

**PEER REVIEW IN EMPLOYMENT DISPUTES:
AN EMPLOYEE RIGHT OR AN EMPLOYEE WRONG?**

TANYA M. MARCUM

Bradley University

ELIZABETH A. CAMPBELL

Central Michigan University

ABSTRACT

One of the boldest initiatives in the legal field in the last few decades has been the increased use of alternative dispute resolution methods to resolve employment disputes. Judicial enforcement of arbitration and other forms of alternative dispute resolution methods have been imposed on all facets of business and domestic activities. In the employment arena, especially in nonunionized settings where employees do not enjoy the benefits of collective representation, the search for mechanisms to achieve the resolution of employment disputes has resulted in innovative techniques and processes. This article will focus narrowly on the use of peer review, a type of dispute resolution in the employment arena where the panel consists of coemployees who are peers of the very employee involved in a dispute with the employer. Many legal issues are raised concerning this form of alternative dispute resolution process, and this article will examine each of them, as well as the risks and benefits inherent in the employee's use of peer review processes to resolve employment disputes.

INTRODUCTION

In the employment arena, especially in nonunionized settings where employees do not enjoy the benefits of collective representation, the search for mechanisms to

achieve resolution of employment disputes has resulted in innovative techniques. Such procedures, as a group, are referred to as alternative dispute resolution (ADR). Arbitration is the most widely recognized form of ADR. Peer review is one method currently increasing in popularity within the employment setting. In order to resolve an employment dispute, peer review utilizes a panel of coemployees who are peers of the very employee involved in a dispute with the employer.

Every form of ADR has both advantages and disadvantages. Specifically, peer review has inherent benefits and risks to the employee. The legal issues of neutrality, management dominance, and the denial of the fairness of due process are some of the major risks to the employee when peer review is used.

Labor union agreements with an employer and private employment contracts in nonunion settings often contain a clause requiring that disputes arising out of either the collective bargaining agreement with a union or a private employment contract be submitted to arbitration. Even if there is no predispute arbitration clause in a contract, parties can always agree to submit a dispute to some form of arbitration after a dispute has arisen. Once an arbiter renders an award, the parties may appeal to a court; however, only in rare or unique circumstances will a court overturn an arbiter's decision. According to the Federal Arbitration Act (FAA), there are only four grounds for overturning an award: when the award was obtained by corruption or fraud, when there is evidence of partiality or corruption on the part of an arbiter, when there is arbiter misconduct, or when the arbiter has exceeded his/her power. An appeal to a court that attempts to attack the integrity of an arbiter is rarely successful.

The traditional methods of ADR have been expanded by the creativity of the legal profession. Gone are the days of the use of only mediation and arbitration as processes to resolve employment disputes. Today, other processes, such as peer review, have been developed, and their popularity is increasing (Association for Conflict Resolution, 2003). Peer review raises some serious legal questions that must be addressed.

MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES

In the unionized workplace, grievance arbitration of employment disputes was institutionalized by important U.S. Supreme Court decisions (Leroy & Feuille, 2007). More recently, the U.S. Supreme Court addressed the case of *Gilmer v. Interstate/Johnson Lane Corp* (1991), which involved mandatory arbitration of an employment dispute regarding a statutory right created by the Age Discrimination in Employment Act (ADEA). Gilmer was required, as part of an application to become a registered securities representative with the New York Stock Exchange, to fill out the application and accept its terms. The arbitration clause at issue in the contract was entered into with the securities exchange, not with the employer.

The employer moved to compel arbitration on the basis of a predispute agreement to arbitrate. Gilmer's employer argued that the dispute must be determined by utilizing arbitration, not litigation. The Supreme Court held that Gilmer, by agreeing in his security application to arbitrate any dispute arising out of his employment, had waived his right to sue his employer under the ADEA. Thus, the statutory ADEA claim could be the subject matter of arbitration in a non-unionized private employment setting as long as the agreement when made between the parties was fair. The essential holding of the case was that an ADEA claim can be subjected to compulsory arbitration, as long as the "prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (*Gilmer v. Interstate/Johnson Lane Corporation*, 1991: 27). The Gilmer Court noted that the availability of judicial scrutiny of arbitration awards would ensure that such awards would comply with the requirements of the statute.

