

## **PEER REVIEW VERSUS GRIEVANCE PROCEDURES IN PUBLIC UNIVERSITIES IN THE UNITED STATES**

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### **ABSTRACT**

This article examines the peer review processes in Public Universities in the United States developed to resolve faculty rights complaints. The peer review processes, in general, do not meet the same standards of procedural and distributive justice that are generally expected of grievance procedures negotiated at arm-length. The procedural problems alone suggest that universities with peer review process may examine the efficacy of their dispute resolution processes. The results concerning distributive justice are inclusive and require additional examination before conclusions may be drawn with respect to peer review.

As an industry, education is heavily unionized, with more than 80 percent (or about 1.5 million) of teachers in elementary and secondary education being represented by unions, primarily the National Education Association and the American Federation of Teachers, AFL-CIO [1]. In higher education, however, the percentage of faculty members represented by a union is far lower. In 1994, only about 225,000 college professors (or about one-third) were represented by a union [2], with the American Association of University Professors being the dominant, industry-specific union.

In large measure these differences in unionization are the result of variations in the legal environment. Thirty-eight states in the United States provide legal protection for collective bargaining rights, and another three states require "meet-and-confer" privileges for public school teachers, but only 20 of these states extend these collective bargaining rights or meet-and-confer privileges to public

college and university faculty members [3]. Where the bargaining rights of teachers exist is in the public sector.

The Taft-Hartley Act (National Labor Relations Act, as amended) does not protect collective bargaining rights in private sector education. The courts have refused to extend these rights to the faculty of private elementary and secondary school employees [4] and to the faculty and staff of private colleges and universities [5]. This results in state and local employees having collective bargaining rights that do not extend to the private sector, a result which is just the opposite of general industry, in which state and local governmental employees have little or no protection, while private sector employees do.

The legal basis for the denying faculty in private sector universities the protection of the National Labor Relations Board is a simple extension of a long-standing legal doctrine commonly referred to as the "Doctrine of Academic Abstention" [6]. Under this doctrine, university faculty members are considered managerial employees, and managerial employees are not afforded the protections of the National Labor Relations Act. The Doctrine of Academic Abstention has been described as:

For years, the judiciary refrained from asserting jurisdiction over matters concerning academe. The theory was that professors were in a unique position, because of their education and professional duties, to qualify them to make decisions concerning virtually all academic matters. The courts also reasoned that if there was judicial intrusion into academic matters, society's best interest would not be served. The courts simply adopted the prevalent professorial view that academic freedom was the basis upon which academic decisions should be founded. The Courts' unwillingness to substitute their judgment for professorial determinations in academic matters has come to be known as the doctrine of academic abstention. . . . [7, p. 93].

In other words, professorial discretion is managerial discretion of professional employees that is sufficiently unique, in the view of the courts, that society is best served when the exercise of this discretion is left as unfettered as possible by the judiciary. The managerial aspect of this professorial discretion, however, is precisely why the courts have also refused to find that the Taft-Hartley Act applies to private universities.<sup>1</sup> The courts have decided that it was the Congressional intent that managerial employees not be covered by the National Labor Relations Act. The problem then becomes one of whether professors really possess managerial authority and whether this managerial authority leads to procedural and distributive justice in the ultimate decision-making authority in resolving disputes that may arise between the institution and individual faculty members.

<sup>1</sup> The Taft Hartley Act (61 Stat. 138, Section 2.2) specifically exempts managerial employees from coverage of the statute. Therefore, there is a dichotomy: Managerial discretion results in academic abstention; however, the same managerial discretion also results in exclusion of professors from the statutory protection of the Taft-Hartley Act.

The purpose of this article is to examine professorial managerial powers, as they typically apply, in peer review for the resolution of faculty disputes in public universities in the United States. Once the peer review processes have been examined, they are compared to the standards used to gauge the effectiveness of collective bargaining grievance procedures, in an attempt to draw inferences concerning the processes used in universities to resolve faculty disputes. Specifically, both procedural and distributive justice criteria form the basis of this institutional examination of peer review and its efficacy.

