

## CHAPTER 12

### ARBITRATION FORUMS

#### I. ACADEMIA

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The unionization of college faculty remains an expanding phenomenon. As of January 1, 1988, approximately 212,000 faculty, accounting for one third of the professoriate, were represented by certified bargaining units in public and private, two- and four-year institutions. Over 434 collective bargaining agreements covering 1,028 campuses were in effect.<sup>1</sup> Enabling legislation exists in 27 states under which public sector faculty bargain. An additional three states permit negotiations subject to local governing board authorization. Public sector faculty also negotiate in the absence of legislation. At approximately 70 private institutions faculty collectively bargain under the protection of the National Labor Relations Act.<sup>2</sup>

The vast majority of faculty collective bargaining agreements contain grievance procedures culminating in arbitration as a means of resolving disputes.<sup>3</sup> Grievance arbitration is also found on nonunionized campuses and is utilized in those schools as a mechanism for institutionalizing processes to ventilate alleged unfair employment practices or as a means of preventing unionization. While the number of institutions with these grievance

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<sup>1</sup>Of the 434 collective bargaining agreements, 68 percent (295) are at two-year colleges, and 32 percent (139) are at four-year institutions, while 18 percent are at private colleges, and 82 percent at public institutions. The National Education Association (NEA) represents faculty at 223 institutions, the American Federation of Teachers (AFT) at 134, and the American Association of University Professors (AAUP) at 41. Independent unions and joint affiliations account for the rest. For a statistical analysis of faculty collective bargaining, see Douglas and Cohen, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, v. 14 (New York: Baruch College, 1988).

<sup>2</sup>Private sector faculty collective bargaining is regulated and conducted pursuant to the National Labor Relations Act, as amended.

<sup>3</sup>The data with respect to contract clause analysis were originally compiled in conjunction with the Labour Agreements Data Bank of McGill University. See Douglas, *An Analysis of the Arbitration Clause in Collective Bargaining Agreements in Higher Education*, 39 Arb. J. 38 (1984).

procedures culminating in arbitration is limited, it is expected that this figure will increase.<sup>4</sup>

The widespread use of binding arbitration on unionized campuses suggests that decision-making responsibility, once thought to lie within the exclusive domain of the academy of self-governing scholars, is now being shared with third-party neutrals, thus altering long-standing college governance procedures.<sup>5</sup> The issues at grievance are often critical to professional life, involve career decisions (that is, reappointment and tenure), and are aggressively pursued. In making these decisions administrators and faculty must be cognizant of contractual requirements as numerous aspects of governance and peer review are being codified into the labor agreement.

In the more than two decades that collective bargaining in higher education (CBHE) has been in place, a body of case law, practice, customs, and rules has developed similar to that found in most other unionized employment relationships. Although there are distinctions between academic and industrial arbitration, these differences are minimal. The dissimilarities are primarily found in contractual limitations placed on the scope of review and arbitrability. Questions and issues critical to an understanding of arbitration in higher education are listed below:

1. What are the procedural similarities and differences between academic arbitration and the industrial model?
2. Is there an inherent conflict between academic arbitration and a collegial employment relationship based on peer review and shared authority?
3. What is the scope of arbitrability and the role of "academic judgment" within the academic arbitration process?
4. What are the restraints imposed by the requirements of confidentiality in the peer review process?

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<sup>4</sup>Nonunionized institutions with faculty grievance and arbitration procedures include Columbia, Cornell, and Northeastern universities. No data are available as to the number of schools that fall into this category. The increased use of arbitration in other non-unionized industries is expected to spill over into higher education for both faculty and support staff personnel.

<sup>5</sup>For further reading on the relationship between college governance and collective bargaining, see Lee, *Contractually-Protected Senates at Four-Year Colleges*, in *The Legal and Economic Status of Collective Bargaining in Higher Education*, ed. Joel M. Douglas (New York: Baruch College, 1981), 56; Kemerer and Baldrige, *Senates and Unions: Unexpected Peaceful Coexistence*, 52 *J. Higher Educ.* 256 (1987); Douglas, *The Impact of Collective Bargaining on Governance*, PERS Information Bull. (Jan.-Feb. 1979).

