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STATE EMPLOYEE GRIEVANCES AND DUE PROCESS: AN ANALYSIS OF CONTRACT ARBITRATION AND CIVIL SERVICE REVIEW SYSTEMS

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I. INTRODUCTION

A major concern of public employees today is the guarantee of fair treatment in their employment. This guarantee, or due process, is secured through the institution of procedures whereby employees can have those discipline-related actions reviewed that they consider to be unfair or in violation of their rights as employees. A truly effective employee review procedure would further provide that complaints or grievances not settled through employer-employee accommodation be submitted to an impartial third party for adjudication.

The majority of states, including those in the southeastern United States,[1] have provided their employees with such review procedures.[2] These civil service or statutory review procedures vary widely in form, scope, and effectiveness. Jurisdictions where collective bargaining by public employees is allowed provide a second method of review—the grievance procedure pursuant to a union contract.[3] This negotiated grievance procedure typically

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1. Florida, Georgia, South Carolina, North Carolina, and Virginia will be considered as the Southeastern States throughout this analysis.

2. *See, e.g.*, GA. CODE ANN. § 40-2207 (Supp. 1977); N.H. REV. STAT. ANN. § 98:15 (Cum. Supp. 1975); N.M. STAT. ANN. § 5-4-40 (Cum. Supp. 1975); OHIO REV. CODE ANN. § 124.33 (Page Supp. 1976); TENN. CODE ANN. § 8-3227 (1973).

3. Among the 18 states with comprehensive public bargaining laws, *see* note 69 *infra*, contract grievance procedures are permitted in the following states: ALASKA STAT. § 23.40.210 (1972); FLA. STAT. ANN. § 447.041 (Harrison 1977); HAW. REV. STAT. § 89-10(a) (Supp. 1975); IND. CODE § 20-7.5-1-4 (1976); IOWA CODE ANN. § 20.9 (West Cum. Supp. 1977); ME. REV. STAT. tit. 26, § 965(4) (Cum. Supp. 1976), § 979-K (1964); MASS. GEN. LAWS ANN. ch. 150E, § 8 (West Cum. Supp. 1977); MICH. COMP. LAWS ANN. §§ 423.211-.215 (1967 & Cum. Supp. 1977); MINN. STAT. ANN. § 179.70(1) (West Cum. Supp. 1977); N.H. REV. STAT. ANN. § 273-A:4 (Supp. 1975); N.J. STAT. ANN. § 34:13A-5.3 (West Cum.

culminates in binding arbitration by an impartial third party selected by both the employer and the employee representative.

In the southeastern United States, with the exception of Florida,[4] public employees have no statutory right to bargain collectively. Few public employees in these states can resort to a contractual grievance arbitration to obtain an impartial third party review of their discipline-related grievances, as the union is not allowed to act as a bargaining agent for these employees. Therefore, the only guarantee of due process generally available to public employees in Georgia, North Carolina, South Carolina, and Virginia is the statutory civil service review mechanisms.[5]

The recent decision of the Supreme Court in *Bishop v. Wood*[6] could be interpreted as support for the proposition that, without a specific statutory grant, public employees have no right to an impartial review of their employment-related grievances.[7] However, public officials should not consider this opinion as giving them the power to deny to public employees their due process rights.[8] The guarantee of due process in one's employment through the union's collectively bargained grievance procedure is one of the most important benefits unionization offers employees.[9] The view generally held in the Southeast, that collective bargaining is inappropriate in the public sector,[10] obligates public

Supp. 1977); N.Y. CIV. SERV. LAW §§ 203, 208.1(a) (McKinney 1973); OR. REV. STAT. § 243.706 (1975); PA. STAT. ANN. tit. 43, §§ 1101.606, .903 (Purdon Cum. Supp. 1977); VT. STAT. ANN. tit. 3, § 904(a)(7) (Cum. Supp. 1977); WIS. STAT. ANN. §§ 111.86, .91(3) (West 1974 & Cum. Supp. 1977).

4. *See* FLA. STAT. ANN. § 447.401 (Harrison 1977).

5. *See* GA. CODE ANN. § 40-2207 (Supp. 1977); S.C. CODE ANN. § 8-17-20 (1976); N.C. GEN. STAT. §§ 126-34 to -37 (Supp. 1975); VA. CODE §§ 2.1-114.5, 15.1-7.1 (Supp. 1977).

6. 426 U.S. 341 (1976). This case involved a permanent municipal employee who was discharged without a pretermination hearing. The reasons for the discharge were not publicly disclosed, nor were they made known to any prospective employers. The discharged employee filed suit claiming that the employer's action deprived him of a property interest without due process, as guaranteed by the fourteenth amendment. The Supreme Court denied his claim and held that he, as a public employee, did not have a protected property right to his job. Therefore, the Court ruled in this case that, absent a statutory or contractual guarantee, the discharged employee did not have a constitutionally protected right to a pretermination hearing.

7. *Id.* at 346-47.

8. This is not to contend that such a posture by state legislatures is in evidence, but the absence of bargaining rights and meaningful appeal systems for local governmental employees in many states indicates that such a possibility is not imagined.

9. *See generally* H. DAVEY, CONTEMPORARY COLLECTIVE BARGAINING 141-90 (3d ed. 1972).

10. This is evidenced by the fact that only Florida has a comprehensive bargaining law for most public employees. *See generally* FLA. STAT. ANN. §§ 447.301-.309 (Harrison 1977).

managers and legislators in this region to provide as an alternative a statutory review procedure that will guarantee fair treatment to their employees. Enlightened state legislators and administrators in the Southeast must, therefore, consider whether existing statutory review procedures provide public employees with a full and equitable guarantee of fair treatment in their employment.

Since the primary alternative to a statutory review procedure is contractual grievance arbitration, the issue of whether the existing statutory review procedure adequately protects the public employees' rights is determined by comparing the efficacy of these two procedures. For the purposes of this study, it is necessary to view contractual grievance arbitration in the abstract, as a dispute resolution technique, without regard to the fact that it normally emerges as a result of collective bargaining. The focus of investigation, therefore, will be upon the finality and nature of the statutory civil service adjudication vis-à-vis contractual grievance arbitration by a mutually acceptable, neutral third party.

II. DESCRIPTION OF THE STUDY

A key factor in determining the effectiveness of a dispute resolution technique is the degree of finality maintained by the adjudications made under that procedure. The finality of an initial adjudicative decision is determined by two factors:[11] the number of levels of review to which the decision is subject and the extent to which such review reaches the merits of the initial adjudication.[12] If one assumes that the adjudication that is rendered under a review or grievance procedure is fair and objective, then it is clearly in the interest of both the employer and the employee to achieve a final resolution as soon as possible.

Consequently, the initial aim of this investigation will be to determine which mechanism, either the statutory review procedure or the grievance arbitration pursuant to a union contract, produces decisions that possess the higher degree of finality. As

11. *See* Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration,* 46 TEXAS L. REV. 865 (1968).

12. When the term "initial adjudication" or "initial adjudicative stage" is used, the authors are referring to that step in the review procedure where a third party from without the organizational structure or the bargaining relationship is called upon to make a determination to resolve a dispute.

noted above, contractual grievance arbitration is not widely utilized in the Southeastern States. Thus, in order to achieve fully the objective of the first phase of this study, it is necessary to analyze the review procedures as they exist in several jurisdictions where both contractual grievance arbitration and the statutory review procedures are well established as the means of resolving discipline-related disputes.

For the purposes of this analysis, the grievance and review procedures serving as comparative models will consist of those procedures extant in the federal government and the states of Minnesota, New York, Pennsylvania, and Wisconsin. The four states have comprehensive public employee collective bargaining laws,[13] which either sanction or require binding arbitration as the concluding step in the contractual grievance procedure.[14] The legal framework for collective bargaining in the federal government, embodied in Executive Order No. 11,491 [hereinafter referred to as Order 11,491],[15] permits limited grievance arbitration pursuant to a union contract. Each of the five governmental units in the sample group also has a statutory civil service review procedure for its employees. The four states and the federal government thus have had extensive experience dealing with public employee grievances through both the contractual grievance arbitration and the statutory review procedures. The breadth of experience within these four sample states and the federal government, along with the representative nature of their statutory review procedures, provides a meaningful comparison with the practice existent in the Southeastern States.

As a result of this analysis, observations will be made as to which of the procedures produces the greater finality and the fewer levels of substantive review of the initial adjudicative decision. Based upon these observations and other relevant considera-

13. MINN. STAT. ANN. § 179.65 (West Cum. Supp. 1977); N.Y. CIV. SERV. LAW § 203 (McKinney 1973); PA. STAT. ANN. tit. 43, §§ 1101.606, .903 (Purdon Cum. Supp. 1977); WIS. STAT. ANN. §§ 111.86, .91(3) (West 1974 & Cum. Supp. 1977).

14. MINN. STAT. ANN. § 179.70(1) (West Cum. Supp. 1977); N.Y. CIV. SERV. LAW § 203 (McKinney 1973); PA. STAT. ANN. tit. 43, §§ 1101.606, .903 (Purdon Cum. Supp. 1977); WIS. STAT. ANN. §§ 111.86, .91(3) (West 1974 & Cum. Supp. 1977).

15. Exec. Order No. 11,491, 3 C.F.R. 191 (1969), *as amended by* Exec. Order No. 11,838, 3A C.F.R. 126 (1975). Executive Order No. 11,491, promulgated by President Nixon in October 1969, grants "meet and confer" bargaining rights to most federal employees. This order replaced Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Compilation), which first granted bargaining rights to federal employees and was promulgated by President Kennedy in October 1962,

tions, conclusions will be reached as to the efficacy of grievance arbitration vis-à-vis statutory civil service alternatives.

