

## **The Need for Training and Education in Peer Review of Employment Disputes**

by

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### **I. Introduction**

The early 1960's began an era of social legislation affecting the workplace and the employer-employee relationship.<sup>1</sup> Since then, there has been a growth in the number of employment related disputes that demand resolution. In response to the demands, both public and private employers have developed new and innovative mechanisms to deal with these human resource concerns. In both the unionized and the non-unionized sector, arbitration agreements entered into in anticipation of a dispute have grown in numbers and have become increasingly popular in employment contracts.<sup>2</sup> In 1991, the United States Supreme Court upheld the use of pre-dispute mandatory external arbitration agreements between employers and employees in the non-unionized sector<sup>3</sup> as a means of alternative dispute resolution of employment-related claims stating that there is a strong presumption in favor of arbitration.<sup>4</sup>

Currently many non-unionized employers both in the public and private sectors rely on internal alternative dispute resolution (ADR) to resolve employment disputes even though many scholars still do not support binding arbitration of employment disputes.<sup>5</sup>

Recently, employee handbooks and policies have been crafted and adopted by employers to describe and provide for internal processes to allow for grievances to be filed and for employment disputes to be resolved within the workplace itself.<sup>6</sup> Most, if not all, of these newly created policies are multi-faceted involving numerous steps in the

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<sup>1</sup> See Civil Rights Act of 1964, 42 U.S.C. § 21 (1964); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1967); American with Disabilities Act of 1990, 42 U.S.C. § 126 (1990).

<sup>2</sup> Elisa Westfield, Note, *Resolving Conflict in the 21st Century Global Workplace: The Role of Alternative Dispute Resolution*, 54 Rutgers L. Rev. 1221 (2002).

<sup>3</sup> For over four decades arbitration clauses have been incorporated within collective bargaining agreements and enforced by courts.

<sup>4</sup> *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991).

<sup>5</sup> Donna M. Matthews, *Employment Law after Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 Berkeley J. Emp. & Lab. L. 347 (1997). See Jessica Oser, *The Unguided Use of Internal ADR Programs To Resolve Sexual harassment Controversies in the Workplace*, 6 Cardozo J. Conflict Resol. 283 (2005).

<sup>6</sup> These processes are sometimes referred to as Internal Dispute Resolution or Employee Dispute Resolution and the attraction for them is essentially a result of the Supreme Court's decisions in *Burlington Industries v. Ellsworth*, 524 U. S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

internal dispute resolution process.<sup>7</sup> One such step in the processes involves utilization of a peer review panel to assist in resolving the dispute. This concept of peer review began in the mid 1980's and has now been integrated into these more expanded steps of dispute resolution. Most peer review panels consist of co-employees who are peers with the employee involved in a dispute with the employer. The co-employee peer review panel within the employer's workplace may, in accordance with adopted employer policy, make either a final, binding decision<sup>8</sup> in an arbitration type of proceeding or may simply provide an advisory recommendation to an employer.<sup>9</sup> Such decisions or recommendations address many types of disputes that arise in industry including legal issues that can and often do involve a statutorily created right.

This article addresses a significant concern regarding the need for adequate training in the law for peer review panel members so as to allow educated decisions regarding any legal issues that may be presented to the peer review panel. In reviewing the standards and protocols for traditional and historic arbitration procedures, it is apparent that proper training has always been a prime ingredient in the make-up of those who are selected to serve as arbitrators.<sup>10</sup> Nothing less should be made available in the peer-review process. Options for a solution to this major concern will be presented herein and analyzed.

## II. Peer Review at a Glance

Peer review within the employment place using co-employees is said to have developed in the mid 1980's, much earlier than the more recent Supreme Court decisions. It originated at General Electric's Appliance Park plant in Maryland,<sup>11</sup> arguably as a process to avoid unions in its workplace. The process moves certain disputes resulting from personnel decisions from the management arena by delegating the decision making function to co-employee peers. Marriott International utilizes a similar process to that of General Electric's process.<sup>12</sup>

Many other industries also use this type of dispute resolution process to resolve disputes that arise within the workplace or their business.<sup>13</sup> TRW, Inc. a transportation parts and equipment producing company, has a peer review policy that applies to all of its U.S. employees not covered by a collective bargaining agreement. Its peer review

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<sup>7</sup> *Alliance for Education in Dispute Resolution*, administered by the Institute on Conflict Resolution at the School of Industrial and Labor Relations at Cornell University.

<http://www.ilr.cornell.edu/icr/alliance.html>. See also, Nonprofit Risk Management Center, *Grievance Procedures and Internal Dispute Resolution* available at <http://www.nonprofitrisk.org/library/articles/employment01002000.shtml>.

<sup>8</sup> For a discussion of final, binding peer review processes, see Tanya Marcum, and Elizabeth Campbell, *Peer Review in Employment Disputes: An Employee Right or an Employee Wrong?*, 13 J. Workplace Rgts. 41 (2008).

