INTERNAL DISPUTE RESOLUTION: THE LEGAL ENVIRONMENT OF COMPLEX PUBLIC ORGANIZATIONS

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(ABSTRACT)

This study carries forward the new institutional exploration of the legal environment of organizations by examining the dynamics of legalization in the Commonwealth of Virginia Grievance Program. It extends legalization research to the public administration and policy field by exploring and describing how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes. This knowledge and insight will educate and empower public administrators to better manage the political, administrative, and institutional change normatively sanctioned by the downsizing, reinvention, and reengineering government reform movement.

A phenomenological or naturalistic inquiry perspective frames the research as a methodological philosophy or research mode that focuses on what people experience and how they interpret the world. Thirty-four key informants were interviewed Statewide from three primary groups: (1) Managers and supervisors, (2) Non-supervisory personnel and grievants, and (3) Administrative hearing officers appointed by the Virginia Supreme Court. As a means of triangulation multiple data-gathering techniques

were used to investigate interview data. Other sources include direct observations, official documents, and archival records.

The study employs Sitkin and Bies' (1994) new institutional conceptualization of legalization as an investigatory lens to examine and report the findings. Data analysis revealed that the legalization of internal dispute resolution (IDR) in the Commonwealth tends to result in the circumvention of immediate supervisors in the formal grievance process, thereby obviating their positional authority to resolve employee grievances in a nonadversarial way. In sum, data supports the legalization literature that indicates mimicking judicially legitimate procedure in the grievance process alters the way flexibility, trust, and shared meanings govern the essence of organizational relationships and results in economic and systemic costs (loss of organizational trust and legitimacy) while resulting in little substantive justice.

This study suggests that public organizations that are better adapted to their legal environments are not necessarily more effective. Thus, public administration theorists and practitioners should strive to understand how organizational forms, structural components, and legal rules (the institutional environment) transform organizational relationships (social and technical environments) in complex, public organizations.

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I.

INTRODUCTION

> *When we view an organization "as an institution," we may mainly be concerned with the values it embodies from the standpoint of the people whose lives it touches as well as that of the larger community.*
>
> *- Philip Selznick, The Moral Commonwealth*

This dissertation is a case study in the dynamics of legalization in public sector grievance programs in a nonunion environment.[1] It is designed to investigate and describe how legalization, as illustrated by the Commonwealth of Virginia Grievance Program, transforms internal dispute resolution (IDR) between management and employees. It focuses on the paradoxical nature of legalization and is informed by two main themes. First, the persistent and insoluble conflict between traditional management prerogatives, such as the Employment-at-Will Doctrine, and expanding employee rights in the workplace affects the process of IDR and perceptions and expectations of

[1]As used in this dissertation legalization refers to the impact of legalistic influences on organizational processes and structures (Sitkin and Bies, 1994, 20).

workplace justice (Westin and Feliu, 1988; Ewing, 1983; and Sovereign, 1984).[2] Second, although legalization promises to enhance efficiency, effectiveness, fairness, or legitimacy of the Program, in practice "it can paradoxically undermine the very social goals it was designed to further" (Sitkin and Bies, 1994, 29). Thus, it is the legal environment of complex, public organizations which this dissertation study explores.

Statement of the Problem

Recent efforts to reform government are challenging many of the basic theoretical and managerial assumptions and values of governance in complex, public organizations. Under the political rubric of reinventing government, these efforts portray government as a failed enterprise and advocate radical organizational changes in structure, policy, and procedure designed to reduce the size of government by flattening organizations and

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[2]A full discussion of the many historical and contemporary conceptual interpretations and definitions of justice is well beyond the scope and limitations of this project. As used herein, workplace justice refers to procedural and substantive justice. Procedural justice denotes procedural due process of law as founded in the provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. Its fundamental role is to control administrative discretion by protecting entitlements, rights and securing fairness, equal treatment and predictability (Yudof, 1994, viii). However, as Selznick (1992) notes, rules and legal principles are not ends in themselves and have no intrinsic worth. They are judged according to their contribution to substantive justice, which is the ultimate criterion. Substantive justice, therefore, is concrete, not abstract. It is fairness made good for particular litigants, taking all of their circumstances into account. It is the just outcome, not the fair procedure (198).

encouraging the use of private sector practices and services (Goodsell, 1993, 85).[3] This period of political, administrative, and institutional change and instability confounds the internal and external legal environments of public organizations at the national and subnational levels. Most alarmingly, it results in a dilemma as public administrators attempt to reconcile traditions of constitutional governance and legal accountability with the search for flexibility, innovation, and productivity in addressing managerial and programmatic issues (Carroll, 1995, 302-312). Founded in the United States Constitution and public law, the legal environment of complex, public organizations and the legitimacy of public administration are being challenged.[4]

Intimately related to the issue of delegitimation is the consequential conflict that manifests itself at the organizational level. Broadly speaking, implementation of government reinvention initiatives such as downsizing, flattening management, and adherence to private sector practices and techniques directly affect the fragile interplay

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[3]For a review of the basis of the reinventing government movement, see David Osborne and Ted Gaebler, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector (Reading, Mass: Addison-Wesley, 1992). For a critical analysis of the reinvention movement, see Charles T. Goodsell, "Reinvent Government or Rediscover It?," Public Administration Review 53 (January-February 1993): 85-87.

[4]For a review of the foundations of public administration in the U.S. Constitution, see John A. Rohr, To Run a Constitution: The Legitimacy of the Administrative State (Kansas: The University Press of Kansas, 1986), and "The Constitutional Case for Public Administration," 52-95; in Refounding Public Administration, Gary L. Wamsley, et al. (California: Sage, 1990). For a discussion of the foundations of public administration in public law, see Ronald C. Moe and Robert S. Gilmore, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," Public Administration Review 55 (March/April 1995), 135-146 and Phillip J. Cooper, Public Law and Public Administration (New Jersey: Prentice Hall, 1988).

between employee rights and management prerogatives in the public work environment. As a result, when internal disputes surface between management and employees, their resolution is of major importance to perceptions of workplace justice and, ultimately, organizational and institutional legitimacy. The following examples vividly illuminate the complexity of the tension between management's right to downsize, restructure and reassign workers and employees' rights to procedural due process.

Virginia Governor George Allen's 1995 reorganization of State agencies and departments expands the number of employees who can be dismissed without the protections of Virginia's 52 year-old civil service system.[5] On the one hand, Allen argues that his formal authority to reorganize the State work force is a valid, codified management prerogative. On the other hand, however, his actions resulted in the reclassification and subsequent termination of a number of high-level employees whose positions became exempt under the Commonwealth's formal Grievance Program. Sponsored by the Virginia Governmental Employees Association (VGEA), the affected employees initiated legal action against the Commonwealth asserting that their rights to procedural due process under law were violated.[6]

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[5]Randolph Goode, "Governor's Firing of Workers Upheld," Richmond-Times Dispatch, 18 June 1995, sec. B, p. B1.

[6]See Mandel v. Allen, 889 F. Supp. 857 (E.D. Va. 1995). The U.S. District Court held that: (1) Virginia's grievance procedures for State employees are not constitutionally protected property rights; (2) Layoff rights afforded classified employees rise to the level of property rights; (3) Employee who was mistakenly reclassified...suffered no deprivation; (4) Classified employees whose positions were abolished failed to establish any violation of prescribed layoff procedures; (5) Employee

A local government example further illustrates the tension. During the late 1980s, the City of Hampton Director of Parks exercised his management prerogative to terminate the employment of the City's Golf Course Superintendent. In response the Superintendent exercised his employee right to have the dismissal reviewed through the City's formal grievance procedure. The initial three stages of the grievance process were management review steps in which management sustained the Director's action. But the final step was a formal grievance hearing conducted by a standing Grievance Panel appointed by the Hampton City Council. The Panel ruled in favor of the Superintendent and ordered that he be reinstated to his former position. In defiance of the ruling the Parks Director reinstated the Superintendent for one work day before exercising his management prerogative to reassign him to a different position in the department at the same pay grade, but with less status and responsibility. Subsequently, the Superintendent pursued enforcement of the Panel's decision through the courts where he prevailed and was reinstated to his former position.[7]

These examples illustrate the fragile interplay between management prerogatives and employee rights as well as the inherent tension between procedural and substantive workplace justice concerns in public organizations. In each case management exercised

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was not deprived of constitutionally protected status when her reporting line within the agency was changed, resulting in a reclassification from "classified" employee to "exempt" employee, with consequent loss of procedural protections in case of job abolition.

[7]See Zicca v. City of Hampton, 240 Va. 468 S.E. 2d 882 (1990).

its codified rights. Both resulted in adverse actions against public employees which raised issues of workplace justice. Ultimately, however, the organizations' internal legal environments could not resolve these disputes. As a consequence the issues had to be resolved in the courts, the organizations' external legal environment.

The Legal Environment of Public Organizations

With the development of the new institutional theory in organizations scholars have begun to recognize the importance of legal environments for organizations (Scott, 1994, 7). Most notably, Sitkin and Bies' (1994) conceptualization of legalization as a particular type of institutionalization in which law and law-like forms offer a normative source of organizational legitimacy is representative of the revitalized study in the legal environment of organizations (19-49). Their law-oriented perspective is distinct from the legal-rational view of bureaucratization which stresses the competitive, efficiency driven effects of bureaucratic procedures.[8] It "stresses the circumstances under which mimetic institutional processes lead to the symbolically useful, but instrumentally dysfunctional, adoption of bureaucratic or legal procedures" (22). This conceptualization affords a new lens through which to view and explore the dynamics of legalization in complex, public organizations.

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[8]For a review of the legal-rational perspective, see Max Weber, The Theory of Social and Economic Organization (New York: Free Press, 1947).

Sitkin and Bies emphasize that it is the fear of litigation that drives the inner dynamics of legalization in organizations (vi). They suggest that a litigious model of conflict resolution governs organizational activities and heavily influences administrators' approaches to their duties and responsibilities. The model is characterized by formal rules and procedures, adversarial relations, legalistic rhetoric, and an inordinate attention given to legal sanctions and criteria in decision making (Ibid). Furthermore, Sitkin and Bies maintain that the internalization of this model has become a routine mechanism for resolving conflict in and between organizations (24). Its key features are its adversarial, zero-sum approach and its "ultimate reliance on judicial review (reconciliation through litigation) or quasi-judicial review (reconciliation through internal dispute resolution procedures)" (Ibid).

Formal and informal public employee grievance programs and procedures are IDR mechanisms and represent the legal environment of public organizations.[9] Broadly stated, they are designed to mimic judicially legitimate process and procedure in the resolution of employee complaints in the workplace in an effort to enhance organizational efficiency, effectiveness, fairness, and legitimacy.[10] Nonetheless, the legalization of

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[9]The legal environment of public organizations extends far beyond formal employee grievance programs. However, IDR mechanisms represent the litigious model of conflict resolution very well because they rely on quasi-judicial and judicial review to resolve organizational disputes.

[10]This refers to the procedural due process aspects of most grievance procedures in public organizations as well as the legal requirements associated with the formal grievance hearing phase or step which are not unlike civil court proceedings (Bonfield and Asimow, 1989, 10).

IDR can paradoxically have unintended consequences. For example, some administrators rely on highly legal processes and procedures, such as formal grievance procedures, to protect themselves and their organizations against litigation in the courts. To that end, they focus on legal criteria, reasoning, and rationale--what is legally defensible--rather than sincerely attempting to resolve employees' complaints. Consequently, this trend can undermine social goals, such as workplace justice, by "fostering a superficial reliance on that which has an acceptable rationale over that which is socially rational (i.e., meets the letter rather than the spirit of the law)" (31). Sitkin and Bies explain the significance of this trend:

> As decisions are increasingly dominated by a concern for what is legally defensible...there is a potential for legalization to dominate attention, decision making, and structure at the expense of the organization's social and economic performance....Balancing the multiple criteria can create paradoxical outcomes when managers attempt to pursue legitimacy and performance criteria--each at the expense of the other. As a result, legalization paradoxically poses serious threats to both an organization's legitimacy and its effectiveness (20).

In other words, the routine use of legal processes, procedures, and decision criteria in resolving employees' complaints and concerns can conflict with organizational performance and paradoxically damage organizational legitimacy. Simply put, when legalization dominates managerial attention it can affect the long term health and goals of the organization. Viewed in this light the paradoxical nature of legalization serves as a viable lens through which to explore and describe the dynamics of the Commonwealth's legal environment.

The Paradoxical Nature of Legalization

Sitkin and Bies suggest that formalization, rationality, power, and justice paradoxes are created by the duality inherent in the process of legalization (29). Formalization paradoxes result, on the one hand, from adopting legalistic approaches as a means of institutionalizing informal practices (30-31). On the other hand, however, formalizing a successful practice such as informal IDR may remove the sense of intimacy or interpersonal responsibility that was the cornerstone of its success (Ibid). For example, on the positive side, formalizing IDR empowers employees with voice and enhances reliability and trust through the use of procedural due process safeguards. But on the negative side, it may also create an adversarial legal climate that undermines the informal and valued trust that managers share with their subordinates by focusing on legal rather than social processes. In this respect the use of legal-rational procedures and criteria in decision making is intimately related to the formalization paradox.

Sitkin and Bies contend that rationality paradoxes occur when managers rely on legal reasoning "as the epitome of rationality" (30). On the one hand legalization provides managers with an apparently authoritative basis and justification for making managerial decisions, but on the other, it undermines the rationality of organizational actions by "obviating the flexibility of [their] positional authority" (Ibid). Hence, when legal reasoning, criteria, and rule-following dominate managerial decision making, administrative discretion to respond to organizational change may be limited. More

importantly, as managerial decisions become dominated by what is legally defensible, they slowly shift concern away from that which makes organizational sense. For instance, relying on legal-rational decision criteria to resolve employees' grievances in an attempt to minimize conflict and reduce legal liability to protect the organization may actually contribute to a growing adversarial legal climate that damages the long-term health of the organization (31). Sitkin and Bies emphasize, however, that "one of the primary motivations for utilizing legalistic decision criteria is to place constraints on the arbitrary use of power by those in positions of formal authority" (29).

But although formal, legal authority is designed to restrict administrative discretion and ensure workplace justice on the one hand, on the other there is a great amount of latitude that can be used by those in positions of authority to cover and legitimize their actions. In short, the power paradox derives from the misuse of formal authority. This can be accomplished by adhering to proper procedure to cleanse "questionable actions and ward off the threat of perceived illegitimacy" (Ibid). Thus, a reliance on legalistic criteria to remedy power inequities can paradoxically serve to protect the status quo (29-30). For example, public employees in the Commonwealth of Virginia are statutorily prohibited from officially grieving codified management prerogative issues such as work assignments, establishment of wages, position classifications, or work activity reasonably expected to be a part of the job content.[11] Notwithstanding, employees may grieve the

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[11]These are only several of management's statutorily protected rights. For a review of other management prerogatives see Section 2.1-116.06 C, Code of Virginia 1950, as amended, 1995 Replacement Volume 1, 371-372 and The Employee Grievance

unfair application or misapplication of any policy or procedure. Thus, on the one hand the statute protects management rights and constrains administrative discretion; but on the other managers can use their formal authority to reapply a tainted process or procedure--making the complaint nongrievable--thereby covering and legitimizing their actions with the veneer of legal respectability, resulting in a justice paradox.

The justice paradox is intrinsically related to the formalization, rationality and power paradoxes. It stems from a reliance on legalistic reasoning and criteria at the expense of humanistic and social considerations.[12] On the one hand, legalistic processes and procedures can protect managers and their organizations against litigation, as well as promise equity and fair treatment to stakeholders and constituents (31). But on the other hand, legalization can undermine social goals of justice by fostering a superficial reliance on that which meets the letter over the spirit of the law (Ibid). Inherently, formal grievance programs and procedures not only afford aggrieved employees procedural protection against the arbitrary use of administrative discretion, they serve to direct dissent into organizationally acceptable forms and channels that prevent it from escalating and challenging the legitimacy of management and the organization (Sheppard, Lewicki and Minton, 1992, 154-156). In this context the focus of workplace justice is on the fair

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Procedure, DERC, 1997, 1-15.

[12]Sitkin and Bies argue that there is growing evidence that "law without justice" is becoming commonplace, as managerial decisions are dominated increasingly by a concern for what is "legal" at the expense of humanistic and social considerations, such as justice and fairness (31). Here the authors are referring to substantive justice--the spirit rather than the letter of the law--the just outcome, not the fair procedure.

procedure, not the just outcome--humanistic or social considerations. Thus, the paradoxical nature of workplace justice is characterized by the innate tension between procedural and substantive justice concerns in complex, public organizations.

The Zicca v. City of Hampton (1990) case previously discussed best illustrates this point. Although Mr. Zicca was afforded the procedural due process of the City's grievance procedure and reinstated to his former position as Golf Course Superintendent, the Director of Parks reassigned him to a different position only one day after his reinstatement. On the one hand, Mr. Zicca was afforded procedural justice. But on the other hand, the Director used his formal authority and administrative discretion, a valid management prerogative, to reassign Mr. Zicca. In this way he technically implemented the Grievance Panel's final, binding decision and then exercised a management right to reassign employees. But in essence the Director denied Mr. Zicca substantive justice--the exact position from which he was terminated.[13] Thus, on the one hand the City complied with the letter of the law--procedural fairness; but on the other hand, it undermined the spirit of the law--the social goal of substantive justice in the public work environment.

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[13]The Zicca Case is also an excellent example of the interrelationship between the formalization, rationality, power, and justice paradoxes.

Summary

Recent efforts to reinvent government are challenging many of the basic theoretical and managerial assumptions and values of governance in complex, public organizations. Most notably, the implementation of government reinvention initiatives directly affects the delicate interplay between management prerogatives and employee rights in the public workplace as public administrators attempt to reconcile traditions of constitutional governance and public law with the search for flexibility, innovation, and productivity. As a result managerial decisions are increasingly dominated by a concern for what is legally defensible at the expense of social and humanistic considerations. Thus, the legal environment of complex, public organizations and the legitimacy of public administration are being challenged.

Purpose of the Study

The purpose of the dissertation is to extend the research in the legal environment of organizations from other academic fields to public administration and policy by exploring and describing the dynamics of legalization in complex, public organizations. To that end a phenomenological or naturalistic inquiry perspective frames the research as a methodological philosophy or research mode that focuses on what people experience and how they interpret the world. From this paradigmatic perspective human activity is seen as a collection of symbols expressing layers of meaning, and, thus, context is critical

to understanding and involves interpreting and constructing social reality (Miles and Huberman, 1994, 8; and Sjoberg, et al., 1991, 31). However, case study research is only generalizable to theoretical propositions and not to populations or universes (Yin, 1994, 10). It does not represent a "sample," and its purpose is to expand and generalize theories (analytical generalization), not enumerate frequencies (statistical generalization) (Ibid). In this respect its descriptive and prescriptive value lies in the recognition that it contributes to public administration scholarship and practitioners' understanding of and insight into the dynamics of legalization in complex, public organizations. This scholarship and insight will educate and empower public administrators to better manage the political, administrative, and institutional change normatively sanctioned by the downsizing, reinvention, and reengineering government reform movement.

Scott (1994) emphasizes that until recently scholars have neglected legal environments in organizations and reveals that the preponderance of the literature relating law and organizations primarily focuses on the organization of legal systems and crime and organizations (4-5). He stresses that there is no more important issue for analysts to understand than the ways in which organizations are shaped by legal rules and processes (Ibid). In this sense Pfeffer (1994) suggests that given the various significant costs and consequences of legalization for organizations an important research task is to investigate "how what often begins as a sensible attempt to provide due process and procedural justice can go awry with more emphasis on the procedure than on justice" (343). Sitkin and Bies concur and argue that legalization is not well understood as an

organizational phenomenon, however organizational theory "represents a potentially important--and previously neglected--source of insight" (31). They disclose that the insights of Weber (1947), Selznick (1969), and legal scholarship more generally have remained largely neglected (Ibid). This holds especially true for the field of public administration and public affairs as public personnel management and organizational research has failed to address the internal legal environment within which public employee grievances are resolved. This study addresses that void and fills a gap in the public administration organizational studies and management literature by investigating how legalization affects IDR processes in public organizations situated in a turbulent environment of political, administrative, and institutional reform.

Research Question

How does the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes? This is the main question addressed by this dissertation. More precisely, this study examines the dynamics of legalization and explores the following related questions:

(1) *What are the organizational benefits of resorting to legal-rational decision criteria to resolve internal disputes between management and employees?*

This question explores the instrumental and symbolic benefits of the Commonwealth's formal Grievance Procedure. It speaks directly to Sitkin and Bies'

definition of legalization as a particular type of institution in which law and law-like forms offer a normative source of organizational legitimacy (22).

(2) *Who develops and interprets legal rules within the organization and how are those requirements transmitted?*

This question investigates the role played by DERC, HRM, the Department of Personnel and Training (DPT), and professional organizations such as the Virginia Alliance of State Employees (VASE) and the Virginia Governmental Employees Association (VGEA) in developing, interpreting, communicating, and administering IDR policies and procedures in the organization.

(3) *How does mimicking judicially legitimate processes and procedures in resolving employees' grievances affect organizational and institutional legitimacy?*

This question examines how adopting legal-formal processes and procedures in the resolution of employees' grievances affects organizational and institutional legitimacy. It examines the efficacy of the Commonwealth's formal Grievance Program as perceived by key informants. This exploration provides public administrators with an understanding of the relationship between the legal environment of public organizations and employees' perceptions of organizational and institutional legitimacy. Thus, public managers will be better prepared to balance organizational legitimacy and performance criteria.

(4) *How does legalization impact IDR processes in complex, public organizations?*

This question addresses Sitkin and Bies' argument that the legalization of organizations is a significant social trend in which decisions are increasingly made based

upon what is legally defensible rather than what is organizationally and socially feasible (20). To that end, it investigates the tension between procedural and substantive workplace justice concerns as perceived by upper management, immediate supervisors, aggrieved employees, union members, independent hearing officers, grievants' advocates (attorneys and lay-representatives), human resource management (HRM) officers, and Department of Employee Relations Counselor (DERC) officials. Knowledge of this tension is important to public administrators because a reliance on procedural due process to resolve employee grievances--the fair procedure--can undermine social goals of workplace justice by focusing on judicially legitimate processes at the expense of humanistic and social considerations--"fairness made good for particular litigants taking all of their circumstances into account" (Selznick, 1992, 198).

(5) *What are the alternatives to legalization? Given the Commonwealth's internal and external legal environments, what, if any, are possible alternative methods for resolving employees' concerns and complaints?*

This question speaks to the viability of alternative dispute resolution (ADR). For example, Lan (1997) warns that the high costs of litigating organizational conflict has forced organizations to search for alternative methods of ensuring organizational justice (31). Similarly, Mauer and Flores (1986) argue that workplace conflict must be redefined so that employees are not forced to challenge management. They maintain that redefinition is best understood in contrast to traditional grievance procedures which typically define conflict as a violation of a policy, procedure, or work rule (53). Alternatively, they proffer a problem-solving approach that "creates a better perception

of employee justice" (54).

Organization of the Dissertation

The dissertation is organized into seven chapters. Chapter two reviews the relevant literature on IDR and the legal environment of organizations. It develops the argument that the interdisciplinary research in IDR and the revitalized inquiry in the legal environment of organizations are inextricably linked to one another as well as the discipline and study of public organizations and management. In sum, it discerns and sketches a research nexus that exposes a gap in the public administration and policy literature.

Chapter three presents and justifies the appropriateness and application of the naturalistic inquiry perspective and the case study strategy and design that frame the research. The chapter first examines the epistemological paradigms debate about how best to conduct social science research, focusing on methodological issues and considerations associated with competing inquiry paradigms and discussing the advantages and disadvantages of each. Next, the chapter reviews the specific procedures employed for data collection and analysis.

Chapters four through six constitute the centerpiece of the dissertation and report the results of the case study. Chapter four introduces the research findings by presenting a contextual overview of the Commonwealth of Virginia Employee Relations Program

which reveals that it is shaped by legal rules, processes and procedures that constitute its legal environment. It tells a story about the historical foundation, development, and implementation of public employee grievance rights and formal grievance processes that focus on legal programmatic and procedural issues and considerations that constitute a contextual canvas upon which a portrait of the internal dynamics of legalization is created in subsequent chapters.

To that goal, employing Sitkin and Bies' (1994) new institutional conceptualization of legalization as an investigatory lens, chapters five and six explore and describe the internal dynamics of legalization in the Commonwealth's formal Grievance Program as reported by key informants. Chapter five explores the duality of the legalization process by examining three salient 1995 revisions to the Program which expose the paradoxical nature of formal IDR in public organizations. In a similar way chapter six explores the implications and tradeoffs associated with legalization by examining the paradoxical nature of legal-formality, legal-rational decision making, formal authority, and workplace justice. Finally, chapter seven discusses the significance of the research and its implications for public administration theory and practice.

II.

LITERATURE REVIEW

> *The demands for `legal equality' and of guaranties against arbitrariness require formal rational objectivity in administration in contrast to personal free choice on the basis of grace....The democratic ethos...based as it is on the postulate of substantive justice in concrete cases for concrete individuals, inevitably comes into conflict with the formalism and the rule-bound, detached objectivity of bureaucratic administration.*
>
> *- Max Weber on Law in Economy and Society*

This dissertation speaks directly to internal dispute resolution (IDR) and the legal environment of complex, public organizations. Toward that goal the chapter develops the argument that IDR and the revitalized study in the legal environment of organizations are inextricably linked to one another and the discipline and study of public administration and policy. Employing the legal environment of public organizations as a research nexus, a review of the literature suggests a two-fold trend: (1) A debate centering on what constitutes a viable grievance program in organizations situated in a legal environment characterized by an increasing tension between employee rights and management prerogatives in the workplace, and (2) A revitalized interest in the institutional study in the legal environment of organizations. In sum the chapter discerns

and sketches a connection between the two trends that exposes a gap in the public administration organizational and management studies literature.

The chapter first reviews the legal basis of the public employment relationship founded in the Bill of Rights of the United States Constitution; public law; and customs, usage, and mutual understandings between employees and management. It focuses on the inevitable and evolving tension between management prerogatives and employee rights in the public workplace that "define the rights, obligations, and mutual expectations often evoked in adversarial situations" (Lee, 1992, 15). In broad brush it reviews the legal environment within which public organizations develop and implement IDR policies and procedures to resolve employees' concerns and complaints, generally in the form of formal grievance programs.

Based on this legal context the chapter next reviews the literature on what constitutes a viable grievance program.[14] The breadth of the discussion and debate is interdisciplinary and complex and centers on the tension between formal and substantive rationality--formal legal procedures versus substantive outcomes.[15] At issue is

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[14]The discussion derives from the interdisciplinary research in internal dispute resolution, grievance programs, and related issues. It applies to public and private sector organizations.

[15]Substantive due process rights are founded in the Doctrine of Substantive Due Process which should not be confused with the terms "substantive justice or substantive outcomes" as used in this dissertation. Substantive due process is the Doctrine that due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution require legislation to be fair and reasonable in content as well as application. Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of life, liberty or property. The essence of substantive due process is protection from

organizational efficiency, effectiveness, and legitimacy and their relationship to workplace justice. One side of the debate stresses that grievance programs and procedures are designed fundamentally to preserve and protect the power of those who govern the organization (Sheppard, Lewicki, and Minton, 1992, 154). Viewed through this lens organizations are more concerned with the appearance of fairness than actual substantive outcomes (156). In this sense a viable grievance program affords aggrieved employees due process of law--procedural fairness--as determined by the structure of the decision process and the interpersonal behavior of the parties who implement the decision (Brockner and Siegel, 1996, 391). Here workplace justice and organizational legitimacy are founded in mimicking formal legal process and procedure and substantive justice is a "derivative, a hoped-for-by-product of impeccable method" (Nonet and Selznick, 1978, 67).

In contrast, the other side of the debate emphasizes organizational communication, interpersonal relationships, and nonadversarial, problem-solving approaches that prevent employees from challenging management. In this formulation management must redefine workplace conflict and use alternative dispute resolution (ADR) techniques such as consensus-building, joint problem-solving, negotiation, informal arbitration, and mediation to create better communication and perceptions of workplace justice (Lan,

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arbitrary and unreasonable action. Substantive rights, therefore, are a right to equal enjoyment of fundamental rights, privileges, and immunities; distinguished from procedural rights (Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn.: West, 1990), 1429).

1997, 31; and Mauer and Flores, 1986, 53). This encourages employees and supervisors to work in a collaborative environment to solve problems and resolve workplace disputes. Here the focus of IDR is on social process and substantive justice. Hence, workplace justice and organizational legitimacy are founded in the just outcome, not the fair procedure (Selznick, 1992, 198).

The first trend in the literature reveals a debate on what constitutes viable IDR in organizations situated in a legal environment characterized by an increasing tension between employee rights and management prerogatives in the workplace. At the center of the debate is whether organizations are better served by legal or social IDR processes and what effect each has on organizational efficacy and workplace justice and legitimacy. In this way formal grievance programs are intimately related to the revitalized study in the legal environment of organizations.