Even though the *Gilmer* Court determined that an agreement to arbitrate could include arbitration of a statutory right, in this case a right under the ADEA, it left open a question that was raised concerning the proper interpretation of the FAA regarding the arbitration of employment disputes. The argument made by Gilmer to the Supreme Court was that arbitration of employment disputes in private nonunionized settings was precluded by virtue of language in section 1 of the FAA, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." However, the Supreme Court avoided making a decision on this question.

Thus, the *Gilmer* decision simply held, with a vigorous dissenting opinion, that under the specific circumstances of the case, an employee who signed an agreement to arbitrate would be preempted from litigating an age discrimination suit in court but would be required to submit it to arbitration. Thus, the question raised regarding the interpretation of the language of section 1 of the FAA and the argument that the statute was not applicable to the arbitration of employment disputes went unanswered. The stage was set for another case.

Due to the controversy generated by the *Gilmer* decision, the U.S. Supreme Court agreed to hear another case involving the arbitration of employment disputes. In *Circuit City Stores, Inc. v. Adams* (2001), the question concerning the language of the FAA was finally answered. A provision in the application for employment at Circuit City required all employment disputes to be settled by arbitration. Saint Clair Adams completed such an application for employment. After Adams was hired as a sales counselor, he filed an employment discrimination suit against the employer in state court, a suit that was removed to federal district court. The U.S. Supreme Court held that the language of the FAA, section 1, confined the exemption from the statute to transportation workers (seamen and railroad employees), thereby rejecting the argument put forward in the *Gilmer* case that the statute precluded the arbitration of all employment disputes.

One would have thought that the issue regarding the arbitration of employment disputes was finally settled, but to date this is not the case. Ongoing controversies continue, regarding the use of arbitration in employment disputes and whether or not these types of clauses are revocable.

After the U.S. Supreme Court announced its decision in *Circuit City*, the case was remanded to the Ninth Circuit Court of Appeals for further consideration in accordance with the Supreme Court's decision. Upon reconsideration of the issues in the case, the Ninth Circuit Court issued its opinion, revoking the *Circuit City* arbitration agreement on the grounds that it constituted a contract of adhesion and was "both procedurally and substantively unconscionable" (*Circuit City Stores, Inc. v. Adams*, 2002: 893). This type of decision invalidating an arbitration agreement can be found in a variety of other cases. For example, in the case of *Hooters v. Phillips* (1999: 943), the Fourth Circuit Court of Appeals held that the employer's arbitration agreement was invalid and unenforceable because the arbitration clause was "egregiously unfair," "utterly lacking in the rudiments of evenhandedness," "crafted to ensure a biased decision maker," and designed to "undermine the neutrality of the proceedings"; it "deviated from [the] minimum due process standards" established by the American Arbitration Association. In essence, the Fourth Circuit Court held that the contract violated public policy. In the case of *Walker v. Ryan's Family Steak House* (2003: 921), the U.S. district court held that the arbitration agreement was invalid and unenforceable because there was a "virtual assurance of bias when a for-profit entity seeks to provide a 'neutral' arbiter service, while simultaneously relying on the continuing satisfaction of its employer-clients for its livelihood, and tailors many of its crucial procedures to favor employers."

Despite numerous legislative attempts to mandate judicial enforcement of arbitration agreements, it is apparent from lower federal and state court decisions that there remain continued judicial resistance and an outright refusal to enforce certain types of arbitration clauses in nonunionized employment contracts. Unionized employers are not able to insist that arbitration provisions in collective bargaining agreements bar litigation over violation of rights (*Alexander v. Gardner-Denver Co.*, 1974). In general, the justification for the refusal by courts is either that the current employment practice of requiring newly hired employees to agree to an arbitration clause as a condition of their employment is unfair and one-sided or that the mechanism for the arbitration process is skewed in favor of the employer. This is particularly true in times of economic hardship. In a nonunionized private employment setting, an employee usually has little or no bargaining power to negotiate a fair arbitration clause in the employment contract or to determine the specifics of the arbitration procedures that must be followed if an employment dispute arises. The arbitration clauses are drafted by employers and presented to job candidates on a take-it-or-leave-it basis.

The mood now is that employers are uncertain and cautious about relying on arbitration agreements to resolve employment disputes. The prospects for the

passage of legislation making arbitration imposed as a condition of employment unenforceable are most uncertain, but consideration of such legislation reflects the uneasiness over the use of such agreements (Walsh, 2004). In view of the judicial concerns regarding the enforceability of arbitration agreements, other techniques for dispute resolution have been devised and are in the process of being tested. This brings us to the growing practice of conducting a mandatory dispute resolution process using a panel of workplace peers, in other words, a peer review.