The purpose of this paper is to identify various aspects of the academic arbitration model for those who might be called upon to serve as neutrals in higher education disputes. This paper is limited to the arbitration of faculty rights and, while there are a growing number of arbitration cases relating to nonfaculty and support staff personnel, that area is beyond the scope of this paper. The data for this study were gathered from the contract file of the Baruch College, National Center for the Study of Collective Bargaining in Higher Education and the Professions (NCSCBHEP), City University of New York.<sup>6</sup> The Center maintains a collective bargaining agreement data base, a library of related material, and a depository of arbitration awards issued from 1975 to 1985.

### **Procedural Similarities and Differences Between Academic and Industrial Arbitration**

The uniqueness of CBHE, at least with respect to the grievance and arbitration process, is not supportable. Procedural and structural components inherent in academic arbitration are similar to those found in most industrial contracts. In a study conducted by the NCSCBHEP of 129 arbitration clauses in faculty contracts, it was found that over 90 percent contained grievance procedures, with 74 percent of these culminating in binding arbitration.

The American Arbitration Association (AAA) was named as the administrative tribunal in more faculty collective bargaining agreements than any other agency. Nearly one third of all contracts (31 percent) named the AAA, 7 percent named public employment relations boards (PERBs), and 4 percent named the Federal Mediation and Conciliation Service (FMCS). Nearly 25 percent of the agreements provided a choice of agency alternatives citing AAA, PERB, and FMCS. However, 13 percent did not specify any agency, requiring mutual consent as the primary criterion in the selection process. Only 4 percent of the contracts surveyed designated permanent panels of arbitrators. While

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<sup>6</sup>The National Center for the Study of Collective Bargaining in Higher Education and the Professions (NCSCBHEP) is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities and in the professions.

6 percent of the contracts utilized procedures other than the ones cited above, 9 percent were silent on this issue.

Only two contracts required that the arbitrator have prior experience in arbitrating higher education issues. This is consistent with the industrial model wherein the arbitrator need not possess expertise in the subject matter in order to be selected to hear cases in a particular industry. Many experienced arbitrators are rostered by the AAA, FMCS, state PERBs, and other arbitration agencies and the same names are likely to appear on arbitration panels and lists, no matter which tribunal is designated. The vast majority of higher education arbitration cases are heard by single, *ad hoc* arbitrators selected to hear grievances on a case-by-case basis with selection procedures similar to those found in the industrial model.

Several higher education faculty contracts contain expedited grievance procedures similar to those in the United States Postal Service, Veterans Administration, and various civil service commissions. Conditions cited for the use of the accelerated process include summary discharge, class action claims, and grievances arising from an authority higher than the immediate supervisor.

### **Conflict Between Arbitration and a Collegial Employment Relationship**

In perhaps no other employment relationship does the question of shared authority among faculty, administration, and board of trustees cloud the issue of managerial authority. In the industrial sector, the managerial and supervisory delineation is clear. According to one commentator, this issue "highlights clearly the most distinct aspect of higher education bargaining . . . this shared system of college and university governance has no known counterpart and presents unique problems to collective bargaining."<sup>7</sup>

Furthermore, assuming for the purposes of discussion that faculty are employees whose rights to bargain are statutorily protected and not subject to the managerial or supervisory designation delineated by the United States Supreme Court in *NLRB v. Yeshiva University*,<sup>8</sup> there arises the question of against

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<sup>7</sup>Weisberger, *Faculty Grievance Arbitration in Higher Education: Living With Collective Bargaining*, IPA Monograph No. 5 (Ithaca, NY: Cornell University, 1976), 3.

<sup>8</sup>See *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 (1980) for an analysis of the managerial status of college faculty.

whom the grievant is grieving. Is the grievance against fellow members of the faculty, or against management or supervisory administrators outside the bargaining unit? Since the majority of faculty grievances involve appointment, retention, promotion, and tenure (ARPT), it would appear that faculty members are grieving the actions of their peers. If faculty members are denied reappointment by members of their own departmental promotion and tenure committee (PTC) (assuming that the substantive aspects of that decision are arbitrable), the arbitrator may be required to rule on the conflicting rights of unit members. This issue often goes beyond shared authority and collegiality, and places faculty against their peers in an adversarial review process.

In the case of nontenured faculty, similar issues are encountered. Since bargaining unit membership is not based on seniority, cases of nonreappointment often involve the collective judgment of senior faculty with respect to junior members. Unlike the industrial sector, where employment probation may involve six months to one year, academic probation can be as long as five to seven years, thereby greatly increasing the frequency of grievance claims by junior faculty.

