a reviewing court's decision to vacate an arbitrator's award.[63]

In *Misco*, an employee, whose job involved the operation of dangerous equipment, was apprehended in a car filled with marijuana smoke. The car, which did not belong to the employee, was located on company grounds. The police recovered plastic scales and marijuana gleanings during a subsequent search of the employee's automobile. Without knowledge that the police had searched the employee's car, the company discharged the employee for violating a company rule prohibiting the posssession of drugs on company premises. The employee filed a grievance to protest the discharge.[64]

Finding that the company had failed to prove that the employee used or possessed marijuana on company premises, the arbitrator upheld the grievance and ordered the company to reinstate the employee with back pay and full seniority status.[65] The district court vacated the award on public-policy grounds and the Fifth Circuit affirmed,[66] noting that the award violated the policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."[67] The United States Supreme Court reversed.[68]

The Supreme Court agreed to review the court of appeals' decision on the question of whether an arbitrator's award may be reversed by a court on public-policy grounds only when the award violates positive law. However, the Court did not definitively de-

61. *Id.* (citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962)).

62. 484 U.S. 29 (1987).

63. *Id.* at 43-44 (quoting *W.R. Grace & Co.*, 461 U.S. at 766 ("[I]f the contract . . . violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant . . . .") (citation omitted)).

64. *See Misco*, 484 U.S. at 33.

65. *See id.* at 33-34.

66. *See id.* at 35.

67. *Id.* at 35 (quoting Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (5th Cir. 1985)).

68. *See id.* at 45.

cide this issue, but rather reversed the court of appeals on other grounds. The Court held that the lower courts exceeded their authority by disregarding the arbitrator's findings of fact with regard to whether the incident violated the employer's rules and by reaching their own findings with respect to the evidence in the arbitration regarding to the marijuana found in the grievant's car.[69]

After a general recitation of the standards set forth in the *Trilogy*, the Court reached the public-policy argument. The Court proceeded to restrict the *W.R. Grace & Co.* decision to those instances where a clear violation of an explicit public policy had occurred.[70] In the Court's opinion, *W.R. Grace & Co.* did not sanction a comprehensive judicial power to reject arbitration awards as against public policy,[71] but rather restricted public-policy review to those awards that were contrary to other laws and legal precedents.[72] The Court held that, "as long as the arbitrator is even arguably construing or applying the contact and acting within the scope of his authority, that a court is convinced it committed serious error does not suffice to overturn his decision."[73] Since the court of appeals grounded its decision only in general considerations of public policy, its ruling was inconsistent with both the holding in *W.R. Grace & Co.* and the findings of the arbitrator.[74] The Supreme Court therefore reversed.[75]

It is not surprising, therefore, that many commentators have argued strenuously in the years since the *Trilogy* for continued deference to arbitration awards.[76] Nevertheless, in spite of the gen-

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69. *See id.* at 39-42.

70. *See id.* at 43 (citing *W.R. Grace & Co.*, 461 U.S. at 766) (quoting Muschaney v. United States, 324 U.S. 49, 66 (1945)).

71. *See id.*

72. *See id.*

73. *Id.* at 38.

74. *Id.* at 44-45.

75. *See id.* at 45. It is important to note that the Court's opinion does not define whether a reviewing court's power to vacate an arbitrator's award arises only in those circumstances where public policy has been expressed as a positive law. Justice Blackmun suggests that satisfaction of the *W.R. Grace* criteria is a necessary element of any decision to vacate an arbitral award, but it may not be sufficient grounds for doing so. *See id.* at 47-48 (Blackmun, J., concurring).

76. *See* David E. Feller, *The Coming End of Arbitration's Gold Age, in* Arbitration 1976: Proceedings of the Twenty-Ninth Annual Meeting of the National Academy of Arbitrators 97, 107 (1976) (stating that deference to arbitral awards is a result of "recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-government"); Timothy J. Heinsz, *Judicial*

eral pronouncements of the Court from the *Trilogy* through *Misco* regarding deferential review, courts on numerous occasions have found legitimate bases for overturning arbitrators' awards, many times on public-policy grounds. Many of these decisions are discussed below.

2. *The United States Court of Appeals for the First Circuit*

There are numerous cases from the United States Court of Appeals for the First Circuit that discuss the appropriate standard of judicial review of arbitration awards. This section will examine the leading First Circuit cases in this area. These cases can generally be separated into two categories: (1) cases that embrace the standards propounded by the *Trilogy* and (2) cases that apply the public-policy analyses used in *W.R. Grace & Co.* and *Misco*.

The First Circuit decision in *Bettencourt v. Boston Edison Co.*[77] is one of its most influential restatements of the principles set forth in the *Trilogy* and is often cited in the opinions issued by that court.[78] *Bettencourt* involved a challenge to an arbitrator's

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Review of Labor Arbitration Awards: The Enterprise Wheel *Goes Around and Around,* 52 Mo. L. Rev. 243 (1987) (discussing the expanding judicial scrutiny of arbitration decisions); Edgar A. Jones Jr., *His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration,* 30 UCLA L. Rev. 881 (1983) (arguing that the courts have disrupted bargaining relationships by their willingness to override arbitrators' decisions); Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review,* 80 Colum. L. Rev. 267, 297-98 (1980) ("It is to be hoped that judges will learn to temper their activist instincts with an appreciation that the agreement before them is a unique type of contract, and that an apparently erroneous award may in fact just reflect the creative search for special rules that the parties need from their private judge, and for which they have negotiated."); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny,* 75 Mich. L. Rev. 1137, 1160-61 (1977) (stating that the arbitrator is the "reader" of parties' contract, his award becomes part of their contract and therefore courts defer to the arbitrator whose award should stand, absent procedural violations or illegality of resulting contract); Clyde W. Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass,* 2 Buff. L. Rev. 1, 27 (1953) (considering the role of courts in reviewing the merits of grievance, and finding that "courts have a function, but it is the limited one of exercising only enough supervision to prevent labor arbitration from destroying itself").

77. 560 F.2d 1045 (1st Cir. 1977).

78. *See, e.g.,* Wheelabrator Envirotech Operating Servs. Inc. v. Massachusetts Laborers Dist. Council Local 1144, 88 F.3d 40, 44 (1st Cir. 1996); North Adams Reg'l Hosp. v. Massachusetts Nurses Ass'n, 74 F.3d 346, 348 (1st Cir. 1996); Maine Cent. R.R. Co. v. Brotherhood of Maintenance of Way Employees, 873 F.2d 425, 428 (1st Cir. 1989); Local 1445, United Food and Commercial Workers Int'l Union

ruling that the termination of an employee was consistent with the terms of the parties' collective bargaining agreement. The court of appeals affirmed the district court's entry of summary judgment in favor of the company.[79]

After citing the *Trilogy* and the general policies that weigh against the judicial review of arbitrators' decisions, the First Circuit outlined a three-step test for determining whether an arbitrator's decision evinced an "infidelity to his obligation to interpret and apply the collective bargaining agreement."[80] The court stated:

> It may be that some of the arbitrator's findings and some steps in his reasoning process are questionable . . . . But appellant has to show far more than that the case might have come out the other way, or that there were gaps in the arbitrator's reasoning. At a minimum, he must establish that the award is "unfounded in reason and fact," is based on reasoning "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling," or is mistakenly based on a crucial assumption which is "concededly a non-fact."[81]

The court, citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, concluded with an explicit rejection of a substantial evidence standard of review.[82] The First Circuit has continued to apply the *Bettencourt* standard to disputes concerning the reviewability of arbitration awards.[83]

The court of appeals nonetheless has been willing to overturn arbitrators' decisions in a number of instances. For example, it overturned an award where an arbitrator had clearly misinterpreted unambiguous language in the collective bargaining agree-

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v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir. 1985); Courier-Citizen Co. v. Boston Electrotypers Union No. 11, Int'l Printing and Graphic Communications Union, 702 F.2d 273, 281 (1st Cir. 1983).

