Grievance Arbitration Awards in the Public Sector: How Final in Florida?

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Grievance Arbitration Awards in the Public Sector: How Final in Florida?

JEAN REED*

The concept of finality in grievance arbitration in the private sector is well established. The author focuses first on the Supreme Court decisions in the Steelworkers Trilogy, which provide the rationale for final and binding arbitration. After considering the relevance of this rationale, the author then analyzes two recent Florida district court decisions on the finality of grievance procedures in the public sector. Finally, the author considers the appropriate framework for applying the theories underlying the Steelworkers decisions to the public sector in Florida.

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The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.¹

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1. Safeway Stores v. American Bakery Workers Local 111, 390 F.2d 79, 84 (5th Cir. 1968) (Brown, C.J.).
I. INTRODUCTION

The brusque admonition of former Chief Judge John R. Brown of the Fifth Circuit to parties seeking court review of a labor arbitration award in the private sector reflected prevailing judicial opinion when it appeared over a decade ago. Although this summary observation may have been blunt, it remains indicative of the mantle of deference courts generally assume when they consider the results reached in binding arbitration of labor disputes in the private sector.²

Judicial acceptance of binding arbitration in the public sector, however, is considerably less pervasive. If one assumes that deference by the courts has enhanced the viability of binding arbitration as a mechanism for dispute resolution in the private sector, then it follows that judicial recognition of the finality of public sector arbitration may foster its use in the public sphere. More particularly, in jurisdictions such as Florida where statutes require final and binding grievance arbitration in every collective bargaining agreement involving state or local government employees, judicial acceptance of the finality concept is arguably crucial to efficient and orderly resolution of labor conflicts in the public sector.

In the years since the Steelworkers Trilogy,³ a name given three Supreme Court decisions rendered together in 1960, the de-

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². The Eighth Circuit recently observed without elaboration that “judicial review of labor arbitration is limited.” Chauffeurs Local 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 716 (8th Cir. 1980). Similarly, the First Circuit defined the judicial standard to be applied in examining private sector labor arbitration awards as the “rule of non-reviewability.” Bettencourt v. Boston Edison Co., 560 F.2d 1045, 1049 (1st Cir. 1977). The Fifth Circuit further emphasized the minor role courts are to play after labor arbitration, and remanded a case in 1976 for a finding of whether judicial challenge to an arbitration award was justified. International Ass’n of Machinists Dist. 776 v. Texas Steel Co., 538 F.2d 1116 (5th Cir. 1976) (district court could award attorney’s fees to the party who prevailed before the arbitrator if the other party’s refusal to abide by the arbitration award was unjustified). The Fifth Circuit stated it would not “countenance frivolous and wasteful judicial challenges to conscientious and fair arbitration decisions.” Id. at 1122. That court has also sanctioned the exercise of broad remedial powers by an arbitrator. E.g., United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir.), cert. denied, 419 U.S. 998 (1974). ³. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Justice Douglas wrote the principal opinion for the majority in each of the three decisions. Justices Brennan and Harlan joined with Douglas in each decision but appended remarks appearing in American Mfg. that were applicable to both American Mfg. and Warrior. 363 U.S. at 569. Justice Frankfurter joined Justices Brennan and Harlan in their observations but did not join the Douglas opinions, merely concurring in the result of each case. Justice Whittaker dissented in both Warrior and Enterprise but concurred in the result in American Mfg. Justice Black did not participate in considering or deciding any of the cases.
ference the courts have afforded to arbitration awards in the private sector has increased. The Trilogy exalted arbitration as a crucial segment of the system of industrial self-government created by collective bargaining agreements. Commentators and lower courts alike have construed the Trilogy decisions as manifesting a strong federal policy favoring arbitration as a means of resolving controversies arising from the interpretation or application of contracts negotiated by representatives of labor and management. In addition, as such observers as Judge Brown have commented, a corollary to this federal labor policy requires that the courts restrict their role in evaluating arbitral determinations. The resulting proposition—that arbitration is not only the preferred, but also the final method for resolution of contractual disputes occurring in the workplace—is clearly a valid construction of the Trilogy decisions. Justice Douglas's majority opinions in the Trilogy contain such a formulation, although it was not necessary to the Supreme Court's disposition of the specific issues that the cases presented. Despite some variation at the appellate level, the federal district courts

4. Discussion of the self-governing qualities of collective bargaining agreements appeared prior to the Steelworkers decisions. E.g., Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1492 (1959) (collective bargaining agreement essentially an instrument of government, not merely an instrument of exchange); Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1024 (1955) (arbitration an integral part of industrial self-government). Justice Douglas's Trilogy opinions drew directly upon the views of Cox and Shulman, e.g., 363 U.S. at 578-80. In Warrior, for example, Douglas declared that a "collective bargaining agreement is an effort to erect a system of industrial self-government." Id. at 580. The Fourth Circuit had previously adopted the position embraced by Justice Douglas when it stated:

The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted.


5. For early commentary on the extent to which the Trilogy court went beyond deciding the cases before it, see P. Hays, LABOR ARBITRATION: A DISSENTING VIEW 7 (1966) (remarks by Supreme Court on nature of arbitration incidental to holding that agreements to arbitrate and arbitration awards are fully enforceable in federal courts); Kagel, Recent Supreme Court Decisions and the Arbitration Process, in PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND PUBLIC POLICY 1 (S. Pollard ed. 1961) (Supreme Court went "beyond the necessities of the case"). But see Christensen, The Disguised Review of the Merits of Arbitration Awards, in PROCEEDINGS OF THE 25TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AT THE QUARTER-CENTURY MARK 99, 113 (B. Dennis & G. Somers eds. 1972) (Douglas's rhetoric extravagant but based on well-established premise).

6. A case provoking severe criticism for its lack of adherence to the Trilogy is Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2d Cir. 1966). E.g., Chris-
rapidly adhered to the principles set forth in the Trilogy,\(^7\) and over the years have continued to do so.

Federal substantive law regulating labor agreements enforceable under section 301 of the Labor Management Relations Act (LMRA)\(^8\) accommodates the Trilogy's precepts, which therefore control labor arbitration litigation brought under this statute. Although potential suits under section 301 can arise from a collective bargaining agreement in any enterprise in which a labor dispute affects the flow of commerce,\(^9\) certain categories of employers, including state and local governments, are exempt from federal regulation.\(^{10}\) Collective agreements entered into by such segments of management are therefore excluded from the purview of section 301. As a result, the Steelworkers Trilogy is not a commanding legal authority in the realm of state and local government employment relations. Nonetheless, the Trilogy opinions have had noticeable impact on the public sector, because state courts dealing with


9. By its own terms, § 301 applies to all contracts “between an employer and a labor organization representing employees in an industry affecting commerce.” 29 U.S.C. § 185 (1976). The phrase “industry affecting commerce” is statutorily defined as “any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.” Id. § 142(1).

the resolution of labor disputes in that arena have frequently adopted the concepts mandated by the Trilogy cases.  

Although the significance of distinctions between private and public sector collective bargaining has provoked lively debate,

there has been scant discussion of the differing constraints surrounding arbitration in the two settings. The question of whether full, or even partial, adoption of the Trilogy is warranted in the public sphere remains unanswered. Beginning with a brief review of the nature of final and binding labor arbitration and its position within the framework of public and private labor relations, this article will then focus upon two Florida decisions and analyze the desirability and appropriateness of the Trilogy's finality concept as a proper allocation of function between judge and arbitrator in resolving labor disputes in the public sector. The two cases demonstrate that the Trilogy's dictates are not always applicable, a finding that indicates that state courts should proceed with caution in reviewing arbitration awards in the public sector. This writer concludes that a modification of the Trilogy finality standard is desirable for evaluating state and local government employment grievances after binding arbitration. Although this conclusion may not receive universal acceptance, reviewing the present status of grievance arbitration in the public sector may help bring the problems of this process to the forefront of legal discussion.


12. Compare Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107 (1969) with Burton & Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L.J. 418 (1970). Wellington and Winter argue that certain fundamental restraints exist in private sector labor relations, which do not exist in the public arena. For example, they point to the profit motive, which they view as restraining employers from conceding unnecessarily to unions, and to the employees' self-interest, which they believe prevents unions from demanding concessions inherently destructive to the employer's existence. Assuming these constraints to be absent from the public sphere, Wellington and Winter contend that certain restrictions must be legislatively or judicially supplied to control public sector labor relations. Burton and Krider disagree. They assert that bans on public employee strikes should be limited. For a recent article arguing that reliance on private labor market premises is inappropriate for analysis of public labor market regulation, see Staaf & West, Agency Shops and the Public Sector: An Economic Analysis, 33 U. Miami L. Rev. 645 (1979).
II. THE LABOR ARBITRATION PROCESS

A. Description

Through participation in collective bargaining and the signing of a written agreement, American labor develops its central contractual relationship with management. Generally, labor agreements in the private sector established through this process regulate a virtually limitless variety of employment concerns. Collective bargaining negotiations commonly include provisions concerning wages, hours of employment, and working conditions. Other topics are health and accident insurance, retirement and pension plans, promotions, discipline, and prohibitions on an employer subcontracting work normally done by employees. Agreements in the public sector are more difficult to describe in standardized terms because legislatures often forbid many provisions for which parties freely bargain in the private sector. In both the public and private sectors, however, collective bargaining agreements operate prospectively and commonly last for one, two, or three years.

Understandably, almost any labor contract that purports to regulate an employment environment with numerous workers, business exigencies, and unforeseen problems, will generate controversies between union and management over the provisions of that contract. To cope with such disagreements, virtually every agreement in the private sector and most agreements in the public sec-


14. Because of the varying nature, size, and complexity of companies that enter into collective bargaining agreements, it is difficult, if not impossible, to describe a typical labor contract. For a sample private sector collective bargaining agreement, see the 1979 Statutory Appendix to Smith, Merrifield & St. Antoine, Cases and Materials on Labor Relations Law at 167 (6th ed. 1979) [hereinafter cited as Smith].

15. In Florida, for example, such collective bargaining agreements may not contain provisions regulating retirement benefits. Fla. Stat. §§ 447.301(2) and 447.309(5) (1979).

tor provide their own dispute resolution machinery—the grievance procedure—which presumably resolves the day-to-day conflicts over contract interpretation and application. The grievance process permits flexibility in collective bargaining because the parties can use it to resolve issues omitted from the initial agreement either through oversight or by deliberate intent. In fact, since the contractual grievance process is typically controlled not by the individual employee, but by the union, the Supreme Court has applauded the grievance mechanism as a forum in which union and management in effect extend their negotiations by clarifying the terms of the collective bargaining agreement.