<sup>9</sup> Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Techniques*, 16 Ohio St. J. on Disp. Resol. 643 (2000-2001).

<sup>10</sup> When court annexed mediation or arbitration is used, mediators and arbitrators must be trained and licensed. See Mich. Comp. Laws §§ 600.5073(2); 552.513(13); 600.4905; and 691.1559.

<sup>11</sup> Cooper, Nolan, and Bales, *ADR in the Workplace* 11 (2d ed. 2005).

<sup>12</sup> *Id.*, at p. 12.

<sup>13</sup> Caras and Associates, Inc., *Peer Review*, available at <http://www.peerpanel.com/review.htm> (last visited December 5, 2008).

process handles disputes such as involuntary terminations, claims of unlawful discrimination, harassment, or constructive discharge based on protected status, and any other disputes that involve discipline, promotion, and pay.<sup>14</sup> Peer review processes are growing with popularity among private business companies, such as Du Pont, Cigna, Rockwell International Corp., and Darden Industries (Red Lobster, Olive Garden). Within the federal government, many agencies provide for the resolution of employment disputes utilizing peer review processes.<sup>15</sup> The United Parcel Service (UPS) has an employee dispute resolution program that includes optional peer review by a three-member panel of employees.<sup>16</sup> Many state governments have also adopted such dispute resolution policies.<sup>17</sup>

As evidence of the growing support for internal dispute resolution techniques, in 2003 the Equal Employment Opportunity Commission (EEOC) announced the implementation of a voluntary pilot program in which private sector discrimination claims filed with the EEOC would be referred to the employer's internal dispute resolution program, whenever it would be appropriate to do so. Still the internal dispute resolution program must meet with the EEOC's specific criteria. One example of an internal program is peer review. The EEOC criteria require that it is voluntary, an established program, with written procedures, free to the employee, and the program must address all claims and relief under statutes enforced by the EEOC.<sup>18</sup>

The peer review process has several titles such as quality circles, work teams, committees, associate review boards, joint employer-employee grievance boards, and peer review boards. Although the titles may differ, the function is the same, i.e. to resolve employment related disputes internally within the company, rather than through an external process. Unlike external arbitration processes, internal dispute resolution is not administered by an external arbitration organization. Thus many internal processes do not comport with the 1995 Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.<sup>19</sup> Most external arbitration organizations that adopted the protocol will not provide arbitration services if the protocol is not followed. Consequently, internal peer reviews, which generally do not follow the protocol, are left with few or no required safeguards for due process.<sup>20</sup> Whether the internal process results in binding arbitration or merely an advisory

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<sup>14</sup> U.S. Equal Employment Opportunity Commission, *Best Practices of Private Sector Employers*, available at <http://www.eeoc.gov/abouteeoc/task/practice.html> (last visited August 27, 2008).

<sup>15</sup> Government agencies that have employee peer review processes or programs include the Department of the Army, Office of the General Counsel, available at <http://www.hqda.army.mil/ogc/referenc/adr.htm>; the Department of Health and Human Services, The Alternative Dispute Resolution Division, available at <http://www.os.dhhs.gov/dab/adr>; the National Transportation Safety Board, No Fear Act, available at [http://www.nts.gov/Info/No\\_Fear\\_Act.htm](http://www.nts.gov/Info/No_Fear_Act.htm).

<sup>16</sup> Meeting of the U.S. Equal Employment Opportunity Commission, *Remarks of F. Peter Phillips*, available at <http://www.eeoc.gov/abouteeoc/meetings/12-2-03/phillips.html>.

<sup>17</sup> As an example, New York State Unified Court System, available at <http://courts.state.ny.us/ip/adr/index.shtml>.

<sup>18</sup> The U.S. Equal Employment Opportunity Commission, *Best Practices of Private Sector Employers*, available at [http://www.eeoc.gov/abouteeoc/task\\_reports/practice.html](http://www.eeoc.gov/abouteeoc/task_reports/practice.html) (last visited August 27, 2008).

<sup>19</sup> The protocol in its entirety can be found at [www.adr.org/sp.asp?id=32540](http://www.adr.org/sp.asp?id=32540); or [www.bna.com/bnabooks/abana/special/protocol.pdf](http://www.bna.com/bnabooks/abana/special/protocol.pdf)

<sup>20</sup> Cynthia Cohen, *Justice and Peer Review Systems: A framework for Analysis*, 28 *Journal of Collective Negotiations in the Public Sector* 2, 83 (1999).

recommendation, the reviewers are not attorneys, but rather workplace peers of the employee who has the dispute with the employer.

