CHAPTER 5

DUE PROCESS AND FAIR REPRESENTATION IN GRIEVANCE HANDLING IN THE PUBLIC SECTOR

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Public Employment and the Constitution

In the days before public-sector bargaining, the matter of grievance procedures, like all terms and conditions of employment, was determined unilaterally by government. In many areas of public employment there was no grievance system. In others there might be an informal intra-agency mechanism. For the most serious kinds of personnel actions, such as discharge, there developed at federal, state, and local levels a wide variety of procedures, including such devices as agency appeal boards, civil service commission or other statutory hearing processes, perhaps even judicial review. To the entire area of public employment, constitutional limitations on the power of government had virtually no applicability. The accepted doctrine was that public employment was a privilege to which government could attach conditions it could not impose upon citizens generally. Thus, public employees enjoyed no substantive or procedural constitutional guarantees against their government employers.

Both the Fifth Amendment, which runs against the national government, and the Fourteenth Amendment, which runs against all governmental action at state and local levels, contain the identical prohibition that no person shall be deprived of life, liberty, and property without due process of law. The meaning of the language is obviously not self-evident, and it has been the task of the courts—principally the U.S. Supreme Court—operating under the distinctively American doctrine of judicial review, to give definition and application to the amorphous words. The due-process clauses have generated more litigation than any other portion of the Constitu-

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tion. The questions are perennial. What is included in the word "liberty"? What is meant by "property"? And what is the function of the phrase "due process of law"?

Through a series of Supreme Court decisions, the specific guarantees of the Bill of Rights, which run directly against the national government, have been found to be included in the word "liberty" in the Fourteenth Amendment, and so made binding against state and local governments. Thus, for example, the First Amendment freedoms of speech, press, assembly, and religion now apply at all governmental levels. In addition, the word "liberty" in both the Fifth and Fourteenth Amendments has been held to include other rights not specifically mentioned in the Constitution, but declared by the Court to be "fundamental" in a free society. As to the term "property," the word has never been confined to legal title to real estate and chattels, but has been applied to a wide range of intangible interests. Finally, the principal meaning of the phrase "without due process of law" is that notice and some kind of a hearing must be provided before a person can be deprived of liberty or property. The essential requirement in all cases is "fundamental fairness." The Court has used a case-by-case approach in determining when a hearing is required and what the specific components of the hearing must be. Depending, in the particular situation, upon the nature and importance of the individual right and the government interest which allegedly justifies deprivation of the right, the hearing may range from a very informal investigatory process to a very formal adversary, evidentiary, trial-type hearing with an extended list of procedural safeguards. The Court's ad hoc approach to the problem, which requires particularized judgments, guarantees continuing confusion and uncertainty as to when a hearing is required and what kind of hearing it must be.

In the past 20-odd years, the Supreme Court has held in a series of cases that the personal rights in the Constitution apply to government, not only when its actions run against citizens generally, but also when it acts in the capacity of an employer. Two examples will suffice. In *Pickering* v. *Board of Education,*[1] the Court held that First Amendment freedom of speech invalidated the discharge of a public-school teacher who publicly criticized the school board on a matter of public interest connected to the operation of the schools. In *Garrity* v. *New Jersey,*[2] the Court held that an employee could not be coerced by threat of discharge into forgoing his

[1] 391 U.S. 563 (1968).
[2] 386 U.S. 493 (1967).

constitutional privilege against self-incrimination. In these and other cases the Court has expressly repudiated the earlier view that government employment is a privilege which entails the sacrifice of constitutional rights.

The Property Interest in Public Employment

Two decisions of the Court in 1972—*Board of Regents* v. *Roth*[3] and *Perry* v. *Sinderman*[4]—broke new ground. Both cases dealt with the termination of employment, through nonrenewal of a contract, of state-college teachers. Perry had been a professor for 10 years, the last four on one-year contracts, when he was nonrenewed. Roth was not rehired at the end of his first year. In the *Roth* case, the Court stated that if a termination were based on a ground such as dishonesty or immorality (whatever that may mean in today's society) which reflected upon the employee's "good name, reputation, honor and integrity or foreclosed opportunity for other employment, this would be such a deprivation of 'liberty' that due process would require an opportunity to be heard in order to refute the charge." In both cases the Court also recognized that a teacher could have such a "property" interest in continued employment as to trigger the due-process right to notice and hearing before the employment could be terminated. The Court noted that either a statute or a formal tenure system requiring "cause" for discharge would be sufficient to create such a property interest. The Court went further, however, and held that even in the absence of a tenure system, a "property" interest in the employment could be found on the basis of rules and mutual understandings, including implied ones. In both cases the Court stated that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Given such a "property" interest, the Court held that procedural due process required a hearing to determine if there was sufficient "cause" for the discharge. While the Court's language on the showing of a "property" interest was stated with reference to college teachers, clearly it is not so confined and may be applied to all levels and kinds of public employment.

In *Roth* and *Perry* the Court did not deal with the kind of hearing which was required. It did, however, speak clearly on the timing

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[3] 408 U.S. 564 (1972).
[4] 408 U.S. 593 (1972).

of the hearing. Quoting an earlier case, the Court stated: ". . . it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." In *Roth* Justice Stewart added that "When protected interests are implicated, the right to some kind of prior hearing is paramount." He described as "rare and extraordinary" the situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing. . . . "

Notwithstanding the foregoing language, a majority of the Court declined to adhere to it two years later in a fascinating and frustrating case called *Arnett* v. *Kennedy*.[5] There the Court had before it a federal statute, the Lloyd-La Follette Act, which dealt with federal employment. The Act states that "an individual in a competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." Kennedy, a nonprobationary employee of the Office of Economic Opportunity, was discharged for making recklessly false and defamatory statements about his supervisor. Under the statute and OEO regulations, Kennedy was entitled *before* discharge to notice of the charge against him, access to the material on which the charge was based, and an opportunity to make written and oral response to it. *After* discharge, he was entitled on appeal to a full evidentiary trial-type hearing. The principal issue was whether the hearing procedures satisfied procedural due-process requirements. The government won the case, six to three, but the Court was much divided and there was no majority opinion.

Three of the six justices who voted to sustain the procedures (in an opinion by Rehnquist) measured the scope of the "property" interest by the stated procedures available for protecting it. They thought that due process required no more of a hearing than that provided by the statute which created the "property" interest. This view was specifically repudiated by the other six justices who agreed that the "property" interest and "due process" questions were separate. Of these six, three found that the procedures were valid. Two of the three—in an opinion by Powell— held that the government's interest in expeditious removal of an unsatisfactory employee outweighed the interruption of the employee's income during the

[5] 416 U.S. 134 (1974).

period between discharge and hearing. To the argument that absence of a hearing before dismissal increased the likelihood of wrongful dismissals, Powell replied that the predischarge procedures satisfied that concern. One justice (White) agreed that postponing the full evidentiary hearing until after discharge was permissible only because of the existence of the predischarge procedures which protected against wrongful and erroneous discharges. He was troubled, however, by the loss of income suffered by the employee pending the postdischarge evidentiary hearing, and suggested the possibility of a suspension from duty with continuance of pay. Only three justices—the dissenters, one of whom is no longer on the Court—would have held that a full evidentiary hearing was required before dismissal.

Faced with the issue, it seems probable that the three justices represented by the Rehnquist opinion would find hearing after termination sufficient. One of these three, incidentally, was Justice Stewart, who evidently decided that he disagreed with what he had written two years before in the *Roth* case. But, since the Powell and White opinions explicitly relied upon the predismissal procedures, the matter is not free from doubt when such procedures are not available.[6]

In its 1976 decision in *Bishop* v. *Wood,*[7] the Court made it plain, five to four (however plain that is), that state and local governments could "grant or withhold tenure at their unfettered discretion," and that whether tenure had been granted in a particular case was a question of state law which was binding on the federal courts. The decision is highly questionable. A city ordinance in Marion, North Carolina, classified certain employees as "permanent" and provided for dismissal for the stated grounds of negligence, inefficiency, or unfitness to perform the duties. The ordinance required no hearing of any type before discharge, but only for written notice and a statement of reasons for the discharge if requested. The lower courts had read the statute, in accordance with their understanding of North Carolina law, as authorizing discharge "at the will and pleasure of the city" and thus not creating any "property" interest in continued employment. This interpretation, which is inconsistent with the face of the ordinance, was accepted by the Court in a five to four decision. The majority also held that the plaintiff's dismissal for "failure to follow orders, causing low morale and conduct unsuited

[6] For a thorough analysis of *Kennedy* and other cases, see Ashe and De Wolf, *Procedural Due Process and Labor Relations in Public Education: A Union Perspective,* 3 J. of Law and Educ. 561 (1974).

[7] 426 U.S. 341 (1976).

to an officer" had not interfered with any "liberty" interest in reputation since these grounds for discharge had not been publicly disclosed, but only communicated privately to the plaintiff. At this point it may be noted that the Court has held that "liberty" is a question of federal law, whereas "property" is a question of state law. The reason for the difference has not been explained, but Justice Stevens nevertheless chided Justice Brennan, one of the dissenters, for his "remarkably innovative suggestion that we develop a federal common law of property rights. . . ."

The Court's decisions in *Perry, Roth,* and *Kennedy* have generated a substantial amount of litigation in a variety of factual contexts in the public-employment area. In these cases public employees are claiming that they have "property" interests in their employment and that they are deprived of those interests by procedures which deny procedural due process. Because of the ambiguity of the Court's decisions, the lower courts, not surprisingly, have reached conflicting and inconsistent results. Time does not permit discussion of specific decisions, so let me generalize. In numerous cases the *Roth* principles have led to a finding of a "property" interest when there was no formal tenure system or even a "cause" limitation on discipline. While most of the cases deal with discharge, there are also decisions finding a "property" interest in less drastic forms of personnel actions, such as suspensions, demotions, denials of vacation benefits, layoffs, and the like. As to the timing of the hearing, some courts require an evidentiary hearing before the personnel action becomes final; others follow the Powell-White view in *Kennedy* that a full hearing may be postponed until after discharge *if* there are adequate predischarge procedures; some decisions find a posttermination hearing sufficient. As to the specific components of the hearing, the following have been required by some court somewhere: advance notice of the charges; the right to present affirmative evidence; the right to representation by legal counsel; the right to confront and cross-examine adverse witnesses; an impartial decision-maker, that is, someone other than the official imposing the action; and the right to a written decision. Other rights are claiming recognition—that legal rules of evidence be followed, that a transcript be prepared, and that the hearing be open to the public. As you can see, there are many issues that need clarification from the Court which created the confusion in the first place.[8]

[8] The cases summarized in the text are collected in Lowy, *Constitutional Limitations on the Dismissal of Public Employees,* 43 Brooklyn L. Rev. 1 (1976); Baird and McArthur, *Constitu-*

Public-Sector Arbitration and Due Process

Let me emphasize that all this judicial activity has dealt with statutory and administrative procedures which were created independently, and in most cases before the advent, of collective bargaining. At the 1958 meeting of this Academy, just before public-sector bargaining began to emerge, Charles Killingsworth and Eli Rock gave papers on "Grievance Adjudication in Public Employment"[9] in which they surveyed the situation, described it as chaotic, and recommended the use of advisory arbitration by third-party neutrals. They noted that real arbitration would have to await the establishment of collective bargaining, At the 1967 meeting Eli gave a paper on the "Role of the Neutral in Grievance Arbitration in Public Employment."[10] He was able to report that 20 actual advisory arbitrations had been rendered in the federal service under the Executive Order. He discussed how, at state and local levels, the establishment of binding arbitration would have to overcome the legal doctrines of sovereignty and nondelegation of legislative power. But he predicted that the public sector would follow the private in the use of grievance arbitration. In his 1970 presidential address, Jim Hill discussed the subject and stated: "Grievance arbitration in public employment is now in its infancy. There is every reason to believe it will soon become a giant."[11] In 1975, a survey by the Bureau of Labor Statistics[12] of 655 state and local collective agreements revealed that about 90 percent provided for a grievance procedure and about 80 percent for arbitration, figures somewhat lower than in the private sector but unexpectedly high considering the time-span involved. The AAA monthly report on "Labor Arbitration in Government" is only one index of the increased use of public-sector arbitration. We now have the giant (some call it a monster), and it is still growing.

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tional Due Process and the Negotiation of Grievance Procedures in Public Employment, 5 J. of Law and Educ. 209 (1976); *Comment, The Unclear Boundaries of the Constitutional Rights of Public Employees,* 44 UMKC L. Rev. 389 (1976).