Following these conclusions, the focus of the study will shift to the southeastern United States. The due process guarantees available to state employees in the Southeast will be enumerated and evaluated. The study will conclude with the formulation of a proposed statutory review mechanism for state employees. This model grievance or review procedure will seek to maximize the guarantee of due process for the public employees while retaining a workable and acceptable environment for public sector labor relations in the Southeast.

III. THE LEGAL STATUS OF RIGHTS ARBITRATION AWARDS

The treatment of grievance arbitration in public sector labor relations closely parallels the treatment given to it in the private sector. For this reason, the substantive federal labor law, which specifies the legal status of a union-negotiated grievance arbitration in the private sector, is summarized below.

A. The Private Sector Treatment

Federal law regarding private sector grievance procedures is based primarily upon section 203(d) and section 301 of the Labor Management Relations Act of 1947 [hereinafter referred to as LMRA].[16] Section 203(d) provides, in part, that: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[17] Regarding the status of union-negotiated procedures, section 301 provides that the parties to a collective bargaining agreement negotiated under the provisions of the LMRA may seek enforcement of the contracts by filing suit in an appropriate federal district court.[18]

In *Textile Workers Union v. Lincoln Mills,*[19] the Supreme Court held that section 301 may be used to enforce contractual agreements for the arbitration of unresolved grievances.[20] The

16. Labor Management Relations (Taft-Hartley) Act §§ 203(d), 301, 29 U.S.C. §§ 173(d), 185 (1970).

17. *Id.* § 203(d), 29 U.S.C. § 173(d).

18. *Id.* § 301, 29 U.S.C. § 185.

19. 353 U.S. 448 (1957).

20. *Id.* at 455.

Court cited the extensive legislative history, which placed emphasis upon the stabilizing influence such a promise to arbitrate has upon the employer-union relationship.[21] Particularly important, in the Court's view, was the fact that the binding arbitration provisions are typically the *quid pro quo* for a no-strike pledge by the employee organization.[22] In a similar manner, the Court has ruled that a recalcitrant employee organization may be compelled, by means of an injunction, to comply with the contractual no-strike obligations, which are coupled with binding arbitration provisions.[23] Thus, it is clear that recalcitrant private sector employers and unions can be forced through court action to comply with contractual arbitration provisions.

In *Lincoln Mills,* the Court further interpreted section 301 to be more than jurisdictional in nature. That section was held to grant the federal courts authority to fashion a body of federal law for the enforcement of collective bargaining agreements.[24] Exercising that authority, the Supreme Court in 1960 further clarified the legal status of the contractual grievance arbitration in a series of cases commonly referred to as the *Steelworkers Trilogy.*[25]

In *United Steelworkers v. American Manufacturing Co.,*[26] the Court greatly enhanced the finality of grievance arbitration when it ruled that the federal courts cannot review the decision of an arbitrator as to the merits of a particular grievance.[27] Basing its holding upon the pertinent language of section 203(d) of the LMRA noted above,[28] the Court stated:

> The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.
>
> . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face

21. *Id.* at 453-54.

22. *Id.* at 455.

23. Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 253 (1970).

24. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

25. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

26. 363 U.S. 564 (1960).

27. *Id.* at 568.

> is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.[29]

The Court, in reaffirming its position on the finality of grievance arbitration awards under the LMRA, in *United Steelworkers v. Enterprise Wheel and Car Corp.*,[30] stated: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[31]

In the remaining *Steelworkers Trilogy* case, *United Steelworkers v. Warrior & Gulf Navigation Co.*,[32] the Court further clarified its strong preference for binding arbitration as the better method for resolving disputes between employers and employee organizations.[33] This decision clearly prevents the parties, in most cases, from escaping the obligation to arbitrate by seeking judicial review of an arbitrator's decision on the ground of arbitrability. The Court also expressed, in dictum, the opinion that arbitrators are more qualified than judges to interpret contract language and to apply the "common law of the shop,"[34] which defines the ground rules for day-to-day employer/employee relations.[35]

Thus, when an employer and an employee organization in the private sector agree to binding arbitration as the final step in the contractual grievance procedure, they agree in advance to accept the decision of the arbitrator as to the merits of any dis-

28. *See* note 17 and accompanying text *supra.*
29. 363 U.S. at 567-68.
30. 363 U.S. 593, 599 (1960).
31. *Id.* at 596.
32. 363 U.S. 574 (1960).
33. *Id.* at 578.
34. *Id.* at 582.
35. *Id.*

pute that arises. They cannot generally turn to the courts for a complete or substantial review of the arbitrator's decision.[36] As noted above, throughout the case law developed under section 301 and section 203(d) of the LMRA,[37] the theme of the stabilizing effect upon the employer/employee relationship of a mutually agreed upon dispute resolution procedure, which possesses a high degree of finality as its major characteristic, recurrently appears.[38]

The National Labor Relations Board's policy of a limited deferral to grievance arbitration in particular unfair labor practice cases further indicates the preferred status of grievance arbitration as the method of resolving employment-related disputes in the private sector. The Board will not defer to grievance arbitration in a case that involves an unfair labor practice charge of discrimination based on union activity.[39] In cases not involving such an alleged discriminatory act, the Board has developed a policy of deferring to grievance arbitration when:

1. The unfair labor practice dispute is a matter covered by the collective bargaining agreement;
2. the arbitrator's decision resolves the unfair labor practice matter;
3. the arbitration proceedings are fair and regular; and
4. the arbitrator's decision is consistent with the policies and case law developed under the LMRA.[40]

To support its policy of limited deferral to arbitration in regard to unfair labor practice matters, the Board noted that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by [the Board's] recognition of the arbitrators' award."[41] In *Collyer Insulated Wire,*[42] the Board said the widespread acceptance of arbitration is consistent with the national labor policy in requiring the parties in such cases "to honor their contractual obligations rather than, by casting

36. *See* notes 25-35 and accompanying text *supra.*

37. Labor Management Relations (Taft-Hartley) Act §§ 203(d), 301, 29 U.S.C. §§ 173(d), 185 (1970).

38. The *Steelworkers Trilogy* provides the definitive statement as to the extent to which the federal courts will review the decision of an arbitrator in a labor dispute.

39. General Am. Transp. Corp., 228 N.L.R.B. No. 102, filed Mar. 16, 1977.

40. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

41. Speilberg Mfg. Co., 112 N.L.R.B. 1080, 1080 (1955).

42. 192 N.L.R.B. 837 (1971).

[the] dispute in statutory terms, to ignore their agreed-upon procedures."[43]

From the foregoing, it has been established in the private sector that a union-negotiated contractual arbitration procedure is the preferred method of resolving grievance disputes between employers and employees or their representative organizations. As illustrated in a survey by the Bureau of National Affairs, over ninety-five percent of the collective bargaining agreements in the private sector provide for binding arbitration as the final step in the grievance procedure.[44] This widespread utilization of arbitration and the high degree of finality accorded arbitration awards act to insure that employees who seek the arbitration of adverse actions taken by their employer will be afforded a prompt adjudication of their case.

The developing public sector labor law of grievance arbitration closely follows the developments in the private sector. In many areas of public employee labor relations, it is often maintained that private sector principles are inappropriate, as the status of the strike[45] and unit determination,[46] for example, is not recognized. However, grievance adjudication is one area where the private sector/public sector parallel is widely acknowledged. The major concerns in public employee grievance adjudication are the same as those considered essential to an effective grievance resolution in private employment; *i.e.*, the rapid and final disposition of the grievance, a fair and objective determination, and a belief by all parties that the process is one that guarantees an employee's due process.[47]

43. *Id.* at 843.

44. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 51:1-9 (1975).

45. Employees of the federal government are prohibited from engaging in strikes. Exec. Order No. 11,491, § 19(b)(4), note 15 *supra,* at 202. It appears that most states also prohibit their employees from engaging in strikes. *See, e.g.,* GA. CODE ANN. § 89-1301 (1971); MO. ANN. STAT. § 105.430 (Vernon Supp. 1977); N.H. REV. STAT. ANN. § 273-A:13 (Supp. 1975). However, Alaska, Hawaii, and Pennsylvania clearly provide a right to strike for specified state employees as long as such activity does not injure the public welfare. ALASKA STAT. §§ 23.40.200(c)-.200(d) (1972); HAW. REV. STAT. § 89-12(b) (Supp. 1975); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1977).

Minnesota does not allow its employees to strike. MINN. STAT. ANN. § 179.64 subd. 1 (West Supp. 1977). However, certain conduct by the employer, defined in MINN. STAT. ANN. §§ 179.68 subd. 2(9),.69 subds. 3&5 (West Supp. 1977), may be raised by the employees as a defense to violations of the prohibition against strikes. *Id.* § 179.64 subd. 7.

46. *See, e.g.,* Hawaii's and Minnesota's provisions regarding supervisory employee bargaining units. HAW. REV. STAT., §§ 89-6(a)(2), - 6(a)(4) (Supp. 1975); MINN. STAT. ANN. § 179.65 subd. 6 (West Supp. 1977).

47. Jones, note 11 *supra,* at 869.

Because of this wide acceptance of contractual grievance arbitration as an effective means of dispute resolution in the private sector, the relevant statutory provisions and interpretative decisions in the five sample jurisdictions as to the legal status of grievance arbitration and the finality of such arbitration awards merit closer examination.

