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INTRODUCTION

Many school boards, and other public employers as well, find themselves under increasing union pressure to include in their labor agreements "seniority" and "grievance and arbitration" provisions modeled upon those commonly found in private sector union contracts. The wide acceptance of such provisions in the private sector[1] makes resistance to such demands during negotiations difficult. Indeed, it appears that increasing numbers of public employers are yielding to these union demands and are inserting seniority and/or grievance and arbitration provisions in their collective bargaining agreements.[2] Use of private sector contract models in the public employment sphere, however, ultimately may prove to be a costly mistake.

The "due process" provisions embodied in the fifth and fourteenth amendments to the United States Constitution[3] continue to generate court rulings

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[1] Ninety-six percent (96%) of 400 representative private sector union contracts examined by the Bureau of National Affairs, Inc. in early 1975, contained grievance and arbitration provisions. 50 DLR B-1, B-4 (March 13, 1975). *See also,* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1729, CHARACTERISTICS OF AGREEMENTS COVERING 2,000 WORKERS OR MORE, 70 (1972).

[2] Seventy-nine-percent (79%) of the bargaining agreements covering employees of state and local governments examined in a recent study contained grievance procedures culminating in binding arbitration of grievance disputes. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1833, GRIEVANCE AND ARBITRATION PROCEDURES IN STATE AND LOCAL AGREEMENTS, (1975). *See generally,* Ullman and Begin, *The Structure and Scope of Appeals Procedures For Public Employees,* 23 IND. & L. REL. REV. 323 (1969-70). *See, e.g.,* Board of Educ. of the Sch. Dist. of Philadelphia v. Philadelphia Federation of Teachers, Local No. 3, 346 A.2d 35 (Pa. 1975).

[3] The fourteenth amendment states in pertinent part: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . ." Similarly, the fifth amendment, which is applicable to actions of the federal govern-

against public employers whose decisions to discharge, discipline, or otherwise alter the status of their employees are considered by the courts to invade those employees' constitutionally protected "liberty" or "property" rights.[4] Meanwhile, identical actions taken by private non-governmental employers continue to be practically immune from such judicial scrutiny.[5] Consequently, as a result of the "due process" constraints on public employers which already exist, public employers which "merely" transport into their public sector labor agreements such well established private sector principles as seniority clauses and grievance and arbitration provisions may be granting to their employees *far greater rights,* at *far greater cost,* than their private sector counterparts.

An earlier article in this Journal discussed at length some of the leading court decisions dealing with the due process rights of public employees.[6] Moreover, because the legal evolution of this field is far from complete,[7] little purpose would be served by an additional analysis of those cases. However, before embarking on the principal task of this article—an examination of whether it makes "sense" for public employers to utilize private sector grievance, seniority and other such models and concepts in public sector labor

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ment, states: ". . . [nor shall any person] be deprived of life, liberty, or property, without due process of law . . ." The constitutions of many states also contain "due process" clauses similar to those quoted above.

[4] Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 406 U.S. 593 (1972); Roane v. Callisburg Indep. Sch. Dist., 511 F.2d 633 (5th Cir. 1975); Mims v. Board of Educ. of the City of Chicago, 523 F.2d 711 (7th Cir. 1975); Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975); Skehan v. Board of Trustees at Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983, 95 S.Ct. 1986 (1975); Hortonville Educ. Ass'n v. Hortonville Joint Sch. Dist. No. 1, 225 N.W.2d 658 (Wis. 1975), *cert. granted,* 44 USLW 3180 (U.S. October 6, 1975); Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968). *See also,* Board of Regents v. Roth, 408 U.S. 564 (1972); Civil Service Commission of City and Cty of Denver v. District Court of 2nd Judicial Dist., 527 P.2d 531 (Colo. 1974). *But see,* Boehning v. Indiana State Employees Ass'n, No. 74-1544 (U.S. Nov. 11, 1975), wherein the Court, reversing the Seventh Circuit, applied the abstention doctrine to preclude plaintiffs' federal court action until their right to a pre-termination hearing under state law had first been determined.

[5] As the Fifth Circuit Court of Appeals explained in Hines v. Cenla Community Action Committee, 474 F.2d 1052, 1058 (5th Cir. 1973): "This right [to due process under the fourteenth amendment] applies only to jobs held in public employment." It continued: "Since the plaintiff in the present case was not employed by the state and there was no state involvement in her employment, procedural safeguards guaranteed by the Fourteenth Amendment did not apply to her private contractual employment." *See also,* Adickes v. S.H. Kress and Co., 398 U.S. 144, 169 (1970); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Joy v. Daniels, 479 F.2d 1238 (4th Cir. 1973). *But see,* Holodnac v. Avco Corp., 514 F.2d 285 (2d Cir. 1975).

[6] Ashe and Gerard, *Procedural Due Process and Labor Relations in Public Education: A Union Perspective,* 3 J. OF L. & EDUC. 561 (1974).

[7] The United States Supreme Court has recently agreed to review three decisions dealing with the constitutional due process property rights of public employees. Hortonville Educ. Ass'n v. Hortonville Joint Sch. Dist. No. 1, 225 N.W.2d 658, *cert. granted,* 44 USLW 3180 (U.S. Oct. 6, 1975), Bishop v. Woods, 498 F.2d 1341 (4th Cir. 1974), *cert. granted,* 44 USLW 3222 (U.S. Oct. 14, 1975); Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975), *cert. granted,* 44 USLW 3222 (U.S. Oct. 14, 1975).

agreements—a brief review of the law in this area may be helpful in focusing attention on the nature and scope of the problem which now confronts school boards and other public employers with unionized employees.

THE "LIBERTY" CONCEPT AND DUE PROCESS OF LAW

Recent court decisions have clearly established that a public employer may not deprive its employees of liberty without first granting such employees certain due process of law protections. In *Board of Regents v. Roth*,[8] the United States Supreme Court indicated that a public employee's constitutionally protected right to liberty is invaded when his "good name, reputation, honor and community standing" are jeopardized by the public employer's action.[9] As the Fifth Circuit Court of Appeals recently stated:

> A liberty interest arises, for example, when one is publicly subjected to a badge of infamy, such as being "posted" as a drunkard . . . . It arises when an employee is able to demonstrate that the state has made a charge "that might seriously damage his standing and associations in this community" or that is of such a nature as to impose "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities". . . . Moreover, to raise a liberty interest such charges must be public ones; we have recently held that even charges of the most damaging nature do not do so by their mere presence in confidential files.[10]

A public employee's possession of a liberty right *does not depend* upon such factors as tenure rights, contractual provisions, or length of service, but rather upon the seriousness of a public accusation upon the employee's standing in the community.[11] Although the *events* giving rise to a public employee's claim that his liberty has been unlawfully violated frequently arise in the employment context, the duties of the public employer in such a case are tested by standards unrelated to the *structure and substance* of the employment relationship itself, and therefore the liberty right concept will not be further discussed in this article.

THE "PROPERTY" RIGHTS OF PUBLIC EMPLOYEES

Constitutional "due process" requirements also protect the "property" rights of public employees. However, in this regard, it is important to recognize that public employees do not possess protected property rights to their job merely by virtue of their employment relationship. As the Tenth Circuit Court of Appeals recently stated:

> . . . Public office or employment generally is held not to be a property interest within the meaning of the Fourteenth Amendment.[12]

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[8] 408 U.S. 564 (1972) [hereinafter cited as Roth].

[9] *Id.* at 573.

[10] Kaprelian v. Texas Women's University, 509 F.2d 133, 137 (5th Cir. 1975).