[9] In The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), at 149 *et seq.*

[10] In The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 260.

[11] In Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), at 187, 201.

[12] U.S. Department of Labor, Bureau of Labor Statistics, Grievance and Arbitration Procedures in State and Local Agreements, Bull. No. 1833 (Washington: U.S. Government Printing Office, 1975).

In his 1967 paper, Eli Rock made this prophetic statement: "It is at least possible that questions like enforceability and procedural due process, which have been thoroughly analyzed in the private sector, may now have to be analyzed all over again in the separate framework of the public sector."[13] As to enforceability, we have now learned that the *Warrior & Gulf* presumption of arbitrability in the private sector has not been followed in many state-court public-sector decisions. Arbitrability questions have been influenced by legal limitations on the permissible scope of bargaining, and arbitration has not been enforced in some cases where the court believed that the subject matter of the grievance was outside the area of bargainable subjects. This thinking also makes public employers reluctant to submit the issue of arbitrability to the arbitrator, as is commonly done in the private sector. The same factor may have a similar impact when the arbitrator's award is challenged on jurisdictional grounds. Where there is a tradition of judicial review of administrative personnel decisions on grounds such as legality under statutory norms, sufficiency of evidence, and so forth, there may be reluctance to abandon judicial safeguards for an unreviewable arbitrator's decision. While it is true that in some jurisdictions the movement has been toward the *Enterprise Wheel* doctrine of the private sector, there are decisions in other states which point in the other direction of greater judicial review. It is certainly too soon for confident assumptions and predictions, and for fuller discussion I commend to you Ben Aaron's discussion in his Wingspread paper.[14]

As yet the possible impact of constitutional due process on public-sector grievance disputes has not received a great deal of attention in judicial decisions or legal literature. I propose now to discuss briefly a few of the more obvious implications.

Let us assume that we have a collective agreement which contains a provision requiring "just cause" for discharge or discipline and a grievance procedure culminating in binding arbitration. Now suppose a grievant who alleges that he was discharged for publicly criticizing the agency which employs him, an activity far more likely to occur in public-sector employment than in private. In short, the grievant alleges that his public employer has violated his First Amendment freedom of speech. Last year at this meeting Jack Get-

[13] *Supra* note 10, at 284.

[14] Aaron, *The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process,* in The Future of Labor Arbitration in America (New York: American Arbitration Association, 1976).

man argued valiantly that, in private-sector arbitration, arbitrators should incorporate, to some extent, principles of constitutional liberty. For his effort, he was nailed to the cross by Jack Dunsford and Jim Jones.[15] But can there be any doubt, in the public sector, that a discharge for exercising protected speech would not constitute "cause" under the agreement? In the famous *Holodnak* case,[16] the court suggested that a private employer was subject to the First Amendment because its work was so involved with the government as to constitute "state action." It is an *a fortiori* case when the employer is a public agency which is directly subject to constitutional requirements. I put it to you, therefore, as a valid generalization that in the public sector any alleged "liberty" interest within the meaning of the due-process clause of the Constitution is properly subject to grievance arbitration under the "just cause" provision of the agreement. Such claims in the past have been adjudicated in the courts. "Just cause" provisions may not yet be as prevalent in public-sector collective agreements as in the private, but if they become so, then the many practical advantages of arbitration over litigation may divert some of these cases. Such disputes would present once more, and in the most acute form, the problem of the arbitrator's enforcement of public law through contract interpretation. The idea of an arbitrator's enforcing constitutional rights may seem startling to you, but it did not bother the Second Circuit in *Holodnak.*

I will submit a second proposition—that the effect of the "just cause" provision is to create a "property" interest in continued employment under the due-process clause of the Constitution. As has been noted, in state and local government this is a question of state law, but in light of the Supreme Court's language in *Roth,* it is difficult to imagine that a conscientious state court would hold otherwise. The "just cause" clause in the collective agreement is fully comparable to a teacher-tenure law in creating an entitlement to continued employment, and is certainly stronger evidence of a "property" interest than the informal practices and implied agreements which have been found sufficient in many cases. I think it must follow, also, that the seniority and other employee-benefit provisions of the typical collective agreement create other "prop-

[15] In Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 61 *et seq.*

[16] *Holodnak* v. *Avco Corporation and UAW Local 1010,* 381 F.Supp 191, 87 LRRM 2337 (D. Conn. 1974), aff'd in part and rev'd in part, 514 F.2d 285, 88 LRRM 2930 (2d Cir. 1975), *cert. den.,* 96 S.Ct. 188 (1975).

erty" interests. In short, the effect of the collective agreement in the public sector is to create not merely contractual employment rights, but also constitutional property rights. Thus, grievance disputes involve constitutional "property" interests, and the contract grievance-arbitration system must therefore meet the requirements of procedural due process. It does not necessarily follow that the private-sector model satisfies all the constitutional requirements.

First, does the arbitration hearing meet due-process requirements? If I read *Kennedy* correctly, at least six justices (and possibly more) believe that due process requires, at some stage, a "full evidentiary" or "trial-type" hearing, at least in discharge cases. Given that the goal of procedural due process is "fundamental fairness," it may seem strange to this audience that any doubt could exist whether grievance arbitration meets the standard. And indeed, if we look at the cases in which the courts have found administrative discharge proceedings inadequate under due-process requirements, the reason is not usually one which would invalidate the typical arbitration proceeding. Thus, the requirements of confrontation and cross-examination of adverse witnesses, the opportunity to present affirmative evidence, an impartial decision-maker, and a written decision cause no problem in the arbitration process where such rights are clearly present.

One due-process right which is generally recognized does, however, raise a problem in the context of arbitration. That is the right to be represented by legal counsel. In the arbitration proceeding, the union is the custodian of the employee's grievance. It is the union that decides who will present the case at arbitration and, at least in the private sector, the representative may or may not be an attorney. In either event, the choice is not made by the grievant who may, indeed, have little confidence in the union spokesman. The possible disadvantage to the grievant is increased when a nonlawyer union spokesman is pitted against a skilled company attorney. In the private sector this arrangement is not fatal to the validity of the arbitration process. But in the public sector, can we be so confident that the result will be the same? If a discharged grievant has a right to legal counsel in an administrative hearing, it would seem to follow that he has the same right in an arbitration proceeding. If this is so, then the union must assume the responsibility, and the cost, of providing counsel.

But even the presence of union legal counsel does not end the due-process inquiry. Right to counsel in other contexts tacitly assumes counsel of one's own choosing. And so we must ask whether

the grievant is constitutionally entitled to separate representation. In the private sector, both unions and employers have, for a variety of practical reasons, resisted separate counsel for the grievant. As of now there is no legal right to separate representation, and the Wingspread conferees agreed that an arbitrator lacks power to allow it over the parties' objection. Arbitrators confronted with the situation usually try to work something out to everyone's agreement, if not satisfaction. In the public sector, due-process doctrine easily supports a constitutional right to separate counsel if the courts decide that it is desirable as a matter of policy.

As yet there are almost no court decisions that measure arbitration against due-process requirements. The one leading case so far is *Antinore* v. *New York State*[17] in which the trial court found the arbitration proceeding constitutionally defective because the collective agreement did not deal with such matters as a definite standard of proof, qualifications of the arbitrator, provisions for a transcript, testimonial and confrontation rights, and a written decision by the arbitrator with reasons. In the appellate division the case went off on another point which I will mention in a moment, but there was agreement that the arbitration process fell short of constitutional due process. To the extent that *Antinore* holds that all of the specifics of the process must be delineated in the agreement, I think the decision is in error. Adherence to them in practice should be sufficient. But *Antinore* requires some procedures not always found in arbitration as presently conducted and certainly does not exhaust all the possibilities. It would be foolish to assume that *Antinore* is a sport case rather than a harbinger of an increased judicial scrutiny of arbitration in light of due-process standards.

Second, what about the timing of the hearing? In the private sector, the employer takes the action—be it discharge, denial of a promotion, or whatever—and the grievance mechanisms are then invoked to challenge the action. This arrangement preserves management autonomy and control, and the theory is that a subsequent remedy, for example, reinstatement or award of the job with retroactive back pay, is sufficient redress if a violation is found. As the foregoing discussion demonstrated, this sequence has not been accepted in public-employment discharge cases. Applying the varying approaches of those cases to arbitration, due process would obviously not be met under the view that the evidentiary trial-type

[17] 79 Misc. 2d 8, 356 N.Y.S.2d 794, reversed, 49 A.D.2d 6, 371 N.Y.S.2d 213, 90 LRRM 2127 (1975), aff'd, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 94 LRRM 2224 (1976).

hearing—the arbitration—must come before discharge. The Powell-White view in *Kennedy* would justify arbitration after discharge only if there were predischarge procedures like those in *Kennedy*. But the usual grievance procedure does not meet this test because it, too, comes after discharge. Nor does it appear that an informal investigation of the circumstances before making the discharge decision would satisfy the *Kennedy* requirement. In short, the sequence of events in the private-model grievance-arbitration system clearly seems constitutionally inadequate under the standard of *Kennedy* and its progeny.

Third, what about the union's power not to arbitrate? In the private sector, the Supreme Court held in *Vaca* v. *Sipes,*[18] which was a discharge case, that the employee does not have an absolute right to have his grievance taken to arbitration, that the union can in good faith settle cases short of arbitration, and that such settlement is final and binding so long as the union has not breached its duty of fair representation to the employee in the processing of the grievance. Justice Black dissented from this holding for the precise reason that the employee was thus denied any hearing on the merits of his grievance, either before an arbitrator or a court. The question is whether *Vaca* should be applied in the public sector where due process, as of now, requires a trial-type evidentiary hearing at some stage.

The *Antinore* case mentioned earlier did not quite reach this question. Before 1972 civil service employees in New York were entitled by statute to administrative hearings in discharge cases, with judicial review of the decision. In 1972 the law was amended to authorize the parties to collective agreements to make arbitration the exclusive remedy, thus eliminating the statutory-hearing right. The trial court, as mentioned earlier, found that the arbitration process failed to meet due-process requirements. It held further that to require the employee to relinquish his statutory-hearing right was a denial of equal protection, since the statutory hearing was subject to full judicial review, whereas the arbitrator's decision was insulated from any judicial review on the merits. The appellate division reversed, holding that the union's execution of the agreement was a valid waiver of the individual's due-process and equal-protection rights. This result was justified, in the court's opinion, by the public interest in expediting the resolution of disciplinary disputes more simply and promptly than would have been the case

[18] 386 U.S. 171, 64 LRRM 2369 (1967).

under the statutory-hearing procedure. The New York Court of Appeals affirmed.

As a matter of legislative policy, it would seem preferable to give the employee the option of choosing arbitration or a statutory hearing and then holding him to his choice. This would protect the individual right and eliminate the constitutional arguments without jeopardizing any public interest either in the disposition of discharge cases or in the encouragement of collective bargaining. The court's decision also seems wrong to me. It is perhaps true that government could operate in all areas more expeditiously if it were not for those pesky constitutional rights which people keep insisting on. But, as the Supreme Court has stated, "The Constitution recognizes higher values than speed and efficiency."[19] A public interest can always be conjured up to balance any individual rights. It is the proper function of courts to vindicate personal rights and not to dilute or deny them. And so to me, it would have been better law for the New York court to tell the legislature it could not authorize parties to execute collective agreements which operate to waive the constitutional rights of employees.

On its facts, *Antinore* dealt only with whether the union could waive due-process requirements in an arbitration hearing, and not whether the union could deprive the grievant of a hearing altogether by deciding not to arbitrate, as in *Vaca*. If state law should provide, however, that an employee's due-process right to a hearing before final termination can be extinguished by a union's good-faith decision not to arbitrate, it would appear that this extension of *Vaca* to the public sector would be invalid. There is no support in any of the public-sector discharge cases which I discussed earlier for the proposition that a hearing can be dispensed with altogether. The fairest possible union representation is not equivalent to a hearing before a neutral adjudicator.

In *Vaca* the Court stated there was no "substantial danger to the interests of the individual employee" by giving the union power in good faith to settle grievances short of arbitration. But in the private sector the question was whether an employee's right to a hearing should be created where it had not previously existed. In the public sector we start with the employee's constitutional right to a hearing, and in that context it would require a major judicial reversal to eliminate totally the right to a hearing and hold that due process is satisfied by the union's good-faith refusal to arbitrate.

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[19] *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972).