B. Federal Government

Section 13(b) of Executive Order No. 11,491,[48] as amended, specifically permits the use of contractual grievance procedures for the arbitration of disputes.[49] However, several other provisions of Order 11,491 act to limit substantially the importance of arbitration as a means of resolving discipline-related grievances. Section 13(a)[50] stipulates that matters, *i.e.*, grievances, which can be raised under a "statutory appeals procedure" may not be brought as a grievance under the procedure contained in a collective bargaining agreement.[51]

The nature of the contractual arbitration is further restricted by sections 11(a) and 12 of Order 11,491, which narrow the scope of collective bargaining agreements.[52] These sections require that the negotiation and administration of agreements be conducted so that resulting contracts and dispute settlement procedures will not conflict with:

1. Existing laws and regulations;
2. *Federal Personnel Manual*[53] policies;
3. published agency regulations and policies for which a compelling need exists, as defined by the Federal Labor Relations Council;
4. any controlling agreement at a higher level in the agency; or

48. 3 C.F.R. 191 (1969), *as amended by* Exec. Order No. 11,838, 3A C.F.R. 126 (1975).

49. *Id.* § 15 at 200, *as amended by* Exec. Order No. 11,838, 3A C.F.R. at 130.

50. *Id.*, *as amended by* Exec. Order No. 11,838, 3A C.F.R. at 129.

51. *Id.*

52. Since arbitration is limited by section 13(a) of the order to matters specified in the agreement, any narrowing of the scope of the negotiations resulting from sections 11(a) and 12 limits the purview of arbitration under such agreements. *Id.* §§ 11(a), 12, 13(a) at 198-200, *as amended by* Exec. Order No. 11,838, 3A C.F.R. at 128, 129-30.

53. U.S. CIVIL SERVICE COMM'N, FEDERAL PERSONNEL MANUAL (1969). This is an extensive volume of regulations provided by the U.S. Civil Service Commission to serve as personnel management instructions for the heads of the various federal agencies within the executive branch of government.

5. any other provisions of the executive order.[54]

Whenever, because of the above restrictions, a dispute arises as to the arbitrability of a particular complaint, the parties by mutual agreement may submit this dispute to arbitration for resolution.[55] If the parties do not resolve the question of whether a grievance is within the statutory review procedure or not, the Assistant Secretary of Labor for Labor-Management Relations is required by Order 11,491 to decide the issue.[56]

Generally, arbitration awards that arise from a collective bargaining agreement in the federal sector are subject to initial review by the Federal Labor Relations Council [hereinafter referred to as the FLRC].[57] The FLRC has the discretion to sustain, modify, set aside in whole or in part, or remand the decision of an arbitrator.[58] The FLRC regulations provide for review of an arbitration award only if the award appears to be contrary to:

1. Applicable law;
2. an appropriate regulation;
3. Executive Order No. 11,491; or
4. other grounds accepted by courts in the private sector as grounds for review.[59]

The FLRC has generally endeavored to pursue this policy.[60] However, the narrow scope of collective bargaining and the nature of the review process in the federal sector[61] have tended to result in a shift from those principles of review used in the private sector. Thus, the FLRC has struck down the award of an arbitrator and the contractual provision upon which the award was based where they interfered with management's right, as pro-

54. Exec. Order No. 11,491, §§ 11(a), 12 at 198, 199-200, *as amended by* Exec. Order No. 11,838, 3A C.F.R. at 128 (1975).

55. Executive Order No. 11,491 provides that:

> [Q]uestions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

Id. § 13(d) at 200, *as amended by* Exec. Order No. 11,838, 3A C.F.R. at 130 (1975).

56. The pertinent language states: "Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision." *Id.*

57. *Id.* § 13(b). The FLRC is established by section 4 of Exec. Order No. 11,491. *Id.*

58. Federal Labor Relations Council Review Functions, 5 C.F.R. § 2411.37 (1977).

59. *Id.* § 2411.32.

60. Miserendino, *Arbitration in the Federal Service: The Regulation of Remedies*, 30 ARB. J. 129, 130-34 (1975).

61. *See* notes 49-57 and accompanying text *supra*.

vided in section 12(b)(5) of Order 11,491,[62] "to determine the methods, means, and personnel by which operations are to be conducted."[63]

Another example of the FLRC's interpretation of its scope of review is provided by its decision in *AFGE Local 12 v. United States Department of Labor*.[64] In this decision, the FLRC modified an arbitration award on the basis that the arbitrator had exceeded his contractual authority by granting relief to non-grievants as well as to grievants.[65]

These two decisions, in addition to the FLRC's standards for review, indicate that the FLRC review of arbitration awards is an extensive one. The FLRC maintains, however, that it will only very hesitantly interfere with an arbitrator's award and will pay deference to such an award.[66] However, the material discussed above demonstrates that this policy of deference has not been broadly construed.

From the foregoing discussion, it can reasonably be inferred that contractual arbitration in the federal public sector does not enjoy the sanctity accorded it under the body of substantive federal labor law in the private sector. The scope of the negotiated grievance procedures is limited by applicable law, agency rules and regulations, and policies set forth in the *Federal Personnel Manual*.[67] In addition, the finality of arbitration awards in the federal public sector is less than complete.

The standards which the FLRC has established for the review of arbitration awards appear to allow that body to delve to a degree into the merits of a particular case, thereby exceeding the scope of review permitted by the federal courts in the private sector.[68] The extent to which the FLRC reviews the merits of a particular case is open to debate. The mandated preemption of the contractual grievance procedures by the statutory review procedures, when coupled with this broad scope of review, acts to

62. 3 C.F.R. 191, 200 (1969).

63. Veteran's Administration Hosp., Canandique, N.Y., F.L.R.C. No. 73A-42, GOV'T EMPL. REL. REP. (BNA) RF 21:7015 (1974).

64. F.L.R.C. No. 72A-3, GOV'T EMPL. REL. REP. (BNA) RF 21:7009 (1973).

65. *Id.*

66. NAGE Local R8-14, F.L.R.C. No. 74A-38, GOV'T EMPL. REL. REP. (BNA) RF 21:7285 (1975); Federal Labor Relations Council Announcement Giving Guidance on Review of Arbitration Awards, [1976] GOV'T EMPL. REL. REP. (BNA) 665:I-1 to -9.

67. Note 53 *supra*.

68. *See* notes 63-67 and accompanying text *supra*.

make the finality of arbitration awards in federal public sector labor relations somewhat tenuous.

C. *The State Statutes*

Most of the eighteen comprehensive state public employee collective bargaining laws either require or permit the inclusion of grievance procedures.[69] This can be demonstrated by examining the statutes in the sample state jurisdictions. In New York and Wisconsin, such contractual arbitration provisions are permitted but are not required.[70] The public employee statutes in Minnesota and Pennsylvania require that binding arbitration be included as the final step in contractual grievance procedures.[71] When presented with the issue, the courts in these four states have consistently held that the contractual agreements to arbitrate are valid and enforceable.[72]

Under the public employee statutes of Minnesota, New York, Pennsylvania, and Wisconsin, there is no preemption by statutory civil service procedures of contractual grievance procedures as a means of resolving discipline-related disputes. Thus, unlike the federal sector, employees in these jurisdictions who are covered by a collective bargaining agreement have a choice in selecting the forum in which they will seek the redress of a discipline-related grievance.

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69. These comprehensive public employee collective bargaining statutes are: ALASKA STAT. § 23.40.210 (1972); CONN. GEN. STAT. ANN. § 7-468(d) (West 1972); FLA. STAT. ANN. § 447.401 (Harrison 1977); HAW. REV. STAT. § 89-11(a) (Supp. 1975); IND. CODE § 22-6-4-9 (1976); IOWA CODE ANN. § 20.18 (West Supp. 1977); ME. REV. STAT. ANN. tit. 26, § 979-K (1964); MASS. GEN. LAWS ANN. ch. 150E, § 8 (West Supp. 1977); MICH. COMP. LAWS ANN. § 423.211 (West 1967); MINN. STAT. ANN. § 179.70 (West Supp. 1977); N.H. REV. STAT. ANN. § 273-A:4 (Supp. 1975); N.J. STAT. ANN. § 34:13A-5.3 (West Supp. 1977); N.Y. CIV. SERV. LAW § 203 (McKinney 1973); OR. REV. STAT. § 243.666(2) (1975); PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1977); VT. STAT. ANN. tit. 3, §§ 903, 904 (Supp. 1977); WASH. REV. CODE ANN. § 41.56.080 (1972); WIS. STAT. ANN. § 111.91(a) (West 1974).

70. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1977); WIS. STAT. ANN. § 111.86 (West 1974).

71. MINN. STAT. ANN. § 179.70 (West Supp. 1976); PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1977).

72. *See, e.g.*, Associated Teachers v. Board of Educ., 33 N.Y.2d 229, 236, 306 N.E.2d 791, 796, 351 N.Y.S.2d 670, 676 (1973); Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972); Local 1226, AFSCME v. City of Rhinelander, 35 Wis. 2d 209, 151 N.W.2d 30 (1967).

The authors are aware of no reported decisions regarding this issue in either Minnesota or Pennsylvania. The reason for this may be the unambiguous language of the public employee collective bargaining statutes in these states. These statutes clearly require binding arbitration as the terminal step in a contractual grievance procedure. Note 71 *supra.*

In New York, the public employee collective bargaining statute, the Taylor Law,[73] allows the state employer to enter into agreements with certified employee representatives.[74] Under such agreements, the negotiated grievance procedure culminating in binding arbitration may become the sole means for resolving discipline-related grievances.[75] In 1973, the state and the Civil Service Employees Association [hereinafter referred to as the CSEA] entered into an agreement specifying the contractual grievance procedure, including binding arbitration, which would serve as the only procedure available to those state employees represented by CSEA wishing to appeal disciplinary actions taken by their employers.[76]

The amendment to the Taylor Law and the subsequent agreement between the state and the CSEA were challenged on the basis of the fourteenth amendment provisions guaranteeing equal protection and due process.[77] In *Antinore v. State,*[78] the New York Supreme Court, Appellate Division, unanimously upheld the constitutionality of the subject sections of the Taylor Law. In so holding, the court stated:

> Indeed, far 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 their disposition by one of the methods provided by sections 75 and 76 of the Civil Service Law. Thus the provision "carries out Federal and State policy favoring arbitration as a means of resolving labor disputes . . . ."[79]

The agency charged with the administration of the public employee statute in New York is not granted the authority to review arbitration awards.[80] This is true of Minnesota[81] and Penn-

73. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1977).