PEER REVIEW

The term “peer review” is not relegated only to the resolution of employment disputes. Indeed, the approach has been employed in many decision-making contexts, including those regarding professional conduct. Where employment disputes are concerned, the processes that have been devised lack certain characteristics of arbitration, and as such, peer groups generally have no authority to make binding decisions. Many companies have adopted participatory workplace organizations, with names such as quality circles, work teams, committees, peer review boards, and the like. They take part in an arbitration-like process, but the arbiters are not attorneys but workplace peers. The peer review process has been described by the Equal Employment Opportunity Commission (EEOC) as a nonbinding problem-solving process brought before a panel of fellow employees and managers who volunteer to resolve the dispute (Equal Employment Opportunity Commission, 2003). In addition to the EEOC, other government agencies that have employee peer review processes or programs include the Department of the Army (2007), the Department of Health and Human Services (2003), and the National Transportation Safety Board (2007).

Educational institutions have also established employee peer review processes wherein a panel of employees functions generally in an advisory position with no universal authority to make a binding decision; it simply functions to provide recommendations to appropriate employer authorities. Kansas State University has developed a peer review policy for its employees. Its policies and procedures manual indicates that its employees are entitled to a “fair hearing before an impartial panel of classified employees” (Kansas State University, 2006).

The utility and functions of such advisory panels of organizational peers have been analyzed and discussed by numerous scholars, and some cautionary notes have been struck. In *Workplace Justice Without Unions* (Wheeler, Klass, & Mahony, 2004: 11–14), the authors point out that

Peer review, which originated in the mid 1980's, was originally intended to be primarily a union-avoidance strategy. . . . The procedures used by peer review vary considerably. . . . However, they follow a general pattern of having worker complaints go to a hearing-like stage where a panel that is comprised of employees makes a decision regarding the worker complaint. . . . On its face, peer review appears to be an extraordinary

delegation of power by management to rank and file employees. From the point of view of traditional analysis of management/employee relations, it is certainly an anomaly. . . . The avoidance of unions is certainly among the motivations, and peer review may provide a substitute for one of the main advantages of unionism—an effective grievance system. . . . The most important effects from both the employer and employee perspectives may be more subtle and long-range. It may well be that supervisors take greater care with disciplinary actions when they know that a relatively objective review of the actions will be made. . . . From a management perspective, it may be extremely helpful in the long run to have a group of rank and file employees (trained review panel members) who have a sympathetic understanding of the difficulties that managers face in discipline cases.

Thus, a new form of dispute resolution, particularly focused on disputes between employer and employees, has now been devised. This method has attributes similar to those of arbitration, but rather than using an external arbiter, the peer review arbitration process utilizes employees as the arbiters of disputes between employees and employer. It has become an increasingly popular method of dispute resolution and is used by such businesses as Darden Industries (Red Lobster, Olive Garden), TRW Inc., Rockwell International Corp., and Marriott International, Inc. (Jacobs, 1998). Peer review is dispute resolution in the employment setting using coworkers as the decision makers. Disputes and grievances involving employment issues such as demotion, termination, and discipline are common subjects of peer review. The panels of fellow employees can take testimony, conduct document reviews, and make decisions.

Peer review processes may be as different as their names. Common names given to peer review groups include associate review board and joint employer-employee grievance board. Peer review panels may be set up by contract, but generally the peer review process is created by the employer and described in employment handbooks or employment manuals. Depending on the particular wording in the handbook or manual, the peer review process by its very existence may create a contractual relationship between the employer and the employee, in contrast to a relationship in which the employee can be discharged at any time, that is, an “at-will” employment relationship (*Toussaint v. Blue Cross*, 1980). As will be seen below, questions can always be raised regarding the validity and legality of these newly developed processes for the resolution of employment disputes. These questions are of particular importance when a peer review process results in a binding decision in preclusion of litigation.