Thus, the chapter next reviews the literature on the legal environment of organizations. But as previously noted, the preponderance of the literature relating law and organizations primarily focuses on the organization of legal systems and crime and organizations (Scott, 1994, 4-5). In other words, the legal environment of organizations is "not well understood as an organizational phenomenon" (Sitkin and Bies, 1994, 31). It is less understood as an institutional one. Cognizant of this fact, part two first briefly examines germane theoretical foundations in legalization research by linking the seminal works of Weber (1947), Selznick (1969), and Nonet and Selznick (1978) to the new institutional study in the legal environment of organizations as espoused by Sitkin and

Bies (1994).

The new institutionalism in organizational analysis has a "distinctly sociological flavor" although it diverges from earlier sociological approaches to organizations and institutions (Powell and DiMaggio, 1991, 11). New institutional study focuses on institutionalization as occurring at the sector or societal levels rather than the organization. Its locus is organizational in that "organizational forms, structural components, and rules, not specific organizations, are institutionalized" (14). Notably, organizational theorists have begun to investigate the impact of legalization on organizations from this perspective (Scott, 1994; Van Maanen and Pentland, 1994; Feldman and Levy, 1994; Pfeffer, 1994; Stutman and Putnam, 1994; Shapiro and Kolb, 1994; and Sitkin and Bies, 1994). Thus, the chapter reviews the new institutional study in the legal environment of organizations with a focus on Sitkin and Bies' theoretical model of the legalization process.

In sum, a preponderance of the literature demonstrates that the interdisciplinary research and study of IDR and the revitalized inquiry in the legal environment of organizations are inextricably linked to one another and the study of public administration and public affairs. This fact points to a gap in the public administration and policy literature which this dissertation seeks to fill by investigating how legalization affects IDR processes in complex, public organizations. To that end the chapter begins with a review of the interdisciplinary literature on IDR in complex organizations.

Part I

Internal Dispute Resolution

The Public Employment Relationship

The first trend in the literature examines IDR in organizations and debates what constitutes a viable grievance program. The discussion and debate centers on the insoluble and evolving tension between employee rights and management prerogatives in the workplace. At issue is organizational efficacy and legitimacy and their relationship to workplace justice. In the public sector the tension derives from the modern public employment relationship which is legally founded in the United States Constitution; public law; organizational policies and procedures; and collective bargaining agreements. Although persons who work in the private sector "may be subject to similar rights and restrictions, public employees may actually have prospects of protection or relief not available to private sector employees, as government policies are always subject to the constraints of the Bill of Rights of the U.S. Constitution" (O'Neil, 1993, 6).[16]

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[16]O'Neil explains that government funding or the exercise of a governmental function may subject some private employers to the full range of public responsibilities to their employees based on the theory that they are performing a governmental role. For example, Executive Order 11246, signed by President Johnson on September 24, 1965 and amended on October 13, 1967, forbids any agency contracting with the federal government to discriminate on the basis of race, creed, color, national origin or sex. Furthermore, Congress has reduced the disparity between the public and private sectors by extending legislation such as the Rehabilitation Act of 1992 to the private sector (6).

But notwithstanding constitutional protections and a "plethora of legislation, executive orders, and civil service regulations, until recently the fundamental [public] employment relationship was governed by the common law doctrine of privilege" (Lee, 1992, 16).[17] The doctrine held that public employees served at the will and pleasure of their employers and were subject only to statutory and civil service regulations. Simply put, public employment was judicially determined to be a privilege--not a right. Consequently, public employers could impose conditions of employment as they saw fit, within statutory limitations. This meant that government workers surrendered their constitutionally guaranteed rights as the price of public employment (Ibid).

From Privilege to Property Interest

By the mid 1960s the U.S. Supreme Court had begun to erode the doctrine of privilege.[18] In its decision in Keyishian v. Board of Regents (1967), a case concerned with the application of the First Amendment, the Court rejected the premise that public employees sacrifice their constitutionally guaranteed freedoms as a condition of public

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[17]See Arch Dotson, "The Emerging Doctrine of Privilege in Public Employment," Public Administrative Review 15, no. 2 (Spring 1955), 77-88. For a review of Judge Holmes' decision establishing the Doctrine, see McAuliffe v. Mayor of City of Bedford, 155 Mass. 216 (1892). For an example of the judicial application of the Doctrine, see Bailey v. Richardson, 86 U.S. App. D.C. 248, 260 (1950).

[18]The constitutional protections discussed in this section are relevant only in the context of public employment. See appendix a for a selective review of the constitutional protection of public employees.

service.[19] Later, in Board of Regents v. Roth (1972), the Court also rejected the doctrine of privilege in the context of the Fifth and Fourteenth Amendments.[20] In that decision the Court announced that public employment creates a "property interest" when it engenders the expectation of continued employment. The Court ruled that it is not the Constitution that creates this expectation, but statutes, rules, or understandings that secure certain benefits and entitlement to those benefits. In short, a property interest in employment is founded in the formal or implied contractual relationship that fosters the expectancy of continued employment. This means that for public employees classified as "permanent" the contractual relationship is generally defined by legal documents, statutes, civil service regulations, and agency personnel policies (Lee, 1992, 16). In other situations "it may be understood by inference or extrapolation from custom, usage, and mutual understandings" in the absence of a formal, written contractual relationship (17-18).

In essence the Supreme Court made clear that "public employment...may not be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action" (Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967)). Often referred to as the "Doctrine of Unconstitutional Conditions," it has

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[19]385 U.S. 589 (1967). Public employees may challenge actions by their employers that interfere with their fundamental constitutional rights. Government actions that infringe on these rights must cease unless the government can demonstrate a compelling state interest--an interest so vital that it justifies the interference with the employee's freedom (605-606).

[20]408 U.S. 564 (1972).

special force in the public employment context (Cooper, 1988, 332). For instance, O'Neil (1993) explains that the primary constitutional protections afforded public employees in the First, Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution "apply to states as well as the federal government--state legislatures, administrative agencies, courts, and to all levels of local government" (4). Furthermore, additional protections are codified in most state constitutions. In the case of conflicting state and U.S. constitutional protections, the higher standard applies. Hence, the basic guarantees of the Bill of Rights of the U.S. Constitution provide a floor of protection, but not a ceiling (5).

But the constitutional protection of public employee rights is limited, qualified, and evolving.[21] Although the Court rejected the doctrine of privilege, it has stopped short of conferring the full range of freedoms on public workers (3). Lee (1992) emphasizes that case law principles hold that freedoms guaranteed by the U.S. Constitution are not absolute and may be constitutionally subject to restriction--narrowly tailored to serve the stated purpose (27). Nonetheless, in balancing the state's interest against the individual rights of public employees the Court brought the public service within its constitutional framework. In this way it transformed and constituted the legal environment of complex, public organizations by creating an evolving tension between employee rights and management prerogatives in the public workplace. It is often these

[21]See appendix a for a discussion of how the constitutional protection of public employee rights are limited, qualified, and evolving.

rights, obligations, and mutual understandings that are evoked in adversarial situations (15). But in addition to the limited and qualified constitutional protections afforded public employees, much of the law that protects government workers comes in statutory form and often exceeds what the U.S. Constitution guarantees (O'Neil, 1993, 4).

The Statutory Protection of Public Employee Rights

Scholars suggest that the statutory protection of employee rights is on the rise (O'Neil, 1993; Cooper, 1988; Westin and Feliu, 1988; Sovereign, 1984; and Ewing, 1983).[22] In fact, many protections are founded in federal, state, and local statutes and ordinances, as well as organizational policies and procedures and collective bargaining agreements. Therefore, a comprehensive review is beyond the scope of this project. Alternatively, the evolution of civil service reform in the United States, the establishment of a Civil Service Commission (CSC), and the development of the principle of merit illustrates the complexities of the statutory protection of public employees.[23]

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[22]This includes private as well as public sector employees. However, the U.S. Supreme Court's ruling that state government workers can not challenge the overtime provisions of the Fair Labor Standards Act of 1938 in state court, 52 stat 1060, as amended, 29 U.S.C. and section, 201, et seq., may indicate a reversal of this trend. See Alden v. Maine, No. 98-436, decided June 23, 1999.

[23]See appendix b for a selective review of other examples of the statutory protection of public employee rights: (1) Partisan political activities, (2) Discrimination in employment, and (3) Collective bargaining for federal employees.

Statutory Protection Through Civil Service Reform

Civil service reform in the United States has resulted in a vast amount of statutory protection for public servants, although it has steadily evolved within the context of constitutional, political and historical limitations (Rohr, 1992, 239). With the election of President Jackson in 1829 the open use of political patronage eventually led to the assassination of President Garfield in 1881 by a disgruntled job seeker. This and major societal, technological, governmental, and institutional changes led to much needed civil service reform.[24]

Although President Grant first created a CSC in 1871 which drafted legislation that would have curbed open patronage, it was not until the passage of the *Pendleton Act of 1883* that a lasting CSC was created and founded on the principle of merit. Its main features included competitive examination requirements, security from dismissal for political reasons, and protection from being coerced into political activities (Lee, 1987, 23). Initially the *Act* was somewhat limited in that it only covered about ten percent of all government workers, most of whom were clerical workers in Washington, D.C. However, a significant aspect of the legislation was that it gave the president authority to extend merit principle coverage to federal employees by executive order (Shafritz,

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[24]One of the first personnel system reforms actually occurred in 1829 with President Andrew Jackson's concept of "rotation-in-office." This is sometimes overlooked because President Jackson's "spoils system" has a negative connotation (A note from John A. Rohr on a PAPA 6494 Capstone in Ethics term paper titled: "The French Higher Civil Service: A Guide to SES Reform," unpublished, by William M. Haraway, August 1994).

Hyde, & Rosenbloom, 1992, 18-19). Thus, in 1897 President William McKinley issued an executive order that guaranteed that no civil servant would be removed "except for just cause and upon written charges of which the accused shall have full notice and an opportunity to make defense" (O'Neil, 1993, 121).[25] These provisions were codified in the *Lloyd-LaFollette Act of 1912*, which governed federal civil service procedure until the adoption of the *Civil Service Reform Act (CSRA) of 1978.*

Shafritz, et al., suggest that the civil service system in the United States has progressed through a number of phases that define it as an institution and provide insight into the evolution of statutory protections for public workers (30). During phase one, which is characterized by the period from 1883 through the early 1920s, the main role of the newly created CSC was one of policing or preventing patronage. The major aim was to depoliticize the public service by ensuring that positions were filled by non-partisan means. Phase two began with the advent of scientific management in the 1920s.[26] The essence of personnel administration during that time was to develop a more scientific approach which focused on position classification.[27] Until 1930 the CSC functioned primarily as an examining agency with policing duties and responsibilities.

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[25]15th Report of the United States Civil Service Commission, p. 70 (1897-98), Rule II.

[26]For a comprehensive discussion of Scientific Management, see Frederick W. Taylor, Principles of Scientific Management (New York: Harper & Bros., 1911) and "Scientific Management." In Classics of Public Administration, 3ed., eds. Jay M. Shafritz and Albert C. Hyde, 29-32. (California: Brooks/Cole, 1992).

[27]For example, this resulted in the Position Classification Act of 1923.

In the early 1930s the CSC was given more centralized personnel functions such as classification, efficiency ratings, and retirement administration. This marked the beginning of the centralization of the personnel function in the CSC. However, its image was negative resulting from its restricting and policing roles (32-36).

By 1937 the role of the CSC became the subject of the President's Committee on Administrative Management,[28] and in 1938 President Roosevelt "issued an executive order that required each agency to establish a division of personnel supervision and management" (37). President Truman further decentralized the federal personnel function after World War II. Thus, phase three illustrates the massive decentralization of CSC duties and responsibilities which would cause the CSC to seek out a new identity and image (39).

From the early 1950s through 1978 the CSC sought to find a new role. It tried to "stress merit, executive leadership, and representativeness all at once to the possible detriment of each of these values" (Ibid). Yet its image and role was to be defined within the context of other societal reforms such as the *Civil Rights Act of 1964*, the Vietnam War, and Watergate. Unfortunately, decentralization limited its success. Finally, with the election of Jimmy Carter to the presidency in 1976, the CSC was doomed to become defunct. Carter campaigned on a civil service reform platform. He voiced his dissatisfaction with the federal bureaucracy when he stated that

[t]he system has serious defects. It has become a bureaucratic maze which

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[28]Also known as the Brownlow Committee.

> neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape, delay, and confusion (Lee, 1987, 29).

Furthermore, the CSC had fallen under the attack of civil rights groups and labor unions who believed that personnel administration and management "was overwhelmingly dominated by [nonminority and] management interests" (Shafritz, et al., 41). These criticisms provided much of the impetus for passage of the *Civil Service Reform Act of 1978.*

The *CSRA of 1978* was the first major overhaul of civil service laws since the establishment of the system in 1883. It created what the Supreme Court has called "an elaborate new comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by [federal employers]" (O'Neil, 121).[29] Its main features abolished the CSC and created the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB), replaced the Federal Labor Relations Council with the Federal Labor Relations Authority (FLRA), and created a Senior Executive Service (SES). Although a full discussion of the various components of the *CSRA of 1978* is beyond the scope of this project, it is important to note that OPM was given the authority that was previously vested in the CSC. The MSPB was designed to be the "watchdog" of the federal merit system, and the FLRA was given the authority and responsibility for all labor relations and collective bargaining in the federal government. The SES was created to provide managerial flexibility and executive leadership by allowing SES members to

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[29]See Bush v. Lucas, 462 U.S. 367, 385 (1983).

be transferred and dismissed without a meaningful appeal process (45). Albeit not part of the *CSRA* itself, the Equal Employment Opportunity (EEO) Program was reassigned to the Equal Employment Opportunity Commission (EEOC). The *Act* also provided for veterans' preference, whistle-blowing protection of federal employees, and protection from wrongful or arbitrary action.

Provisions of the *CSRA of 1978* established performance appraisal standards against which agencies may initiate adverse action either for unacceptable performance or to promote the efficiency of the service.[30] For example, in cases of demotion or termination, the *CSRA* mandates that employees are entitled to (1) thirty days advance written notice of the proposed action, identifying specific instances of unacceptable performance on which the action is based, and the critical elements of the employee's position to which those standards apply; (2) the right to be represented by an attorney; (3) a reasonable time in which to answer orally and in writing; and (4) a written decision (122). In short, the *CSRA of 1978* guarantees procedural protection to public employees in the form of due process.[31]

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[30]See 5 U.S.C. Sec. 4303 (1988).

[31]The agency has in each case the option of providing a hearing in lieu of, or in addition to, the employer's chance to respond (a pre-determination hearing). Employee appeals to an adverse action at the agency level may either be pursued under a collective bargaining agreement or through a hearing before the Merit System Protection Board or an administrative law judge. The employee may be represented by an attorney or other advocate. An appeal from an adverse judgment at the agency level may be further appealed to the U.S. Court of Appeals for the Federal Circuit which will set aside the decision if it is found to be (1) arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law; or (2) obtained without procedures required by law, rule, or

Equally important, there have been constructive criticisms of the CSRA of 1978 by practitioners and academicians alike. Lane (1989) argues that the "dominant effect [of the *CSRA* and OPM that it created] has been in the radical revision of the values and institutions of the public service" (331). He suggests that value changes, politicization of the administrative process, organizational instability, and a loss of resources and talent "have brought OPM to the point of institutional incapacity" (342). Lane and Wolf (1990) concur and stress that "[b]y any measure of performance against legislative intent, OPM has been largely an organizational failure in the conduct of its programs and the achievement of its goals" (20). Huddleston (1992) also concurs and argues that the SES of today bears little resemblance to the one designed in 1978 (191). He maintains that the scandals and policy disasters of the recent past have derived from a "system of political administration that suppresses the wisdom and values of career professionals and gives free rein to the half-baked ideas and short-term interests of political appointees" (192-193). Others suggest that the *CSRA* and SES are a classic study of politics and compromise (Ingraham and Rosenbloom, 1992, 313). Thus, much criticism has been directed at OPM, the SES, and President Carter's attempt to control the federal bureaucracy through the appointment and assignment of senior executives. Notwithstanding, the civil service reform movement in the United States has provided much of the impetus for a vast amount of statutory protection of public employee rights.

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regulation having been followed; or (3) unsupported by substantial evidence (O'Neil, 1993, 122-123).

But in addition to constitutional and statutory protections, many other significant government workers' rights exist.

Employee Rights Founded in Customs, Usage, and Mutual Understandings

Osigweh (1989) suggests that employees desire greater rights than are provided for by law and that a sizable gap exists between the treatment they expect and receive (211). This creates frustration on the part of employees and restricts an employer's ability to regulate employment conflict (Ibid). He sketches three conceptions of employee rights. First, the *legal perspective* is denoted by "court enforceable obligations" (213). These obligations are founded in the U.S. Constitution and federal, state, and local statutes. Second, the *moral perspective* espouses the application of moral standards, based on each person's inherent value as a human being. Osigweh contends that the degree of respect given by the organization to the moral rights of individuals will determine their dignity and quality of life in the workplace. He argues that organizations must fulfill their moral obligations if they expect loyalty from employees. Finally, the *practical perspective* posits that employees will act on their own expectations of rights due them and organizations will adjust their behavior when they perceive it to be in their best interest (213). Osigweh concludes that in addition to legalistic considerations organizations may be governed in their approach to employee rights by the desired rights of employees. Thus, employee expectations and job perceptions are equally important.

Baker (1985) concurs and maintains that employee rights and obligations are founded in implied and psychological contracts between employers and employees. He defines psychological contracts as the sum total of all written, unwritten, spoken and unspoken, expectations of the employer and employee and contends that shared expectations are the key aspect of the relationship. It is the interactive nature of the relationship that shapes employees' expectations and perceptions of the organization and the employment relationship (38). Significantly, in addition to legal rights, organizations must be cognizant of desired employee rights founded in custom, usage, and mutual understandings, as they can create a property interest in continued employment and conflict with management prerogatives.

Management Prerogatives

Management prerogatives encompass those tasks determined by the organization as essential to control and successfully manage. In this context, management reserves the exclusive right to manage its affairs and operations. In the public sector management prerogatives or rights are defined and protected by codified public law. Accordingly, management reserves the right to (1) establish and revise wages, salaries, position classifications, or general benefits; (2) determine work activity, job content, measurement, and assessment; (3) decide the contents of established personnel policies, procedures, rules, regulations, ordinances, and statutes; (4) determine the methods, means, and personnel by which work activities are carried on; (5) control the hiring,

transfer, assignment and retention of employees; (6) relieve employees from duties during emergencies; and (7) terminate, layoff, demote or suspend duties from lack of work, reduction-in-force, or job abolition (Section 2.1-116 C, Code of Virginia 1950, as amended, 1995 Replacement Supplement, 372).

But management prerogatives can be legislated away by federal and state mandates, bargained away in collective bargaining agreements, and weakened by the courts. Some scholars argue that better educated employees will persist in testing their rights in areas traditionally considered as management prerogatives (Sovereign, 1984, 353; and Ewing, 1983, 19). Thus, management prerogatives are continually being redefined. The Employment-at-Will (EAW) Doctrine provides an excellent example.

The Employment-at-Will Doctrine

Koys, Briggs, and Grenig (1987) explain that EAW is primarily a question of state law based on the common law principle that the duration of the employment relationship is a matter of contract between free agents (565-566). They argue that although the Doctrine has been eroded by employee rights legislation, grievance and arbitration processes, and various court decisions it is still quite pervasive. They acknowledge, however, that state courts have recognized three major exceptions to the Doctrine: (1) *Violation of public policy*, (2) *Breach of an implied contract*, and (3) *Commitment of a tort of emotional distress, defamation, or third-party interference with a contractual relationship*. First, a wrongful discharge claim based on a *public policy exception*

generally must demonstrate that the employer was motivated by bad faith, malice, or retaliation. Crucial to this showing, the former employee must expose the discharge as based on the performance of an act encouraged by public policy.[32] Second, the *implied contract exception* holds that representations in employee handbooks, job application forms, employment interviews, and/or personnel policies can create a contract that modifies the terms of the EAW employment relationship. It implies that termination must be for "just cause" rather than for any reason whatsoever. The exception holds an implied covenant of good faith and fair dealing. The third exception relates to *tortious conduct by the employer.*[33] For example, some terminated employees "have argued that their discharges unjustifiably produced outrageous emotional distress or defamed their characters" (566).

Koys, et al., present the results of a study conducted to determine the extent to which various state courts have philosophically accepted or rejected these exceptions. The results indicate that there is much disparity between states. They report that most state courts accept the public policy exception and that the implied contract exception is

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[32]For example, filing a formal grievance or refusing to do something that public policy would condemn, such as committing perjury.

[33]A tort may be defined as the violation of duty (other than a breach of contract) owed a person. A tort can occur when someone inflicts harm on another without justification. Any person who suffers tortious harm from the unlawful act of another may recover damages from the person at fault (Koys, et al., 1987, 566).

steadily becoming more widely accepted (Ibid).[34] They conclude that acceptance of the EAW Doctrine is declining. This confirms the views of others (Westin and Feliu, 1988; and Ewing 1983) who argue that the "chipping away of the employment-at-will doctrine will continue, state by state until there is little left of the doctrine" (Sovereign, 1984, 353).

Summary

A selective review of the protection of employee rights reveals that civil service reform in the United States has resulted in a vast amount of statutory protection for civil servants, although it has evolved within the context of constitutional, political, and historical limitations (Rohr, 1992, 239).[35] Furthermore, the Supreme Court's decision in Roth forced public organizations to acknowledge employee rights founded in customs, usage, and mutual understandings. Hence, the Roth decision has led scholars to study nonstatutory employee rights founded in the implied and psychological contractual public employment relationship.

Yet public organizations must retain the ability to control and successfully manage. Therefore, management reserves the exclusive right to manage its affairs and

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[34]Their study indicates that the Commonwealth of Virginia courts only accept the public policy exception (568).

[35]Passage of federal laws in response to political patronage, discrimination in employment, and the labor movement vividly illustrate this point. See appendix b for a selective review of the statutory protection of public workers in these areas.

operations in the form of codified management prerogatives. However, management prerogatives can be legislated away by federal and state mandates, bargained away in collective bargaining agreements, and weakened by the courts. As a consequence management prerogatives such as the Employment-at-Will Doctrine are continually being redefined. Thus, a review of the public employment relationship reveals an inevitable, persistent, and evolving tension between management prerogatives and employee rights in the workplace. This dynamic relationship defines the rights, obligations, and mutual expectations often evoked in adversarial situations and constitutes the legal context within which public organizations develop and implement IDR policies and procedures, generally in the form of formal grievance programs.

Formal Grievance Programs

Formal grievance programs provide aggrieved employees with an internal mechanism to resolve work related complaints.[36] Their success relies on the degree to which management accepts and administers them professionally (Youngblood, Trevino, and Favia, 1992, 286-289; and Klaas, 1989, 451). But success also heavily depends on workplace justice as informed by the themes of procedural, distributive, and substantive

[36]The following discussion derives from the interdisciplinary research in grievance programs and related issues. It applies to public and private sector organizations.

justice.[37] Simply put, the success and legitimacy of formal grievance programs depends on whether employees view them as procedurally and substantively fair. Thus, a discussion of formal grievance programs in the employment context appropriately begins with a brief review of formal grievance procedures.

Grievance Procedures

In the nonunionized public sector employee grievances are generally resolved by an appeals system that uses personnel boards or civil service commissions. In the unionized public sector employee grievances may also be processed through agency grievance procedures established pursuant to collective bargaining agreements. However, much more is known about the experience and performance of the private sector union grievance process than civil service appeal processes, as published data is much less available (Peterson and Lewin, 1990, 3).

Broadly speaking, formal grievance procedures afford employees procedural due process in the resolution of workplace disputes by establishing the parameters of grievable issues, providing for a series of appeal steps with an expedited route for serious disciplinary cases, and including a final review step by the chief administrative officer

[37]See footnote 2 on page 1 of this dissertation for a review of procedural and substantive justice. Distributive justice concerns the obligations of the community to the individual and requires fair disbursement of common advantages and sharing of common burdens (Henry C. Black, Black's Law Dictionary (Minnesota: West, 1990)). As used in this dissertation, distributive justice refers to similar outcomes based on similar circumstances and facts in the resolution of a grievance.

or a neutral third-party (arbiter).[38] Final grievance decisions are enforceable by the courts. But the overall success of formal grievance procedures lies in the degree to which they serve managements' purposes and are accepted as legitimate by employees. In this respect considerable attention has been afforded to organizational justice.[39]

Organizational Justice

Organizational justice research and theory has developed in three phases (Brockner and Siegel, 1996, 391). The first phase centered on distributive justice--fairness defined in terms of outcomes.[40] It focused on the perceived fairness of organizational decisions. Phase two centered on procedural fairness--determined by the structure of the decision process and by the interpersonal behavior of the parties who implement the decision.[41] It sought to disentangle the effects of distributive and procedural justice. Phase three, the current phase, evaluates the "joint and interactive

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[38]A grievance is an employee or union complaint originating out of some question of rights in the employment relationship. Formal grievance resolution is primarily an adversarial process.

[39]The terms organizational justice and workplace justice are used interchangeably in the following discussion.

[40]For example, see M. Deutsch, Distributive Justice: A Social Psychological Analysis (New Haven, CT: Yale University Press, 1985).

[41]For a discussion of procedural justice effects founded in Self-Interest Theory, see Thibaut and Walker, Procedural Justice: A Psychological Analysis (Hillsdale, NJ: Lawrence Erlbaum, 1975). For a review of procedural justice effects founded in the Group Value Model, see Lind and Tyler, The Social Psychology of Procedural Justice (New York: Plenum, 1988).

effects of distributive and procedural justice on people's reactions to a decision" (Ibid).

Brockner and Wiesenfeld's (1996) study represents the third phase of organizational justice research (392). They found that "procedural justice moderated the impact of distributive justice on individuals' reactions to a decision" (Ibid). In this formulation, when procedures were viewed as unfair people responded much more favorably to relatively high distributive justice. When procedures were viewed as fair distributive justice had much less of an impact on individual's reactions. In other words, when organizational procedures were perceived as fair (procedural justice) members were not as concerned about whether outcomes were based on similar facts and circumstances (distributive justice). Brockner and Siegel (1996) build on these findings and observe that it is the degree of trust engendered by procedural justice that interacts with distributive justice to influence reactions to a decision (398):[42]

> Trust refers to a belief about a party's future behavior. In deciding whether the party is trustworthy, individuals draw on information about the party...in which the past is believed to be a good predictor of the future....Thus, when current procedures are fair (or unfair), it is reasonable to believe that future procedures also will be fair (or unfair). Trust, in short, is affected by people's estimates of the future level of procedural justice (401).

Youngblood, et al., support this position and stress that employees' perceptions of the fairness of grievance programs are based on the maintenance of trust issues as expressed through procedural and distributive justice (286). They maintain that neutral

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[42]For a comprehensive review of trust related issues in organizations, see Roderick M. Kramer and Tom R. Tyler, Trust in Organizations, Frontiers of Theory and Research (California: Sage, 1996).

third-party resolution of grievances is central to that trust (Ibid). Klaas (1989) reports that equity perceptions of trust regarding an outcome for a grievance procedure are enhanced if the procedure is viewed as fair (453). Similarly, others observe that building employee representation into the appeal stage of the procedure is being seen by organizations as essential to trust and the legitimacy of grievance programs (Westin and Feliu, 1988, 223). But trust must be learned and reinforced (Powell, 1996, 57). It is developed and maintained slowly. Taylor (1990) observes: "Real and abiding trust is earned and awarded to persons who genuinely care about others and who demonstrate that care over...time by their competence, integrity, loyalty and openness" (35).

McClelland (1987) argues that mistrust can result from management sending mixed signals to employees when words and actions are inconsistent (24). She warns that such inconsistencies weaken organizational legitimacy. Denton and Boyd (1990) concur and emphasize that employees who mistrust a grievance program will view it as a "rubber stamp process...[and] only the severe cases of dissatisfaction surface, those involving discipline and discharge" (59-60).[43]

Other scholars suggest that mistrust of management by employees can only be alleviated by redefining workplace conflict. For example, Mauer and Flores (1986) recommend a problem-solving approach as an alternative to traditional grievance

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[43]For example, grievance data between the years 1988 and 1992 for State and local governments in the Commonwealth of Virginia indicate that 60.25% of all grievances which were formally adjudicated involved discipline and discharge issues (Virginia Grievance Program Project, unpublished, William M. Haraway, October 1993).

procedures which typically define organizational conflict "as a violation of policy, procedure, or work rule" (53). They argue that such definitions force employees to challenge management[44]--basically charging that the supervisor was not doing his or her job. They stress that a problem-solving approach, which involves employee participation and empowers supervisors, creates better communication and perceptions of workplace justice (54). In effect, they advocate the use of nonadversarial, alternative dispute resolution (ADR).