74. *Id.* § 204(2).

75. *Id.* § 26(4). *See also* Teachers Ass'n v. Board of Educ., 61 Misc. 2d 492, 305 N.Y.S.2d 724 (Sup. Ct. 1969).

76. *See* Antinore v. State, 49 App. Div. 2d 6, 371 N.Y.S.2d 213 (1975). *See generally* note 150 and accompanying text *supra.*

77. Antinore v. State, 49 App. Div. 2d 6, 371 N.Y.S. 2d 213 (1975).

78. *Id.*

79. *Id.* at 11-12, 371 N.Y.S.2d at 217-18 (1975).

80. *See* N.Y. CIV. PRAC. LAW §§ 7501, 7511 (McKinney 1963).

81. MINN. STAT. ANN. § 179.70(1) (West Supp. 1977).

sylvania,[82] as well as New York. In these three states, the award of an arbitrator is open to review only by the appropriate state courts.[83] The standards for this review are specified in each state's rules of civil procedure.[84] These standards are substantially equivalent to the criteria utilized in the private sector. For example, the New York Civil Practice Law and Rules[85] stipulate the following grounds for vacating an arbitrator's award:

1. Corruption, fraud, or misconduct in procuring the award;
2. partiality on the part of the arbitrator;
3. action taken by the arbitrator exceeds his authority or does not result in a final and definite award;
4. absence of a valid agreement to arbitrate; or
5. noncompliance with the agreement to arbitrate.[86]

Of the four states surveyed, only Wisconsin grants the public sector administrative agency any authority to review an arbitration award.[87] Such a review by the Wisconsin Employment Relations Commission [hereinafter referred to as the WERC] is limited to the following issues:

1. Whether the award was obtained by fraud or corruption;
2. whether the arbitrator was partial;
3. whether the arbitrator wrongfully refused to postpone a hearing or hear evidence; and

82. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1977).

83. PA. STAT. ANN. tit. 5, § 57 (Purdon 1963 & Supp. 1977). MINN. STAT. ANN. § 179.72 (West Supp. 1977) provides that the decision of the Public Employee Relations Board shall be binding unless violative of state or local law. *See generally* Minnesota State College Bd. v. Public Employee Relations Bd., 303 Minn. 453, 228 N.W.2d 551 (1975) (holding that the Board's decisions are not exempt from MINN. STAT. ANN. § 15.0424 (West 1977), which provides for the judicial review of final agency decisions). N.Y. CIV. SERV. LAW § 209 (McKinney 1973) also provides that the decisions of the public arbitration panel shall be binding and final. *Cf.* Albany Permanent Professional Firefighters Ass'n v. Corning, 51 App. Div. 2d 386, 381 N.Y.S.2d 699 (1976) (review of the panel's decision is appropriate pursuant to N.Y. CIV. PRAC. LAW §§ 7501-7514 (MCKINNEY 1963)).

84. N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963). *See* Mount St. Mary's Hosp. v. Catherwood, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 260 N.E.2d 508 (1970) (broadening the above standards of review).

85. N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963).

86. *Id.* (b)(1), (2).

87. WIS. STAT. ANN. § 111.88(1)(West 1974).

4. whether the arbitrator misused or overstepped his contractual authority.[88]

On the basis of the foregoing, it may be concluded that the status of the contractual grievance arbitration in the five sample jurisdictions is generally consistent with practices under the LMRA,[89] although the federal experience provides a moderate exception.[90] In three of the states studied, the award of an arbitrator in a dispute over employee rights is reviewable only by the appropriate state courts.[91] In Wisconsin, the initial review is made by the WERC.[92] The standards by which this review is conducted make it clear that the adjudicative bodies do not look to the merits of particular controversies in making their decisions to uphold, vacate, or modify arbitration awards. Instead, it appears that any review is limited primarily to questions of procedural and arbitral regularity.[93]

IV. STATUTORY PROVISIONS GOVERNING THE REVIEW OF INTITIAL ADJUDICATIVE DECISIONS UNDER CIVIL SERVICE PROCEDURES

It is clear from the preceding analysis that a public employee whose discipline-related complaint is advanced to arbitration can expect, except in unusual cases, that the decision of the arbitrator will be final and dispositive of the matter. Most state and federal employees are granted some form of appeal rights under a statutory civil service procedure.[94] Further, most of these procedures provide for a hearing outside of the employing agency.[95] Therefore, when a public employee seeks redress of a discipline-related complaint through a statutory civil service procedure, and that review progresses to the adjudication stage, the question of finality arises. As with grievance arbitration, the focus of this overview is on the administrative and judicial deference given this initial resolution review.

In the subsequent discussion, the finality of the decision reached at the initial adjudicative stage in statutory civil service

88. *Id.* § 298.10(1).
89. *See* notes 18-47 and accompanying text *supra.*
90. *See* notes 49-66 and accompanying text *supra.*
91. *See* notes 80-86 and accompanying text *supra.*
92. *See* notes 87 & 88 and accompanying text *supra.*
93. *See* notes 69-88 and accompanying text *supra.*
94. *See* notes 97-101 and accompanying text *infra.*
95. *Id.*

review procedures will be investigated. The discussion will center primarily upon the five sample jurisdictions examined above.

A. The Basic Variations

It is well documented that administrative law, particularly at the state level, provides for a wide range of procedures and standings in the relationship between individuals, agencies, and the courts.[96] Without considering the effect of case law and court interpretation of the various state civil service provisions at this time, the predicament of an employee who attempts to read and understand only the review mechanism in his state needs to be analyzed. The material below illustrates the often confusing variety of treatments available in the several states for the adjudication of an employee's grievance through a statutory civil service procedure.

Based solely on a reading of the statutory provisions for such agency action, different mixtures of the following elements may be available in a particular employee's right of review:

1. The review may be heard by a hearing officer who makes no award, but presents a report of facts and recommendations to the civil service board.[97]
2. The review may be heard by a hearing officer who is empowered to make an award which is appealable to the civil service board.[98]
3. The civil service board itself may make an initial award after hearing the review and the statute could provide that the award may be non-reviewable by the courts.[99]
4. The award of the civil service board may be susceptible to court review on specified grounds only.[100]
5. The award of the board may be appealed for general review by the courts.[101]

96. *See, e.g.*, 1, 2 F. COOPER, STATE ADMINISTRATIVE LAW 377, 535-45, 730-33 (1965); K. DAVIS, ADMINISTRATIVE LAW TEXT 396-418 (3d ed. 1972); B. SCHWARTZ, ADMINISTRATIVE LAW 454-55 (1976).

97. *E.g.*, CAL. GOV'T CODE § 19582 (West Cum. Supp. 1977); HAW. REV. STAT. § 76-47 (Supp. 1975).

98. *E.g.*, IDAHO CODE §§ 67-5316(h), (i) (Cum. Supp. 1977); NEV. REV. STAT. § 284-39 (1973).

99. *E.g.*, DEL. CODE tit. 29, § 5949 (1974); OR. REV. STAT. § 240.560 (1975).

100. *E.g.*, KY. REV. STAT. § 18.272(5) (Cum. Supp. 1976); MASS. GEN. LAWS ANN. ch. 31, § 45 (West Cum. Supp. 1977).

101. *E.g.*, OR. REV. STAT. § 240.563 (1975); W. VA. CODE § 29-6-15 (Supp. 1977).

The important point is that the panoply of adjudicative structures represented above reflect only those stated provisions that might be perceived by an employee. A full understanding of the adjudicative finality involved in a statutory review procedure often would not be available to a layman who was not cognizant of the administrative law within that state. For example, in some states where no court review is provided, there is a de facto judicial review of an agency's decisions.[102] In other states, the courts take significant liberties with the statutory language in interpreting the permissible scope of review.[103] This range of judicial treatment serves to increase the variation found in the degree of finality from jurisdiction to jurisdiction.

However, a complete treatise on the scope of the permissible judicial review of agency proceedings is beyond the intended purview of this article. Of primary interest is an illustration of the difference between the court's review of the merits of a contractual arbitration award and the judicial review of the merits of an adjudication under a statutory civil service procedure. Consequently, the major procedural grounds which are commonly available as the basis for appealing an agency decision will not be discussed.

Some legislatures have successfully managed to insulate certain agency actions from a review on the merits by the courts.[104] One approach has been to preclude judicial review by statute.[105] However, the courts would still be able to review the various questions of law that pertained to agency action, though not those matters within the agency's discretion.[106] A second means of limiting judical review would be to commit statutorily certain areas of action to the agency's discretion, thereby further insulating the agency's determination on the merits from reconsideration by the courts. This second method of increasing the finality of the agency's action is the more prevalent method in those states which limit judicial review of grievance appeals.[107]

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102. *See* note 83 *supra;* notes 103 & 127 and accompanying text *infra.*

103. *See, e.g.,* Hannifan v. Sachs, 150 Conn. 162, 187 A.2d 253 (1962); Department of Revenue v. State Civil Serv. Comm'n, 12 Pa. Commw. Ct. 400, 316 A.2d 676 (1974). These cases interpreted CONN. GEN. STAT. ANN. tit. 5, § 202 (West 1969) and PA. STAT. ANN. tit. 71, § 741.951(c) (Purdon Supp. 1977), respectively, so as not to preclude all forms of judicial review.

