

10-1-1973

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Maurice C. Benewitz

*National Center for the Study of Collective Bargaining in Higher Education of Baruch College*

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### Recommended Citation

Maurice C. Benewitz, *In Defense of Academic Judgment: A Comment*, 23 Buff. L. Rev. 201 (1973).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol23/iss1/8>

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## COMMENTARY

### IN DEFENSE OF ACADEMIC JUDGMENT: A COMMENT

MAURICE C. BENEWITZ\*

The article by Bernard Mintz and Allan Golden in Volume 22, Number 2, of the *Buffalo Law Review*<sup>1</sup> concerning the arbitration of faculty grievances in the City University of New York raises some difficulties for this writer who is both a member of the faculty of the City University and arbitrator on a number of panels. The authors and I disagree about the arbitral process and its limitations, about the distinctions or lack thereof between the awards they cite, and about the necessity for review of the way in which both parties to an agreement apply the language they have mutually adopted. I suggest that either side may misconstrue language whose application becomes disadvantageous to them and that the arbitrator dealing with such interpretations will seem to take away something a party thought it had won. I further suggest that such differing views are precisely the reason arbitrators are used in the first place.

The authors charge that "arbitrators do not like to be faced with caveats which restrict their powers."<sup>2</sup> However, any review of normal arbitration procedure, either academic or non-academic, would raise some question about this assertion. Even where a demand for arbitration, rather than a signed submission, initiates a grievance, there are several ways in which the issue, or issues, must be identified:<sup>3</sup> carefully worded grievances; a stipulation or submission executed at the beginning of the hearing; or a determination by the arbitrator of the issue either at the request of the parties or because they were unable to agree. These procedures constitute a deliberate invitation on the part of the

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\* Director, National Center for the Study of Collective Bargaining in Higher Education of Baruch College. A.B., Harvard College, 1947; Ph.D., University of Minnesota, 1954.

1. Mintz & Golden, *In Defense of Academic Judgment: Settling Faculty Collective Bargaining Agreement Grievances Through Arbitration*, 22 *BUFFALO L. REV.* 523 (1973).

2. *Id.* at 543.

3. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 186-90 (3d ed. 1973).

arbitrator to the parties to limit his jurisdiction as narrowly as they please and even more narrowly than the language of the contract requires if the parties so desire; this is the process followed and encouraged by any professional arbitrator.

In this regard, it is interesting that a number of the CUNY arbitrations proceeded without a signed submission. Thus, the parties were unable or unwilling to limit the authority of the arbitrator by sharply focusing their instructions on what he was to do. I contend that most of the arbitrators did not go beyond the contracts; but, if the parties do not choose to limit the arbitrator, they should assume part of the blame if, *arguendo*, he goes astray.

As a general proposition, not limited to CUNY, there is a continuing discussion in the arbitration profession as to what must be done when "the four corners of the contract" conflict with statutory or other social requirements. A profession eager to exceed the limits of the contract would have little to say here. Yet many, if not most, arbitrators would follow the lead of Mark Kahn in *Reynolds Metal Company*.<sup>4</sup> Arbitrator Kahn was required, in this non-academic matter, to decide a matter concerning refusal of Sunday work for religious reasons. A contractual exception provided for release "when an employee has a substantial and justifiable reason for not working." In addressing only the narrow question of whether the grievant could rely on the contractual exception, Kahn ruled that "the agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds."<sup>5</sup> This case is cited as an instance in which an arbitrator held to the language of an Agreement even when substantial questions of public policy dictated a different result. To be sure, this penchant of the arbitrator to be bound by the contract in such cases has been subjected to scathing criticism in articles reviewing such action.<sup>6</sup>

There is no showing that the awards cited by Mintz and Golden, except as they deal with the "Smith" award reinstating an instructor

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4. 56 LAB. ARB. 592 (1967).

5. *Id.* at 596. In simultaneous litigation the district court for the Western District of Michigan upheld the grievant's claim of religious discrimination and directed his reinstatement. *Dewey v. Reynolds Metal Co.*, 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970) (the appellate court held that the collective bargaining agreement did not discriminate since it applied equally to all).

6. *See, e.g.*, Jacob, *Dewey v. Reynolds Metal Company: Arbitration and Judicial Review Under the 1964 Civil Rights Act*, 24 LAB. L.J. 100 (1973).

## COMMENTARY

with automatic tenure,<sup>7</sup> exceeded or were held by the courts to exceed the powers of the arbitrator in the Agreement. Among a number of other things which *did* happen was the development of a difference of opinion among a number of competent arbitrators appointed under the two City University contracts. Their disagreement involved the application of contradictory contract language. The matter giving rise to the arbitrator's decision concerning "judicial roulette"<sup>8</sup> cited by Mintz and Golden is most instructive in this regard.