Another potential area of conflict between academic arbitration and a collegial employment relationship is the widespread reliance on and acceptability of the American Association of University Professors (AAUP) Policy Statements and whether these documents can be juxtaposed on labor agreements without eroding their substance. The 1940 AAUP Statement of Principles codifies standards of academic freedom, and the 1958 AAUP Statement of Procedural Standards in Faculty Dismissal Proceedings sets forth procedural standards to be applied in faculty dismissal proceedings.<sup>9</sup> While the application of the 1958 Statement varies, the format is akin to advisory arbitration since *ad hoc* faculty hearing officers conduct due process hearings and make recommendations in the disposition of a claim. These recommendations are rarely, if ever, binding. The import of the process often transcends the individual claim because its impact on academic issues related to the employment relationship must be considered. The 1973 AAUP report on the Arbitration of

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<sup>9</sup>AAUP, *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments; Statement on Procedural Standards in Faculty Dismissal Proceedings (1958)*, in AAUP Policy Documents and Reports (Washington: AAUP, 1984), 3, 10.

Faculty Grievances and the 1983 Statement of Arbitration in Cases of Dismissal support the use of arbitration to resolve faculty status disputes.

The AAUP model of arbitration departs from the academic arbitration process negotiated in collective bargaining agreements in several areas. These modifications are not contained in any one document but have been compiled by the author from the four AAUP documents cited above, including the following:

1. Faculty participation in the form of a "mediative effort" prior to the arbitration stage should be encouraged.
2. The "mediative effort" should be continued by faculty selected to serve on the arbitration panel designated to hear the formal charges.
3. Individuals selected as arbitrators should be ". . . knowledgeable in the ways of the academic world, aware of the institutional implications of their decisions and, . . . , sensitive to the meaning and critical value of academic freedom . . . ." <sup>10</sup>
4. The individual grievant, rather than the bargaining agent, should control access to arbitration.
5. The arbitration process should not be limited to unionized schools.
6. The arbitrator should have full access to the ". . . substance of the record developed in the hearings before the faculty committee." <sup>11</sup>

The AAUP Statements raise several critical issues. The first two points emphasize a conciliatory approach consistent with the development of a nonadversarial process. The selection of neutrals who have prior experience in arbitrating higher education disputes is not supported by the practice in the profession. The fourth point, permitting individual faculty access to the arbitration process, is inconsistent with fundamental union security concepts and is indicative of a schism within the AAUP as to their role as a union or a professional association. The suggestion for arbitration at nonunionized institutions has not met with a large degree of compliance at present. The same may be said for providing the arbitrator with the substance of the record developed through the peer review process. Although the AAUP

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<sup>10</sup>AAUP, *Arbitration in Cases of Dismissal*, in AAUP Policy Documents and Reports, *supra* note 9, at 67.

<sup>11</sup>*Id.* at 68.

supports the use of arbitration to resolve certain faculty status disputes, it cautions that arbitration cannot and should not replace the faculty's primary responsibility of peer review and determination of who shall hold faculty appointments.

### **Arbitrability and the Role of "Academic Judgment"**

The restraints placed on the scope of what is reviewable in academic arbitration exceed that of virtually any other industry. The major difference between arbitration in the academic and industrial sectors lies in the issue of "academic judgment." Almost every agreement limits the arbitrator's ability to review academic judgment decisions, although no consensus exists between academic judgment and due process violations. An enigma has developed around the term, with administrators quick to argue that most appointment, retention, promotion, and tenure decisions (ARPT) must be classified as academic judgment issues while faculty unionists hold that the same questions involve due process violations subject to the arbitration procedure.

Most of the peculiarities and problems associated with academic arbitration are found within this area. Academic judgment may be defined as the routine use of collegial peer review and recommendations to appropriate administrative officials. It has been suggested that "academic judgment is surrounded by a mystique which has made it unassailable. It is said to be the collective judgment of the College and, therefore of one's peers. One should not question the judgment which is said to be the consensus of one's colleagues."<sup>12</sup>

An entire body of custom and practice has evolved requiring deferral by arbitrators to the sanctity of the academic judgment decision. Unless a review of academic judgment is specifically granted to the arbitrator, the arbitrator is constrained to rule only on procedural issues. The burden of proof is on the grieving party to show that the academic judgment violated the terms of the collective agreement or was done in an arbitrary or capricious manner.