104. *See* 2 F. COOPER, note 96 *supra,* at 677-79.

105. *Id.*

106. *See, e.g.,* note 51 *supra.*

107. Those states that have specifically committed certain areas to the agency's

B. *The Court Review on Substantial Evidence*

The award of a civil service board or commission is subject to some form of judicial review on the merits in most jurisdictions.[108] The most common standard for review is that of "substantial evidence." The substantial evidence rule is verbalized in section 706(E) of the Administrative Procedure Act,[109] which applies to the federal agencies and provides various levels of guidance for the regulation of state agencies. This act states that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . ."[110] The generally accepted meaning of "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[111] Other standards provide for a broader basis of review, but some form of the substantial evidence rule remains popular in most civil service cases.[112]

However, knowledge of whether a given jurisdiction employs the substantial evidence doctrine in its review of a civil service board's decision often establishes little more than a basis for generalization. As one writer aptly commented regarding the scope of judicial review for agency action: "Whatever impression a literal-minded reader may get from the words in the statute book, the plain reality is that the substantial evidence rule as the courts apply it is a variable. It is made of rubber, not of wood."[113]

C. *Pennsylvania*

The Pennsylvania Civil Service Act[114] provides for the review

discretion and thus allow only certain issues to be judicially reviewed include Idaho, IDAHO CODE § 67-5316 (Cum. Supp. 1977), and Kentucky, KY. REV. STAT. § 18.272 (Cum. Supp. 1976).

108. *See, e.g.*, notes 100 & 101 and accompanying text *supra*.

109. 5 U.S.C. § 706 (1970).

110. *Id.*

111. Consolidated Edison Co. v. NLRB, 305 U.S. 193, 229 (1938); K. DAVIS, note 96 *supra*, at 527.

112. The "clearly erroneous" test is one example. Under this standard, the reviewing court will overturn an agency finding if the record demonstrates that there was a mistake in judgment, even though the record contains evidence which supports the agency's decision. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1947). The MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g) contains the "clearly erroneous" test rather than the "substantial evidence" test. However, this test does not appear to be widely used in personnel actions and procedures. *See generally, e.g.*, notes 97-101 *supra*.

113. K. DAVIS, note 96 *supra*, at 530.

114. PA. STAT. ANN. tit. 71, §§ 741.1-.1002 (Purdon 1963 & Supp. 1977).

of a disciplinary action taken against an employee in the classified service.[115] If an employee requests the review of a disciplinary action and this review proceeds to adjudication, the Act specifies that the initial and only adjudication will be made by the State Civil Service Commission [hereinafter referred to as the Commission].[116] The Commission must hold a public hearing,[117] and the language of the statute suggests that the action of the Commission will not be reviewable by the courts.[118] However, case law clearly sanctions the judicial review of the Commission's decisions.[119] In *Commonwealth v. State Civil Service Commission,*[120] the court held that a Commission decision could be reviewed pursuant to a variation on the substantial evidence rule.[121] Specifically, the court stated that the Commission's findings were not acceptable unless supported by evidence "sufficient to convince a reasonable mind to a fair degree of certainty."[122] Thus, the court applies a more stringent test for the sufficiency of evidence than that applied under the standard notion of substantial evidence. This variation suggests that Pennsylvania employs a broader review of the merits than would be required in a review under the substantial evidence rule.

D. New York

If an employee chooses the civil service system for review in New York, the initial adjudication will be by the appropriate state or municipal civil service commission [hereinafter collectively referred to as the Commission].[123] Again, the statutory language indicates that the Commission decision is to be final and conclusive.[124] The courts, however, have not felt estopped from reviewing the merits of a disciplinary proceeding in which it is claimed that the Commission acted in a purely arbitrary

115. *Id.* § 741.951(a).
116. *Id.*
117. *Id.*
118. *Id.* § 741.951(c).
119. *E.g.*, East v. Commonwealth, 17 Pa. 199, 331 A.2d 601 (1975); Ogasawara v. Commonwealth, 9 Pa. 354, 305 A.2d 734 (1973).
120. 12 Pa. Commw. Ct. 400, 316 A.2d 676 (1974).
121. *Id.* at 401, 316 A.2d at 677.
122. *Id.*
123. N.Y. CIV. SERV. LAW § 76(1) (McKinney 1973).
124. *Id.* § 76(3).

manner.[125] In *Pauling v. Smith,*[126] this test for review of arbitrary action was stated as follows: "[W]hether . . . the punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' . . . ."[127] This would imply that a judicial review of the merits must produce a strong negative reaction before a Commission decision would be reversed rather than produce strong evidence in support of a decision before such a decision will be upheld, as in Pennsylvania. Thus, the standard for judicial review of a Commission's decision in New York is narrower than the usual substantial evidence test.

E. Wisconsin

Wisconsin state employees have a right to request that disciplinary actions be reviewed by the State Personnel Board [hereinafter referred to as the Board] on the basis of "just cause."[128] The action of the Board is subject to a judicial review[129] under a near classic version of the substantial evidence rule. The courts will not substitute their judgment for the special expertise of an agency if the record shows a rational basis for the agency's interpretation.[130] Thus, Wisconsin courts follow a substantial evidence standard in reviewing the merits of a disciplinary action by the Board.

F. Minnesota and the Federal Government

Straightforward examples of the substantial evidence approach are evidenced in the Minnesota and the federal civil service systems. Federal employees may have adverse personnel actions reviewed by the Civil Service Commission.[131] The determination of the Commission can be appealed to the Federal Em-

125. Barbanto v. Moses, 31 App. Div. 2d 898, 297 N.Y.S.2d 831 (1969); Trotman v. Hoberman, 56 Misc. 2d 915, 290 N.Y.S.2d 680 (Sup. Ct. 1968).

126. 46 App. Div. 2d 759, 361 N.Y.S.2d 16 (1974).

127. *Id.* at 760, 361 N.Y.S.2d at 18. *See also* Haywood v. Craig Colony, 5 App. Div. 2d 958, 171 N.Y.S.2d 898, *modified on other grounds,* 6 App. Div. 2d 757, 174 N.Y.S.2d 455 (1958); Plunkett v. Wilson, 179 Misc. 149, 37 N.Y.S.2d 959 (Sup. Ct.), *aff'd,* 269 App. Div. 743, 54 N.Y.S.2d 706 (1942).

128. WIS. STAT. ANN. § 1603.05 (West 1972 & Supp. 1977).

129. *Id.* § 227.15 (West 1957 & Supp. 1977).

130. Libby, McNeil & Libby v. Wisconsin Employment Relations Comm'n, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

131. 5 C.F.R. §§ 771.101-.119 (1974).

ployees Appeals Authority [hereinafter referred to as the FEAA].[132]

The FEAA was created by Executive Order No. 11,787,[133] and it maintains a staff of adjudicators who are assigned to make the final appellate decision in the Civil Service review procedure.[134] The final decision by the FEAA is judicially reviewable to determine if it is arbitrary or capricious or, in other words, to determine if it is based on substantial evidence.[135]

Similarly, Minnesota provides for judicial review in order to insure that the actions of the State Personnel Board are not arbitrary and unreasonable or are not unsupported by substantial evidence on the record as a whole.[136] The Minnesota structure provides for a hearing officer who makes recommendations to the Board as a preliminary step, rather than an initial, direct review by the Board.[137]

G. Summary

While the review of the five sample jurisdictions is not exhaustive, it illustrates the range of grievance procedures available to public employees under civil service statutes and the degree to which those procedures have been modified by judicial decision. At least some degree of judicial review of civil service board decisions is a common element in all five approaches. This review generally provides a marked contrast to the status of an arbitrator's treatment of the merits in disposing of a contract grievance.

V. CONCLUSIONS

The initial goal of this investigation was to determine the degree of finality granted to contractual grievance arbitration awards vis-à-vis the initial adjudicative decision in a statutory civil service review procedure. In the states covered by the study, it is clear that the grievance arbitration awards are subject only to very limited review and, therefore, can be said to possess a high degree of finality.

It would appear that in most states with comprehensive pub-

132. *Id.* at §§ 772.101-.312.
133. Exec. Order No. 11,787, 3A C.F.R. 151 (1974).
134. *See id.*; Vigil v. Post Office Dep't, 406 F.2d 921 (10th Cir. 1969).
135. Benson v. United States, 421 F.2d 515 (9th Cir. 1970).
136. Gibson v. Civil Serv. Bd., 285 Minn. 507, 171 N.W.2d 712 (1969).
137. MINN. STAT. ANN. § 43.24 (West Supp. 1977).

lic employee collective bargaining statutes, contractual grievance arbitration awards can be appealed only to the appropriate state court. Upon appeal, the grounds for judicial review are essentially the same as those that apply in the private sector under the LMRA. Thus, the decision of an arbitrator in a grievance case will normally be overturned only if the court finds that the arbitrator failed to comply with the contract, that he was not impartial, that due process was denied to either party, or that the award was obtained by fraud, corruption, or other misconduct.[138] Such an approach virtually precludes a review of the arbitration award based upon the merits of the case.