[11] Termination of a public employee, or failure to rehire or renew a public employee's employment agreement, *standing alone* is not considered such a deprivation of reputation as to constitute a "liberty" interest. *See, e.g.*, Roth, at 575; *see also* Burdeau v. Trustees of California State Colleges, 507 F.2d 770 (9th Cir. 1974).

[12] Abeyta v. Town of Taos, 499 F.2d 323, 327 (10th Cir. 1974).

Consequently, according to the courts, public employees who do not have tenure, civil service, contractual or other job protections merely serve their employer "at will" and can be terminated at any time for any permissible reason without a hearing or other due process procedures.[13]

Although a constitutionally protected "property" right to one or more attributes of public employment is not created by the employment relationship itself, it is affected by the *structure and substance* of that relationship. Thus, protected "property" rights, where they are found to exist, have their origin in the state and local ordinances, rules and regulations, agreements and common practices which have defined the attributes of public employment in a particular instance. As the Supreme Court explained in the *Roth* case:

> Property interests, of course, are not created by the Constitution. Rather, they 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.[14]

Of central importance to the public administrator, then, must be the initial inquiry, "What gives rise to a constitutionally protected property right in the public employment sphere?" The answer to this question is—it depends upon a number of things.

Property rights may arise, for example, by statutes such as those granting employees tenure[15] or civil service protections;[16] they may arise by individual agreement between the employing governmental unit and the employee involved;[17] and they may arise without any formal agreement at all, if, in view of all of the surrounding circumstances, a court can be convinced that there was, in fact, an understanding that the employee would be accorded continued employment in his job.[18] The breadth of the judicial decisions in this area strongly supports the conclusion that, when squarely confronted with the question, the courts will hold that a collective bargaining agreement between a public employer and a union representing that employer's public employees is sufficient to vest in those employees a constitutionally protected property interest in the employment conditions it establishes.

It is important to note that the employment related "property" rights of

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[13] As the law has developed, public employers may, for this reason, "choose to employ personnel without imbuing them with job tenure or civil service type rights of job continuity." McDowell v. State of Texas, 465 F.2d 1342, 1348 (5th Cir. 1971), *cert. denied,* 410 U.S. 943 (1973).

[14] Roth, at 577.

[15] *Cf.,* Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972).

[16] Russell v. Hodges, 470 F.2d 212 (2nd Cir. 1972); Palermo v. Eisenberg, 367 N.Y.S. 2d 378 (1975). *See* Goss v. Lopez, 419 U.S. 565 (1975). *But see,* Bishop v. Wood, 498 F.2d 1341 (4th Cir. 1974), *cert. granted,* 44 USLW 3222 (U.S. Oct. 14, 1975).

[17] Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983, 95 S.Ct. 1986 (1975); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *Cf.,* Roane v. Callisburg Indep. Sch. Dist., 511 F.2d 633 (5th Cir. 1975).

[18] Perry v. Sinderman, 406 U.S. 593 (1972) [hereinafter cited as Sindermann]; Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1072). *But see,* Bishop v. Wood, 498 F.2d 1341 (4th Cir. 1974), *cert. granted,* 44 USLW 3222 (U.S. Oct. 14, 1975).

teachers and other public employees have been held to extend far beyond the mere right to be free from summary termination of employment. Indeed, the "due process" protection of property rights has been extended by the courts to:

1. Disciplinary suspensions from work;[19]
2. Demotions or transfers;[20a]
3. Lay-offs because of lack of funds or otherwise.[21]

And, in one recent case, the Second Circuit Court of Appeals indicated that, under certain circumstances, the constitutional requirement of "due process" may also extend to the action of a public employer in selecting or by-passing an employee for promotion.[22]

The growing number of judicial decisions similar to those outlined above clearly demonstrates the practical public sector impact of many contract clauses common in the private sector. The public sector employer which binds itself contractually to dismiss employees only for "just cause," for example, has with virtual certainty created a constitutionally protected right to continued employment in the future.

Likewise, a public employer which agrees to assign regular work, or overtime, to promote employees, to reduce its workforce, or to recall employees from layoff on the basis of an objective criterion such as "seniority" may be creating similarly protected property rights which may well subject its decisions in those vital areas to the constitutional requirements of "due process."

Good reasons may exist for agreeing to such provisions. However, before such agreement is reached, every public employer should carefully consider the possibility that by adopting such contractual provisions, it is not only limiting its ability to manage its affairs in a fashion similar to the limitations accepted by private sector employers, but *also* creating constitutionally protected property rights where none previously existed. As will be discussed below, the protected nature of these rights may impose further limitations on the public employer, and generate new problems, which do not confront the private sector employer.

THE REQUIREMENTS OF DUE PROCESS

As noted above, once the existence of a property right has been established, by contract or otherwise, a public employee's enjoyment of that "right" can be adversely affected only after the employee has been provided the constitutional protections of due process of law. Unfortunately for the public adminis-

[19] Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975).

[20] Daniel v. Porter, 391 F.Supp. 1006 (W.D.N.C. 1975); *See also,* Civil Service Commission of City and Cty. of Denver v. District Court of Second Judicial Dist., 527 P.2d 531 (Col. 1974).

[20a] Confederation of Police v. City of Chicago, —F.2d—, 91 LRRM 2195 (7th Cir. 1976).

[21] Mims v. Board of Educ. of City of Chicago, 523 F.2d 711 (7th Cir., 1975); Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974).

[22] Schwartz v. Thompson, 497 F.2d 430, 433 (2nd Cir. 1974), wherein the Court stated, "While one can conceive of circumstances where a promotion would be virtually a matter of right—for example, where it was solely a function of seniority or tied to some other objective criteria—this is not such a case." *See also,* Koscherak v. Schmeller, 363 F.Supp. 932 (D.C.N.Y. 1973), *aff'd,* 415 U.S. 943 (1974); Council of Directors and Supervisors of L.A. City Schools v. L.A. Unified Sch. Dist. of L.A. Cty, 110 Cal. Rptr. 624 (Cal. App. 1973).

trator, there is virtually no judicial agreement on what "due process" steps are required in the employment area.[23] Indeed, it is the very nature of due process that specific rules cannot be laid down with absolute certainty. As the Supreme Court stated in *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy:*

> . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. "[D]ue process unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances." [24]

The list of due process "requirements" imposed by courts in non-employment situations such as the denial of welfare benefits is imposing.[25] As stated in *Goldberg v. Kelly,*[26] due process entails:

1. Timely advance notice of the action contemplated by the government and the reasons for that action;
2. An effective opportunity for persons affected by the proposed action to respond through a hearing;
3. The right to present evidence;
4. The right to confront adverse witnesses;
5. The right of cross-examination;
6. The right to be represented at the hearing by counsel;
7. The right to have a decision based solely upon applicable legal rules and the evidence adduced at the hearing;
8. The right to an impartial decision-maker;
9. The right to a statement by the decision-maker of reasons for the decision.

Not all of these requirements appear to have found their way into the context of public employment rights—yet. But the list of requirements which have been accepted in this area is long, and getting progressively longer.[27] Thus, there are now on the books court decisions requiring public employers to provide:

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[23] *See generally, Non-Tenured Teachers and Due Process: The Right to a Hearing and Statement of Reasons,* 29 WASH. & LEE L. REV. 100 (1972).

[24] Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

[25] Similar requirements must be met in unemployment compensation matters. California Human Resources Department v. Java, 402 U.S. 121 (1971); Fusani v. Steinberg, 364 F.Supp. 922 (D.Conn. 1973), *vacated on other grounds,* 419 U.S. 379 (1975).

[26] Goldberg v. Kelly, 397 U.S. 254 (1970).