79. *See Bettencourt*, 560 F.2d at 1048.

80. *Id.* at 1049 (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

81. *Id.* at 1050 (citations omitted).

82. *See id.*

83. *See, e.g., Wheelabrator Envirotech Operating Servs. Inc.*, 88 F.3d 40; Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Profs., 746 F.2d 924 (1st Cir. 1984).

ment.[84] Any award which does not draw its essence from the terms in the collective bargaining agreement will be subjected to close scrutiny in the First Circuit.[85] Nevertheless, while the "'considerable deference due an arbitrator's decision 'does not grant carte blanche approval to any decision that the arbitrator might make,'"[86] exceptions to the general rule against the review of arbitrators' awards are "few and far between."[87]

In 1992, the First Circuit refined the general rules set forth in the *Trilogy*. In *El Dorado Technical Services, Inc. v. Union General de Trabajadores de Puerto Rico*,[88] Judge Selya stated:

> In labor arbitration, matters of contract interpretation are typically for the arbitrator, not for a reviewing court. While the arbitrator's award must draw its essence from the collective bargaining agreement, it need not mirror a judge's notion of how the agreement's language might best be interpreted or might most fairly be applied to a given set of facts. . . . Put succinctly, then, a court should uphold an award that depends on an arbitrator's interpretation of a collective bargaining agreement if it can find, within the four corners of the agreement, any plausible basis for that interpretation.[89]

Clearly, in decisions like *El Dorado* and *Bettencourt*, the First Circuit adheres to the general rules set forth in the *Trilogy*, and the notion that judicial review of arbitration awards should be generally limited to a narrow subset of circumstances so as not to reduce the arbitral process to "an empty exercise."[90] Notwithstanding the Court's deferential approach to arbitral awards, however, the First

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84. *See* Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940, 945 (1st Cir. 1988) (vacating an arbitrator's award "using reasoning reminiscent of an *Alice In Wonderland* fantasy").

85. *See, e.g.*, El Mundo Broading. Corp. v. United Steelworkers of Am., 116 F.3d 7 (1st Cir. 1997).

86. *Advest, Inc.*, 914 F.2d at 8 (quoting Challenger Carribean Corp. v. Union General de Trabajadores, 903 F.2d 857, 861 (1st Cir. 1990) (quoting International Bhd. of Fireman and Oilers, Local 261 v. Great N. Paper Co., 765 F.2d 295, 296 (1st Cir. 1985))).

87. *Id.* (noting that proving that an arbitrator's award evidences a "manifest disregard" of the law requires a showing that the arbitrator knew the pertinent law and willfully chose not to apply it); *see also id.* at 10 (citing O.R. Secs., Inc. v. Professional Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988)).

88. 961 F.2d 317 (1st Cir. 1992).

89. *Id.* at 319.

90. *Id.* at 320.

Circuit has long recognized a public-policy exception to the general standard-of-review rules set forth in the *Trilogy*.

The First Circuit's decision in *United States Postal Service v. American Postal Workers Union*[91] represents a clear statement of the public-policy exception as it existed prior to *Misco*.[92] *Postal Workers* involved a postal employee who was discharged from duty for embezzling government funds. An arbitrator had ordered the employee's reinstatement without back pay, and the postal service sought to vacate the award as a violation of public policy.[93]

The court of appeals rejected the union's argument that a judge could only vacate an arbitrator's award on policy grounds if the policy had tangible roots in some form of direct legal prohibition.[94] Judge Pettine, sitting by designation on the court of appeals, held that such a close fit between the challenged award and the public policy was not required to vacate an arbitral award. Rather, the court held that an arbitration award may be vacated when it violates a clearly defined public policy. Judge Pettine relied on the positive law that created both professional and ethical standards for all postal employees.[95] Drawing from theses sources, Judge Pettine concluded:

> [W]e cannot avoid the common sense implications that requiring the rehiring of [the employee] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed — the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.[96]

In light of *Misco,* there may be some question about the continuing vitality of the First Circuit's decision in *Postal Workers*. Although *Postal Workers* does not undertake the *Misco* analysis verbatim, it does appear to satisfy the standards enunciated in *Misco*. It describes the well-defined and dominant public policy

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91. 736 F.2d 822 (1st Cir. 1984) (Pettine, J., Senior District Judge of the District of Rhode Island, sitting by designation).

92. *See id.*

93. *Id.* at 824.

94. *See id.*

95. *See id.* at 825.

96. *Id.*

against the embezzlement of public funds,[97] and it accounts for the law and legal precedents that define the scope of the postal employee's duties vis-à-vis her government employer.[98]

The First Circuit recently revisited the public-policy exception to the general rule in *Exxon Corp. v. Esso Workers' Union, Inc.*[99] *Exxon* demonstrates the continuing vitality of the public-policy exception, with a subtle variation on the Court's reasoning in *Misco*.[100] *Exxon* involved a challenge to an arbitrator's award that ordered reinstatement of a truck driver who was discharged for violating the company's drug policy. The driver's usual duties involved transporting combustible materials on busy interstate highways.[101] The company required all employees holding safety-sensitive jobs to sign a statement acknowledging the company's drug-free workplace policy. The employee in question had signed the statement.[102]

The First Circuit vacated the arbitrator's award as a direct violation of the well-defined public policy "counseling against the performance of safety-sensitive tasks by individuals who are [laboring under the influence of drugs]."[103] The court, per Judge Selya, reasoned that both decisional law and positive statutory law provided substantial evidence of a policy against operating dangerous machinery while impaired.[104] The court rejected the union's argument that the arbitrator had not violated public policy in issuing his award because it was uncertain whether the employee was impaired by cocaine while discharging his duties.[105] The court framed the policy in broad terms, noting that the public policy not only encompassed the performance of safety-sensitive tasks, but also included the employer's duty to implement and enforce drug-free workplace programs.[106]

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97. *Id.* at 825-26.

98. *See id.* (citing Local 453 Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25, 29 (1963)).

99. 118 F.3d 841 (1st Cir. 1997).

100. *Id.* at 843, 844-45 (citing *Misco,* 484 U.S. at 42-43).

101. *Id.* at 843.

102. *See id.*

103. *Id.* at 848.

104. *See id.* at 846-47.

105. *See id.* at 849.

106. *See id.* at 851.