Furthermore, in *Alexander* v. *Gardner-Denver*[20] the Court held that a grievance-arbitration system in a collective agreement could not operate as a prospective waiver of an employee's Title VII cause of action in federal court. *Antinore* to the contrary notwithstanding, it would seem that an employee's constitutional right to a due-process hearing is of at least equal legal value to a statutory right to be free of discrimination. If an alleged discriminatee is entitled to two hearings, how can it be said that a discharged public employee is not entitled to at least one? On the basis of existing law, it seems likely that in the public sector the result should be either that there is an employee right to arbitration or that he is not bound by the union's decision not to arbitrate and may obtain his hearing in court.[21] This would deprive the employer of the benefit of contract finality, but *Gardner-Denver* also subordinated finality to an overriding interest.

I should like to make it clear that the foregoing due-process speculations are based on existing case law under *Roth-Sinderman-Kennedy,* the basic proposition being that a public employee with a property interest in his job is entitled to a full-scale hearing at some time. It must be recognized that this requirement imposes great demands of time and expense, especially when large numbers of employees and discharges are involved. Practical considerations will generate pressures to relax or modify the requirement, and you should not be too surprised if the next Supreme Court decision in this area modifies the concept of a "property" interest or cuts back on the due-process rights of the employee. Indeed, *Bishop* v. *Wood* may be the tipoff case that the Court is ready to do just that. Certainly I would not be the first commentator to have his observations mooted by the Court.

Fair Representation

Let me now move to the second topic of my assignment—the union's duty of fair representation, surely one of the most overwritten subjects in labor law. You will be pleased to hear that I am not going to rehash still one more time the origin and development of the duty. And through heroic self-control, I am restraining myself from editorializing on what I believe to be the Labor Board's totally unjustified assumption of jurisdiction in this area. Instead, I take as

[20] 415 U.S. 36, 7 FEP Cases 81 (1974).

[21] A contrary view is argued in *Note, Public Sector Grievance Procedures, Due Process and the Duty of Fair Representation,* 89 Harv. L. Rev. 752 (1976).

my point of departure *Vaca* v. *Sipes* and the Court's identification of two branches to the duty of fair representation—one resting on the union's discrimination, bad faith, or hostility to the grievant; the other based on the processing of the grievance in a "perfunctory" manner or by the "arbitrary" abuse of the settlement device.

Under the holding of *Vaca,* a union's breach of its duty of fair representation not only creates a cause of action against the union, but also nullifies the settlement of the grievance and gives rise to a suit by the employee against the employer on the contract. In the 10 years since *Vaca,* the courts and the NLRB have grappled with the application of the terms "bad faith," "discriminatory," "perfunctory," and "arbitrary" to many different kinds of union conduct. One important aspect of the inquiry has been whether "negligent" handling of a grievance constitutes a breach. A recent study[22] indicated that perhaps 20 percent of the cases since *Vaca* have dealt with a claim of unfair representation in the arbitration proceeding itself, rather than in the prior processing of the grievance. Until last year the best-known case in point was *Holodnak* v. *Avco Corp.*,[23] in which the Second Circuit sustained a district court in finding a breach of duty of fair representation because of inadequate preparation and presentation of the case by union counsel.

In March of last year, the Supreme Court added grist to the mill with its decision in *Hines* v. *Anchor Motor Freight.*[24] In *Hines,* a group of over-the-road truck drivers were discharged for padding their motel expense accounts. The union processed their grievances, but failed to investigate the possibility that the motel clerk had overcharged them for his own gain, in spite of the request by the drivers that the union do so. The discharges were upheld by an area joint committee. The employees then retained counsel who obtained evidence that the motel clerk was indeed the culprit. The employees then brought a *Vaca* suit against the union for unfair representation and the employer for discharge without cause. The district court dismissed both actions, concluding that the facts showed "at most bad judgment" on the part of the union. The court of appeals reversed the dismissal against the union, concluding that there were sufficient facts from which bad faith or arbitrary con-

[22] Koretz and Rabin, *Arbitration and Individual Rights,* in The Future of Labor Arbitration in America, *supra* note 14.

[23] *Supra* note 16.

[24] 96 S.Ct. 1048, 91 LRRM 2481 (1976). The case is discussed in Coulson, *Vaca v. Sipes Illegitimate Child: The Impact of Anchor Motor Freight on the Finality Doctrine in Grievance Arbitration,* 10 Ga. L. Rev. 693 (1976).

duct could be inferred. It sustained the dismissal against the employer, however, and it was this action which the Supreme Court reversed.

The Court held that the award was not final and binding so as to insulate the employer from suit on the contract if the arbitration process had "fundamentally malfunctioned" by reason of the union's breach of its duty of fair representation. As Justice White put it: "The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions." Justice White made it plain that an arbitration award can not be set aside merely because of newly discovered evidence. He also stated that "The grievance process can not be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake."

In evaluating *Hines,* it is important to remember that the suit against the union was not before the Court. The decision does not, therefore, hold that the union breached its duty, but simply that, if a breach were proved at trial, the award would then lose its finality. The opinion is careful not to indicate any prejudgment by the Court as to whether the alleged facts show unfair representation, error in judgment, or newly discovered evidence. Justice Rehnquist's dissent stated that the Court had assumed *arguendo* that the union had breached its duty. While this is not a necessary predicate for the Court's actual holding, it is a fair inference. Assuming that the Court believed the alleged facts showed unfair representation, it may then be asked: What definition or standard of fair representation did the Court have in mind? One of the standards set forth by Clyde Summers at this meeting three years ago was that "The union owes the employees it represents the fiduciary duty to use reasonable care and diligence in investigating and processing grievances on their behalf."[25] In his dissent in *Hines,* Justice Rehnquist asserted that the majority had accepted the standard that "ineffective" representation in the presentation of the case to the arbitrator constitutes unfair representation. If this is correct, then *Hines* is indeed an important breakthrough in the meaning and application of the "arbitrary/perfunctory" breach of the duty. The fact that the

[25] *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), at 31.

union failed to investigate the motel clerk, even when requested by the employees to do so, supports this rationale. On the other hand, Justice White's opinion gives little support to this theory. Indeed, the opinion itself reads to the contrary, emphasizing in several places the bad faith/discrimination breach of the duty. It is worth noting that the court of appeals based its holding partially on the allegation of personal hostility against the plaintiffs by the union officers. It may also be mentioned that the Court, in citing court of appeals decisions in support of its position, did not invoke *Holodnak*.

In the criminal law area, the federal courts have been very cautious, even reluctant, to find that legal counsel is ineffective. Indeed, it is fair to say that the constitutional standard of adequate representation in criminal cases is rather low, and it would certainly be anomalous to require a higher standard in arbitration cases. Moreover, many of the union representatives who investigate and present cases in arbitration are not attorneys, and it would seem patently unfair to expect them to possess the skills of a legal counsel. It would be premature to conclude, therefore, that *Hines* portends any large-scale nullifications of arbitration awards. No doubt it will spawn some increase in the number of actions brought by disgruntled grievants, but it seems safe to predict that success will be confined to the most egregious factual situations. Another reason for believing that *Hines* will have limited impact is that probing the effectiveness of counsel would in many cases involve consideration of the merits of the dispute.

Nevertheless *Hines* is a clear warning-signal to the parties. One of the inadequacies of the arbitration process, which can be attested to by any member of this Academy, is the too-frequent failure by the parties to investigate their grievances fully. *Hines* underscores the self-interest in careful investigation and preparation of cases for arbitration—the union to protect itself against unfair-representation suits, and the employer to protect the finality of the award. Thus, *Hines* could result in improving the arbitration process. *Hines* may also provide the pressure necessary to break the impasse over an issue noted earlier—the right of the grievant to separate representation at the arbitration proceeding. Obviously, the possibility of an unfair-representation finding is sharply minimized, if not altogether eliminated, if the grievant's personal attorney participates in the presentation of the case. In some cases unions might be willing to turn the entire presentation over to the grievant's attorney in exchange for a written release from the duty to represent. The

traditional reluctance of employers to permit separate representation may be overcome by the desire to assure the finality of the award.

Hines also bears on the proper role of the arbitrator. Since the emergence of labor arbitration, there has been much disagreement over whether the arbitrator should be a passive presiding officer and let the record on which he must decide be made by the parties' representatives, or whether he should play an active role in the adducement of evidence. It seems fair to say that generally speaking the parties are more in favor of the passive role, whereas the arbitrators espouse the active one. But, even among arbitrators, there are substantial differences as to the degree of participation. It seems clear that *Hines* supports the wisdom and propriety of the active role. The vantage point at the head of the table gives a unique opportunity, as the presentation of the case unfolds, to spot gaps in the evidence, missing lines of inquiry, etc., which could be the basis of an unfair-representation suit. The arbitrator, perhaps even more than the parties, has an interest in the integrity and fairness of the process, and has, it seems to me, a special duty to ensure it. This includes seeing to it, as best he can, that the grievant's case, which he must decide, is adequately and fully presented. And the arbitrator, no less than the parties, has an interest in ensuring that the award will indeed be final and binding. If this view is sound, then obviously it behooves arbitrators to sharpen this professional skill, for arbitral intervention is a matter of judgment, timing, and style which must always avoid taking the case away from the parties.

Under federal law, the duty of fair representation was created judicially as a derivative of the union's exclusive statutory power to represent all employees in the bargaining unit. Most of the state laws authorizing public-sector bargaining include the principle of exclusive representation, and in the few cases which have arisen so far the state courts have recognized the correlative duty of fair representation. Although this might be considered initially as a question of state law, I do not believe the states can constitutionally make any other choice. The Supreme Court's decision in its original fair-representation case back in 1944[26] strongly suggested that, in the absence of a duty of fair representation, the statutory provision for exclusive representation would be a denial of equal protection. That was a private-sector case, and I think the result would be certain in the public sector. In addition, since public-sector grievance procedures must meet due-process standards, it seems clear that the

[26] *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 15 LRRM 708 (1944).

absence of a duty of fair representation would result in the deprivation of a "property" interest without the "fundamental fairness" required by the due-process clause.

Thus far there have been very few fair-representation cases under state laws. One of these, *Belanger* v. *Matteson,*[27] a 1975 Rhode Island case, is worthy of comment. The case arose under a teachers' contract. Both Belanger and Matteson bid on an opening for the position of business department head at a high school. The contract contained the familiar provision that "Where qualifications are considered equal, seniority . . . shall prevail." Matteson had more seniority than Belanger, so of course you can guess who got the job. Matteson then filed a grievance which was processed by the union through arbitration to victory. The arbitration board sustained the grievance and awarded Matteson the job. Up to this point the pattern is familiar, and this is where most such cases end. But, contrary to custom, Belanger then asked the union to file a grievance in his behalf protesting his demotion. When the union declined, the disappointed and displaced junior brought suit against Matteson, the union, the school authorities, and the arbitrators, seeking to set aside the award on the grounds that the union had breached its duty of fair representation and that the arbitrators had exceeded their authority under the contract.

The Supreme Court of Rhode Island held that the union had breached its duty on a theory of fair representation which I believe is unprecedented. It went this way: The grievance of Matteson, the senior employee, although theoretically against the school, was in reality against Belanger, the junior employee who got the promotion. The union had processed Matteson's grievance without consulting Belanger or considering his qualifications. The court stated that the union had as much of an obligation to support the junior employee as it did the senior employee until such time as it had examined the qualifications of both candidates. The union "never recognized its duty to independently determine whether Matteson or Belanger was entitled to the job. It seems to us that the only fair procedure in this type of a conflict is for the Union, at the earliest stages of the grievance procedure, to investigate the case for both sides, to give both contestants an opportunity to be heard, and to submit their qualifications to the Union."

This view of the union's role in a seniority v. ability case is quite different than has generally been assumed. In the collective bargaining process, the seniority factor is there at the insistence of the

[27] 346 A.2d 124 (R.I. 1975).

union, and it is management which insists on the protective flexibility of the equal-ability requirement. It is a management judgment that the junior employee has such superior ability that seniority may be ignored. The union is the defender of the seniority concept and can be expected to grieve in all promotion-bypass cases except those in which the senior employee is clearly unqualified (and even a fair number of those situations get taken up). It is novel to assert that the union has a duty to make its own determination of the qualifications of the junior employee as a prerequisite to supporting the grievance of the passed-over senior. Further, it is unrealistic to consider the two employees as being on the same footing so far as the contract and the union's duty are concerned. Prima facie, the senior employee has a contract right to the promotion, whereas the junior employee's right is contingent upon the soundness of management's judgment that his qualifications are superior. Finally, it can be assumed that the interests of the junior employee will be protected by management which promoted him. Since the senior employee must look to the union for protection, it seems quite foreign to the concept of fair representation to impose upon the union the duty toward the junior employee suggested by the Rhode Island court.