The main purpose of peer review committees and their movement into the workplace is to engage all employees at all levels of a company by giving them a greater voice in improving company operations. Companies would want to do this in order to make their businesses more competitive. Employees often are beneficiaries, finding greater fulfillment in their jobs and greater control over the content of their jobs. Many employees want to have a voice in their work and their

workplace. Peer review gives employees an awareness and appreciation of the company's needs and obligations. The management strategy of encouraging worker-management cooperation by increasing employee involvement in decision making and enhancing the cooperative spirit in the workplace is increasingly being used in companies and government. Many companies find that peer review groups often lead to organizational innovation, which is one of the key components of economic growth.

Federal law guarantees the right of employees to organize and to form unions for the purpose of collective bargaining with their employers. In the National Labor Relations Act (NLRA), the term employee includes most employees, but not supervisors. A supervisor is defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances." According to the U.S. Department of Labor, Bureau of Labor Statistics, union density has declined in the U.S. to the point that there are 5 states (North Carolina, South Carolina, Virginia, Georgia, and Texas) in which less than 5% of the workforce is unionized and 18 other states in which less than 10% of the workforce is unionized. Also, federal labor law protections have not been extended to supervisors, and the courts have applied a broad definition of the term supervisor to include even college professors (*NLRB v. Yeshiva University*, 1980). But peer review is feasible for supervisors and for employees in states with very low union density. In businesses that utilize peer review to resolve employment disputes, this process is available to all, regardless of their status as supervisors or employees.

A SAMPLE PEER REVIEW PLAN

Recently, a local small, private, nonunionized automotive parts manufacturing company¹ has considered a predispute peer review process to deal with potential disputes regarding employees' "just cause" discharges. The purpose of the proposed procedure, devised by the employer, is to allow an appeal by any nonmanagerial employee (called an associate) who has been discharged from employment by the company. The proposal creates an associate review board that is empowered to conduct a hearing regarding the disputed discharge; both the discharged associate and company management may be present at the hearing and may present arguments for and against the discharge. The proposed policy provides that the associate review board, after consideration of the evidence presented by both parties, will make a final *binding* decision regarding the disputed discharge. The proposed policy also provides that any discharged

¹The name of this small manufacturing company is withheld due to current labor issues involving the company.

employee *must* utilize the review board procedure and that failure to do so will preclude any other legal action to appeal against the discharge decision.

The proposed plan sets forth the creation of an associate review board committee. The committee is to have 14 members consisting of associates working for the company, excluding managers and supervisors, who will be elected through a secret ballot by all company employees (associates) and who will sit on the committee for a one- or two-year term. Each May, seven nonmanagement employees are to be elected by secret ballot. When an appeal for a review before the associate review board is made, nine members of the committee will be randomly selected to conduct an adversarial hearing on the appeal. Two of the nine members are alternates, as seven associates actually hear the appeal.

The review board committee is to conduct hearings during the normal work day, thus, at the expense of the company. The proposed plan provides for employer-sponsored and paid-for training of the 14 committee members, to acquaint them with company policies and procedures, with legal and ethical issues, with dispute resolution techniques, and with considerations of fairness, confidentiality, and the identity and cross-examination of witnesses and the relevance of evidence. The actual training is to consist of a one-witness mock hearing after a discussion of the purpose and function of the associate review board. The proposed plan contains no mechanism to provide for training on the meaning and application of statutorily created employment rights.

The seven members of the board chosen to hear a particular dispute may request testimony from an appropriate company manager or executive regarding company policy or procedures. The plan is silent as to who will actually perform the training of the committee; it would be advisable to use independent legal counsel to conduct this task. In fact, the company proposing this peer review process suggested using a lawyer from a large law firm to conduct the training of the first committee members.

The proposed plan also provides for a neutral independent, volunteer moderator, approved by both parties, who schedules the hearing and coordinates the selection of the seven board members, including the exclusion and replacement of any member deemed ineligible or disqualified due to partiality or bias. However, if a dispute arises regarding the exclusion of members, the review board itself, by majority vote, will decide the question of the eligibility of a particular associate to participate in the hearing.

The moderator will have no voting right regarding the decision of the board. The voting will be by secret ballot with majority rule. Finally, the proposed policy provides that the discharged associate may request an associate of his/her choosing or an attorney to serve as a representative at the hearing and the employer can do the same. The goal is to have the moderator schedule the hearing at a mutually convenient date, allowing for sufficient time for preparation by both parties, but generally within 60 days of the appeal being made. The purpose of the hearing is to present the true facts of the case for impartial consideration by the

associate review board. The structure of the hearing is such that the burden of proof is on management to justify the discharge of the associate employee. In the proposed training materials, it is suggested that the board consider whether there was a legitimate business need for management's action and whether there were reasonable safeguards for the associate employee's rights. The associate employee's responsibility is to rebut the employer's evidence.