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<sup>12</sup>Wolf, *The Gray Areas Between Due Process and Academic Judgment*, in *Campus Bargaining in the Eighties: A Retrospective and Prospective Look*, Proceedings of the Eighth Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education, ed. Aaron Levenstein (New York: Baruch College, 1980), 131.

Unless specifically authorized by contract, the arbitrator may not review or even consider the qualifications of a candidate involved in an ARPT grievance. The union, when placed in the difficult position of seeking to reverse a PTC decision, cannot obtain the information sought because the process is confidential. Academic judgment involves matters of academic policy and institutional needs and is not subject to arbitral review.

Those unfamiliar with the workings of the academic community are often surprised by the lack of substantive rights and protections afforded faculty in ARPT decisions. College presidents are generally not required to give any reasons for non-reappointment or other adverse personnel actions. If reasons are required, the president need not justify these reasons. As one arbitrator well versed in CBHE noted, "an unusual feature of academic agreements is that they provide so little protection in the area of substantial personnel actions which would at least be reviewable in many other arenas. These actions are appointment, retention, promotion and tenure."<sup>13</sup>

Although academic judgment has enjoyed an exempt status, there are signs, albeit minimal, that its immunity is eroding. Some contractual inroads have been made by faculty contracts giving arbitrators specific contractual authority to review academic judgment questions. This is the surest method of obtaining review.

Review of academic judgment decisions has also occurred in cases where college administrators have used improper or incomplete personnel files to reach their decisions. Procedural errors involving matters of substance (for example, failure to review all submitted materials) may serve as the basis to set aside a decision and permit further review. When an academic judgment grievance is sustained, however, the remedies are greatly constricted. Arbitrators are usually limited to a remand to correct the procedural deficiency. Often this involves resubmission of the claim to the same faculty committee which originally deliberated the matter. After reconsideration they once again reach the same decision, but this time no procedural violations are noted. Some agreements provide for remand to select faculty review committees; others presume the status quo for an

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<sup>13</sup>Benewitz, *Arbitration in Higher Education: Is Academic Arbitration "Sui Generis"?* in *The Legal and Economic Status of Collective Bargaining in Higher Education*, *supra* note 5, at 63.

additional year while the new deliberations are ongoing. In virtually no case may the arbitrator award the ARPT decision sought by the grievant.

### **Requirements of Confidentiality in the Peer Review Process**

Academic freedom requires the deliberations and proceedings of peer evaluators to be privileged and confidential. The need for anonymity is based on the perception that protection is needed by those conducting reviews and evaluations and that to do otherwise seriously jeopardizes the process. The conflict between confidentiality and due process persists. Confidentiality is vigorously defended when the issue involves faculty peer review. When personnel decisions are made by college administrators, however, the demand by administrators for privilege and confidentiality is challenged by faculty, who argue that due process guarantees access to all available information.

This conflict between confidentiality and due process, and academic arbitration in an employment relationship built on collegiality, is inherent in the process as long as the vast majority of academic personnel decisions are conducted in secret sessions. A faculty member involved in an ARPT action needs only to be told the consensus outcome of the decision. Information as to the vote count, how individual faculty members voted, and the reasons for their actions are not revealed. It is a long-standing and widely accepted premise of the academic community that the decisions of peer evaluators and the PTCs are confidential. The PTC administrative proceedings are presumed free of error and are not subject to arbitral review.

In cases involving allegations of bias, grievants are routinely denied substantive data, thereby limiting them to procedural arguments. If a Title VII civil rights violation is alleged, the claimant may go into court and argue the need to breach the confidentiality barrier and demand access to all materials and records used in the deliberative processes.

As the review below indicates, decisions involving discrimination cases arising out of unfavorable ARPT actions in the context of the academic freedom/confidentiality issue are voluminous and mixed.

The federal courts have refused to extend the concept of absolute privilege from disclosure to faculty peer evaluators. *In*

*re Dinnan*<sup>14</sup> denied a claim that academic freedom conferred an absolute shield from disclosure of a vote taken by a promotion review committee. Professor Dinnan was ordered to reveal his vote, refused to, and was subsequently found guilty of contempt of court and jailed. In *Gray*,<sup>15</sup> where a balancing test was applied, the court held that "absent a statement of reasons, the balance tips towards discovery and away from recognition of privilege." Gray was entitled to discover the vote of the PTC in order to proceed in a civil rights case that he initiated.