Alternative Dispute Resolution

Lan (1997) maintains that the high costs of litigating organizational conflict has forced individuals and organizations to search for alternative methods of ensuring organizational justice (31):

> Alternative dispute resolution [ADR] methods such as consensus-building, joint problem-solving, negotiation, informal arbitration, mediation, nonbinding minitrials, partnering, outlets for emotions, enlargement of conflicts to include more players, increasing the stakes, and so on, have begun to dominate the conflict resolver's agenda (Ibid).

Simply put, organizations are attempting to find new ways to resolve internal disputes through the use of problem-solving techniques rather than adversarial processes and

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[44]Sitkin and Stickel (1996) explain that distrust is engendered when an individual or group is perceived as not sharing key cultural values. When a person challenges an organization's fundamental assumptions and values, that person may be perceived as operating under values so different from the group's that the violator's underlying world view becomes suspect (Gabarro, 1978; Lindskold, 1978). The person is then seen as a cultural outsider (Sitkin and Roth, 1993) (198).

procedures. The focus of ADR is on substantive as opposed to procedural workplace justice.

Carnevale (1993) outlines the advantages of ADR: (1) Higher grievance settlement rates short of arbitration; (2) Lower costs; (3) Reductions in the time it takes to get complaints decided; (4) Achievement of better overall results because the parties themselves have a greater hand in working out their own problems; (5) Appreciative attitudes toward collaboration; and (6) Positive spillover effects in other areas of the relationship between the participants. He argues that these advantages include "lower transaction costs (time, money), increased learning about problem solving, and the advancement of skills helpful to the maintenance of mature, continuing relationships" (455). He notes that ADR is intended to supplement, not replace, traditional grievance procedures (456).

However, ADR is not without its problems or critics. Lan argues that ADR methods such as arbitration and mediation in the public sector privatizes the process by using private third-parties (31). Their participation obviates agency decision making and focuses on bargaining and negotiation. This displaces, he argues, the social and administrative objectives that aim at achieving fairness, due process, and social justice (Ibid). Cogan (1994) cautions further that a serious pitfall of private third-party ADR providers is often overlooked (722). She warns that "safeguards for truth-telling intrinsic

in a judicial proceeding are not present in non-judicial ADR proceedings" (724).[45]

Finally, Piskorski and Ross (1993) summarize other ADR problems for organizations: (1) Judicial review of arbitrator's awards are extremely limited; (2) Employees may pursue questionable claims due to the low cost of the arbitration process; (3) Arbitrators may be less receptive than judges to technical legal arguments and may be unfamiliar with the law; (4) Arbitrators may look to "just cause" as a basis for discharges; (5) Arbitration agreements cannot preclude an employee from filing an administrative action with a federal agency or filing a lawsuit; and (6) Arbitration agreements generally do not provide for or substantially limit discovery (209-210). Optimistically, however, ADR facilitates and enhances organizational trust and workplace justice.

Reprisal and Retribution

A related justice issue is one of reprisal and retribution against those involved in formal grievances. Lewin and Peterson (1988) point to substantial evidence of negative consequences for those who have filed formal grievances (207). They report that grievance procedure users have significantly lower job performance ratings, lower promotion rates, poorer work attendance, and higher turnover in the year following

[45]See Preiser v. Rosensweig 614 A.2d 303 (Pa. Super 1992). A Pennsylvania appellate court held that statements made by counsel, in the process of a bar association fee dispute arbitration, were not judicially privileged; therefore, a defamation cause of action against counsel, for statements made during the arbitration, was actionable.

grievance settlement (208). Interestingly, Pulhamus (1991) recounts the same findings for supervisors involved in grievance cases (488).

In a study conducted by Westin and Feliu (1988) employees acknowledged that they and their colleagues had genuine fears of reprisal from supervisors and management if they invoked the grievance procedure, despite official protections and promises that this would not happen (24-25). "The problem with reprisals here is real," one employee commented, "especially for lower level employees and blacks and minorities" (Ibid). Klaas and DiNisi (1989) confirm this finding and report that retribution and reprisal in the form of lowered performance appraisals for employees who utilize grievance procedures primarily occurs when the employees pursue a grievance against their supervisors (713). This raises questions about organizational trust, justice, and the role of first-line supervisors and managers against whom grievances are filed in that reprisal and retribution behavior creates and perpetuates what McClelland identifies as "[a] we/them attitude...instead of synergy of team effort, all groups find themselves protecting their own interests" (26).

Interactive Justice: The Interpersonal Relationship

Creed and Miles (1996) observe that "within organizations, managers...play a central role in determining both the overall level of trust and specific expectations within

given units" (19).[46] They emphasize the significance of the manager's role:

> Managers' beliefs and actions directly and indirectly influence both process-based and characteristic-based trust in organizations. They can increase or decrease the opportunities for exchanges that could increase trust levels, and they can diminish or increase characteristic differences...Perhaps more important...managers' overall attitudes and behaviors determine the initial levels of trust expectations within organizations, in effect enacting the context within which organizational processes will be embedded. Thus, inside organizations one can conceptualize the trust function as having both characteristic and process variables, with managers' core beliefs setting the overall predisposition for trust or distrust (20).

In short, managers and supervisors set the tone for trust or distrust in organizations through their actions and beliefs.

Youngblood, et al., note that many of the concerns mentioned as reasons for filing grievances pertain to the interpersonal relationships between supervisors, managers, and their employees (301). But supervisory employee relations training is far from well developed (Pulhamus, 1991, 488).[47] Nevertheless, employers offering a guarantee of workplace justice will find an intensified need to train supervisors and managers,

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[46]For a contemporary discussion of the role of trust in interpersonal relationships in the workplace, see Roy J. Lewicki and Barbara Benedict Bunker, "Developing and Maintaining Trust in Work Relationships," in Trust In Organizations, eds. Roderick M. Kramer and Tom R. Tyler, 114-139 (California: Sage, 1996).

[47]For example, grievance data between the years 1988 and 1992 for local governments in the Commonwealth of Virginia indicate that grievance procedure and handling training for first-line supervisors and managers at all levels is a low priority or does not exist. Of 106 local government respondents, only 19 (17.92 percent) reported providing grievance procedure training and only 15 (14.15 percent) reported providing grievance handling training to first-line supervisors and managers at all levels (Virginia Grievance Program Project, unpublished, Haraway, 1993, 56).

particularly if it is their aim to avoid unionization (Kalish, 1986, 19-20). However, there are other valid reasons for organizations to pursue workplace justice.

Symbolic Workplace Justice

Sheppard, Lewicki, and Minton (1992) propose that "understanding justice issues suggests that we need to look at the `balance' or equivalency between outcomes, procedures, and systems, and at the `rightness' or correctness of particular outcomes, procedures, and systems" (104).[48] They posit three positive short- and long-term effects of organizationally just behavior. First, persistent justice usually produces immediate and direct consequences--equal treatment raises group spirit, voice creates greater commitment to a decision, and access creates loyalty.[49] Second, persistent justice engenders a positive affect toward the agent--distributive justice tends to make employees feel good

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[48]The authors argue that an understanding of organizational or workplace justice extends beyond procedural justice. They advocate that, additionally, one must evaluate and understand outcomes relative to principles of fairness (distributive justice) and justness (substantive justice).

[49]For a widely cited source of theoretical and empirical studies of organizational voice and loyalty, see Albert O. Hirschman, Exit, Voice, and Loyalty: Response to Decline in Firms, Organizations, and States (MA: Harvard University Press, 1970). Hirschman's model is intended to apply across disciplinary domains. His major thesis is that there are two forms of active response available to participants (customers, employees, citizens) when they perceive deteriorating conditions, one economic (exit) and the other political (voice). Exit means escaping a disagreeable condition while voice entails attempting to change it. Loyalty implies some sort of positive affective attachment that binds participants to an organization--it discourages exit as a response to dissatisfaction even when attractive alternatives to the deteriorating organization are available (Graham & Keeley, 1992, 191-200).

about their jobs, procedural justice creates loyalty toward management, and systemic justice creates loyalty toward the organization and its objectives. Finally, persistent justice protects the agent from active, negative, and group responses to occasional injustice (102). Thus, Sheppard, et al., argue that perceptions of workplace justice lead to perceptions of perceived legitimacy, which in turn lead to compliance with the system (103).[50] In sum, they suggest that grievance programs and procedures are designed fundamentally to preserve and protect the power of those who currently govern the organization (Ibid):

> Their purpose is to direct dissent into [organizationally] acceptable forms and channels, not to permit that dissent to escalate and to challenge the very legitimacy of the organization and its leadership. Employees...are given instructions about how to file a complaint, where to file it, and how responses will be returned....Control over the procedural mechanisms and apparatus is maintained by employees whose jobs [and pay] are clearly defined by management....Many [grievance] systems are more concerned with maintaining the "appearance" of fairness than actual fairness itself (154-156).[51]

More precisely, the authors suggest that grievance systems have symbolic value,

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[50]For a discussion of the correlation between procedural justice and institutional legitimacy, see Tom R. Tyler and Kenneth Rasinski, "Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson," Law and Society Review 25 (1991): 621.

[51]Also see Louis R. Pondy, "Reflections On Organizational Conflict." Journal of Organizational Behavior 13 (1992): 257-261. Pondy retracts his earlier position that organizational conflict exposes a breakdown of the organization. He argues that the normative aim of managing an organization-qua-conflict-system is to stage the right conflict episodes, with the right conflicting parties, over the right issues, operating under the right ground rules. Thus, long-lasting organizations have functional institutional conflict.

irrespective of their immediate functionality.

Conclusion

The first trend in the literature reveals an interdisciplinary discussion and debate on what constitutes viable IDR in organizations situated in a legal environment characterized by an insoluble and evolving tension between employee rights and management prerogatives in the workplace. It centers on the tension between formal, legal rationality and substantive justice in formal grievance programs. As discussed in the chapter introduction, at issue is organizational efficacy and legitimacy and their relationship to workplace justice. In essence the debate focuses on IDR and the legal environment of organizations. Thus, IDR is intimately related to the new institutional study in the legal environment of complex organizations.

Part II

The Legal Environment of Complex Organizations

Studying the impact of legalization in organizations is in its infancy. Scott (1994) explains that the preponderance of the literature relating law and organizations primarily focuses on the organization of legal systems and crime and organizations (4-5). He stresses that there is no more important issue for analysts to understand than the ways in which organizations are shaped by legal rules and processes. Sitkin and Bies (1994)

concur and emphasize that the insights of Weber (1947), Selznick (1969), and legal scholarship more generally have remained largely neglected (31). Scott advises that although Max Weber pointed "to the close [connection] of law and associations nearly a century ago, organizational research and theory has failed to build on this legacy" (3). Knowledge of these theoretical foundations in legalization research is critical to an understanding of the revitalized study in the legal environment of organizations.

Theoretical Foundations in Legalization Research

Weber's seminal characterization of bureaucracy as legal-rational suggests a connection between the internal administration of an organization and the character of a legal order (Selznick, 1969, 6-7). His analysis of bureaucracy stresses the rational reconstruction of human institutions and emphasizes the tension between formal and substantive rationality. Weber explains that a system is rational when it applies calculable means to achieve determinate ends by using objective rules and procedures. Formal rationality obtains when a particular logic, including a legal one, structures that means. Although formal rationality contributes to substantive outcomes, it focuses, primarily, on the internal state of the system. In contrast, when a system is articulated to social or human purpose it is substantively rational (Ibid, 76-82).

Selznick (1969) examines legalization and workplace justice and illuminates the tension between procedural and substantive justice in organizations. His institutional

approach suggests that legalization transforms the role of the employee and the nature of an organization. Employees, to the extent that they have formal employee rights to question management, become members of an association which expands organizational boundaries and transforms it qualitatively into an emergent polity. In short, legalization signifies "the transformation of the instrumental organization into an institution and opens the door to due process governance" (Sutton, Dobbin, Meyer and Scott, 1994, 948). Selznick (1996) elaborates:

> Here institutionalism takes the form of `legalization,' understood as infusing a mode of governance with the constraints and aspirations of a legal order. The outcome is 'private government' and, with it, something akin to the rule of law. Legalization can also mean something rather different: the spread of 'legalism,' that is, mechanical following of rules and procedures without regard for purposes and effects (271-272).

Simply stated, Selznick suggests that the legalization of organizations sets the stage for IDR but warns that although legalization equalizes parties and makes decisions predictable "substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of the legal process" (1969, 13).

Nonet and Selznick's (1978) developmental typology of modes of law-in-society further develops this theme.[52] They distinguish that

> a legal order has many dimensions and that inquiry is best served when we treat those dimensions as variables. Instead of talking about *necessary* connections between law and coercion, law and the state, law and rules, or law and moral aspiration, we should consider *to what extent and under*

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[52]For an application of Nonet and Selznick's model, see Joseph V. Rees, Reforming the Workplace, A Study of Self-Regulation In Occupational Safety (Philadelphia: University of Pennsylvania Press, 1988).

> *what conditions* those connections occur....We do not dismiss the great issues of legal theory, but we do suggest that they may yield to a social-science perspective (9).

Nonet and Selznick's model assesses the characteristic posture of a legal order and distinguishes three modalities or basic states of law-in-society: (1) Law as the servant of repressive power; (2) Law as a differentiated institution capable of taming repression and protecting its own integrity; and (3) Law as a facilitator of response to social needs and aspirations. They assert that although a legal order will exhibit elements of all three types its basic posture will approximate one more closely than the others (14-15).

First, the repressive law model features a close integration of law and politics in which official discretion is pervasive, opportunistic, and rampant. The focus and main attribute of law is order. To that end rules are crude and detailed; coercion is extensive and weakly restrained; morality is founded in legality and constraint; law is subordinated to power politics; and participation is relegated to submissive compliance--criticism is viewed as disloyal (16). Repressive law, consequently, hinders the development of distinct legal institutions and provides "only a limited capacity to fulfill the most basic function of legal ordering--the legitimation of power" (51). Legitimacy is founded in social defense and raison d'etat, and procedural and substantive justice is arbitrary (16). It is the issue of legitimacy that is the chief source of transition from repressive to autonomous law.

Autonomous law refers to the emergence of autonomous legal institutions which are characterized by the rule of law. Nonet and Selznick advise that the rule of law is

"born when legal institutions acquire enough independent authority to impose standards of restraint on the exercise of governmental power" (53). It is rule-centered because this helps maintain the institutional system (63). Simply stated, rules, as opposed to values, are the cutting edge of social control in which legitimacy is founded in procedural fairness (69).

The autonomous law model evokes the ethos of modern bureaucracy in which the focus is on the regular observance of prescribed administrative routines (65). Although autonomous law tames repression it is mainly an instrument of social control. Its chief attributes are that (1) law is separated and elevated above politics, (2) the legal order espouses the "model of rules," (3) procedure is the heart of law--regularity and fairness, not substantive justice, are the first ends and the main competence of the legal order, and (4) "fidelity to law" is understood as strict obedience to the rules of positive law (56). Thus, the focus of morality is institutional--a preoccupation with the integrity of legal process (16). Law is independent of politics; participation is limited by established procedures; coercion is controlled by legal constraints; and discretion is confined by rules and narrow delegation (Ibid). In this formulation reasoning is constituted by a strict adherence to legal authority, and substantive justice is a "derivative, a hoped-for-by-product of impeccable method" (67). Hence, it is the conflict and insoluble tension between procedural and substantive justice that engenders forces that push the legal order beyond the limits of autonomous to responsive law.

Responsive law strives to reduce the arbitrariness in positive law and administration by "reaching beyond formal regularity and procedural fairness to substantive justice" (106). That achievement requires institutions to be competent as well as legitimate. The emphasis is on developing legal tools, broadly defined, in order to solve social problems. Legitimacy is founded in substantive justice. Responsive law decreases the reliance on artificial reason; converges legal and policy analysis; reintegrates legal and moral judgment and legal and political participation; and absorbs law into the larger realm of administration (Ibid). Thus, legal and political aspirations are integrated; rules are subordinated to principle and policy; reasoning is purposive; discretion is expanded but accountable to purpose; coercion is constituted by a positive search for alternatives; and morality is founded in cooperation (16).

Nonet and Selznick allow that the master ideal of responsive law, as of autonomous law, is legality (107). But they caution that the ideal of legality in responsive law should not be confused with the "paraphernalia of legalization--the proliferation of rules and procedural formalities" (108). The central task of the legal process is to facilitate social needs and aspirations by diagnosing institutional problems and redesigning institutional arrangements rather than adjudication. The legal process is "first and foremost a problem solving enterprise" (Rees, 1988, 16). Therefore, the focus is on legal ends, not the aggrieved individual, per se (Nonet and Selznick, 106). Hence, in a purposive system

> legality is the progressive reduction of arbitrariness in positive law and its administration. To press for a maximum feasible reduction of arbitrariness is to demand a system of law that is capable of reaching beyond procedural fairness to substantive justice. That achievement...requires institutions that are competent as well as legitimate....If there is a paradigmatic function of responsive law, it is regulation, not adjudication. Broadly understood, regulation is the process of elaborating and correcting the policies required for the realization of a legal purpose...[it] is a mechanism for clarifying the public interest (108-109).

Nonet and Selznick's developmental model depicts responsive law as a higher stage of legal evolution than repressive or autonomous law, although it recognizes the continuing relevance of repressive and autonomous law in modern society. Yet responsive law, they note, marshals greater institutional competencies to the pursuit of justice.

Summary

The insights of Weber (1947), Selznick (1969), and Nonet and Selznick (1978), as well as legal scholarship more generally, have been largely neglected (Sitkin and Bies, 1994, 31). Although Max Weber pointed to the close connection of law and associations nearly a century ago, organizational research has failed to build on this legacy (Scott, 1994, 3). The new institutional inquiry in the legal environment of organizations begins to fill that gap.

New Institutionalism: A Revitalized Study in the Legal Environment of Organizations

Scott (1994) observes that only recently, and particularly with the development of the new institutional theory in organizations, have scholars begun to recognize the importance of legal environments for organizations (7). The new institutionalism in organizational analysis has a "distinctly sociological flavor," but it "diverges in systematic ways from earlier sociological approaches to organizations and institutions" (Powell and DiMaggio, 1991, 11). The old and new institutionalisms are similar in that they share a skepticism toward rational-actor models of organization, view institutionalization as a process that makes instrumentality rational by limiting the options that can be pursued, and emphasize the relationship between organizations and their environments. Further, each promises to reveal aspects of reality that are inconsistent with organizations' formal accounts and stresses the role of culture in shaping organizational reality (11-12).

The new institutionalism differs from the old in analytic focus, approach to the environment, views of conflict and change, and images of individual action (Ibid). It focuses on institutionalization as occurring at the sector or societal levels rather than the organization. Its locus is interorganizational in that "organizational forms, structural components, and rules, not specific organizations, are institutionalized" (14). In contrast to the old institutionalism, new institutionalism treats organizations as loosely coupled arrays of standardized elements rather than as organic wholes (Ibid). Organizational

theorists have begun to investigate the impact of legal environments in organizations viewed through this lens.[53]

For example, Scott partitions the legal environment of organizations into three components or themes: (1) Regulatory, (2) Interactional, and (3) Definitional (8-13). The regulation of organizational behavior, typically by the state, creates governance regimes at the level of the sector or organizational field. The interactional component examines how legal institutions and legal culture influence the ways in which societal actors construct problems and the techniques and procedures for dealing with them. The definitional component stresses the role played by law in constituting social actors and relations. He explains that the study of regulatory systems and legalization processes provide a crucial insight into

> the ways in which organizations respond to wider societal rules and regulatory frameworks and the ways in which they themselves create law-like rules and procedures--to effect control, to protect rights, to delay settlements, to enhance legitimacy, and for many other reasons (14).

In pursuit of this insight some scholars have begun to investigate the impact of legal procedures in organizations (Van Maanen and Pentland, 1994; Feldman and Levy, 1994). Van Maanen and Pentland (1994) explore the symbolic or rhetorical uses of legally required record keeping procedures and argue that they are "fundamentally self-

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[53]For a discussion of the ethos and direction of the new institutionalism, see Philip Selznick, "Institutionalism `Old' and `New,'" Administrative Science Quarterly 41 (1996): 270-277. Selznick questions the wisdom of drawing a sharp distinction between the "old" and "new" institutionalisms. Also, see W. Richard Scott, Institutions and Organizations (CA: Sage, 1995).

conscious and self-interested" (53). They examine how the legal context in organizations is implicated by specialized styles of text.[54] More precisely, they investigate how the threat of an adversarial audience shapes the records that organizations routinely produce. They conclude that the symbolic or rhetorical value of the information put forth in working papers and reports is of greater importance to organizational members than whatever technical value such documents convey. In short, they claim that the role of law is remote--legal constraints mostly affect the rhetoric surrounding the decisions (83).

Feldman and Levy (1994) ask why organizations have become more legalistic and how this increased legal context influences what organizations do (109). They posit that organizations often turn to legal processes and procedures in making decisions or resolving problems when there are competing claims on a decision or solution. This, they argue, is because the lack of agreement about what would be an acceptable decision deprives all proposed solutions or decisions of legitimacy. Alternatively, formal rules provide legitimacy--"the basis of this legitimacy [however] is agreement on the process rather than...on the substance of the decision" (Ibid). Thus, Feldman and Levy suggest that an increasing disagreement on the substance of decisions may account for an escalation of legalization in organizations (109).

Others have researched the costs of legalization and the use of legalistic communication in organizations (Pfeffer, 1994; Stutman and Putnam, 1994; and Shapiro

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[54]Their study investigates the legal record keeping requirements of policemen and auditors.

and Kolb, 1994). Pfeffer (1994) argues that legalization of the employment relationship results in economic and systemic costs, some of which are hidden (336). He suggests that the preponderance of evidence is that a legalistic approach to employment results in the direct expenditure of tremendous resources which result in little substantive justice. But the money spent on lawyers' fees and legalistic proceedings is small compared to systemic costs. He observes that there are hidden costs associated with the loss of organizational trust and the need to continually monitor employees in an effort to control their behavior (336-344).

Stutman and Putnam (1994) emphasize that litigation as a way of thinking and talking in organizations "constrains how problems are conceived, and may alter the way flexibility, trust, and shared meanings govern the essence of organizational relationships" (282). Similarly, Shapiro and Kolb (1994) argue that the language characterizing mediation processes encourages disputing parties to replace their initial rights or adjudicative orientation with an interests-oriented perspective. In this manner, mediation can serve to de-legalize the issues (305). But they caution that internal mediation may encourage organizations to address narrow issues at the expense of broader, institutional ones (306).

Most notably, Sitkin and Bies' (1994) conceptualization of legalization as a particular type of institutionalization in which law and law-like forms offer a normative source of organizational legitimacy illustrates institutional concerns. Sitkin and Bies argue that it is the fear of litigation that drives the inner dynamics of legalization in

organizations (vi). They maintain that a litigious model of conflict resolution governs organizational activities and heavily influences administrators' approaches to their duties and responsibilities. The model is characterized by formal rules and procedures, adversarial relations, legalistic rhetoric, and an inordinate attention given to legal sanctions and criteria in decision making (Ibid). They contend that the internalization of this model has become a routine mechanism for resolving conflict in and between organizations. Its key features are its adversarial, zero-sum approach and its "ultimate reliance on judicial review (reconciliation through litigation) or quasi-judicial review (reconciliation through internal dispute resolution procedures)" (24).

Sitkin and Bies define legalization as "a process that encompasses the diffusion of legalistic reasoning, procedures, and structures as a means of sustaining or enhancing the legitimacy of the organization (or an organizational unit) with critical internal or external constituencies" (21). Their definition conceptualizes legalization as a particular type of institutionalization in which law and law-like forms offer a normative source of organizational legitimacy independent of their immediate organizational functionality, or any other criteria of internal rationality (Ibid). Their law-oriented perspective is distinct from the legal-rational view of bureaucratization in that it stresses the circumstances under which mimetic institutional processes lead to the symbolically useful, but instrumentally dysfunctional, adoption of bureaucratic or legal procedures (22). Their view can be distinguished from a more general institutional perspective:

[L]egalization implies that organizations will respond to threats to

> legitimacy with increased use of legalistic features (e.g., formal decision criteria or due process procedures) and the decreased use of nonlegalistic sources of institutional legitimacy (e.g., cultural traditions or norms). In contrast, a purely institutional view would predict that both potential sources of legitimacy would increase as threat rises (Ibid).

Sitkin and Bies identify five dimensions or characteristics that suggest a duality in the legalization process: (1) Formal, standardized policies and procedures, (2) Adoption of legal forms as culturally acceptable, (3) Dominance of legal criteria over managerial and professional criteria, (4) Heightened concern over litigation, and (5) Use of legal rhetoric. First, *Formalization/Standardization* takes the form of increased use of standard operating policies and procedures that reflect an emphasis on due process, formalization, and official written findings. In this sense legalization refers to bureaucratic goal displacement which is characterized by "the increased utilization of excessively cumbersome or inappropriate administrative processes" (24). Second, *Internalization of the Litigious Model of Conflict Resolution* focuses on litigation as a routine mechanism for resolving conflict in and between organizations. It features adversarial, winner-take-all procedures and ultimately relies on judicial and quasi-judicial review. It emphasizes due process, the advocacy model of conflict, and the use of third-party arbiters of justice. Therefore, it discourages organizational consensus building and problem solving processes. Third, *Adoption of Legitimacy-Enhancing Legal Forms* addresses the increased attention to institutional acceptability. It focuses on acceptability based on the adoption of culturally acceptable legal forms which symbolically represent institutional legitimacy. Fourth, *Legalistic Rhetoric* focuses on the increased use of quasi-

legal language in organizational communication that manifests and exacerbates the other aspects of organizational legalization. The duality of the legalization process suggests that it is paradoxical (22-28).

Sitkin and Bies note that legalization presents a complex set of positive and negative organizational implications and tradeoffs for managers that merit careful review and consideration (28). First, on the positive side, legalization can lead to loose coupling among organizational units and can be particularly adaptive when institutional demands (e.g. legal requirements) diverge from economic-competitive requirements. Second, legalization frequently results in less discrimination against and dispowerment of various classes of workers (or other constituent groups)--legal remedies provide a source of empowerment. Finally, the law can serve as a source of protection and legitimacy for organizations (Ibid).

On the negative side, however, as managerial decisions are increasingly dominated by a concern for what is legally defensible, they shift concern away from that which makes organizational sense. The authors explain:

> While the adoption of legalistic procedures may be motivated by the desire to enhance the efficiency, fairness, or effectiveness of existing practices...such procedures frequently obstruct the achievement of these goals. Sometimes this is due to drawing managerial attention to real or imagined legal requirements or threats at the expense of attention to customer or task requirements (Ibid).

In other words, when legalization dominates managerial attention it can affect the long-term health and goals of the organization. Thus, while legalization is frequently an

intendedly positive force, it can paradoxically undermine the very social goals it was designed to further (28-29).

Sitkin and Bies identify four paradoxes of legalization: (1) The Power Paradox, (2) The Rationality Paradox, (3) The Formalization Paradox, and (4) The Justice Paradox. First, the *Power Paradox* derives from the misuse of formal authority. On the one hand, formal legal authority is designed to restrict administrative discretion and ensure justice in organizations. On the other hand, there is a certain amount of latitude, administrative discretion, which can be used by those in positions of authority to cover and legitimize their actions.

The authors point out that it is the fragmented state of the institutional environment that allows managers to interpret legal and regulatory constraints and select among them to justify their actions (Ibid). Therefore, administrators can use codified law, administrative policy and procedures, and other legal authority, such as IDR mechanisms, to justify their actions. This can be accomplished by adhering to proper procedure to "cleanse their questionable actions and ward off the threat of perceived illegitimacy" (Ibid; Browning and Folger, 1994; and Van Maanen and Pentland, 1994). As a result, a common outcome of legalization is that questionable managerial actions are "protected by the veneer of legal respectability" (28-29). In sum, legalistic criteria to remedy power inequities can actually serve to protect the status quo (29-30).

The *Rationality Paradox* derives from administrators' reliance on the use of legitimate, law-like procedures in decision making. On the one hand, such reliance

provides an apparently authoritative basis for justifying managerial decisions.[55] But on the other hand, reliance on legalistic criteria can actually undermine organizational rationality by superseding administrators' positional authority and limiting their discretion to respond immediately to change. For instance, administrators often use legal reasoning as an apparently authoritative justification for making organizational decisions such as establishing specific deadlines for the acceptance of employment applications. Yet in so doing they obviate the flexibility of their positional authority to make immediate, adaptive decisions based on changes in the organization's environment when recruitment demands must be extended to allow for a highly qualified group of applicants to apply or to correct a tainted employment process.

The *Formalization Paradox*, on the one hand, results from adopting legalistic approaches as a means of institutionalizing informal practices that may have been particularly successful. On the other hand, "the very act of formalizing a successful practice may remove the sense of intimacy or interpersonal responsibility that was the cornerstone of its success" (Ibid). For example, formalizing social processes such as IDR provides formal, procedural justice. Nonetheless, the increased attention placed on the process of legalization "may undermine the informal and valued trust that managers share with their subordinates" (31). Consequently, formalization can have a profound effect on workplace justice and result in a justice paradox.