The proposed plan provides that the associate review board may uphold the discharge or set aside the discharge and award back pay. If the discharge is set aside, the employing company may determine that the event that triggered the process indicates that some discipline is still warranted and impose it according to the established policies of the company. Thus, the employer may still discipline the employee after the hearing for the very same incident that was the subject of the review.

There appears to be no question that the employer in this sample plan is proposing a predispute binding dispute resolution process using coemployees or associates as the panel of arbiters. This type of dispute resolution is a good example of a peer review process.

LEGAL ISSUES SURROUNDING THE SAMPLE PEER REVIEW PLAN

The actual processes utilized by various predispute peer review methods to resolve employment disputes have been reviewed by the courts. A common concern is the denial of the elementary fairness of a given process. In traditional arbitration, arbiters follow rules of arbitration that comply with federal arbitration standards. Even if the contractual requisites with regard to issues such as consideration and genuine consent are satisfied, there remain significant legal concerns regarding predispute peer review processes. The concerns focus on whether the peer review committee or group can function as a neutral body, whether such an employee committee can function independently or is inevitably dominated by management, and whether such a committee can effectively vindicate disputes regarding statutory claims. These are matters of public policy regarding the validity and enforceability of any arbitration agreements.

In response to these legal concerns, the company proposing the sample peer review plan relies on case law to demonstrate the legality of the predispute peer review process under consideration. The company's position is that the proposed peer review process has been drafted in such a way as to avoid all of the legal pitfalls and to conform with the standards of fairness established by the legal system.

Procedural Fairness and Neutrality

The company has relied specifically on the case of *Renny v. Port Huron Hospital* (1986: 429), wherein the court acknowledged that "[B]y establishing an

internal grievance procedure an employer may avoid judicial review” and that “[A]dditionally, the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could, for example, provide for binding arbitration on the issues of cause and damages.” The employee handbook in *Renny* established an employment contract allowing the discharge of an employee only for just cause and utilizing an optional grievance procedure and a grievance board.

Upon a review of the grievance procedure at issue in the *Renny* case, the Michigan Supreme Court established standards and set forth the following guidelines:

The essential elements necessary to fair adjudication in administrative and arbitration proceedings are:

1. Adequate notice to persons who are bound by the adjudication;
2. The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
3. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
4. A rule specifying the point in the proceeding when a final decision is rendered; and
5. Other procedural elements as may be necessary to assure a means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.

The *Renny* court decided that the grievance procedures established by the hospital employer lacked these above-enumerated elements of fairness, because the procedures were not described in the employee handbook, and they failed to provide adequate notice to the employee as to the witnesses to be called, failed to allow the plaintiff to present her own evidence, denied the plaintiff the right to be present during her own hearing, and allowed for unilateral changes by the employer. For all of these reasons, the decision of the grievance panel was set aside and the plaintiff was allowed to adjudicate her employment dispute in court.

The standards set forth by the court in *Renny* were adopted and applied by the U.S. district court in the case of *Thornsberry v. North Star Steel Co.* (1991). The court first noted that the plaintiff, Thornsberry, had the option of using the binding peer review grievance procedure or an independent arbitration process. Thornsberry voluntarily chose the peer review process. Thus, the court found that he had received adequate notice, thereby satisfying the first *Renny* standard. The plaintiff was also given the right to present evidence, call witnesses, cross-examine witnesses, and set forth his own story, thus meeting the second *Renny* standard. The district court found that the employer’s representative at the peer

review hearing, in his opening statement, adequately set forth the issues of law and fact, and identified the point at which the decision was to be made, so as to satisfy the third and fourth *Renny* standards. And finally, the court found that all other procedural elements necessary to resolve the dispute had been met.