The conflicting opinions turned on whether progress toward the Ph.D. could be considered in deciding whether a full-time lecturer was to be reappointed under the United Federation of College Teachers contract. The Nota Bene clause, article 6.4 Step 2, memorialized in the Mintz and Golden article provides in relevant part:

Grievances relating to appointment, reappointment, tenure or promotion which are concerned with matters of academic judgment may not be processed by the conference beyond Step 2 . . . . Grievances . . . in which there is an allegation of arbitrary or discriminatory use of procedure may be processed by the conference through Step 3 [arbitration] . . . . In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures. It shall be the arbitrator's first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgment. In no event, however, shall the arbitrator substitute his judgment for the academic judgment.<sup>9</sup>

Article 13.1 of the Agreement defines full-time lecturer as:

A tenure bearing . . . title used for full-time members of the faculty who are hired to teach and perform related faculty functions *but do not have a research commitment*.<sup>10</sup>

Article 25.6 of the Agreement provides that effective one year after initial appointment:

No member of this unit, full-time or part-time, shall be denied reappointment on the basis of professional incompetence unless he has been evaluated during at least three semesters . . . and unless two of the last three evaluations indicate unsatisfactory performance.<sup>11</sup>

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7. Mintz & Golden, *supra* note 1, at 530.

8. *Id.* at 536.

9. Agreement between the Board of Higher Education of the City of New York and the United Fed'n of College Teachers, Local 1460, October 3, 1969, at 7-8.

10. *Id.* at 9 (emphasis added).

11. *Id.* at 23.

In one of the cases cited by Mintz and Golden, an arbitrator ruled that requiring progress toward the Ph.D. for reappointment as a lecturer violated Article 13.1 by setting a research requirement.<sup>12</sup> This, if true, would also seem to violate Article 25.6 by setting another professional requirement for reappointment besides the satisfactory observations there required. On the other hand, another of the arbitrators, in two unreported awards,<sup>13</sup> held that the requirement of the Ph.D. was an exercise of academic judgment. Thus, two arbitrators considering the same language came to different conclusions. Indeed, as Mintz and Golden aver, this may often result if the contract language is unclear or conflicting.<sup>14</sup> But the arbitrator who found that requirement of the Ph.D. was "classically a matter of academic judgment" deferred to the *Nota Bene* as any professional arbitrator coming to such conclusion would almost certainly do.

The other arbitrator found that the requirement of the Ph.D. violated Article 13.1. As he read the Agreement, *one form of academic judgment which the parties had agreed not to apply to full-time lecturers* was that concerning research performance. He therefore held that requiring progress to the degree was a requirement of research performance and directed reinstatement. Was he chafing at a caveat which restricted his powers? I think not. If he found, correctly or not, that the parties had removed the question of progress to the Ph.D. from the area of proper academic judgment, then the *Nota Bene* did not apply. As with any other man, he might have misread the contract (one of these two arbitrators *must* have done so unless the contract is so ambiguous as to *allow* conflicting interpretations), but on his finding he did not violate the *Nota Bene*.

Another important duty of an arbitrator is to determine whether academic judgment is involved. Certainly this determination cannot be made simply on the assertion of the University that it is. If that were true why charge the arbitrator with the responsibility to rule on the question? Would it not be a foregone conclusion? Board rules or other requirements of the Agreement (*e.g.*, Article 13.1) enter such determination. That one side or the other does not agree with the determination made does not mean that the arbitrator has chafed at a caveat which restricted his powers.

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12. Mintz & Golden, *supra* note 1, at 538.

13. Unreported decisions dated March 24, 1972, June 23, 1970.

14. Mintz & Golden, *supra* note 1, at 543.

## COMMENTARY

Frank and Edna Elkouri have collected examples showing that while it is unusual for arbitrators to rule differently on the same provision of a given contract, it is not impossible or even improper. The examples note that this might occur under the following circumstances: if the previous decision indicated bad judgment; if new facts became available; if new conditions arose; if there were obvious and substantial errors of fact or law or if there had not been a fair and full hearing.<sup>15</sup>

It is possible to conclude that the CUNY arbitrators found different interpretations of conflicting language (not of a single section as discussed above) or might have come to differing conclusions for the other reasons listed above. If the language is unclear or leads to an un contemplated result, the words of distinguished arbitrator, Milton Friedman, might well be applicable:

Arbitrators deal with the Collective Bargaining agreement presented to them by the parties, who must assume responsibility for what is good in it or bad in it . . . . Arbitrators have not imposed the terms of the Contract, or formulated its language . . . . They are not the judges of its wisdom, its fairness, its equity or its reasonableness.

....