The First Circuit's decision in *Exxon* invites a comparison to *Misco*. Both cases involved the discharge of an employee for violating a company drug policy. Both cases also involved a public-policy challenge to an arbitrator's award. In both cases, a United States court of appeals held that an arbitrator's award directly contravened a public policy. Only the definition of the public policy separates the two cases.[107]

By choosing to define the policy broadly, *Exxon* appears to push the limits of the public-policy exception of *Misco*. Judge Selya's opinion supports this proposition. Citing both *Misco* and *W.R. Grace & Co.*, his opinion stated:

> Public policy, however, has its own imperatives — and they occasionally conflict with the imperatives of contract interpretation. It is a fundamental rule that courts must refrain from enforcing contracts that violate public policy. Collective bargaining agreements are simply a species of contracts and, as such, are not immune from the operation of this rule. As with any contract . . . , a court may not enforce a collective bargaining agreement that is contrary to public policy. Because this refusal to enforce contracts which offend public policy is inured in judicial tradition, the question of what public policy demands is within the judicial, not the arbitral, domain.[108]

While the First Circuit's approach restates the standard of judicial review announced in the *Trilogy*, it appears to take an expansive view of the public-policy exception. While the Supreme Court in *Misco* deferred to the arbitrator's conclusions, the First Circuit in *Exxon* vacated the arbitrator's ruling.[109] *Exxon* may represent a more aggressive approach in the First Circuit for analyzing the public policies which are affected by arbitrators' decisions.

Exxon notes the existence of a "broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs."[110] Moreover, *Exxon* signals that the essential question under *Misco* remains the definition and importance of the public policy at issue. It holds that this is a judicial,

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107. *Compare Misco*, 484 U.S. at 42-44 (articulating a public-policy definition) *with Exxon*, 118 F.3d at 847-49 (same).

108. *Exxon*, 118 F.3d at 844-45 (citations omitted).

109. *See id.* at 844, 846 & n.3, 849 & n.4.

110. *Id.* at 848.

not an arbitral, function. So long as a court defines the policy broadly enough, it follows that a reviewing court may vacate an award regardless of the arbitrator's determinations of the merits.

3. *The United States District Court for the District of Rhode Island*

The United States District Court for the District of Rhode Island has had comparatively fewer opportunities to address the standard of judicial review of arbitration awards. Generally, the court has applied the standard set forth in the *Trilogy*.[111]

In its most recent decision regarding a challenge to an arbitration award, the district court reaffirmed its adherence to the *Trilogy*. In *Larocque v. R.W.F., Inc.*,[112] the court quoted from both *El Dorado Technical Services* and *Misco,* stating:

> In labor arbitration, matters of contract interpretation are typically for the arbitrator, not for a reviewing court. While the arbitrator's award must draw its essence from [sic] the collective bargaining agreement, it need not mirror a judge's notion of how the agreement's language might best be interpreted or might most fairly be applied to a given set of facts. So long as the arbitrator, acting within the scope of his delegated authority, is arguably construing the contract, his decision must stand. . . . Put succinctly, then, a court should uphold an award that depends on an arbitrator's interpretation of a collective bargaining agreement if it can find, within the four corners of the agreement, any plausible basis for that interpretation.[113]

The court upheld the arbitrator's award, noting that the unfettered judicial review of arbitrators' awards would gut the arbitration

111. *See, e.g.*, Larocque v. R.W.F., Inc., 793 F. Supp. 386, 388 (D.R.I. 1992), *aff'd*, 8 F.3d 95 (1st Cir. 1993); Victor Elec. Wire and Cable Corp. v. International Bhd. of Elec. Workers, Local 2014, 411 F. Supp. 338, 340-43 (D.R.I. 1976), *aff'd*, 546 F.2d 413 (1st Cir. 1976); Master Sheet Metal Workers and Composition Roofers Ass'n of Rhode Island, Inc. v. Local Union No. 17, 397 F. Supp. 1372, 1377-78, 1381 (D.R.I. 1975).

112. 793 F. Supp. 386.

113. *Id.* at 388 (citations omitted); *see also supra* note 89 and accompanying text (quoting *El Dorado*).

process and "render it meaningless."[114] Decisions prior to *Larocque* also reflect a measured deference to arbitrators' decisions.[115]

While it is apparent that the district court will not review an award on its merits, it will vacate the award in that set of narrowly defined circumstances listed in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*[116]

B. *Rhode Island Law*

1. *Statutory Law*

An action brought in federal court to vacate an arbitration award is typically brought under section 301 of the NLRA. In contrast, Rhode Island state courts have jurisdiction to review arbitration awards pursuant to statute. Section 28-9-18 of the Rhode Island General Laws provides for this jurisdiction as follows:

> Grounds for vacating award. — (a) In any of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:
>
> (1) When the award was procured by fraud.
>
> (2) Where the arbitrator or arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (3) If there was no valid submission or contract, and the objection has been raised under the conditions set forth in § 28-9-13.
>
> (b) motion to vacate, modify, or correct an arbitrator's award shall not be entertained by the court unless the award is first implemented by the party seeking its vacation, modification, or correction; provided, however, the court, upon sufficient cause shown, may order the stay of the award or any part thereof upon circumstances and conditions which it may prescribe.

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114. *Id.* at 388.

115. *See, e.g.*, Robert E. Derecktor of Rhode Island, Inc. v. United Steelworkers of Am., Local 9057, CIV.A. No. 89-0439B, 1990 WL 82813, at *3-4 (D.R.I. 1990) (Hagopian, Mag.); *Victor Elec.*, 411 F. Supp. at 340-342. *Cf. Master Sheet Metal Workers*, 397 F. Supp. 1378-79 (vacating partially an arbitrator's award that it deemed an "utter and total disregard" of the collective bargaining agreement).

116. 363 U.S. 593 (1960).

> (c) If the motion to vacate, modify, or correct an arbitrator's award is denied, the moving party shall pay the costs and reasonable attorneys' fees of the prevailing party.[117]

Putting aside awards which are procured by fraud,[118] the statute provides that "the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated: . . . (2) [w]here the arbitrator or arbitrators exceeded their powers."[119]

2. *Decisional Law and the Standard of Review*

The Rhode Island Supreme Court has stated that courts must accord arbitration awards substantial deference.[120] For example, in *Town of Coventry v. Turco*, which is often cited by litigants as a leading case in this area, the court expressed the view that the authority to review arbitration awards is limited, and that the courts should be deferential to arbitration as a contracted-for method of dispute resolution:

> It is well established that our judicial authority to vacate arbitration awards is limited. Absent a manifest disregard of a contractual provision or a completely irrational result, the award will be upheld. Moreover, as long as an arbitrator's award "'draws its essence' from the contract and is based upon a 'passably plausible' interpretation of the contract, it is within the arbitrator's authority and our review must end."[121]

This statement of policy echoed the court's earlier holding in *Jacinto v. Egan*, in which the court stated:

> The proper role for the courts in this regard is to determine whether the arbitrator has resolved the grievance by considering the proper sources—"the contract and those circumstances out of which comes the 'common law of the shop'"—

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117. R.I. Gen. Laws § 28-9-18 (1956) (1995 Reenactment).

118. Motions to vacate based on fraud are not discussed in this Article. The basis is obvious, and clearly the proof of the fraud is key to any such motion.

119. R.I. Gen. Laws § 28-9-18(a)(2); *see, e.g.*, Town of Coventry v. Turco, 574 A.2d 143, 147 (R.I. 1990) (adding that the arbitrator exceeded his authority and vacating the award pursuant to § 28-9-18); State v. National Ass'n of Gov't Employees, Local 79, 544 A.2d 117, 119-20 (R.I. 1988) (same).

120. *See, e.g.*, *Turco*, 574 A.2d at 147; Jacinto v. Egan, 391 A.2d 1173, 1175-76 (R.I. 1978).

121. *Turco*, 574 A.2d at 146 (citing *Jacinto*, 391 A.2d at 1176).