Just as collective agreements may differ, the details of a grievance procedure may differ from one enterprise to the next. Nevertheless, the central feature of any grievance process is a hierarchy of discussions between designated representatives of

17. Virtually all (94%) of the 1,717 contracts studied in a national survey of private sector collective agreements contained a grievance procedure culminating in binding arbitration. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1425-26, MAJOR COLLECTIVE BARGAINING AGREEMENTS, ARBITRATION PROCEDURES 5 (1966). A more current review indicates that of the nine out of every ten state or local government contracts providing some form of grievance process, 79% contain arbitration provisions. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1833, GRIEVANCE AND ARBITRATION PROCEDURES IN STATE AND LOCAL AGREEMENTS 4, 18 (1975).

18. Although an aggrieved employee usually must initiate his grievance, it is the exclusive majority representative who processes it. In the private sector, before an employee can sue for breach of contract under § 301 of the LMRA, he must exhaust his contractual remedies, Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), and demonstrate that the union violated its duty of fair representation in processing his grievance. Vaca v. Sipes, 386 U.S. 171 (1967). Florida’s District Court of Appeal, Third District, has upheld the exhaustion requirement in a recent public sector case. City of Miami v. Fraternal Order of Police, 378 So. 2d 20 (Fla. 3d DCA 1979). For a discussion of whether determination of the rights of public employees through informal contractual procedures meets the requirements of the fourteenth amendment due process clause, see Comment, Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation, 89 HARV. L. REV. 752 (1976).

Florida’s Public Employees Relations Commission (PERC) has addressed the necessity of union involvement in the grievance arbitration process. See Leon County CTA v. Leon County School Bd., 6 FLA. PUB. EMPL. REP. ¶ 11001 (1979); Heath v. School Bd. of Orange County, 5 FLA. PUB. EMPL. REP. ¶ 10074 (1979).

19. Warrior, 363 U.S. at 581 (meaning and content given to collective bargaining agreements by processing disputes through grievance machinery); Enterprise, 363 U.S. at 596 (arbitrators indispensable part of continuous collective bargaining process).

management and labor. This hierarchy comes into play when an employee files a grievance, alleging a violation of rights under the agreement. If the union pursues the disputed matter, the grievance proceeds through “steps,” winding its way through progressively higher levels of management. At any step or level, management may affirm its original decision (and thus deny the grievance) or it may grant the grievance. Similarly, the union, at any level, may withdraw the grievance, accept a compromise worked out with management, or indicate its intent to proceed to the next level in the hierarchy should the grievance remain denied. The number of steps or levels in the grievance procedure are not uniform from contract to contract, but, assuming that a provision for arbitration exists, a failure to settle the grievance through negotiation after exhausting all previous levels leaves the union with the option of demanding arbitration. In the private sector, few disputes proceed to arbitration, since the parties usually settle before that stage. Fewer still reach the courts on appeal following arbitra-

21. Shulman, supra note 4, at 1007.
22. Labor arbitration involving the interpretation or application of a collective agreement is known as “rights arbitration.” Labor arbitration involving a dispute over the inclusion of terms in a collective agreement is designated “interest arbitration.” This article reviews “rights arbitration” only. For a discussion of “rights” and “interest” arbitration and the arbitrator’s role in each, see F. Elkouri & E. Elkouri, How Arbitration Works 47-67 (3d ed. 1973).

The Florida Legislature has not provided for binding interest arbitration to resolve impasses that occur in public sector collective bargaining; a special master’s recommendations following impasse are only advisory, as the legislature is the final forum for dispute resolution. Fla. Stat. § 447.403 (1979). Proposals in favor of such arbitration have surfaced in the past, however, as noted by McHugh, The Florida Experience in Public Employee Collective Bargaining, 1974-1978: Bellwether for the South, 6 Fla. St. U. L. Rev. 263, 268 n.24 (1978). Florida voters rejected a suggested constitutional amendment to prohibit binding interest arbitration in a 1978 statewide referendum. One commentator has argued recently that the most effective way to implement public employee collective bargaining in Florida is through interest arbitration. Williams, Alternatives to the Right to Strike for Public Employees: Do They Adequately Implement Florida’s Constitutional Right to Collectively Bargain? 7 Fla. St. U. L. Rev. 475 (1979).

23. A private sector employee does not always have a right to grievance arbitration. Vaca v. Sipes, 386 U.S. 171, 196 (1967). Numerous lower court decisions, rendered after Vaca, have noted that unions have broad discretion in deciding whether to invoke the final stage of a grievance procedure. E.g., Stanley v. General Foods Corp., 508 F.2d 274 (5th Cir. 1975); Lewis v. Magna American Corp., 472 F.2d 560 (6th Cir. 1972); Sarnelli v. Meat Cutters Local 33, 457 F.2d 807 (1st Cir. 1972).

24. Smith, supra note 14, at 642. Accepting the high percentage of agreements with grievance procedures terminating in arbitration, see note 17, supra, this seems a valid assumption despite the apparent lack of empirical studies on the point. At the very least, as Professor Jules Getman suggests, only those cases “not winnowed out” by the lower echelons of the grievance process will reach arbitration. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 919 (1979).
tion.\textsuperscript{25} and of these, the courts vacate only a tiny number.\textsuperscript{26}

When grievance mechanisms exist within the public sector, their fundamental nature is essentially the same as in the private sector,\textsuperscript{27} although one should note one significant difference in Florida labor relations. In the private sector, section 203(d) of the LMRA evidences congressional approval of nonjudicial dispute resolution: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."\textsuperscript{28} The Supreme Court, in one of the Trilogy cases, relied upon this language as indicating legislative intent to give full play to the dispute resolution machinery of the parties.\textsuperscript{29} Despite these clear legislative and judicial sanctions, union and management reach agreement to arbitrate labor controversies in the private sector only through voluntary bargaining; neither Congress nor the courts require them to accept such a procedure.

In Florida, on the other hand, the legislature has made the submission of labor disputes to arbitration compulsory by requiring that every collective bargaining agreement in the public sector have a resolution procedure that is final.\textsuperscript{30} Arguably, this legislative impetus behind the arbitration process as a means of dispute resolution in the public sector indicates intent to promote judicial deference to an arbitration award's finality. The Supreme Court drew upon a similar statutory requirement in a 1972 decision, \textit{Andrews v. Louisville & Nashville Railroad}.\textsuperscript{31} In \textit{Andrews} the Court held that employees in industries covered by the Railway Labor Act\textsuperscript{32} do not have the option of judicial suit for wrongful discharge. In-
stead, they must exhaust their administrative remedies before the National Railroad Adjustment Board. Thereafter, they may seek review of the Board’s proceedings only as provided by the Act. Section 153 of the Railway Labor Act designates the remedies available to an employee, as the Court emphasized in Andrews: “[S]ince the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems . . . from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.” Thus, in accord with the Andrews rationale, the general federal labor policy developed under section 301 (favoring contractual remedies in resolving labor grievances) may support an argument for an even greater degree of judicial deference in a jurisdiction where statutes mandate dispute resolution remedies. Regardless of whether this contention gains wide acceptance, the crucial point is that provision for final and binding arbitration, an option voluntarily included in any private sector contract, must be included in every collective agreement in the public sector in Florida.

In sum, a union-management grievance process culminating in arbitration is a contractual proceeding derived from collective bargaining. Whether the inclusion of arbitration in a labor contract results from voluntary agreement or statutory mandate, it is a method whereby the parties to a labor controversy attempt to settle their differences through discussion and, failing such resolution, select an impartial third party to whom they submit the dispute for determination. Accordingly, at least in Judge Brown’s view, there the matter ends.

B. Presumed Value

When labor arbitration functions properly, some admire it as the “paradigm of private justice.” Whether or not it deserves such accolades, labor arbitration is a remarkably successful tool for

34. 406 U.S. at 323.
35. The District Court of Appeal, Third District, recognized this need to exhaust contract grievance procedures in City of Miami v. Fraternal Order of Police, 378 So. 2d 20 (Fla. 3d DCA 1979). The Supreme Court of Pennsylvania also recognized this need in Board of Educ. v. Teachers Local 3, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975). Whether other state courts will take a similar position remains to be seen.
36. Safeway Stores v. American Bakery Workers Local 111, 390 F.2d 79, 84 (5th Cir. 1968) (Brown, C.J.).
37. Getman, supra note 24, at 916.
dispute resolution. Commentators have frequently described it as providing a relatively speedy, informal, and inexpensive means of settling labor conflict, although a few observers have protested that these attributes are somewhat illusory. Whatever its virtues may be, the success and widespread use of labor arbitration have caused some to herald the process, perhaps unwisely, as a panacea for other controversial situations.

As with any private system of dispute resolution, arbitration arguably conserves judicial resources. In the labor context, however, one may attribute two other, and more significant, values to grievance arbitration. First, labor arbitration arguably promotes industrial stability because management's agreement to arbitrate is usually connected to a union agreement to refrain from striking. This juxtaposition is known as labor's "quid pro quo," a rationale that often underlies Supreme Court decisions involving union-management relations. Facially, the quid pro quo rationale lacks merit as a justification for labor arbitration in the public sector in jurisdictions such as Florida, which prohibit strikes by government employees. Efficient, final processing of grievances in the public sector is a virtue more evident in commercial arbitration. E.g., Merkle v. Rice Constr. Co., 271 So. 2d 220 (Fla. 2d DCA 1973) (purpose of commercial arbitration agreements is avoidance of litigation).

41. The quid pro quo rationale was initiated by the Supreme Court in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). According to the Court, "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." Id. at 455. Obvious or not, the Court has used this theory not only in the Trilogy decisions, Warrior, 363 U.S. at 578 n.4 (citing Textile Workers v. Lincoln Mills, 358 U.S. 448, 455), but also in a host of other cases dealing with labor arbitration. E.g., Nolde Bros., Inc. v. Bakery Workers Local 358, 430 U.S. 397 (1976); Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). The Supreme Court's use of the quid pro quo theory may have led to the general assumption that grievance arbitration deters strikes. E.g., McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 COLUM. L. REV. 1192, 1210-11 (1972). But cf. Grodin, Political Aspects of Public Sector Interest Arbitration, 64 Calif. L. Rev. 678 (1976) (effectiveness of arbitration in deterring strikes over long periods undetermined).

42. Public employees in Florida are prohibited from striking by the state constitution, Fla. Const. art. I, § 6, and by statute, Fla. Stat. § 447.505 (1979). At least seven states...
sector, so the argument goes, is not as crucial to the prevention of strikes and preservation of labor peace as in the private sector. Nevertheless, public employees do strike notwithstanding these legal barriers, and they may enjoy a de facto right to strike that, by threat or exercise, "appears to be no less effective than the legalized right enjoyed by employees in the private sector." In addition, public employees sometimes engage in work disruption techniques such as "slowdowns" and "sickouts." Thus, labor disturbances exist in the public sector as well, and, to the extent that grievance arbitration reinforces or maintains any degree of labor peace in that sphere, the quid pro quo rationale supports the argument for adopting that process.