The newly devised internal peer review process in the employment setting is one of many options in the employment dispute resolution handbag that is receiving tremendous support from employees and their companies. More often than not, in today's employment dispute resolution procedures, the steps to be followed involve more than a peer review panel decision. These procedures may include as few as two or as many as six steps to be taken in resolving a dispute.<sup>21</sup> Although the number of steps in these various internal processes may differ, the one generic item involved in every one of them is that a peer review is afforded as one step in the process. (See attached Appendix A for a flow chart describing a sample process.) In one regard, the internal peer review using co-employees is similar to peer review of professional conduct using co-professionals such as is found in the medical profession, legal profession, engineering profession, and several others. Yet, in another regard, it simply is not the same as professional peer review because co-professionals are trained in the profession and are relied upon to determine violations of professional standards rather than legal rights. Also, professional misconduct is not usually an employment dispute but rather involves a professional violation.

Peer review processes vary depending on the employer's particular policy but they follow a general pattern of having worker complaints go to a hearing-like stage to determine the outcome of the dispute by the panel that is comprised of employees (peers). Generally, most peer review processes begin after an employee challenges a management decision and utilizes any preliminary resolution steps that are part of the particular process. Typical preliminary steps often include open door policies to approach direct supervisors and internal ombudspersons to review concerns and make investigations.

After the preliminary steps are exhausted and have failed to resolve the dispute to the satisfaction of the employee, the actual peer review process begins. At this point a panel is notified. The panel may consist of five or more individuals from the place of employment. Selection procedures vary; peer reviewers are generally co-employee volunteers who offer to serve in the reviewing process. Most often, among those who demonstrate a willingness to be considered as a panelist, there will follow an election by peers to determine who will serve in that capacity. A new panel is formed for each employment dispute. After the panel is selected, it hears the dispute and makes either a binding or an advisory decision regarding a broad range of employment issues. A binding decision is viewed as promoting employee trust in the informal dispute resolution process, which trust may be lessened if the decision could be challenged to a higher tribunal.<sup>22</sup> However, the main reason for an advisory opinion, rather than a binding opinion, is that the parties are not permanently bound by the decision and may pursue further review. As discussed below, research demonstrates however that employees do not pursue further review.

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<sup>21</sup> See *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11<sup>th</sup> Cir. 2005) and *Shelton v. Ritz Carlton Hotel Company, LLC*, 550 F. Supp. 2d 74 (D.C. Cir. 2008), which describe a three-step dispute resolution process (open door process, peer review process, and arbitration) as set forth in the employment agreement. Often, mediation is included as one of the steps.

<sup>22</sup> Douglas McCabe and David Lewin, *Employee Voice, A Human Resource Management Perspective*. 34 *California Management Review*, 112 (Spring 1992) at 119.

Those elected must be willing to be trained simply regarding company policies and procedures that are to be applied in reaching a resolution to the dispute. According to author Martin F. Payson, “You have to teach them 10 key concepts: Be open minded; consider only the facts presented; do not bring in any prejudices or bias; be a good listener and not jump to conclusions; ask questions but not be argumentative; decide based on the facts in the room; be conscious of existing company policy; decide based on existing company policy not what they think the policy should be; keep what is said in the room confidential; and keep in mind disclosure laws.”<sup>23</sup> However, where peer review panels are used, there is usually little or no training on the law.

Generally, employees perceive the peer review panel, both binding and advisory, as a process that is fair and impartial. This process gives the appearance to employees of allowing them to manage themselves because it supports a team approach. But evidence about this matter suggests otherwise. Reibstein reports that these panels favor management almost 60 and 70 percent of the time, and that “workers seem to be tougher on their peers than [on] their supervisors.”<sup>24</sup> Employees expect that a dispute taken through the peer review process will be resolved much faster than traditional external arbitration or court litigation. Employees usually view this process of internal dispute resolution as a swift form of due process.<sup>25</sup>

However it must be remembered that internal grievance procedures are private. The concepts of due process as found in the 14<sup>th</sup> Amendment to the U.S. Constitution are mandates solely on government in its relations with its citizens. Constitutional mandates were never intended to be applicable to private conduct or employment relationships in the private sector. Early labor legislation enacted in the mid-20<sup>th</sup> century to control private industry embodied due process concepts into statutory form and recent management practices have voluntarily embraced procedural due process safeguards into employment policy statements. However, such safeguards are not legally mandated and thus are not readily applicable to the functions of review panels within private industry. Since private industry is not prone to share the details of management policies and since employees seem to have the feeling of being appropriately treated by the peer review panels, many employees do not take to court the ultimate decisions made by these peer review panels. Consequently there is little information provided by industry regarding specific plans or how these plans are implemented or the decisions of a peer review panel.

### **III. Training of Arbitrators: A Comparison to Peer Review**

When a state statute provides for court-annexed arbitration, it also describes the necessary qualifications of one who is eligible to become an arbiter. These qualifications generally require that the arbiter be an attorney licensed to practice law.<sup>26</sup> An attorney

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<sup>23</sup> Martin F. Payson, *A Jury of Peers*, (February 2, 1998) available at <http://www.Industryweek.com.ReadArticle.aspx?ArticleID=75>.

<sup>24</sup> Larry, Reibstein, *More Firms Use Peer Review Panels to Resolve Employees' Grievances*, Wall S. J., December 3, 1986, §2, at 29.