> but not to determine whether the arbitrator has resolved the grievance correctly.[122]

Recently, however, the Rhode Island Supreme Court has shed new light on the standard of review of arbitration awards and arguably expanded the circumstances in which arbitration awards may be overturned.[123] These cases signal a new era of judicial examination of arbitration awards in the public sector in Rhode Island, and significantly restrict the ability of arbitrators to construe public-sector contracts in a manner that is inconsistent with statutory law, the parties' collective bargaining agreement or public policy. Further, these cases make clear that courts must not tolerate the use of past practices as a basis for an arbitration award that is either inconsistent with law, public policy or the explicit terms of the parties' labor contract.

The court now has made clear that deferential review will only be accorded to decisions that are clearly arbitrable and in which the arbitrator has legitimately exercised his or her powers. In *RIBCO*, the court noted that it will not apply a "circumscribed standard of review" and will vacate an award where, for example, the issue determined by the arbitrator was not arbitrable in the first place, or if the arbitrator "exceeded his or her powers."[124] Most significantly, the *RIBCO* court held that, in cases where an arbitrator has adjudicated a non-arbitrable issue or has exceeded his or her powers, the court will decide the issue de novo, and will apply a heightened level of review.[125] The court explained that "[o]ur heightened level of review in such cases is predicated on the possibility that an arbitrator might be called upon to consider and to interpret a [collective bargaining agreement] in such a way that it would alter existing statutory policies or override other supervening state law governing the public-employment sector."[126] Ac-

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122. *Jacinto,* 391 A.2d at 1176 (citing Robert A. Gorman, Labor Law 585 (1976) (quoting Safeway Stores v. American Bakery and Confectionery Workers Int'l Union, Local 111, 390 F.2d 79, 82 (5th Cir. 1968))).

123. *See* Town of Smithfield v. Local 2050, No. 96-255, 1998 WL 61142 (R.I. Feb. 12, 1998) (hereinafter *Town of Smithfield*); *Rhode Island Bhd. of Correctional Officers v. State*, No. 96-240, 1998 WL 45284 (R.I. Jan. 15, 1998) (hereinafter *RIBCO*); Department of Mental Health, Retardation, and Hosps. v. Rhode Island Council 94, 694 A.2d 318 (R.I. 1997) (hereinafter *MHRH*).

124. *RIBCO*, 1998 WL 45284, at *5 (citing *Turco,* 574 A.2d at 146) (quoting Jacinto v. Egan, 120 A.2d 907, 912 (R.I. 1978)).

125. *Id.*

126. *Id.*

cording to the *RIBCO* court, an arbitrator exceeds his or her powers when the award does not "draw its essence" from the contract, or is not based on a "passably plausible" interpretation thereof.[127] In such cases, the court may conclude that "the arbitrator manifestly disregarded a contractual provision or reached an irrational result and thereby exceeded his or her authority."[128] In addition, an arbitrator may exceed his or her powers where he or she interprets a collective bargaining agreement "in such a way that it contravenes state law or other public policies that are not subject to alteration by arbitration."[129]

Thus, it appears that the court after *RIBCO* will apply a heightened standard of review to any case in which the arbitrator has exceeded his or her powers in one of the following ways: (1) the award evinces a manifest disregard for the parties' collective bargaining agreement;[130] (2) the award is contrary to public policy;[131] (3) the award is in manifest disregard of the law;[132] (4) the award

127. *Id.*

128. *Id.* (citing *Turco*, 574 A.2d at 146 (quoting *Jacinto*, 120 A.2d at 1176)).

129. *Id.* (citing *MHRH*, 692 A.2d at 322; Vose v. Rhode Island Bhd. of Correctional Officers, 587 A.2d 913, 914 (R.I. 1991)).

130. *See Turco*, 574 A.2d at 147.

131. *See MHRH*, 692 A.2d at 322.

132. Prior to *RIBCO*, the Rhode Island Supreme Court had not considered manifest disregard of the law as a specific basis for overturning a labor arbitration award. *MHRH* and *RIBCO*, however, read together appear to set forth clearly manifest disregard of the law as a basis for vacating an arbitration award. This conclusion is consistent with several recent cases involving arbitration awards considered under statutory language identical to that found in § 28-9-18. *See, e.g.*, Peerless Ins. Co. v. Nault, 701 A.2d 320, 323 (R.I. 1997) (considering language in § 10-3-12(4) of the Rhode Island General Laws which exactly tracks the language of § 28-9-18) ("A manifest disregard of the law, although not specifically provided for in the statute, has also been recognized as grounds for vacating an arbitration award.") (citing Westminster Constr. Corp. v. PPG, Inc., 376 A.2d 708, 711 (1977)). The Rhode Island Supreme Court will have another opportunity to address this issue directly when it considers the appeal of Justice Silverstein's decision in *RIASSE, Local 580 v. State*, (No. xx-xxx (R.I. Super. Ct. xxxx), *appeal docketed*, No. 97-4329 (R.I. xxxx) (vacating an arbitration award holding that sick time may be counted as "hours worked" for purposes of computing overtime in direct contravention of § 36-4-63 of the Rhode Island General Laws)

is irrational[133] and/or (5) the arbitrator has decided a non-arbitrable issue.[134]

a. *Manifest Disregard of the Specific Terms of the Parties' Labor Contract*

Perhaps the most obvious basis for overturning an award is also, in some ways, the most controversial. Courts have for many years recognized that arbitrators are given the power to interpret the parties' collective bargaining agreements and are creatures of the contract. This fundamental notion was at the heart of the United States Supreme Court's decisions in the *Trilogy*. The words of Justice Douglas, oft-repeated, carry great weight:

> There the need is for flexibility in meeting a wide variety of situations. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[135]

Justice Douglas's statement of the law commences with the caveat that the "refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[136] While the opinion clearly does not foreclose all forms of judicial review of arbitration awards, "[t]his

133. *See Jacinto,* 391 A.2d at 1176; Rhode Island Council 94 v. State, No. 96-0307 (R.I. Super. Ct. July 31, 1996) (Israel, J.), appeal argued (R.I. April 7, 1998) (holding that an arbitration award finding Adult Correctional Institution inmates on work detail to be "employees" for purposes of the CBA is irrational). This case is pending before the Supreme Court; oral argument was held on April 7, 1998.

134. *See RIBCO*, 1998 WL 45284, at *5; *MHRH*, 692 A.2d at 323.

135. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); *see also Jacinto*, 391 A.2d at 1175 ("[T]he judicial branch must not overlook the fact that an arbitration award is the decision of an extra-judicial tribunal which the parties themselves have created . . . .").