Florida's Public Employees Relations Commission has espoused this view, lauding the arbitration machinery as a device for discouraging "the use of less favorable methods to settle a grievance, i.e., walkouts, wildcat strikes, and unfair labor practice pro-


ceedings."\(^{45}\) The Commission has also characterized legislatively mandated arbitration as a necessity because the law prohibits public employee strikes.\(^{46}\) According to this theory, the legislature presumably perceived the quid pro quo as a positive value and, by statutorily balancing arbitration agreements and promises not to strike, merely directed the maintenance of this value in public employment.

Second, labor arbitration in the private sector arguably assures workers of their ability to protect and enforce rights obtained through union negotiation. With grievance arbitration, employees know that impartial third parties will ultimately resolve their complaints. In the private sector, this aspect of "industrial democracy" is highly significant because an employee without a grievance procedure has no peaceful means to challenge management action. In the public sector, however, government employees usually have access to some form of civil service appeal process.\(^{47}\) Because distinctions exist between these two processes,\(^{48}\) however, an argument can be made that arbitration is not necessarily redundant in the public sector. The scope of a civil service appeal normally includes only matters of appointment, promotion, and discharge.\(^{49}\) Conversely, a grievance proceeding is typically open to complaints about wages, hours, and working conditions, and obviously encompasses a wider range of employee concerns. Thus, although third-party resolution of disputes may not be new for the typical government employee, the opportunity for redress is considerably broadened when collective bargaining produces a grievance process. The


\(^{46}\) The Commission has stated that, in the absence of binding arbitration, a public employee organization "is left with no effective recourse if the parties are unable to reach a mutually satisfactory settlement to a grievance. In order to compensate for [the] loss of economic power [caused by the strike prohibition] the Legislature enacted Section 447.401 requiring binding grievance arbitration." Id. See Comment, Public Employee Legislation: An Emerging Paradox, Impact and Opportunity, 13 San Diego L. Rev. 931, 952-53 (1976).

\(^{47}\) See Pegnetter & Hayford, supra note 20; Ullman & Begin, supra note 27.

\(^{48}\) Observers commonly note four differences: 1) public employers or the legislature normally establish civil service appeals processes unilaterally, whereas grievance procedures arise through bilateral negotiation; 2) employee grievances often reflect union concerns, whereas civil service appeals generally encompass highly individualized matters; 3) union screening of meritless grievances is absent in the civil service appeals process; 4) civil service appeals systems are appellate procedures whereas grievance arbitration is an extension of collective bargaining.

Florida Legislature permits coexistence between grievance procedures and civil service appeal systems in the public sector, but an employee eligible to use both must pursue only one avenue of settlement.60

In summary, both Congress and the Florida Legislature promote arbitration as a favored form of dispute resolution in the workplace. Arbitration arguably provides: (1) a relatively speedy, informal, and inexpensive forum; (2) an avoidance of litigation; (3) a therapeutic proceeding for workers; (4) a flexible extension of collective bargaining; and (5) a basis for maintaining labor peace. Although the analyses of these attributes are different in the public and private sectors, essentially similar rationales for adopting arbitration apply in both spheres. The status of arbitration as a linchpin of industrial and governmental employment relations is apparently secure.

III. THE STEELWORKERS TRILOGY

A settled principle in the realm of labor relations in the private sector is that parties may adopt binding arbitration to resolve possible future disputes involving their collective bargaining agreement. The common law in most states, however, held that this promise to arbitrate was not specifically enforceable,51 and the federal courts followed the same rule.62 Paradoxically, despite this

50. Fla. Stat. § 447.401 (1979). Florida's District Court of Appeal, First District, has made it clear that Chapter 447 does not afford public employees any procedural rights with respect to civil service appeal systems. Metropolitan Dade County v. Dade County Employees Local 1363, 376 So. 2d 1206, 1208 (Fla. 1st DCA 1979). The Second District has held that the statutory requirement of an election between an available grievance procedure and a civil service appeal process is not limited to career service employees. Thus, a statutory appeal procedure for eligible teachers and a bargained-for grievance process can offer alternative remedies. PERC v. District School Bd., 374 So. 2d 1005, 1013 (1979). For a recent discussion of this case, see Note, Discharged Teachers: The Right to Elect Between Statutory and Collective Bargaining Appeals Procedures, 9 Stetson L. Rev. 474 (1980).


doctrine, the courts generally favored enforcement of an arbitrator's award. 83

In 1957, however, the Supreme Court held, in Textile Workers v. Lincoln Mills, 84 that under section 301 of the LMRA the federal courts could develop a body of federal law for labor relations and enforce arbitration provisions in collective bargaining agreements. 85 Three years later, the Court accorded great deference to arbitration proceedings and their results, in the Steelworkers Trilogy.

Commentators have repeatedly examined the Trilogy cases, 56 making an in-depth analysis unnecessary here. In brief, the United Steelworkers of America brought suit to compel arbitration in Warrior and American Manufacturing, and an action to force compliance with an arbitrator's award in Enterprise. In the former suits, the Supreme Court ordered arbitration, and in Enterprise the Court upheld the award. The Court's general propositions on arbitration, as previously mentioned, 87 were more significant than its actual holding. The Trilogy established 88 the following tenets:

53. E.g., Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854), in which the Supreme Court stated: "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." Id. at 349.


55. The Supreme Court later made it clear that § 301 did not prohibit state court jurisdiction over suits to enforce the labor contract. State and federal courts thus have concurrent jurisdiction over such suits, necessarily including enforcement of the arbitration clause. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). Nevertheless, state courts exercising this jurisdiction must apply federal substantive law to the litigation. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); accord, Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968) (§ 301 action to enforce a collective agreement governed by federal substantive law as fashioned under Lincoln Mills even if suit brought in state court). If state arbitration statutes arguably apply to § 301 proceedings, a state court must determine if a conflict with federal law exists. At least one commentator has attempted to examine state arbitration statutes and analyze their compatibility with federal labor policy. Comment, The Applicability of State Arbitration Statutes to Proceedings Subject to LMRA Section 301, 27 Ohio St. L.J. 692 (1966). See also Smith & Clark, Reappraisal of the Role of the States in Shaping Labor Relations Law, 1965 Wis. L. Rev. 411.


57. See notes 3-7 and accompanying text supra.

58. The only major exceptions developed by the Supreme Court to the deference doctrine of the Trilogy cases are, first, the line of decisions represented by Vaca v. Sipes, 386 U.S. 171 (1967), and Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), and, second, by Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Vaca-Hines opinions hold that the breach of a union's duty of fair representation to an individual employee, relieves the
1. Courts should ultimately resolve the question of arbitrability unless the parties expressly state that an arbitrator shall make binding decisions on this issue.
2. A court should hold a dispute arbitrable unless the parties expressly state or otherwise clearly indicate that a disputed topic is not subject to arbitration.
3. Courts should not examine the merits of an award in suits to compel arbitration or in suits to enforce or vacate awards.
4. A court should not set aside an award as beyond the arbitrator's authority merely because the court disagrees with the arbitrator's interpretation of the agreement.

adversely affected individual of his obligation to exhaust grievance arbitration procedures and deprives any arbitral award rendered under such circumstances of the finality it would otherwise possess. Gardner-Denver holds that an adverse arbitration award does not preclude de novo adjudication in federal court of a racial discrimination claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) to 2000(e)-17 (1976). This article will later examine the latter case in greater depth. See notes 164-170 and accompanying text infra. Other significant labor arbitration cases appear in note 41 supra.

59. Arbitrability is essentially the question whether a specific dispute is subject to arbitration pursuant to the collective bargaining agreement adopted by the parties. Florida's District Court of Appeal, Second District, recognized that the question of arbitrability is for the judiciary to decide. PERC v. District School Bd., 374 So. 2d 1005 (1979). The court based this recognition, however, on Annot., 24 A.L.R.2d § 752 (1952), not the Trilogy. Id. at 1015. This article assumes that the presumption in favor of arbitrability is the wisest allocation of function between court and arbitral forum for public sector labor relations. This view is not universally accepted, however. See Acting Superintendent of Schools v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977) (the courts will deny arbitration unless the question is expressly, directly, and unequivocally within the ambit of the arbitration clause).

60. Shortly after the Trilogy decisions, a committee of the American Bar Association issued a report stating that the Steelworkers cases established the following six propositions:

(1) Arbitration is a matter of contract, not of law; parties are required to arbitrate only if, and to the extent that, they have agreed to do so.
(2) The question of arbitrability under a collective bargaining agreement is a question for the courts, not for the arbitrator, unless the parties specifically provide otherwise in their agreement.
(3) Since arbitration under a collective bargaining agreement is an alternative to the strike, rather than to litigation, as in commercial arbitration, the traditional judicial reluctance toward compelling parties to arbitrate is not applicable to labor arbitration.
(4) When the parties have provided for arbitration of all disputes as to the application or interpretation of a collective bargaining agreement, the courts should order arbitration of any grievance which claims that management has violated the provisions of the agreement, irrespective of the courts' views as to the merit of the claim.
(5) When the parties have coupled with a provision for arbitration of all disputes a clause specifically excepting certain matters from arbitration, the courts should order arbitration of a claim that the employer has violated the agreement unless it may be said with positive assurance that the subject matter falls within the exception clause.
Distilled even further, the Trilogy established two broad judicial standards favoring labor arbitration: (1) a presumption in favor of arbitrability and (2) deference to the finality of arbitral awards. The remainder of this comment focuses on the latter concept.

IV. COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

A. Brief History

Widespread organization of public employees is a relatively recent phenomenon in the United States. Few public employee labor groups had developed by the late nineteenth century, and although state and local government employees established a national union in 1936, public workers did not become a prominent national force until the 1960's.

One reason for this delayed development was that the courts denied public employees many of the rights possessed by their counterparts in the private sector, frequently rationalizing this denial as grounded on the sovereignty doctrine. The doctrine applies to a sovereign's control over its own affairs, guaranteeing efficient and competent government. The courts used this doctrine to bar collective bargaining in the public sector on the premise that the arbitrator should be able to based on

(6) An arbitral award should be enforced (absent fraud or similar vitiating circumstance) unless it is clear that the arbitrator has based that award upon matters outside the contract he is charged with interpreting and applying. Report of Special Warrior & Gulf Committee, in 1963 PROCEEDINGS OF THE ABA SECTION OF LABOR RELATIONS LAW 196-97.