<sup>25</sup> McCabe, *supra* note 22, at 114-115.

<sup>26</sup> As an example, under court-annexed arbitration procedures in the United States District Court for the Eastern District of New York, arbitrators must submit an application in order to be appointed. The

licensed to practice law has received extensive training prior to obtaining that license. Many law school curriculums offer, at a minimum, elective courses in alternative dispute resolution methods. Law schools across America provide extensive legal education to their students, including civil procedure and many areas of substantive law.

In order to receive accreditation, a law school must provide a curriculum that complies with the mandates of the American Bar Association (ABA). Pursuant to the ABA Standards for Approval of Law Schools, Standard 302, the required curriculum must include substantial instruction in substantive law, and legal analysis, reasoning and writing.<sup>27</sup>

The National Academy of Arbitrators (NAA)<sup>28</sup> suggests that arbitrators should have special training to assure knowledge of statutory issues that may arise and to assure due process and fairness in the conduct of the hearings. The recommendation of the NAA is that employment arbitrators have training on substantive, procedural, and remedial issues to be confronted and to be trained on the statutes safeguarding employees' rights that may arise in the employment setting.<sup>29</sup> This organization recognizes that the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes and the Due Process Protocol work together to assist a particular arbitrator in deciding if s/he should accept a particular case. The NAA suggests that training in statutory issues is necessary and a training program should be established by government agencies, bar associations, academic institutions, and other relevant institutions on a regular basis.

The 1995 *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*<sup>30</sup> sets forth the qualifications of arbitrators. The protocol calls for the creation of a roster containing specific qualifications of arbitrators and essentially requires that arbitrators should have: (1) skill in the procedures of conducting a hearing; (2) knowledge of the statutes at issue in the matter; and (3) familiarity with the workplace and the employment environment. The protocol also dictates the development of a training program to educate existing and potential labor and employment arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted in the particular dispute. It further requires expert training in the statutes and in employer procedures governing the employment relationship. Finally procedural due process training is of prime importance.

The protocol include the same requirements of the NAA guidelines that training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, or other similar institutions of expertise. The training should be

application includes the requirement that the applicant must be a licensed, practicing attorney. U.S. District Court, *Eastern New York ADR Program*, available at <http://www.nyed.uscourts.gov/adr>.

<sup>27</sup> American Bar Association, 2007-2008 Standards for Approval of Law Schools, available at <http://www.abanet.org/legaled/standards/standards.html> (last visited February 5, 2008).

<sup>28</sup> National Academy of Arbitrators, *Membership Guidelines*, available at [http://www.naarb.org/member\\_guidelines.html](http://www.naarb.org/member_guidelines.html), (last visited December 18, 2008). The National Academy of Arbitrators is a non-profit professional organization for arbitrators and has established the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Within their Code is a Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship.

<sup>29</sup> National Association of Arbitrators, *Due Process Protocol*, available at [http://www.naarb.org/due\\_process/due\\_process.html](http://www.naarb.org/due_process/due_process.html) (last visited August 27, 2008).

<sup>30</sup> The protocol in its entirety can be found at American Bar Association, Section of Labor and Employment Law, available at <http://www.bna.com/bnabooks/ababna/special/protocol.pdf>.

administered perhaps by the designating agency, such as the American Arbitration Association or the National Association of Arbitrators, at various locations throughout the country. The Protocol further requires that such training should be updated periodically and be required of all arbitrators. These are the formal requisites for external employment dispute resolution, and nothing less should be made available in the peer-review process.

In those situations where peer review panels function to provide either advisory or binding decisions, the panel members function in a traditional decision making mode and thus should be trained and qualified. Yet, the co-employees who make up a peer review panel and implement these dispute resolution procedures have no specialized legal knowledge or training.<sup>31</sup> Another significant due process deficiency in the procedures is the absence of any mechanism for legal representation on behalf of the employee presenting the complaint.<sup>32</sup> Without these guarantees, the decisions of these peer review panels may not comport with NAA and AAA established due process requisites and may not ensure effective vindication of statutory rights.

At first blush, non-binding peer review processes may appear not to be problematic when lacking the protocol requisites because the decisions are often not final and thus they are potentially subject to further review. However, in practice, few employees who use peer review actually take the matter further and initiate litigation against the company. Whether this is so because employees believe they have had their "day in court," or whether they have been persuaded by their peers' determination that the challenged action was proper, most employees accept the decision of the peer panel. This is so even though most decisions are adverse to the employee.<sup>33</sup> As a caveat to industry it should be noted that the employer creation of peer review panels that do not have binding authority may result in a claim of an unfair labor practice especially if the panels are supported and dominated by management.<sup>34</sup>

In time, it is likely that more courts will review many, if not all, peer review awards especially those emanating from binding peer review processes. Courts should take a closer look and renewed interest in the decisions of peer review panels in general due to their above enumerated deficiencies. Many scholars have determined that there is a dire need for educating the participants involved in these peer review process system.<sup>35</sup> Since most internal grievance procedures are private, a vast majority of the disputes never make it to court. As a result there is no oversight of the employer's internal grievance procedures to ensure due process and thus no assurance of effective vindication of statutory rights.