However, the plaintiff made an argument that the peer review was completely employer dominated and thus did not meet the fifth requirement as set forth in *Renny v. Port Huron Hospital* (1986: 433). The U.S. district court was not persuaded, stating that

The court finds such argument unpersuasive. A review of the transcript of the peer review reveals that defendant's representative, Kollodge, presented defendant's side of the issue; plaintiff presented his side of the issue, and the members of the peer review board asked questions of both plaintiff and defendant. Further, the peer review board was made up of members equally chosen by plaintiff and defendant and it had the sole power to render the final decision on plaintiff's grievance. (*Thornberry v. North Star Steel Co.*, 1991: 16)

Thus, the plaintiff in *Thornberry* raised the question about employer domination and the court simply ignored the question. Employer domination is a crucial point in determining the fairness and neutrality of the peer review procedures, and that point goes to the fifth requirement set forth in the *Renny* case above. The failure of the court to address that crucial point makes the *Thornberry* decision flawed.

Since the pronouncement of the *Renny* and *Thornberry* decisions, more recent cases have elaborated on legal guidelines regarding the processes for arbitration. These recent cases must be taken into consideration in analyzing the proposed sample peer review plan and other such creative ADR methods. In the case of *Cole v. Burns International Security Services* (1997), the federal district court stated that before arbitration could be ordered, a court must scrutinize the agreed upon or contemplated arbitration system to ensure that minimal standards of procedural fairness are satisfied. The *Cole* court adopted the recommendations of the Department of Labor's Dunlop Commission (1994: 30–31) and noted that an arbitration arrangement would be enforced if it “(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum” (*Cole v. Burns*, 1997: 1482–1483).

It appears that the most significant factor in the cases and enumerated guidelines is that the arbitration process be procedurally fair, that is, that arbiters should be neutral and that the employee should have the opportunity to participate in the selection of arbitrators. Manipulation of the process by an employer compromises neutrality. In *Walker v. Ryan's Family Steak House* (2005: 386), the Sixth Circuit

Court of Appeals affirmed the decision of the U.S. district court, stating that the arbitral forum was biased in favor of the employer because it “operates on a for profit basis” and has a “financial interest in maintaining its arbitration service contracts with employers.” In *McMullen v. Meijer* (2004: 487), the Sixth Circuit Court of Appeals held that an employee could not effectively vindicate her statutory rights because the employer maintained “exclusive control over the pool of potential arbitrators.”

In light of these recent decisions, a careful analysis of the proposed sample peer review plan seems to indicate that the makeup of the proposed dispute resolution panel may be subject to challenge on the grounds that such a peer review panel created by the employer and composed of coemployees lacks neutrality, lacks adequate training, and cannot therefore effectively maintain the employee’s rights. The proposed plan needs to be crafted in such a way as to allow for comprehensive training of the employees selected to be on the panel and to make sure that the decisions of the employees are not subject to employer recourse. The language of the proposed plan is not clear in these areas. It seems that it would be difficult, but not impossible, to achieve neutrality in a panel of arbiters made up of employees who work for the very employer involved in the employment dispute. Such a panel would operate under the exclusive control of the employer, would have a pecuniary interest in members’ own employment with the employer, would be subject to the arbitration training selected and provided by the employer, and, finally, would continue working for the employer during and after the peer review process. Such a group of employees, even if elected by fellow associates, could be intimidated by and beholden to the employer for personal economic reasons. One way to assist with this problem is to make the decisions of the peer review panel as anonymous as possible. The company in our sample peer review plan needs to be advised that a serious challenge could be raised concerning the neutrality of the arbitral panel created for this peer review process and that such a challenge would most likely be successful as the plan is currently drafted. If the plan is redrafted to allow for comprehensive training, then it could possibly meet these challenges.

Employer Domination

In addition to the question of the neutrality of the peer review panel, another issue of major concern exists. If the operations of the peer review panel are determined to be “dealing with” the employer regarding grievances or labor disputes, then, pursuant to the National Labor Relations Act, the panel is considered to be a labor organization. If the panel is found to be a labor organization as defined by the NLRA, then any managerial domination of the panel constitutes an unfair labor practice in violation of the NLRA, section 8(a)(2) and (1).

Therefore, it is of paramount importance that a determination be made regarding the operations of the proposed review panel, the manner in which it is constituted,

and the authority given to the panel. Only then can a decision be reached as to the appropriate application of the NLRA. If the function of the proposed peer review panel is to make binding decisions on personnel matters such as promotions, demotions, and disciplinary actions including discharges and dismissals, then the question is whether the panel essentially “deals with” the employer within the statutory description of a labor organization. If the panel does “deal with” the employer on such matters as stated in the statute, then the employer may not dominate the panel.