63. Petro, supra note 62, at 110.
government's power over public employment is unique and cannot be shared or delegated. Thus, any organized effort to interfere with this power through collective bargaining (and picketing or striking) is not compatible with the state's prerogatives and is therefore unlawful.64 Until recently, the sovereignty doctrine was often a judicial block to collective bargaining in the public sector in Florida.65

When a legislature permits the state to enter into collective agreements, however, it negates judicial resort to the sovereignty doctrine. One commentator concluded:

[T]he [sovereignty] doctrine is a clear and effective bar to any action on the part of government employees to compel the government to enter involuntarily into any type of collective bargaining relationship . . . . [But] the doctrine does not preclude


65. E.g., [1943-1944] Fla. Atty Gen. Biennial Rep. 391, which contains the following statement:

[N]o organization, regardless of its affiliations, union or nonunion, can tell a political subdivision possessing the attributes of sovereignty, whom it can employ, how much it shall pay them, or any other matter or thing relating to its employees. To even countenance such a proposition would be to surrender a portion of the sovereignty that is possessed by every municipal corporation and such a municipality would cease to exist as an organization controlled by its citizens, for after all, government is no more than the individuals who go to make up the same and no one can tell the people how they should run their government.

Id. at 391. The preceding opinion relied heavily upon a New York case in which the court declared:

To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that Government employees have power to halt or check the functions of government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.


the enactment of legislation specifically authorizing the government to enter into collective-bargaining relationships with its employees.66

The concept of illegal delegation of power relates to such sovereignty concerns.67 This theory, often the basis for judicial invalidation of "binding" grievance arbitration in the public sector,68 proposes that a government's delegation of significant functions to nongovernmental officials encroaches upon the sovereign exercise of power. For example, government sometimes seeks to share its authority through collective bargaining and grievance arbitration with such private persons as labor union leaders and arbitrators—individuals not elected by a political constituency.

Before 1951, the courts had slowly formulated their use of sovereignty and delegation theories to bar collective bargaining relationships in the public sector. The Supreme Court of Errors of Connecticut reversed this trend when, in a case heralded by unions as a breakthrough, it declared collective bargaining permissible in the public sector.69 It took nearly two decades before the Supreme Court of Florida emphatically endorsed this idea in the 1969 case of Dade County Classroom Teachers' Association v. Ryan.70 The court in Ryan announced the constitutional right for public employees to bargain collectively under article 1, section 6 of the Florida Constitution.71 The Florida Legislature immediately enacted a statutory framework for implementing this constitutional right, following another court suit.72

67. The illegal delegation of authority doctrine has been referred to as the "offspring" of sovereignty. See Wellington & Winter, supra note 12, at 1107 (1969).
68. See note 78 and accompanying text infra.
70. 225 So. 2d 903 (Fla. 1969).
71. FLA. CONST. art. 1, § 6 provides:

Right to Work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

72. Dade County Classroom Teachers' Ass'n v. Legislature, 269 So. 2d 684 (Fla. 1972). In this action the teachers union requested the Supreme Court of Florida "to compel the [legislature] to enact standards or guidelines regulating the right of collective bargaining by public employees of this state." Id. at 685. The court declined but issued a warning that further unreasonable delay by the legislature would warrant judicial intervention. Id. at 688. For an historical survey of collective bargaining in Florida prior to 1974, see McGuire, supra note 65, at 28-58.
In 1974, the Florida Legislature enacted the Public Employee Relations Act (PERA) and made collective bargaining a reality for Florida's state and local government employees. No other state in the southeastern United States has similarly enacted such comprehensive guidelines. Although Florida remains in the forefront of this area, the remainder of the Southeast provides neither statutory nor constitutional protection for collective bargaining by public employees. Such provisions are prerequisites to labor activity in the public sector, given that no court has held that the first amendment right of association includes the right to bargain collectively with a public employer. Remarkably, judicial concern for sovereignty and delegation of power has again surfaced in cases involving arbitration awards in the public sector, examined in the following section.

B. Binding Grievance Arbitration in the Public Sector

1. LEGALITY

State courts have variously resolved the issue of the legality of binding grievance arbitration in the public sector. When no comprehensive statute is present, some courts negate a negotiated

73. Act of May 30, 1974, ch. 74-100, 1974 Fla. Laws 134 (codified at Fla. STAT. §§ 447.201-609 (1979)). The effective date of the Act was January 1, 1975. To be precise, it should be noted that the Florida Legislature had provided bargaining rights to a few groups of public employees prior to the enactment of PERA. E.g., Fire Fighters Bargaining Act, ch. 72-275, 1972 Fla. Laws 998 (repealed by PERA in 1974). The 1974 Act is not entitled the Public Employees Relations Act but it has come to be so known.

74. An overview of the type of coverage provided in the southeastern states can be found in Nolan, Public Employee Unionism in the Southeast: The Legal Parameters, 29 S.C. L. REV. 235 (1978). The southeastern states surveyed by Nolan include Florida, Louisiana, and Mississippi (public sector collective bargaining permitted); Alabama, Georgia and Kentucky ("meet and confer" relationships permitted); North Carolina, South Carolina, Tennessee and Virginia (public sector collective bargaining prohibited). Nolan admits, however, making the preceding categorization with an awareness that actual practice in this realm often departs "widely from the norm set by legal authority." Id. at 255.

75. Id. at 303.


procedure for grievance arbitration because the delegation doctrine prohibits the state as employer from entering into an executory agreement to arbitrate. But in Ohio, a state within this category, the supreme court held that a board of education, having the power to contract, has the discretionary authority to enter into collective bargaining agreements containing arbitration provisions. When collective bargaining is statutorily sanctioned, some courts have ruled that the statute authorizes a public official to agree to dispute resolution through arbitration.

Despite these various judicial approaches, it seems fair to say that "the majority rule [is] that grievance arbitration does not constitute an unlawful delegation of authority to private persons." Accordingly, the Florida Legislature's approval of binding arbitration in the public sector and its requirement that collective bargaining agreements contain a final resolution procedure, indicate its position on this issue. Although Florida courts have not yet addressed a challenge to the constitutionality of this enactment, two appellate court opinions suggest that there may be a constitutional question to consider.

2. PARAMETERS OF OPERATION WITHIN FLORIDA

Despite the Florida legislative enactments, little statutory guidance is given to Florida employers, employees, their bargaining

82. Fla. Stat. § 447.401 (1979). The section provides in relevant part:
Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties.
83. See note 30 and accompanying text supra.
84. Brevard Fed'n of Teachers Local 2098 v. School Bd., 372 So. 2d 169, 170 (Fla. 4th DCA 1979); Duval County School Bd. v. Florida PERC, 353 So. 2d 1244, 1249-50 (Fla. 1st DCA 1978).
agents, or the courts by way of delineating the framework in which arbitration is to operate. Florida’s PERA limits arbitrators only by withholding from them “the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement.” This void leaves the Trilogy standards as a possible source of precedent. Yet federal statutes do not apply to state and local government labor relations, despite arguments in favor of such legislation. As previously mentioned, the National Labor Relations Act specifically excludes state and local governments. Suits seeking to enforce public sector arbitration agreements and awards cannot arise under section 301. Moreover, the extent to which state arbitration law impacts upon labor arbitration in the private sector is unclear. When arbitration matters in the public sector are brought before the courts, however, state law does control their resolution.

Generally, state arbitration law comprises statutory rules


86. E.g., Labor Management Relations in the Public Sector: Hearings on H.R. 12532, H.R. 7684 & H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 25 (1972) (statement of Jerry Wurf, President, AFSCME). For an opposing viewpoint, see id. at 281 (statement of James D. Hodgson, Secretary of Labor). In National League of Cities v. Usury, 426 U.S. 833 (1976), the Court held the extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to state and local government employees invalid as an impermissible interference with traditional governmental functions. Any congressional attempt to regulate the collective bargaining relationships of those employees must now consider this Supreme Court decision.

87. See note 10 and accompanying text supra.

88. Although the Court in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), stated that the “substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws,” it later declared that “state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.” Id. at 456-57. The Court in Lincoln Mills left unresolved whether the United States Arbitration Act (USAA), 9 U.S.C. §§ 1-14 (1976), applies to labor arbitration. The Act covers commercial arbitration but excludes “contracts of employment.” Justice Frankfurter, dissenting in Lincoln Mills, felt that the majority had, through its silence on the matter, rejected the applicability of the USAA. 353 U.S. at 466-68. As one commentator has pointed out, however, one may interpret judicial silence on the topic as simply a decision to avoid an issue unnecessary to disposition of the case before it. Dunau, supra note 6, at 433. Two other observers have contended that even if not directly applicable to labor arbitration, the USAA could be used as a guideline for fashioning the body of law mandated by Lincoln Mills. Elkouri & Elkouri, supra note 22, at 28; Comment, supra note 51, at 950-52.

89. Also, if the parties take a state arbitration dispute to a federal court through diversity jurisdiction, that court must decide the case on the basis of state law. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (state law controls question of enforceability of arbitration provision in diversity suit).
and the common law, since most courts recognize that a state arbitration statute supplements the common law.90 Furthermore, some general arbitration statutes apparently apply to both commercial and labor disputes.

In Florida, the latter view prevails. Although the Florida Legislature enacted the Florida Arbitration Code in 195791 and revised it a decade later,92 the Code does not mention which types of arbitration fall within its purview. One commentator recognized shortly after its enactment:

The code is entitled “An Act Relating to Commercial Arbitration” though the word “Commercial” does not appear in the text of the statute itself. It seems quite probable that a question will be raised, sooner or later, as to whether or not a labor-management contract is a “commercial” contract, so as to fall within the coverage of the code.93

Nevertheless, Florida judicial decisions indicate that no one has challenged the application of the Florida Arbitration Code to labor arbitration. Today, courts apparently assume there is no question that the Code applies. In several instances, courts have invoked the Code in litigation over arbitration in both the private and the public sector without uttering a single judicial word about its propriety.94 The author of the above quotation,95 although acknowledging