Arbitration awards regarding employees' rights in the federal public sector, arising under Executive Order 11,491,[139] do not enjoy the high degree of finality accorded such awards in those states with comprehensive collective bargaining statutes. Initially, the arbitration procedure will be preempted when the employee has recourse to a statutory civil service review procedure.[140] Additionally, the decision of an arbitrator in the federal sector may be appealed to the FLRC. The FLRC review is not limited to the procedural and due process matters noted above. In many instances, despite the FLRC disclaimer, it appears that the FLRC does engage in a form of review that could be said to reach to the merits of the case.[141]

In contrast to the uniform finality of contractual grievance arbitration awards in the states with comprehensive collective bargaining statutes, this study has illustrated the existence of diversity in the review procedures to which initial adjudicative decisions under a statutory civil service procedure are subject.[142] Despite this diversity, it can be observed that the decisions reached at the first adjudicative stages of statutory civil service review procedures are not generally granted the same degree of finality accorded arbitration awards.

Some form of substantive, higher level review is inevitable under a statutory review procedure regarding public employees' rights. Whether this review is performed by the civil service commission or board or by the courts, it is clear that the review is

138. *See* notes 69-93 and accompanying text *supra.*
139. Note 15 *supra.*
140. *See* note 59 and accompanying text *supra.*
141. *See* notes 49-66 and accompanying text *supra.*
142. *See* notes 96-137 and accompanying text *supra.*

typically not limited to only procedural or due process considerations.[143] It appears even with judicial review, under the vacillating standard of the substantial evidence rule, that some form of review on the merits frequently occurs. Whatever the specific criteria, the scope of this review is more expansive than that normally allowed in cases involving the review of contractual arbitration awards. This latitude for review is certain to increase the likelihood that the initial decision will be modified or overturned by the reviewing body.

These observations lead to the conclusion that contractual grievance arbitration establishes a more predictable termination point in the adjudication of discipline-related complaints than does the statutory civil service review procedure. This lesser degree of finality provided by the civil service review procedure may be a factor in reducing the attractiveness of such a procedure vis-à-vis the union-negotiated grievance procedure.

Contractual grievance procedures ending in binding arbitration offer several other advantages over statutory civil service review mechanisms. The range of arbitrable issues is usually broader than that permitted under a statutory review procedure. Normally, a contractual grievance procedure is triggered where it has been claimed that the collective bargaining agreement has been violated.[144]

In addition, the ultimate dispute-resolution mechanism is one that the parties to the collective bargaining agreement, *i.e.*, the employer and the employees through their union, have mutually formulated and agreed upon. It is obvious that such a procedure will be more acceptable to employees than a system unilaterally developed and imposed by the public employer or a state legislature.

In the same manner, the individual who judges the merits of the complaint in the final step of a contractual grievance procedure is one mutually chosen by the employee representative and the employer from a panel of ad hoc professional arbitrators maintained by a neutral administrative agency. Under a statutory procedure, the initial adjudicator is typically a hearing officer appointed by the state civil service commission or a person

143. *See, e.g.*, notes 122 and 127 and accompanying text *supra*. The reviewing body may overturn or modify the initial adjudication for reasons solely within its discretion, including a review of the merits. *E.g.*, NEV. REV. STAT. § 284.390 (1973).

144. *See, e.g.*, note 93 and accompanying text *supra*.

selected by the employee from a list provided by the employer.[145] Consequently, the neutrality of the adjudicator under a statutory review procedure is not assured to the same extent as that provided by contractual grievance arbitration.[146]

When the salient features of adjudication under a statutory civil service review procedure are compared with the characteristics of the contractual rights arbitration, it appears that the latter mechanism generally prevails as the more effective process for guaranteeing an aggrieved employee a rapid and dispositive resolution of his complaint. The advantages of the union-negotiated grievance arbitration include savings in time, expense, and trouble as well as the assurance of a neutral adjudication.[147]

The experience in New York, discussed above,[148] lends support to this observation. The management-proposed system of submission of all unresolved discipline grievances to binding arbitration, in lieu of the statutory review procedure, has resulted in a more effective discipline program and a more prompt disposition of problem cases.[149] Management's attitude in reaction to the operation of this system has been summarized as follows:

> The State approached the arbitral process with a degree of apprehension. It was troubled that arbitrators might not understand the special requirements of public service and might attempt to apply private-sector rules to the resolution of matters of public-service discipline. These concerns proved to be unfounded.
>
> A number of critical principles have already emerged from the arbitral decisions. These include:
>
> —the special responsibilities of employees in custodial situations
>
> —the special responsibilities of public employees to the public
>
> —the requirement that public employees "work now and grieve later"—that is, that they must obey an order of a supervisor and rely on the grievance procedure to question the propriety of the order
>
> —the requirement that public employees not abuse sick leave and report for work on time

145. *See, e.g.*, notes 97-101 and accompanying text *supra*.

146. Fisback, *Grievance Arbitration in Public Employee Disciplinary Cases*, 22 LAB. L.J. 780, 785 (1971).

147. Osterman & Austin, *New York State's Disciplinary Arbitration Procedures*, 47 N.Y. ST. B.J. 181, 181-83 (1975).

148. *See* notes 73-86 and 123-27 and accompanying text *supra*.

149. *See* notes 73-86 and accompanying text *supra*.

> —the fact that certain offenses—such as patient abuse or possession of drugs—are firing offenses.
> This is not to say that the State has agreed with all of the decisions of the arbitrators; but on balance, it seems that the State is winning the cases that it should win and losing the cases that it probably should lose.[150]

Having reached the above conclusions as to the relative efficacy of the two procedures, the issue that is raised is how this finding is relevant to jurisdictions where public employees do not bargain collectively and, therefore, have no access to the contractual grievance arbitration procedure. This issue will be analyzed with emphasis upon the southeastern United States. A brief examination and evaluation of the review procedures available to state employees in the five Southeastern States will be presented.

VI. THE SOUTHEASTERN STATES

Each of the five Southeastern States[151] has some type of statutory procedure whereby state employees can have discipline-related actions reviewed. Only Florida has enacted a comprehensive public employee collective bargaining law.[152] As most of this legislation in the Southeast has only recently been promulgated, there is little interpretive case law specifying the finality of the adjudications made under this procedure. Therefore, the observations as to the finality of each procedure will be largely based upon the relevant statutory language, where it exists.

A. Florida

Section 447.401[153] of the Florida statutes requires that all collective bargaining agreements between public employers and public employees shall incorporate a grievance procedure culminating in final and binding arbitration by a mutually selected, neutral third party.[154] This provision of the Florida law, though it has not been interpreted by the courts, appears to be clear as to its intention and probable effect, since it is similar to the

150. Osterman & Austin, note 147 *supra*, at 183.
151. *See* note 1 *supra*.
152. FLA. STAT. ANN. § 447.401 (Harrison 1977).
153. *Id.*
154. *Id.*

language in the Pennsylvania and Minnesota bargaining statutes.[155]

Florida's State Career Service Law[156] provides a grievance procedure whereby eligible state employees may seek review of the following employment-related actions: "suspension, reduction in pay, transfer, layoff, demotion, and dismissal."[157] Employees have the option of utilizing the statutory review procedure or the contractually-provided grievance procedure, if one exists, but not both.[158] Under the career service procedure, the review of disciplinary actions is performed directly by the Career Service Commission. Actions by the Career Service Commission are reviewable by the judiciary on any of the following issues:

1. The Commission did not afford a fair and equitable hearing.
2. The decision of the Commission was not in accordance with existing statutes or rules and regulations promulgated thereunder.
3. The decision of the Commission was not based on substantial evidence.[159]

B. Georgia

Georgia's state merit system law[160] provides that eligible employees may have those actions reviewed that result in discharges or other adverse actions affecting the individual's compensation or employment status.[161] A career service employee[162] may obtain a hearing before a hearing officer appointed by the State Personnel Board.[163] The hearing officer makes recommendations to the Board which then issues a decision as to whether the disciplinary action was for "proper cause."[164] This adjudicative decision of the Board may be submitted to the appropriate state court for review.[165]

155. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1977); MINN. STAT. ANN. § 179.70 (West 1976).

156. FLA. STAT. ANN. § 110.022 (Harrison 1975 & Supp. 1976).

157. *Id.* § 110.061(2)(a) (Harrison Supp. 1976).

158. *Id.* § 447.401 (Harrison 1977).

159. *Id.* § 110.061(4) (Harrison 1975). For a general discussion of the status of unionism in Florida's public sector, see Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C.L. REV. 235, 255-67 (1978).

160. GA. CODE ANN. §§ 40-2201 to -2211 (1975 and Supp. 1977).

161. *Id.* § 40-2207.1 (Supp. 1977).

162. *Id.* § 40-2207 (1975).

163. *Id.* § 40-2204(b)(4).

164. *Id.* § 40-2207.1(e) (Supp. 1977).

165. *Id.* § 40-2207.1(h).