136. *Enterprise Wheel & Car Corp.*, 363 U.S. at 596. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." *Id.* at 597.

statement does suggest a high degree of receptivity to the conclusiveness of an award."[137]

The Rhode Island Supreme Court has recognized the need for a reviewing court to vacate an arbitration award where the arbitrator goes beyond the terms of the collective bargaining agreement. The court's decision in *Town of Coventry v. Turco* is the leading case on this point. Thus, in *Turco*, the court considered an arbitration award which included a police officer's 120-day accumulated sick pay in his base pay for pension calculation purposes, where the contract did not so provide. In this case, the parties' pension article was silent as to which benefits should be included in base pay for pension purposes. The parties agreed, however, in spite of the contract's silence, that certain sick payments made to an officer during the year were included in base pay. Based on this agreement, the arbitrator ruled that accumulated sick leave should also be included even though it was accumulated over many years and paid out at retirement. The court held that the award manifestly disregarded the contractual provisions, and achieved "an irrational result" because the award essentially rewrote the contract.[138]

The court noted a willingness to forsake the "public policy that favors the final resolution of disputes . . . by arbitration" when arbitrators act outside of the scope of their power and authority.[139] While this dicta gives a nod to Justice Douglas's opinion in *Enterprise Wheel & Car Corp.*, it clearly endorses the proposition that an arbitrator is confined to a reasonable interpretation of the contract he or she interprets. The holding of *Turco*—that arbitration awards which evidence an infidelity to the agreement that the par-

137. Jonathan Yarowsky, Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. Rev. 936, 954 (1976); *see also* Bernard Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 427 (1969) (stating that "[a] collective bargaining agreement typically provides that an arbitration award shall be 'final and binding'. . . .[and] conclusiveness is expected, for the essence of the arbitration process is that the arbitrator's decision shall put the dispute to rest").

138. *Turco*, 574 A.2d at 147 (concluding that the arbitrator's decision to disregard the contract achieved an irrational result).

139. *Id. But see id.* at 148 (Kelleher, J., dissenting) ("This court has stated that 'judicial reversal of an arbitrator's award solely on the ground of a reviewing court's disagreement with his construction of the contract is prohibited.'") (citing Council 94, Am. Fed'n of State, County, and Mun. Employees v. State, 475 A.2d 200, 203 (R.I. 1984)).

ties negotiated are subject to judicial review and must be vacated[140]—has been recently reaffirmed by the court in *RIBCO*.

b. *Awards That Are Contrary to Public Policy*

The United States Supreme Court and the United States Court of Appeals for the First Circuit have explicitly recognized a public-policy exception to the enforcement of arbitration awards.[141] The Rhode Island Supreme Court has at least implicitly recognized a court's right to vacate an arbitration award that is contrary to public policy. In Rhode Island, *Vose v. Brotherhood of Correctional Officers*[142] is the seminal case on this issue.

Vose involved a dispute over the arbitrability of a labor agreement which specifically prohibited the Director of the Department of Corrections (DOC) from mandating overtime. DOC, because of a lack of sufficient volunteers for available overtime, mandated that correctional officers perform overtime. This was a direct violation of the labor agreement. The union filed a grievance and proceeded to arbitration. DOC sought an injunction against the arbitration. The Rhode Island Supreme Court ruled that the Director of DOC had a statutory obligation to provide safety, discipline and care to the inmates and to the public. Hence, any agreement which limited this statutory obligation was void and unenforceable.[143]

The court did not use the term "public policy" in its decision in *Vose*. However, it is clear that the court was referring to an important public policy in its decision. The court confirmed this view in *RIBCO* where it stated that one of the ways in which an arbitrator may exceed his or her powers is "by interpreting a CBA in such a way that it contravenes state law *or other public policies.*"[144] It

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140. This proposition is also a fundamental principal of arbitral law. *See* Elkouri *supra* note 1, at 482-83. Elkouri notes:

> If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. . . . As Arbitrator Fred Whitney has stated, an arbitrator cannot "ignore clear-cut contractual language," and "may not legislate new language, since to do so would usurp the role of the labor organization and employer."

Id. (citations omitted).

141. *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

142. 587 A.2d 913 (R.I. 1991).

143. *Id.* at 916.

144. *RIBCO*, 1998 WL 45284, at *5 (emphasis added) (citing *MHRH*, 692 A.2d at 322).

seems clear under these cases that the court recognizes statutes as clear expressions of public policy. Where, as in *Vose*, an arbitration award concludes that the collective bargaining agreement requires conduct that repudiates or requires a party to act in violation of a statutory obligation, the court will vacate the award.[145]

In the recent *MHRH* decision, the court confronted an issue similar to the issue encountered in *Vose*. In *MHRH*, the issue was whether the Department of Mental Health & Retardation and Hospitals could impose limits on the number of consecutive work shifts for nurses where the collective bargaining agreement permitted multiple consecutive shifts. The arbitrator held that the imposition of such limits violated the contract. The court held that the department was not required to arbitrate before it could take steps to insure the quality of the healthcare provided to the agency's patients.[146] In the court's words, "when it comes to its statutory duty of looking after these disabled patients, the state should not have been required to arbitrate whether it should take nine stitches in time to save it from taking one."[147] While the decision turned on the arbitrability of the dispute, as did *Vose,* the case is an important indicator of the court's willingness to examine carefully the public-policy implications of a decision in reviewing a labor arbitration award, even to the point of reviewing such an award de novo to determine whether the issue was arbitrable in the first place.

It is very clear that the court will not allow arbitration awards which violate clear statutory provisions, or which require conduct that contravenes clear statutory mandates, to stand. What is not clear, however, based on a review of the cases to date, is whether the court will treat cases which violate public policies not clearly expressed in statutory law in a similar fashion. Reading *Vose* and *MHRH* together with *RIBCO*, it is reasonable to conclude that the court will apply the same strict standard of review to broader public-policy considerations such as the First Circuit did in *Exxon,*

145. With regard to the particular policy at issue in *Vose*, the court stated that, "due to the exigencies incident to running a correctional institution, we could not fathom a result that would leave the director unable to provide for adequate security, regardless of whether an emergency is deemed to be present." *Vose*, 587 A.2d at 915-16.

146. *MHRH*, 692 A.2d at 325.

147. *Id.*

which are not necessarily expressed in statutes that are directly on point.[148] Moreover, this would be a natural extension of the court's holdings in these cases. The public policies of a community or a state are expressed in the statutory and case law of the community, as well as other, less tangible sources, which courts are clearly capable of assessing. An arbitration award in violation of public policy should not be allowed to stand, so long as the policy is well-defined, dominant and identifiable by reference to proper sources, such as statutory or case law. Given the appropriate set of facts, it seems likely that the court will continue to vacate awards in these circumstances.

c. *Manifest Disregard of the Law*

Closely related to the issue of public policy as grounds for vacating an arbitration award are cases where an arbitrator has refused or failed to apply applicable external law. An arbitrator must be faithful not only to the contract which he or she interprets, but also to the law. This is particularly true in the public-sector context. Numerous cases from a variety of jurisdictions have held that an arbitrator must apply and be faithful to external law when interpreting a labor contract.[149] Several courts have considered

148. It is notable that in *RIBCO*, one of the State's primary arguments was that the practice affirmed by the arbitrator—full/block time leave for union officers—was a violation of the Rhode Island State Labor Relations Act, R.I. Gen. Laws § 28-7-13(3)(iii), which makes payments by employers to unions an unfair labor practice. The court declined to address this issue, holding instead that the arbitrator's award, inasmuch as it was predicated upon a past practice, was unenforceable under *Rhode Island Court Reporters Alliance v. State,* 591 A.2d 376 (R.I. 1991). *RIBCO*, 1998 WL 45284, at *6.