After finding a breach of duty by the union, the Rhode Island court then refused to set aside the award, noting that the junior employee's interests had been fully protected in the arbitration by the school spokesman and that he himself was present and testified at the arbitration hearing. In this respect the case differs from most promotion-bypass cases, in which the junior employee is not usually present at the hearing. This circumstance has been much discussed at meetings of this Academy,[28] and I will not review it now. In the private sector it has not presented a legal problem. In the public sector, where arbitration must satisfy constitutional standards, we can look forward to the case in which the junior employee, who was not present at the arbitration in which the bypassed senior employee's grievance was sustained, claims a denial of procedural due process because his job was taken away through a proceeding from which he was excluded. Such litigation can, of course, easily be forestalled by having the junior employee testify at the hearing, but, for various reasons, neither the company nor the union calls the junior as a witness.

[28] See Williams, *Intervention: Rights and Policies,* in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963), at 266.

The Supreme Court and the Public Sector

Now that I have fulfilled my obligation to discuss the assigned topic, I should like to use my remaining time to mention briefly some other constitutional law aspects of public-sector bargaining. In 1970 Don Wollett wrote a seminal paper entitled "Public Employee Bargaining and the Constitution."[29] Since then the federal courts, as he anticipated, have affirmed the First Amendment associational right of public employees to join unions, although a different result has been reached with respect to supervisors.[30] The courts have declined, however, to recognize a constitutional right to engage in collective bargaining, and in North Carolina a federal court has upheld a statute, virtually unique in the nation, which makes public-sector collective agreements unlawful.[31] Although in a few states statutes have accorded a limited right to strike, no court has yet held that there is any constitutional right to strike. The Supreme Court's affirmance in *Postal Clerks* v. *Blount*[32] closed the door on this issue. Peaceful picketing, however, has just recently attained constitutional status in a U.S. district court decision[33] involving picketing by the National Treasury Employees Union and several Internal Revenue Service offices. The Federal Labor Relations Council, which had read the Executive Order as prohibiting all picketing, has accepted the district court decision and has issued a guideline statement[34] based on a distinction between picketing which interferes with an agency's operation and that which does not.

There have been additional developments at the Supreme Court. All of you are aware of the Court's decision last term in *National League of Cities* v. *Usery*,[35] in which it invalidated the application of the Fair Labor Standards Act to state and municipal employees. This unprecedented limitation of the power of Congress to regulate commerce cast substantial doubt on the validity of a federal law providing for collective bargaining in state and local government and thus rendered less likely the passage by Congress of such a law.

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[29] In Southwestern Legal Foundation 16th Annual Institute on Labor Law (Albany, N.Y.: Matthew Bender & Co., 1970).

[30] *Elk Grove Firefighters Local 2340* v. *Willis*, 400 F.Supp. 1097 (D. Del. 1975), affirmed by unpublished order by 7th Cir., July 1, 1976.

[31] *Winston-Salem/Forsyth County Unit of North Carolina Association of Educators* v. *Phillips*, 331 F.Supp. 644 (M.D.N.C. 1974).

[32] 325 F.Supp 879, 76 LRRM 2932 (D.D.C. 1971), aff'd without opinion, 404 U.S. 802 (1971).

[33] *National Treasury Employees Union* v. *Fasser*, 93 LRRM 2311 (D.D.C. 1976).

[34] 609 GERR 41 (1977).

[35] 96 S.Ct. 2465 (1976).

In other cases the Court dealt directly, and for the first time, with public-sector unionism. In *City of Charlotte* v. *Local 660, International Association of Fire Fighters,*[36] the city refused to withhold union dues from the paychecks of member firemen, even though it withheld amounts for payments to various other organizations. The city's policy was to withhold only for programs of general interest in which all city or departmental employees could participate solely by virtue of their employment. Thus, savings-bond deductions or deductions for group life insurance were permissible. Union dues checkoffs were not permitted since they applied only to those in the employee group who were members of the union. The Supreme Court, applying the minimum standard of review in an equal-protection case, unanimously sustained the city policy as a rational method of deciding which checkoff requests it would honor.

A more important decision was *Hortonville Joint School District No. 1* v. *Hortonville Education Association.*[37] In support of bargaining demands, 86 teachers went on strike, contrary to state law. The school board gave notice and was prepared to conduct individual disciplinary hearings. The teachers, through counsel, declined individual hearings, stating that they preferred to be treated as a group. The board discharged the teachers. The Supreme Court of Wisconsin noted that there were available remedies other than dismissal of the teachers, such as an injunction against the strike and mediation of the dispute. It thought that the school board, because of its participation in the bargaining which preceded the strike, was unable to take a detached view of the situation. It held that due process required that the teachers' conduct and the board's response to it must be evaluated by an impartial decision-maker. Accordingly, it granted de novo judicial hearing on the propriety of the discharges. The United States Supreme Court reversed, six to three. The Court noted that there were no factual issues in dispute since the teachers admitted they were on strike. Nor was there any dispute that the strike was unlawful. The board's decision to discharge the strikers was therefore "not an adjudicative decision" and "was only incidentally a disciplinary decision . . ."; rather, it was a governmental and policy decision as to how best to serve the interests of the school system, the parents, children, and taxpayers. For that kind of decision, the Court did not agree that the board's involvement in the negotiations kept it from being impartial, and

[36] 96 S.Ct. 2036, 92 LRRM 2597 (1976).
[37] 96 S. Ct. 2308, 92 LRRM 2785, *cert. den.*, 92 LRRM 2918 (1976).

therefore its decision could be the final decision, without any judicial review, so far as due process was concerned.

The Court took summary action in two other public-sector cases. In *Crestwood Education Association* v. *Crestwood Board of Education,*[38] the Michigan Supreme Court had held that strikers could be discharged under the state's PERA without a *prior* hearing, but with the right to a hearing after discharge. The Supreme Court dismissed the appeal "for want of a substantial federal question." This result—discharge without prior hearing—was based on the illegality of the strike and the strong public necessity of a summary response. It does not necessarily foreclose the requirement of a prior hearing before discharge of an individual employee for reasons which may be in dispute. In *Vorbeck* v. *McNeal,*[39] the Court summarily affirmed a decision of the Eighth Circuit sustaining, against an equal-protection challenge, the exclusion of police from Missouri's "meet and confer" statute. The special nature of police duties justified denying them a right accorded to other state and local employees.

This term the Court continues to give its attention to public-sector bargaining. In *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission,*[40] the school board was engaged in negotiations with the union, and one topic was a "fair share" clause under which nonunion teachers would be required to pay union dues. "Fair share" is a new and more appealing label for what has been known as an agency shop. At a regularly scheduled public meeting of the school board, a nonunion teacher spoke and read a petition in opposition to the "fair share" clause. The WERC and the Wisconsin Supreme Court both held that the school board, in permitting the teacher to speak, had violated its duty to bargain solely with the exclusive bargaining representative. The Supreme Court unanimously reversed, holding that the teacher's public statement did not constitute "negotiation" with the board and was protected speech under the First Amendment. The Court's opinion makes it clear that a school board, and presumably other public employers as well, can hold public meetings at which the subject under negotiation can be discussed by citizens. In a footnote, the Court appeared to concede, and a concurring opinion emphasized, the validity of the provision in Wisconsin's "sunshine law" which

[38] 96 S.Ct. 3184, 92 LRRM 2918 (1976). See also *Lake Michigan Federation of Teachers* v. *Lake Michigan Community College,* 518 F.2d 1091 (6th Cir. 1975), *cert. den.,* 96 Sup.Ct. 3198, 92 LRRM 2918 (1976).

[39] 96 S.Ct. 3160, 92 LRRM 2861 (1976).

[40] 97 S.Ct. 421, 93 LRRM 2970 (1976).

permitted the actual negotiations between the public employer and the union to be conducted in private.

The validity of the agency shop itself was presented in *Abood* v. *Detroit Board of Education*.[41] The agency shop is responsive to the problem of "free riders" who, in the absence of a union-security clause, would benefit without cost from the contract provisions and the union's duty to represent them in grievance matters. But since unions, in addition to collective bargaining expenses, spend money for political purposes, the question arises whether employees who oppose those purposes can be compelled to support them. The Supreme Court has decided on statutory grounds that the NLRA and the RLA permit only compulsory payment in support of collective bargaining costs, and not political expenditures. In *Abood* the Michigan Supreme Court decided that the Constitution requires the same result under the state public-sector bargaining law. Before the U.S. Supreme Court the nonunion employees argued that the agency shop provision is totally invalid on the theory that, in the public sector, no distinction can be drawn between collective bargaining and political activities since the bargaining itself is a political activity. The case was submitted last November and is now awaiting decision.

I have mentioned these recent Supreme Court opinions not merely because they are important in themselves, but because of their larger portent. Until now public-sector bargaining at state and local levels has been almost altogether a matter of state law determined by state legislatures and state courts. We may now be moving into a period of increased and active federal constitutional scrutiny. The Constitution applies to all forms of "state action," a concept which easily comprehends the entire public-sector bargaining area. The public employer is obviously a state agent. Clearly, the determination of the terms and conditions of public employment constitutes state action, no less so when determined by collective bargaining than by legislation. The collective agreement which includes those terms is just as subject to constitutional requirements as would be a state statute prescribing such terms. Since the union is authorized by the state to participate in the setting of the employment conditions, its actions to that end arguably are also state

[41] 97 S.Ct. 1782 (1977). The case was decided after delivery of this paper. The Court upheld the validity of the agency shop, again drawing the line on compulsory payment between contract bargaining/administration costs and expenditures for ideological causes. It rejected the argument that all activities of public-sector unions are political for the purpose of applying the First Amendment ban on involuntary support. Three justices accepted the argument and would have invalidated the agency shop in its entirety.

action. Private arbitrators who render decisions that bind governmental bodies perform a public function and hence are engaged in state action. This is particularly apparent in interest arbitration where statutes prescribe the standards and criteria the arbitrator must apply and make the award subject to judicial review. The foregoing propositions are so unexceptionable and so taken for granted that they have not called for express articulation. I am emphasizing them now simply to make the point that the entire spectrum of public-sector bargaining activity is a vast area of state action which has not yet been shaped on the lathe of the Constitution. The lathers are the federal courts, and the master lather is, of course, the U.S. Supreme Court.

The Supreme Court has unreviewable discretion in interpreting and applying the Constitution. While the actions of all other branches and levels of government are subject to review by the Court, the only check on the Court's exercise of power is its own sense of self-restraint. Under constitutional concepts such as freedom of speech, due process, and equal protection, it has created a large reservoir of doctrines, principles, tests, and case precedents, and it continues to create new ones. These legal tools and techniques can be manipulated to produce any number of legally justifiable results. It is altogether clear that in its constitutional decisions the Supreme Court is not bound, but merely guided, as far as it wishes to be, by the text of the document, the historical intention, its own doctrines, and its own case precedents. The Court exercises what Holmes called the "sovereign prerogative of choice" and, in final analysis, its constitutional decisions are policy judgments which reflect the legal, political, social, and economic philosophies of the members of the Court. In addition, the Court has the power to decide what cases it will decide. This means that the Court can, for its own undisclosed reasons, select critical areas of public policy in American life, bring them before its bar in litigated cases of its own choosing, and then shape and direct them through the medium of constitutional decisions. What I am suggesting is that the Court just may have decided that public-sector unionism and collective bargaining have reached such a dimension of importance in American life that they now require or deserve the Court's own particular wisdom and guidance. The fact that the Court will not permit Congress to legislate in the area does not mean that the Court itself will not intervene.

It would be rash to suggest the specific issues to which the Court might give its attention, although I have suggested one, or to pre-

dict with any confidence the general thrust of future Court decisions. It seems fair to say, however, that within the last five or six years the Court's labor-law decisions in the private sector, generally speaking, have been more favorable to employers than was true before. In the area of public-sector labor law, the few decisions handed down thus far must surely give more comfort to employers than to unions. In addition to the ones I mentioned relating to collective bargaining, the Court handed down other decisions last term adverse to the claims of public employees. Thus, the Court sustained the power of cities to require residency as a condition of employment,[42] upheld a mandatory retirement at age 50 for police officers,[43] and approved a city's hair-length requirement for policemen.[44] This term the Court has rendered a decision which will make it more difficult for public employees to prove that their discharge violated a "liberty" interest.[45] But the power that denies may also grant protection, and in another case decided last year the Court invalidated in large part a venerable American institution—the spoils system—by holding that the First Amendment prohibited a newly elected Democratic sheriff in Cook County from discharging employees on his staff because they were Republicans.[46]

On net balance, however, it seems clear that employers fare better than employees and unions at the bar of today's Supreme Court. This new trend in labor law is but one manifestation of the philosophical shift which has occurred on the Court in the last half-dozen years and which has been working changes in many other areas of public law. But the same phenomenon which produced the current dispensation—changes in the membership of the Court—could recur sooner than anyone expects and give us a swing back in the other direction. So, if I may close with related metaphors, employers should enjoy the manna while it is falling, while employees and unions may hope that their days in the wilderness are numbered.