### PEER REVIEW

The peer review process is one typically created by the institutions' self-governance body, usually referred to as a senate or faculty council, or a similar label.<sup>2</sup> These bodies are commonly elected entities whose constitution, authority, or charge, typically provides for these bodies to have certain legislative authorities over matters academic in the institution. Generally, this authority is delegated by the board of governors (board of regents, etc.) or sometimes the state's legislature. Occasionally, peer review processes are imposed by the administration of the university or required by law.

Peer review is a process that has multiple steps, not unlike a collective bargaining grievance procedure, but it ends in a process where a faculty committee makes a decision and that decision is forwarded to the institutions' administration for its action. The decision of the faculty committee is typically not binding on the institutions' administration, and the administration is generally free to accept or reject the recommendation. The only compelling authority of the faculty committee is the political strength of the faculty with respect to the administration's action or lack thereof.

The multiple-step processes under the peer review mechanism generally contain some requirement that the aggrieved faculty member bring the complaint to his/her immediate supervisor, generally a department chair or director. If the problem cannot be resolved at that point, there may be a requirement that the problem be taken to the next level administrator, i.e., a dean, before the complaint is brought before the faculty committee. In the institutions examined, it was generally not required that the complaint be reduced to writing until such time as the complaint goes before the faculty committee. In none of the peer review

<sup>2</sup> The generalizations made here come from a survey of peer review documents obtained from several universities, primarily from the faculty handbook (or similarly labeled document) from: Ball State University, Colorado State University, Indiana University-Bloomington, Indiana-Purdue University-Fort Wayne, Indiana University, Purdue University-Indianapolis, Kansas State University, Kansas University, University of Missouri-Kansas City, Oklahoma State University, Texas Tech University.

processes was there a formalized discovery process similar to union grievance procedures.

It is also interesting to note that the language of the peer review processes does not typically limit complaints in very specific ways. In practice, it appears that most institutions limit complaints to terms and conditions of employment, but most provide other mechanisms to resolve other matters. For example, in Indiana and Kansas institutions review mechanisms are in place to resolve matters involving such things as discrimination, harassment, and violations of academic ethics. These processes are administrative and do not involve peer review. Therefore, dispute resolution in most academic institutions involves both peer and administrative processes.

Virtually all of these peer review processes end in the faculty committee being charged only with the authority of making recommendations to the president or a similar official of the university. Recommendations made under these processes have no binding authority and simply provide a formal mechanism for the faculty to have a voice in resolving complaints concerning the application of managerial authority in the institution.

It has been argued that peer review processes are formulated to provide either procedural justice or distributive justice, or potentially both [8]. Procedural justice concerns the faculty members' rights to have effective input into the creation of the peer review system, while distributive justice involves the justice of the outcomes of the peer review process.

Procedural justice within an environment is simply the creation of opportunities to have effective input into the system by which disputes are resolved. Face validity is how much of the issue of procedural justice is measured. Distributive justice, on the other hand, can be examined by measuring the results of the processes and how they are perceived by the participants. Each of these criteria provide some insight into the efficacy of peer review dispute settlement mechanisms.

### **COMPARISONS OF GRIEVANCE PROCEDURES AND PEER REVIEW PROCESSES**

Grievance procedures generally are the products of collective bargaining agreements and provide for multiple-step, formalized processes for resolving grievances that arise in the interpretation and application of a contract. These processes generally involve some form of discovery requirements so that a record of evidence is developed with which to make a decision and to provide a record should the process culminate in binding arbitration by a neutral third party. In 1945, then-President Harry Truman appointed a commission to examine grievance procedures and determine which characteristics of these processes made them effective methods for resolving disputes in the workplace. The substantial body of literature that has evolved over the intervening period has been unable to improve

on this commission's report. The characteristics of an effective grievance procedure, according to the Truman Commission Report, are:

1. Collective bargaining agreements should contain provisions that grievances and disputes involving the interpretation and application of the terms of the agreement are to be settled without resort to strikes, lockouts, or other interruptions to normal operation by an effective grievance procedure with arbitration as its final step.
2. To be effective, the procedure established for the settlement of such grievances and disputes should meet at least the following standards:
  - a. The successive steps in the procedure, the method of presenting grievances or disputes, and the method of taking an appeal from one step to another should be so clearly stated in the agreement as to be readily understood by all employees, union officials, and management representatives.
  - b. The procedure should be adaptable to the handling of the various types of grievances and disputes that come under the terms of the agreement.
  - c. The procedure should be designed to facilitate the settlement of grievances and disputes as soon as possible after they arise. To this end:
    - 1) The agreement should provide adequate stated time limits for the presentation of grievances and disputes, the rendering of decisions, and the taking of appeals.
    - 2) Issues should be clearly formulated at the earliest possible moment. In all cases that cannot be settled in the first informal discussions, the positions of both sides should be reduced to writing.
    3. Management and the union should encourage their representatives to settle at the lower steps grievances that do not involve broad questions of policy or of contract interpretation and should delegate sufficient authority to them to accomplish this end.
    - 4) The agreement should provide adequate opportunity for both parties to investigate grievances under discussion.
    - 5) Provision should be made for priority handling of grievances involving discharge, suspension, or other disciplinary action.
  - d. The procedure should be open to the submission of grievances by all parties to the agreement.
3. Management and unions should inform and train their representatives in the proper functioning of the grievance procedure and in their responsibilities under it. In such a program it should be emphasized:
  - a. That the basic objective of the grievance procedure is the achievement of sound and fair settlements and not the "winning" of cases;
  - b. That the filing of grievances should be considered by foremen or supervisors as aids in discovering and removing causes of discontent in their departments;
  - c. That the tendency by either party to support the earlier decisions of its representatives when such decisions are wrong should be discouraged;
  - d. That the willingness of management and union officials to give adequate time and attention to the handling and disposition of grievances and disputes is necessary to the effective functioning of the procedure;

- e. That for the sound handling of grievances and disputes both management and union representatives should be thoroughly familiar with the entire collective bargaining agreement [9, pp. 45-46].

As can be seen from a cursory examination of the commission's report, it addresses procedural matters in an attempt to assure that the parties to the process perceive it is procedurally just. Further, the report also addresses the issues necessary to increase the probability that the process will provide distributive justice through assuring propriety in the procedures used to resolve grievances and disputes.

The matters of procedural and distributive justice as they apply to peer review are addressed in the following paragraphs.

### **Procedural Justice**

Procedural justice involves the idea of "voice" [10] and access. Without access to the process, voice for the employees to have effective input does not exist. The commission's recommendations were that voice should not be limited and that all parties to the collective bargaining agreement should be eligible to file complaints under the model effective-grievance procedure. Further, the commission noted that access revolves around the provisions of the parties' collective bargaining agreement. Too often colleges and universities have no primary document, such as a collective bargaining agreement, where the terms and conditions of employment, rights and responsibilities of faculty members, and expectations concerning productivity can be found. The end result is that access to the peer review process is generally far less certain than under a collective bargaining process, where the issues of access and bargaining items are clearly identified.

The commission also noted that grievance procedures should end in final and binding arbitration. Arbitration provides for several procedural characteristics that do not exist in peer review. Arbitration is final and binding. The process has been sanctioned by the courts as an agreement between the parties beforehand to submit to a neutral, third party, operating under a specified code of conduct [11]. The arbitrator's decision must be based on the contract and the record of evidence. If these standards are met, the courts bar judicial review of an arbitrator's award [12]. In other words, the courts have determined that arbitration as practiced in the unionized sectors of the economy provides sufficient procedural justice that the courts ought not interfere in the process. However, this judicial stamp of approval has not been applied to the peer review process.

At the end of a peer review process the aggrieved person has resort to the courts, which cannot be limited by contract or denied by a successor employer [13]. The courts have historically been hesitant to intervene in academic matters, but this hesitancy seems to have diminished in recent years, particularly as personnel matters and academic issues involving students have come before the courts [6]. This is evidence that the courts do preferentially treat processes that are clearly

procedurally just and involve arm's-length decision making, as opposed to decisions made by one of the disputants.

As is also evident from a review of the commission's report, specific time limits exist for processing complaints, decisions, and appeals to the next step. None of the peer review processes examined provided time limits to make the processes efficient. No discovery processes are identified in the peer review processes, and virtually nothing is stated in the processes concerning any expedited handling of discharge or disciplinary matters. These failures to provide procedural due process bring substantially into question whether procedural justice is available from such peer review processes.