The limitations on the arbitrator . . . are of universal application, for the function of an arbitrator—as most agreements gratuitously emphasize—is to interpret and apply the Agreement, but not add to it, subtract from it, or vary it in any way.<sup>16</sup>

Thus the arbitrator seeks to operate within the four corners of the agreement however wise or unwise the language may be. It is to his advantage to do so since any result caused by the language of the parties cannot be laid to the arbitrator. Any deviation from the contract by the arbitrator may not only lead to court action to vacate the award on the grounds that the arbitrator exceeded his jurisdiction, but will almost certainly lead one party or the other to avoid that arbitrator's service in the future. For this reason, as well as because arbitrators believe themselves to be bound by the contract in Friedman's properly professional sense, the arbitrator may not go as far in remedying inequities as might a court faced with the same fact pattern. Any

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15. F. ELKOURI & E. ELKOURI, *supra* note 3, at 379.

16. Friedman, Special Issues in Arbitration of Higher Education Disputes: Academic Judgment and Tenure Quotas, April 13, 1973 (to be published in the *Journal of the National Center for the Study of Collective Bargaining in Higher Education*, Nov. 1973).

professional arbitrator seeks almost always to adhere to specific limitations of the submission or the agreement where the limitations are clear and the requirements are not contradictory. In the unusual case where he carves new ground, the arbitrator goes to great lengths to explain on what basis he has done so and often the answer can be found in other actions of the parties—so-called past practices.

Mintz and Golden, it seems to me, miss the point in several ways in the awards they cite. First, they do not recognize the conflict between the *Nota Bene* and the limitation concerning academic judgment (as seen by some CUNY arbitrators and not others) in Article 13.1.<sup>17</sup> Second, they do not recognize that if an arbitrator finds one of the several kinds of discrimination prohibited by Article VII of either Agreement, he must rule that what occurred was not based on academic judgment or even faulty procedure and go forth from that point.

More importantly, Mintz and Golden fail to recognize that in the awards they cite in which failure of procedure arose, two different situations occurred. It is true that in an important CUNY case the courts have held that failure of procedure may not be transmuted into the conferring of tenure.<sup>18</sup> But this ruling does not immediately indicate that reinstatement where procedure has failed and where no other remedy will allow procedure to be followed (*e.g.*, two semesterly observations) is forbidden under the law or the contract *where* the reinstatement does not automatically confer tenure. A good example might be in the hypothetical case of a Higher Education Officer—a contract title which never leads to tenure—who was not evaluated by his superior and who had no opportunity to review his personal file as required by Articles XVII and XVIII of the Legislative Conference Agreement. Since there were no observations, no academic judgment could have occurred and even if it could have, the employee was entitled to be told of his shortcomings and to be afforded an opportunity to correct them. This is the purpose of the provisions. Does the court decision quoted by the authors<sup>19</sup> clearly and unequivocally deny reinstatement as a remedy? I suggest that the readers of the *Buffalo Law Review* consider the language again and ponder this question. The

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17. See note 1 *supra* & accompanying text.

18. *Legislative Conference v. Board of Higher Educ.*, 38 App. Div. 2d 478, 330 N.Y.S.2d 688 (1st Dep't 1972).

19. Mintz & Golden, *supra* note 1, at 532.

## COMMENTARY

readers might also consider the fact that the arbitrators have reinstated a number of employees without court challenge by the University.

Turning to some of the other conclusions reached by Mintz and Golden, one finds their assertion that the arbitrators gave that which the parties did not agree upon in negotiation.<sup>20</sup> If this is true, it is a perversion of the process. Could one show the arbitrator a written demand which failed of adoption, it would be unusual indeed for him to grant the same thing in an award. But what was here referred to? Presumably, since it is not specifically identified, the authors refer to the reinstatement instead of remand given by some arbitrators. But I have already noted that at least some of these arose out of determination, correct or not, that other sectors of the contract were violated so that the *Nota Bene* did not apply.

The authors charge that some matters were granted which never arose in negotiations.<sup>21</sup> What these are, we again are not sure. But if the arbitrators granted anything not founded on the words of the Agreement, it is clear that a motion to vacate would have been in order. To the best of my knowledge, only one such motion has been successful in the courts. Every person acquainted with contract implementation is aware that no contract deals with every condition that might arise. If the contract did so in explicit fashion, no "interpretation or application of the contract" would be needed from any arbitrator.

The authors contend that the arbitrators allowed the union to use "that which was crystal clear in its contract wording . . . to probe for further gains through the arbitral process."<sup>22</sup> Surely we were entitled to read some of these crystal clear words which were so misused. I have read these contracts and find much that is unclear, and I work within the context in which the words were written. Indeed, following the distribution of the Agreements, Professor, then Vice-Chancellor, Mintz issued a continuing series of administration interpretations and applications. In my office these fill two loose-leaf folders. Why were they issued? May I suggest that the answer to this question is "crystal clear"?

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20. *Id.* at 543.

21. *Id.*

22. *Id.*