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<sup>31</sup> Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Techniques*, 16 Ohio St. J. on Disp. Resol. 643, 660 (2000-2001).

<sup>32</sup> *Id.* at 659. See Samuel Estreicher and David Sherwyn, *Alternative Dispute Resolution in the Employment Arena* 604 (2003).

<sup>33</sup> Nancy L. Vanderlip, *Resource Book for Managing Employment disputes*, The Utility and Functioning of Peer Review Boards, (CPR Institute for Dispute Resolution, Inc. 2004).

<sup>34</sup> *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

<sup>35</sup> Arnold M. Zack, *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution: The Due Process Protocol: Getting There and Getting Over It*, 11 Empl. Rts. & Employ. Pol'y J. 257, 265 (2007).

#### IV. The Problem: Can a Peer Review Process Provide an Effective Vindication of Statutory Rights?

What is meant by the phrase effective vindication of statutory rights? At a minimum it requires that any alternative dispute resolution process must provide for an expert resolution that fully complies with the rights provided by the applicable statute.<sup>36</sup> Essentially any body that functions in the dispute resolution process must have legal expertise. "Minimal level of integrity of the process requires that the arbitrator.... be capable of deciding the case on the basis of the evidence presented."<sup>37</sup> For example, can a peer review panel recognize a statutory claim of an employee and can this panel effectively vindicate the statutory right, even in disputes where the right may be affected by provisions imbedded in an employer's internal policy? Without adequate training, this answer must be no!

There is no universal mandate that one who determines the resolution to a dispute be an attorney. Further, there is no judicial or statutory mandate that this person or group of persons receive legal training. But it is important to recall that historically, the judiciary had been hostile to the practice of arbitration. That hostility lessened after the enactment of the Federal Arbitration Act (FAA)<sup>38</sup> and subsequent state statutes authorizing arbitration of disputes. But as late as 1950, the United States Supreme Court refused to allow arbitration of statutory rights; in the case of *Wilko v. Swan*,<sup>39</sup> the court prohibited the use of arbitration where statutory claims were raised. It is true that, some thirty years later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>40</sup> (in a case involving anti-trust claims under the Sherman Act) the Court reversed itself stating:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>41</sup>

It was in the *Mitsubishi* case that the court approved arbitration of statutory rights stating, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and

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<sup>36</sup> Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 Brandeis L. J. 779, 819 (2003), wherein the author states that the court's decision in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), "arguably holds that parties resisting arbitration on the grounds that the procedures are unfair has the burden to prove that the procedures of the arbitration system under attack preclude them from effectively vindication their statutory rights."

<sup>37</sup> *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>38</sup> Federal Arbitration Act, 9 U.S.C. § 1, et seq. (1947).

<sup>39</sup> 346 U.S. 427 (1953).

<sup>40</sup> 473 U.S. 614 (1985).

<sup>41</sup> *Id* at 628.

deterrent function.”<sup>42</sup> Subsequently, the Supreme Court has expanded this holding to allow for arbitration of statutory rights in employment disputes.<sup>43</sup>

However, there is increasing legal concern about the appropriateness of arbitration<sup>44</sup> or peer review determinations of claims under such remedial statutes as the Civil Rights Act of 1964 and 1991, the Age Discrimination In Employment Act, the American with Disabilities Act, and the Equal Credit Opportunity Act. This has resulted in calls for the expansion of judicial review of external arbitration awards in these areas.<sup>45</sup> In the meantime, the courts have formulated a number of grounds for overturning external arbitration awards on the basis that there has not been an effective vindication of statutory rights. Courts have overturned awards where they are: (1) in manifest disregard of the law, (2) conflict with public policy, (3) arbitrary and capricious, (4) completely irrational, (5) or are biased in favor of management and thus failing in neutrality.<sup>46</sup> In review of such cases, courts have held that arbitration is not a fair trade of the procedures and opportunity for review by a court and expediency cannot justify the bargain.

In the case of *Cole v. Burns*<sup>47</sup> the federal district court stated that an arbitration arrangement in an employment dispute will only 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.”<sup>48</sup> In a footnote, the court pointed out:

In response to the overwhelming unanimity of opposition to employer manipulation of procedures for the arbitration of employment disputes, JAMS/Endispute, a large provider of arbitration services, recently announced that it will not accept arbitration assignments in employment cases unless the arbitration agreement: (1) provides for the same rights and remedies available to the individual under applicable federal, state and local law; (2) permits the employee to participate in the selection of a neutral arbitrator; (3) allows the employee the right to be represented by counsel; (4) allows reasonable discovery prior to the arbitration hearing; and (5) ensures that the employee has the right to present his or her proof through testimony, documentary evidence, and cross examination.<sup>49</sup>

In light of these recent decisions critical of external arbitration procedures involving employment disputes concerning statutory rights even where the external arbiters are trained and licensed attorneys, it is unlikely that a court would readily

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<sup>42</sup> *Id.* at 637.