The question of disclosure of peer review proceedings to investigative agencies was addressed in two EEOC matters. In *EEOC v. University of Notre Dame du Lac*,<sup>16</sup> the court upheld the qualified privilege doctrine and allowed EEOC access to certain limited information but shielded the identities of peer evaluators. The qualified academic privilege doctrine was rejected in *Franklin and Marshall*,<sup>17</sup> where the court found the investigative powers of the EEOC controlling over the institution's claim of an academic freedom privilege.

Another instance in which due process rights have been extended to individual faculty members is *Board of Regents v. Roth*,<sup>18</sup> where the U.S. Supreme Court granted a due process hearing to faculty who, as a result of adverse personnel actions, had either been denied an interest in "liberty" or had previously established a "property interest" in their continued employment. Although *Roth* has not been utilized as a means of gaining reconsideration of unfavorable ARPT arbitration awards, it does move the review process beyond where it had been.

While these cases signal some erosion in the invincibility of academic confidentiality, faculty seeking information to buttress their grievances, absent proof of procedural error, will often be denied. If confidentiality or due process rights have been violated by the employer, it is doubtful that the issue can be success-

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<sup>14</sup>In *re Dinnan: Blaubeergs v. Board of Regents*, 661 F.2d 426, 430, 27 FEP Cases 288 (5th Cir. 1981), *cert. denied sub nom. Dinnan v. Blaubeergs*, 457 U.S. 1106, 28 FEP Cases 1656 (1982).

<sup>15</sup>*Gray v. Board of Higher Educ. of City of New York*, 692 F.2d 901, 30 FEP Cases 297 (2d Cir. 1982).

<sup>16</sup>715 F.2d 331, 32 FEP Cases 1057 (7th Cir. 1983).

<sup>17</sup>*EEOC v. Franklin & Marshall College*, 775 F.2d 110, 39 FEP Cases 211 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163, 40 FEP Cases 1617 (1986).

<sup>18</sup>408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 118 LRRM 3041 (1985), where the Court held that public employees must receive all procedural rights to which they are entitled including, if applicable, a pretermination hearing.

fully raised as a defense for a breach of standards. With a few noted exceptions, the courts do not intervene nor do they reverse arbitration awards. The long-standing practice of deferral to arbitration is widely accepted and noted.<sup>19</sup>

Although the vast majority of arbitrators do not conduct independent factual inquiries, those who try to obtain additional information, or who are curious as to why such information has not been introduced into the record, will most certainly be advised of the confidentiality of the process.

### Summary and Conclusions

Arbitration of faculty status issues remains a viable means of dispute resolution on unionized campuses. The deferral accorded the arbitration system and individual arbitrators by the courts and administrative agencies is well established. A widely accepted anti-interventionist policy is practiced by the judiciary for reviewing college and university institutional employment practices. Exceptions are noted, most frequently in the field of equal employment.<sup>20</sup>

Opponents of faculty unionization cite academic arbitration as an example wherein collective bargaining is inherently contradictory to peer review and a collegial employment relationship. They ask how can an outside arbitrator evaluate peer review decisions without intruding on the nature of faculty governance.

The effect of arbitral remedy remains unclear, as arbitrators are frequently limited to procedural remands to the very committee that made the decision that gave rise to the grievance. It is hardly a victory for faculty "successful" in their grievance to discover that they must begin the process all over again with the same peer review participants.

A source of conflict continues between those seeking to grieve ARPT decisions and academic traditionalists who hold that aca-

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<sup>19</sup>A contrary view was set forth in *Dixon v. Rutgers*, 215 N.J. Super. 333, 521 A.2d 1315 (1988). The New Jersey Superior Court, affirming the judgment of the appellate division, held that the collective bargaining agreement between Rutgers and the AAUP "does not preclude discovery of peer review materials." Professor Dixon had appealed an adverse tenure and promotion decision, arguing that she was entitled to discovery of confidential letters from outside evaluators. The university claimed that an academic freedom privilege existed and that they should not be required to disclose these external confidential letters.