[27] Perhaps the most succinct description of the due process rights which must minimally be accorded public employees before a property interest is taken from them was stated by the Fifth Circuit Court of Appeals in Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970), wherein the Court stated that minimum procedural due process requires that:

> "(a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
>
> (b) he be advised of the names and the nature of the testimony of witnesses against him,
>
> (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,
>
> (d) that the hearing should be before a tribunal that both possesses some academic expertise [the case involved a teacher] and has an apparent impartiality toward the charges."

1. Advance notice of any charges against the employee;[28]
2. A hearing prior to taking any action against the employee;[29]
3. An impartial decision-maker to hear the matter and render a decision;[30]
4. The right at the hearing to representation by counsel;[31]
5. The further right at the hearing of the employee to confront his accusers;[32]
6. The right at the hearing to cross-examine witnesses;[33] and
7. The right to a written decision.[34]

In addition to these rights public employees have insisted, though unsuccessfully so far, that any hearings must be open to the public[35] and that the formal legal rules of evidence be applied in any such hearing.[36]

It thus becomes the unenviable task of the public administrator to devise a system which will meet all the due process requirements a court—with the admirable accuracy of hindsight—will feel are appropriate for each constitutionally protected property right established by a collective bargaining agreement, or otherwise. This may prove to be no small task.

THE PRIVATE SECTOR SOLUTION—AND WHY IT WON'T WORK

In private sector labor agreements, the almost universally accepted mechanism for resolving contractual disputes over the rights of the parties is a grievance system which culminates in final and binding grievance arbitration by an impartial third party arbitrator. Such grievance and arbitration provisions are designed to operate "after the fact." That is, they are consciously designed to function as a mechanism for *subsequent review* of mana-

[28] Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974); Horton v. Orange Cty Bd. of Educ., 464 F.2d 536 (4th Cir. 1972); Olson v. Regents of the Univ. of Minnesota, 301 F.Supp. 1356 (D.Minn. 1969). *See also,* the cases cited in note 29, *infra.*

[29] Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975); Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983, 95 S.Ct. 1986 (1975). *But see,* Arnett v. Kennedy, 416 U.S. 134 (1974); Davis v. Vandiver, 494 F.2d 830 (5th Cir. 1974); Vance v. Chester Cty Bd. of Sch. Trustees, 504 F.2d 820 (4th Cir. 1974); Brubaker v. Board of Educ. Sch. Dist. 149, 502 F.2d 973 (7th Cir. 1974), *cert. denied,* 421 U.S. 965 (1975).

[30] Hortonville Educ. Ass'n v. Hortonville Bd. of Educ., 225 N.W.2d 658 (Wis. 1975), *cert. granted,* 44 USLW 3180 (Oct. 6, 1975); Hostrop v. Board of Junior College District No. 575, 471 F.2d 488 (7th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973). *But see,* Burnley v. Thompson, 524 F.2d 1233 (5th Cir. 1975); Robinson v. Wichita Falls and North Texas Community Action Corp., 507 F.2d 245 (5th Cir. 1975); Nelson v. Kleepe, 494 F.2d 514 (5th Cir. 1974); Davis v. Vandiver, 494 F.2d 830 (5th Cir. 1974); Simard v. Board of Educ. of Town of Groton, 473 F.2d 988 (2nd Cir. 1973).

[31] Olshock v. Village of Skokie, 401 F.Supp. 1219 (N.D. Ill. 1975). Buggs v. City of Minneapolis, 358 F.Supp. 1340 (D.Minn. 1973). *But see,* Vance v. Chester Cty Bd. of Sch. Trustees, 504 F.2d 820 (4th Cir. 1974).

[32] Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 1651 (concurring opinion of Justice Powell); Kelley v. Herak, 252 F.Supp. 289 (D.Mont. 1966).

[33] Kelley v. Herak, 252 F.Supp. 289 (D.Mont. 1966); Buggs v. City of Minneapolis, 358 F.Supp. 1340 (D.Minn. 1973).

[34] Antinore v. State of New York, 79 Misc.2d 8 (Monroe City 1974). This case was reversed on other grounds, though the reversing court indicated approval of this portion of the lower court's holding, Antinore v. State of New York, 371 N.Y.S.2d 213, 216 (App. Div. 1975).

[35] Dougherty v. Walker, 349 F.Supp. 629, 645–46 (N.D.Mo. 1972), *rev'd on other grounds* (8th Cir., August 23, 1973).

[36] Jaeger v. Stevens, 346 F.Supp. 1217 (D.Colo. 1971).

gerial decisions which have already been made; they are not designed to challenge decisions as the decisions are being made. Thus, if an employer has issued an improper order, or even wrongfully terminated an employee, the employee must carry out the order (absent threat to safety), or vacate the premises if termination is involved. Only later may the employee file a grievance to question the propriety of the managerial action taken. By fashioning grievance and arbitration provisions in this manner, private sector employers have maintained their ability to take *prompt action* whenever they are confronted with an unexpected change in business conditions, disciplinary problems, or even the occurrence of strikes or other unanticipated work stoppages.[37]

In contrast, many of the constitutional "due process" requirements applicable to public employers are designed to operate during the decision making process itself. These requirements, fashioned by courts rather than arbitrators, are intended to *slow down* the action of public officials at least to the extent necessary to ensure that the officials have given fair consideration to the competing interests of all of those whose interest will be affected.[38] Although the wisdom of such delay is questionable in the public employment context,[39] the fact remains that the courts continue to require it.[40] It is a fact of life which the public employer, unlike his private sector counterpart, must face.

Because of the fundamental differences in the underlying purpose of a

[37] A decision by Arbitrator Shulman more than 30 years ago, propounding a principle still widely followed, aptly illustrates this point. Holding that employees acted improperly in refusing to accept job assignments they believed violated the union contract, Arbitrator Shulman stated:

> "But an industrial plant is not a debating society. . . . When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. . . . It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision." Ford Motor Co., 3 Lab. Arb. 779, 781 (1944).

[38] As Daniel Webster observed in Dartmouth College v. Woodward, 4 Wheat 519, 581 (1819), due process of law is intended to mean a law "which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

[39] Public employers certainly have no less need than their private sector counterparts for the ability to deal promptly, efficiently and effectively with constantly changing conditions by altering their internal work responsibilities and job assignments. Similarly, the need to maintain order and discipline within an employer's workforce does not diminish simply because an employer is a public agency or instrumentality, particularly where strikes are involved. *Compare,* Rockwell v. Board of Educ. of the Sch. Dist. of Crestwood, 227 N. W.2d 736 (Mich. 1975) (discharge of tenured striking teachers without providing due process protection, sustained) *with* Hortonville, Educ. Ass'n v. Hortonville Joint Sch. Dist. No. 1, 225 N. W.2d 658, *cert. granted,* 44 USLW 3180 (U.S. Oct. 6, 1975) (discharge of striking teachers without first providing due process protection violates Constitution). *See also,* Lake Michigan College Fed. of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 622 GERR B-5 (6th Cir. 1975) (discharge of striking teachers sustained).

[40] *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134 (1974), (Powell, J., concurring); Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975); Skehan v. Board of Trustees of Bloomsburg College, 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983 (1975).

grievance and arbitration procedure on the one hand and due process requirements on the other, the typical private sector grievance and arbitration procedure is likely to be ill-suited for satisfying a public employer's due process obligations. Although the private sector procedure is far faster than a court proceeding, it is likely to prove far too time-consuming to a public administrator who, like his private sector counterpart, is faced with a need for prompt action but who, unlike his private sector counterpart, must meet the procedural due process requirements of the Constitution *before* a decision to act can be reached. To the extent that the Constitution requires effective action to cease while a hearing is held, private sector grievance and arbitration principles are of little aid indeed.