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[42] *McCarthy* v. *Philadelphia Civil Service Comm.*, 96 S.Ct. 1154 (1976).
[43] *Massachusetts Board of Retirement* v. *Murgia*, 96 S.Ct. 2652 (1976).
[44] *Kelley* v. *Johnson*, 96 S.Ct. 1440 (1976).
[45] *Mt. Healthy School District Board of Education* v. *Doyle*, 97 S.Ct. 568 (1976).
[46] *Elrod* v. *Burns*, 96 S.Ct. 2673 (1976).

Comment—

BERNARD F. ASHE*

At the outset, I would note that I disagree with Professor Murphy's conclusion that the arbitration process does not satisfy the procedural due-process requirements of the U.S. Constitution. I would like to deal with the specific components of due process which he feels are lacking in public-sector grievance arbitration. As I understand them, the objections may be placed into three categories.

First, issue is taken with the normal practice of refusing the individual grievant an opportunity to be represented by his individually retained legal counsel. Second, it is contended that the lack of any preseparation evidentiary hearing is contra to traditional notions of due process and that the postseparation arbitration hearing is not sufficient to remedy the problem. Lastly, and most troublesome, is the issue of the waiver of due-process protection allegedly forced upon public employees by virtue of their membership in a bargaining unit whose contract with the public employer contains a provision for the arbitration of disciplinary disputes. Implicit in this final objection is that by refusing to take an individual employee's grievance to arbitration, a union is capable of affirmatively depriving that employee of his inherent right to challenge the arguably illegal actions of his employer.

I would now like to address my remarks to each of these issues and to show not only that the arbitration process is capable of and, indeed, does afford individual employees at least the quantum of procedural due process that the courts would require of traditional administrative disciplinary proceedings, but that arbitration accomplishes this goal in a more efficient, quicker, and less costly manner than any other currently in use. The key to my argument is that sufficient due process is afforded at each individual step of the arbitration process, since when the process is viewed as a whole, including all of the safeguards recent cases have read into the process, the sum of the parts adds up to a figure which more than satisfies the constitutional mandates.

As I have already mentioned, Professor Murphy's first objection is to the inability of an individual employee to be represented by independent counsel of his own choosing. I do not dispute that this

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is the case and, indeed, feel that it is the way it should be. Grievance arbitration is a creature of contract, and the parties to the contract should be left to their own devices, within limits, to determine how the arbitration should be handled.

However, I do not believe the public employee is, or should be, totally at the mercy of his union representative in pursuing his constitutional rights. It is at this point that I introduce two concepts which together form a fail-safe line and allow me to conclude that arbitration does measure up to constitutional standards. The first of these safeguards is the universal rule that arbitration awards will not be given finality by the courts unless there is a showing that the arbitration procedures were fair and regular. The second safeguard is the judicially imposed duty of fair representation which, as will be discussed later, under recent case law has evolved into the individual employee's great weapon against any impropriety by his union.

I will answer each attack on the sufficiency of due process in arbitration by reference to these two safeguards, for, as I said before, my position depends on looking at the totality of the arbitration process rather than the hearing as an isolated incident.

I am sure that by now you can see that my response to Professor Murphy's objection regarding independent legal counsel is that in the first instance it should be the union, and the union alone, who should represent the individual grievant. In the rare instance where the issue of separate representation will be raised, or when the interests of the union and the individual diverge, there is a method and a forum for raising that issue.

I will concede that in those situations where the grievant and the union have divergent interests, or are in dispute as to some issue, the mechanism of suing for breach of the duty of fair representation, as was done in *Hines* v. *Anchor Motor Freight,*[1] is indeed a more cumbersome method than the traditional administrative hearing of ensuring that the individual employee, represented by his own counsel, has his day in court. However, I feel this occasional hardship is more than justified when it is recognized that issues such as these will present themselves only rarely, and that the great bulk of cases will be processed much more quickly and efficiently through arbitration without any need for recourse to the courts on any issue.

Professor Murphy's second point is that arbitration of discipline cases does not afford the employee a predischarge hearing. I think

[1] 424 U.S. 554, 91 LRRM 2481 (1976).

that a distinction must be made between removal from the workplace and termination of employment. The former I refer to as a preseparation procedure and the latter as a discharge. Again, I do not agree that a preseparation hearing is in fact denied to the employee since an employee is usually verbally confronted before a suspension occurs. Discharge generally does not occur in the public sector until after a hearing. As the court noted in *Goss* v. *Lopez,*[2] the preseparation hearing need not be surrounded by great detail or formality.

This point in my argument rests on the web of the ever-elusive *Arnett* v. *Kennedy*[3] opinions in which only three justices, writing in dissent, contended that a full evidentiary pretermination hearing was required. The remaining six justices would be satisfied with something less than the full prior hearing.

The plurality opinion of Justice Rehnquist argues that the statute granting the property or liberty interest may also define the quantum of due process sufficient to deprive an individual of that interest. Thus, the arbitration process would qualify under this test if it were specifically provided for by the particular civil service statute. While I am fully aware that on this point six justices dissented, I am also aware of the majority opinion in *Bishop* v. *Wood,*[4] decided only last year, which indicates that the existence of a property interest in continued employment is a question of state law, depending for its determination on a reading of the entire statute, including any discharge procedures contained therein.

If the Supreme Court will uphold a state court's determination that there is no property interest because the statute provides for discharge at the pleasure of the city, is there any real distinction between that instance and the plurality opinion in *Arnett* to the effect that the statute defines the requisite due process?

Similarly, the concurring opinion of Justices Powell, Blackmun, and White would likely support the argument that arbitration satisfies due-process requirements. Their position is that due process is a flexible concept, the quantum required being a function of the extent of the deprivation and of the employer's legitimate interest in dismissing the employee. Thus, something less than a full evidentiary hearing prior to separation from service would satisfy the constitutional requirement if the employer could demonstrate some need to discharge the employee, a situation which would normally present no problem in the usual "just cause" dismissal case.

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[2] 419 U.S. 565 (1975).
[3] 416 U.S. 134 (1974).
[4] 426 U.S. 341 (1976).

In the normal context, grievance arbitration admittedly does not provide a prior hearing, but it is submitted that the strong language of the Court when speaking of the arbitration process in the *Steelworkers* trilogy and its progeny indicates that the Court would regard the due-process clause satisfied by an arbitration hearing. That the Court would reach this decision is further evidenced by an examination of the general trend the Supreme Court and lower federal courts have taken. The Burger Court has made it plain that it does not intend to extend further the intrusion of the federal courts into what they view as local personnel problems. To support this theory of the retreat of the courts from this entire area, I need only cite the decisions in such recent cases as *Washington* v. *Davis,*[5] *Bishop* v. *Wood,*[6] and *Codd* v. *Velger.*[7]

A different situation arises when the union representative declines to take an employee's grievance to arbitration, thus finalizing the discharge without a hearing. This clearly raises the question of the employee's constitutional right to a hearing "before the discharge becomes final." It is in this context that the duty of fair representation and constitutional rights merge in the collectively bargained grievance procedure. One of the answers to this problem is to conclude that by selecting union representation, the employee has waived his constitutional protections.[8]

Professor Murphy's final objection to the substitution of arbitration procedures for traditional administrative hearings is that it is impermissible to require a public employee to waive his constitutional right to a due-process hearing. Initially, let me say that what is being waived is not a right to *a* due-process hearing, but rather the right to a traditional administrative hearing. As I have already argued, the arbitration process does measure up to due-process standards. Therefore, the only remaining issue is whether the individual employee has a vested interest in a particular type of hearing.

The New York Court of Appeals, in affirming the appellate division's opinion in *Antinore* v. *State of New York,*[9] spoke precisely to this issue of waiver. In fact, the court's decision was founded not on the adequacy of due process, but rather on the question of

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[5] 426 U.S. 229 (1976).
[6] *Supra* note 4.
[7] 45 L.W. 4175 (1977).
[8] It has to be understood that this whole discussion presumes that the grievance-arbitration process addresses itself in appropriate cases directly to rights that are specifically protected by statutes or the Constitution. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).
[9] 40 N.Y.2d 921, 358 N.E.2d 268, 94 LRRM 2224 (1976).

waiver. The public-policy considerations in favor of arbitration proceedings, producing a quick and final determination of the merits of the dispute in a more efficient manner than the statutory procedure, were held to be sufficient to justify a waiver of the individual's claim to a statutory hearing.

The rationale of *Antinore* can only be buttressed by adding to the waiver issue the conclusion I have urged to the effect that arbitration does afford the requisite due-process guarantees. In *Antinore* the court held that a waiver is effective even if the alternative procedure does not meet due-process criteria. Can the decision be any different if the only issue is whether an employee's certified bargaining agent can choose, without the specific approval of the employee, which one of two constitutionally adequate procedures are to be utilized? I see no reason why the traditional rule that a union speaks for all unit members should be changed. The surrender of individual bargaining or other rights to the collective representative is not a new concept; it is one of the basic tenets upon which the process of collective bargaining is based.

This has been repeatedly recognized and approved by the courts in such landmark cases as *Ford Motor Company* v. *Huffman,*[10] which dealt with the general bargaining authority of recognized unions, and *Boys Markets, Inc.* v. *Retail Clerks Union,*[11] which spoke of the waiver of the right to strike which is given as a quid pro quo for an arbitration clause. I can perceive no significant distinction between these judicially approved waivers and the waiver by a union of an individual's right to an administrative hearing when the alternative selected by the union meets the standards of constitutional due process.

The question can be asked, what does due process require? It requires notice and an opportunity to be heard at a meaningful time. The notice and the hearing requirements, from a procedural viewpoint, have never been formalized or ritualized. As long as the individual has an adequate opportunity to present his "side of the story," it has generally been found that due process has been satisfied. That this is the very purpose of a grievance-arbitration proceeding should be clear.

An examination of recent cases will evidence the fact that the courts are reluctant to hold that procedures established by a public employer do not afford sufficient due-process guarantees as long as

[10] 345 U.S. 330, 31 LRRM 2548 (1953).
[11] 398 U.S. 235, 74 LRRM 2257 (1970).

they provide the basics of notice and an opportunity to be heard before the termination becomes final.

The U.S. Court of Appeals for the First Circuit recently held in *Downing* v. *LeBritton*[12] that a mentally retarded employee of a state university was afforded sufficient due process in his termination hearing even though he was not allowed representation by either legal counsel or his union business agent. The court stated that the employer's regulations, which allowed the employee to be "assisted" by any fellow employee, but not by a nonemployee, satisfied due-process requirements. The court went on to indicate its feelings as to the degree of formality termination hearings should take:

> "The insertion of counsel or other non-University representative into termination proceedings would stimulate lawyer representation of the University and perhaps others; would formalize the hearings and force them into an adversary mold; would cast a litigation chill on decisions to terminate; and would increase the likelihood that many otherwise ordinary personnel actions would become causes célèbres."

If we may assume that this decision indicates the trend other courts will follow in determining the quantum of due process required to terminate public employees, my contention that the grievance-arbitration process more than satisfies the current mandates is buttressed, particularly in light of *Goss* v. *Lopez*,[13] *Bishop* v. *Wood*,[14] and *Wood* v. *Strickland*.[15] Justice Stevens's closing paragraph in *Bishop* v. *Wood* is particularly pertinent:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."

Following the chronology of Professor Murphy's presentation, I would now like to turn to a discussion of a union's duty of fair representation. I mentioned this concept earlier in the context of defend-

[12] 550 F.2d 689, 94 LRRM 2935 (1977).
[13] *Supra* note 2.
[14] *Supra* note 4.
[15] 420 U.S. 308 (1975).

ing the adequacy of due-process protection afforded by the arbitration process. At that juncture I said that a union's fulfillment of the duty was one of the elements of the argument that arbitration could satisfy due-process requirements. Conversely, it follows that if the union breached its duty to represent an individual fairly, that individual was not afforded due process and, hence, was deprived of a liberty or property interest.