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[55]Sitkin and Bies observe that managers are drawn to the use of legalistic procedures and criteria in decision making because it is viewed as the "epitome of rationality" (30).

The *Justice Paradox* derives from a reliance on legalistic reasoning and criteria at the expense of humanistic and social considerations. On the one hand, legalistic processes and procedures can protect managers and their organizations against litigation, as well as promise equity and fair treatment to stakeholders and constituents. On the other hand, legalization can undermine social goals of justice by fostering a superficial reliance on that which meets the letter over the spirit of the law (Ibid). An excellent example of the justice paradox is the case of Zicca v. City of Hampton previously discussed.[56]

Conclusion

The second trend in the literature exposes a revitalized interest in the institutional study in the legal environment of organizations that is in its infancy. Its theoretical foundations derive from the seminal works of Weber, Selznick, Nonet and Selznick and other legal scholarship more generally. The central unifying theme is the tension between formal and substantive rationality and its effect on organizational justice and legitimacy in complex organizations. Building on this legacy new institutionalists are revisiting and

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[56]See chapter one, pages 4-5 for a review of the Zicca case. Zicca was terminated from his position by the City and subsequently reinstated by the City's appointed, standing grievance panel. In defiance of the ruling the Director of Parks reinstated him for one work day and then used his management prerogative to reassign Zicca to another position at the same pay grade but with less status and responsibility. The City argued that it had not violated the Grievance Panel's decision since it reinstated Zicca to his previous position for one day, but the court disagreed and ordered him reinstated to the exact position from which he was originally terminated.

reexamining the close connection of law and administration in complex organizations. They are reviving the distinction between formal, legal-rationality as espoused by Weber (1947) and economic/technical rationality.[57] Thus, Sitkin and Bies' conceptualization of legalization illustrates the circumstances under which mimetic institutional processes lead to the symbolically useful, but instrumentally dysfunctional, adoption of legalization which creates paradoxes for complex organizations when managers attempt to pursue legitimacy and performance criteria, each at the expense of the other.

The Gap in the Public Administration Literature

As a preponderance of the literature suggests, IDR and the revitalized study in the legal environment of organizations are inextricably linked to one another and the discipline and study of public administration and policy. The literature discerns and sketches a nexus between the notion of the law as protector of fairness in public employee relations and conceptions of organizational justice, ethics, and public human resource management (Sitkin and Bies, 1994, 44). The nexus is predicated on the legal basis of the public employment relationship which is founded in the Bill of Rights of the U.S. Constitution; Supreme Court decisions; public law; and customs, usage, and mutual

[57]Weber's conception of formal rationality is at variance with the contemporary notion of economic or technical rationality which stresses the efficient utilization of means to attain ends. The new institutional theory has attempted to revive this distinction (Sitkin and Bies, 1994, 11).

understandings between public organizations and government workers. Explicitly stated, the public employment relationship is constituted by its legal environment.

But recent efforts to reform government are challenging many of the basic theoretical and managerial assumptions and values of governance in complex, public organizations. Under the political rubric of "reinventing government," these efforts portray government as a failed enterprise and advocate radical organizational changes in structure, policy, and procedure designed to reduce the size of government by flattening organizations and encouraging the use of private sector practices and services (Goodsell, 1993, 85; and Osborne and Gaebler, 1993, 166).[58] This period of political, administrative and institutional change and instability confounds the internal and external legal environments of public organizations at the national and subnational levels (Moe & Gilmore, 1995, 135-140). Most alarmingly, it results in a dilemma as public administrators attempt to reconcile traditions of constitutional governance and legal accountability with the search for flexibility, innovation, and productivity in addressing managerial and programmatic issues (Carroll, 1995, 302-312). In short, the legal environment of complex, public organizations and the legitimacy of public administration are being challenged.

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[58]The "reinventing government" movement does not advocate that government can be operated exactly like a private sector business. However, its tenets suggest that government can become more "entrepreneurial." Osborne and Gaebler note that "[a]ny institution, public or private, can be entrepreneurial, just as any institution, public or private, can be bureaucratic" (22).

Intimately related to the issue of delegitimation is the consequential conflict that manifests itself at the organizational level. Adherence to private sector practices and techniques founded in "entrepreneurialism" directly challenges the legal environment of complex, public organizations. Hence, the resolution of internal disputes are of major importance to public employees' perceptions and expectations of workplace justice and organizational and institutional legitimacy.

With the development of the new institutional theory in organizations, scholars have begun to recognize the importance of legal environments for organizations. However, the preponderance of the literature relating law and organizations primarily focuses on the organization of legal systems and crime and organizations. Thus, legalization is not well understood as an organizational phenomenon. It is less understood as an institutional one. This points to a gap in the public administration literature that this dissertation study seeks to fill.

Toward that goal the study of legalization in complex, public organizations, as illustrated by the Commonwealth of Virginia Grievance Program, extends the research in the legal environment of organizations from other academic fields to public administration and policy and fills a gap in the public administration organizational and management studies literature by investigating how legalization affects IDR processes in complex, public organizations. Its descriptive and prescriptive value lies in the recognition that it contributes to public administration scholarship as well as public administration theorists' and practitioners' understanding of and insight into the dynamics

of legalization. This knowledge and insight will educate and empower public administrators to better manage the political, administrative, and institutional change normatively sanctioned by the downsizing, reinvention, and reengineering government reform movement.

Next, chapter three presents and justifies the appropriateness and application of the naturalistic inquiry perspective and the case study strategy and design that frame the research. The chapter first examines the epistemological paradigms debate about how best to conduct social science research, focusing on methodological issues and considerations associated with competing inquiry paradigms. Finally, the chapter reviews the specific procedures employed for data collection and analysis.

III.

RESEARCH STRATEGY AND DESIGN

What were ducks in the scientist's world before the revolution are rabbits afterwards.

- Thomas S. Kuhn, The Structure of Scientific Revolutions

The purpose of the research strategy and design is to provide a framework for action to investigate and describe how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes. A naturalistic inquiry perspective frames the research, and, thus, the appropriate research strategy and design is a holistic, single-case study (Stake, 1995; Berg, 1995; Yin, 1994, 1993, 1989, 1984; Miles and Huberman, 1994; Sjoberg, Williams, Vaughan, and Sjoberg, 1991; Orum, Feagin, and Sjoberg, 1991; Patton, 1990; Lincoln and Guba, 1985; and Nachimas and Nachimas, 1982). Although the case study strategy "comprises an all encompassing method....[it] is neither a data collection tactic or merely a design feature alone...but a comprehensive research strategy" (Yin, 1994, 13).[59] Nevertheless, the case study is but one of five major research strategies in the

[59]Case study research can include both single- and multiple-case studies. Yin (1994, 1989, 1984) cautions that although some fields such as public administration have tried to delineate sharply between these two approaches (comparative studies versus single-case

social sciences (4).[60] Hence, justification for its appropriateness and application to this study begins with a discussion of the epistemological debate about how best to conduct social science research. The debate centers on methodological issues and considerations associated with competing inquiry paradigms (Patton; Lincoln and Guba; and Kuhn, 1962, 1970).

Competing Inquiry Paradigms in the Social Sciences

Kuhn (1970) challenges conventional wisdom which traditionally perceives science to be a cumulative process of discovery toward more accurate and complete descriptions of the world (3-4).[61] In his discussion of scientific revolutions, Kuhn introduces and defines paradigms as "what the members of a scientific community share, and conversely,

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studies) they are two variants of case study designs (14).

[60]The five major research strategies in the social sciences are experiments, surveys, archival analysis, histories, and case studies (Yin).

[61]Since World War II much of the research in the social sciences has been dominated by the functionalist paradigm and the Natural Science Model which assumes the independence of researchers from their research and that "universal laws" of human nature and reality exist--they are fixed over time and space. Most important to these researchers is the establishment of rigorous and standardized procedures for collecting and analyzing data to test hypotheses and predict the course of social reality. Testability and prediction are the strategic means for evaluating theories--but it can only be accomplished through standardization and replication of the research of others (Sjoberg, et al., 1991).

a scientific community consists of men who share a paradigm" (176).[62] He explains that

> [o]n the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science (175).

Kuhn distinguishes between paradigms and theories.[63] He notes that a theory is similar to a paradigm in that it provides a logical basis for expectations or predictions about the world. It attempts to explain a phenomenon. The important difference, however, is that a theory is much more narrow than and exists within a paradigm. Thus, theories reflect the rules and methodologies of a particular paradigm with which it is associated (66-76).

Kuhn further argues that "incommensurability" limits the ways in which different paradigms compete and communicate (148). He articulates that proponents of competing paradigms are always at least slightly at cross-purposes, and, therefore, "competing paradigms must fail to make complete contact with each other's viewpoints" (Ibid). Kuhn

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[62]Gareth Morgan (1980) advises that Kuhn's (1962) concept of paradigms has been subjected to a wide and confusing range of interpretation due to the fact that Kuhn used the paradigm concept "in not less than twenty-one different ways," consistent with three broad senses of the term: (1) As a complete view of reality, or way of seeing; (2) As relating to the social organization of science in terms of schools of thought connected with particular kinds of scientific achievements; and (3) As relating to the concrete use of specific kinds of tools and texts for the process of scientific puzzle solving (606).

[63]Kuhn stresses that not all theories are paradigm theories. He explains that "only as experiment and tentative theory are together articulated to a match does the discovery emerge and the theory become a paradigm" (61).

elaborates that because competing and successive paradigms speak different languages "they will inevitably talk through each other when debating the relative merits of their respective paradigms" (109). In essence, the competition between competing paradigms is not the sort of battle that can be resolved by proofs (148). Consequently, different standards or definitions of science employed by competing paradigms facilitate incommensurability. In this sense, Kuhn reveals, "paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute" (23).

While the advancement of knowledge could be substantial when paradigm shifts occur, Kuhn maintains that scientists may have to relinquish the notion that paradigm shifts carry them closer to the truth (170). He suggests that scientific "progress," the accumulation of research knowledge, should be evaluated based on how we build upon what we already know--as opposed to some universal truth to which we should aspire (171). This ontological distinction frames the long-standing epistemological debate between philosophers of science as well as methodologists about how best to conduct research.[64]

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[64]For example, Burrell and Morgan (1979) argue that social and organizational theory can be analyzed in terms of four paradigms (functionalist, interpretive, radical-humanist, and radical-structuralist) which reflect different sets of metatheoretical assumptions about the nature of science, the subjective-objective dimension, the nature of society, and the dimension of regulation-radical change. Each of these paradigms defines the grounds of opposing modes of social analysis and has radically different implications for the study of organizations. The epistemological paradigms debate reflects this view.

The Epistemological Paradigms Debate: Methodological Issues and Considerations

Patton (1990) explains that the epistemological paradigms debate centers on the relative value of two fundamentally different and competing inquiry paradigms: (1) *Logical-positivism*, which uses quantitative and experimental methods to test hypothetical-deductive generalizations, versus (2) *Phenomenological or naturalistic inquiry*, using qualitative and naturalistic approaches to inductively and holistically understand human experience in context-specific settings (37). Inherently, logical positivism and naturalistic inquiry assume differing, and even conflicting axioms or basic beliefs about (1) ontology--the nature of reality, (2) epistemology--the relationship of knower to the known, (3) the possibility of generalization, (4) the possibility of causal linkages, and, finally, (5) the role of values (Lincoln and Guba, 1985, 37). It is important, therefore, to understand these different paradigmatic stances in selecting a research strategy and design.

Ontologically, the positivist inquiry paradigm assumes that there is a single tangible reality, an objective world, which is fragmentable into independent variables and processes which can be studied independent of one another. Therefore, inquiry can converge onto that reality until, finally, it can be predicted and controlled. In contrast, the naturalistic inquiry paradigm assumes that there are multiple realities that can be studied only holistically. Consequently, naturalistic inquiry will inevitably diverge (each

inquiry raising more questions than it answers) so that prediction and control are unlikely outcomes although some level of understanding can be achieved (Ibid, 37-38).

Epistemologically, the positivist inquiry paradigm assumes that the researcher and the object of inquiry are independent. In contrast, the naturalistic inquiry paradigm assumes that the researcher and the object of inquiry are inseparable and interact to influence one another. These conflicting epistemological stances speak to the possibility of generalization and causal linkages as well as the role of values in inquiry (Ibid).

With respect to generalizability of research findings, the aim of the positivist inquiry paradigm is to develop a nomothetic body of knowledge in the form of generalizations that are truth statements free from both time and context. In contrast, the aim of the naturalistic inquiry paradigm is to develop an idiographic body of knowledge in the form of working hypotheses that describe the individual case. Furthermore, the positivist inquiry paradigm assumes causal linkages--cause and effect. Viewed through this lens, every action can be explained as the result (effect) of a real cause that precedes or is simultaneous with the effect temporally (linear causality). In contrast, the naturalistic inquiry paradigm assumes that all entities are in a state of mutual simultaneous shaping so that it is impossible to distinguish causes from effects (nonlinear causality). Thus, the positivist inquiry paradigm assumes that inquiry is value-free--based on the use of an objective methodology. In contrast, the naturalistic inquiry paradigm assumes that

inquiry is value-bound (Ibid).[65]

Summary

The epistemological paradigms debate centers on the relative value of logical-positivism versus phenomenological or naturalistic inquiry. Logical positivism engenders the use of quantitative methodologies to test hypothetical-deductive generalizations, while phenomenological or naturalistic inquiry engenders the use of qualitative and naturalistic approaches to inductively and holistically understand human experience in context-specific settings (Patton, 1990). The incommensurability of the two inquiry paradigms limits the ways in which they compete and communicate with one another. Inherently, they speak different languages and are at cross-purposes (Kuhn, 1970). Nonetheless, social science research consists of the use of both paradigms as alternative realities (Morgan, 1980).[66]

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[65]Lincoln and Guba argue that naturalistic inquiry is value-bound in at least five ways: Inquiries are influenced by (1) inquirer values as expressed in the choice of a problem, evaluand, or policy option, and in the framing, bounding, and focusing of that problem, evaluand, or policy option, (2) the choice of the paradigm that guides the investigation into the problem, (3) the choice of the substantive theory utilized to guide the collection and analysis of data and in the interpretation of findings, and (4) the values that inhere in the context. Finally, (5) inquiry is either value-resonant (reinforcing or congruent) or value-dissonant (conflicting). Problem, evaluand, or policy option, paradigm, theory, and context must exhibit congruence if the inquiry is to produce meaningful results (38).

[66]Morgan emphasizes that one of the most important implications of Kuhn's work stems from the identification of paradigms as alternative realities. The term is used here in its metatheoretical or philosophical sense to denote an implicit or explicit view of reality (606-607).

For example, Orum, et al., (1991) note that most quantitative social science research falls into two research strategies that furnish information that is quantitatively manipulated: Surveys and experiments (3). In contrast, Yin (1994) suggests that the "case study is preferred in examining contemporary events...when relevant behaviors cannot be manipulated" (8). Therefore, an understanding of the epistemological paradigms debate is critical to the appropriate selection and application of a social science research strategy and design.

Phenomenology And The Naturalistic Inquiry Paradigm

A phenomenological or naturalistic inquiry perspective frames the research. Patton (1990) cautions, however, that the term phenomenology has been so widely used that its meaning has become confused (68). He reveals that "[s]ometimes phenomenology is viewed as a paradigm, sometimes a philosophy or as a perspective, and...sometimes even...as synonymous with qualitative methods or naturalistic inquiry" (Ibid). Patton suggests that a phenomenological perspective can mean either or both (1) a focus on what people experience and how they interpret the world (in which case one can use interviews without actually experiencing the phenomenon oneself) or (2) a methodological mandate to actually experience the phenomenon being investigated (in which case participant observation would be necessary) (70). As used in this dissertation, phenomenological perspective refers to the naturalistic inquiry paradigm as a methodological philosophy or

mode which focuses on what people experience and how they interpret the world.[67] It is consonant with the interpretive paradigm which is

> based upon the view that the social world has a very precarious ontological status, and that what passes as social reality does not really exist in any concrete sense, but is the product of the subjective and inter-subjective experience of individuals. Society is understood from the standpoint of the participant in action rather than the observer. The interpretive social [researcher] attempts to understand the process through which shared multiple realities arise, are sustained, and are changed (Morgan, 1980, 608-609).

From this paradigmatic perspective "human activity [is] seen as text--as a collection of symbols expressing layers of meaning" (Miles and Huberman, 1994, 8). Further, because human beings' activities intersect with organizations that are relatively autonomous, "[o]ne cannot add up the characteristics of human agents and fully understand the total organization" (Sjoberg, et al., 1991, 39). Hence, context is critical to understanding and involves interpreting and constructing social reality (31). Following a Meadian perspective that asserts that the human agent is truly social in nature and the self and the social mind are products of interaction with others, Sjoberg, et al., argue that "it becomes well-nigh impossible to rely on statistical analysis per se for the investigation of certain major sociological issues" (38-39).[68] Their perspective is consistent with the

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[67]For a comprehensive discussion of the historical development of phenomenology, see Michael M. Harmon and Richard T. Mayer, Organization Theory For Public Administration (Boston: Little, Brown and Company, 1986).

[68]Sitkin and Bies' new institutional perspective on legalization is an example. Powell and DiMaggio argue that the new institutionalism in organizational analysis has a distinctly "sociological flavor" that emphasizes the ways in which action is structured and order made possible by shared systems of rules that both constrain the inclination and

aim of this study which is designed to investigate how the legal environment of complex, public organizations serve to transform social processes for resolving problems and disputes. Thus, operationally, the interpretive nature of the phenomenological/naturalistic inquiry perspective logically elicits the use of the case study research strategy and design (Lincoln and Guba, 1985, 41-42).

Research Strategy of Choice: The Case Study

Lincoln and Guba argue that one of the more important operational implications for investigators doing research in the style or mode of the naturalistic inquiry paradigm is the case study research strategy (Ibid). They suggest that researchers operating from the naturalistic inquiry paradigm are likely to prefer the case study because (1) it is more adapted to a description of the multiple realities encountered at any given site, (2) it is adaptable to demonstrating the investigator's interaction with the site and consequent biases that may result (reflexive reporting), (3) it provides the basis for both individual "naturalistic generalizations" and transferability to other sites (thick description), (4) it is suited to demonstrating the variety of mutually shaping influences present, and (5) it can picture the value positions of investigator, substantive theory, methodological paradigm, and local contextual values (Ibid). Yet there is no simple taxonomy within

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capacity of actors to optimize as well as privilege some groups whose interests are secured by prevailing rewards and sanctions (11).

which various kinds of case studies might be classified (361). They may be written with different purposes in mind and at different analytic levels, demand different actions from the inquirer, and result in different products (Ibid). As a research strategy case studies can be used in many situations, including public administration research and organizational studies--as they contribute uniquely to our knowledge of individual, organizational, social, and political phenomena (Yin, 1994).

Yin (1994, 1984) makes the persuasive argument that the case study strategy is an empirical inquiry that "investigates a contemporary phenomenon within its real-life context, when the boundaries between phenomenon and context are not clearly evident and multiple sources of evidence [triangulation] are used" (23). He elaborates that it can be used for exploratory, descriptive, or explanatory purposes and maintains that it has a distinct advantage when a "how" or "why" question is being asked about a contemporary set of events over which the investigator has little or no control (20). Nevertheless, the case study strategy has been confused with case study designs as well as qualitative research methods (Stake, 1995; Yin 1994, 1984; and Orum, et al., 1991). For example, ethnography, or what is sometimes referred to as "field research" that relies heavily upon participant observation, does not always produce case studies (Yin, 1994). Indeed, case studies can include, and even be limited to, quantitative evidence (12-14). Alternatively, some case studies have made use of both qualitative and quantitative methods (Orum, et

al., 1991).[69] In sum, there is no strict methodological hegemony consistent with the case study strategy. Yet reflecting back on the earlier discussion of the competing inquiry and epistemological paradigms debate, the case study strategy is not without its critics who argue that it is inconsistent with logical-positivist methodologies associated with the Natural Science Model.

However, Yin stresses that criticisms of the case study strategy have been misdirected (16). The greatest concern has been over the lack of rigor of case study research (9). The issue is one of sloppy research that allows biased views to influence the direction of the findings or conclusions. But Yin reminds us that bias can also enter into the conduct of experiments and other research strategies. Another common concern is that case studies provide little basis for scientific generalization. But Yin refutes this claim by arguing that

> case studies, like experiments, are generalizable to theoretical propositions and not to populations or universes. In this sense, the case study, like the experiment, does not represent a "sample," and the investigator's goal is to expand and generalize theories (analytic generalization) and not to enumerate frequencies (statistical generalization) (10).

A final criticism is that case studies take too long and result in massive, unreadable documents. Yin suggests that this complaint confuses case studies with ethnographies which require long periods of time in the field and emphasize detailed, observational data (11). These and other criticisms emanate from competing paradigms

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[69]Yin does not explicitly reconcile the inconsistencies inherent in the use of qualitative and quantitative methodologies in the same case study. Specifically, he does not reconcile issues of validity and reliability.

in the social and natural sciences and the resulting epistemological paradigms debate as previously discussed.[70] Nonetheless, the case study research strategy has a number of distinct advantages over other strategies for social science research.

Advantages of Case Study Research

Orum, et al., maintain that there are four distinct advantages to the use of the case study research strategy: (1) It permits the grounding of observations and concepts about social action and structures in natural settings at close hand, (2) It provides information from a number of sources and over a period of time, thus permitting a more holistic study of complex social networks and of complexes of social action and meanings, (3) It can furnish the dimensions of time and history to the study of social life, thereby enabling the investigator to examine continuity and change in lifeworld patterns, and (4) It encourages and facilitates, in practice, theoretical innovation and generalization (6-7). In essence, the "detailed and rich data offered by the well-crafted case study permit the analyst to develop a solid empirical basis for specific concepts and generalizations" (7). It features a holistic approach and, thereby, offers empirical and theoretical gains in understanding larger social complexes of actors, actions, and motives over time (8). Finally, the case

[70]Other criticisms raise questions about construct, internal, and external validity, reliability, and generalization of findings issues.

study strategy lends itself to theoretical generation and generalization (13).[71]

Thus, although criticized, the case study research strategy has a number of distinct advantages for conducting social science research from a phenomenological/naturalistic inquiry perspective. It has maintained its legitimacy and continues to be used extensively in the social sciences, including practice-oriented fields such as public administration (Yin, 1994). As with all empirical research, an appropriate case study research design "guides the investigator in the process of collecting, analyzing, and interpreting" data (Nachimas and Nachimas, 1982, 77).

Research Design: The Holistic, Single Case

Yin (1994) advises that every type of empirical research has an implicit, if not explicit, research design and warns against considering case studies "as a subset or variant of the research designs used for other strategies, such as experiments" (19). He recommends that in some situations existing works may provide a rich theoretical framework for designing a specific case study. Case study designs can incorporate combinations of single or multiple and holistic or embedded cases. Single case designs are used when the case represents an extreme or unique case, as well as a prelude to further study. In contrast, multiple case designs are used as a method of comparing

[71]Theoretical generalization involves suggesting new interpretations and concepts or reexamining earlier concepts and interpretations in major and innovative ways (Yin, 1984).

similar cases using a replication logic rather than a sampling logic.[72]

Concomitantly, case study designs can be holistic or embedded. A holistic design is advantageous when there are no logical subunits of analysis or when the relevant theory underlying the case study is of a holistic nature. In contrast, the same case study may involve more than one unit of analysis--subunits of analysis--and, thus, would require an embedded design. Consequently, both single and multiple case study designs can be holistic or embedded (28-51). Therefore, case study research designs must be selected and constructed carefully.

Components of the Case Study Research Design

Yin identifies five major components of research designs that are applicable to case studies: (1) A study's question(s), (2) Its propositions, if any, (3) Its units of analysis, (4) The logic linking the data to the propositions, and (5) The criteria for interpreting the findings (20). First, the study's questions should be developed and evaluated to determine if they elicit the use of the case study research strategy which is most likely to be appropriate for "how" and "why" questions. Second, study propositions, if appropriate, can be developed to reflect important theoretical issues and direct the researcher where to investigate. Third, the unit of analysis must be

[72]For example, in the field of public administration comparative case studies are used to compare constitutions, governmental structures and bureaucracies.

determined. It is related to the way the initial research question(s) have been defined. For any topic chosen as the unit of analysis, specific time boundaries are needed to define the parameters of the case. Fourth, the plan must specify how the data will be linked to the propositions, if any, or how the data will be linked to the purpose of the study (e.g., pattern matching techniques). Fifth, the research design must specify the criteria for interpreting a study's findings; although Yin acknowledges that there is no precise method for interpreting case study findings (21-26). Nevertheless, there are valid criteria for judging the quality of a case study research design.

Testing the Quality of a Case Study Research Design

Yin (1994) argues that the quality of a case study research design can be judged by tests of construct, internal, and external validity and reliability (37). Construct validity is most problematic for case study researchers and consists of establishing correct operational measures for the concepts being studied. Construct validity is increased during the data collection phase of the study by using triangulation techniques and establishing a chain of evidence.[73] After the final case study report has been drafted, construct validity is strengthened by having a key informant review the draft (Ibid).

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[73]Triangulation represents varieties of data, investigators, theories, and methods (Orum, et al.). For many researchers, however, triangulation is restricted to the use of multiple data-gathering techniques (usually three) to investigate the same phenomenon. This is interpreted as a means of mutual confirmation of measures and validation of findings (Berg, 1995).

Internal validity applies primarily to explanatory or causal studies and not to descriptive or exploratory studies. It is a concern for investigators who are trying to determine whether event x led to event y. But "the concern over internal validity for case study research may be extended to the broader problem of making inferences" based on interview and documentary evidence (35). Yin argues that using pattern-matching, explanation building, and time-series tactics can strengthen internal validity in case study research (Ibid).

External validity concerns the problem of the generalizability of the study's findings beyond the immediate case study. As discussed previously, the external validity problem has been a major criticism of case study research. Yin suggests that case study findings are generalizable to broader theories (36).[74] But generalization is not automatic--"a theory must be tested through replications of the findings" (Ibid).

Finally, the test for reliability demonstrates that the operations of the study can be repeated by the same or other researchers with the same results.[75] The goal of reliability, therefore, is to minimize the errors and biases in a study. The use of case study protocols, which document case study research procedures, and a case study data base increase and strengthen reliability (40). Thus, the collection of evidence in case

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[74]Yin argues that case studies are generalizable to theoretical propositions (analytic generalization) and not to populations or universes (statistical generalization).

[75]Yin explains that the emphasis of reliability is on the ability to conduct the same research over again with the same results and not on replicating the results of one case by doing another case study.

studies is critical to issues of validity and reliability.

Sources of Case Study Evidence

Case study evidence can originate from many sources, albeit six of the most important ones are documents, interviews, physical artifacts, archival records, direct observations, and participant-observation (78). Although each has strengths and weaknesses no one source has a complete advantage over all the others--they are complementary (79). Thus, a good case study uses as many sources as possible (80). Notwithstanding, Berg (1995) advises that the open-ended interview is an especially effective method of data collection "when investigators are interested in understanding the perceptions of participants or learning how participants come to attach meanings to phenomena or events" (35). Others agree (Yin; Miles and Huberman; Patton; Mishler, 1991; Lincoln and Guba) and argue that key informants are critical to the success of a case study because most studies are about human affairs.

In this context Miles and Huberman differentiate between qualitative and quantitative research sampling and note that qualitative case sampling (interviewing) is theoretically driven (29). Simply put, it is purposive rather than random; as in experimental research designs (Ibid; Berg; Lincoln and Guba; Yin; Orum, et al.; Sjoberg, et al.; and Patton).

Miles and Huberman explain:

> Choices of informants, episodes, and interactions are...driven by a conceptual question, not by a concern for "representativeness"....The prime concern is with the conditions under which the construct or theory operates, not with the generalization of the findings to other settings....[It] has an iterative...quality, working in progressive "waves" as the study progresses. Sampling is investigative; we are cerebral detectives, ferreting out answers to our research questions. We observe, talk to people, and pick up artifacts and documents. That leads us to new samples of informants and documents....At each step along the evidential trail, we are making sampling decisions to clarify the main patterns, see contrasts, identify exceptions or discrepant instances, and uncover negative instances--where the pattern does not hold (Ibid).

Because sampling is purposive key informants can provide investigators with insights and suggest sources of corroboratory evidence (Yin). Operationally, purposive sampling can be used as a means of "triangulating" to address potential problems of construct validity, as multiple sources of evidence essentially provide multiple measures of the same phenomenon (92).

Summary

The case study research design guides the investigator in collecting, analyzing, and interpreting data (Nachimas and Nachimas). It should not be confused or equated with research designs for other research strategies such as surveys or experiments. Conceptually, existing works provide a rich theoretical framework for designing case studies which can be a combination of single or multiple and holistic or embedded designs. The basic components of a well-crafted case study research design consist of

study questions; propositions, if any; an appropriate unit of analysis; the logic linking the data to the propositions or conceptual frame; and the criteria for interpreting the findings. Case study data can come from a variety of sources, however, the primary sources are documents, interviews, physical artifacts, archival records, and direct and participant observations. Therefore, sampling is purposive rather than random and is theoretically driven by the study's research questions and conceptual frame.