The typical private sector grievance and arbitration contractual provision may also fail to meet the needs of public employers even when applied in situations in which the reviewing function predominates. Consequently, even if the courts were to no longer require pre-decision hearings, private sector arbitration procedures would still most likely not meet emerging public sector due process requirements.

Private procedures, though designed to be fair, are not fancy. Many of the "legal niceties" common to litigation before the courts are by design not present in arbitration. For example, during arbitration the "legal" rules of evidence are not normally applied to exclude "hearsay" or other forms of "evidence" which a court of law would refuse to consider.[41] Often no formal transcript is made of the proceedings. In many cases attorneys are not used by one or both parties to present their cases. Although most arbitrators issue written decisions, such decisions are not expressly required by most arbitration agreements. And, in the private sector, the trend seems to favor still further simplification of these already informal procedures.[42]

As discussed previously, some courts have held that adherence to legal evidentiary rules, the right to counsel and provision for a transcript and written decision are all necessary elements for a procedure to meet constitutional "due process" requirements. It is thus apparent that utilization of a typical grievance and arbitration procedure would *not,* for such courts, satisfy

[41] Indeed, in Harvey Aluminum, Inc. v. Steelworkers, 263 F.Supp. 488 (C.D. Cal. 1967), a court overturned an arbitrator's award on the ground that the arbitrator had improperly restricted the parties to evidence admissible under "legal rules." The court stated:

> "Arbitration is encouraged by both state and federal governments. If both employers and unions concerned are to engage in agreements providing for arbitration, they must have complete confidence in the proceedings. The denial of admission of material evidence on [technical legal] grounds . . . would be of no solace to the losing party who had been given to understand that arbitration hearings were informal proceedings not governed by the rules of evidence applied in trial courts." *Id.* at 488.

[42] For example, the 1974 labor agreement between the Steelworkers and the basic steel companies incorporates an optional "experimental arbitration procedure" pursuant to which "(a) The hearing shall be informal. (b) No briefs shall be filed or transcripts made. (c) There shall be no formal evidence rules. (d) Each party's case shall be presented by a previously designated local representative . . ." and pursuant to which the arbitrator is required to issue a decision (including a "brief written explanation of the basis for his conclusion") no later than 48 hours after the close of the hearing. *See* 1 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, 29:1, 29:76 (1974).

the requirements of due process—even at the review stage of the procedure.[43]

In *Antinore v. State of New York*[44] a lower court in New York was squarely presented with the issue of whether a contractually agreed-upon grievance and arbitration procedure satisfied an aggrieved employee's constitutional due process rights and, if not, whether the contractual procedure or the constitutional protection should previal. The grievant, a "tenured civil servant," was suspended without pay from his position as a childcare worker at a state training school when the state learned of charges against him alleging various immoral acts.

When advised that his employment would be permanently terminated, the grievant invoked the arbitration procedures availble to him under the collective bargaining agreement between his union and his employer. Thereafter, he also filed an action for declaratory judgment to clarify his rights as between conflicting requirements of the less favorable (for him) grievance procedure, on the one hand, and the pre-existing review procedures of the New York Civil Service Law, which had been supplanted by the bargaining agreement, on the other. The grievant argued that the contract's grievance and arbitration procedure did not pass constitutional due process muster and, consequently, he could not be barred from the more favorable procedures available under the state civil service law.

In a decision distinctly lacking in clarity, the trial court agreed with the grievant, finding at least in part that the contractual grievance arbitration procedure did not meet minimum constitutional due process standards.[45] Specifically, the court pointed out that the contractually established grievance and arbitration procedure:

1. Contained no requirement that the arbitrator state, in writing, the reasons for his decision either as to the employee's guilt or the penalty to be prescribed;
2. Did not require the arbitrator to be bound by any "rules of law";
3. Did not adequately provide for review of the arbitrator's decision, as it placed the burden on the grievant to obtain and furnish all of the parties a copy of the hearing transcript at his own expense; and
4. Did not ensure that the arbitrator would be trained and qualified to render a decision, as the contract said nothing about the qualifications or expertise required of the arbitrator.

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[43] The Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), a civil rights case, contains an informative comparison of judicial and arbitration procedures. Holding that arbitration of a civil rights claim pursuant to a labor agreement did not extinguish an employee's right to a new court trial on his charges, the Court stated:

> "[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply . . . the rights and procedures common to civil trials, such as discovery, compulsory process cross-examination, and testimony under oath, are often severely limited or unavailable . . . [and] arbitrators have no obligation to the court to give their reasons for an award." *Id.* at 57–58.

[44] 79 Misc.2d 8 (Monroe City 1974).

[45] A second ground for the court's decision was a finding that grievant was denied equal protection of the laws; the contract waived for the grievant the state statutory review procedures while employees not covered by the contract retained their rights to such review procedures.

Finding that the grievant's constitutional due process rights had not been waived by his union, the court granted grievant's motion for summary judgment and ordered the state to proceed against the grievant under its civil service law.[46]

The trial court's decision in the *Antinore* case indicates the type of problems a "typical" grievance and arbitration provision may generate when placed under a constitutional due process microscope for examination by a reviewing court. Significantly, in *Antinore* the court was not even presented with the most obvious potential constitutional defect of a standard grievance and arbitration provision; that is, termination or suspension without pay pending completion of the arbitration process. As stated earlier, a number of courts have held that such termination or suspension by a public employer constitutes a violation of due process.[47] In the experience of the authors virtually no private sector grievance procedures provide for suspension with pay pending a grievance hearing.[48]

Another constitutional "due process" defect may arise when a "typical" grievance or arbitration procedure is adopted by a public employer. A collective bargaining agreement, though presumably intended to be for the benefit of employees, is legally and practically a contract between the employer and a labor organization. The labor organization is an entity distinct from its members. In some cases the organization may have "institutional" interests adverse to those of some of the individuals it represents.[49] Even in the best of circumstances, a labor organization is often called upon to take a position which will adversely affect some of its members in order to benefit the majority.[50] The organization's right to do this is expressly recognized by law

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[46] The trial court's decision on the waiver issue was reversed upon appeal. For a discussion of the appellate court's ruling, *see,* notes 64–67 *infra* and accompanying text.

[47] *See* the cases cited at note 29, *supra.*

[48] Private sector arbitrators have uniformly supported the concept of suspension without pay for a number of reasons. First, they have many times stated that reinstatement with backpay is an adequate remedy for an employee improperly suspended or terminated. Additionally, private sector arbitrators have been mindful that if a grievant loses at the arbitration step he will have been unjustly enriched for the 20 to 60 days or so in which he has been receiving pay while on suspension status. Moreover, it is not uncommon in disciplinary actions for an arbitrator to award reinstatement without backpay where the grievant has been found to be partially at fault concerning the action which gave rise to the suspension or termination. Finally, arbitrators are apparently not unmindful of the inequity situation created where one employee on suspension receives full pay for not working while his fellow employees who are not on suspension must work full time for their pay. Again, the opinion seems to pervade that if the employee was wrongfully suspended he will be made whole by reinstatement and backpay. *But see,* Arnett v. Kennedy, 416 U.S. 134, 171–203 (1974) (Justice White concurring in part and dissenting in part).

[49] For example, it is principally the union as an entity which benefits from a dues "checkoff" provision in a contract. Similarly, it is the union as an entity which benefits from "union shop" or "maintenance of membership" contract provisions pursuant to which an employee may ultimately be discharged.