90. The Florida statutory provisions governing arbitration provide an alternative to, but do not eliminate, the common law method of arbitration. Gaines Constr. Co. v. Carol City Utilities, Inc., 164 So. 2d 270 (Fla. 3d DCA 1964) (two types of arbitration recognized in Florida, one common law, the other statutory). Under the common law in Florida, contracting parties may not consent to an irrevocable agreement to arbitrate future disputes. Flaherty v. Metal Products Corp., 83 So. 2d 9 (Fla. 1955). Moreover, the Fifth Circuit has held that contractual agreements to arbitrate future controversies are contrary to public policy and unenforceable under Florida law as tending to oust the jurisdiction of the courts. Wickes Corp. v. Industrial Fin. Corp., 493 F.2d 1173, 1175 (5th Cir. 1974). The State of Washington, however, has held that its statute completely supercedes the common law. Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, 1 Wash. 2d 401, 96 P.2d 257 (1939).
91. 1957 Fla. Laws, ch. 57.01-.31.
94. E.g., Lake County Educ. Ass’n v. School Bd., 360 So. 2d 1280, 1282 (Fla. 2d DCA 1978) (Florida Arbitration Code provides exclusive grounds for vacating an arbitration award); Caltagirone v. School Bd., 355 So. 2d 873 (Fla. 2d DCA 1978) (application for order to compel arbitration pursuant to the Florida Arbitration Code denied); Leon County Classroom Teachers Ass’n v. School Bd., 363 So. 2d 353, 355 (Fla. 1st DCA 1978) (stay of arbitration examined under relevant provisions of Florida Arbitration Code); Gersh v. Concept House, Inc., 291 So. 2d 258 (Fla. 3d DCA 1974) (Florida Arbitration Code governs stay of
the question of applicability, similarly assumed that applicability when he concluded "[t]here seems little doubt that the introduction of a workable Arbitration Code will be highly conducive to the orderly disposition of many labor-management disputes without court action."96

What necessarily follows from the preceding assumption is that the Florida Arbitration Code and its attendant procedures and interpretations arguably apply to labor arbitration in the public sector. Therefore, in challenging arbitral determinations, public sector representatives must turn to the Arbitration Code for guidance. Under the Code, there are only five grounds for vacating an award.97 One Florida appellate court has repeatedly asserted that these five grounds provide the only bases upon which it will overturn an award.98 Even a cursory review of the five reveals that the most likely challenge to a labor arbitration decision will come from the assertion that an arbitrator "in the course of his jurisdiction exceeded [his] powers."99

The Florida courts, however, explicitly note that the five grounds for vacating an award may not appear as defenses to a motion to confirm an arbitral decision after the statutory period

95. Whitehouse, supra note 93, at 370.
96. Id.
97. FLA. STAT. § 682.13(1)(a)-(e) (1979) sets forth the five grounds:
   (1) Upon application of a party, the court shall vacate an award when:
      (a) The award was procured by corruption, fraud or other undue means.
      (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.
      (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers.
      (d) The arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 682.06, as to prejudice substantially the rights of a party.
      (e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under § 682.03 and unless the party participated in the arbitration hearing without raising the objection. Additionally, "[a]n application to modify or correct an award may be joined in the alternative with an application to vacate the award." Id. § 682.14(3).
for filing a motion to vacate that decision has run. In other words, a party wishing to overturn an award must take affirmative action by filing within the statutory period a motion to vacate the award unless the victorious party files to confirm within the statutory period. In the latter case, a cross-motion to vacate would be permissible.

Although no Florida case concerning a challenge to an arbitration award makes reference to the Steelworkers Trilogy, the state courts follow the common law principle that a court should make "every reasonable intendment" in favor of an award. In particular, the Supreme Court of Florida has stated that courts are not to review the merits of an arbitration award. As a corollary to these principles, the Florida judiciary has traditionally held that arbitration awards will be affirmed despite errors of fact or law. The preceding tenets, however, are derived predominantly from Florida decisions involving commercial, not labor, litigation. Labor arbitration cases in Florida with significant precedential value are remarkably few.

Florida courts have left unanswered the following questions in their review of arbitral determinations: (1) Does the Florida Arbitration Code apply to cases involving labor, as well as commercial, arbitration? (2) If the Code does apply, do commercial and labor interpretations under the Code govern labor arbitration determinations? (3) To what extent should private sector labor precedent from the Steelworkers cases govern public sector labor arbitration, given that Florida courts have never expressly recognized the Trilogy as controlling their review of arbitration awards? Although the preceding questions merge at various levels of inquiry, this article will address only the third query.

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100. Travelers Ins. Co. v. Allen, 356 So. 2d 1287, 1287 (Fla. 3d DCA 1978); Lopez & Roque Tile Co. v. Clearwater Dev. Corp., 291 So. 2d 126, 128 (Fla. 2d DCA 1974).

101. The only Florida case in which reference to the Trilogy appears is a recent public sector case, City of Miami v. Fraternal Order of Police, 378 So. 2d 20, 23-24 (Fla. 3d DCA 1979), in which the Trilogy decisions are cited as support for the doctrine of exhaustion of administrative remedies.


103. Ogden v. Baile, 73 Fla. 1103, 1110, 75 So. 794, 796 (1917); accord, Dairyland Ins. Co. v. Hudnall, 279 So. 2d 905 (Fla. 3d DCA 1973).

104. E.g., Johnson v. Wells, 72 Fla. 290, 295, 73 So. 188, 192 (1916); Newport Motel, Inc. v. Cobin Restaurant, Inc., 281 So. 2d 234, 235 (Fla. 3d DCA 1973); Dairyland Ins. Co. v. Hudnall, 279 So. 2d 905 (Fla. 3d DCA 1973).
V. Finality in Florida

A. Chapter 447 and Grievance Arbitration

As stated earlier, the Florida Legislature has mandated binding arbitration in the public sector, but employees must elect either a civil service appeal procedure or the grievance process established by collective bargaining. Further, the legislature provided that management's rights to discipline, direct, or discharge employees do not bar any employee from raising a grievance when the exercise of those rights has the practical consequence of violating the collective bargaining agreement. Aside from the foregoing, Chapter 447 of the Florida Statutes is silent about the arbitration mechanism in the public sector.

Until recently, the Florida Public Employees Relations Commission (PERC) had supported arbitration by ruling that, under certain specified conditions, the PERC general counsel could refer to arbitration any matters arguably subject to both an unfair labor practice hearing and a grievance procedure. The PERC rule detailed the administrative procedures to follow both before and after arbitration for such circumstances. Furthermore, it gave the general counsel the discretion, in addition to referring a case to arbitration, of accepting the decision of the arbitrator instead of proceeding with an unfair labor practice hearing. Although the current rules, promulgated by PERC in May of 1979, contain no comparable provision, PERC decisions, nevertheless, have consistently sustained administrative deference to arbitration.

B. The Florida Cases

The next inquiry in the search for a framework for final resolution of labor disputes in the public sector examines the judicial

106. See note 50 supra.
108. Ch. 8H-4.18.
review of Florida labor arbitration cases. Only two of Florida's appellate courts have confronted the issue of the finality of grievance arbitration in the public sector in any depth. A comparison of these two decisions forms the basis for analyzing the application of the Trilogy concepts in the public sector.

1. KOENIG v. TYLER

Robert and Ethel Koenig were employees of Metropolitan Dade County and members of the American Federation of State, County and Municipal Employees (AFSCME), Local 1363, which had a collective bargaining agreement with the county. The Metropolitan Dade County Personnel Rules provided that a department head could consider an unauthorized absence from work for a period of three consecutive days a resignation. The collective bargaining agreement provided that under such circumstances, an employee had the right to petition the personnel director for a review of the incident. The personnel director would then make a "final and binding" decision.

After the Koenigs failed to report to work for three consecutive days without authorization, their department head discharged both from their positions. Under the personnel rules, they petitioned for and received a hearing with the personnel director, who upheld their involuntary resignations. When the Koenigs sought to have his decision vacated, the trial court refused. Florida's District Court of Appeal, Third District, held that the Koenigs were bound by the personnel director's final decision.

The court quoted from the Personnel Rules, the collective bargaining agreements, and other relevant cases. The court held that the personnel director's decision was final and binding.

111. The two courts are Florida's Second and Third District Courts of Appeal. The Second District also addressed arbitral finality in City of West Palm Beach v. Palm Beach County PBA, 387 So. 2d 533 (Fla. 2d DCA 1980), which considered the concept of conclusive public sector arbitration awards. The case, however, did not lend itself to the type of analysis applied to Lake County Educ. Ass'n v. School Bd., 360 So. 2d 1280 (Fla. 2d DCA 1978), but does support this writer's conclusion that the court should play a deferential role when confronting a properly arbitrable public sector dispute. The Third District in a terse opinion reviewed the finality concept in Metropolitan Dade County v. Dade County Employees Local 1363, 346 So. 2d 1066 (Fla. 3d DCA 1977), but the court in that case relied upon commercial cases for support. The Fourth District also dealt with the subject in summary fashion. Brevard Fed'n of Teachers Local 2098 v. School Bd., 372 So. 2d 169 (Fla. 4th DCA 1979).

112. 360 So. 2d 104 (Fla. 3d DCA 1978).

113. Id. at 170. Although a personnel director is not truly an impartial arbitrator, the Koenigs' contract called for "final and binding" resolution of employee disputes through a multi-level system analogous to standard grievance arbitration models. Indeed, the Third District Court of Appeals accepted this analogy when it relied on Republic Steel v. Maddox, 379 U.S. 650 (1965), a case involving private sector grievance arbitration. See note 116 and accompanying text infra.
the First District in *Heath v. Central Truck Lines, Inc.*:114

We...are in full accord that appellants pursued their administrative remedies in accordance with the grievance procedures set forth in the contract, and the final decision of the appropriate committee, even though adverse to their position, is final and binding between the parties and is not assailable by resort to the courts of this state in a proceeding of this kind.115

Although neither the First District in *Heath* nor the Third District in *Koenig* referred to the *Trilogy* decisions in their opinions, the notion of judicial deference to the parties' chosen grievance procedure controlled both cases. Both *Koenig* and *Heath* relied upon *Republic Steel Corp. v. Maddox,*116 which had cited *Warrior* to support the proposition that an aggrieved employee with contractual grievance remedies must first submit his dispute to an arbitrator rather than a court.117

2. LAKE COUNTY

The second Florida case that addresses in detail the finality of the determination of a grievance in the public sector is *Lake County Education Association v. School Board.*118 There, an arbitrator confronted the issue of whether a principal had had proper cause to deny reappointment to a probationary teacher under the collective bargaining agreement between the employee's union and the School Board.119 The arbitrator found that just cause did not

114. 195 So. 2d 588 (Fla. 1st DCA 1967). In *Heath,* a joint labor-management committee rendered the final and binding decision.
115. Id. at 589-90.
117. The New York Court of Appeals paralleled the reasoning of *Koenig* in Binghampton Civil Service Forum v. City of Binghampton, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978). In refusing to vacate an arbitrator's award for the discharge of a municipal employee, the New York court used language reminiscent of Judge Brown's 1968 observation, see note 1 and accompanying text supra, when it held: "The bargain [to arbitrate], having been struck, must now be honored." 44 N.Y.2d at 26, 374 N.E.2d at 383, 403 N.Y.S.2d at 485.
118. 360 So. 2d 1280 (Fla. 2d DCA 1978).
119. The relevant contract provisions were as follows:

**ARTICLE IV**

*Association and Teacher Right and Responsibilities*

L. Teachers will be treated fairly and equitably in the application of School Board policy.

**ARTICLE VI**

*Grievance Procedure*
exist and ordered the School Board to offer to reinstate the teacher. On review, the circuit court upheld the School Board's challenge of the award, vacating the arbitrator's decision. The court held that the arbitrator had exceeded his powers by having disregarded "applicable terms of the collective bargaining agreement by substituting his judgment for that of the School Board as to [the] reasonableness of the School Board's policies and rules."120

The District Court of Appeal, Second District, upheld the lower court but rested its decision on entirely different grounds. The appellate court viewed the crucial issue as the enforceability of the requirement of a "just cause" for refusing to reappoint a probationary teacher.121 Relying upon cases in New York, Illinois, and Massachusetts,122 which had held similar provisions unenforce-

F. Powers of the Arbitrator.
1. It shall be the function of the arbitrator, and he shall be empowered, except as his powers are limited below, after due investigation, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement. He shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
2. In dealing with the equitable application of School Board policy, the arbitrator shall have no power to change any policy, or rule of the Board, nor to substitute his judgment for that of the Board as to the reasonableness of such policy or rule. The arbitrator shall be concerned only with whether a School Board policy is being equitably applied to the member(s) of the bargaining unit. The arbitrator's award shall be limited only to rectifying the inequity.