The quality of a case study research design can be judged by tests for validity--construct, internal, and external--and reliability (Yin, Miles and Huberman, and Patton). To strengthen the validity of case study research the investigator can use triangulation techniques, establish a chain of evidence, have a key informant review the findings for accuracy, and use pattern-matching techniques and explanation building. Further, reliability, minimizing errors and biases, can be strengthened by the use of a case study protocol and data base.

Finally, the case study research strategy and design espoused by these theorists undergirds and supports the purpose of this study. It provides a framework for action to investigate and describe how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes. Toward that goal a phenomenological/naturalistic inquiry perspective frames the research, and thus, the appropriate research strategy and design is a holistic, single-case study.

The Research

Institutional Review Board Authorization

Research conducted through Virginia Polytechnic Institute and State University that involves humans as research subjects requires approval from the Institutional Review Board for Research Involving Human Subjects (IRB). The legal basis for such review and approval is detailed in Title 45 Code of Federal Regulations Part 46 (45 CFR 46) which applies specifically to research funded by federal agencies. However, the University has determined that all research involving human subjects, regardless of funding source, shall conform to these standards. The University's IRB review process insures the ethical conduct of the research and that human subjects involved in the research will be exposed to the least possible risk. Further, the review process provides the researcher with an opportunity for critical evaluation of the proposed research methodology and affords the researcher the legal umbrella of the University.[76]

In accordance with the requirements of the University's IRB an Informed Consent for Participants of Investigative Projects and a Research Protocol were developed and submitted to the IRB for review and approval.[77] The protocol provides justification for the project and explains the purpose of the study. The informed consent advises

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[76]See the Virginia Tech "Application For Approval Of Research Involving Human Subjects," 1995, 2.

[77]See appendix c for a copy of the Informed Consent for Participants of Investigative Projects. See appendix d for a copy of the Research Protocol.

participants of (1) the purpose of the research, (2) procedures, (3) risks and benefits of participation, (4) the extent of anonymity and confidentiality, (5) compensation (no monetary or intangible contribution is associated with participation in this research study), (6) freedom to withdraw at any time, (7) approval of the research, and (8) the subject's responsibilities. In addition, it requests the research subject's written permission/consent to participate in the study, including authorization for the researcher to audiotape the research interview. The IRB reviewed and approved the research project, concurring that it was of minimal risk to the human subjects involved and that appropriate safeguards were incorporated.[78]

Data Collection

Access to State agencies was achieved through the Department of Employee Relations Counselors (DERC) as the result of the Virginia Grievance Program Project (1992) conducted by the researcher. That project was designed and conducted as a pilot study to investigate and compare State and local government grievance programs in a

[78]See appendix e for the IRB Expedited Approval/"Internal Dispute Resolution: A Study in the Legal Environment of Public Organizations," Reference 96-169. As required in some instances the research was also approved by the Institutional Review Board(s) for Research Involving Human Subjects in individual State agencies. State agency IRB approvals are not included in the appendix due to the confidentiality and anonymity associated with this project.

nonunion environment.[79] The researcher sought and was granted approval for the completion of that Project in 1992 through the director of DERC. Subsequently, the researcher secured approval to access State agencies for the purpose of this dissertation through the director of DERC in the Spring of 1996.[80] Upon approval, the researcher contacted appropriate State agencies and made a formal presentation to the human resource management directors, as appropriate, explaining the study's purpose, methodology, time requirements for the agencies involved, and issues of anonymity and confidentiality for agencies and participants.

Following case study methodology (Stake; Berg; Yin; Miles and Huberman; Sjoberg, et al.; Orum, et al.; Patton; Lincoln and Guba; and Nachimas and Nachimas) voluntary participants were purposively solicited for the study.[81] Key informants were

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[79]The Virginia Grievance Program Project was a study of State and local government grievance programs in the Commonwealth of Virginia that focused on internal dispute resolution between the years 1988 and 1992. It was conducted in accordance with doctoral proseminar requirements and reported as a doctoral symposium in the Center for Public Administration and Policy at Virginia Tech University during 1993.

[80]As an incentive to approve access to State agencies the researcher agreed to provide a report to DERC at the end of the data gathering process outlining major findings. See appendix f for a copy of "A Report On The Commonwealth Of Virginia Grievance Procedure," dated November 19, 1997.

[81]Volunteer key informants were solicited from various State agencies and included three major groups: (1) Management--managers and supervisors at all organizational levels, including human resource managers and employee relations counselors; (2) Grievants/Employees--rank-in-file nonsupervisory personnel and those with State grievance procedure experience; and (3) Neutral Third-Party Administrative Hearing Officers--appointed by the Virginia Supreme Court.

identified and open-ended, semistandardized personal interviews were conducted.[82] Participating managers, rank-in-file and supervisory employees volunteered through their respective human resource management departments. Other grievants contacted the researcher directly as the result of solicitation letters initiated through various agency human resource management departments.[83] Hearing officers were purposively identified based on their experience and requested to participate. In sum, a total of thirty-four interviews were conducted: Twenty-eight Statewide in four agencies and six interviews with administrative hearing officers appointed by the Virginia Supreme Court to preside over final step grievance hearings.

Each participant was interviewed individually in a location that ensured privacy and confidentiality. The Informed Consent for Participants of Investigative Projects discussed above was used to advise each participant and obtain their written permission to participate--allowing the researcher to audiotape the research interview. During the initial phase of each interview the researcher established rapport with the participant by providing her/him with an overview of the research project. Next, the participant was asked to tell the researcher what he/she thought the researcher "ought to know about the

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[82]Semistandardized interviews involve the use of predetermined questions and/or topics that are typically asked of each interviewee in a systematic and consistent order. However, the interviewer is allowed to digress and probe beyond the answers to these questions/topics in an attempt to approach the world from the interviewee's perspective (Berg, 1995, 33).

[83]Employees who received adverse grievance decisions were more likely to volunteer than those that won their grievances. However, key informants consisted of both groups.

State's Grievance Program/Procedure." He/she was also instructed that the researcher might interrupt to request specific information or pursue a follow-up question when necessary. This open-ended approach allowed participants an opportunity to interpret the focus of the interview and respond in a personally determined manner. Toward that goal, participants were asked to provide examples, illustrations, and stories whenever possible.

In addition to audiotaping each interview, the researcher wrote extensive interview notes. Participant interview data (audiotapes and researcher notes) were coded to ensure anonymity and confidentiality. Immediately after each interview, without referring to interview notes, the researcher wrote a thematic summary of each interview in a personal journal. This information was used in conjunction with direct interview data to help identify and pursue patterns and themes associated with this study. Further, as a means of triangulation multiple data-gathering techniques were used to investigate data collected during the interview process (Berg; Yin, 1994; and Orum, et al., 1991). Other sources of data collection included direct observations, documents, and archival records.

To increase reliability a case study data base management system was developed and implemented. A research data management file and the personal journal previously mentioned were maintained by the researcher to manage data, act as a contact summary form, and document the research process. Journal notes were cross-checked for accuracy and correctness against interview notes, audiotapes, and germane documentation. Finally, follow-up interviews were conducted as needed to verify information and investigate issues identified during the initial data collection phase of the project.

Data Analysis

Analyzing case study evidence is especially difficult because the strategies and techniques have not been well defined (Yin, 1994, 102; Rudestam and Newton, 1992, 113 and Lincoln and Guba, 1985, 354).[84] Nonetheless, a preferred strategy is to rely on the theoretical propositions upon which the original objectives and design of the case study were based (Yin, 103). Hence, the analytical tool used to examine the case study data for this dissertation is Sitkin and Bies' (1994) paradoxes of legalization discussed in chapter two. It is used as the theoretical, conceptual framework for investigating how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes in a nonunion environment.

Data analysis followed an iterative process to distinguish emerging legalization patterns and expose contradictions (Yin, 1994, 106-107; Miles and Huberman, 1996, 56). First, transcribed interview and researcher notes were purposively organized into three distinct participant groups: Management, Employees/Grievants, and Neutral Third-Party Administrative Hearing Officers.[85] Second, legalization paradox themes were identified

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[84]Qualitative analysis does not yield knowledge in the same sense as quantitative explanation. The emphasis is on illumination, understanding, and extrapolation rather than causal determination, prediction, and generalization (Patton, 1990, 424).

[85]These are the major participant groups involved in the Commonwealth's Grievance Program.

and extracted from the data for each participant in the study.[86] To ensure anonymity, confidentiality, and provide a means by which the researcher could validate specific data, interview codes were used when identifying and categorizing legalization paradoxes for each participant.[87]

Third, extracted legalization paradox themes were reorganized by participant group by legalization paradox: Power, Rationality, Formalization, and Justice. This facilitated the identification of legalization themes by participant group by paradox and served as a method of triangulating interview data within and between the three groups.[88] These themes were triangulated with other sources of data: Documentation (DERC annual reports, agency reports, grievance program literature, etc.); observations, and archival records (enabling legislation). As a result additional investigative questions emerged and follow-up interviews were conducted to pursue answers and ensure the accuracy of data. Finally, the data analysis process and findings were discussed and coordinated with the

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[86]See appendix g, "Paradoxes of Legalization Worksheet," dated June 1996.

[87]This method provided a road map by which the researcher could backtrack specific data to transcripts, audiotapes, and researcher notes of participant interviews to ensure correctness and extract "thick description" in reporting the results of the study.

[88]Triangulation of data consisted of two primary efforts: First, the researcher attempted to triangulate important legalization themes identified during the interview process phase of the study by cross-checking those themes against the three identified groups. Specific themes (e.g. the State's Mediation Program) were cross-checked between the three identified groups. Second, this iteration of data deleted interview transcript and researcher interview note codes so that legalization themes common to all groups could be identified without reference to any particular group. Once these themes were identified, the researcher verified and cross-checked the findings to ensure that they were not skewed by any one group.

dissertation chair in an effort to guard against possible researcher bias (Lincoln and Guba, 41-42).

Conclusion

A phenomenological or naturalistic inquiry perspective frames the research. As used in this dissertation it refers to the naturalistic inquiry paradigm as a methodological philosophy or research mode which focuses on what people experience and how they interpret the world. Ontologically, it assumes that there are multiple realities that can be studied only holistically. Epistemologically, it assumes that the researcher and the object of inquiry are inseparable and interact to influence one another. Furthermore, it assumes that entities are in a state of mutual simultaneous shaping so that it is impossible to distinguish causes from effects--inquiry is value-bound. In essence it assumes that context is critical to understanding and involves interpreting and constructing social reality. Thus, the interpretive nature of the phenomenological/naturalistic inquiry perspective logically elicits the use of the case study research strategy and design to investigate and describe how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes.

The following four chapters constitute the centerpiece of the dissertation and report the results of the case study research. Chapter four first introduces the research findings by presenting a contextual overview of the Commonwealth of Virginia Employee Relations Program which reveals that it is shaped by legal rules, processes and procedures

that constitute its legal environment.

Next, employing Sitkin and Bies' (1994) institutional conceptualization of legalization as an investigatory lens, chapters five and six explore and describe the internal dynamics of legalization in the Commonwealth's formal Grievance Program as reported by key informants. Chapter five explores the duality of the legalization process by examining three salient 1995 revisions to the Program which expose the paradoxical nature of formal IDR in complex, public organizations. In a similar way chapter six explores the implications and tradeoffs associated with legalization by investigating the paradoxical nature of legal-formality, legal-rational decision making, formal authority, and workplace justice. Finally, chapter seven discusses the significance of the research and its implications for public administration theory and practice.

IV.

THE LEGAL ENVIRONMENT CONSTITUTED: THE PROCESS OF LEGALIZATION

> *Your organization doesn't need a [grievance program] if there is already strong mutual trust between management and nonunion employees, if you have no fear of union success in an attempt to organize employees, if you are not worried about lawsuits by former employees, if all managers and supervisors down the line appear to understand and comply with personnel policy, if managers deal promptly and ably with subordinates' complaints, if you have plenty of feedback on the effects of personnel policy, and if employee morale appears to be about as high as it can be.*
>
> *- David W. Ewing, Justice on the Job*

The purpose of this chapter is to establish the legal environment for the study constituted by the Commonwealth of Virginia Employee Relations Program. The chapter tells a story about the development and implementation of formal IDR which focuses on legal, programmatic, and procedural issues and considerations that constitute a contextual canvas upon which a portrait of the internal dynamics of legalization in a nonunion environment is created in subsequent chapters. It first traces the legal foundations of public employee grievance rights in the Commonwealth of Virginia. Second, it provides a brief programmatic overview of the Employee Relations Program. Finally, it examines the legal-procedural features and characteristics of the Commonwealth's Grievance and

Mediation Programs that illuminate the ways in which public organizations are shaped by legal rules and processes that formalize and rationalize IDR and constitute their legal environment.

Legal Foundations of Public Employee Grievance Rights in the Commonwealth of Virginia

As discussed in chapter two the rights of public employees are founded in the Bill of Rights of the United States Constitution; codified federal, state, and local statutes; organizational policies and procedures; and collective bargaining agreements. Indeed, grievance rights for public employees in the Commonwealth of Virginia are constituted by State statutes.[89] In 1970 the Virginia General Assembly amended the *Virginia Personnel Act* to require the Governor to establish and maintain an appeal procedure to assure all persons employed under the *Act* a full and impartial inquiry into the circumstances of removal (1).[90] Although the initial right to formal consideration of a grievance was related to disciplinary action, the State Director of Personnel notified State agencies in January 1971 that employees should have other grievances formally considered (Ibid). The Director's opinion was advisory and there was no express

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[89]This brief historical overview of the legal development of public employee grievance rights in the Commonwealth derives from a DERC document titled "History of Employee Grievance Rights in Virginia," 1-14, n.d.

[90]Virginia Personnel Act, as amended, 1970 Virginia Acts, Chapter 546.

mandate for agencies to establish an individual grievance process or procedure for resolving nondiscipline related disputes. As a result not all agencies established grievance procedures for their employees. Thus, on November 28, 1972 the Governor adopted *State Personnel Rule 14* which provided for a uniform employee grievance procedure for all state agencies (2).[91]

In conjunction with *Rule 14* the Virginia General Assembly created the Commission to Study the Rights of Public Employees (4).[92] The Commission conducted an investigation into the rights of public employees and received documentary and testimonial evidence from interested parties. It noted approval of the Governor's adoption of *State Personnel Rule 14* and recommended that State and local governments be required by law to establish and maintain a uniform employee grievance procedure (Ibid).[93] Subsequently, adopting the Commission's recommendations, the General

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[91]The uniform grievance procedure was developed by the Division of Personnel with the assistance of several State agencies. It became effective on December 1, 1972 and excluded employee removals and demotions; as they were reviewed under a separate appeal procedure pursuant to the Virginia Personnel Act. Although considered a uniform procedure, it was issued in two forms: One for agencies with fewer than 100 employees --with three grievance steps, and the other for agencies with 100 or more employees--with four grievance steps. In addition, it provided for a panel hearing as the final step of the process with panel membership determined by the size of the agency. See the Sixth Interim Report of the Commission on State Government Management, "Recommendations on the State's Personnel Process, Consultant's Report on Personnel," 52-53, December 1975.

[92]House Joint Resolution No. 122, 1972.

[93]See the "Report of the Commission to Study the Rights of Public Employees to the Governor and General Assembly of Virginia," House Document 12, 5, 1973. The Commission also recommended that the Virginia Personnel Act should be amended to

Assembly amended the *Virginia Personnel Act* in 1973 mandating a uniform employee grievance procedure (5).[94]

In 1973 the General Assembly also formed the Commission on State Government Management. It was charged with the task of studying the structure of State government and recommending possible changes to increase the efficiency and effectiveness of management. The Commission employed Management Services, Inc., to study and evaluate the State's personnel system. Based on its findings and suggestions, the Commission recommended further changes to the State's uniform grievance procedure (5-6).[95]

In 1977 the General Assembly determined that the State grievance procedure was again in need of fine-tuning. The Senate and House General Laws Committees formed a Joint Subcommittee and assigned it the responsibility of studying the procedure and

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require review of demotions as well as removal.

[94]See 1973 Virginia Acts, Chapter 7, and House Joint Resolutions 207, 208, and 209, 1973. The appeal procedure requirement was not binding on the Department of State Police, local school boards or employees of the General Assembly. The term "grievance" was defined to specifically exclude negotiations of wages, salaries, or fringe benefits. Further, public employers were required to promulgate and implement rules and procedures to provide employees with an opportunity to contribute to the development of policies which affect working conditions.

[95]Recommendations included (1) establishing additional time limits such as a limitation on the time period for initiating a grievance, (2) taking action to protect the employee when management fails to comply with time limits, (3) clarifying the role of employee representatives, and (4) emphasizing the responsibility of first-line supervisors for resolving grievances. See the "Commission on State Government Management Recommendations on the State's Personnel Process," Appendix, Consultant's Report on Personnel, 52, December 1975.

making appropriate recommendations. The Joint Subcommittee held public hearings throughout the State and identified deficiencies in the procedures and their application (6-7).[96] It emphasized the importance of addressing all employee grievances and criticized the provision that allowed agencies to question the grievability of issues by referring them to the Director of Personnel for a determination (7).[97]

The Joint Subcommittee recommended (1) changes to the definition of grievance, (2) placing reasonable time limits on the submission and appeal of grievances, (3) changes in the level of the procedure at which a determination of grievability is decided, (4) changes in the method of panel selection, (5) guidelines to ensure more uniformity in procedures for conducting panel hearings, and (6) additional grievance training for supervisors. More importantly, however, it identified a need to provide employees with a source of information outside their agency and recommended that an Office of Employee Relations Counselors be created. It advocated that the Director of that Office

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[96]The Joint Subcommittee criticized the fact that a separate appeal procedure was in place for dismissals, demotions, and suspensions as it was confusing, and, in the case of disciplinary actions, did not provide an impartial review of the agency's actions--as the only appeal of an agency head's action was to the Director of Personnel. Further, it revealed that some employees were reluctant to use the procedure for lack of knowledge and fear of reprisal. See the "Report of the Joint Senate and House General Laws Committees Study on the Grievance Procedure to the General Assembly," Senate Document No. 23, 7, 1978.

[97]Ibid, 8-9. The Joint Subcommittee disclosed that "[e]vidence has been overwhelming that lower level supervisors are closing down the lines of communications by informally and improperly declaring an employee's complaint not a grievance and thereby refusing to deal with employee problems and concerns."

be appointed by and report directly to the Governor (8).[98]

In response to these recommendations the General Assembly passed legislation in 1978 that amended the *Virginia Personnel Act* and substantially modified the State Grievance Program (9). The changes, which were designed to make the grievance procedure more responsive to employees, created the Office of Employee Relations Counselors as an independent State agency with the responsibility of (1) providing information to State employees concerning personnel policies, rules and regulations, (2) investigating allegations of reprisal for using the grievance procedure, (3) collecting grievance procedure statistical data, and (4) making recommendations to the Governor and the General Assembly for improving the grievance procedure. The changes also (1) provided a more comprehensive definition of grievance, (2) mandated new time limits for the submission of initial grievances, (3) established a minimum level of grievance steps, (4) required determinations of grievability to be decided by agency heads, rather than personnel directors, (5) mandated that final grievability determinations would rest with the circuit court having jurisdiction in the locality where the grievant was employed, and (6) required supervisory training in the use of the grievance procedure (9-10).[99]

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[98]Ibid, 6-10.

[99]1978 Virginia Acts, Chapter 845.

The Office of Employee Relations Counselors received additional duties and responsibilities from the General Assembly between 1979 and 1995.[100] In 1979 it was assigned the responsibility for interpreting the grievance procedure, ruling on the grievability of issues at the management steps of the process, and directing compliance with appropriate legislative and administrative mandates (10). In 1984 the Department of Employee Relations Counselors' (DERC) responsibilities were further expanded to include administration of the State grievance procedure and oversight of local government grievance procedures (Ibid).

The General Assembly also created another Joint Subcommittee in 1984 to study three specific aspects of the State Grievance Procedure: (1) Panel impartiality, (2) Grievances filed by Department of Corrections employees terminated due to criminal convictions, and (3) Administration of local government grievance procedures (Ibid). The Joint Subcommittee recommended that certain persons not be allowed to become members of grievance panels;[101] administrative hearing officers appointed from the Virginia Supreme Court's list be used as the third member on panel hearings; Department of Corrections employees terminated due to criminal convictions/probation be allowed to have a circuit court hearing in lieu of a panel hearing; and the number of days an agency

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[100]The Office of Employee Relations Counselors was also renamed the Department of Employee Relations Counselors (DERC).

[101]It prohibited from grievance panel membership those directly involved with the dispute giving rise to the grievance or having a close association with one of the grievance parties and/or attorneys.

head had to determine grievability be reduced (10-11).[102] These recommendations were subsequently adopted in 1985.

The General Assembly amended the *Virginia Personnel Act* in 1985 in response to the recommendations made by the Joint Subcommittee (11-12).[103] It placed restrictions on persons who could serve on grievance panels; reduced the time period for grievability determinations by agency heads; required that in the case of terminations the third grievance panel member should be appointed by the Director of DERC from the list of eligible administrative hearing officers prepared and maintained by the Executive Secretary of the Virginia Supreme Court; and granted Department of Corrections employees terminated due to criminal convictions and/or probation de novo hearings in circuit court (12). These revisions remained in effect until 1995 when some were amended based on the recommendations of a task force initiated by DERC.

In 1993 DERC responded to complaints that the grievance procedure was not working as intended by establishing a Task Force to Study the State's Grievance Procedure.[104] The Task Force consisted of approximately fifty members from the State

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[102]See the "Report of the Joint Subcommittee Studying the State Grievance Procedure to the Governor and the General Assembly of Virginia," Senate Document No. 16, 5-7, 1985.

[103]1985 Virginia Acts, Chapter 515.

[104]DERC's 1995 Annual Report notes that the grievance procedure had "become burdened with many components that frequently led to a lengthy and consuming process" (1). Complaints were received from various employees and employee groups/unions. Although collective bargaining for State employees is unlawful in the Commonwealth, the State informally considers the views of employees who are also members of employee

work force throughout the Commonwealth.[105] It studied four specific subject areas related to the Commonwealth's Grievance Program: (1) Access to the grievance procedure, (2) The management review steps of the procedure, (3) Grievance hearings, and (4) The role of DERC (12).

During 1994 the Task Force accepted oral and written comments from State agencies and employees on topics including, but not limited to: Access to the grievance procedure, resolution steps, hearings, retaliation, mediation, monitoring and agency accountability, and grievance training (13).[106] It studied other public and private grievance programs and conducted survey research soliciting input from hundreds of State supervisory and nonsupervisory personnel (Ibid).[107] Finally, in 1995 the Task Force submitted its findings and recommendations to the General Assembly which mandated revisions to the Program by adopting the majority of the Task Forces's recommendations.[108] The most significant were revisions to the grievance procedure

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groups/unions; such as the Virginia Alliance of State Employees (VASE) and the Virginia Governmental Employees Association (VGEA).

[105]Ibid. The Task Force membership consisted of State employees from all levels of the organization and included human resource managers as well as supervisory and nonsupervisory personnel. DERC's director expressed that the procedure could be made better if all users and interested parties came together to design an improved procedure.

[106]The Task Force was extended through 1994 by Senate Joint Resolution 135, 1994.

[107]For example, between June and July 1994 the Task Force conducted hearings at twenty different sites in the Commonwealth which afforded an opportunity for approximately four hundred State employees to attend and be heard.

[108]See Senate Document No. 16, Senate Bill 1008 and House Bill 2456, 1995.

management resolution steps;[109] appeals of qualification determinations;[110] the final step hearing process;[111] and the ability for the courts to award attorneys' fees to either party for petitioning to have a hearing decision implemented.[112] The revisions were adopted in response to threats to organizational legitimacy and present a complex set of organizational implications and tradeoffs that merit careful review and consideration. Although germane to the present discussion, their examination will be deferred to the next chapter which examines the dynamics of the legalization process.

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[109]See Section 2.1-116 et seq., Code of Virginia 1950, as amended, 1995 Replacement Volume 1, 366-381. Although management retained all of its prerogatives promulgated in the grievance procedure, it revised the procedure to allow any work related issue to be raised and processed through the management resolution steps of the procedure.

[110]Ibid, 317-372. Determinations of grievability at the management resolution steps are no longer an issue to be decided as all issues are grievable at that level. But not all issues that infringe upon codified management prerogatives can be qualified for a final step hearing.

[111]Ibid, 372-373. This change discontinued the three member panel hearing and substituted one hearing officer as the final step in the grievance process. Prior to July 1, 1995 grievance panels consisted of three members selected as follows: One member was selected by the grievant, one by management, and the third member selected by agreement between the first two. The circuit court of jurisdiction appointed the third member when no agreement could be reached. As an exception, in cases involving terminations from employment, the third panel member was a hearing officer appointed from a list of hearing officers developed and maintained by the Executive Secretary of the Virginia Supreme Court.

[112]Ibid, 373. Hearing officers' decisions are final and binding if consistent with law and policy. Either party to a dispute may petition the circuit court for an order requiring implementation of a hearing officer's decision. The court may award attorneys' fees to either party.

Summary

Grievance rights for public employees in the Commonwealth of Virginia are constituted by statutes promulgated to improve the programmatic and procedural due process provisions of the Employee Relations Program. Programmatically, the Department of Employee Relations Counselors was created as an independent State agency under the direction of the Governor to administer the Program. Procedurally, the formal Employee Grievance Procedure was continuously revised to enhance trust, fairness and the legitimacy of the Program internally and externally. A close examination of the programmatic and procedural characteristics of the Program demonstrates the ways legal rules and processes shape complex, public organizations.

The Employee Relations Program

The Employee Relations Program is governed pursuant to *Section 2.1-116.01 et seq. of the Code of Virginia 1950*, as amended.[113] The *Code* assigns responsibility for employee relations management in the Commonwealth to the Director of DERC and promulgates (1) the establishment, powers, and responsibilities of DERC; (2) the responsibilities of state agencies under the program; (3) grievance procedures generally;

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[113] 1995 Replacement Volume 1, Annotated, 366-381 and 1997 Cumulative Supplement, Annotated, 65-70. For establishment of grievance procedures for counties, cities, and towns, see Section 15.2-1506-1507, Code of Virginia 1950, as amended, 1995 Replacement Volume 1, Annotated, 171-177.

(4) criteria for qualifying grievances for hearings and grievance hearings generally; (5) hearing officers' duties, decisions, and costs; and (6) the eligibility of State employees to use the grievance procedure (366-381). It requires the Director to establish and administer a formal Grievance Program and a statewide Mediation Program consisting of alternative processes for resolving employment disputes (367-369). A brief description of the procedural components of the Grievance Program reveals that it is highly formal, complex, and legalistic.

The Grievance Program

The Grievance Program is administered by DERC which is located in the State Capitol--Richmond, Virginia. DERC is staffed by a Director, Assistant Director, and eight full-time Employee Relations Counselors who serve a State work force of approximately 71,000 classified employees.[114] Its *1991-92 Annual Report* emphasizes that

> the Department is a confidential resource for employees experiencing work-related problems. The Department assists employees by providing information on personnel policies, employment rights, and the grievance procedure. To achieve satisfactory resolutions of problems, various alternatives are explored including intervention, mediation, and utilization of the grievance procedure (n.p.no.).

DERC also provides training and consultation services to managers in State agencies to

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[114]As of January 1, 1998 only six Employee Relations Counselors were employed although there are eight authorized positions.

"help [them] effectively address work place issues and to assure that the grievance procedure is a fair, equitable and expeditious process to resolve employee complaints" (Ibid).[115] Nonetheless, the most widely recognized responsibility of the Department's conflict resolution processes is administration of the Commonwealth's formal Employee Grievance Procedure.

The Employee Grievance Procedure

The grievance procedure consists of three distinct phases: (1) The resolution (management review) steps; (2) Qualification for a hearing; and (3) The hearing (Employee Grievance Procedure, 1997, 2).[116] In essence, it allows all nonprobationary, classified State employees to formally pursue legitimate complaints or concerns through successively higher levels of management to a hearing.[117] However, once a grievance

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[115]DERC's 1996 Annual Report indicates that it conducts more than 100 training sessions annually with over twenty-five percent of the courses offered outside the capital (Richmond) area. Except for mediation training, these courses are offered free and available to both employees and supervisors. The Report advises that "[i]t is important for supervisors to understand the technicalities of the grievance process as well as to appreciate how the process enables problems to be identified and resolved" (3). DERC also offers human resource management professionals taped seminars on such topics as: Fair Labor Standards Act; Unions in the Public Sector; Americans with Disabilities Act; Conducting Agency Investigations; and Sexual Harassment in the Workplace (Ibid).

[116]The following discussion of the Commonwealth's grievance procedures examines those in effect July 1, 1995 through present.