[50] For example, cases involving the assignment of work, or overtime, or promotions frequently require a union to contend that one employee it represents rather than another which it also represents was entitled to the work (and pay) in question.

in the private sector,[51] and therefore, most private sector collective bargaining agreements give effect to this fact of life by incorporating in their grievance procedures provisions *permitting the union alone* to settle grievances with the employer or pursue its interests in arbitration.[52] Private sector unions may, and sometimes do, refuse outright to take a grievance to arbitration. So long as the labor organization is fairly representing its members, its legal right to refuse to take a matter to arbitration is expressly recognized by law.[53] And private sector cases are legion in which a union has successfully defended its refusal to take a grievance to arbitration either because of excessive costs,[54] because the principle sought to be established by the grievant would be inimical to the majority interests of the organization,[55] or because of other lawful reasons.[56]

Many grievance and arbitration provisions in public sector labor agreements similarly vest in unions the exclusive authority to process, settle, or arbitrate the grievances of the employees they represent.[57] The effect of constitutional due process requirements on such provisions, however, is far from clear.

Constitutionally protected property interests of public employees have been traditionally considered by the courts to be the "property" of the individual employee involved—not of the labor organization. When the interests of *all* employees coincide, and do not conflict with the institutional interests of the union, it may be that a union's decision to settle or process a grievance creates little or no problem because it may be argued that, as agent of the employees, it has waived their right to a formal "due process" type of hearing.[58] However, in the far more typical case where a union must seek a grievance adjustment acceptable to a majority of its members, but where that adjustment may adversely affect a few, a significant "due process" issue may well persist.[59]

To the extent that the union refuses to process a grievance at all, or to the

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[51] Humphrey v. Moore, 375 U.S. 335 (1964). *See also* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[52] *See, e.g.*, Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

[53] Vaca v. Sipes, 386 U.S. 171 (1967). *See also* Carroll v. Brotherhood of Railroad Trainman, 417 F.2d 1025, 1028 (1st Cir. 1969), where the court properly recognized that a "union must often make good-faith tactical decisions in spite of employee disagreement."

[54] Encina v. Tony Lama Co., Inc., 448 F.2d 1264 (5th Cir. 1971); Curth v. Faraday, 401 F.Supp. 678, 90 LRRM 2735 (D.Conn. 1975).

[55] Bazarte v. United Transportation Union, 429 F.2d 868 (3d Cir. 1970), and cases cited therein.

[56] *See* Vaca v. Sipes, 386 U.S. 171 (1967); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970).

[57] *See, e.g.*, Norton v. Massachusetts Bay Transportation Authority, 336 NE.2d 854, 90 LRRM 3054 (Mass. 1975), where the court held that (as in the private sector) under such a provision an individual public employee may not compel arbitration of his contract grievance.

[58] The appellate court in *Antinore v. State of New York*, 371 N.Y.S.2d 213 (App.Div. 1975), reversed the trial court's decision on this ground, holding that the grievant's bargaining agent had effectively waived his right to a hearing under the state civil service law.

[59] This problem is compounded in the less typical but not infrequent case in which the institutional interests of the union collide directly with the personal interests of its membership.

extent that the union asserts a position during arbitration contrary to the interests of a majority or of any of its members, the acceptability of a waiver argument is likely to be negated by the adversity of the union's interest to that of an employee whose property right is constitutionally protected. In such circumstances, it is unlikely that the contractually established grievance and arbitration procedure will be viewed by the courts as an acceptable substitute for a due process type hearing.

A SECOND BITE AT THE APPLE

Public employers who insert in their collective bargaining agreements grievance and arbitration provisions of the private sector type have still another unwelcome surprise ahead of them. They may find that such provisions not only fail to meet their due process obligations, as pointed out above, but also that they create an *additional* problem for the public administrator.

In the private sector, grievance and arbitration provisions in collective bargaining agreements function effectively as a substitute for litigation in the courts.[60] When a grievance and arbitration provision exists, the courts *will not normally permit* an employee to sue his employer in court over an alleged contract violation without first exhausting his rights under the grievance procedure.[61] If, in the course of the grievance procedure, the employee's union settles the grievance, that settlement will be binding on him.[62] And if the case has gone to arbitration, the arbitrator's award will be dispositive of the claim.[63] Thus, as a practical matter, the chances that an alleged contract violation will end up in the courts are remote indeed.

It is questionable whether the presence of a grievance and arbitration procedure in a *public sector* union contract will have a similarly salutory effect. On the contrary, it must be remembered that although the *origin* of a public employee's right may be contractual, once established it becomes *constitutionally* protected. The treatment accorded the *contractually* protected rights of private sector employees by the courts, therefore, cannot safely be relied upon to forecast the treatment they will accord the *constitutionally* protected rights of public employees.

The recent decision of the appellate court in *Antionore v. State of New York*[64] lends some support to the view that where a contractually established grievance procedure exists a public employee is bound by it and cannot claim a right to an independent due process hearing. In a decision more notable for its insight into the practical considerations involved in a collective bargaining relationship than for sound constitutional analysis, the court held

[60] *See,* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), and the Steelworkers Trilogy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). *See also,* Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[61] Republic Steel v. Maddox, 379 U.S. 650 (1965).

[62] Bazarte v. United Transportation Union, 429 F.2d 686, 872 (3d Cir. 1970).

[63] United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). *Compare,* remarks of Prof. Aaron that "more rigorous" court review can be expected in public sector arbitration. 233 DLR C-1 (Dec. 3, 1975).

[64] 371 N.Y.S.2d 213 (App.Div. 1975).

that the employee there involved was legally bound by his union's agreement to waive its members' rights to due process hearings in order to obtain an arbitration clause in the collective agreement.[65] The court stated:

> The union represents all the employees as to all covered matters. . . . The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him. Labor relations involving any sizable group cannot be expected to proceed only with the consent of each member of the group. Orderly process requires that agreements be made and complied with even in the face of minority dissent or disapproval. Plaintiff, as employee, has the benefits of the contract; he must accept also what he may regard as the disadvantages, for in the bargaining process it may well be that the latter were assumed in exchange for the conferral of the former. If plaintiff or others in his unit are dissatisfied with their agent's product, there are means available to effect a change in representation and certification. . . . Meantime, he can no more claim exemption from the negotiated agreement than may a citizen, with impunity, withhold compliance with a statute becase he disfavored his legislature's affirmative vote on the enactment.[66]

In a ruling very much akin to court decisions interpreting grievance and arbitrations in the private sector, the court carefully pointed out that

> [F]ar from violating public policy, the binding arbitration procedures provided by the agreement between the state and CSEA must be viewed as advancing the public good by the expedition of the resolution of disciplinary disputes in a simpler, more prompt manner than would attend to their disposition by one of the methods provided by Section 75 and 76 of the Civil Service Law.[67]

The appellate court's decision in the *Antinore* case most certainly provides a "practical" result to the public employer's problem of constitutional due process. Unfortunately, the court's decision is, however, based upon a waiver theory which conflicts significantly with the Supreme Court's views as expressed in cases such as *Alexander v. Gardner-Denver Co.*[68]

The *Gardner-Denver* case involved a black employee who was allegedly discharged by his private sector employer for "just cause." The employee claimed he was the victim of racial discrimination by his employer, and because the labor agreement applicable to him prohibited racial discrimination the employee filed a grievance alleging violation of this contractual right. An arbitrator found the employee was discharged for "just cause," impliedly finding that no discrimination had occurred. Undaunted, the black employee then sued his employer under Title VII of the Civil Rights Act of 1964, and the employer argued to the court that the employee's suit should be summarily dismissed because he had already litigated and lost the issue of racial discrimination before the arbitrator.

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[65] In *Antinore,* the interests of the union insofar as the merits of the employee's grievance were concerned did not apparently conflict with those of the employee. The conflict of interest issue previously discussed in connection with the waiver rationale was therefore not addressed by the court.