<sup>43</sup> See *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>44</sup> Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1 (1987).

<sup>45</sup> See Julian J. Moore, *Note: Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 Colum. L. Rev. 1572 (2000).

<sup>46</sup> See *Circuit City Stores v. Adams*, 279 F.3d 889 (9<sup>th</sup> Cir. 2002); *Hooters of America v. Phillips*, 173 F.3d 933 (4<sup>th</sup> Cir. 1999); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6<sup>th</sup> Cir. 2004).

<sup>47</sup> *Cole v. Burns*, 105 F.3d 1465 (D.C. Cir. 1997).

<sup>48</sup> *Id.* at 1482.

<sup>49</sup> *Id.* at n. 11, 1483.

approve a dispute resolution process wherein those deciding the dispute have no training in the law. If the resolution process fails under judicial scrutiny where trained experts are involved, it certainly will face harsh criticism where expertise is lacking. The fact that disputing employees consider a peer review process to be fair (even though scholars indicate it is not) makes the use of peer review panels even more troublesome because the decisions go unchallenged. To date, apparently no legal scholars have identified a case challenging the functions of these peer review panels that are imbedded in an employer's internal dispute resolution process. The absence of any legal challenge may result from the fact that an employer has a proprietary interest in these newly developed policies and is reluctant to share the details of them or make them transparent unless and until there is a court challenge to them and industry is then required to do so.

## **V. The Resolution: Limited Authority of Panels and Legal Representation**

In order to overcome the legal concerns regarding the use of peer review panels, some options are available. Probably the easiest, simplest and most readily available option is to do nothing until such time as a legal challenge to these procedures is taken to the judicial system. The advantage to the option of abstention is that the likelihood of a challenge is slim as long as the disputing employees believe a peer review process to be fair and the processes themselves remain opaque. The disadvantage of such an option is that peer review mechanisms are not always fair and the opaqueness of the current practices is slowly giving way to greater transparency due to scholarly research such as that cited herein. The reality is that at some point there will be a legal challenge.

Another option is to eliminate peer review altogether. The advantage of this option to the employees would be to remove the control of management over the process and place it into an external arena where it will enjoy greater transparency and protections of the due process protocol. A disadvantage to the employee is that the peer review process provides a team atmosphere and cooperative employment spirit which would be lost if peer reviews were eliminated altogether. The advantage to management in eliminating the peer review process would be to remove the consternation of constant examination by scholars and experts intent on overseeing employee rights. However, the disadvantage to management is the loss of a mechanism that is simpler, quicker, less costly, and appears to have the support of the employees.

The next option would be to allow for external legal representation of the employee involved in the dispute. Legal representation of the employee before these panels should provide effective vindication of the employee's statutory rights. To foster fairness, both parties, the employee and the employer, must have equal access to legal counsel in all processes to resolve the dispute. The advantage of this option is that presence of counsel would arguably satisfy the due process requirements and would allow for transparency of the peer review mechanism. The disadvantage of this option is that presence of legal counsel would extend the time period for presenting and arguing the case before a panel and would open the door to further challenges concerning the process. There is also the question of cost for presence of counsel. Needless to say, an employer would not readily embrace such an option unless forced by a court decision to do so.

Another option would be to provide expansive legal training to members of a peer review panel. The advantage of this option is that training would educate on the intricacies of employment rights, both statutory and common law rights, and thus would not focus narrowly on the facts and law of a particular case. The disadvantage of this option is again the expenditure of time and money necessary to adopt such an approach, especially in these tough economic times when cost factors influence policy.

It may be difficult for industry and scholars to decide which option is preferable. If an economist is consulted on the matter, the recommendation would be to conduct a cost benefit analysis. The analysis would then focus on the economic benefit stemming from the financial simplicity of the peer review process, measured against the eventual cost to industry if the process is challenged and found by the legal system to be flawed. If a human resource expert is consulted on the matter, the analysis would focus on the increased morale in the work force stemming from a process that employees deem to be fair, measured against the disruption among employees if that trust in the process is ever shaken. If a philosopher is consulted the analysis would focus on the moral principle that human beings should be afforded some control in decisions regarding the property right of human labor, measured against the ethical concern that the process could be contaminated by managerial influence. If a legal expert is consulted, the analysis would focus on society's need for alternative mechanisms in resolving disputes especially in an era where overburdened courts support such alternatives, measured against the potential failure of substantive and procedural due process safeguards in implementation of a process without legal oversight.

In the opinion of these authors, peer review panels should not be used to resolve disputes involving legal claims especially those arising out of statutorily created employment rights unless there has been thorough training on the law and/or support from external legal representation.<sup>50</sup> This is offered as the best solution to satisfy the concerns of the economists, the human resource directors, the philosophers and members of the legal profession. If properly done, this solution will eliminate the concerns of all experts.