Section 40-2207.1(m)[166] stipulates the following:

> The court shall not substitute its judgment for that of the board as to the weight of the evidence on questions of fact. . . . The court may reverse the decision or order of the board if substantial rights of the petitioner have been prejudiced because the board's findings, inferences, conclusions, decisions or orders are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the board;
> (3) Made upon lawful [*sic*] procedure;
> (4) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercises of discretion.[167]

C. North Carolina

In North Carolina, permanent employees[168] subject to the State Personnel Act[169] cannot be "discharged, suspended, or reduced in pay or position except for just cause."[170] An employee must be given fifteen days written notice of such disciplinary action, with both the reasons for the discipline and the employee's right of review specified.[171] An aggrieved employee may then appeal the proposed discipline to his department head.[172] If unsatisfied with the department head's disposition of his appeal, the employee may appeal the disciplinary action to the State Personnel Commission.[173]

Upon review, the State Personnel Director or a Commission designee investigates the incident and may hold a hearing.[174] If no settlement is reached as a result of this investigation and/or hearing, recommendations are made to the Commission by the hearing officer. The Commission, after considering the recommendations from the hearing officer, makes a final and binding decision

166. *Id.* § 40-2207.1(m).
167. *Id.* For a general discussion of the status of unionism in Georgia's public sector, see Nolan, note 159 *supra*, at 280-83.
168. N.C. GEN. STAT. § 126-34 (Supp. 1975).
169. *Id.* §§ 126-1 to -16 (1974 & Supp. 1975).
170. *Id.* § 126-34 (Supp. 1975).
171. *Id.* § 126-35.
172. *Id.*
173. *Id.*
174. *Id.* § 126-37.

to resolve the dispute.[175] The statute does not provide for judicial review of the Commission's decisions in such matters.[176]

D. South Carolina

South Carolina's State Employee Grievance Procedure Act of 1974[177] requires that each state agency establish an employee grievance procedure.[178] Grievable issues "include but are not necessarily limited to classification, dismissal, suspensions, involuntary transfers, promotions, and demotions."[179] This statute also creates the State Employee Grievance Committee, which consists of seven members appointed by the State Budget and Control Board.[180] Members are drawn from the career service or appointed personnel in the several state agencies.[181]

A permanent state employee[182] who has utilized the departmental grievance procedure and who remains unsatisfied may appeal to the Committee.[183] The Committee will hold a hearing and make a decision in resolution of the grievance. The Committee's decision is then submitted to the Board.[184] If the Board does not reject the Committee's decision within fifteen days, the decision becomes final. If the Board rejects the Committee's decision, the Board's resolution of the grievance, which is made without a hearing, is final and binding.[185] There is no language in the act pertaining to the judicial review of the adjudications promulgated under its provisions.[186]

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175. *Id.*

176. Though this statute is silent, an aggrieved employee appears to be able to obtain judicial review of a Commission's decision pursuant to N.C. GEN. STAT. §§ 150A-43 to -52 (Supp. 1975). For a general discussion of unionism in North Carolina's public sector, see Nolan, note 159 *supra*, at 287-92.

177. S.C. CODE ANN. §§ 8-17-10 to -40 (1976).

178. *Id.* § 8-17-20. A caveat should be raised at this point in that the employees of the railroads operated pursuant to § 54-3-200 have the right to collectively bargain, and such right may include the right to have an arbitration agreement. *Id.* § 54-3-210. The operation of these railroads now lies with the South Carolina Railways Commission. *Id.* §§ 58-19-30,-40.

179. *Id.*

180. *Id.* § 8-17-30.

181. *Id.*

182. *Id.* § 8-17-40.

183. *Id.*

184. *Id.* § 8-17-30.

185. *Id.*

186. Though there is no specific provision for the judicial review of the Board's decision, review of such a decision may be had pursuant to S.C. CODE ANN. § 1-23-280 (Cum. Supp. Nov. 1977). This statute employs the "clearly erroneous" test. Note 108 and accom-

E. Virginia

Section 2.1-114.5.D.2[187] of the Virginia State Personnel Act[188] directs the State Department of Personnel to promulgate

> [a]n employee grievance procedure to afford an immediate and fair method for the resolution of disputes which may arise between an agency and its employees; however, such procedure shall not be binding on local school boards nor on employees of the General Assembly. The term "grievance" as used herein shall not be interpreted to mean negotiations of wages, salaries, or fringe benefits.[189]

As a result of this statutory directive, the state has established a grievance procedure for state employees.[190] A grievance under this procedure is defined as a complaint or dispute regarding the application or interpretation of personnel policies or procedures.[191] After several preliminary steps, the procedure culminates in a determination by a three or five member panel, chosen by the aggrieved employee and the employer.[192] The panel members must be state employees.[193] In order to arrive at the three or five member panel, the aggrieved employee selects one or two state employees, and the employer then selects one or two additional employees to serve as panel members. These panel members, in turn, select the final panel member, who shall not be an employee of the agency or department in which the grievance is filed.[194]

After a full hearing, this panel issues by majority vote a decision in resolution of the grievance. This decision is binding on both the employer and the employee.[195] There is no provision in the statute or the procedure directly sanctioning any form of judicial review of the panel's decision.[196]

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panying text *supra*. For a general discussion of unionism in South Carolina's public sector, see Nolan, note 159 *supra*, at 292-94.

187. VA. CODE § 2.1-114.5.D.2 (Supp. 1977).

188. *Id.* §§ 2.1-110 to -116 (1973 & Supp. 1977).

189. *Id.* § 2.1-114.5. p.2.

190. *Id.*

191. *Id.* The section, prefaced by a directive to the Department of Personnel and Training regarding the establishment of employee-management relations, provides: "The term 'grievance' as used herein shall not be interpreted to mean negotiations of wages, salaries or fringe benefits." *Id.*

192. VA. STATE DEP'T OF PERSONNEL, GRIEVANCE PROCEDURES FOR STATE EMPLOYEES (1977).

193. *Id.*

194. *Id.*

195. *Id.*

196. In addition, Virginia's Administrative Process Act, VA. CODE § 9-6.14:20 (Supp.

F. Observations

The statutory review procedures available to state employees in the Southeast appear to fit the general pattern of statutory civil service systems. While each procedure varies slightly, a major focus is usually on the review of discipline-related actions. In Florida, Georgia, North Carolina, and South Carolina, the final adjudicative decision is made by a commission or board appointed by the governor or other administrative officials within the state government.[197] Virginia provides for a decision by a three or five member panel of fellow state employees.[198] The statutory review procedure in each of these five states is administered by either the state department of personnel, a body appointed by the governor or by public management.[199] Thus, the state government maintains a significant degree of control over these procedures and their adjudications.

In Florida and Georgia, administrative adjudications are reviewable by the appropriate state court.[200] In North Carolina, South Carolina, and Virginia, the procedures make no explicit

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1977), expressly exempts "from the operation of this chapter any agency action relating to the following subjects . . . (v) the selection, tenure, dismissal, direction, or control of any office or employee of an agency or the state." For a general discussion of unionism in Virginia's public sector, see Nolan, note 159 *supra*, at 298-302.

197. FLA. STAT. ANN. § 447.403 (Harrison 1977) provides for a final review by the legislative body in the event of an impasse. The legislature, after considering the findings of fact and recommendations of the special master, at a public hearing shall "take such action as it deems to be in the public interest."

In Georgia, the final decision is to be made by the State Personnel Board, as provided in GA. CODE ANN. § 40-2207 (Supp. 1977). The members of the Board are appointed by the Governor, pursuant to GA. CONST. of 1945 art. XIV, § I, para. 1, which provision was expressly continued by the Executive Reorganization Act of 1972, 1972 Ga. Laws 1015, § 7.

N.C. GEN. STAT. § 126-37 (Supp. 1975) vests final decision-making authority in the State Personnel Commission, whose members are appointed by the Governor. In South Carolina, the State Employee Grievance Committee makes the final decision. S.C. CODE ANN. § 8-17-30 (1976). Its members are appointed by the State Budget and Control Board. *Id.* For the structure of the powerful Budget and Control Board, see *id.* § 1-11-10.

198. *See* note 192 *supra.*

199. Florida's statutory review procedure is administered by the Public Employees Relations Commission, whose members are appointed by the Governor. FLA. STAT. ANN. § 447.207 (Harrison 1977). The procedures are administered by the state personnel departments in Georgia and North Carolina, *see* note 197 *supra,* and by the State Personnel Division in South Carolina, S.C. CODE ANN. § 8-17-40 (1976). Virginia's procedures are overseen by its Department of Personnel and Training, VA. CODE §§ 2.1-11.4.5.D.1, .2 (Supp. 1977), whose members are appointed by the Governor. VA. CODE § 2.1-113 (Supp. 1977).

200. *See* notes 159 & 161 and accompanying text *supra.*

provision for the judicial review of the final administrative adjudication.[201]

Only in Florida do state employees have access to a union-negotiated review mechanism which culminates in a binding adjudication by a mutually selected, neutral third party. Florida state employees covered by a collective bargaining agreement can obtain this neutral adjudication through the contractual grievance procedure.[202]

It is difficult to determine the efficacy of the statutory review procedures in the Southeast. As all these procedures are relatively new, few statistics or interpretative court decisions exist that would facilitate such an evaluation. With this caveat, the following observations may be made as to the structural shortcomings of these procedures:

1. Because of the absence of the mutual selection of a neutral third party adjudicator, there is no firm guarantee that an aggrieved employee will receive a neutral adjudication of his complaint.
2. Due to the fact that the agencies or bodies charged with the administration and enforcement of these procedures are generally part of the state management group, the neutral administration and enforcement of these procedures is not assured.
3. There are no provisions in any of the statutory procedures to insure good faith compliance by employers.
4. There are no provisions in any of the relevant legislation to protect employees who file for review from retaliation by the employer.

Based on these factors and on the other failings of such procedures discussed above,[203] a strong possibility may exist that the present statutory review procedures in the southeastern United States do not sufficiently maintain due process for state employees in their employment.

Statistics from Virginia act to support the above conclusion. There are approximately 60,000 employees covered by the procedure promulgated under the state's grievance procedure statute. In the first twenty-six months of the procedure's existence, from April 1, 1974 to June 30, 1976, a total of 259 grievances were

201. *See* notes 176, 186 & 196 and accompanying text *supra.*
202. *See* note 158 and accompanying text *supra.*
203. *See* notes 197-202 and accompanying test *supra.*

filed.[204] This small number of grievances indicates that either there is an unusually small number of employment-related problems in Virginia, or more likely, that state employees are not aware of the procedure or are not using it. A review system can only be successful if employees feel confident about its effectiveness and protection.