<sup>20</sup>See *Alexander v. Gardner-Denver*, 415 U.S. 36, 7 FEP Cases 81 (1974), in which the Court held that the Title VII rights of an employee may not be limited even after an adverse arbitration award.

democratic judgment determinations are not subject to arbitrable review. Contract language suggests that arbitrators have jurisdiction only on procedural grounds. What decisions fall under the cloak of academic judgment and are immune from review is still an open question. As facets of the employment relationship have become more protected, so have the rights of faculty seeking review of unfavorable ARPT decisions. While academic judgment is memorialized in a majority of collective bargaining agreements in higher education as beyond the scope of arbitral review, some erosion of this concept, especially in discrimination claims, may be occurring.

Academic arbitration remains a conservative process with both faculty unionists and college administrators relying, to a large degree, on the procedural models developed in the industrial sector more than 50 years ago.

### **Comment—**

JAMES P. BEGIN\*

My reaction to Joel Douglas' paper focuses primarily on questions of concern to arbitrators handling cases in higher education: How do the procedures work in practice? What peculiar problems occur in running a hearing and writing an award? Unfortunately, research on the operation of faculty grievance and arbitration procedures is surprisingly sparse. Therefore, I must rely on information derived from my own cases and from the operation of the faculty grievance process at Rutgers University, where the faculty has been unionized since 1970. How courts deal with related issues is also informative.

As Joel has pointed out, the biggest difference in the arbitration process under faculty contracts compared with most other contracts is that in order to protect substantive "academic judgment," the scope of arbitration is limited to alleged procedural violations of appointment and promotion rules and regulations in most four-year faculty agreements. The "academic freedom" rationale for this limitation dates back centuries and derives from the perceived need to prevent outside interference with the ability of professors to think and speak freely.

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The remedies that arbitrators can award are normally limited to remanding the appointment or promotion decision to the appointment and promotion process for correction of the procedural errors; rarely may an arbitrator grant promotion or tenure as a remedy. As Joel has pointed out, the fact that a majority of faculty grievances deal with the appointment and promotion process represents a significant difference from other occupational groups. If I have a disagreement with Joel, it is that I feel this difference is more important to arbitrators and the arbitration process than he does.

The best way to illustrate this conclusion is to relate my experience with higher education faculty cases. One case I arbitrated dealt with a labor economist who challenged her university for failing to reappoint her. She alleged both age and sex bias, and had to prove her case using only procedural violations. She was not allowed to get to the substance of whether her scholarly performance with respect to publications was sufficient for reappointment.

The problem with this approach is that you get as proof a long list of disconnected, often nitpicking, procedural allegations. For example, this case included 16 categories of alleged procedural violations (with many issues in each category), ranging from an allegation that her chair did not consider all her research evidence (a serious procedural violation in my opinion), to less serious allegations that her chair omitted her name from the college catalogs, looked at her funny at one meeting, and excluded her from another. At Rutgers a case with which I am familiar included an alleged procedural violation that the dean in his curriculum vitae forgot to list the grievant's name on one of several co-authored publications.

Proving bias or any other kind of allegation on procedural grounds alone is a difficult task for the employee and the union. Although cases at Rutgers are frequently remanded for the correction of procedural violations, only a tiny percentage of the grievants have ever succeeded in getting reappointed, promoted, or tenured through the grievance process. Why? Because the correction of procedural violations does not change the quality or quantity of a faculty member's publications. The process is loaded with faculty who build long lists of procedural allegations in the hope that the result will grant what has been denied. The stakes are high since professional reputation and ability to get a good academic job are on the line. In the process

much time and money are wasted, and, since many allegations are directed against one's peers, the impact on a unit's psychological climate is substantial.

As an arbitrator, I feel uncomfortable with this situation. In the above case I wish that I could have compared her scholarly record with that of younger, male colleagues who had been reappointed or been given tenure. But I could not do this because it concerns academic judgment. As it turned out, I would have felt comfortable dealing with the merits of this case since I am familiar with labor economics as a discipline. If the grievant had been a physicist, however, my confidence might have been less, although once a reappointment or promotion decision moves beyond a particular discipline, administrators, faculty, or governing board members who participate in higher level reviews rarely possess any more ability to judge the merits of a physicist's scholarly work than I did. So I personally think the procedural limitation is unreasonable.