Peer review processes housed and sometimes sheltered within industry when used to resolve employment disputes are problematic for the same reasons that courts have found certain external arbitration processes to be unfair. For example, many courts have found mechanisms using external alternative dispute resolution of employment disputes to be unfair and thus unenforceable in cases where (1) industry itself has created the resolution process, (2) or has unilaterally set the procedures to be followed, (3) or has or continues to pay the reviewers (such as co-employees) thereby maintaining an economic advantage over the process, (4) or has or continues to control the methods and format of the process, (5) or maintains an atmosphere that the reviewers are answerable to industry.<sup>51</sup> Just as courts have refused to allow and enforce external arbitration processes under these above enumerated conditions, so too would the legal system give close scrutiny and criticism of an internal review process with similar characteristics.

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<sup>50</sup> It is suggested that external legal representation for the disputant employee can provide the necessary legal education just as is provided by counsel to judges or juries in litigation.

<sup>51</sup> See *Walker v. Ryan's Family Steak House, Inc.*, 400 F.3d 370 (6<sup>th</sup> Cir. 2005); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6<sup>th</sup> Cir. 2004); *Hooters of America v. Phillips*, 173 F.3d 933 (4<sup>th</sup> Cir. 1999); *Circuit City Stores v. Adams*, 279 F.3d 889 (9<sup>th</sup> Cir. 2002).

A good example of a problematic peer review occurred at a local industrial plant that had terminated employment of an employee who suffered from carpal tunnel syndrome and could no longer function in the assigned job or any other. The employee chose to have a peer review panel hear and decide the dispute regarding the termination. The neutral, objective volunteer who served as moderator of the process can verify that the hearing before the panel involved no discussion of the Americans with Disabilities Act<sup>52</sup> nor the recent amendments to the Americans with Disabilities Act<sup>53</sup> or the mandates within the Act, that the employer must attempt to provide reasonable accommodations to the disabled employee. The peer review panel decided the case in favor of management and the employee never challenged the panel's decision, as she apparently believed that she had been fairly treated by her peers. Had the peer review panel been properly trained as to the intricacies of the ADA the decision could well have been different and the process would have been more fair. It is because of concerns such as this, that a recommendation is made herein that peer review panels be properly trained on the law by those who are experts in the law. The company's legal counsel, who discussed the matter with the moderator after the decision was pronounced, justified the process on the grounds that it was supported by a state supreme court decision. However, a review of that decision finds that the state supreme court established guidelines for such proceedings one of which stated that the process must provide "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."<sup>54</sup> The peer review process just discussed could not have followed that guideline without adequate training in the law.

Panels should be limited to resolving those disputes that solely involve the application of company policy, as long as the application of policy does not have an underlying discrimination claim or other statutory violation. Thus, it is possible that peer employees may provide a more fair and objective approach regarding interpretation and implementation of company policy than administrators, but still they remain employees of the company and may tend to identify with the policies of the organization rather than providing a truly independent perspective.<sup>55</sup>

An interesting example of an independent decision on a non-statutory claim which had been presented to a peer review panel concerning enforcement of a company policy occurred when a waitress at a Red Lobster restaurant was fired for violating company policy by taking out of the comment box a comment card completed by a customer. The policy was that only the manager could remove the comment. The peer review panel met within three weeks and were told to do what they felt was fair. Fairness, to the panel, was to overturn the management decision to fire the waitress and to reinstate her to her position at the restaurant without back pay.<sup>56</sup> Peer review panels normally should not change existing policies of the employer unless they decide that the policy would be unfair in its implementation. The panels should not review actions that

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<sup>52</sup> The Americans with Disabilities Act of 1990, 42 U.S.C. §12101 (1990).

<sup>53</sup> The American with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12101 (2008), was signed into law on September 25, 2008 and became effective January 1, 2009.

<sup>54</sup> *Renny v. Port Huron Hospital*, 427 Mich. 415, 398 N.W.2d 327 (1986).

<sup>55</sup> Cooper, Nolan, and Bales, *ADR in the Workplace* 11 (2d ed. 2005).

<sup>56</sup> Margaret Jacobs, *Red Lobster Tale: Peers Decide Fired Waitress's Fate*, *The Wall Street Journal*, B1 (Jan. 20, 1998).

involve management decisions based on subjective criteria such as job evaluations, performance reviews, or promotions/demotions of management personnel.

Trained panelists should have the authority to investigate relevant facts and should have the legal skills to ensure that applicable law, policies, or practices are followed correctly and fairly.<sup>57</sup> If these panels find otherwise, it should have full authority to remedy the management decision so as to be consistent with existing company policy and past company practices.