I would like to discuss a few recent cases involving the duty of fair representation to demonstrate the great lengths to which courts are willing to go to ensure that public-employee unions properly carry out their responsibility to protect the due-process rights of their members. One feature of these cases worth noting is that the courts appear willing to apply the private-sector duty of fair representation to the public sector without any modification; it appears as if the courts are promoting the legitimization of arbitration as an institution rather than as a procedure to which different rules and standards apply to the public as opposed to the private sectors.

Hines v. *Anchor Motor Freight*[16] promises to have a far-reaching impact on the doctrine of finality of arbitration awards. But it is evident that the Court intentionally avoided the issue of what constitutes a breach of the duty of fair representation. Whether a union's mere negligent handling of a grievance will qualify as a breach of the duty will have to await another decision of the Court; the lower courts appear to be hopelessly confused as to the standard of care the duty requires.

In *Jackson* v. *Regional Transit Service,*[17] a New York appellate division held that a public-employee union breached its duty of fair representation by negligently failing to comply with contractual time limits regarding selection of an arbitrator. When the arbitrator denied the grievance on this procedural point, the employee filed a breach-of-contract suit against only the employer in state court. On appeal of the trial court's dismissal for failure to state a cause of action, the appellate division held that the proper standard was the "perfunctory manner" rule that was mentioned in the dicta of *Hines.* The New York court then went on to state that the union was not a necessary party to the action in view of the fact that once the arbitration process has broken down because the union breached its duty, traditional due-process protection is not waived. (I should note that this is the same appellate division that decided *Antinore.*)

[16] *Supra* note 1
[17] 94 LRRM 2070 (1976).

This case points out the fundamental thrust of my due-process argument, specifically that arbitration does provide sufficient due process when it works as intended. I submit that this method affords all interested parties a fair hearing while performing that function quickly and efficiently. In those rare instances when it fails, there is another procedure guaranteeing that the individual employee is protected.

Other recent cases dealing with tangential issues offer a glimpse of how the courts view the larger problem of who is responsible for the union's breach of its duty of fair representation.

In the private-sector case of *Gosper* v. *Fancher,*[18] the New York Court of Appeals dealt with a breach-of-duty suit against a union alone; the employer was not joined as a party. The court stated that their interpretation of *Hines* is that the proper party to proceed against is the employer and that the liability of the union should be limited to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer (quoting *Czarek* v. *O'Mara*[19]).

Again, the conclusion that can be reached is that the due-process requirement runs from the public employer to the employee. It is the ultimate responsibility of the employer to make sure any discharged employee is afforded full protection. In addition to this protection running from the employer, the individual grievant is also the recipient of the protection provided by his union representative throughout the course of the grievance procedure. If this relationship is not performed satisfactorily, the courts are waiting in the wings not only to void the employer's disciplinary action, but also to assess against the union the incremental cost of challenging the employer's action in another forum.

Within the strictures alluded to in this presentation, it should be clear that I strongly feel that the grievance-arbitration process satisfies the due-process requirements imposed upon termination of public-sector employment. The fairness, regularity, and generalized effort on the part of arbitrators to get a full and complete understanding of the facts surrounding a discharge as well as the seeming reluctance on the part of arbitrators to sustain discharges except in cases of outrageous or egregious conduct mitigate against a denial of due process, in general, and in discharge cases particularly. The due-process issue rarely arises in any context other than discharges.

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[18] 40 N.Y.2d 867, 307 N.Y.S.2d 1007, 94 LRRM 2032 (1976), *cert. den.*, 45 L.W. 3600, 94 LRRM 2798 (1976).

[19] 397 U.S. 25, 29 (1970).

In conclusion, then, I want to applaud this development in the law. The balancing of interests seems to have achieved equity in not only guaranteeing full due-process rights to the individual employee, but also recognizing the benefits and economies of making full use of the arbitration process. I see this as a useful step toward resolving the delicate issues inherent in any situation involving the discharge of a public employee.

Comment—

DONALD H. WOLLETT*

Those of us who work on management's side of the table understand that one of the major differences between what we now do in the public sector and what we used to do in the private sector is that employer action is state action, and that it is, therefore, subject to constitutional circumscriptions. There are many examples.

For instance, several of the collective agreements between the State of New York and the unions representing state employees provide that the incumbent union has the exclusive right (a) to access to employees during working hours to explain union membership services and programs, and (b) to receive (quarterly) the name, address, unit designation, and payroll agency of all new employees and any current employee whose agency or address is changed. With an eye on the equal-protection clause, we have taken the position that employee information will be provided, *during the organizational season,* to *all* unions, incumbents and challengers alike; and that all unions will have equal access to employees for campaigning, soliciting memberships, and distributing literature.

Another example is our policy of permitting union members, even when they are threatening illegal strike action, to meet during nonworking hours and in nonworking areas such as lounges and state-operated cafeterias ostensibly to discuss the morality, legality, and propriety of strikes by public employees. This policy is based in part on a judgment that it is wise to avoid confrontation on the free-speech issue, and in part on concern that prohibition might run afoul of the First and Fourteenth Amendments.

Similarly, constitutional considerations are up front in the consciousness of any reasonably alert public management which is involved in the administration of collective bargaining agreements.

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Every action we take is governmental action and has the potential of involving constitutional claims that someone has been deprived of property or liberty without due process of law. The broad question is, to use a lousy noun which is an even worse verb: How do the government's constitutional obligations interface with collective bargaining systems?

Among the troublesome cases are those which form the central concern of Professor Murphy's paper—where an employee is discharged. *Roth-Sinderman*[1] tells us that a public employee has a constitutional right not to be deprived of his employment without due process where he has by statute, rule, or practice an expectation of continuity of employment. Since it seems clear that a property right is created by the job-security provision of the conventional collective agreement, management must be alert to the necessity of according to each such employee the fundamentals of due process.

Professor Murphy sets forth a comprehensive and illuminating review of the cases. He reaches a number of conclusions, the most arresting of which is the following: "[I]n the public sector the result should be either that there is an employee right to arbitration or that [the employee] is not bound by the union's decision not to arbitrate and may obtain his hearing in court."

I am inclined to agree with this conclusion in a case of discharge of an employee covered by a job-security provision. However, I do not accept its extension to "seniority and other employee-benefit provisions of the . . . agreement." In my view, the constitutional requirements in discharge cases are not fully operative in other kinds of grievances. Moreover, I do not agree that an employee necessarily has a right to an arbitral hearing *prior* to suspension from employment.

I think it is constitutionally permissible to do what we do under our collective agreements in New York State: In discharge cases, the employee is foreclosed from electing a statutory hearing. However, he cannot be deprived of an arbitral hearing without his concurrence; the union cannot shut the door to arbitration by either withdrawal or settlement; and the employee is entitled to representation in the arbitration by counsel of his choice. While I am not sure that we are constitutionally required to do so, we have extended this practice to cases involving lesser forms of discipline.

The *Antinore* decision,[2] which stands on the proposition that the

[1] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1972).

[2] *Antinore* v. *New York State*, 79 Misc.2d 8, 356 N.Y.S.2d 794, *reversed*, 49 App.Div.2d 6, 371 N.Y.S.2d 213, 90 LRRM 2127 (1975), *aff'd*, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 94 LRRM 2224 (1976).

bargaining representative has the power under New York law to waive the constitutional rights of employees in the unit, permits public employers and public-employee unions to enter into enforceable agreements making the contractual remedy exclusive. Logically, *Antinore* permits the parties to make binding settlement agreements without employee concurrence. But we have not, for the following reasons, chosen to take *Antinore* that far.

The basis for *Antinore*—that there is a principal-agent relationship between union and employee so that "its assent to the agreement [is] plaintiff's assent"[3]—is too far removed from reality to be a comfortable predicate for state policy. Furthermore, what about federal law? Finally, the effective foreclosure of the statutory remedy is of sufficient importance to the state as an employer to warrant our erring on the side of guaranteeing the grievant due process. The last point, which is sometimes overlooked, is that a contractual remedy in lieu of a statutory remedy may work to the advantage of the public employer. This is certainly true in New York.

Procedures for the discipline of state employees set forth in §§75 and 76 of the New York State Civil Service Law call for an elaborate quasi-judicial proceeding, with a statement of charges, a written answer and a transcript, and a determination by the employing agency, subject to appeals through a complex administrative procedure either to the Civil Service Commission or to the courts under our civil practice act in an Article 78 proceeding. This system is replete with rules and formalities and other technicalities which lend themselves to delay and expense. It is not uncommon for a final disciplinary decision under this system to be delayed for two or three years. In one case in recent years, removal proceedings against a city employee involved three hearing officers, more than 20 days of hearings, and 2,000 pages of transcript. The matter was finally settled because the parties estimated that an additional 50 days of hearing time would have been required at out-of-pocket cost to the employer of nearly a quarter of a million dollars.

As a consequence, in the years before we agreed to contractual machinery for handling disciplinary grievances, only an average of 75 to 100 disciplinary proceedings were initiated per year among the entire work force in the state, which then averaged between 120,000 and 150,000 employees. Discipline was not initiated for minor offenses, and misconduct was permitted to accumulate to the point where discharge was the only appropriate remedy. The em-

[3] 49 App.Div.2d 6, 10 (1975).

ployees in general had a basic contempt for the procedures, which they viewed as a shield against effective discipline.

Obviously it is advantageous to management to avoid giving employees like Antinore, who prefer the statutory system, any basis for claiming a denial of due process.

What about a hearing prior to suspension? Does an employee have a constitutional right to some kind of process prior to removal from the job? This is the *Arnett* v. *Kennedy*[4] situation.

Under the New York agreements, suspension without pay is not a permissible sanction which can be independently imposed by management without an arbitral hearing. Suspension under our disciplinary procedures can be effected *only if* the appointing authority, as the first step leading to punishment, usually termination, finds probable cause to believe that the employee's continued presence on the job endangers person or property or threatens severe interference with operations. This determination, together with the question of whether there is cause for discipline, is subject to review in arbitration.

This procedure appears to satisfy *Roth-Sinderman* because a suspended employee whom the state seeks to terminate has the right to a hearing before "termination becomes effective."[5]

This is our practice with respect to disciplinary grievances. However, in cases (a) where an employee loses an advantage as a consequence of management's interpretation and application of a collective agreement, for example, loses a promotion or suffers a layoff, or (b) where an employee is on probation or is working on a term contract which explicitly requires renewal if employment is to be continued, we do not follow the practice of requiring employee consent to settlements.

It is our position that the union and the employer have the right by agreement to settle with finality these kinds of cases without going through the formalities of a hearing, and we have agreed to give the union the power to refuse to take such cases to arbitration.

Our judgment that this practice is sound has three bases. First, there is the waiver doctrine of *Antinore,* which, thin as it is, controls as far as New York courts are concerned.

Second, the employee interests involved in these kinds of cases arguably do not rise to the stature of a property right within the meaning of *Roth-Sinderman.*

Third, settlements negotiated with the union, including disposi-

[4] 416 U.S. 134 (1975).
[5] *Board of Regents* v. *Roth,* n. 7.

tion of issues generated by management's interpretation and application of the collective agreement, are the stuff of collective bargaining. To deny the union authority and deprive negotiated settlements of finality would rob the process of significance.

Note the following quote from *Vaca* v. *Sipes:*

> "In providing for a grievance and arbitration procedure which gives the union discretion to supervise grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement."[6]

A distinguished member of this Academy, Professor Kurt Hanslowe of the School of Law at Cornell University, recently followed this reasoning in a case involving the State of New York and the United University Professions, which represents the professional staff of the State University. Hanslowe held that a complaint by a professor that nonrenewal of his term appointment was violative of the agreement could be settled by the union and the state, and that the settlement (reached without the grievant's concurrence) was within the authority of the union, was definitive, and rendered the grievance nonarbitrable. The same result follows when the union refuses to take the grievance to arbitration on the ground that it lacks merit. To hold otherwise surely would sap grievance machinery of its vitality.

This is not true, of course, where the union is guilty of bad faith, invidious discrimination, or perfunctory behavior in processing a grievance (*Humphrey* v. *Moore;*[7] *Hines* v. *Anchor Motor Freight*[8]). Under these circumstances the process is flawed and may be inoperative as a bar to other proceedings such as an action on the contract.