However, I do not think there will be an early end to the procedural violation limitation. There has been a long history in higher education of successfully preventing third parties like courts from making academic judgment evaluations. The research of legal scholars indicates that the courts have only rarely intervened in the academic judgment arena. When they did, they exercised considerable restraint in overturning peer reviews of individual faculty members' scholarship, teaching, or academic service. One author concluded:

Analysis of the opinions of federal courts in litigation over faculty employment matters indicates that judicial deference to the academic and professional judgments of faculty and administrators is still the norm. Where constitutional or civil rights are involved, courts are more likely to examine the procedures used and, less frequently, to examine the substance of the decision. Even in those cases where a plaintiff has alleged that a peer review decision was tainted with bias and thus was illegal, courts have been most reluctant to scrutinize, much less to overturn, the judgments of faculty concerning their peers, and the courts have done so only in those cases where either procedural and substantive violations were intertwined or the misconduct alleged appeared to be undeniable.<sup>1</sup>

Another study illustrates the difficulty in achieving reappointment, promotion, or tenure by court action, finding that in

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<sup>1</sup>Lee, *Federal Court Involvement in Academic Personnel Decisions: Impact on Peer Review*, 56 J. Higher Educ. 38-54 (1986).

academic discrimination cases it is rare to obtain such a result by court action.<sup>2</sup> With this legal history it is doubtful that many institutions of higher education will grant arbitrators what they have fought for and won in the courts, in spite of the argument that a carefully designed arbitration procedure is an effective substitute for time-consuming, costly, tension-producing, and unnecessary grievances and court cases. So the erosion which Joel has pointed to is not likely to proceed very swiftly.

I now turn to another issue alluded to by Joel that arbitrators of faculty cases may experience: the confidentiality of (1) letters obtained as a part of the promotion and tenure process from scholars at other institutions evaluating performance of the grievants, (2) materials relating to the performance of colleagues of the grievants, and (3) deliberations of faculty and administrators involved in the promotion and tenure process. As with issues of academic judgment, institutions of higher education have often taken the position that grievants may not have access to such materials or use them in their cases, and have attempted to exclude these materials from discovery.

Sometimes contractual language guides the arbitrator in dealing with these issues. For example, the Rutgers agreement does not make outside letters of recommendation available to grievants, but it does permit two neutral faculty members to review the letters and answer questions about them for the purpose of the grievance proceeding. The agreement does not permit grievants to have access to promotional materials of other faculty.

The courts have dealt with this issue a number of times in recent years. Without going into detail on remedies fashioned by the courts, I can say that one study of legal decisions found that courts prevented discovery in some cases and permitted it in others, and that, on balance, the need for access to this information on the part of plaintiffs was not given proper weight.<sup>3</sup>

A recent New Jersey Supreme Court decision involving Rutgers indicates that things may be changing. The court ruled that the plaintiff had a basic right in a discrimination suit to have access to the promotion material of colleagues who were promoted when she was not. The court reasoned: otherwise, how

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<sup>2</sup>LaNoue and Lee, *Academic Discrimination* (Ann Arbor: U. of Mich. Pr., 1987).

<sup>3</sup>DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?* 1 J. Coll. & Univ. L. 121-131 (1987).

would you know she was discriminated against? The court ruled that she also should have access to her confidential outside letters, subject to controls to protect the authors. It took only about 10 years of litigation to get this ruling.

In closing, I hope that someday there is more systematic research into the issues discussed here. If other occupations begin to use peer review (and this is developing), and if those already using such mechanisms to make personnel decisions become unionized as they are in other countries, then insights gained from such research will be helpful. Perhaps we can also learn by studying how other countries deal with these difficult issues.

## II. MATURE COLLECTIVE BARGAINING RELATIONSHIPS

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### **Purpose of the Study**

A primary goal of this study was to develop case studies of mature collective bargaining relationships. The aim was to highlight the positive aspects of collective bargaining by documenting progress made by managements and unions in moving from an adversarial posture to one of cooperation. The approach was to identify exemplary cases of stable, mature, and generally peaceful labor-management relationships.<sup>1</sup>

Almost 40 years have passed since the National Planning Association published, in 1949, *Causes of Industrial Peace*,<sup>2</sup> a landmark study of selected cases involving stable and harmonious labor-management relations. By adopting a standard approach, its authors were able to synthesize their observations and analyses to make a major contribution to the knowledge of our industrial relations system as it adjusted to change.

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<sup>1</sup>U.S. Department of Labor, Request for Proposal L/A 85-18, C-3.

<sup>2</sup>National Planning Association, *Causes of Industrial Peace* (Washington: NPA, 1949).