## **VI. Conclusion**

Conflict is inevitable. If it is handled well, it can lead to constructive dialogue, needed change within an organization, and ultimately resolution of the conflict. If conflict resolution is handled poorly or left unresolved, it could disrupt relationships, affect on the job performance, and lead to costly and time-consuming litigation. The proper use of peer review panels, as a form of alternative dispute resolution, can be advantageous to both the employer and the employee. Peer review procedures provide a mechanism for incorporating employee involvement into nonunion dispute resolution procedures in the workplace.

First, it reduces the cycle time for resolving disputes. Most processes provide for the hearing by the panel with a few weeks of the event that causes the dispute. Second, it may preserve the working and business relationships of the parties. All parties involved in the process will also gain more of an in depth understanding of the difficulties and pressures of the decisions made and of the jobs that the parties do within the company.

However, with advantages come disadvantages. Peer review panel members are not trained in the underlying legal concepts that many employment disputes contain. Although the peer review panel may be able to look at an existing company policy and decide whether a management decision follows it, a peer review panel lacks the expertise on issues of substantive law. Most employment settings do not allow for external legal counsel to represent the employees during these informal procedures.

Peer review panels may best be used to determine if policies are followed, however any underlying statutory claims that may be contained in or result from the misuse of policy by management, should not be decided by untrained co-employees. Still, a trained peer review member is not the equivalent of an attorney. The development by industry of internal dispute resolution processes using peer review panels made up of fellow employees may be viewed by some as a simple mechanism for poor man justice, but if justice is denied then peer review is a fraudulent game.

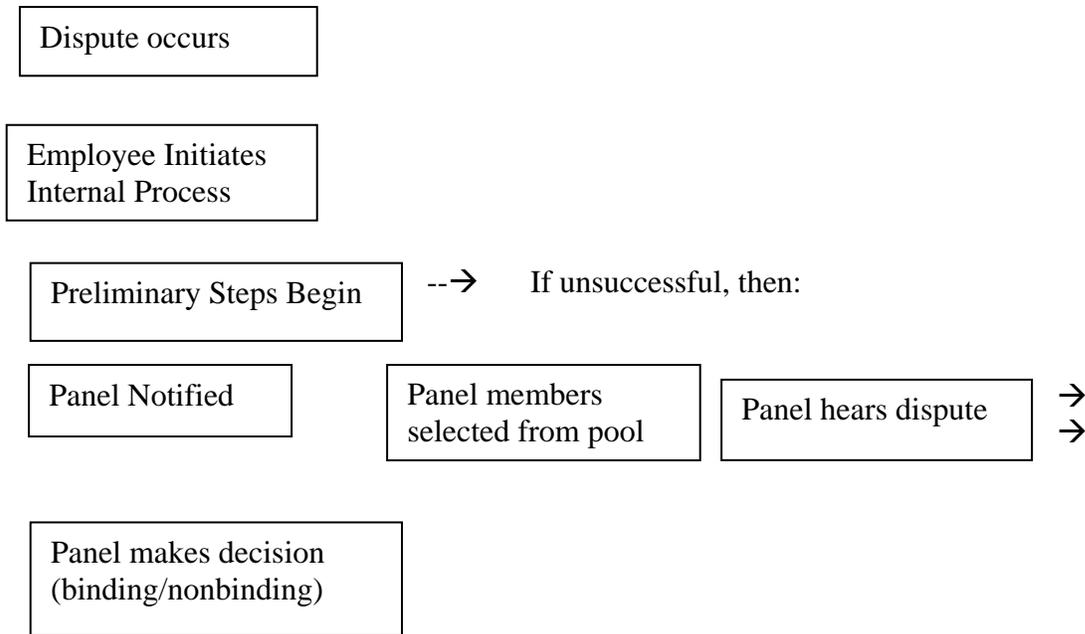
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<sup>57</sup> Katherine V.W. Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 Ohio St. J. on Disp. Resol. 467 (2001), wherein the author suggests, "Arbitration awards should be subject to judicial review on issues of law, but not for interpretations or application of norms."

APPENDIX A

FLOWCHART OF A GENERIC PEER REVIEW PROCESS

- Step 1: Managerial decision is announced.
- Step 2: Employee disputes management's decision (At this point some company policies allow a choice between a management review or a peer review.)\*
- Step 3: Employee begins internal dispute process with notification to the employer.
- Step 4: The ADR process begins within the employment setting (it may involve first meeting with a representative of management or an ombudsman or a variety of other preliminary steps prior to peer review.)\*\*
- Step 5: Employer assembles the peer review members in accord with company policy.
- Step 6: A peer review hearing takes place.
- Step 7: The peer review decision is made, either binding or nonbinding.



\* See ABX Air, Inc.'s policy, available at [www.myabx.com/employee%20policy/policies/disputeresol.htm](http://www.myabx.com/employee%20policy/policies/disputeresol.htm)

\*\*See steps provided by the Ritz Carlton Hotel Company, LLC available at *Shelton v. Ritz Carlton Hotel Company, LLC*, 550 F. Supp. 2d. 74, 80 (D.C. Cir. 2008).