VII. A PROPOSED REVIEW PROCEDURE FOR STATE EMPLOYEES IN THE SOUTHEASTERN UNITED STATES

The existing review mechanisms in the Southeastern States may require modification if they are to guarantee due process rights to state employees. Drawing upon the results of this study, a model statutory procedure is proposed in an attempt to maximize the guarantee of due process rights for the employee while proving workable in the labor relations environment extant in the Southeast. Because of its general nature, the procedure may require slight modification to make it suitable to any particular state.

A. The Guarantee of Due Process

As the goal of the proposed review procedure is to guarantee state employees their due process rights, it is necessary to define these rights. Therefore, the statute creating the review mechanism should incorporate the following language:

> No state employee will be discharged or disciplined without just cause.

The concept of just cause for discipline is the most basic and widely accepted principle of sound discipline.[205] The stipulation

204. VA. STATE DEP'T OF PERSONNEL, SUMMARY OF GRIEVANCES FILED UNDER THE STATE'S UNIFORM GRIEVANCE PROCEDURE, (Apr. 1, 1974 to May 31, 1975, and July 1, 1975 to June 30, 1976).

205. A full discussion of the principle of "just cause" is not within the scope of this article. However, the basic concept is well summarized by the following excerpt from GRIEVANCE GUIDE (BNA) (1972):

> - Was the employer's rule or order reasonably related to efficient and safe operations?
>
> - Did management investigate before administering the discipline? The investigation normally should be made before the decision to discipline is made. Where immediate action is required, however, the best course is to suspend the employee pending investigation with the understanding that he will be restored to his job and paid for time lost if he is found not guilty.
>
> - Was the investigation fair and objective?

that management will discipline or discharge employees only for just cause is incorporated in the majority of collective bargaining agreements.[206] The inclusion of this provision guarantees to the employees that they will not be disciplined or discharged for arbitrary or capricious reasons.

Such an inclusion would serve two purposes. First, it would codify the due process guarantee. Second, it would provide the individuals who adjudicate grievances with a basis for determining the merit of any request for review.

By limiting the scope of reviewable actions to discharge and other discipline-related matters, it would be possible to avoid overloading the procedure with petty complaints. Such a limitation would not significantly reduce the guarantee of due process to employees since the protection against arbitrary discipline is the primary component of this guarantee. This limitation would also relieve an employer's fears that the procedure would be used as a means to achieve de facto collective bargaining over employment-related matters such as wages and working conditions.

B. A Model Grievance Procedure

The core of the proposed system is a uniform grievance procedure which would cover all non-policy-making state employees. The grievance procedure would culminate in binding arbitration by a neutral third party mutually selected by the employee and the employer. The following procedure is offered as a prototype.

When an employee is dissatisfied with his discharge or other discipline-related action taken by the employer, he shall be able

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- Did the investigation produce substantial evidence or proof of guilt? It is not required that the evidence be preponderant, conclusive, or "beyond reasonable doubt," except where the alleged misconduct is of such a criminal or reprehensible nature as to stigmatize the employee and seriously impair his chances for future employment.

- Were the rules, orders, and penalties applied even-handedly and without discrimination? If enforcement has been lax in the past, management can't suddenly reverse its course and begin to crack down without first warning employees of its intent.

- Was the penalty reasonably related to the seriousness of the offense and the past record? If employee A's past record is significantly better than that of employee B, the company properly may give A a lighter punishment than B for the same offense.

206. COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 40:1 (1975). Seventy-nine percent of the collective bargaining agreements surveyed contained a "cause" or "just cause" provision.

to seek a review of such action pursuant to the following procedure:

First Step: The Employee and his Immediate Supervisor

(1) Within three working days of the action giving rise to the grievance, the employee will register his complaint with his immediate supervisor.
(2) The grievance is not written at this point.
(3) The immediate supervisor shall respond to the grievance within three working days.

Second Step: The Employee and the Department Head

(1) If the employee is dissatisfied with the employer's response at Step One, he will advance the grievance in writing to the department head within three working days.
(2) The grievance becomes a formal written grievance at this step.
(3) The department head shall respond in writing to the employee within three working days.

Third Step: The Employee and the Agency or Operation Head

(1) If the employee is dissatisfied with the employer's response at Step Two, he will advance the grievance in writing to the agency or operation head within five working days.
(2) The agency or operation head shall respond in writing to the employee within five working days.

Fourth Step: The Employee and the State Director of Personnel (or his appointee)

(1) If the employee is dissatisfied with the employer's response at Step Three, he will advance the grievance in writing to the State Director of Personnel within five working days.
(2) The State Director of Personnel (or his appointee) shall respond in writing to the grievance within ten days.

Fifth Step: Grievance Arbitration

(1) If the employee is dissatisfied with the employer's response at Step Four, he shall request in writing, within five working days, that the grievance be submitted to final and binding arbitration.
(2) The arbitrator shall decide whether the grievant was discharged or disciplined for just cause.
(3) If the grievance is upheld, the arbitrator shall have the

authority to order appropriate remedial action, including, if appropriate, reinstatement with full backpay.

To insure the prompt disposition of grievances, the time limits should be strictly enforced. Failure by the employer to respond to a grievance within the specified time period at each step shall result in the resolution of the grievance in favor of the employee. In a similar manner, failure of the employee to advance his grievance to the next step of the procedure within the time limits shall result in the grievance being resolved in favor of the employer.

To enhance employee acceptance and support of the mechanism and to insure adequate representation of the grievant, the enabling statute should provide that each aggrieved individual be allowed to choose a representative at the latter stages of the grievance procedure. While this suggestion will surely prompt adverse reaction from some public policy makers, it is well-founded. It is difficult to argue that the majority of rank and file employees could deal on an equal basis with the people in top management or represent themselves competently in an arbitration proceeding. Therefore, once a grievance progresses to the third step, the grievant should be allowed to have another individual present as his spokesperson or advisor.

The statutory grievance procedure should incorporate one further characteristic. To insure prompt and efficacious adjudication of unresolved grievances, the statute should sanction a form of arbitration that is as simple and non-technical as feasible, while still guaranteeing both parties procedural due process. Thus, it is suggested that evidentiary rules be made as accommodating as possible, that hearing transcripts not be allowed, and that post-hearing briefs be barred except in discharge cases.

C. Protection of Employees Against Employer Retaliation

To insure good faith compliance with the procedure, explicit language should be included in the enabling legislation which would prohibit employer retaliation against employees who file grievances. The simplest way to enforce this proscription of employer retaliation is to make such management actions the basis for a separate grievance. Because of the special nature of such retaliation grievances, the review of this grievance should originate at the fourth step of the procedure, *i.e.*, the presentation of the grievance directly to the state director of personnel.

D. Neutral Administrative Agency

As discussed above, a major problem with most statutory review procedures is the fact that they are administered by members of the public management group. Therefore, it is suggested that a truly neutral, autonomous agency or commission be created to administer the prepared review procedure. The functions of this agency would be so limited as to require that it consist of only a part-time chairman, two part-time members, and a full-time executive director. The three commission members, appointed by the governor, would be chosen for their expertise in labor relations and their ability to perform their duties in an objective, impartial manner.

This State Employees Appeals Commission would serve three functions:

> (1) To evaluate and appoint qualified neutrals to a panel of ad hoc arbitrators;
> (2) to provide five-member lists of arbitrators from which the particular employer and the employee in the fifth step of its grievance procedure would mutually select, by an alternate striking of names, arbitrators; and
> (3) to rule, when necessary, that a grievance is resolved based upon one of the parties' failure to meet the prescribed time limits for replying to a grievance or for failing to advance a grievance to the next step of the procedure.

The Commission, thus, would not engage in any adjudication of grievances, but rather would facilitate the efficient operation of the procedure. The fees of the arbitration would be paid by the Commission.

E. Specification of the Grounds for Judicial Review of Arbitration Awards

The major advantage of this proposed procedure over existing review mechanisms is the prompt resolution of disputes. Therefore, it is important that the enabling statute specify the grounds for the judicial review of the arbitration awards in a manner that will prevent substantive review of the merits and a delay in reaching a final resolution. The following language is suggested:

> The decision of the arbitrator shall be reviewable in the appropriate state court. The court shall vacate the arbitrator's award only on the following grounds:

(1) Fraud, corruption, or other serious procedural irregularity in obtaining the award;
(2) partiality on the part of the arbitrator;
(3) action by the arbitrator that exceeds his statutory authority; or
(4) failure of the arbitrator to issue a final and definite award.

By limiting court review to questions of procedural and arbitral regularity, this provision would insure that the adjudications produced under the procedure would, in most cases, be dispositive of the grievance.

VIII. SUMMARY

It is the aim of this article to encourage state officials in the Southeast to review critically and objectively the existing grievance procedures now available to state employees within their jurisdictions. The results reported above indicate that those statutory procedures, when compared to a contractual grievance arbitration procedure, fall short of fully guaranteeing state employees due process in their employment.

Based upon this premise, a statutory procedure which incorporates the essential characteristics of a contractually provided grievance arbitration without requiring the presence of collective bargaining or of a union has been outlined. Thus, the proposed review mechanism should prove workable in states where collective bargaining is neither sanctioned nor advocated by the majority of public officials.

There is an urgent need for those who promulgate public policy in the Southeast to consider seriously the problem of guaranteeing to public employees fair treatment on the job. The procedure put forth above will fill the void which can arguably be said to exist in states where public employee collective bargaining is not widespread or acceptable. If this problem is not confronted and solved by enlightened legislators and public managers, the eventual result may well be the emergence of a burgeoning demand by public employees for full collective bargaining rights.