[117]The grievance procedure defines a classified employee as one "who occupies a position within the occupational classes that are listed in the Commonwealth's Compensation Plan and who is covered by the Virginia Personnel Act" (3).

is initiated, issues of access and/or compliance with established time limits can prevent it from being processed through the management resolution steps. Further, grievances that infringe upon management prerogatives are not qualified to proceed to a hearing (3-8).[118] An examination of the grievance process illuminates the ways in which mimicking legal rules and processes legalizes IDR in complex, public organizations.

Phase I: The Management Resolution Steps

The first step in the resolution process requires the aggrieved employee to reduce the grievance to writing and present it to the first-step respondent (who generally is the employee's immediate supervisor) within thirty calendar days of the event or action giving rise to the grievance (4).[119] The written grievance must state the nature of the problem, support any claims with facts, and specify the exact relief sought.[120]

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[118]Sections 2.1-116.08-013, Code of Virginia 1950, as amended, exempt certain employees of the Departments of Corrections and Youth and Family Services, local social service departments, social service boards, community services boards, and local constitutional offices. They also exempt agency heads or chief administrative officers of government agencies and institutions of higher education appointed by boards and commissions, and law-enforcement officers whose grievances are subject to Chapter 10.1, Section 2.1-116 et seq. and who have elected to resolve such grievances under those provisions (373-375). Section 2.1-116.09 requires that the Office of the Attorney General and every legislative and judicial agency which is not subject to the State grievance procedure shall promulgate and administer a grievance procedure (373).

[119]Grievances alleging discrimination or retaliation by the immediate supervisor may be initiated with the second level supervisor.

[120]Effective July 1, 1995 any issue, complaint, or concern raised by an eligible State employee can be processed through the resolution steps of the Commonwealth's formal grievance procedure. However, not all grievances may proceed to a hearing. Only

Additional claims may not be added once the written grievance is submitted.

The first-step respondent may hold a meeting to discuss the issues grieved, but a meeting is not required. A written response to the employee is required within five workdays.[121] Upon receipt, the employee has five additional workdays to notify management of her/his intention to continue to the second resolution step or conclude the grievance (Ibid). As an exception in cases involving the loss of wages, such as a termination, demotion, or suspension without pay, the grievance procedure provides for an "Expedited Process" that allows the written grievance to be initiated immediately at the second resolution step (Ibid).

Should a second resolution step become necessary, the employee and the second-step respondent are required to meet to discuss the grievance at issue within five workdays.[122] Although each may be accompanied by an individual of choice, a lay advocate or attorney, the second resolution step is not a hearing--it is a fact finding meeting. Hence, there are no formal arguments or cross-examinations. Nevertheless, persons with direct, pertinent information relating to the grievance may appear, be heard

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qualified grievances that do not infringe upon management prerogatives mandated by the General Assembly may proceed to a hearing.

[121]The grievance procedure defines a workday as one that is consistent with the normal work schedule for the individual responsible for taking the required action. Authorized leave time is excluded (4).

[122]Ibid. The grievance procedure defines the second-step respondent as "[a]n individual designated by the agency who is in a senior management position and has the requisite authority to provide the employee with the appropriate relief."

and questioned "to clarify points or explore other avenues of inquiry" (5). Upon completion of the meeting, the second-step respondent is required to "provide the employee with a written response to the issues and the relief sought within five workdays" (Ibid). Subsequently, the employee has five workdays to notify management in writing of her/his intention to terminate the grievance or pursue it to the third resolution step.

The third step in the resolution process requires only a review of the grievance record by a third-step respondent. The third-step respondent is generally "the agency head or an individual designated by the agency who is a deputy, assistant commissioner, director, or manager most senior in the employee's line of supervision and who has the last opportunity to resolve the grievance in the resolution steps" (Ibid). Although a third step meeting is not required, the third-step respondent may hold a meeting with the employee to discuss issues that are still in dispute. Whether a meeting is held or not, the third-step respondent must review the grievance record and provide a written response to the employee within five workdays from receipt of the grievance (Ibid).[123] When a decision is rendered the employee is required to notify management in writing within five workdays of its receipt of her/his intention to terminate or pursue the grievance. If the employee wishes to pursue the grievance beyond the management resolution steps to phase two of the grievance procedure, he/she must request that the agency head qualify

[123]The written response from the third-step respondent must address the issues and the relief sought.

the grievance for a hearing (6).

Phase II: Qualifying the Grievance for a Hearing

The employee's agency head must determine within five workdays whether the grievance qualifies for a formal hearing. Reflecting back on the earlier discussion of management prerogatives in chapter two, recall that management reserves the exclusive right to manage its affairs and operations, and, thus, disqualifies complaints which challenge codified management prerogatives.[124] However, adverse personnel actions such as formal discipline and dismissals for unsatisfactory performance are automatically determined qualified (Ibid).[125] Furthermore, if reasonably supported by facts, complaints of discrimination;[126] arbitrary or capricious performance evaluation;

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[124]See Section 2.1-116.06 C, Code of Virginia 1950, as amended, 1995 Replacement Volume 1, 371-372 and the Employee Grievance Procedure, DERC, 1997, 1-15. Complaints which relate solely to the following issues are by law not grievable and may not be qualified for a hearing: (1) Establishment or revision of wages, salaries, position classifications, or general benefits; (2) Contents of statutes, ordinances, personnel policies, procedures, rules and regulations; (3) Means, methods, and personnel by which work activities are undertaken; (4) Hiring, promotion, transfer, assignment, and retention of employees; (5) Termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (6) Work activity accepted by an employee as a condition of employment or which may be reasonably expected to be a part of the content of the job; (7) Relief of employees from duties in emergencies; or (8) Informal supervisory instructions (e.g., counseling memorandum, oral reprimand, manner of providing supervisory instructions).

[125]Formal discipline refers to written reprimands and terminations, suspensions, demotions, transfers, or assignments issued in conjunction with such written notices.

[126]Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex.

retaliation;[127] and unfair application or misapplication of policies, procedures, rules, and regulations may be determined qualified for a formal hearing (Ibid).[128]

If the agency head determines that a grievance is not qualified for a hearing, the employee may appeal that decision to the Director of DERC by submitting a written request through her/his agency Human Resources Office. That Office is required to copy and mail the complete grievance record, with all attachments, to DERC within five workdays (7). If the Director denies qualification of the grievance for a hearing,[129] the employee, on appeal, may request that the circuit court qualify the grievance.[130]

The circuit court is required to hear the appeal within thirty calendar days from receipt of the request. At the court hearing management and the employee may be

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[127]Retaliation includes participating in the grievance process; complying with any law or reporting a violation of such law to a governmental authority; seeking to change any law before Congress or the General Assembly; reporting a violation of fraud, waste or abuse to the State Hotline, or exercising any right otherwise protected by law.

[128]Although management prerogatives such as personnel policies, procedures, and rules are not grievable, their unfair or misapplication is grievable and qualifies for a formal hearing at the last step in the grievance process if supported by reasonable facts.

[129]There is no mandated time requirement for the Director of DERC to render a determination on the qualification appeal.

[130]The grievance procedure requires the appeal to be forwarded by the agency Human Resources Officer to the clerk of the circuit court in the jurisdiction in which the grievance arose. However, Section 2.1-116.06, Code of Virginia 1950, as amended, mandates that "[p]roceedings for review of the decision of the [DERC] Director denying grievability may be made by an employee filing a notice of appeal with the Director...Within five workdays thereafter, the Director shall transmit to the clerk of the circuit court in the jurisdiction in which the grievance arose a copy of the grievance record. The court, on motion of the grievant, may issue a writ of certiorari requiring the Director to transmit the record on or before a certain date (372).

represented by legal counsel or lay advocate.[131] There is no court cost to the Commonwealth or the grievant, except for attorneys' fees.[132] The court is required to render a decision based on its review of the grievance record and "such additional evidence as may be necessary to resolve any controversy as to the correctness of the record" (8).[133] The decision of the court must be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The court may affirm the decision of the Director of DERC or reverse or modify the decision, but the decision of the court is final and not appealable.[134]

Phase III: The Hearing Process

All qualified grievances proceed to a neutral third-party arbiter or hearing officer for a hearing and final decision.[135] The hearing officer is "selected by the Director of DERC on a rotating basis from a list supplied by the Executive Secretary of the Supreme

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[131]Section 2.1-116.06, F, Code of Virginia 1950, as amended, 372.

[132]Ibid, E, 372.

[133]Ibid, F. The employee and the agency may call witnesses to present testimony and be cross-examined.

[134]Ibid, G.

[135]Sections 2.1.116.03, No. 6 and 2.1-116.07 A, Code of Virginia 1950, as amended, 367 and 372 and 9-6.14:14.1, 29-31.

Court of Virginia" (9).[136] The hearing must be conducted and a decision rendered no later than thirty calendar days after the appointment of the hearing officer. However, the time requirement can be extended "when just cause is present or with the consent of both parties" (Handbook for Hearing Officers, 1995, 1). The hearing must be held in the locality where the employee is or has been employed, and it must be completed in no more than one day; "unless the hearing officer should determine that the time is not sufficient for a full and fair presentation of the evidence by both sides" (Ibid). Grievance hearings are closed to the public and only the parties to the grievance, their representatives, witnesses, and authorized observers may be present (2).[137]

Procedurally, grievance hearings are conducted much like a formal court proceeding, although strict rules of evidence do not apply.[138] By law, hearing officers

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[136]Pursuant to Section 9-6.14:14.1 et seq. Code of Virginia 1950, as amended, all hearing officers must meet the following minimum standards: (1) Active membership in good standing in the Virginia State Bar; (2) Active practice of law for at least five years; and (3) Completion of a course of training approved by the Executive Secretary of the Virginia Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer will be assigned to a proceeding before that agency. These requirements must be met prior to being included on the list of hearing officers (29). There are currently 118 names on the Virginia Supreme Court's list of hearing officers (Hearing Officer System Overview, n.d., 1).

[137]DERC's Handbook for Hearing Officers (1995) explains that grievances focus on personnel matters impacting upon the privacy of the individuals involved, as well as the agency's practices, and, therefore, to protect the privacy of all concerned, grievance hearings are closed to the public (2).

[138]See DERC's Tips for a Successful Hearing (1997). It outlines the legal aspects of a grievance hearing such as the need for a pre-hearing conference with the hearing officer and explains the order of the hearing--making opening statements, presenting witnesses

are authorized to hold conferences for the settlement or simplification of the issues; dispose of procedural requests; issue orders requiring testimony or the production of evidence;[139] administer oaths and affirmations; receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examinations; rule upon offers of proof; oversee an accurate verbatim recording of the evidence; order appropriate remedies, and take other actions as necessary or appropriate.[140] Hearing officers' decisions must be issued in written form and contain findings of fact as to the material issues in a case, as well as the basis for those findings. They are final and binding if consistent with law and policy.[141] Hence, either party may challenge a hearing officer's decision and/or petition the circuit court having jurisdiction for an order requiring implementation of a hearing officer's decision--the court may award attorneys' fees to either party.[142]

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and evidence, and making a closing statement--and advises employees on how to conduct direct examination, handle objections, and conduct cross-examination. It also elaborates that rules of evidence do not apply and that claims must be proven by a preponderance of the evidence--evidence which is more convincing than the other side's evidence (1-6).

[139]Parties to a grievance hearing may not subpoena witnesses. The hearing officer may order witnesses to attend, however, by law, the hearing officer can not enforce such an order.

[140]Section 2.1-116-07, B, Nos. 1-7, Code of Virginia 1950, as amended, 372-373.

[141]Ibid, 373. In grievances initiated by State employees the Director of the Department of Personnel and Training determines whether the decision is consistent with policy.

[142]Ibid.

Summary

The Commonwealth's Employee Grievance Procedure consists of three distinct phases that allow all nonprobationary, classified State employees to pursue legitimate complaints or concerns through successively higher levels of management to a neutral, third-party arbiter or hearing officer. The resolution or management review steps afford management an opportunity to informally review and resolve employees' complaints or concerns within the organization. Nonetheless, employees may pursue qualified grievances to a formal hearing provided that the grievance does not infringe upon codified management prerogatives. Issues of qualification for a hearing are first resolved by agency heads whose determinations can be appealed to the Director of DERC. Appeals of the Director's decision must be made to the circuit court where a final, unappealable decision is rendered.

Qualified grievances proceed to a formal hearing conducted by a hearing officer appointed by DERC from a list developed and maintained by the Executive Secretary of the Virginia Supreme Court. The hearing process, although intended to be informal, inherently mimics formal court proceedings, except that strict rules of evidence do not apply. Accordingly, hearing officers may order witnesses to attend and testify at hearings which are closed to the public. Finally, hearing officers' decisions must be rendered in written form and based on findings of fact as to the material issues in a case. They are final and binding upon the parties if consistent with law and policy. Either party may petition the circuit court of jurisdiction for an order requiring implementation

of a decision. The court, in so ordering, may also award appropriate attorney's fees to either party. Thus, an examination of the Commonwealth's Grievance Program reveals that it is formal, complex, and legalistic. In contrast, the Commonwealth's Mediation Program is designed to be informal, nonlegalistic, and independent of employees' grievance rights. But a brief examination of the Mediation Program exposes that it too is formal, complex, and legalistic.

The Mediation Program

Established by DERC in 1989, the Mediation Program, unlike the grievance procedure, is available to all State employees regardless of their employment status.[143] Mediation is a voluntary process in which trained, neutral mediators assist employees in resolving employment related conflict by discussing issues in an open, honest, and confidential forum to arrive at a mutually satisfactory resolution agreement (Mediation Program Guide, 1995, 2).[144] In this context mediators are not hearing officers or judges and do not make decisions or impose solutions. They assist the parties in clarifying issues and facilitate communication to generate alternatives for the resolution of

[143]This includes probationary and non-classified employees.

[144]The mediation agreement is a written document that is signed by each party involved in the mediation.

employment related conflict.[145]

Programmatically, because the mediation process is designed to be as informal as possible, State agencies are encouraged to establish internally operated mediation programs.[146] But not all agencies administer their own programs and many rely strictly on the mediation services of DERC. Nonetheless, each agency is required to appoint a mediation program administrator; promote the mediation process within the agency; arrange for mediation services; select employees to be trained as mediators; grant leave for mediators to conduct mediations in their agencies and, upon request, for other agencies; and maintain agency data on mediation activities (Mediation Program Guide, 1995, 8). To assist agencies DERC schedules and coordinates mediations upon request and markets the Program. It conducts training programs for mediators; provides orientation training for agency program administrators; serves as a technical resource for internally operated mediation programs; and collects, analyzes, and publishes Mediation Program data (Ibid).

Procedurally, mediation is successful only if the participants sincerely wish to resolve the dispute, trust the mediation process, and are willing to discuss issues openly

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[145]The Mediation Program Guide (1995) defines parties as "employees who are experiencing work-related difficulties and have requested mediation in their effort to resolve the issues" (2).

[146]Internally operated mediation programs must conform to the Statewide Mediation Program administered by DERC. It requires agencies to have written program guidelines; schedule and coordinate mediations using agency mediators or arrange for mediators from other agencies through DERC; and plan regular meetings of agency mediators.

and honestly. To promote success the mediation process is strictly confidential. DERC's Mediation Program Guide (1995) explains:

> Because the goal of mediation is to create an environment where the parties are free to share information without it later coming back to them outside of the mediation session, the sessions are strictly confidential. The only written document which may leave the room is the agreement reached by the parties. No notes may leave the room; no form of recording is permitted. The parties, mediators, and the agency have a shared commitment not to disclose confidences discussed during the mediation (6).

From this perspective confidentiality ensures that no culpability is placed with employees or management. The ultimate goal is to resolve the dispute, not place blame. As a result participants are free to openly and honestly pursue viable alternatives.

The confidentiality of all mediation documentation is the responsibility of the agency mediation program administrator.[147] But overall confidentiality relies heavily upon the participants remaining silent. They may share the fact that a mediation took place or that an agreement was reached. Similarly, they may discuss their personal thoughts on the efficacy of the process, but "sharing what the other party said, or what the other party experienced during the mediation would be a breach of confidentiality" that violates the mediation agreement (Ibid).

When a participant alleges that a written agreement has been violated, the agency mediation program coordinator must "review the agreement with each party and attempt

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[147]Mediation documentation includes requests for a mediation by employees as well as any written agreement resulting from a mediation. In some agencies the Mediation Coordinator is a human resource management professional.

to resolve the issues which may have contributed to the violation" (Statewide Mediation Program, n.d., 2). If unsuccessful, mediation is again offered to resolve the conflict. But if either party refuses a second mediation the initial agreement may be voided. In this situation the employee(s) would be able to exercise any grievance rights available, and management would be able to take action to correct past behavior or performance as necessary (3).[148]

In sum, the Mediation Program provides employees with an alternative to the formal grievance procedure for resolving their work related complaints, concerns, and disputes. It is designed to be informal, nonlegalistic, and independent of employees' grievance rights, and, therefore, is a voluntary process which encourages employees to discuss and resolve their concerns in an open, honest, and confidential environment. Thus, trained mediators facilitate communication between the parties to generate alternatives for resolving conflict. But a successful mediation depends on the degree to which the participants wish to resolve the problem, trust the process, and are willing to discuss issues openly and honestly. To promote success all mediations are conducted confidentially.

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[148]An employee has the right to initiate a grievance on the issue of agreement which was allegedly breached. The grievance must be initiated within thirty calendar days after the agreement has been voided.

Conclusion

The purpose of this chapter has been to establish the legal environment constituted by the Commonwealth of Virginia Employee Relations Program. An examination of the Program reveals that grievance rights for public employees in the Commonwealth are constituted by public law. Specifically, *Section 2.1-116 et seq., Code of Virginia 1950, as amended*, creates a Department of Employee Relations Counselors as an independent State agency to administer a comprehensive Employee Relations Program consisting of grievance and mediation components. The Grievance Program is designed to be highly formal, complex, and legalistic--mimicking legal rules and adversarial processes. In contrast, the Mediation Program is designed to be informal and nonlegalistic--relying on trust and open, honest communication between employees and management to resolve internal disputes. Nonetheless, in practice the mediation process is highly formal and law-like--administered and conducted by management--requiring organizationally trained mediators and binding, written resolution agreements maintained by agency human resource management officials. In sum, it too is formal, complex, and legalistic.

Thus, an examination of the Commonwealth's Employee Relations Program reveals that it is shaped by legal rules and processes that formalize and rationalize IDR and constitute its legal environment. But while legalization may enhance efficiency, effectiveness, fairness or the legitimacy of the Program, in practice it can have unintended consequences (Sitkin and Bies, 1994, 28). Next, chapter five explores the dynamics of the legalization process by examining the most recent revisions to the

Commonwealth's formal Grievance Program.

V.

THE DYNAMICS OF THE LEGALIZATION PROCESS

It is in the dynamics...of institutions that we have most hope of describing and therefore learning to control administrative behavior.

- Norton E. Long, Power and Administration

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.

- James Madison, The Federalist No. 10

In the last chapter an examination of the Commonwealth's Employee Relations Program revealed that it is statutorily and administratively shaped by legal rules and processes that formalize and rationalize IDR and constitute its legal environment. Viewed in this light the institutionalization of legalization through a reliance on formal, procedural safeguards and legitimate, law-like procedures in decision making enhances workplace justice and organizational legitimacy. Nonetheless, legalization presents a complex set of positive and negative implications and tradeoffs for managers that merit careful review and consideration (Sitkin and Bies, 1994, 28). Thus, the purpose of the chapter is to explore the dynamics of legalization inherent in the legalization process.

The chapter first briefly reintroduces Sitkin and Bies' conceptualization of the legalization process as a lens through which to view the findings. Next, as reported by key informants, the chapter explores the dynamics of the legalization process by examining three salient 1995 revisions to the Commonwealth's Grievance Program adopted to correct past deficiencies and respond to threats to organizational legitimacy. In sum, the chapter explores how complex, public organizations respond to threats to legitimacy with the increased use of legalistic features and the decreased use of nonlegalistic sources of institutional legitimacy (Sitkin and Bies, 1994, 22). More specifically, the chapter explores how legalization transforms social processes for resolving internal disputes between public employees and management.

The Lens

As discussed in chapter two, Sitkin and Bies explain that the legalization process is characterized by formal rules and procedures, adversarial relations, legalistic rhetoric, and an inordinate attention given to legal sanctions and criteria in decision making (vi). Its key features are its adversarial, zero-sum approach and its ultimate reliance on reconciliation through litigation or IDR procedures (24). Simply stated, they conceptualize legalization as a particular type of institutionalization in which law and law-like forms offer a normative source of organizational legitimacy independent of their immediate organizational functionality (21). Their view implies "that organizations will

respond to threats to legitimacy with increased use of legalistic features and the decreased use of nonlegalistic sources of institutional legitimacy" (22).

Notably, Sitkin and Bies identify a duality in the legalization process (28). As managerial decisions increasingly become dominated by what is legally defensible, they slowly shift concern away from that which makes organizational sense.[149] As a consequence, when legalization dominates managerial attention at the expense of culturally accepted traditions and norms it can affect the long-term health and goals of the organization by discouraging consensus building and problem solving processes. In this context legalization, while frequently positive (e.g. legal remedies provide a source of empowerment to various constituent groups), can paradoxically undermine the very social goals it was designed to further (22-29). Sitkin and Bies' conceptualization of the legalization process provides an appropriate lens through which to discern and depict the dynamics of legalization in the Program. Thus, the chapter next explores the dynamics of the legalization process by examining three pivotal revisions to the Commonwealth's Grievance Program.

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[149]In this context Sitkin and Bies note that legalization refers to "bureaucratic goal displacement" (24).

An Example of the Legalization Process: 1995 Revisions to the Grievance Program

As reported in the last chapter, the Commonwealth's Grievance Program closely mimics culturally legitimate legal rules and processes which formalize IDR and constitute its legal environment. But as noted by Sitkin and Bies, adopting formal, legalistic approaches can have unintended consequences (28). DERC's *1996 Annual Report* illuminates:

> Mandated by law on July 1, 1972, the grievance procedure has worked well for employees in resolving their employment disputes. However, many shortcomings became apparent over the years. Legitimate concerns of employees were not always being heard, the procedure took too long and was too cumbersome, and grievance panels were difficult to schedule in a prompt manner (4).

In response to these and other criticisms raised by State agencies and employees, DERC revised the Employee Grievance Procedure effective July 1, 1995 to "streamline the process without changing substantive rights" (Ibid).[150] DERC's revisions permit all qualified employees to grieve any issue through the management resolution phase of the procedure and formalize administrative hearing officers as neutral, third-party arbiters at the final step in the grievance process. Knowledge of these revisions is an important

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[150]This refers to the Task Group discussed in the previous chapter which made recommendations to DERC for revising the formal grievance procedure. Other criticisms expressed concern about the fairness of the grievance panel process. Substantive rights refers to management prerogatives which are defined in Section 2.1-116.06 C, Code of Virginia 1950, as amended, 1995. The Code specifically states that "[c]omplaints relating solely to [management prerogatives] are not grievable and shall not proceed to a hearing" (372).

foundation for understanding the dynamics of legalization as reported by key informants in the study. Thus, an examination of the dynamics of legalization in the Commonwealth's Grievance Program begins with a description of the 1995 revisions to the management resolution phase of the grievance process.

The Revised Management Resolution Phase

Two of the most significant revisions to the grievance process remove State agencies from making final determinations on issues of grievability[151] and allow all employee grievances to be officially heard by management.[152] DERC's *1996 Annual Report* explains the rationale for these changes:

> Previously, whenever an employee grieved an action reserved to management, the dispute ended at the [agencies'] offices with a nongrievable ruling. No matter how justified the complaint may have

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[151]Pursuant to the 1995 revision "grievability rulings are not made until...three management steps have been exhausted" (DERC Annual Report, 1995, 5). The intent of the change is to prevent complaints and disputes from being ruled nongrievable prior to being heard by higher levels of management. In many cases, this places the initial grievability ruling at the agency head level. But the agency head's decision can be appealed to the Director of DERC and, finally, to the circuit court whose decision is final and unappealable. Thus, final determinations of issues of grievability are removed from the agencies.

[152]This change is to the formal grievance procedure promulgated by DERC. Section 2.1-116 et seq., Code of Virginia 1950, as amended, 1995, does not specifically mandate that all issues are grievable. Rather, it posits that complaints relating solely to management prerogatives "are not grievable and shall not proceed to a hearing" (372). Thus, there is a subtle distinction and contradiction between the Code and the formal grievance procedure.

> been, if it involved an action reserved to management, the grievance could not proceed. Under the revised procedure, all issues must be heard by management (Ibid).

Although these changes extend the grievance procedure to issues legally defined as management prerogatives, access is limited to the management resolution phase of the process. Simply stated, it allows all employee concerns, complaints, or grievances to be reviewed by management prior to the hearing process,[153] but those that infringe upon codified management prerogatives are not eligible to proceed to a formal grievance hearing.[154]

Prior to 1995 first-line supervisors and managers were not formally required to attempt to resolve employee complaints through the management resolution phase of the procedure if they determined them to infringe upon protected management rights. In fact, *Section 2.1-116 et seq., Code of Virginia 1950, as amended*, and the Employee Grievance Procedure (1992) prohibited issues pertaining to management prerogatives from being officially ruled as grievances.[155] On this legal basis one employee relations counselor

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[153]The 1995 revision requires "only one face-to-face meeting within the three management steps" (DERC Annual Report, 1995, 4). The grievance procedure refers to all face to face resolution steps as "meetings" between the employee and management so as not to infer that a formal "hearing" is taking place. The grievance procedure dictates that "[t]he meeting is not to be conducted as a hearing with arguments and cross-examination; the purpose is for fact finding. The meeting shall not be recorded" (4).

[154]See Section 2.1-116.06 C, Code of Virginia 1950, as amended, 1995.

[155]Prior to 1995 the grievance procedure stated that a grievance shall be a complaint or dispute by an employee relating to his employment, including but not limited to: (1) Disciplinary actions, including dismissals (whether resulting from formal discipline or unsatisfactory job performance or involuntary resignation), demotions and suspensions;

recalls that "a lot of managers hid behind that nongrievable thing and there was a lot of frustration on the part of employees."

Although the revisions expand official review of grievances to protected management rights issues, they do not procedurally change the management resolution phase of the procedure. A DERC counselor depicts the relationship between management's prerogatives and employees' expanded grievance rights using a brick wall metaphor:

> Management has so many prerogatives. The way I explain it is...here I am an employee who is standing in front of a brick wall five feet thick and twenty thousand feet high and management is behind that wall and they are pushing that wall and they can crush it because that is their prerogative because they have everything going for them. What the [revised] grievance procedure does is drill a little hole in that wall. When the wall falls, I still have a chance to meet with management and talk to them...It gives the opportunity to do that rather than the wall just falling on me at the first step in the old procedure. The rules have changed but there is still a formal process in terms that there are certain steps, and there are certain time lines that must be met. That is the process. What has changed to me is the content. The process is still formal but the content has changed in the fact that management must now respond rather than just hide behind something such as this is not grievable and not listen...

While one human resource manager approves of the revision and acknowledges that it is "designed for better communication--explanation--issues need to be discussed

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(2) The application of personnel policies, procedures, rules, regulations, ordinances, and statutes; (3) Acts of retaliation as the result of utilization of the grievance procedure or of participation in the grievance of another employee; (4) Complaints of discrimination on the basis of race, color, creed, political affiliation, age, disability, national origin, or sex; and (5) Acts of retaliation as the result of complying with state or federal law, reporting a violation of any such law to a governmental authority, or seeking to change a law before Congress or the General Assembly (The Employee Grievance Procedure, 1992, 2).

with people," another suggests that "[m]aking everything grievable is problematic--I'm not sure that this is the best way." Echoing that sentiment, an agency employee relations director emphasizes that "this is a problem because we [management] know everything is not [grievable]. I think it is unfair."

Here language is revealing. Enabling legislation strictly prohibits issues solely related to management prerogatives from being formally grieved under the procedure. But DERC interprets the legislation to allow all issues to be grieved through the management resolution phase. The resulting dilemma is framed by semantics. On the one hand the *Code* prohibits management prerogatives from being grieved; but on the other, however, it does not restrict the informal discussion of those issues. For example, *Section 2.1-116.05 C of the Code* distinguishes between informal complaints and formal grievances by stating that "[p]rior to initiating a written grievance, the employee shall be encouraged to pursue an *informal complaint* [emphasis added] with his immediate supervisor" (369). But the *Code* continues: "To the extent that [complaints] cannot be resolved *informally* [emphasis added], the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure" (368-369).[156] The *Code* is clear that any employee complaint can be informally considered by management. But with respect to issues of grievability the *Code* leaves no room for interpretation:

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[156]Enabling legislation states that "[u]nless exempted under Section 2.1-116 or other provisions of the Code, all classified nonprobationary state employees shall be included in the grievance procedure" (373).

> *Complaints relating solely to the following issues are not grievable* [emphasis added] and shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies (Section 2.1-116.06 C, as amended, 372).

In short, the *Code* reserves management's "exclusive right to manage the affairs and operations of state government" (371). Hence, management prerogatives are statutorily excluded as grievable issues in the formal grievance process.