The proposition that the workings of grievance machinery are vulnerable if tainted by a breach of the union's duty of fair representation means that management cannot be indifferent to the way in which the union does its job. The conventional view is that the

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[6] 386 U.S. 171, 64 LRRM 2369, 2377 (1967).
[7] 375 U.S. 335, 55 LRRM 2031 (1964).
[8] 424 U.S. 554, 91 LRRM 2481 (1976).

internal affairs of the union are not management's business. But since management's ability to rely on grievance machinery as a defense to an action on the contract depends in part on the way in which the union carries out its responsibilities, management necessarily has an interest in the process.

Two examples from our experience in New York come to mind.

1. One of the unions with whom we do business discriminates against nonmembers in disciplinary grievances. Members are provided representation by counsel; nonmembers are represented by union lay staff. A nonmember grievant may be represented by counsel, but only at his own expense. Is a settlement negotiated by a nonlawyer representative binding? Or can it be attacked on the theory that the grievant was the victim of a denial of fair representation—hostility and discrimination against the nonunion faction? How about an arbitration award where the nonmember grievant did not have counsel? Is it not similarly vulnerable?

The same union discriminates against nonmember disciplinary grievants in another way—by requiring them, if they choose to go forward without the union, to pay half of the arbitrator's fee in advance. If a nonmember settles short of arbitration for financial reasons, can he escape the settlement on the same ground?

Our concern is that such discrimination creates an infirmity in most disciplinary settlements negotiated with nonmembers and makes arbitration awards in every disciplinary case where the nonmember grievant does not have a lawyer potentially useless as a defense to an action on the contract.

2. Similar problems arise when the union carelessly fails to file a timely notice of appeal to arbitration. A recent New York case (*Jackson* v. *Regional Transit Service*[9]) holds that the union's negligence in failing to file a timely notice of appeal is a violation of the duty of fair representation and causes the employer to lose the defense that the employee has failed to exhaust the grievance machinery. (See also *Ruzicka* v. *General Motors.*[10]) As a consequence, the unions tell us that if we enforce timeliness requirements, we will simply expose ourselves to an action by the employee on the contract; accordingly, we should forgive their failures, no matter how egregious they may be.

If one assumes that employees have the right to enforce collective agreements, it is hard to quarrel with the court's position in these

[9] 54 App.Div.2d 305 (4th Dept. 1976).
[10] 90 LRRM 2497 (6th Cir. 1975).

cases. To hold otherwise would relegate the employee to an action against the union. But the employee cannot gain the remedy of reinstatement in such a lawsuit. Why should he suffer this loss because of the union's dereliction?

On the other hand, these decisions make meaningless the timeliness requirements for which the employer bargained. The principle of apportionment of damages between union and employer, as spelled out in *Vaca* v. *Sipes,*[11] is inadequate. It ignores the importance to the employer of not being required to reinstate an employee who, in the employer's judgment, was rightfully discharged but who may gain reinstatement in a court proceeding because the evidence against him which would have been available in a timely arbitration has been lost as recollections have faded and witnesses have retired, resigned, or died.

The indicated answer to these difficulties is for the employer to obtain from the union a promise not to discriminate against nonmembers and a provision for exemplary, as well as compensatory, damages when the union's improper processing of a grievance exposes the employer to liability. However, the practicability of this answer depends upon the price which the unions will demand for such commitments. It seems likely that the price will be too high to interest most public employers and that the union duty will continue to be partly an employer responsibility.[12]

Comment—

HERBERT PRASHKER*

I have been flattered on previous occasions by the invitation of the Academy to address annual meetings on various subjects in prior years. I never felt more flattered, though, than I was at approximately quarter to 12 last night when I got the invitation to talk to you today without any preparation whatever. What flattered me most, of course, was the notion that a body as distinguished and

[11] 386 U.S. at 197-198, 64 LRRM at 2379-2380 (1967).

[12] Ben Aaron, expressing his disagreement with the *Humphrey* v. *Moore* proposition that an individual employee has standing to enforce the collective agreement, argues that the employee who asserts a union's failure to represent him fairly should have an action solely against the union, with the right, if successful, to have his grievance under the collective agreement submitted to arbitration. Aaron, *Constitutional Due Process,* in Labor Relations Law in the Public Sector, ed. Andria S. Knapp (Boston: American Bar Association, 1977), 179, 180.

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knowledgeable as this one might really learn something from something that I said off the cuff.

It is very difficult, of course, to replace Don Wollett on this program, even if I had all the time in the world to put my thoughts together. I don't want you to expect from me either the wisdom or experience or thoughtfulness that you would have gotten from Don on this subject matter. I also want to point out that although I am a management lawyer, my personal views, which are all I'm going to be able to present, may not represent the views of most of management. As our moderator has indicated, my professional life has been varied, and, as a management lawyer, I may have a minority view.

I gathered from the address of the president of the Academy at lunch yesterday, as I have gathered from the subject matters selected for the agendas of the annual meetings of this Academy for the last few years, and from the agendas of seminars about arbitration generally across the country, that arbitrators and the arbitration profession generally are somewhat concerned and, if I may say so, sensitive about the increasing judicial unwillingness to defer to the exclusivity, the finality, and the nonreviewability of the decisions of arbitrators. Of course, that lack of deference is expressed in the choice of subject matter to which we are now addressing ourselves—the notions of due process and fair representation, both of which have been imported into the arbitral process and other parts of the collective bargaining process by the courts, superimposing new obligations on people who participate in grievance arbitration and arbitration generally, and stipulating new conditions for the enforceability and finality of the awards of arbitrators. Heeding the decisions of the Supreme Court in *Gardner-Denver* and *Anchor Motor Freight,* it appears that arbitrators generally, and some of our most distinguished ones, are concerned about the increasing importance of lawyers and legal procedures to their process. They are, I think, somewhat annoyed and bothered by it. As a matter of fact, I detect a sense on the part of some arbitrators that they are losing the feeling that the world in general is paying to them the deference which it once did, and to which they are, as far as I'm concerned, properly entitled.

As a litigating lawyer who appears before courts, I'd like to give you my reaction to what I detect as that concern: it is that the phenomena which you are observing and to which you are reacting really have very little to do with the judiciary's perception of labor arbitration as a separate subject matter of their concern. Your

awareness of increased judicial intrusiveness is also sensed by our established institutions in general—legislatures, administrative agencies, the secretaries of our federal departments, indeed, by the President of the United States. It's a reflection of the increased judicial activism of an entire generation, and it would be amazing if the arbitration profession entirely escaped the effects of an awakened and, in the view of some, a virulent judicial sense that the courts really say the last word about practically anything.

Let me give you one example of my sense of the situation. We recently had a relatively unimportant case in the federal district court in the Southern District of New York before a distinguished district judge, involving an employee who had been discharged by an airline (she was a flight attendant) for allegedly taking a drink in the course of a flight. She had taken her case before our System Board of Adjustment where she had been represented by a very able young lawyer provided by the union. The case had been heard by a distinguished arbitrator; I believe he is a member of this Academy. He decided against her. She then went out and hired a new lawyer and brought an action in the Southern District to set aside the award, alleging that she had been denied the opportunity to present certain witnesses whom she had wished to call. She claimed that the arbitrator had declined to hear those witnesses, and she asked that his award be set aside.

We naturally moved to dismiss the action and for summary judgment. Our motion was denied. It was denied by this judge who said we would have to prove, before the action was dismissed, that she had been provided a hearing before the arbitrator that was fundamentally fair. He said that if, indeed, as she alleged, the arbitrator had been unwilling to hear the two or three witnesses she claimed she had offered, that the court could find that she had been denied fundamental fairness and set aside the award.

That may sound rather shocking to some of us who have been accustomed to feel that arbitration proceedings are beyond judicial scrutiny. After all, if the arbitrator's award is not subject to judicial review on the merits, how in the world can we be required to prove in court that an arbitrator was correct in excluding evidence? Can a procedural ruling on the exclusion of evidence entitle one to set aside an arbitrator's award in federal court? Ridiculous!

Well, perhaps it is not entirely ridiculous. If you knew what else the judge in question did all day, you would not expect him to be all that deferential to your process or to any other process in which there was a claim that somebody had been denied fundamental

fairness. This judge had spent a very considerable part of a prior year or two requiring the City of New York to close Tombs Prison because it did not provide fundamental fairness or decent quarters for the prisoners who were there awaiting trial.

To argue to such a gentleman the principles of judicial restraint and that the decision of an arbitrator is beyond his power of review is a very, very heavy burden for any advocate. I am afraid that your profession, like the rest of us, is going to have to suffer this judicial intrusiveness into our little world of arbitration as long as the federal judiciary and the state judiciary become accustomed to the exercise of these enormous powers.

As a result of the judge's determination that we had to prove that fundamental fairness had been accorded, we had to take the deposition of the arbitrator. He was sworn, he came to a lawyer's office, and he testified that he had not excluded any evidence. The attorney for the union, who was also deposed, confirmed that he had never offered it. So the case was eventually dismissed.

Fortunately, we won't have to take this very important question of how far judges can intervene to review the exclusion of evidence in arbitration proceedings to the Circuit Court of Appeals in New York quite yet. I say "fortunately" because, I should remind you, that court, as currently constituted, is itself rather activist. I suggest again that a court which is going to do those things is not going to listen too long to arguments, in the face of claims of denial of due process, that the fabric of collective bargaining requires that everything that arbitrators do where due-process claims are made is okay and not worthy of judicial review. That's off my chest as a matter of general observation, and I should now like to address myself to some particulars of Professor Murphy's paper and of Mr. Ashe's response.

First, there is the question of whether or not a public employee is entitled to a due-process hearing before or after discharge—that is to say, whether or not the Constitution of the United States requires that such a hearing be provided regardless of what the state or municipality provides in statutes or ordinances, and regardless of what the public employer and the union provide in their collective bargaining agreement. As Professor Murphy points out, this issue arises separately from the question of what kind of hearing is required in arbitration, and it arises separately from the question of whether an arbitration hearing in fact provides due process.

But I think it is crucial to say that the question of what constitutes due process in an arbitration hearing depends mightily upon the

separate question of whether, collective bargaining and arbitration aside, a public employee is entitled under the Constitution to a hearing before he's discharged, or after he's discharged.

The proposition that a public employee is entitled to such a hearing is the proposition upon which all Professor Murphy's argument rests, and that proposition is very shaky indeed. In fact, the most recent decision of the Supreme Court in the *Wood* case indicates that there is no such constitutional right to hearing, in the sense that if the state gives you a job and provides procedural protections around that job which do not include a hearing concerning your discharge, then you are not constitutionally entitled to a hearing, because, according to the Court, the state has defined your interest in such a way that it does not rise to the dignity of a property right, the status which creates the right to a hearing. The argument may be a little circular—it is indeed very circular—but the result is that if the state does not give you the right to a hearing, you don't have the right to a hearing under the Constitution of the United States.

If that is so—if, in the absence of a collective bargaining agreement you have no right to a hearing under the Due Process Clause of the United States Constitution—then the argument that the collective bargaining agreement deprives you of a constitutional due-process hearing by assigning your right of hearing to arbitration rather than to an administrative hearing falls, because the premise of the argument has vanished.

Moreover, Professor Murphy's suggestion that the New York courts in the *Antinore* case have stated or even intimated that an arbitration hearing does not conform to due process of law overlooks the decision of the New York Court of Appeals, the highest court of the state. That court, in affirming the decision of the appellate division that the employee was not entitled to the statutory hearing, took pains to strike from the appellate division's opinion the portion which had suggested that a due-process hearing in arbitration required something more than the ordinary hearing under the arbitration law of the State of New York, and that such a hearing would have to include specific safeguards of due-process rights. This deletion suggests to me inexorably that the court of appeals held that an arbitration hearing conforming to Article 75 of New York Civil Practice Law and Rules, which is our ordinary arbitration proceeding, affords due-process rights.

I believe that would be the sense of most arbitrators and practitioners generally. Certainly the ordinary discharge hearing contains all the elements necessary to fundamental fairness, such as some

notice of the charge, an opportunity to present witnesses, and an opportunity to cross-examine the witnesses of the employer.

Having said that much, and addressing myself now, specifically, to the very interesting question that is raised about the right of counsel, it is suggested that due process requires that a grievant be able to present a case through his own attorney, rather than being stuck with the union's lawyer. I know of no case that says any such thing. Whether it is a good idea to let an employee be represented by his own counsel, as a matter of good labor relations or as a matter of sound administration of a contract grievance procedure, is a separate question to which I will address myself later. But it is a question of policy, of what is the wiser or more intelligent thing to do. I do not think it is a constitutional question.