In the case of *Electromation v. NLRB* (1994), the Seventh Circuit Court of Appeals held that a private nonunionized employer committed an unfair labor practice in violation of the NLRA, section 8(a)(2), when it created employee committees whose functions were to deal with work-related issues, committees whose continued existence depended on the employer, whose activities were determined by the employer, and that lacked the independence of action and free choice guaranteed by the NLRA.

The *Electromation* court noted that the administrative law judge (ALJ) decided that the company had committed an unfair labor practice in violation of the statute “because he found that the company had organized the committees, created their nature and structure, and determined their functions” (*Electromation v. NLRB*, 1994: 1153). The court acknowledged the conclusions, reached by both the administrative law judge and the National Labor Relations Board (NLRB), that the employee committees functioned in a representative capacity and were dominated by management in violation of section 8(a)(2) of the NLRA in light of the following facts: “(1) the employer initiated the idea to create the committees, (2) the employer unilaterally drafted the written purposes and goals statements of the committees, (3) the employer unilaterally determined how many members would compose each committee. . . . the employer permitted the employees to conduct committee activities on paid time within a structure wholly designed by the employer” (*Electromation v. NLRB*, 1994: 1154). In summary, the *Electromation* court held that the company had violated the NLRA.

The court’s holding in *Electromation* was adopted by the Sixth Circuit Court of Appeals in the case of *NLRB v. Webcor Packaging, Inc.* (1997). In *Webcor*, the employer established a plant council, composed of management and elected workers, that dealt with employment issues. The NLRB determined that the council was an employee representation committee under company domination that violated the NLRA. The *Webcor* court, in adopting the findings of the administrative law judge, determined that the elected worker-members on the council represented the workers. The court further determined that the council was established to deal with the employer and had an “active, ongoing course of dealings” (*NLRB v. Webcor Packaging, Inc.*, 1997: 1122) with the employer. As to dominance by management of the plant council, the court indicated that important factors determining management dominance were that the council was created by management, could be disbanded by management, was funded by

management, met during work hours, never met independently of management, and held elections supported by management.

However, it is important to point out that the NLRB, as an administrative agency with adjudicatory powers, has ruled specifically on the matter of peer review committees in nonunionized employment. In the case of *Keeler Brass Automotive Group* (1995), the NLRB held that an employee committee similar to that in *Webcor*, which did not make a final and binding decision and which was engaged in “dealing with” the employer over wages, hours, and terms and conditions of employment, was a “labor organization” under the law. The NLRB also found that in *Keeler* there was illegal dominance by the employer over the labor organization or committee, and in the subsequent reformation of the committee and its ongoing administration. Therefore, the NLRB decided that in *Keeler* the employer had committed an unfair labor act in violation of the NLRA.

In contrast to the *Keeler* ruling, in the case of *Sparks Nugget, Inc.* (1977), a case that preceded *Electromation*, the NLRB decided that an “employees council” that made final and binding decisions regarding grievances and reported those decisions to management functioned independently. Because there had been no “dealing with” management in a representative capacity, consequently there was no unfair labor act by management and, thus, no violation of the law.

These administrative agency decisions by the NLRB appear to hold that if the peer review process is not binding and the committee does not have full grievance handling authority but is merely advisory or representative of employees to management, then the group is a labor organization. If, then, management dominates the employee committee, there is likely a violation of the NLRA. On the other hand, if the decision of the peer review committee is binding on the employer, then it is likely to be determined not to be dominated by management and there is no violation of the NLRA.

CONCLUSION: BENEFITS AND RISKS OF PEER REVIEW ARBITRATION

Peer review has many advantages for the employee. Peer review panels provide a mechanism for incorporating employee involvement into nonunion dispute resolution procedures in the workplace. Training improves communication and listening skills, ensures a better understanding of company policies, ensures privacy and confidentiality, and makes for fact-based decisions. This builds employee confidence in the process. Peer review arbitration panels have the freedom to craft resolutions that both sides to the dispute can actually live with, as opposed to court action.

The peer review process must be final and binding, resulting in a final decision. The peer review process must be one that is binding on management, not one that merely makes suggestions to management. If the peer review process does

not have full grievance handling authority without dealing with management, then management likely dominates the peer review process and, thus, the process is illegal. If, on the other hand, the decision of the peer review committee is binding on the grievant and management, the process only receives “input” from management, and the panel is neutral and is fully educated to vindicate statutory rights if such are involved, then it is likely to be determined not to be dominated by management and may survive challenges in court.