ARTICLE VIII
Teacher Evaluation
A. The evaluation and assessment of the performance of each teacher is solely the responsibility of the administration and may not be delegated.
J. No teacher shall have his employment discontinued nor be demoted, dismissed, suspended or reduced in rank except for proper cause.

Id. at 1281.
120. Id. at 1282.
121. Id. The court framed the issue in the case as whether "a school board [can] enter into a collective bargaining agreement under which its decision not to reappoint a nontenured teacher must be based upon proper cause." Id.
able as contrary to public policy, the Second District concluded that the Lake County School Board had no authority to include a "just cause" requirement in its collective bargaining agreement. The disputed provision violated public policy embodied in section 230.23(5) of the Florida Statutes.\(^{123}\)

The reasoning in *Lake County* could have a substantial impact on judicial perceptions of the finality of grievance arbitration in Florida's public sector. The court stated, without citation to authority, that the Florida Arbitration Code\(^{124}\) "provides the exclusive grounds for vacating an arbitration award."\(^{125}\) Having made this sweeping pronouncement, the court found it unnecessary to discuss the School Board's contention that the arbitrator had exceeded his power under section 682.13(1)(c) of the Code. Rather, the court framed the dispositive issue as one of contract validity.\(^{126}\) Unfortunately, the Second District did not discuss whether section 682.13(1)(c) was the appropriate vehicle for challenging the validity of provisions in public sector collective bargaining agreements, though arguably this could follow from the court's reasoning.

Of the five statutory challenges to arbitration awards,\(^{127}\) only section 682.13(1)(c) could conceivably be used to raise questions of contract enforceability. The court did not consider the usual challenges under this section—i.e., contentions that the arbitrator had modified or altered the contract. By considering contract validity in an action to vacate an award, however, the court implicitly relied on section 682.13(1)(c). Its own determination of the exclusivity of the Florida Arbitration Code in such cases strongly supports this conclusion.

The *Lake County* decision provides a basis for using the rubric "exceeding his powers" to ascertain the enforceability of contractual provisions of collective agreements in the public sector. If a provision is unenforceable, then its subject matter cannot be a permissible topic of negotiation.\(^{128}\) Therefore, by identifying a dis-

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\(^{124}\) The statute provides that a school board shall "[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees." *Fla. Stat.* § 230.23(5) (1979).

\(^{125}\) *Id.*

\(^{126}\) See note 97 *supra*.

\(^{127}\) Even where the enforceability of a provision is not at issue, section 682.13(1)(c) permits review of the arbitrator's actions. If the *Lake County* court had held the "just cause" provision enforceable, it might have gone on to examine the arbitral decision to see whether proper methods of interpretation produced the result. Under *Trilogy* guidelines,
puted provision as unenforceable, a court could easily dispose of any case. In sum, by extending section 682.13(1)(c) of the Code to encompass questions of contract validity, the Lake County decision has enabled the courts to influence the substance of collective bargaining in the public sector and to undermine the finality of arbitral awards.

A secondary point is that the School Board did not argue in its appeal to the Second District that the dispute was not a proper one for arbitration. By ignoring this characterization, the School Board avoided the traditional doctrine in the private sector to the effect that failure to object to arbitrability before arbitration, or before an attempt to seek judicial review of an award, constitutes waiver of that issue on review.129

The District Court of Appeal, Third District, apparently views a prior objection to arbitrability as a prerequisite to one’s raising a judicial challenge to an award on that basis. In a per curiam opinion in City of Miami v. Fraternal Order of Police,130 the court affirmed the dismissal of the city’s suit to vacate an arbitration award under section 682.13(1)(c). The lower court had based its dismissal “upon a showing that the City had agreed to the submission of the issue [to an arbitrator] that it now contends was beyond the scope of arbitration.”131 Note that the arguments against such inquiry would be limited to determining whether the parties received the arbitration for which they bargained.


130. 368 So. 2d 56 (Fla. 3d DCA 1979).

131. Id. Contra, Candor School Dist. v. Candor Teachers’ Ass’n, 42 N.Y.2d 266, 366 N.E.2d 826, 397 N.Y.S.2d 737 (1977) (“just cause” provision in public sector collective bargaining agreement unenforceable as against public policy). The school district in Candor did not raise the arbitrability question at any point in the proceedings. The court noted, however, that this omission did not bar a challenge to the award on the ground that the arbitrator had exceeded his authority in ruling for the teachers. According to this case, one may challenge the enforceability of a collective bargaining agreement merely by alleging that the arbitrator exceeded his authority and without reserving the arbitrability question before litigation. The preservation of the right to judicial review by timely objection is unnecessary. The Second District left unresolved in Lake County the question whether it would adopt this rationale in its entirety, but handling of the case suggests an affirmative answer.

The Supreme Court of Minnesota viewed the issue of public sector arbitrability as a de novo proceeding and stated:

Where arbitrability is raised in proceeding, to vacate an award on a claim that the arbitrator exceeded his authority, ... independent judicial resolution should occur. This is not to say that the court could not be aided by the arbitrator’s determination of the issue; however, the proceeding is de novo, evidence in addition to that presented to the arbitrator may be received, and the objecting party has the burden of proving the invalidity of the award.
enforceability set forth in Lake County are advanced by the very party that had previously agreed to the provision under attack. As Lake County shows, a party successful in challenging an arbitration award in court after agreeing to arbitration in its labor contract can retrieve from the court what it relinquished at the bargaining table.

Another facet of the Lake County opinion is that the court held that the "just cause" provision violated public policy as expressed in certain statutes. Two considerations are immediately discernible: (1) the use of public policy to vacate an arbitral determination; and (2) the impact of such use upon public employees' collective bargaining.

The first concern, using public policy to overturn arbitration decisions, exposes the judiciary's latent power to control the framework of the state’s labor relations. In Lake County, the Second District found no express statutory conflict with the contractual clause but invalidated the provision nonetheless, because of a judicially perceived clash with implicit public policy. Although some courts have accepted public policy as a valid basis for refusing to enforce an arbitral award, the Lake County court examined neither the premises for such acceptance nor its actual application in that sector. Instead, the Second District cited two private sector cases it deemed relevant, but gave no further explanation for its selection. One of these opinions, Goodyear Tire & Rubber Co. v. Sanford, a private sector case based on the Trilogy, strongly emphasized the use of a balancing approach in suits brought to vacate arbitration awards. This approach ameliorates the conflict between federal policy favoring arbitration and whatever public policy the court perceives to be at stake. The Goodyear court obviously viewed the finality concept as significant, for it declared that "only clear violations of important public policies justify the vacating of awards." Since Goodyear clearly sets forth the requirement of

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132. 360 So. 2d at 1285.
133. Id. at 1284.
137. Id. at 485 (emphasis in original) (citing with approval Symposium—Arbitration and the Courts, 58 W. L. Rev. 466 (1963)).
weighing competing interests, the Second District's failure to recognize this test is incongruent with its reliance on the case in Lake County.

The use of public policy as a limitation upon labor arbitration, and thus upon collective bargaining, is not unique to Florida. The trouble with this concept is that it allows a judge to declare public policy without regard to any legal authority, making his personal view dispositive of any case. This is a potent tool for the judiciary and, at the very least, argues strongly for Goodyear's balancing approach so that federal or state policies favoring the use of labor arbitration may be recognized.

The Lake County court did not balance public policy, but created it. By holding the "just cause" provision unenforceable, the court also labeled it an improper subject for collective bargaining in the public sector. Admittedly, the determination of proper subjects for bargaining is an uncertain area in Florida because of the legislature's failure to clarify the relationship between prior statutory law and collective bargaining. With the exception of retirement benefits, specifically excluded from the public sector bargaining framework, it is unclear which prior laws control public employment relations in Florida. Thus, the courts must determine the appropriateness of a subject for bargaining by inquiring whether the legislature meant to reserve the topic for its official control. Definite answers are difficult to find, and judicial resort to notions of implicit public policy becomes an easy justifica-

138. In a New York public sector case, for example, the court remarked that the power to arbitrate particular public sector matters may be limited by "[p]ublic policy, whether derived from [a statute], and whether explicit or implicit in statute or decisional law or in neither." Susquehanna Valley Central School Dist. v. Susquehanna Valley Teachers Ass'n, 37 N.Y.2d 614, 616-17, 339 N.E.2d 132, 133, 376 N.Y.S.2d 427, 429 (1979).

139. FLA. STAT. §§ 447.301(2), .309(5) (1979). Florida's PERA also indicates that public sector collective bargaining agreements must exclude terms of employment appearing in "applicable merit and civil service rules and regulations." Id. § 447.309(5) (1979). This prescription does not appear in id. § 447.301(2), however, and the ambiguity increases because pre-existing civil service enactments regulate much of public employment.

140. Obviously, judicial determination of bargainability encroaches upon PERC's authority to make such decisions, an overlap raising significant primary jurisdiction issues.

141. See Civil Serv. Comm'n v. Wayne County Bd. of Supervisors, 384 Mich. 363, 373, 184 N.W.2d 201, 204 (1971) ("we are left to guess what the 1965 legislature would have done . . . and our guess is") (emphasis in the original). The Michigan court could find no policy basis for preferring a contractual over a statutory scheme of employment regulation and simply applied the rule of construction that the last statute enacted repeals all prior law. Id. at 374. Since the later statute was the Michigan collective bargaining statute, Wayne County replaced prior state labor laws with contract clauses established through the collective bargaining process.
tion for court action. It would seem, however, that the balancing expressed in Goodyear and ignored in Lake County cannot be conducted until the parameters of bargaining in the public sector are more precisely delineated. If this assumption is correct, the status of collective bargaining, as well as the finality of grievance arbitration awards, must remain uncertain for Florida’s public employees for some time.