149. *See, e.g.*, Lodge 2424, Int'l Ass'n of Machinists and Aerospace Workers v. United States, 564 F.2d 66, 71 (Ct. Cl. 1977) (overturning an arbitrator's decision where the arbitrator ignored the laws and regulations which were an integral part of the agreement and which equally bounded the parties); Board of Educ. v. Yonkers Fed'n of Teachers, 385 N.E.2d 1297, 1298 (N.Y. 1978) ("Arbitration awards are always limited by the interdictions of public policy as expressed in the Constitution, statutes or decisional law of the State."); *see also, e.g.*, Niagara Wheat Field Adm'rs Ass'n v. Niagara Wheat Field Cent. Sch. Dist., 375 N.E.2d 37, 40 (N.Y. 1978) ("[T]he freedom of a public employer to contract with an employee organization, although broad, is not wholly unrestrained. Any provision of a collective bargaining agreement which contravenes public policy, statute or decisional law may not stand and an arbitration award effectuating such a provision is vulnerable to attack . . . . A public employer may not, through a collective bargaining agreement, jeopardize its effectiveness by relinquishing control of essential facets of its operation.") (citations omitted).

the issue directly in reviewing labor arbitration awards. For example, one court stated that "[i]t is elementary that parties to a collective bargaining agreement cannot bargain for provisions that are contrary to the law."[150] Moreover, "[a]lthough the arbitrator is free to make an award consonant with the scope of the collective bargaining agreement, he must not issue awards that conflict with 'external law' such as federal statutes and regulations."[151] While the Rhode Island Supreme Court has not directly confronted this issue in the context of a review of a labor arbitration award under section 28-9-18, it is clear from the reading of several recent cases that the court considers manifest disregard of the law grounds for vacating an award.

The court has refused to overturn an arbitrator's award where the award was based upon a "mere mistake of law" that did not rise to the level of manifest disregard of the law. The court explains: "Manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. . . . [A] manifest disregard of the law . . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same."[152]

The Rhode Island Supreme Court's recent decision in *Peerless Insurance Co. v. Nault*[153] considered language in section 10-3-12 of the Rhode Island General Laws[154] which exactly tracks the language of section 28-9-18. The court's opinion made clear that man-

150. Devine v. Brisco, 733 F.2d 867, 872 (Fed. Cir. 1984); *see also* Graphic Arts Int'l Union, Local No. 280 v. NLRB, 596 F.2d 904 (9th Cir. 1979) (holding that a party cannot lawfully demand an illegal contractual provision); Thompson v. Board of Educ., 526 F. Supp. 1035 (W.D. Mich. 1981) (holding that a school district's policies violated federal and state statutes).

151. *Brisco*, 733 F.2d at 872; Devine v. Nutt, 718 F.2d 1048, 1053 (Fed. Cir. 1983), *rev'd on other grounds*, 472 U.S. 648 (1985) ("Judicial deference to an arbitral award may be inappropriate when the award is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining agreement.")

152. Westminster Constr. Corp. v. PPG Indus., Inc., 376 A.2d 708, 711 (R.I. 1977) (alteration in original); *see also* Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990) (stating that manifest disregard of the law is grounds for vacating an arbitral award where the arbitrator knew the law and willfully chose to ignore it).

153. 701 A.2d 320 (R.I. 1997).

154. R.I. Gen. Laws §§ 10-3-1 to -21 (providing the general guidelines and procedures of Rhode Island's general Arbitration Act). For a treatment on labor arbitration, see §§ 29-9-1 to -26 of the Rhode Island General Laws.

ifest disregard of the law is grounds for vacating an award. Quoting language from a decision by the United States Court of Appeals for the Ninth Circuit, the court stated that "[a] manifest disregard of the law, although not specifically provided for in the statute, has also been recognized as grounds for vacating an arbitration award."[155]

In *MHRH*[156] and *Vose*,[157] the Rhode Island Supreme Court held that the State may not contract away its statutory obligations. In *Vose*, the court wrote:

> [L]ike a judge sitting without a jury, an arbitrator is called upon not only to make findings of fact but also to apply the law to the facts. In applying the law, the arbitrator will necessarily be called upon to make rulings concerning the applicable law and to interpret the law according to the facts before him or her. . . . With that said, we do agree with the director that the instant issue is not arbitrable. . . . What makes this case properly justiciable is that there is a conflict between this statute and the [labor contract] . . . . [T]he collective bargaining agreement shall not be interpreted as restricting the director's statutory power to order mandatory involuntary overtime.[158]

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155. *Peerless Ins. Co.*, 701 A.2d at 323 (quoting *Westminster Constr. Corp.*, 376 A.2d at 711). Other recent cases on the federal level suggest a limitation to this doctrine, one which has some common-sense appeal—in order for an arbitration award to be overturned because it manifestly disregards the law, it must be shown that the arbitrator knew the law and disregarded it. *See, e.g.*, DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 822 (2nd Cir. 1997) (finding that the arbitrator did not manifestly disregard the law in failing to award attorney fees to a prevailing party under the Age Discrimination in Employment Act, where the party did not submit to the arbitrator the provision from the Act which required an award of attorney fees to the prevailing party).

156. 692 A.2d 318 (R.I. 1997).

157. 587 A.2d 913 (R.I. 1991); *see also Westminster Constr. Corp.*, 376 A.2d at 711. These two cases are also discussed in detail in the public-policy section, *supra*, section II.B.3.

158. *Vose*, 587 A.2d at 914-16 (citing Power v. City of Providence, 582 A.2d 895 (R.I. 1990)) (footnotes and additional citations omitted). Accordingly, a contract which calls for a violation of state law cannot be upheld by an arbitrator. To this end, the court stated: "An arbitrator sits as an alternative to a judicial forum for the purpose of resolving a dispute . . . . In applying the law, the arbitrator will necessarily be called upon to make rulings concerning the applicable law and to interpret the law according to the facts before him or her." *Id.* at 914. It is a basic principle of contract law that contracts which are in contravention of a state statute are illegal, and therefore, no contractual rights can be created or enforced. *See* Birkett v. Chatterton, 13 R.I. 299, 302 (1881).

In addition, in *RIBCO*, the court indicated that an arbitrator exceeds his or her powers by interpreting the collective bargaining agreement in a way that "contravenes state law" or other public policies not subject to alteration by arbitration. Each of these cases indicates the court's apparent willingness to overturn arbitration awards which directly contravene or fail to apply statutory law. Read in conjunction with *Peerless Insurance Co.*, these cases support the inescapable conclusion that the Rhode Island Supreme Court considers manifest disregard of the law to be grounds for vacating an arbitration award. At least one case currently pending before the Rhode Island Superior Court may give the court the opportunity to consider "manifest disregard of the contract" in the labor-arbitration context.[159]

d. *Irrationality*

Until recently, the concept of an "irrational" arbitration award was difficult to define. Courts had frequently referred to irrationality as a basis for overturning an award, but rarely used it as an exclusive basis for a decision to overturn an award. More typically, the court would address the issue of whether an arbitrator exceeded his or her authority in the context of the failure to follow the explicit terms of the collective bargaining agreement, such as in *Turco*, or the issuance of an award that requires the party to engage in conduct which violates its statutory obligations, such as in *MHRH*.

However, in the recent case of *Town of Smithfield v. Local 2050*,[160] the court directly addressed the issue of irrationality in the context of the review of an arbitration award.[161] In *Town of Smithfield*, the court considered a decision by an arbitrator to allow union officials to be paid for time spent in collective-bargaining

159. In *State v. RIASSE, Local 580*, No. xx-xxx (R.I. Super Ct. xxxx), *appeal docketed*, No. 97-4329 (R.I. xxxx), the superior court vacated an award of an arbitrator, holding that a policy memorandum which allows certain state employees to count sick leave as hours worked for overtime computation purposes, in direct contravention of a state statute (and the collective bargaining agreement's explicit terms), must be enforced in spite of the statute. This case has been appealed by the union to the Rhode Island Supreme Court, *see also supra* note 132, and it will present an opportunity for the court to confront the issue in the labor-arbitration context.