I don't think it's a question that should be settled by the United States Supreme Court. I feel it's a question that should be settled by the "parties"—and I use that expression loosely—the employer and the union representing the employees in the first place. I'll come back in a moment to the issue of exactly who the "parties" are to a collective bargaining agreement, because I think we speak very ambiguously when we use that phrase. For the moment I'll continue to embrace it.

The due-process question—specifically the question of whether a grievant is constitutionally entitled to have his own lawyer—has to be examined in the framework of an assumption that the union is providing fair representation in providing its own lawyer. In other words, if we assume that an arbitration proceeding has been completed and that an attack is made on the award, it can be on the ground that the employee had no fair representation—the union-supplied lawyer did a terrible job, he didn't prepare, he wasn't really interested—or it can be on the ground of denial of due process in refusing to let the employee have his own lawyer.

If one determines that the union failed to provide fair representation, you never reach the due-process question. You only properly get to the due-process question if you've decided that the union did provide him with fair representation—that the union's lawyer did a reasonably decent job, at least sufficient to survive the test, whatever it's going to be, of *Hines* v. *Anchor Motor Freight*. Then you address yourself to the question: Are we now going to set aside the award on the ground that, despite the presence of fair representation, the employee did not have the right to select his own counsel?

The suggestion that, in a criminal case, you are constitutionally entitled to your own counsel is true in a rather loose way, but strictly

speaking, you are not always entitled to counsel of your own choosing. For example, if you cannot afford to pay for a counsel of your own choosing and the court has to appoint one, the criminal defendant does not have a right to select from all the lawyers in the world the one he wants. He takes the one that the court appoints, and that satisfies due process.

I would argue that a member of a bargaining unit who has filed a discharge grievance under a collective bargaining agreement, who, though denied the right to select his own counsel, was provided with counsel by the union—counsel who, for purposes of this discussion, we assume has fairly represented the employee—has been provided with counsel sufficient to meet all constitutional requirements.

I think a more difficult question raised by the *Hines* v. *Anchor Motor Freight* decision, which deals with fair representation, is a question of collective bargaining policy and not a constitutional question at all. That question is this: Given the fact that employees as well as unions will suffer if union representation of the employee in the arbitration proceeding is not adequate—whatever the standards of adequacy are going to be—is it a wise course for employers and unions together, at this stage in the development of our law, to provide grievants with the right under the contract to process their own grievances to arbitration and, if they like, to select their own lawyer to present their grievance? I myself believe that if that right were provided, and if an employee, having that choice, accepted union representation, including union counsel, that we stand in the long run a much, much better chance of having arbitration decisions free of attack on the ground that the representation provided was not fair or adequate. After all, the individual grievant in such case will have been provided the opportunity to select the kind of representation he wanted.

I spoke a few minutes ago about the ambiguity as to who are the "parties." I was reminded of that ambiguity yesterday during our luncheon address. There is a strong feeling, I know, in the arbitration profession that arbitrators are the instruments of the parties; some people would use the word "functionaries" of the "parties," meaning, of course, in that particular usage the employer and the union. What has been fuzzed over in that statement, I have always thought, is the question of whether the "parties" do not somehow include the employees, not only collectively, but individually, remembering that in a given arbitration proceeding the union is frequently representing particular individuals—one, two, or maybe a hundred.

The concept is important because the notion that the arbitration proceeding is a proceeding between the "parties"—meaning the parties to the contract, the union and the employer—is frequently the basis of the argument that the grievant has no independent right to be represented, or to be represented by his own attorney, or even to take the case to arbitration without the union's consent.

It may interest some of you to know that our law, and indeed our practice on this point, is not entirely consistent. Although under the National Labor Relations Act agreements customarily read that they are between the union and the employer, "parties to this agreement," the Railway Labor Act, which governs our airlines and railways, produces a different vocabulary. Most of our contracts under the Railway Labor Act read, in their preambles, that they are between the employees and the carrier. For example, they will recite: "Agreement between the pilots of United Airlines, Inc., as represented by the Air Line Pilots Association, International, and United Airlines, Inc." Along the same line, any contract under the Railway Labor Act is not a bar to a change in the representative union during the term of the contract. A contract could have been signed yesterday, and some new union may file a petition tomorrow with the National Mediation Board for a change in representation and the Board will process it. The effect of the election of a new representative is that the new representative takes over and is bound by the preexisting contract between the employees and the carrier.

Although not too many of us pay much attention to these oddball facts, the fact that we do have a different practice under the Railway Labor Act and under the National Labor Relations Act, although most of us aren't even conscious of it, suggests to me that, again, there is a certain ambiguity in our thinking about who the "parties" to these contracts really are, whether the contract be under one statute or the other. After all, even under the National Labor Relations Act, the union is acting only as the collective bargaining agent for the employees; in other words, the employees are the principals. In ordinary legalese, if the employees are the principals, why don't we refer to them as "parties" to the contract, and why don't we recognize them as having procedural as well as substantive rights under the contract?

Again, I would suggest an examination of, or a little more thought about, that ambiguity in our thinking when we address the questions raised by *Hines* v. *Anchor Motor Freight*. If the employees are "parties," if they are the people who are most fundamentally interested in what is going on at grievance hearings, and if the

union, their agent, may not adequately represent them, and if, as a result, neither the employer nor the union is going to come out of arbitration proceedings with really final determinations, shouldn't we practitioners who write the grievance and arbitration procedures, in recognition of the real actualities of the situation, seriously consider giving these individuals—who some might think are "parties" to these agreements—an independent right to process their grievances to arbitration and to participate in the arbitration as parties without, of course, excluding the union from participation in the proceeding, should it wish to participate?

Discussion—

EDGAR A. JONES, JR.: I'd like to make an observation and then ask a question. There is a recent decision in the Ninth Circuit, *Michelson's Food Services* [545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976)], which holds that an arbitrator, functioning under a collective bargaining agreement in the private sector, has the inherent power to designate an employee as a "party," with all of the significance that entails.

Now the question: Bill Murphy talked about the problem of due process and property and referred to the junior employee who, in all of our arbitral experience, is always in the wings and never called onto the main stage of the proceedings when the senior employee is complaining about the selection of the junior employee in lieu of a senior employee. I'd like to get Bill's reaction: Is there a due-process problem? Has there been a due-process problem, as he sees it, in the private and in the public sector, when that junior employee is not brought into the proceeding and given some kind of day in court?

MR. MURPHY: Ted, I have a paragraph on that very point in my paper, which I omitted spontaneously as I went along. But in the case which I discussed, *Belanger* v. *Matteson,* in fact the junior employee was present and testified at the hearing.

As we all know, that seldom, if ever, happens in private-sector hearings. So I did raise the question as to whether or not in the public sector we could look forward to that issue's being presented by the junior employee who was not present at the hearing and who was denied an expectation of a job—that is, a property interest—through a hearing at which he was not present.

I'll just have to say the same thing about that as I said with respect to a right to counsel at the hearing. Due-process doctrine is flexible and broad enough to accommodate such a holding if the

federal courts decide as a matter of policy that that is what they want to hold, but there isn't any case on it right now—not to my knowledge.

Let me just add that I think perhaps the two discussants attributed to me more of a positive view on the due-process question than I intended to convey. I didn't purport to say that these matters had already been adjudicated by the courts, and I certainly wasn't intending to take flat positions. I was intending to raise due-process implications and speculations which I think very likely will be the subject of future litigation, and undertaking to set forth what the argument would be when it was made.

BENJAMIN AARON: The three speakers have all assumed, as the courts did in *Anchor Motor Freight,* in the earlier case, *Humphrey* v. *Moore,* and in similar cases, that the joint board that made the decision which was subsequently challenged was a board of arbitration. They have, at least tacitly, rejected the argument made by Mr. Justice Goldberg in *Humphrey* v. *Moore,* and later repeated in some detail by Professor Feller in his essay on the general theory of the collective bargaining agreement, that this is not a board of arbitration at all, but simply represents the result of an agreement between the parties to the collective bargaining agreement, either that they have reached an interpretation of that agreement or that they have amended it, or added an addendum to it—whatever terms you want to use.

If you accept that argument, I'd like to ask Bill Murphy how that would affect, in his judgment, the rights of the employees who claimed they were not fairly represented at the "arbitration" stage of the proceeding.

MR. MURPHY: Ben, I know there are people who have tried to explain away *Hines* v. *Anchor Motor Freight* on the ground that it was not an independent neutral arbitration, but was a joint committee, and I don't attribute any significance at all to that for two reasons.

One is in the footnote to the opinion, which refers to the joint board as a joint arbitration committee; it's referred to that way. Secondly, and more important, Justice White's opinion clearly speaks of the malfunctioning of the arbitration process. There isn't any doubt that Justice White has disregarded the fact that this was a joint committee.

But I understand your question is: Assuming that it is not an arbitration committee, but is in fact just a joint committee which is an extension of the grievance procedure, how would that affect the employees' rights?

I think the answer to that question comes back to what the courts will decide is the measuring standard of the duty of fair representation. The duty was originally created in the context of negotiation, and if this is an extension of the negotiation proceeding, there isn't any doctrinal impediment to applying the duty to it. It's a question of defining what the standard is by which the duty is or shall be measured.

It's Clyde Summers's standard that the duty of fair representation requires a diligent, attentive investigation in the processing of the grievance, and if the union fails to uncover facts which would have been helpful to the grievant, then I think the *Hines* case arguably supports the finding that the employee's rights have been violated and the award should be set aside.

ROBERT GARRETT: I'm a management representative, and I'll address my question to the panel: How does a management protect itself against this kind of situation?

As I understand the circumstances, I doubt rather seriously that I would have done anything differently than did the people in *Anchor Freight*. They had the receipts, they had the statement from the motel owner as well as the motel clerk, and so on. What this comes down to is that if a lazy union does a perfunctory job or even a negligent job of investigating a grievance or the background on it, does that mean that in order to protect ourselves, we, management, have to do their job for them?

MR. PRASHKER: I'm probably going to strike out. Number one: this was a discharge case. The employer has to do its own job for itself and undertake a reasonable investigation to be sure it has grounds for discharge. I think you'd do that in any case. I don't know that there's anything that you can do to protect yourself from the particular development in *Hines* v. *Anchor Motor Freight*. The investigation which uncovered the truth in that instance was not an investigation which preceded the filing of the lawsuit, but discovery in the federal courts under the Federal Rules of Civil Procedure, after the lawsuit had been instituted. At that point, the attorney for the employees had rights which no management will ever have, namely, the right to send a subpoena to the clerk of that particular motel, to take his deposition, and in sort of grand-jury fashion to ascertain the truth. There's no way you're going to be able to do that before a discharge under any system of investigation you devise.

The best idea I've come up with to protect yourself against the kind of liability that's in this case is what I said a few minutes earlier. That is to include in your contract grievance and arbitration

provision a provision giving the employee the right to process his own grievance. I think, as I've said, that that's going to create an entirely different judicial environment for consideration of a claim that an employer would be stuck with back pay if the claim now becomes that the union specially selected by the employee for processing his particular grievance in a particular case has failed to do as adequate a job as a lawyer entitled to use discovery under the Federal Rules of Civil Procedure.

NEIL BERNSTEIN: I'm wondering if any of the panelists are aware of any cases that are extending the duty of fair representation to the prehearing aspects of the arbitration process. What I have in mind here is selection of an arbitrator, waiver of a three-member board, expedited proceedings, or stipulations of fact, saying either that the union didn't do a proper job or that the grievant had a right to participate in those particular decisions.

MR. MURPHY: I'm not aware of any cases that go directly to the question that you raised, but I think from my own view that the duty of fair representation begins from the time that the representative is selected to represent the employee and continues throughout the course of that representation process. So it subsumes anything that goes on from collective bargaining through the grievance-arbitration process, etc. I don't think it makes any difference whether the problem that you're posing rises before you get to the formal arbitration stage.

While I have the mike, I'd like to go back to another question. I think that *Hines* v. *Anchor Motor Freight* is an unusual case, and I think it will be rare that employees will be able to prove a breach of the duty of fair representation in the investigation and preparation of a case for arbitration.

But I think there are two things that flow from *Hines*. One is that it's a warning sign that the parties, however you may define them—whether in Mr. Prashker's terms or in my terms—both have a duty to do the best job they can in investigating a situation before the process of discharge is completed.

Second, I would think that in the public sector the burden would fall more heavily on the employer in terms of the consequences of the failure to investigate properly before moving to the discharge of an employee, than it would on the union in investigating to defend against a discharge. This is because, as we have been discussing, the public employer must meet due-process standards before discharge.