Turning to a third facet of the Lake County opinion, one reads with surprise that “the standard of judicial review of an arbitrator’s decision is extremely limited.” The appellate court had identified the issue confronting it as one of contract validity and not as one of the arbitrator’s power or of the merits of his decision. Nonetheless, this inconsistent statement appears. After stating its supposedly deferential position, however, the Second District proceeded to pay only lip service to it. The court examined a part of the arbitrator’s decision suggesting that the School Board could not consider the reappointment of a nontenured teacher until a full year of probationary status had elapsed. The court held that this suggestion was “incorrect because such a conclusion [was] clearly beyond the arbitrator’s authority.” Immediately following this statement, the Second District reviewed the merits of the arbitral opinion. The review was, admittedly, not crucial to disposition of the suit since the court categorized the case as one of contract enforceability. Nevertheless, the court appears to have established a clear conflict with the Trilogy concepts. The Trilogy directs a court to sustain an arbitration award if it merely disagrees with the arbitrator’s interpretation of the parties’ collective bargaining agreement. This is a standard acknowledged by Florida’s District Court of Appeal, Fourth District, albeit not in Trilogy terms, in Brevard Federation of Teachers, Local 2098 v. School Board. In Brevard, the Fourth District relied upon a decision by the Supreme Court of Iowa in holding that, although an arbitral interpretation of a collective agreement might not resemble the court’s analysis, such a difference does not warrant judicial reversal of the

142. 360 So. 2d at 1284.
143. The supporting authority for the statement was neither the Trilogy nor any other labor precedent, but Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So. 2d 1240 (Fla. 2d DCA 1976), cert. denied, 353 So. 2d 675 (Fla. 1977), a Florida commercial arbitration case that, understandably, makes no reference to the Trilogy decisions.
144. 360 So. 2d at 1285.
145. 372 So. 2d 169 (Fla. 4th DCA 1979).
award. The Lake County court proceeded differently.

The Second District’s decision that the Lake County arbitration award was “incorrect” resulted from the court’s construction of two Florida statutes regulating the procedures a school board must follow in assessing the performance of a probationary teacher. Thus, the underlying concern of the court is arbitral interpretation of statutory law. This raises the question of the relationship between “external” or “public” law and the arbitral function.

Many commentators believe that arbitrators should ignore statutory considerations and concentrate solely upon the contract as presented for interpretation. Others feel that the arbitrator must consider all relevant issues affecting the contract, including an arbitral assessment of the applicable public law. As one might expect, a number of observers take a position somewhere between these two extremes. All significant commentary to date, however, has focused on the relationship of arbitration to public law in the context of labor relations in the private sector. One problem with this is that clashes between the two, although perhaps on the increase, are less prevalent than in the arena of the public sector.

147. 372 So. 2d at 170.
148. FLA. STAT. § 230.33(7)(d) (1977) and FLA. STAT. § 230.23(5)(c) (1979). The first statute directs school superintendents to submit reappointment nominations for teachers at least six weeks before the post-school conference period. The second statute directs school boards to act upon the superintendents’ nominations not less than four weeks preceding the post-school conference period. The teachers’ collective bargaining agreement provided that a principal was to notify in writing by April 1st those teachers not intended for reappointment. 360 So. 2d at 1285. Apparently, the arbitrator had determined that the principal’s recommendation, which he had drafted by March 1st, had to be joined with subsequent evaluations in order that the school board could review a teacher’s full year of probationary status.


One influential view is that of Dean St. Antoine,\(^{152}\) who argues that the arbitrator in the private sector should be a “contract reader” oblivious to the impact of legislative regulation.\(^{153}\) He does so in partial reliance on Justice Douglas’s statement in *Enterprise*,\(^{154}\) that an arbitration award should rest on the collective bargaining agreement and should be disregarded if based “solely upon the arbitrator’s view of the requirements of enacted legislation.”\(^{155}\) Perhaps, then, the *Lake County* award would be invalid if the arbitrator had predicated his decision entirely upon the two Florida statutes regulating school board procedures, but valid if he had based his opinion upon the collective bargaining agreement, in accord with those statutes. If Justice Douglas is read accurately, the distinction is a viable one.

Even if the notion of the arbitrator as “contract reader” is the better view, private sector arbitrators must still grapple with such recent legislation as Title VII,\(^{156}\) OSHA,\(^{157}\) and ERISA.\(^{158}\) Their problems, however, pale by comparison with their counterparts in the public sector, who must deal with a myriad of state legislation governing the working conditions of public employees. Since virtually all collective bargaining in the public sector arises within the framework of this legislation, labor relations in the public sector are woven into the fabric of public law. Florida, like most states, has failed to indicate the appropriate relationship between collective bargaining and preexisting state legislation. This leaves the courts, and possibly the arbitrators, with the task of sorting out the boundaries of each.

The District Court of Appeal, First District, touched lightly on this issue in *Leon County Classroom Teachers Association v. School Board*.\(^{159}\) In *Leon County*, the School Board sought a stay of arbitration, contending that the teachers’ grievance was non-arbitrable. The appellate court refused to uphold the injunctive orders issued by the lower court. In so doing, the appellate court relied on a Massachusetts case\(^{160}\) holding that arbitration would not be stayed because of the mere possibility that the “arbitrator’s

\(^{152}\) St. Antoine, *supra* note 149.
\(^{153}\) *Id.* at 1142.
\(^{155}\) *Id.* at 597 (emphasis added).
\(^{159}\) 363 So. 2d 353 (Fla. 1st DCA 1978).
award . . . might purport to intrude into the school committee's inviolate authority." Thus, the First District applied the Trilogy presumption in favor of arbitrability, although the First District did not discuss its reasoning as a reflection of the Steelworkers cases. In effect, the First District acknowledged the external constraints within which an arbitrator of grievances in the public sector must operate but chose to leave the matter in the arbitral forum in the hope that it could be satisfactorily resolved there. The court, however, did not clarify which type of solution would satisfy it.

One commentator has further argued that in the private sector at least, the expectations of the parties to a labor arbitration proceeding do not encompass arbitral interpretation of public law. Regardless of whether this is a correct assumption, it is arguable that the contrary is true in the public sector, in which collective bargaining agreements thoroughly interrelate with state legislation. The notion that "[p]ublic law is for public tribunals to define" may be less than ironclad with respect to labor relations in the public sector if arbitrators in that setting are given free rein to assess the contractual framework within which the parties to a collective agreement in the public sector must operate.

The proper response of arbitrators to public law is but one side of this issue of the applicability of external criteria to grievance arbitration in the public sector. The other side is the appropriate scope of judicial concern for arbitral decisions that interact in some fashion with statutory pronouncements. The United States Supreme Court partially addressed this dilemma in a 1974 case, Alexander v. Gardner-Denver Co., in the context of Title VII litigation. In Gardner-Denver, the Court permitted an employment discrimination suit to be brought by a grievant even though he had previously submitted his dispute to arbitration. The Court ruled that the doctrine of "election of remedies" did not apply, because the employee's rights under Title VII were totally independent of his rights under the collective bargaining agreement. The case has received considerable attention, particularly in light of a remarkable footnote in which the Court indicated that it accords

161. 363 So. 2d at 356. See also Manatee County Mun. Employees Local 1584 v. Manatee County School Bd., 6 FLA. PUB. EMPL. REP. ¶ 11188 (1980).
162. Edwards, supra note 38, at 79.
163. Id. at 91.
165. Id. at 50.
great weight to arbitration findings when certain due process concerns are met.¹⁶⁸

Although one may infer from Gardner-Denver a general principle that arbitration awards will not bind courts when the grievant asserts public law rights, at least one commentator has construed the case as being limited to the Title VII context, on the basis of the overwhelming national policy favoring nondiscrimination.¹⁶⁷ The Tenth Circuit, in Satterwhite v. United Parcel Service, Inc.,¹⁶⁸ took the latter approach in holding that an employee's submission of a claim to final arbitration forecloses his right to sue under the Fair Labor Standards Act.¹⁶⁹ The Satterwhite opinion, rendered after the Supreme Court decided Gardner-Denver, certainly clouds the issue whether Gardner-Denver resolves the relationship between public law and arbitration awards in the private sector in any context but discrimination suits. Because of the ambiguity of the Gardner Court's footnote, one may even dispute the latter point.

The long-standing tradition that courts will not vacate arbitration awards for errors of fact or law interacts with the preceding discussion of the effect of external criteria upon decisionmaking in the arbitration forum.¹⁷⁰ Just how much credence a court will give to this doctrine in connection with the interrelationship of state legislation and public sector grievance arbitration is pure speculation. Whatever its precedential value, however, Florida courts have endorsed this aspect of judicial review in numerous instances.¹⁷¹

In sum, Gardner-Denver does not resolve the dispute over the arbitrator as the reader of a contract, nor does it clarify the response to arbitration awards demanded of a public tribunal dealing with external law. Moreover, the decision does not delineate guidelines that a tribunal such as Florida's District Court of Appeal, Second District, may attempt to follow in assessing arbitral determinations in the public sector that possibly contravene management rights embodied in state statutes. Once again, therefore, the only available touchstone for such judicial review is the Steelworkers Trilogy.

¹⁶⁶. Id. at 60 n.21.
¹⁶⁷. E.g., St. Antoine, supra note 149, at 1157-60.
¹⁶⁸. 496 F.2d 448 (10th Cir.), cert. denied, 419 U.S. 1079 (1974).
¹⁷⁰. See note 53 and accompanying text supra.
¹⁷¹. E.g., Johnson v. Wells, 72 Fla. 290, 295, 73 So. 188, 192 (1916); Newport Motel, Inc. v. Cobin Restaurant, Inc., 281 So. 2d 234, 235 (Fla. 3d DCA 1973); Dairyland Ins. Co. v. Hudnall, 279 So. 2d 905 (Fla. 3d DCA 1973).
Interestingly, Lake County once more raises the specter of illegal delegation of power in the evaluation of labor relations in the public sector. As the Second District stated in justifying its concern for public policy:

[The existence of a “proper cause” provision in the collective bargaining agreement with respect to the reappointment of nontenured teachers necessarily limits the exclusive authority otherwise vested by law in that board. The practical effect of a proper cause provision is to transfer the ultimate responsibility for reappointment of nontenured teachers to an arbitrator.]

The Second District obviously considered such a “transfer” unacceptable and invalid; but the court did not assess the possibility that the parties to the collective bargaining agreement might have negotiated and agreed to the “transfer.” Neither does the opinion give any weight to the general legislative policy favoring arbitration as a preferred method of dispute resolution in labor matters. Last but not least, the Trilogy is ignored.