160. No. 96-225, 1998 WL 61142 (R.I. Feb. 12, 1998).

161. *See id.*

negotiations with their employer.[162] The arbitrator relied on the past practices of the parties in reaching his conclusion.[163] The court, relying on its decision in *Rhode Island Court Reporters Alliance v. State*,[164] held that the parties did not meet the test for a valid past practice, and therefore the issue decided by the arbitrator was "not an arbitrable issue."[165] After holding that the arbitrator's award did not meet the requirements of *Court Reporters*, the court went on to discuss the evidence presented to the arbitrator and concluded that the arbitrator's decision was, in fact, "irrational."[166] The court appeared struck by the lack of credible evidence put before the arbitrator to support the union's argument that the town of Smithfield was aware of the practice which it had allegedly ratified by its conduct.[167] The court expressed further amazement that the arbitrator concluded from such a barren record that the town must have known of the practice and failed to repudiate it.[168] As a result, the court found this to be a "irrational conclusion" which found no support in any of the evidence put before the arbitrator.[169] The court further found that the arbitrator's rejection of evidence that the town had rejected the practice as irrelevant lacked any rational basis and that "[s]uch a conclusion defies reason."[170] The court noted that the trial court was mistaken in believing that there had to be a "showing of bias, corruption or mental incompetence on the part of the arbitrator" in order for the arbitrator's decision not to be "passably plausible." Relying on *Westcott Construction Corp. v. City of Cranston*,[171] the court noted that it had previously implied that an arbitrator's award which was not "passably plausible" is necessarily "irrational."[172]

The holding in *Town of Smithfield* is important for several reasons. First, it somewhat clarifies the definition for irrationality as a basis for vacating an arbitration award. It sets out the irration-

162. *Id.*
163. *See id.* at *1.
164. 591 A.2d 376 (R.I. 1991).
165. *Town of Smithfield*, 1998 WL 61142, at *3.
166. *Id.*
167. *See id.*
168. *See id.*
169. *Id.*
170. *Id.* at *4.
171. 586 A.2d 542 (R.I. 1991).
172. *Town of Smithfield*, 1998 WL 61142, at *4 (quoting *Westcott Constr. Corp.*, 586 A.2d at 543).

ality standard as the absence of a "passably plausible" interpretation of the collective bargaining agreement's terms.[173] Second, it clears the way for the superior court, in reviewing an arbitrator's award, to examine the evidence upon which the arbitrator relied in reaching his or her conclusion.[174] Thus, it is not just the conclusion which is subject to review by the court, but the evidence which the arbitrator considered in order to reach the conclusion. This is important because some superior court judges have been reluctant to dig too deeply into the reasoning behind the arbitrator's award on motions to vacate. Under *Town of Smithfield*, however, it appears that the superior court is not only permitted, but is required to examine the nature and weight of the evidence upon which the arbitrator relied for his or her decision when confronting the question of whether the award is in fact a "passably plausible" interpretation of the agreement.

The supreme court currently has before it a case which may allow for further clarification of irrationality as a basis for overturning an arbitration award. In *Rhode Island Council 94 v. State*,[175] the court will consider the question of whether an arbitrator's conclusion that prisoners, working at various state facilities performing menial labor, should be considered "employees" for purposes of the parties' collective bargaining agreement. The superior court held that such a conclusion was irrational stating that "this court concludes that no reasonably literate person would seriously choose the word 'employee' in the English language to describe the status of three-dollar-per-day prisoners laboring involuntarily for the state."[176]

e. *Arbitability and the Rejection of "Past Practices"*

MHRH, RIBCO and *Town of Smithfield* signal a dramatic new direction of the Rhode Island Supreme Court in reviewing motions to vacate arbitration awards. First, these cases, taken as a whole, dramatically narrow the kinds of disputes which are arbitable under public-sector collective bargaining agreements in Rhode Island. Second, these cases hold that the standard of review applica-

173. *Id.*
174. *See id.* at *3.
175. No. 96-0558, *appeal argued* (R.I. April 7, 1998).
176. *Rhode Island Council 94*, C.A. No. PC-96-0307 (Israel, J.) (R.I. Super. Ct. July 31, 1996).

ble to arbitration awards which consider issues beyond the four corners of collective bargaining agreements is a "heightened standard of review"—not a deferential one. Third, these decisions, in particular *MHRH* and *RIBCO*, make clear that arbitability is the equivalent of subject matter jurisdiction, and can be raised by the parties or the court at any time during the proceedings, and may not be waived.[177]

In these cases, the court has dramatically narrowed the types of issues which may be submitted to arbitration by virtually eliminating the ability of a union, or an employer, to bring a grievance based solely upon the existence of a "past practice" between the parties which the grieving party claims created a legally binding right. This issue was first addressed by the court in *Rhode Island Court Reporters Alliance v. State.*[178] In *Court Reporters*, the court specifically addressed the issue of past practice and held that, in order for there to be a legally binding past practice: "the contract must contain a past practice provision or savings clause that evidences the mutual intent of the parties to establish these benefits as enforceable past practices. Otherwise, these past practices cannot serve as the basis for arbitration."[179] The court set forth five specific criteria that must be met before it would find a "mutual intent" between the parties to adopt a past practice as a binding agreement. There must be: "(1) clarity and consistency throughout the course of conduct, (2) longevity and repetition creating a consistent pattern of behavior, (3) acceptance of the practice by both parties, (4) mutuality in the inception or applications of the practice, and (5) consideration of the underlying circumstances giving rise to the practice."[180]

In *MHRH*, *RIBCO* and *Town of Smithfield*, the court applied a restrictive interpretation of *Court Reporters*. In *MHRH*, the contract contained a past-practice clause which provided that, "[e]xcept as otherwise expressly provided. . . , all privileges and benefits which employees have hitherto enjoyed shall be maintained and continued by the state during the term of this agree-

177. *See, e.g., RIBCO*, 1998 WL 45284, at *5 (discussing how the use of arbitration as a vehicle to hear grievances is equivalent to subject matter jurisdiction in courts).

178. 591 A.2d 376 (R.I. 1991).

179. *Id.* at 378.

180. *Id.* at 379.

ment."[181] In *RIBCO*, the court considered a nearly identical "privileges and benefits" clause. The *RIBCO* court stated that such a clause does not indicate the parties' intent to establish a particular practice as a contractually protected benefit or privilege merely because it is a practice of the parties. The court stated:

> Indeed, the CBA makes no mention whatsoever of past practices serving as the basis for an arbitable grievance. Here, as in the *Court Reporters* case, "we must limit our analysis to the four corners of the instrument." Because past practices are not specified in the CBA as contractually protected "benefits and privileges," we hold, as we did in the *Court Reporters* case, that a grievance pertaining to alleged past practices is not arbitable absent a specific CBA provision evidencing the mutual intent of the parties to bind themselves to such practices and identifying the specific past practices that are to be enforceable in this manner. Without such a provision DOC's past approval of requests for paid full-time union leave was a mere administrative policy that could be changed, like any other governmental policy, whenever the appropriate government authorities chose to do so.[182]

Further, if a practice contravenes another specific provision of the collective bargaining agreement, then it must be "in writing and signed by the parties to be binding" where the collective bargaining agreement requires that any alteration or modification of the agreement must be executed in writing.[183]

The *RIBCO* court also made an additional important holding regarding the use of past practice in public-sector labor law. The court held that, even if the collective bargaining agreement had contained a binding past-practice clause—which according to the court it did not—and if the actions of the state could have satisfied all five criteria in *Court Reporters*, then "[w]hen the underlying circumstances supporting a binding practice change, there is good reason to conclude that the practice itself, being 'no broader than

181. *MHRH*, 692 A.2d at 320 n.6.