[66] *Id.* at 217.

[67] *Id.* at 217–18.

[68] 415 U.S. 36 (1973).

The District Court and the Court of Appeals both sustained the employer's position. As the Supreme Court explained:

> The District Court and the Court of Appeals reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award. In the District Court's words, it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." [69]

This argument was rejected by the Supreme Court. It ruled that the black employee had a *statutorily protected* right to be free from racial discrimination, and that it was the duty of the courts to protect that right by giving the black employee a chance in a court of law to prove his case even though he had "lost" before the arbitrator. In the Supreme Court's view, the employee did not have "two strings to his bow." Instead, the Court stressed the differences between court enforcement of a contractual right which had already been the subject of an arbitration proceeding and the enforcement of a separately created statutory right. In the Court's words:

> This argument mistakes the effect of Title VII. Under the *Steelworkers's Trilogy*, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. *Rather he is asserting a statutory right independent of the arbitration process.*[70]

Significantly, the Supreme Court specifically considered, and *rejected,* the contention that the employee had waived his right to sue by proceeding to arbitration under the collective bargaining agreement. It held that because Title VII rights have no relationship to the collective bargaining process, the union had no power to bargain them away in advance. The Court continued:

> Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies . . . must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights.[71]

Whatever the merits of the Supreme Court's *Gardner-Denver* decision, the irrefutable fact remains that the employer in that case was forced to litigate *twice* the issue of the grievance claim of racial discrimination. The matter was tried once before the arbitrator and again before the courts. Twice, then, the employer was required to collect facts, marshall witnesses and analyze the decisions of each body and consider the possibilities of appeal. Moreover, the employer most likely was required to retain counsel and absorb the cost of written briefs.

If the presence of *statutory* protection warrants imposing on an employer the burden of trying the same issue twice, what, then, is likely to be the result when the right in question possessed by a grieving employee is protected not merely by statute but by the Constitution itself? It may indeed be

[69] *Id.* at 54.

[70] *Id.* (emphasis added).

[71] *Id.* at 52.

that a public employer, having created by contract a number of constitutionally protected property rights, will thus be forced *not only* to arbitrate disputes concerning them, but to litigate the same matters in the courts even after it has prevailed in the arbitration proceeding. Indeed, the Supreme Court indicated just such a result in the *Gardner-Denver* decision when it contrasted the role and skills of an arbitrator with those of a court. In what may well be prophetic words, the Court pointed out that:

> Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, *the resolution of statutory or constitutional issues is a primary responsibility of courts,* and judicial construction has proved especially necessary to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.[72]

Thus, the adoption of a grievance and arbitration provision in a public sector union contract may well have a result *precisely opposite* to that normally existent in the private sector. Instead of reducing litigation over contractually based employee rights, such procedures in public sector agreements, without more, may open the door to *increased litigation* as employees rebuffed by the decision of an arbitrator take a second bite and begin again in the courts claiming a violation of their due process rights.[73]

IS GRIEVANCE ARBITRATION MEANINGFUL IN THE PUBLIC SECTOR?

If, as discussed above, a school board or other public employer is unlikely to meet its due process obligations by adopting a typical private sector grievance and arbitration procedure, and, moreover, if the adoption of such a procedure will create additional problems, the question obviously arises: "Why should any public employer agree to incorporate a grievance and arbitration provision in a labor contract applicable to its employees?" The answer may lay in the *other* benefits which such procedures normally provide.

Clearly, in the private sector, employers derive a number of *positive benefits* from their agreement to adopt a grievance and arbitration procedure:

1. *Grievance arbitration generally results in a no-strike commitment.* Private sector employees have a legally protected right to engage in concerted activities, such as strikes, to obtain concessions from their employer. However, because the law recognizes a no-strike commitment by the union as the *quid pro quo* for an employer's agreement to arbitrate grievances,[74] a no-strike obligation is *legally implied* over issues which are subject to binding arbitration under a collective bargaining agreement.[75] As the Supreme Court noted in *United Steelworkers of America v. Warrior and Gulf Navigation Co.*:[76] "[A]rbitration is the substitute for industrial strife." Thus, when a

[72] *Id.* at 57 (emphasis added).

[73] Indeed, as a result of the *Gardner-Denver* decision employers are now reconsidering the inclusion of contractual clauses prohibiting racial discrimination in order to avoid this same "two bites at the apple" problem.

[74] *See* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567 (1960).

[75] Teamsters, Local 174 v. Lucus Flour Co., 369 U.S. 95, 105-06 (1962).

[76] 363 U.S. 574, 578 (1960).

private sector employer agrees to accept binding arbitration of grievances, he generally receives in return a valuable and legally enforceable commitment, express or implied, that his business operations will not be interrupted by a strike over disputes concerning the meaning, interpretation or application of the contract for the life of the collective agreement.

2. *Arbitration avoids litigation.* As in the public sector, private sector employees obtain rights enforceable in a court of law under a labor agreement between their union and their employer. However, although such rights exist the Supreme Court has, nonetheless, held that where a grievance procedure is present employee disputes over contractual rights must in the first instance be litigated through the contractually established arbitration procedure *before* recourse may be had to the courts.[77] And, once an arbitrator has passed upon an employee's claim, the arbitrator's decision can be overturned by a court only for exceedingly limited and compelling reasons such as fraud or a manifest infidelity to the applicable contract terms.[78] Thus, in almost every case, the arbitration of a contract dispute provides finality to the dispute and avoids litigation because, as a practical matter, no court is going to consider the employees' claims anew.

3. *Arbitration provides a rapid and inexpensive means of resolving workplace disputes.* It is crucial to private employers, employees and unions alike that disputes over the meaning of contractural provisions be resolved expeditiously and at minimal cost. Arbitration meets these needs.

Although arbitration has been criticized by some as being too costly and too lengthy, the fact remains that arbitration provides a considerably more expeditious, timely and inexpensive mechanism for resolving employment disputes than the procedures available to the parties under existing state or federal judicial systems.

4. *Arbitration serves an important therapeutic function.* As the Supreme Court stated in *United Steelworkers of America v. American Mfg. Co.*:[79] "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

The basis for the Supreme Court's observation is not difficult to understand. The daily contacts which are an essential part of virtually all employment relationships are sooner or later bound to generate interpersonal problems. These problems may arise due to misunderstandings, personality clashes or even damaged egos. They may involve a single employee, or many. But regardless of their origin, and regardless of their initial scope, if left unresolved these problems will be compounded and eventually the job performance of all involved will suffer.

Arbitration provides a valuable "safety valve" for these problems. As the authors of perhaps the best-known work on arbitration have observed:

> [A] union might arbitrate a dispute because the employees or subordinate union

[77] Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

[78] *See,* United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); San Francisco-Oakland Newspaper Guild v. The Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969); Ludwig Honold Mfg. Co. V. Fletcher, 405 F.2d 1123 (3rd Cir. 1969).

[79] 363 U.S. 364, 369, (1960).

officers directly involved simply could not be convinced that they were wrong; the company might do likewise in regard to its own subordinate officials. In either instance, higher officials may find it profitable to let an arbitrator make it clear to such persons that they were wrong.[80]

5. *Arbitration fosters the development of a "law of the workplace" geared to the specialized needs of the employment relationship.* As the Supreme Court properly noted in *United Steelworkers of America v. Warrior and Gulf Navigation Co.*:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[81]

From a practical standpoint, the "law of the shop" which has evolved through countless arbitration proceedings provides far more relevant guidance to the parties in the interpretation of their bargaining agreement than similar decisions which emanate from courts of law.[82]

In arbitration, the parties—employers, unions, and employees alike—are likely to have their positions considered and adjudicated by a decision maker well aware not only of such legal matters as the rules of evidence and the rules of contract interpretation, but also of managements' need for flexibility, the unions' need for stability, and the employee's need for certainty in the context of a continuing relationship. In the authors' experience, most arbitrators go to great lengths not only to reach results which are *both* contractually correct and realistic in terms of an employment relationship,[83] but also to carefully explain the reasoning on which their decision is based so that the parties may have sound and proper guidelines by which to conduct themselves in the future.