In sum, the courts have found that as long as voice is apparent, that voice is translated into identification of the parties' respective rights and responsibilities in the form of a contract, and the dispute resolution process ends in arbitration, procedural justice has been achieved. Arbitration awards that arise from procedurally just processes are enforceable in the courts (and the courts make no inquiry into distributive justice issues; see [13]). The procedure is therefore vested with judicial approval, and no such approval occurs in the case of peer review processes.

Herein lies an ethical quandary for universities. To resolve disputes under a union contract, the only costs involved until the arbitration step is reached are those of filing, processing, and appealing of grievances. Arbitration is relatively inexpensive, the arbitrator's fees and expenses rarely exceed a couple of thousand dollars, and normally the process only takes only a few weeks. Usually, arbitration costs are split equally between the parties, and the union pays for representation of the employee. Under a peer review process, rights can be enforced only in the worst case scenario, if the faculty member has the resources and is willing to avail himself/herself of the courts. A lawsuit has the potential of costing tens of thousands of dollars and may take years to work its way through the courts. In this case, the peer review process limits procedural justice to those who can afford the litigation and are willing to proceed to a court. Because peer review results only in nonbinding recommendations to administration, the procedural justice to be obtained from the process depends critically on the administration standing at the end of the process.

### **Distributive Justice**

There is little, if any, information available concerning the results of peer review processes, or how those processes are viewed by those the peer review processes are meant to serve. It is clear that when the administration of a university is granted the authority to make decisions under the peer review process and that same administration is a party to the grievance, distributive justice is unlikely to be assured by peer review. Moreover, a great deal of potential exists for distributive *injustice* in the process. The fact that the justice to be obtained from the process

depends on the administrative individuals to whom the recommendation are to be made, suggests a significant flaw in the nature of the peer review procedures.

Little information exists concerning lawsuits arising from peer review processes. Of the universities whose peer review processes were examined here, nearly all had been subjected to at least one lawsuit in the recent past. However, no conclusions can be drawn from this anecdotal evidence. There is a need for closer examination of the litigation resulting from these processes before we can consider the evidence to be useful. It is, however, clear that litigation does occur, and therefore there is some perception of distributive injustice by faculty members in these peer review processes.

Campus politics may even play a role in the distributive results of these processes. A popular faculty member or one favored by the administration may fare better in the process than a less-popular or less-favored faculty member. The fact that decision makers and disputants must live together in the future and have their own unique histories may result in distributive injustices that are absent in arbitration processes.

A substantial body of literature also exists concerning faculty attitudes toward collective bargaining and unionism in general [14]. No clear agreement has emerged in the literature about the role of distributive justice issues or how these issues affect faculty decisions and their views on unionization. However, it is clear that faculty are unionizing in universities, at a time when unionization in general industry is declining. It is also clear from many of the studies published that faculty at specific institutions appear to have issues with distributive justice at their institutions.

## CONCLUSIONS

From the available evidence it appears clear that peer review processes do not meet the high standards expected of grievance procedures with respect to procedural justice and that procedures connected with peer review processes have not achieved the same level of judicial acceptance as arbitration. There are also several clear and glaring procedural differences between grievance procedures and peer review processes. Time limits, access, primary governance documents, and discovery requirements provide a strong basis for procedural justice in grievance procedures, but these characteristics are absent in peer review processes.

The relative lack of procedural justice, or at least the potential absence of procedural justice in peer review processes, suggests that a change in public policy may be well-advised. The lack of access and the expense of litigation to get to a third-party, neutral decision maker suggest that peer review ought to be closely examined and possibly replaced by a more just system. Perhaps even collective bargaining legislation would better serve as public policy than the current systems.

Distributive justice issues are not as clearly resolved. There is a clear need for greater research in the issue of distributive justice, but at present lawsuits are



pending, and their rate of filing seems to be accelerating, suggesting a perception that peer review contributes to distributive injustice. Further, substantial research has been conducted concerning faculty attitudes about various issues, including unionization and distributive justice. The results of the studies comprising this literature are inconclusive, suggesting that significant problems in distributive justice may exist at some institutions and perhaps not at others. In any event, much more research must be conducted before any conclusions can be drawn concerning distributive justice issues in peer review processes.

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