182. *RIBCO*, 1998 WL 45284, at *6 (citations omitted). Similarly, in *Town of Smithfield*, the court held that a generalized reference to past practices contained in the management–rights clause of the collective bargaining agreement failed to meet the requirements of *Court Reporters*. *Town of Smithfield*, 1998 WL 61142, at *3.

183. *RIBCO*, 1998 WL 45284, at *7.

the circumstances from which it arises' may also change."[184] The court held that a past practice initiated by one administration "is subject to change when a new Governor is elected and takes steps within a reasonable time to carry out his or her reserved management prerogatives."[185] Finally, the court appeared to direct arbitrators to ensure that, in addition to the above practice, a party entering into the alleged agreement supported by past practices must have the actual authority to enter into the agreement. In this case, the court held that the department director did not have sufficient authority to make such an agreement and that the arbitration award should have been vacated on this ground alone.[186]

By virtue of the court's holdings in these cases, it is difficult to imagine an arbitrator's award based on past practice that could survive challenge. Arguably, only grievances which raise issues specifically covered by specific terms of the collective bargaining agreement are arbitable in the first instance. To the extent that such a grievance is based upon or supported by a past practice in order to be arbitable, the grieving party, typically the union, would need to prove four elements. First, the contract must contain a past-practices provision sufficient to meet the requirements of *Court Reporters* and *RIBCO*—such a clause must list those practices which the parties intend to be bound by, thus including them within the four corners of the agreement. Second, the practice must meet the five criteria set forth in *Court Reporters*. Third, the grieving party must show that the persons who made the agreement had the actual authority to contract on behalf of their respective parties to the collective bargaining agreement. Fourth, the practice has not been repudiated by a new administration or executive or by a change in circumstances. This fourfold burden would appear very difficult to meet, thus restricting the parties to grievances which are brought under and which interpret the explicit terms of the collective bargaining agreement.

IV. CONCLUSION

The fundamental holdings of the *Trilogy* continue to set the standard of review for cases brought in the federal courts. How-

184. *Id.* at *7 (citing *Court Reporters*, 591 A.2d at 379) (quoting National Broadcasting Co. 67 Lab. Arb. Rep. (BNA) 989, 992 (1976)).

185. Id. at *8.

186. *See id.* at *8.

ever, it is probable that the First Circuit and the Rhode Island federal district court will continue to scrutinize awards which violate clearly identifiable public policies carefully. In the federal courts, challenges to arbitration awards will likely remain the exception and not the rule.

In the area of public-sector labor law in Rhode Island, the field has changed rapidly over the last two years and is still evolving. The Rhode Island Supreme Court has sent a clear message in its recent cases that arbitrators are not free to ignore the obligations imposed by statute upon public agencies when interpreting collective bargaining agreements; that arbitration awards which ignore or play loose with the explicit terms of a collective bargaining agreement or the law, or which are not based on a passably plausible interpretation of the collective bargaining agreement and are irrational, will be subjected to a "heightened" scrutiny and de novo review by the courts; and that arbitrators should consider only those grievances which are brought under specific and explicit terms of the collective bargaining agreement and may not reach beyond the parties' agreement to consider issues of "past practice" unless all of the standards set forth in *Court Reporters*, as refined in *RIBCO* and *Town of Smithfield*, are met.

These holdings of the supreme court are seen by many in organized labor as a frontal assault by the court on public-sector unions in Rhode Island. Public-sector unions may respond to these recent decisions by seeking legislation from the General Assembly to "correct" these recent rulings of the court. Some in organized labor believe that the court has rejected the fundamental holding of the *Trilogy* that courts should give some deference to arbitration awards. It is this author's view that this extreme view is incorrect. While the court's recent decisions do reflect a more rigorous standard of review, they by no means signal the demise of labor arbitration as the preferred method of dispute resolution in the labor field. A legislative "correction," therefore, would be a serious mistake and should invite a gubernatorial veto. Lawyers who practice in this area and have argued these cases before the superior courts and the supreme court know that judges are loathe to upset an award of an arbitrator unless the circumstances truly call for it. If public-sector employers and their unions exercise restraint and common sense in collective bargaining and utilize the grievance arbitration process for the resolution of legitimate contract interpre-

tation issues, then fewer arbitration awards would be subject to review and vacation by the courts. This solution, which is premised on common sense and good judgment of labor and management professionals, as opposed to a legislative "cure," is the preferable course for the future.

These recent decisions of the supreme court do not signal the end of labor arbitration as we know it. Rather, the fundamental principal of the *Trilogy* is alive and well in public-sector labor law in Rhode Island, and arbitration is still the preferred method of resolving disputed issues between unions and their employers in the public sector. The reasons for judicial deference to awards of an arbitrator, first stated in the *Trilogy*, are many and are still sound. First, a labor arbitrator sits as a judge for the case he or she has been selected to hear. The parties have contracted for this method of resolving their disagreements as to the interpretation of the contract. Typically, the collective bargaining agreement in issue specifies the types of grievances which are arbitable, the procedures for the arbitration and, in most cases, the fact that the award should be "final and binding" upon the parties as an interpretation of the collective bargaining agreement. Thus, the arbitrator is imbued with authority from both parties to act as the neutral interpreter of contractual provisions which they disagree upon. Courts should generally be reluctant to interfere with this contracted-for method of dispute resolution.

Second, the holding of an arbitrator is generally only applicable to the facts of the specific case. Arbitration awards do not carry the precedential value of court decisions, and the doctrine of stare decises does not generally apply in arbitral law. Moreover, a holding by an arbitrator that is disappointing to one party may be addressed by that party in subsequent contract negotiations. Because labor contracts are typically of a relatively short duration—generally not more than three years—the parties have an opportunity within a fairly short period of time to reform their contracts to address arbitration decisions with which they disagree during the contract term. In addition, because arbitration is only one component of the typical grievance-resolution process, it is important that the parties understand that the holdings of arbitrators are indeed binding upon them and not simply an intermediate step on the way to the courthouse. Thus, many grievances are resolved short of arbitration as part of a grievance process which is,

in effect, part of the continuing bargaining process between the employer and the union.

Finally, arbitration generally, and particularly in the labor field, is meant to provide a swift resolution of disputes between the parties. Resort to the courts obviously delays final resolution of disputes, thereby potentially undermining the continuing collective bargaining relationship between the employer and the union.

In the wake of the recent holdings of the Rhode Island Supreme Court, it is clear that both labor and management in the public sector need to work together to clarify their collective bargaining agreements, and to ensure, first, that the practices which they wish to be bound by are codified into their agreements and, second, that the laws and public policies which govern the parties are followed and reflected in the collective bargaining agreements between public-sector employers and their unions. If this is accomplished, then judicial deference will once again be the norm, and arbitration will thrive without interference from the courts.