In contrast, the Commonwealth's revised grievance procedure permits all issues to be heard by management (although they may still not qualify for a hearing) (DERC Annual Report, 1996, 4).[157] An agency human resource management director reflects upon expanding employees' grievance rights to the review of protected management prerogatives:

> I guess the one thing we [management] were all scared about under the new system was we would be flooded with grievances that weren't grievable under the old system and are not grievable under the new to go to the hearing officer which has to be taken through the resolution stuff. That has not been the case. There may have been a few people who have taken advantage of that but I have just not seen that.

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[157]DERC notes that more grievances are being resolved in the resolution steps than ever before. Of the 1158 grievances in 1996, 780 or 67 percent were resolved in the resolution steps. Of those, employees were more likely to get full or partial relief; approximately 46 percent--a 12 percent increase from 1995 (1996 Annual Report, 5).

The fear that management would be swamped with grievances challenging management rights has not materialized.[158] But management rights issues that were previously resolved informally between employees and first-line supervisors must now, ultimately, be formally resolved through the management resolution steps.[159] Thus, paradoxically, while the revision is positive as a legal remedy, providing an expanded source of voice and empowerment to employees,[160] it removes the sense of interpersonal responsibility between first-line supervisors and employees by formalizing and legalizing informal processes for resolving work related issues and disputes. A similar revision to the hearing phase further formalizes and legalizes the grievance process by doing away with lay grievance panel members.

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[158]See appendices h thru l for Commonwealth of Virginia grievance data for FY 95 and FY 96. DERC's 1996 Annual Report emphasizes that there were fewer grievances filed in 1996 than 1995: 1158 in 1996 compared to 1324 in 1995 (4). Of those grievances, 51 percent were disciplinary action related and 14 percent involved leave issues. This proportional breakdown of issues is similar to those in 1995 and previous years (4). Prior to December 31, 1995, DERC maintained grievance data based on fiscal rather than calendar years (1995 Annual Report, DERC, 1). DERC infers that the reduced number of grievances for 1996 is due to the 1995 revisions to the Employee Grievance Procedure, however, there is no direct evidence to substantiate that claim (Ibid).

[159]See Section 2.1-116.05, Code of Virginia 1950, as amended 1995, 369. Although an informal discussion of management rights issues is not precluded by the revision, they can now be pursued upward to higher levels of management through the formal grievance procedure. The Code requires, however, that all official grievances be reduced to writing and formally submitted and processed.

[160]The revision prevents first-line supervisors from automatically terminating an employee complaint, concern, or dispute by determining it to infringe upon management prerogatives.

The Revised Grievance Hearing Phase

A third significant revision to the grievance process mandates the use of neutral, third-party arbiters at the final step of the grievance process--the formal hearing phase.[161] Preceding the revision qualified grievances were resolved at the hearing phase by a formal grievance panel consisting of three members (Employee Grievance Procedure, 1992, 8).[162] For grievances not involving terminations or alleged retaliation, the grievant and management would each select a panel member. The third panel member was selected by the first two. For grievances involving termination or alleged retaliation the third panel member was appointed by the Director of DERC from a list of approved hearing officers.[163] In all cases the third panel member served as the chairperson of the grievance panel. Furthermore, to ensure the impartiality of the panel the grievance procedure prohibited the following persons from serving as panel members:

> [1]. Persons having direct involvement with the grievance or with the problem giving rise to the grievance: for example, the employee, the agency head, management-step respondents, a representative of the employee at the third step, and witnesses who have appeared at any

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[161]See Section 2.1-116.06-07, Code of Virginia 1950, as amended 1995, 371-373. The revised hearing officer phase of the grievance procedure is discussed in the previous chapter.

[162]Qualified grievances are those determined not to infringe upon codified management prerogatives.

[163]The approved hearing officer list referred to here is similar to the one described in the previous chapter for selection of hearing officers under the 1995 revisions to the formal Grievance Program.

> management step. [2]. Managers who are in the direct line of supervision of a employee. [3]. Attorneys having direct involvement with the subject matter of the grievance, or a partner, associate, employee or co-worker of such attorneys. [4]. Relatives of a participant in the grievance process or relatives of the spouse of a participant... [5]. Persons residing in the grievant's or management-step respondents' household, and
> [6]. Employees in the personnel group classification, Employees of the Department of Employee Relations Counselors and the Department of Personnel and Training may not serve as panel members outside their own agencies (Ibid, 9).

The procedure prohibited anyone with the slightest interest in the final outcome of a grievance from participating as a panel member. However, the panel system did not ensure impartiality quite as well as expected. A DERC official explains:

> Under the old panel hearing grievance system *professional panel members* [emphasis added] evolved from both unions and management in agencies. Management employees [panel members] would have their marching orders to find for the agency [because] management felt that the employee representative to the panel would automatically find for the employee.

Thus, agencies felt that they had to have designated panel members to counter biased decisions by grievants' panel members. Another DERC counselor elaborates: "Certain employee organizations had professional panel members who were there arguably, if you heard from the agency, to decide for the employee."

But there were a number of other serious problems with the grievance panel system. First, some employees "didn't want to sit on a hearing and....[m]ost of the employees had to go to outside the agency to find these people [panel members]" (DERC Counselor). This placed an additional burden on lower level employees and those without friends in the organization as they could not find an appropriate panel member to

represent their interests. Second, a more severe problem was that panel members would often "become witnesses off the record during closed panel meetings and deliberations" (Ibid). This contributed to perceptions of bias because it was impossible to rebut a claim and tell another story. Third, as one DERC counselor explains, "people did not know how to conduct a hearing."[164] Fourth, lay panel members possessed little or no direct knowledge of State policy or procedure. Finally, scheduling panels was a difficult task as it required panel members to coordinate their schedules with other panel members, employees, managers, and attorneys. A knowledgeable DERC official recounts: "Scheduling panels became horrible, so by the time a grievance was qualified it could take months before a panel would sit down."[165] Thus, based on these concerns and criticisms the final phase of the grievance process was revised in 1995 to require a neutral, third-party hearing officer appointed by DERC from a list maintained by the Executive Secretary of the Virginia Supreme Court.[166]

DERC notes that, on the positive side, the new hearing officer phase of the grievance process "has been a major enhancement: [T]he percentage of employees

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[164]This was generally not a problem for grievance hearings related to termination or retaliation as an appointed hearing officer presided over the hearing.

[165]DERC's 1995 Annual Report notes that the average time to conclude a grievance increased from 108.8 days in FY 91 to 129.1 days in FY 95 (6).

[166]See Section 2.1-116.07, Code of Virginia 1950, as amended 1995, Replacement Volume 1, 372. Unlike the revision to the management resolution phase of the grievance procedure that requires all issues to be heard by management, this revision is statutorily mandated.

receiving full or partial relief has remained the same, hearings [are] conducted more promptly, and the parties receive well reasoned written decisions" (DERC Annual Report, 1996, 4). But on the negative side, State agencies are required to pay hearing officers' costs:[167]

> [A]gencies are paying on the average $940 per hearing. The hearings were never without cost, but formerly these costs were indirect (the salaries of the panel members). Paying cash has been hard on agencies during these tight budgetary times (Ibid).

The economic cost for some hearings has exceeded several thousand dollars (DERC Counselor). Nevertheless, the number of grievances that were resolved at the hearing phase increased by 6 percent from 1995 to 1996 (Ibid, 5).[168]

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[167]Hearing officer rates of compensation are established by the Executive Secretary of the Virginia Supreme Court. The Court requires that agencies or entities requesting appointment of the hearing officer shall be responsible for all compensation and promulgates that: these guidelines are not mandatory but are suggested as an indication of reasonable allowances: (1) Hearing officer time: $75.00 per hour (hours reading the record, in conducting the prehearing conference and the hearing, or in writing the decision); (2) Administrative time: $50.00 per hour (hours in research, composing and reviewing correspondence, and telephone calls); (3) Clerical time: $15.00 per hour (preparing and mailing correspondence, making arrangements for hearings, faxing, and other tasks normally performed by clerical staff); and (4) Other Expenses: Hearing officers should be reimbursed for *actual expenses* [emphasis added] associated with travel to the hearing at the rates established in the State's Travel Regulations. If a hearing should be a distance greater than 35 miles from the place of business, the hearing officer should be compensated an additional $100 for each round trip to a hearing site. Postage, telephone, fax, and photocopying should be billed at the actual cost. Bills are to be submitted to the agency for which the services are rendered (Hearing Officer System, n.d., 5-6). Although these figures are only "suggested" and "not mandatory," a knowledgeable DERC official notes that all agencies follow these guidelines. They are not negotiable (telecon with DERC, March 1998).

[168]In 1995, 17 percent of all grievances proceeded to a hearing. In 1996, 23 percent proceeded to a hearing (DERC Annual Report, 1996, 5).

But there have been systemic costs as well. For example, an experienced agency human resource director complains about hearing officers' decisions:

> My experience with the hearing officers influences how I deal with grievances. All of the more serious ones must be approved [by personnel officials] before action [a response to the employee]. I don't want to deal with the hearing officer unless absolutely necessary. Now, I negotiate and resolve them at the agency level if remorse is shown on the part of the employee. I am not impressed with the hearing officers thus far.

In other words, the director objects to hearing officers' decisions which are required to be based on fact--was there a violation of State policy or procedure by either the grievant or management?[169] Moreover, to further complicate matters for management, hearing officers can consider mitigating circumstances.[170] For instance, hearing officers may apply some or all of the following circumstances to modify or reverse a grieved disciplinary action:

> (1) The agency failed to show, by a preponderance of the evidence, that the action was warranted; (2) The action was too severe or was disproportionate to the misconduct; (3) The agency failed to communicate performance expectations to the employee prior to issuing discipline; (4) The employee had a good work record, satisfactory performance and/or no prior discipline; (5) The agency failed to follow pertinent policies and procedures; (6) The agency failed to consider mitigating circumstances; (7) The agency failed to give the employee an opportunity to correct the behavior prior to taking the disciplinary action; and (8) The

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[169]See Handbook for Hearing Officers, 1995, 3-4. The written decision must contain findings of fact and the basis for those findings. The decision is final and binding if consistent with law and policy.

[170]Mitigating circumstances are those circumstances "[s]uch as do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability" (Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn.: West, 1990), 1002.

> agency has no policy or procedure justifying the action (Handbook for Hearing Officers, 1995, 4).[171]

This means that hearing officers are empowered to overrule management for a variety of reasons. A paralegal from the Attorney General's Office comments on this power:

> The biggest hearing officer problem is unchecked authority. Some find that a violation occurred, acknowledge the policy violated, but find against management. They step into the shoes of management and substitute their judgment for management's. An action should stand on its own merits. Some decisions are from out of the air.

Managers do not like to have hearing officers second guess their actions. To do so, they contend, is to encroach upon management's administrative discretion to interpret and implement State policies and procedures. In support of this position one agency human resource management official argues that "administrative hearing officers are not as objective as panels, they act more like judges. They are concentrating on employees, not agencies or clients."

Reflecting another position, other agency human resource managers disclose that hearing officers' decisions are good ones *because they must follow State policies and procedures*. An experienced employee relations manager elaborates:

> Hearing officers are bound to the enforcement of the policy--the letter of the law. Their decisions are based on written rules and policies and facts

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[171]DERC's 1996 Annual Report also specifies that the following factors may result in reversal of the agency's action: (1) Employee's good record or character, (2) Level of discipline too severe, (3) factual inconsistencies, (4) Unclear or unevenly enforced policies, (5) Lack of intent to violate policy, (6) Inadequate training or supervision, (7) Co-worker primarily responsible for misconduct, (8) History of antagonism between management and employee, (9) Employee took action to remedy the misconduct, and (10) No discussion or warning prior to disciplinary action (6).

> of whether they are followed. Therefore, hearing officers are bound by rules that are not perfect. They are looking for a technical interpretation of the policy.

Mitigating circumstances notwithstanding, law and policy establishes parameters within which hearing officers must rule. In fact, one hearing officer notes that mitigating circumstances very seldom play a significant role in hearings. Thus, in practice, the hearing phase of the grievance process, although an administrative one, is very formal, complex, and legalistic. A DERC counselor elucidates:

> I think that the down side of the grievance process right now is that it is becoming more legal. It is no longer an administrative process, it is more of a legal process because it is tied to legal factors and the more you tie things to legal factors then it becomes more legal. It is employment law rather than employee relations anymore. We are doing some things now to go more to employee relations [e.g. mediation], but...we apply the standards and when you put administrative hearing officers into those roles and say only attorneys can do it, then you have formed--you have created a kind of legal system.

Conclusion

The purpose of the chapter has been to explore the dynamics of legalization inherent in the legalization process by examining how complex, public organizations respond to threats to legitimacy with the increased use of legalistic sources of institutional legitimacy. Toward that goal an examination of the Commonwealth's 1995 revisions to the Grievance Program reveals they were initiated and institutionalized in response to perceived threats to organizational trust, fairness, and legitimacy. First, the management resolution phase of the grievance process was revised to remove State agencies from

making final determinations on issues of grievability. Second, the management resolution phase was revised to expand employee grievance rights to previously protected management prerogative issues. Finally, the hearing phase was revised to mandate the use of neutral, third-party arbiters at the formal hearing stage of the grievance process for all grievance issues.

Most notably, the Commonwealth's adoption of the 1995 revisions closely mirrors Sitkin and Bies' (1994) view "that organizations will respond to threats to legitimacy with increased use of legalistic features and the decreased use of nonlegalistic sources of institutional legitimacy" (22). In this context the revisions expand and institutionalize legalization--formal rules and procedures, adversarial relations, legalistic rhetoric, third-party arbiters, and an inordinate attention given to legal sanctions and criteria in decision making. But while legalization is frequently positive it can paradoxically undermine the very social goals it was designed to further (23-29).

Indeed, the revisions have had negative as well as positive organizational implications and tradeoffs. On the one hand, the revisions are positive as legal remedies for employees, providing an expanded source of voice, empowerment, and procedural fairness. For management, the revisions enhance organizational legitimacy by providing a positive, legal means to address all employee complaints and concerns, even those that infringe upon protected management rights. But on the other hand, the 1995 revisions have increased the use of legal rules and procedures and decreased the use of informal practices for resolving employee grievances--institutionalizing an adversarial legal

environment that discourages consensus building and problem-solving approaches.[172] In this way the legalization process is paradoxical. Thus, chapter 6 turns its attention to the paradoxical nature of legalization in the Commonwealth's Grievance Program.

[172]See Section 2.1-116.05 C of the Code of Virginia 1950, as amended in 1997, which makes it clear that employee complaints should be resolved informally, if possible, rather than through the formal grievance procedure (369). Using legal remedies to resolve employee complaints or concerns is expensive to the employee and management.

VI.

THE PARADOXICAL NATURE OF FORMAL INTERNAL DISPUTE RESOLUTION

Although rules bring order...sets of rules are potentially rich in conflict, contradiction, and ambiguity, and thus produce deviation as well as conformity, variability as well as standardization.

- James G. March and John P. Olsen, Rediscovering Institutions

Rules, like ideas, have consequences. When there is a mismatch between legal rules and bureaucratic realities, the rules get subverted.

- James Q. Wilson, Bureaucracy

The Commonwealth of Virginia has persistently responded to threats to the legitimacy of its Grievance Program by formally expanding and institutionalizing legal structures, rules, and processes. But while legalization may enhance the efficiency, effectiveness, fairness, or legitimacy of the Program, in practice it frequently obstructs the achievement of these goals and dominates managerial attention at the expense of the

long-term health of the organization (Sitkin and Bies, 1994, 28).[173] Simply stated, legalization can have unintended consequences. Thus, the purpose of the chapter is to explore the dynamics of legalization in the Program with a watchful eye toward its paradoxical nature. Toward that goal the chapter employs Sitkin and Bies' (1994) paradoxes of legalization as conceptual tools to investigate how the legal environment of complex, public organizations serve to transform social processes for resolving problems and disputes.

The chapter is divided into two parts.[174] The first reintroduces Sitkin and Bies' formalization and rationality paradoxes and examines the paradoxical nature of legal formality and rational decision making in the Commonwealth's Grievance Program. Similarly, part two revisits Sitkin and Bies' power and justice paradoxes and explores the paradoxical nature of formal authority and workplace justice. In sum the chapter describes how complex, public organizations are transformed by their legal environments.

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[173]For example, responding to institutional concerns about organizational legitimacy with the increased use of legal processes and procedures may positively increase employee perceptions of workplace justice. But, on the other hand, legalization in the form of procedural due process can be overly burdensome for the organization in terms of staff time and costs.

[174]Although Sitkin and Bies do not directly link the paradoxes of legalization, they can be grouped together for presentation purposes in a number of ways. Even so, there is considerable overlap. For example, legalizing internal dispute resolution (formalization) implies that the organization relies on law-like procedures in resolving grievances (rationality). But relying on legal-rational decision making may also affect the use of formal authority (power) and, consequently, workplace justice.

Part I

Legal Formality and The Formalization Paradox

Sitkin and Bies' suggest that formalization paradoxes result, on the one hand, from adopting legalistic approaches as a means of institutionalizing informal practices that may have been particularly successful (30-31). On the other hand, however, formalizing a successful practice may remove the sense of intimacy, or interpersonal responsibility that was the cornerstone of its success (Ibid). For example, formalizing IDR to enhance reliability and trust through the use of legitimate, law-like procedural safeguards may create an adversarial legal climate that undermines the informal and valued trust that managers share with their subordinates by emphasizing legal over social processes. In essence Sitkin and Bies' formalization paradox affords a new lens through which to explore the dynamics of legalization in the Commonwealth's Grievance Program. Hence, the chapter begins with an examination of how the organization's legal environment affects the supervisors' role in the formal grievance process.

The Supervisors' Role

As previously noted, the Grievance Program is inherently formal, complex, and legalistic--mimicking judicially legitimate rules, processes and procedures that constitute its legal environment. On the one hand, the *Code* and the formal grievance procedure

require that all employee complaints, problems, or concerns be resolved at the lowest possible management level--the immediate supervisor.[175] The purpose is to resolve employee grievances informally, if possible, without resorting to more expensive, time consuming, legal processes required by the formal grievance procedure. Here informal dispute resolution between the aggrieved employee and the immediate supervisor is based on intimacy and interpersonal responsibility--shared trust. An employee with many years of grievance experience reflects:

> [I]f people would just stop and talk to people when they've got a problem. I know a lot of time I have a little problem simply because a [supervisor] wouldn't stop and talk to me for just two or three minutes. It blew up into something real big and I said well damn him I will file a grievance, all right. People need instead of being boss and employee, which we all know we are, he is the boss--we are the employees, people need to be people toward one another. I am not talking about anything perfect because everything is not completely perfect, but at least make some progress in it. We need to take a time to sit down and listen to the employees for a few minutes anyway, really. If you don't have time today, make an appointment for tomorrow.

But contrary to the policy's intent, many supervisors are not permitted to resolve employee grievances at the first step of the management resolution process.[176] A seasoned agency HRM director elaborates:

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[175]See Section 2.1-116.05 C, Code of Virginia 1950, as amended 1995, 369, and the Employee Grievance Procedure (DERC, 1997, 2).

[176]This does not infer that all supervisors must coordinate every grievance before taking action. However, most agencies require that immediate supervisors coordinate their grievance actions with higher levels of management or their HRM department before an official response can be made to the aggrieved employee.

> Well I think there is a group of employees that would say that...you are wasting your time at the first management step. It is a question of how responsive that first-line supervisor may be. It is a difficult issue truthfully because you don't want to take away responsibilities from the first-line supervisor, you want them in a position where they are recognized and can do something. On the other hand, there are many issues that they cannot fix and our approach has been that it is not permissible for a supervisor to say `I can't do that, the department head did that and I can't do anything about it.' So we have...said that you need to check your response with someone, and we have put those kind of parameters. But we have tried to do it in a positive way to keep them in the line of communication with their employees and hopefully to show that they have some responsibility--but at the same time not let them get carried away and do something that negatively impacts the organization, and that is a tough row to hoe.

Thus, while immediate supervisors are empowered by the grievance procedure to respond directly to their subordinates' grievances, higher levels of management won't always let them. Most notably, "[i]n the state, management maintains power and decisions from above on...grievances" (Hearing Officer). This is particularly alarming as supervisors initiate disciplinary actions that account for the lion's share of all grievance actions.[177] Furthermore, "[a]ll supervisors are required to be formally trained in the State's Grievance Program and....formally rated in their performance based on employee relations" (DERC Counselor).[178]

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[177]By statute adverse (disciplinary) actions automatically qualify for a grievance hearing (Code of Virginia 1950, as amended 1995, Section 2.1-116.05 (i)). In FY 95 disciplinary issues were 54 percent of all grievances (DERC Annual Report, 1995, 3). In FY 96, after the most recent revisions to the grievance procedure, 51 percent were related to disciplinary actions. Further, when averaged for FY 92 through FY 96, disciplinary issues accounted for 60 percent of all grievance issues filed (DERC Annual Report, 1996, 4).

[178]See Section 2.1-116.04, nos. 1 and 5, Code of Virginia 1950, as amended 1995, 368.

Nevertheless, many supervisors appreciate the opportunity to coordinate their grievance actions with upper levels of management because "more and more supervisors view grievances [not only] as a challenge to management, [but] as a personal challenge" (Ibid). A manager from a large State agency whose responsibilities include training supervisors in grievance handling offers some insight:

> The instant reaction of supervisors [to a grievance] is defensive--retreat or be aggressive. Few supervisors practice the ideal of talking and listening. Supervisors feel threatened and fear what will happen to them. They are scared to death of their employees and terrified of their bosses.

Many supervisors feel caught between aggrieved employees and upper levels of management when attempting to resolve grievances. On the one hand, they are trained by management and empowered by the formal grievance procedure. But on the other hand, many times upper management intercedes and controls their grievance actions and responses in an effort to develop the best legal strategy for defending the organization against possible litigation. This is necessary, one DERC counselor advises, because "[m]anagement relies on the representations made by the supervisors involved [and] there have been problems of truthfulness and honesty." For instance, one aggrieved rank-in-file employee who won reinstatement to his job after being terminated for cause intimates: "The supervisor used anything to push the issue out of control. He was lying...[and] his testimony changed."

Human Resource Management's Role

Another salient reason why supervisors are circumvented in the grievance process lay in the fact that agency human resource management (HRM) officials formally advise management during the resolution process.[179] As one hearing officer reminds us, HRM officials many times first advised the supervisors on the disciplinary and other personnel actions that resulted in the grievances.[180] They are vested in defending their professional advice as well as management's actions. Therefore, their philosophy of and role in the grievance process is crucial, if not critical, to its success.

Although one DERC counselor reports that "a lot of HRM people like the new grievance system," many agency HRM officials express a different view. For example, one who is experienced in grievance handling at the agency level admits that "[a]s a human resource manager I feel like I'm sitting on a fence--advising employees and representing management. Employees would be better off with another party to advise them." Another, an agency HRM director, reveals that "[h]uman resource management

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[179]The Department of Employee Relations Counselors (DERC) also advises supervisors and management in the agencies. However, there is a critical distinction. While HRM officials may advise agencies how to prepare and win a grievance, DERC's official role is to advise management about the procedural aspects and components of the formal grievance process.

[180]For example, of the 1158 formal grievances filed during 1996, the majority (51 percent) involved challenges to disciplinary actions and 14 percent involved leave issues. HRM officials are responsible for advising management on taking action(s) in both management areas (DERC Annual Report, 1996,4).

is taking the role of investigating grievances in-depth during the management review steps...because of the outside legal environment and possible litigation." In concurring, a very experienced agency employee relations manager echoes the view of most of the HRM officials interviewed: "The new grievance procedure can be overly legalistic. It is curious how legalistic and unworkable the overall system is." Broadly stated, the majority of HRM officials understand their role in the grievance process as one of protecting management from adverse grievance decisions at the hearing phase and developing a legal strategy for possible litigation in the courts.

However, a DERC official cautions that "[b]ased on the number of grievances, the process is a lower priority for HRM officers than other things." Recent grievance data tends to support this contention. Based on the size of the Commonwealth's work force, approximately 71,000 classified employees, the overall number of grievances filed in 1996 is relatively low--1158.[181] Of those, 780 or 67 percent were resolved in the management resolution phase (DERC Annual Report, 1996, 5).[182] Nonetheless, agency

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[181]Ibid, 6. Of the 93 state agencies, grievances were reported in only 46 during 1996. In addition, during that year 54 percent of all grievances (1158) arose from two agencies: The Department of Corrections and the Department of Mental Health, Mental Retardation and Substance Abuse.

[182]The number of formal grievances in the Commonwealth rose from 283 in FY 79 to 1324 in FY 95--an increase of more than 350 percent. Of the 1324 grievances concluded in the FY 95, 82 percent were resolved prior to a panel hearing. Only 240 or 18 percent progressed to a panel hearing (DERC Annual Report, 1995, 2-3). Beginning in 1996 DERC data analysis switched from fiscal to calendar years. In 1996 more grievances were resolved in the management resolution phase of the process than ever before. Of the 780 or 67 percent resolved prior to a hearing, 46 percent resulted in full or partial relief to the aggrieved employee from management (DERC Annual

HRM's involvement in and formal review of grievances for possible litigation is perceived by many employees as interfering with their supervisors' ability to informally resolve disputes: "My department head went to the human resource management office first with every [grievance] issue I raised before he would talk to me about them. He always does that." Another aggrieved employee who is a member of the Virginia Alliance of State Employees (VASE) complains that his

> agency director never sees issues of grievability...he never sees it. He never sees them, he never reads them unless he just happens one day to walk in and pick up a couple of them and say I will just spot check them, you know. Normally he never sees them. HRM who is his designee answers every one of them.

The employee's HRM director corroborates his statement and reveals that

> [t]echnically the Director signs it [issues of grievability]. The person who works for me writes the answer, then I will review them--in fact we [HRM] write the response. He signs it. This Director, I don't even know whether he reads what we send him frankly on the normal case. The last director would read every word of it...

Reflecting a similar concern, another aggrieved employee from a different agency recalls: "The central HRM Office would not meet with me. I received a letter from the HRM Office that the [grievance] issue was not grievable."

Indeed, agency HRM officers are charged with the responsibility of coordinating the grievance process within respective agencies to ensure equity, fairness, and compliance. However, many employees perceive HRM's role as one of policing--telling first-line supervisors what to do and say from a legal, technical perspective.

Report, 1996, 5).

Furthermore, as one hearing officer informs: "HRM officers in agencies don't handle the grievance process very well in communicating with low-level employees." This is supported by one aggrieved employee who discloses that he "talked to DERC who said they could advise me on my grievance--give me options and explain the procedure--[but] I went to the agency central HRM office and got different answers." Yet another employee from a different agency notes: "I went to the HRM Office to file a grievance and they sent me to DERC." Commenting on HRM's impersonal approach, one aggrieved employee complains: "No one in the [HRM] office ever explained the grievance process or procedure. They handed me the grievance booklet--that was all. I got most of my help from a DERC person."

But a DERC counselor notes that HRM only pursues legitimate cases to the grievance hearing phase of the process: "Of those grievances going to a hearing, the majority result in a decision for management. This is because they [agency HRM] are only letting good cases go forward."[183] However, according to a high ranking line-manager, developing a good grievance case requires agency management to circumvent immediate supervisors' formal authority:

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[183]Of the grievances that went to a hearing in 1996, hearing officers upheld the agency's action in 55 percent of the decisions and employees were granted full or partial relief in 45 percent of the decisions. However, the results vary according to grievance issue and mitigating circumstances. For grievances involving discipline and termination, hearing officers upheld the agencies' actions more than in grievances concerning other types of issues. But for other grievance issues, only 43 percent of the hearing decisions held in favor of the agency, and 57 percent of the decisions awarded employees full or partial relief (DERC Annual Report, 1996, 6).

> The grievance process is an adversarial relationship rather than a win-win situation in the organization. The grievance level past the first-line supervisors is the most important...some first-line supervisors have written on grievance forms: `I have no authority to change that policy, etc.' Many times they don't know all the facts. Hearing officers use documentation [facts] in making decisions...and its hard to brief every person individually on new policies...

In other words, hearing officers "are bound to the enforcement of State law and policy. Their decisions are based on written rules and policies and facts of whether they are followed" (HR Manager).[184] Notwithstanding mitigating circumstances, "they are looking for a [legal], technical interpretation of the policy [at issue]" (HRM Supervisor). Consequently, in anticipation of the hearing phase, management emphasizes legal-rational criteria and reasoning in resolving employees' grievances, thereby obviating immediate supervisors' authority to exercise informal, problem-solving approaches. A DERC counselor explains: "Once management determines that a grievance is qualified to progress to the formal hearing phase it feels that it must win" to defend its use of administrative discretion (DERC counselor).[185] To that end it focuses on what is legally

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[184]The hearing officers' written decisions must contain findings of fact and the basis for those findings. The decision is final and binding if consistent with law and policy (Employee Grievance Procedure, 1995, 3-4). For grievances initiated by State employees, the Director of the Department of Personnel and Training determines whether the decision is consistent with State policy (Section 2.1-116-07, Code of Virginia 1950, as amended 1995, 373). However, there is no formal system for establishing precedents based on hearing officers' decisions. Hearing officers can rule differently based on the same evidence and facts--which creates problems relative to distributive justice.