3. CO-EXISTENCE FOR Koenig AND Lake County

In Koenig, the District Court of Appeal, Third District, made its position clear that the finality of a third-party decision made in fulfillment of a contractual provision must be precisely that—final. In Lake County, on the other hand, the Second District extensively reviewed a matter decided by an impartial observer and vacated his award. Both cases involved the termination of public employees, but in Koenig, the County discharged public employees for violation of a rule of the workplace, while in Lake County the School Board simply refused to renew a public employee’s contract. Thus, a fair question arises over whether the decisions are really inconsistent with one another.

In Koenig, the personnel director upheld the discharge as justified after examining the facts surrounding the discharge and reviewing the collective bargaining agreement. Subsequently, the dismissed individuals did not raise the issue of whether the director had violated the collective bargaining agreement through his role as decisionmaker. Moreover, they did not challenge the terms of

172. 360 So. 2d at 1284 (emphasis in original).
the agreement as conflicting with any existing statutory law or public policy.\textsuperscript{176} Thus, the \textit{Koenig} court sought to decide only the question whether or not the personnel director's decision was correct.\textsuperscript{176}

In \textit{Lake County}, however, the court deemed the dispositive issue to be the validity of the contractual provision under which the court was to assess the decision not to reappoint an employee. The arbitrator's perception of the provision and the circumstances surrounding the decision not to reappoint the grievant were thus immaterial to the adjudication of contract legality.

Framed in the preceding manner, the two cases are not only quite distinguishable from one another but also bear sharply different relationships to the \textit{Trilogy} decisions. \textit{Koenig} requires full application of the finality concepts flowing from the \textit{Trilogy} decisions, since it merely presents a request to the court for a judicial interpretation contrary to that reached in a contractually mandated and presumably final and binding proceeding. Nothing in \textit{Koenig} suggested that the third-party decisionmaker did anything other than perform his function—to borrow St. Antoine's phrase—as a "contract reader," and under such circumstances, the arbitral result deserved deferential treatment from the court. The \textit{Koenig} third-party was an individual presumably well-versed in labor relations: a decisionmaker whose expertise qualified him as the best adjudicator of the "common law of the shop" by assessing such factors as the employer's past practices and the equitable application of management policy. In instances such as this, as one well-known commentator phrased it, "[t]he ordinary judge has ordinarily nothing to teach the ordinary arbitrator in the adjudication of an ordinary grievance under an ordinary collective bargaining agreement."\textsuperscript{177} From the standpoint of labor relations, therefore, judicial scrutiny of the \textit{Koenig} award would result in nothing of positive value. The policies favoring a private, third-party forum to resolve a labor controversy support the use of such a forum in \textit{Koenig}-type situations. The Supreme Court's reasoning in the \textit{Trilogy} does not turn upon the private or public status of employees, and the finality of the arbitration award demanded by

\begin{itemize}
  \item \textsuperscript{175} The Koenigs apparently alleged violations of the due process and equal protection clauses of the United States Constitution. The lower court granted summary judgment in favor of the county, however, and the appellate court did not discuss the constitutional issues.
  \item \textsuperscript{176} 360 So. 2d at 107.
  \item \textsuperscript{177} Dunau, \textit{supra} note 6, at 461.
\end{itemize}
the Trilogy fits as well with Koenig as with Enterprise.\textsuperscript{178}

The same finality does not apply in Lake County, in which the judicial question was the enforceability of a contract provision. The Trilogy standards that apply to judicial review of the merits of an arbitration award are irrelevant to a decision on enforceability. If a collective bargaining agreement, or any portion of it, is void, not only does the arbitral process not legitimize the agreement, but an award that becomes the vehicle for challenging the contract's validity is not itself the subject of examination. Similarly, if an arbitrator declares that a collective agreement is unenforceable, the question for the court is again one of contract legality, rather than the merits of the arbitral determination. In either situation the arbitrator may have construed the contract properly, but such a reading does not answer the underlying issue of the contract's validity, an issue suitably addressed by courts, not arbitrators.

One commentator recently examined judicial decisions on arbitration awards in a number of states other than Florida, and concluded that state courts view the Trilogy policy favoring arbitration as a secondary consideration in public sector cases.\textsuperscript{179} According to that commentator, the initial issue in resolving suits over arbitration in the public sector has been whether the dispute in question arose over a subject properly within the scope of collective bargaining under the applicable statute.\textsuperscript{180} Given the lack of legislative definition of the parameters of collective bargaining in the public sector in Florida as in other states,\textsuperscript{181} this result is to be expected. As one may recall, the Court propounded the Trilogy concepts for application within the private sector, in which the range of permissible subjects of bargaining is virtually limitless, and the finality extolled by the Supreme Court in the Steelworkers decisions did not derive from any judicial concern for negotiability. It is thus reasonable to assume that the applicability of the Trilogy principles should provide the threshold question in public sector cases involving ill-defined boundaries for bargaining.

Clearly, however, courts are quite capable of reviewing the merits of an arbitration award through the guise of framing the

\begin{itemize}
\item \textsuperscript{178} United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See text accompanying notes 56 & 60 supra.
\item \textsuperscript{179} Toole, Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments, 33 ARB. J. 6 (1978).
\item \textsuperscript{180} Id. at 14.
\item \textsuperscript{181} See note 141 and accompanying text supra.
\end{itemize}
judicial inquiry as one of enforceability in a suit brought to vacate an award. This is particularly true when the basis for judicial scrutiny is "implicit public policy." One may hope that courts will keep subterfuge to a minimum when they evaluate awards from grievance arbitration in the public sector in Florida, as elsewhere. More importantly, perhaps, one must recognize that the preceding distinctions drawn between Koenig and Lake County do not completely delineate the possible parameters within which challenges to an arbitral award may arise. In Lake County, for example, the court's examination of arbitral interpretations of school board procedures indicates an area in which the Koenig-Lake County boundaries blur and the Trilogy's application becomes more difficult to categorize. Although the arbitral determination contested in Lake County was not dispositive of the case, an analysis of the decision reveals an area of uncertainty for the finality concept as a doctrine governing grievance arbitration in the public sector in Florida.

First, it is unclear if the timing issue was a significant factor in the Lake County arbitrator's assessment that just cause existed for not retaining the grievant; the court's opinion does not show what weight the arbitrator gave to the School Board's "early evaluation." In addition, the extent to which the arbitrator based his conclusion on an interpretation of statutes regulating school board procedures is equally uncertain. Despite these unknowns, however, it is evident that the Second District was concerned with the propriety of the arbitral decision. The Lake County court chastised the arbitrator for reaching an "incorrect" conclusion. The question that arises from this judicial perception of error is whether an application of the finality concept, which is the controlling feature of Koenig, would be appropriate, or whether disregard for the Trilogy mandate would be more suitable because a statutory "conflict" is present, as the Lake County court's handling of the enforceability issue indicates.

The preceding query avoids easy answers, for it underscores the dilemma presented by the relationship between external law and the arbitral forum. Since the arbitrator in Lake County dealt obscurely with the statutory provisions, it is impossible to analyze this aspect of the arbitral decision with any degree of particularity.

182. 360 So. 2d at 1285.
183. Id. at 1282.
184. Id. at 1285.
Obviously, however, this is precisely the type of area in which pre-existing statutory constraints governing public employment must blend with collective bargaining agreements to achieve efficient settlement of labor-management disputes in the public sector. Another commentator has indicated that in this area it is difficult to distinguish and pin neat labels on contract provisions and external law. Thus, although the court's analysis of the timing issue may be reasonable, one may presume that the arbitrator's interpretation was equally plausible. The question, therefore, remains whether to condone the court's lack of consideration for the state policy favoring final and binding arbitration in the public sector.

The dilemma suggests the need to modify the Trilogy standards of judicial review. Solving the dilemma may require an intermediate level of scrutiny in which the court can measure the necessity for rigidly applying preexisting statutes against the need for promoting final and binding arbitration. This proposal reflects the balancing approach expressed in Goodyear, in which the court weighed policies supporting the finality of arbitration in resolving labor disputes against other public interests in determining the acceptability of a contract provision as a topic appropriate for collective bargaining. Here the question is not one of negotiability but one of interpretation, and the Trilogy principles deserve serious consideration even if their full adoption is not warranted. Some may protest, of course, that any degree of judicial review diminishes the effectiveness of arbitration. This contention has merit. Nevertheless, labor relations in the public sector are so inextricably tied to preexisting legislative enactments that a modified Trilogy approach is virtually inevitable.

In sum, the holdings of Koenig and Lake County are indeed compatible with one another and should provide useful precedent in future cases involving similar circumstances. The court's review of the arbitral opinion in Lake County deserves close scrutiny, however, because subsequent judicial concern for the dilemma posed by that analysis will impact heavily upon the entire course of labor relations in the public sector in Florida. One may hope that the state's courts will recognize the virtues of finality in labor arbitration and the preferred status accorded it by the legislature.

VI. Conclusion

Former Chief Judge Brown of the Fifth Circuit is not the only observer since 1960 to have exalted the concept of finality as indispensable to labor arbitration; many commentators perceive limited judicial review of the arbitral forum as a necessity.\textsuperscript{187} Nonetheless, the Steelworkers standards require application only in appropriate circumstances, and as Lake County demonstrates, not every suit instituted to vacate an arbitration award is amenable to such analysis. Consequently, a decision on whether the circumstances of a particular public sector case give rise to judicial application of the Trilogy standards is the crucial first step every court should take when it confronts a challenge to an arbitration award. Ideally, analysis in arriving at this decision will flow from judicial understanding of the merits of the arbitral forum in union-management relations. Although awareness of this value will not resolve the tension between legislative endorsement of compulsory, binding arbitration and the interaction that occurs between collective bargaining agreements and preexisting statutes governing employment relations, it will aid in constructing a viable framework for the functioning of the arbitration process in jurisdictions such as Florida.

The success of grievance arbitration in the public sphere depends in large measure upon developing an effective scope of judicial review of arbitral determinations that is neither so narrow as to ignore the public interest, nor so broad as to destroy the justification for the informality, expertise, and finality of the process. Although it may not be possible to finalize grievances through arbitration as frequently in the public sector as in the private domain, courts should nevertheless make every attempt to support the use of this method to resolve labor disputes in the public sector. Whenever possible, therefore, when an arbiter is chosen to be the judge of a labor controversy and that judge speaks, there the matter should end.

\textsuperscript{187} Dunau, supra note 6, at 429 (finality indispensable to arbitration awards); Comment, supra note 51, at 949 (same); Comment, supra note 10, at 439 (conclusiveness at heart of arbitration process).