Consideration of the above-described benefits derived by private sector employers from their contractual grievance and arbitration procedures indicates that most *do not* have relevance in the context of public employment:

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[80] ELKOURI AND ELKOURI, HOW ARBITRATION WORKS 15 (1973).

[81] 363 U.S. at 581.

[82] The above statement is not intended to impugn the ability of judges. It merely reflects the fact that labor arbitrators possess far more experience in handling such matters than do judges. As the Supreme Court recognized in *United Steelworkers of America v. Warrior and Gulf Navigation Co.*,

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and the trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as collective bargaining permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished . . . *The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.* 363 U.S. at 582 (Emphasis added).

[83] *But see* J. R. Simplot Co., 64 Lab. Arb. 1061 (Arb. Collings, 1975).

1. *A no-strike pledge does not provide a* quid pro quo *for grievance arbitration in the public sector.* On the contrary, as a general rule public employees do *not* have the legally protected right to strike possessed by private sector employees. Indeed, by statute or common law strikes by public employees are legally prohibited in virtually all jurisdictions. Consequently, the first and perhaps most important benefit of grievance arbitration for an employer—the receipt of a legally enforceable no-strike commitment—does not exist in any meaningful manner in the public sector.[84]

2. *Similarly, in the public sector a grievance and arbitration provision cannot be considered as an effective substitute for litigation.* On the contrary, as shown above, it is conceivable that such provisions will generate *more,* not less, litigation because of the availability to the employee of "two bites at the apple." [85]

3. *Arbitration may not provide a fast and inexpensive method of resolving workplace disputes.* Arbitration in the public sector, in itself, is no more costly or time consuming than arbitration in the private sector. But in the public sector arbitration cannot in reality be considered apart from the issue of due process. The inability of the traditional grievance and arbitration procedure to function effectively as a due process mechanism means that the risk of additional litigation before the courts is not ameliorated. Thus, in many cases, the impact of an arbitration provision in the public sector will be to *increase* the cost of disputes by adding to the cost of arbitration the cost of the due process proceeding.

4. *The therapeutic effect of arbitration in public employment is uncertain.* The private sector, it must be recalled, has no other readily accessible mechanism for employees or unions to "let-off steam." The access of private employees to grievance arbitration, then, is particularly important.

The right of public employees to sue for violation of their due process rights, however, provides an alternative mechanism in the public sector. To the extent that such due process litigation is a mechanism adequate for release of (the inevitable) employment related tensions which are sure to arise, the therapeutic value of public sector arbitration commitments may well be illusory. However, as a practical matter—best labeled at the outset as mere speculation based upon experience—the authors believe that despite the availability of due process litigation there still exists in the public sector some therapeutic value to be derived from arbitration.

5. *Public sector grievance arbitration does not assure development of a meaningful "law of the workplace."* There is little doubt that public employment disputes which are taken to arbitration will help develop a "law of the workplace" and will, as well, reap the benefit of the general employment relations expertise already possessed by experienced labor arbitrators. Arbi-

[84] It is not here contended that public sector strike prohibitions are completely effective. However, strikes in violation of no-strike obligations occur in the private sector as well. The benefit here under consideration is whether or not, when such strikes occur, the employer has a legal basis for securing injunctive relief in the courts. *Cf.,* Boys Markets v. Retail Clerks, Local 770, 398 U.S. 235 (1970).

[85] *See* notes 60–73 and accompanying text *supra.*

tration, rather than litigation, of such disputes will thus further the education of the arbitral corps in the sometimes unique problems of public sector employment relations. This is particularly true in matters of public education where sensitive school policies and practices are involved. Such growth can be expected to proceed less rapidly, however, where the threat of due process litigation inhibits resort to the grievance and arbitration process.

A further problem lurks in the availability of court litigation as a concurrent mechanism for review of public management's employment decisions. To the extent conflicting approaches, principles or decisions emanate from arbitrators, on the one hand, and from judges, on the other, the result may be confusion in the mind of the public administrator rather than the development of an employment expertise or "law of the workplace." Such conflicts are, of course, inevitable where separate forums exist with no requirements of comity for their respective decisions.

Although it is clear that public employers as a group will derive significantly fewer *direct* benefits from the inclusion of grievance and arbitration provisions in their collective bargaining agreements than do their private sector counterparts, it is also apparent that there remain some *residual* benefits for the public employer who agrees to such provisions in its collective agreement. The "value" of those residual benefits in any particular case is something which each public employer must evaluate on the basis of its own particular circumstances. In the authors' opinion the "case is a close one." Consequently, before any standard seniority or grievance and arbitration provision is accepted during bargaining, or any arbitration alternative adopted, careful consideration should be given to the many concerns which have been raised above.

POSSIBLE SOLUTIONS TO THE PUBLIC EMPLOYER'S PROBLEMS OF DUE PROCESS AND ARBITRATION

Enough has been said, we think, to establish that the public employer faces a serious dilemma in labor negotiations when discussing seniority or grievance arbitration provisions with a union representing its employees. On the one hand the employer is faced with union demands for contract clauses; such as "seniority" provisions, which are likely to expand still further the "property" rights of employees protected by the Constitution's due process requirements. On the other, the employer is also faced with demands for traditional grievance and arbitration provisions which not only fail to resolve, but may actually aggravate the due process problems the employer must overcome. Obviously, a solution must be found.

Two possible solutions are immediately apparent. In the course of negotiations with the union the public employer can either seek to eliminate entirely the grievance and arbitration provisions from the collective bargaining agreement, or the employer may seek to alter its established grievance and arbitration procedures so that they will incorporate all the necessary due process requirements. While these solutions most certainly have some sur-

face appeal, we believe that, upon analysis, they must both ultimately be rejected.

The exclusion of grievance and arbitration provisions from a labor agreement has a number of serious drawbacks. First, of course, it is virtually certain to meet with vigorous union opposition because such provisions are normally "must" items on the union's negotiating agenda. A complete rejection of such provisions during negotiations may easily frustrate agreement on other issues and perhaps even precipitate a work stoppage. Second, even if the employer has successfully excluded such provisions from the contract, it may find that it has only succeeded in moving from the proverbial "frying pan into the fire."

Undoubtedly, disputes will frequently arise concerning the contract's meaning and the parties' rights thereunder. With no sound contractual mechanism for resolving such disputes available, the frequent use of economic force by the union or the employees becomes a strong possibility. Obviously, the weighty nature of these two practical considerations will, in most cases, lead to the conclusion that an outright refusal to incorporate a grievance arbitration provision in a contract is undesirable.