Arbitration itself has many advantages. Busy courts no longer set out to jealously protect their jurisdiction, but instead appear willing to embrace and actually encourage the practice of arbitration where it is created by a fair agreement, and where the arbitral body functions with a fair process, maintains neutrality and independence, and effectively vindicates rights. As has been indicated, a fair arbitration agreement that allows for a neutral, educated, independent arbitral panel acting vigilantly to protect rights established by the laws entrusted to its care may allow for an effective mechanism for justice. Employees should demand such a fair arbitration agreement, especially when utilizing peer review panels. Employees should demand from management that members of such a panel receive training to ensure that all claims when put before such a committee will be determined by an educated panel.

Employees should demand fair peer review procedures. To be considered fair, a mandatory arbitration agreement should not impose prohibitive costs on the grievant employee, should not limit the statutory remedies of the employee, should not deny the award of attorney fees to the plaintiff’s attorney, should be cautious of “loser pays” provisions, should be knowingly and voluntarily signed by employees, should not be arrived at through coercion or fraud, should allow for a meaningful choice and possibly an “opt-out” provision, should not contain threats of retaliation against members of the peer review panel, and should not allow for unilateral modification. These points must be taken into consideration when employees are considering whether to ask management to implement this form of ADR.

In most disputes, the use of peer review panels should be advantageous to employees. Peers are likely to view the testimony of an employee as credible. Peers do not like to dismiss peers from employment. According to recent statistics, employees who file grievances prevail in arbitration 63% of the time compared to only about 15% of the time in litigation (Green, 2000). In employment-at-will relationships, peer review panels will give employees stronger job security than the courts would provide, as they may create a just cause contract. Employees may retain their jobs after the resolution of the dispute; thus, a working relationship is an important concern when dealing with statutory employment discrimination.

The biggest disadvantage of the peer review method is that the statutory claims of the employee may not be properly protected. Peers usually do

not have any training, legal or otherwise, that will assist in resolving the statutory claims of employees. Peer review may best be utilized for disputes involving areas such as discipline, work assignments, and work schedules. Peer review should be used for fact-based decision making as to whether a company policy has been followed. It should not be used for disputes involving statutory and legal claims.

A second disadvantage of the peer review method is that it is questionable whether peer review panels can really be separated from management control. The peer members on the panel are still employees of management, and may not be able to separate themselves from the fear of later personal repercussions from management due to decisions they made while serving on a panel. Can these employees really be neutral, or are they still management dominated?

Employee intimidation by management is a concern. Intimidation and fear do not foster employee loyalty. One of the purposes of peer review is to enhance employee satisfaction in the workplace. Satisfied workers lead to greater productivity. It is therefore counterproductive for management to intimidate employee members of a peer review committee. A way to avoid employee intimidation aimed at influencing the outcome of peer review would be to allow for employee-only peer review and exclude managers from participation. After all, managers are not peers of the employees. The individual decisions of the panel members should be kept confidential. Voting by secret ballot after the hearing process would ensure the confidentiality of the decision. Perhaps different peer review groups should be trained for different peer classifications.

In the academic world, a peer review process is used to review scholarly work. A double-blind review process is used, in which authors do not know the identity of their reviewers and reviewers do not know the identity of the authors. This facilitates objectivity. "Without anonymity, junior reviewers may become hesitant to offer critical evaluations for fear of career reprisals" (Hillman & Rynes, 2007).

The key to the success of employment contracts that contain peer review clauses is that these processes must be carefully drafted to be fair to the employees and the members of the peer review panel must be properly trained to handle all the issues brought before the panel. Issues of legal and statutory rights should never be brought before an untrained peer review panel. Statutory rights issues are very complex, and employees cannot be properly trained to effectively vindicate the rights of the employee. Relatively noncomplex issues involving workplace conditions and employee behavior are appropriate for referral to peer review panels. The ability to resolve employment issues using an internal system benefits both the employer and the employee. Just, effective, and efficient internal decision making can be accepted by all.

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Direct reprint requests to:

Tanya M. Marcum
Bradley University
Department of Business Management and Administration
Foster College of Business Administration
1501 West Bradley Ave.
Peoria, IL 61625
e-mail: tmarcum@bradley.edu