Similarly, it is undesirable in our opinion to incorporate all the necessary due process requirements into a *contractual* grievance procedure. In the first place, because of the rapidly evolving state of the law in the due process area any such attempt is likely to produce a document which is out-dated soon after it is negotiated. Second, a grievance and arbitration procedure containing "only" those due process requirements which some courts already require would be so cumbersome and unwieldy that it would cease to be an effective mechanism for resolving contractual disputes.[86]

A more realistic solution to the public employer's due process problem is the promulgation of a formal *expedited hearing procedure* for use in those cases where employee "property" interests are involved.[87] The expedited procedure should be written and published, but it should be separate and apart from the labor agreement so that it may be revised as freqeuntly as necessary to meet the current judicial requirements. It should set forth in detail the manner in which the due process requirements are going to be met.[88] But most impor-

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[86] For example, in order to be reasonably certain of meeting existing due process requirements a contractual procedure would have to: prohibit the union from resolving grievances short of arbitration; allow sufficient time to transpire before any action was taken to provide notice to *all* employees who might arguably have property rights which might be adversely affected; management actions would have to be deferred further until the arbitration process had been completed; formal rules of evidence would have to be applied; the right to counsel (with the inevitable delays and extensions that occasions) would have to be assured; the right to examine and cross-examine witnesses would have to be allowed; a formal transcript would have to be provided; a written decision would have to be rendered; and, perhaps, some further form of court review would have to be insured. *See* discussions pp. 213–15, *supra*.

[87] Many public employers have already instituted such procedures, though a number have been of an informal nature.

[88] For example, such a procedure might provide for a prompt informal hearing before an individual or body separate and apart from the one which made the initial decision. Affected persons would be notified of the reasons for the action to be taken as soon as possible and of the

tant, the procedure should be carefully designed so that at *all* times it retains its character as an *expedited* procedure. Such a procedure is of little use to management if it is not able to produce decisions within a reasonably short period of time; hopefully within forty-eight hours of management's initial decision. While it is undoubtedly important to preserve constitutional rights, it is also important for the employer to be able to make and rely upon important decisions with a minimum of delay. Although any employee adversely affected should be allowed to retain counsel to represent him during the expedited hearing procedure, it should be made clear that the retention of counsel will not be permitted to delay the proceedings.

Although adoption of a non-contractual expedited hearing procedure is likely to resolve many of a public employer's due process problems, it may not resolve all of them. It will not, for example, with absolute certainty resolve the "second bite" problem discussed earlier in this article. A solution to the "second bite" problem requires consideration of still further alternatives.

One further, more certain alternative is the adoption of a grievance procedure *without arbitration* as the terminal step "where constitutionally protected property rights are arguably involved." Although this possibility is likely to be less objectionable to a union than complete elimination of a grievance procedure, it must still be recognized that its suggestion will generate a heated and hostile response. This possibility has the decided advantage of providing arbitration for certain contractual claims while at the same time further limiting the employer's exposure to repeated litigation of the same claim. It also, however, has serious drawbacks.

If the employer asserts that the subject of a grievance involves a constitutionally protected property right and is therefore excluded from arbitration, due process litigation in the courts may well be assured. Further, such an assertion may possibly prejudice the employer's position when that litigation does commence. Moreover, the employee's *failure to assert* that a property right is involved is probably not sufficient to stop a court, in a subsequent proceeding from finding that such a right did exist and that due process litigation is proper in spite of the prior arbitration award.

A second alternative, perhaps an off-shoot of the one discussed in the preceding paragraph, would be the addition of a new step in the grievance procedure between the normal last step prior to arbitration and the arbitration step itself. In this new, additional arbitration step, a joint employer-union committee could be formed to meet and consider whether or not the grievance involved rights which were, "arguably constitutionally protected property rights." Perhaps modeled after the joint committee concept common

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expedited hearing procedure available to challenge that action. Employees would be allowed to retain their own counsel, call witnesses and confront accusers during the proceeding. The proceedings at the hearing would be recorded, and the decision of the body hearing the matter would be issued along with a brief summary of the reasons in support of the decision. Thereafter, if desired, a more detailed opinion may be issued. Any individual involved would receive a written explanation of the decision. For further safety the procedure would provide for some review mechanism for the decision beyond this expedited hearing procedure.

to many International Brotherhood of Teamster contracts through the country, this joint committee might provide the advantage of ferreting out from the arbitration procedure those claims involving obvious constitutionally protected rights while at the same time providing a release of employee and union frustrations over managerial decisions adversely affecting the institutional interests of the union. There are, of course, many of the same defects in this approach which were mentioned previously. However, unlike the prior suggestion this approach may be more palatable to the union for it does enhance the union's role in, and control over, the grievance procedure and those grievances filed by its members.

A third possible solution to the public employer's "second bite" problem involves the concept of indemnification. Thus, it could be proposed during negotiations that, as a condition of the employer agreeing to a clause which subjects constitutionally protected rights to the grievance and arbitration procedure, the union specifically agree to indemnify the employer for any and all additional fees or costs incurred by the employer should a dissatisfied employee losing before the arbitrator disregard the arbitrator's award and attempt a second bite at the apple by filing a lawsuit alleging deprivation of his constitutionally protected due process property rights.

Obviously, numerous enforcement problems will be created by such an indemnification procedure. Additionally, unions can be expected to oppose such arrangements as they would be most reluctant to subject their union treasuries to the whims of dissident bargaining unit employees seeking to take advantage of such a situation. However, from the employer's standpoint such a proposal has a great deal of negotiation appeal and merit. It certainly does put the union to the test of determining exactly how important the union considers the grievance and arbitration procedure to be.

A fourth possibility would involve the use of a specific waiver of the right to sue signed by the individual employee whose rights are the subject of the grievance. Thus, a contractually agreed upon grievance procedure could incorporate a requirement that, as a condition of proceeding to arbitration, the grievant (and perhaps all other employees similarly situated) sign a specific individual waiver of their right to pursue subsequent due process court litigation over matters involved in the arbitration proceeding. The terms of such a waiver could be stated in the contract and, additionally, be repeated on a grievance form signed by the employee prior to the convening of an arbitration hearing. Only after such signatures had been obtained would the arbitration step in the contract be activated. The advantage of this alternative is that it would most likely preserve the grievance and arbitration system while at the same time preventing or minimizing the "two bites at the apple" problem now faced by many public employers.

A possible disadvantage to the express waiver alternative suggested above is that it conceivably could be used by a dissident employee to block grievances the union leadership or a majority of union employees believed should be taken to arbitration. To ensure against this eventuality a modification of the same concept—and one which in the authors' opinion may prove to be the most "workable" of the alternatives here explored—could be adopted which

permits grievances to proceed to arbitration in the normal manner, but which limits any remedy awarded by the arbitrator to those employees signing the release.[89] Thus, the grievance procedure would be available, insofar as a remedy is concerned, only to those employees who first sign the release of suit. Little benefit would be gained by exploring further alternatives, though obviously others do exist.

CONCLUSION

One point should be clear. Public employer bargaining representatives on *both* sides of the negotiating table must accord recognition during negotiations to the fact that, *in the public sector,* union seniority proposals which may create constitutionally protected property rights, and union grievance and arbitration proposals which may well create additional due process problems and liabilities, have a practical and legal impact far different than they do in the private sector.

Whether a public employer seeks to modify an existing grievance and arbitration clause or to respond to an initial union proposal in the grievance or seniority area, the public sector negotiator must educate his principal to achieve a greater appreciation of the problems and possible disadvantages associated with such proposals. These problems and disadvantages must thereafter be vigorously asserted across the bargaining table, to obtain for the employer *more* in return for the grant of contractual seniority benefits or grievance and arbitration procedures than has heretofore been the case. In these two areas private sector comparisons fail. Unless public employers obtain *more* in return for agreeing to these benefits than do their private sector counterparts, they have not, quite simply, received fair value from their bargain.

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[89] Most arbitration clauses already contain a provision restricting the arbitrator's authority to add to, detract from, or modify in any way the provisions of the labor agreement. To this might be added, for example, language such as: "nor shall the arbitrator award back pay or any other form of retroactive relief to any employee who has failed to execute a waiver agreement which is incorporated in the record of the arbitration proceedings."