[185]In addition to issues of workplace justice and organizational legitimacy, management feels it must win grievances at the formal hearing phase because it anticipates that, after all administrative remedies are exhausted by the employee, the issue giving rise to the grievance will be taken to the courts--the organization's external legal

defensible; documenting its actions and developing a legal strategy (Ibid).[186] As a result, HRM's administration of the formal grievance process--to protect the organization from adverse hearing decisions and possible litigation in the courts--is perceived by many employees as interfering with their supervisors' ability to informally resolve workplace disputes without resorting to formal, adversarial legal processes and procedures. Thus, intimately related to the paradoxical nature of formalization is the use of legitimate, law-like procedures and criteria in resolving employees' grievances.

Legal Criteria in Decision Making and The Rationality Paradox

Sitkin and Bies maintain that rationality paradoxes occur when managers rely on legal reasoning "as the epitome of rationality" and are "drawn to the use of legalistic

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environment. Therefore, management's "must-win attitude" emanates, in part, from a fear of litigation in the courts.

[186]This applies to grievance issues that management determines automatically qualify for a formal hearing by a neutral, third-party arbiter in accordance with Section 2.1-116 et seq. Code of Virginia 1950, as amended, 1995. Not all grievance issues can proceed from the management resolution to the hearing phase. Those that infringe upon codified management prerogatives are not "grievable" and can not proceed to a formal hearing. In those instances, management complies with the procedural components of the management resolution phase of the grievance process knowing that the issue will never be decided by a third-party hearing officer. Thus, management is not as concerned with documenting its actions or building a legal strategy.

procedures and criteria in decision making" (30).[187] Legalization provides them with an apparently authoritative basis and justification for making managerial decisions on the one hand, but on the other it undermines the rationality of organizational actions by "obviating the flexibility of [their] positional authority" (Ibid). Simply stated, administrative discretion to respond to organizational change or crisis may be limited by "an inflexible, procedural authority rooted in formal rules and an obsessive consistency in applying those rules" (Ibid). Thus, as managerial decisions increasingly become dominated by what is legally defensible, they slowly shift concern away from that which makes organizational sense (24). In this respect Sitkin and Bies note that "some attempts to minimize conflict or to reduce legal liability to `protect' the organization may actually contribute to a growing adversarial climate in which fragile organizational relations are undermined anyway" (31). An examination of the legal dynamics inherent in the formal hearing process illuminates why management uses legal-rational decision criteria to reduce liability and protect the organization when attempting to resolve employees' grievances.

Mimicking Judicially Legitimate Process and Procedure

Reflecting back on earlier discussions of the Commonwealth's Employee Grievance Procedure, qualified issues may progress to the hearing phase where they are

[187]The authors equate the use of legalistic procedures and criteria in decision making to "an emphasis on strict rule adherence" (30).

adjudicated by a neutral, third-party arbiter or hearing officer who renders a final, legally binding decision. Here the adversarial relationship between the aggrieved employee and management is paramount because "although it is an administrative hearing, [in practice] it is a legal process" (HR Manager). For example, recall from chapter four that *Section 2.1-116.07 B, Code of Virginia 1950, as amended 1995*, authorizes hearing officers to (1) hold conferences for the settlement or simplification of the issues; (2) dispose of procedural requests; (3) issue orders requiring testimony or the production of evidence; (4) administer oaths and affirmations; (5) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examinations; (6) rule upon offers of proof; (7) oversee an accurate verbatim recording of the evidence; (8) order appropriate remedies and, finally, (9) take other actions as necessary or appropriate (372-373). In short, hearing officers have broad statutory authority to conduct formal hearings and render legally binding decisions.[188] As a consequence the administrative grievance hearing process, although intended to be informal, paradoxically mimics formal legal proceedings. This is due in large part to the adjudicative power vested in hearing officers by the *Code*, but the adversarial nature of grievance resolution generally and the fact that hearing officers are attorneys trained in formal legal process

[188]It is the responsibility of the hearing officer to hear the evidence de novo (Handbook for Hearing Officers, 1995, 1). A hearing de novo requires that the matter be tried "anew the same as if it had not been heard before and as if no decision had been previously rendered" (Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn.: West, 1990), 721.

and procedure are contributing determinants.[189]

Another tangential reason lay in the fact that, as one DERC counselor informs, "administrative law is not a required law school course." Therefore, many hearing officers have no formal legal training in how to conduct administrative hearings.[190] Viewed in the proper light, it is extremely difficult for some hearing officers to "strike a balance between the hearing as an informal process and having structure at a hearing" (Paralegal, Attorney General's Office). A high-level line manager trained to represent management in grievance cases at formal hearings observes:

> HRM misjudged the legal formality of the new grievance system hearing process...[HRM] told me that it is no big deal, just an informal process. But the hearing officer ran the hearing like a trial. He told me to rephrase my questions and when I couldn't, he told me to just move on. The HRM Office didn't know that the grievant's attorney would be at the hearing.

Expressing a similar concern about the legal-formality of the hearing process, another management representative from the same agency confides that "the hearing is very much like a court case. The grievant's attorney used legal strategies like in a court room. He badgered witnesses and asked trick questions." In corroborating these

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[189]See Section 9-6.14:14.1 et seq. Code of Virginia 1950, as amended 1995, 29.

[190]Pursuant to the Code all hearing officers are required to have "prior experience with administrative hearings or knowledge of administrative law" (Hearing Officer System Rules of Administration, n.d., 1). However, this does not require formal legal training in administrative law. The only formal training required as a minimum qualification to be eligible as a hearing officer is that the candidate complete one training program for administrative hearing officers sponsored by the Office of the Executive Secretary of the Virginia Supreme Court (Ibid).

statements, the agency's employee relations director advises that "[t]he legalization of the hearings can be intimidating. Agency representatives feel that they are not qualified to represent management against grievants' attorneys." Espousing a similar apprehension, a mid-level agency HRM official warns:

> [O]ur agency uses its managers [as agency advocates] who are then at a disadvantage against grievants' lawyers. It is a legal process. Lawyers against non-lawyers is a problem [for management]. The procedure fails by not specifying that lawyers will represent the agencies.

But a number of DERC counselors and HRM officials from various agencies disclose that the Attorney General's (AG) Office will not provide attorneys to represent State agencies in grievance hearings unless the issues are determined to be "high profile" due to heightened public interest or extensive legal liability. An agency HRM director complains: "The AG's Office is involved only when there will be a serious problem, such as in termination cases." Even then, in most situations paralegals from the AG's Office represent the agencies rather than attorneys.[191]

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[191]See Section 2.1-116 F, Code of Virginia 1950, as amended, 1997 Cumulative Supplement, which promulgates that "[t]he employee and the agency may be represented by legal counsel or lay advocate..." (69). For State agencies, Section 54.1-3904 restricts management's legal representation to that received from the Attorney General's Office. In the context of the grievance process, this means that State agencies can not hire an outside attorney or paralegal to represent them at the formal hearing without the approval of the AG's Office. However, it does not prevent individual agencies from defending themselves. To that end, some agencies have trained volunteers from within the organization to represent management. Significantly, prior to the 1995 revisions to the grievance process the AG's Office was mandated to represent agencies at the hearing phase only in termination cases. But with the 1995 revisions, the AG's Office is legally mandated to represent State agencies at all administrative grievance hearings. Due to limited staff and resources this generally consists of furnishing a paralegal to defend management.

Notwithstanding the agencies' preference for qualified attorneys, most favor the services of a paralegal over a management lay-advocate. But one experienced HRM official protests that "[t]he agency is at a disadvantage with paralegals when employees have an attorney. Agencies should hire a legal expert. Paralegals don't always understand the issues involved." In concurring, one hearing officer adds that "[p]aralegals are not so good. Some lay-representatives are better. The paralegals are adequately prepared, but I am not sure that they always understand the issues." "In addition," one agency employee relations director concedes, "some paralegals are intimidated by grievants' attorneys."

By comparison, however, some hearing officers maintain that "using management lay-advocates is a huge problem." One outspoken hearing officer elaborates: "I don't care about legal training, but the AG Office paralegals are good--well prepared and make professional presentations." Another complains: "It can be difficult to maintain a hearing with some lay-advocates. They think they're Perry Mason." But on this point there is little agreement and another hearing officer observes that "paralegals sometimes over-try their cases. I think they are under pressure to win." Still other hearing officers argue that attorneys are needed when complicated legal and technical issues are in question. But notably, a few caution that sometimes the lawyers are an impediment to a resolution because they have "a big ego and want to fight--they are intent on winning the game." One cautions that attorneys "object too much and are generally adversarial, sarcastic, and emotional." Yet another emphasizes that they "[m]ake the process longer and more

expensive because they always seem to challenge the hearing decision."

In contrast to the management resolution phase of the grievance process which relies on informal meetings between the aggrieved employee and management, third-party hearing officers conduct the grievance hearing phase as a formal, adversarial, legal process--hearing the facts de novo and rendering a final, legally binding decision. Therefore, management and aggrieved employees feel compelled to obtain attorneys to represent their respective interests, thereby paradoxically contributing to the legalization of the administrative hearing process.[192] For example, one mid-level manager who experienced the hearing process firsthand as a grievant regretfully reports: "I had a feeling that the hearing was going to be informal, but the hearing officer told me we were going to have a legal hearing. I didn't feel confident to represent myself. I felt that I needed an attorney and hired one." Reiterating this point, an employee from another agency acknowledges that "[t]he grievance procedure is easy to use initially--through the management steps, but I knew it would cost money for legal help if I had to go to a hearing or court." Noting that two-thirds of DERC's staff are attorneys, an employee relations counselor attempts to clarify:

> Hearing officers are attorneys. Employees feel that the hearing process is a legal process and hire attorneys in order to get the playing field level; nobody is explaining this is not a legal hearing--it is an administrative

[192]Because agencies are obligated to execute the law and achieve their objectives they are interested parties to their own adjudication of grievances at the management resolution phase of the grievance process. Therefore, they are not neutral parties to the disputes at issue. But at the hearing phase agencies must defend their use of power and administrative discretion to a neutral, third-party arbiter.

hearing.

But in practice the administrative hearing process is not unlike civil court proceedings (Bonfield and Asimow, 1989, 10). An inspection of DERC's Handbook for Hearing Officers (1995, 1-7) and Tips for a Successful Hearing (1997, 1-6) illustrates.

The Hearing Officers' Role

Section 2.1-116, No. 3, Code of Virginia 1950, as amended 1995, charges DERC with the responsibility of promulgating "rules for conducting [administrative] grievance hearings" (367). Thus, DERC provides guidance to hearing officers in the form of a Handbook for Hearing Officers that is designed to be used in conjunction with the Employee Grievance Procedure.[193] The *Handbook* expounds upon the formal authority statutorily vested in hearing officers by the *Code* and provides procedural guidance as to how best to conduct the grievance hearing process. A brief review of the *Handbook* exposes how mimicking legal process and procedure institutionalizes legalization while deinstitutionalizing interpersonal trust. It states in part that

> [h]earing officers are encouraged to hold a *prehearing conference* [emphasis added]...to prepare the parties for the *presentation of evidence* [emphasis added] at the hearing. The ultimate goal...is to have the time in the hearing devoted to the facts in dispute and not on *evidentiary challenges* [emphasis added] which could have been resolved in advance or on facts which are not in dispute. During the prehearing conference,

[193]The Employee Grievance Procedure and the Handbook for Hearing Officers espouse the same processes and procedures.

> the hearing officer may assist the parties by: (1) Explaining procedures which will be followed at the hearing, the dates for submissions, and the roles of the parties, their representatives, and the hearing officer; (2) Clarifying the issue(s) qualified for the hearing; (3) *Ruling on preliminary procedural and evidentiary requests* [emphasis added]; (4) Assisting the parties in *agreeing to stipulations of fact* [emphasis added]; (5) *Issuing, upon the request of the parties, orders for the appearance of witnesses and production of documents* [emphasis added]; (6) Establishing the date for the *exchange of witness lists and documents and ruling on any objections to the lists* [emphasis added]; (7) Explaining the *standard of proof and order of presentation* [emphasis added] for each party; and (8) Affording the parties the opportunity, upon request, to review the grievance record for completeness and accuracy (1-2).

Hearing officers are encouraged by the *Code* to hold a prehearing conference to narrow the issues to be adjudicated and establish the legal parameters of the process.

The *Handbook* also mandates that "[t]he hearing must be recorded verbatim," and entrusts hearing officers with the responsibility of:

> (1) Conducting the hearing in an orderly, fair, and equitable fashion, pursuant to the provisions of the Employee Grievance Procedure; (2) Contacting the Director of DERC for assistance on procedural or compliance issues raised by the parties; (3) Marking the exhibits received into evidence and ensuring that they are made a part of the grievance record; (4) Recording the decision...; (5) Responding to requests for reopening the hearing or reconsideration of the decision; and (6) Revising the decision to conform to written policy if directed to do so by the Department of Personnel and Training (DPT) (3).

In sum, the *Code* and DERC's Employee Grievance Procedure and Handbook for Hearing Officers empower and require hearing officers to conduct administrative grievance hearings in accordance with formal, complex, legal processes and procedures that mimic judicially legitimate proceedings.

Nevertheless, there are three notable exceptions. First, because grievances focus on personnel matters that affect the privacy of the individuals involved, as well as agencies' practices, grievance hearings are closed to the public to protect the privacy of all parties concerned (2). Second, hearing officers may not subpoena witnesses. They may "issue an order for witnesses to appear at the hearing, [but] neither the agency nor the hearing officer can compel a witness to testify" (Ibid). Furthermore, aggrieved employees and management are not permitted to subpoena witnesses and "some witnesses have refused to testify" (Hearing Officer). Finally, in contrast to formal court proceedings, strict rules of evidence do not apply. Alternatively, hearing officers may consider any evidence they determine germane to the dispute at issue, including hearsay evidence. This means that grievants and agency management must prove their claims by a preponderance of the evidence--that which is more convincing. To assist them in this endeavor, DERC formally outlines the administrative hearing process and offers direction to aggrieved employees and agency managers on how best to prepare and present their side of a grievance. A review of DERC's Tips for a Successful Hearing illuminates the legal complexities of the formal hearing process.

The Grievance Advocates' Role

DERC instructs that the formal hearing process consists of three basic stages: (1) Preparation for and making an opening statement; (2) Presenting witnesses and

evidence; and, finally, (3) Making a closing statement. First, the preparation and opening statement stage consists of reviewing all grievance documentation, focusing on what witnesses will testify to, and, to the extent possible, discovering what evidence the other party will present. DERC encourages grievance advocates to request the assigned hearing officer to hold a prehearing conference so that everyone agrees on what issues were qualified for the hearing; orders for the release of grievance documentation and the appearance of witnesses can be requested; and a date, time, and place for the hearing can be set (Tips for a Successful Hearing, 1-2).[194]

Although some hearing officers report that they do not use prehearing conferences unless requested, many reveal that they "give each party to a grievance an opportunity for a prehearing conference." For example, one judicially proclaims: "I have a strong letter I send to each party...which requires a prehearing conference and the exchange of documentation and exhibits prior to the hearing." However, an experienced paralegal from the AG's Office reveals that "[p]rehearing conferences are used only about twenty percent of the time--its good to narrow issues. But we don't use them much...because it gives the other party a chance to ask that documents be produced earlier."

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[194]The hearing must be held and a written decision issued no later than thirty calendar days after the appointment of the hearing officer. However, this time limit can be extended by the showing of good cause to the hearing officer. The hearing must be held in the locality where the employee is or has been employed. The agency is responsible for arranging for a place to hold the hearing unless the hearing officer chooses to make the arrangements. It is the responsibility of the hearing officer to notify the parties to the grievance, either in writing or at the prehearing conference, of the date, time, and place of the hearing (Employee Grievance Procedure, 1995, 9).

In fact, management controls all the documentation in the grievance process and "[g]rievants have trouble getting information and documentation from management which relates to their hearing" (Hearing Officer).[195] For instance, one agency HRM official stresses that "[g]rievants shouldn't have the same rights to documentation that management has in a grievance. It's management's documentation." This legal position is extremely troublesome to many grievants' advocates and attorneys because "[i]f you don't officially enter documents into evidence while talking about them [in the hearing], they [can't] be considered [as evidence] (Agency Lay-Advocate). Furthermore, an employee relations director notes that hearing officers are requesting more and more information and documentation for their personal review prior to conducting hearings. Therefore, as a legal strategy management evades prehearing conferences as one way to avert providing hearing officers with grievance related documentation prior to it being officially entered into evidence in the formal hearing.

The preparation stage also includes consideration of what order the opening statement will be made. In grievances involving discipline or termination the agency is required to make the first opening statement because it "has the burden of proving that the employee's conduct was improper and that the disciplinary action was appropriate

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[195]Pursuant to Section 2.1-342 B 3 of the Virginia Freedom of Information Act and Section 2.1-382 of the Virginia Privacy Act of 1976, all information relating to the actions grieved shall be made available to the employee by the agency, except as otherwise provided by law. Information pertaining to other employees that is relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the complaint or dispute (Section 2.1-116.05 F, Code of Virginia 1950, as amended 1997, 66).

under the circumstances" (Tips for a Successful Hearing, 3). For other grievance issues the grievant is required to make the first opening statement. The opening statement, although not evidence, is "a road map for the hearing officer" (Ibid). Thus, it should summarize the facts that will be presented; tell why your view of the facts is more reasonable; point out anticipated weaknesses in the other party's facts; and state what relief is sought and why it is fair and appropriate (2-3).

The next stage of the hearing process involves presenting witnesses and evidence (2). Although strict rules of evidence do not apply, DERC recommends the use of the best possible evidence because "[s]ome evidence is more convincing" (Ibid). DERC differentiates:

> Evidence must be relevant and material--proving an important fact that has a connection to an issue that was qualified for the hearing. Evidence must be reliable and trustworthy; some evidence is more so than others. The testimony of any eyewitness who was present when something happened is better than the testimony of a person who only repeats the information heard from the eyewitness. The testimony of a witness who can be cross-examined is better than the written statement of that witness (4-5).

Simply put, hearing officers may consider any evidence and give it the proper weight it deserves. But a hearing officer emphasizes the significance of reliable evidence: "Context is important in a hearing decision. I have to put [evidence] into perspective. There is a great lack of knowledge of [agency] operating procedures by hearing officers." Hence, hearing officers must rely upon the parties to the grievance to provide them with enough reliable evidence to make an appropriate decision. But the fact that evidence has been accepted by the hearing officer does not mean that it is persuasive (Ibid). An

experienced hearing officer elaborates: "Sometimes the written record is different than what I am told [in the hearing]. I use the written record."

Presenting evidence consists of conducting direct examinations of witnesses, handling objections to evidence made by the opposing party, and conducting cross-examinations of the other party's witnesses. First, in preparing to conduct direct examinations, DERC suggests that it is important to decide how the story will be told--which witnesses will go first. Once this has been decided, a list of appropriate questions should be prepared. DERC stresses that each party should "[f]amiliarize the witnesses with the grievance--[t]he who, what, when, where, how and why of the story can only be told by witnesses" (Tips for a Successful Hearing, 2). Hence, witnesses should be allowed to "review any exhibits which they will be discussing" (Ibid). However, DERC cautions that witnesses should testify only to "facts; the demands of the work; or how policies or procedures are applied" (4). To facilitate the process questions should be simple and direct. As a procedural matter witnesses should also be used to present nontestimonial evidence "such as written documents or records, photographs, diagrams, or tangible objects" (Ibid). In this respect DERC recommends that if the opposing party objects to the presentation of any evidence the response should state that "the rules of evidence do not apply and the evidence is relevant because it proves an important fact related to an issue qualified or relief sought" (Ibid).

After completion of each party's direct examination of witnesses and proffer of evidence, the opposing party has the opportunity to cross-examine. Cross-examination

consists of asking the other party's witnesses questions to bring out omitted information or to show why the testimony is not reliable. But cross-examinations should be limited and prudence should be observed--"every witness does not have to be cross-examined" (5). In short, one must not try to discredit every opposing witness lest he lose his own credibility.

Finally, the last stage in the hearing process is the closing statement. Its purpose is to put everything in place and bring out all the points of evidence together into a simple, understandable picture for the hearing officer (Ibid). Procedurally, grievance advocates have the opportunity to make a closing statement after all witnesses have testified and been cross-examined. DERC urges that it be "adapted to the evidence admitted at the hearing" (Ibid). In this legal context each advocate should emphasize the strengths of its evidence and the weaknesses of the other party's case, as well as "[t]he insignificance of the weaknesses of [its own] case, if any" (Ibid). The closing statement should also restate the grievance relief sought, keeping in mind that the grievance procedure limits the type of relief that may be granted by a hearing officer (5).[196]

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[196]The hearing officer has the authority to uphold or reverse the action which is the basis for the grievance or, in appropriate circumstances, to modify the action. Otherwise, the scope of relief available through the grievance procedure is limited. For example, hearing officers have no authority to transfer or demote an employee, however, a decision can include a recommendation to that effect. The concerned agency would not be compelled to officially act upon the recommendation, but it can choose to do so in good faith (Handbook for Hearing Officers, 1995, 4). If a policy was unfairly applied or misapplied, the hearing officer can direct the agency to redo the action from the point at which it became tainted (Employee Grievance Procedure, 1995, 11).

Conclusion

Sitkin and Bies (1994) suggest that because legal reasoning is held up as the epitome of rationality managers are drawn to the use of legalistic procedures and criteria in decision making (30). But an inflexible, procedural authority rooted in formal rules and legal criteria may undermine the rationality of organizational actions by placing authority for IDR decisions in the previously specified rule or procedure, thus obviating the flexibility of supervisors' positional authority (Ibid). Thus, as managerial decisions are increasingly dominated by what is legally defensible, they slowly shift concern away from that which makes organizational sense (24). In other words, attempts to minimize conflict or to reduce legal liability to protect the organization may contribute to an adversarial legal environment that undermines interpersonal responsibility and organizational trust.

An examination of the dynamics of the administrative grievance hearing process illustrates that in practice it mimics civil court proceedings that rely on legalistic procedures and criteria in decision making. This is due in part to statutorily defined procedural guidelines promulgated by the *Code* as well as DERC in its Employee Grievance Procedure and Handbook for Hearing Officers. But the adversarial nature of IDR and the qualification requirement that hearing officers must be attorneys trained in legal process and procedure contribute to the legalization of the hearing process. As a consequence agency management is drawn to the use of legal-rational reasoning, criteria, and procedures in resolving employees' grievances at the management resolution phase

of the grievance process by focusing on what is legally defensible; documenting its actions and developing a legal strategy to defend its use of administrative discretion at the hearing phase.

Agency HRM officials are the organizational gatekeepers in the process--advising agency management and immediate supervisors what to do and say from a legal, technical perspective. They understand their role as one of defending management's use of administrative discretion and protecting it from hearing officers' adverse decisions and possible litigation in the courts. But broadly stated, this requires agency management to circumvent immediate supervisors, thereby obviating their positional authority to resolve grievances informally. Thus on the one hand management's focus on legal-rational criteria provides management with an apparently authoritative basis and justification for making IDR decisions. But on the other, attempts to reduce legal liability to protect the organization contribute to an adversarial legal climate that shifts concern away from informal consensus-building and problem-solving processes based on intimacy and shared responsibility or trust. As a result many aggrieved employees question the role of HRM and immediate supervisors in the formal grievance process. But more fundamentally, they challenge management's use of formal authority and commitment to issues of workplace justice.

Part II

Formal Authority, Administrative Discretion and The Power Paradox

Sitkin and Bies emphasize that "[o]ne of the primary motivations for utilizing legalistic approaches is to place constraints on the arbitrary use of power by those in positions of formal authority" (29). However, the power paradox derives from the misuse of official power. On the one hand, formal, legal authority is designed to restrict administrative discretion and ensure justice in organizations. But on the other hand, there is a great amount of latitude that can be used by those in official positions of power to cover and legitimize their actions. In this respect administrators can use codified law, administrative policies and procedures, and other legal authority, such as formal grievance procedures, to justify their actions. This is accomplished by adhering to proper procedure to "cleanse their questionable actions and ward off the threat of perceived illegitimacy" (Ibid). Indeed, "as a result of the skillful use of legalistic covers, a common outcome of legalization is that questionable actions taken by those in power are protected by the veneer of legal respectability" (Ibid). Thus, a reliance on legalistic criteria to remedy power inequities can actually serve to protect the status quo (29-30).

For example, public employees in the Commonwealth of Virginia are statutorily prohibited from grieving management prerogative issues such as work assignments, the establishment of wages, position classifications or work activity reasonably expected to

be a part of the job content.[197] Nevertheless, the *Code* allows employees to grieve the unfair application or misapplication of organizational policies and procedures related to protected management rights.[198] But when aggrieved employees raise such an issue management can cover and legitimize its actions by using its official authority and administrative discretion to reapply the tainted process, thereby making the dispute nongrievable. In this way public managers can use official, legal authority and administrative discretion to cover and legitimize their actions. A recruitment scenario reported by a seasoned HRM official illustrates the power paradox.

The Veneer of Legal Respectability

A State agency HRM office advertised a position vacancy that would be considered a promotional opportunity for many employees in the organization. Using its management prerogative power to fill vacancies, the agency set parameters for the recruitment process. It recruited in accordance with established administrative policies

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[197]These are only several of management's statutorily protected rights. Although the 1995 revisions to the formal grievance procedure allow employees to grieve any issue through the management resolution phase, Section 2.1-116 et seq. Code of Virginia 1950, as amended 1995, prohibits all management prerogative issues from being grieved to the formal hearing phase.

[198]See the Employee Grievance Procedure, 1997, 6. If reasonably supported by facts, complaints of discrimination, arbitrary or capricious performance evaluation, retaliation, and unfair application or misapplication of policies, procedures, rules, and regulations may be determined qualified for a formal hearing.

and procedures that required all applicants to submit a completed State application to the HRM office by five p.m. on a set date--a Friday. Because the agency's responsibilities extend across the Commonwealth geographically, applicants were required to submit their applications to the central HRM office located in Richmond, VA. Following the agency's procedure, an interested candidate asked his immediate supervisor who was traveling to Richmond several days prior to the recruitment deadline to drop off his completed application. In short, the supervisor did not and put it in the agency's mail system. Consequently, the employee's application did not arrive in the HRM Office until the Monday morning following the Friday afternoon cutoff date.

Meanwhile, because the agency was "hot to trot to fill the vacancy," it began screening applications as they were received and scheduled a number of interviews for final selection while the recruitment process was still in effect (HR Manager). But once the HRM office was made aware that the supervisor had agreed to be responsible for submitting the employee's application on time--but did not--a procedural compliance decision had to be made as to the status of the late application. A HR manager explains:

> [W]e made the decision that management had a responsibility when they said they were going to get that application in--that is an extension of us--management took that responsibility. And by that employee giving that application to the supervisor, the supervisor took the responsibility. Its not the employee's fault that the supervisor didn't do it--so we included it.

The applicant in question was subsequently interviewed, determined to be the best qualified candidate, and offered the promotional opportunity.[199] However, the candidate who placed second in the competitive interview process objected and grieved the selection based on the fact that management accepted the selected employee's application after the established submission deadline. He challenged the misapplication of the recruitment procedure, not the qualifications of the individual promoted or management's prerogative to fill vacancies in a certain manner.

Throughout the management resolution phase of the grievance process management sustained its use of administrative discretion and contended that it had complied with the recruitment procedure. But when the grievance was finally adjudicated by a neutral, third-party hearing officer, he rejected management's position and held that the selected candidate's application must be excluded. Although hearing officers do not have the authority to promote or demote employees, the decision would ultimately result in the promotion of the grievant because he was ranked number two in the selection process.

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[199]As reported to the researcher, it is unclear whether the applicant's superior qualifications played a significant part in management's decision to accept the application after the submission deadline.

To complicate matters the selected employee had been promoted and worked in the new position for several months during the grievance process. Thus, the legitimacy of the recruitment process was at stake. So rather than comply with the hearing officer's decision, management made a legal decision to exercise its formal authority to abort the initial recruitment process and initiate a new one. The HRM official responsible for that decision justifies:

> Of course I went through the roof [about the hearing officer's decision]. I got into it with [DERC] and I...said...the hearing officer's authority is to say this process--the hearing officer could not tell me to promote the other guy. [He] could say that from the point of contamination of the process you need to start over again. Now my solution to that was fine, I can abort a selection process at any time. There isn't any law that says that because I start to advertise for a job I have to fill the job. Management things change, anything can happen. So my solution was I'm going to abort the selection process and do it over again and get everyone...in the [candidate] pool.

The seasoned HR manager knew that if the recruitment process was reinitiated the employee who was first selected would still be the best qualified and, ultimately, be repromoted. In other words, HRM consciously decided to use its formal, legal authority to reapply the tainted recruitment process to cover and legitimize its actions--i.e., protect the status quo with the veneer of legal respectability.

However, DERC would not allow the agency to reinitiate the recruitment process and ruled that the agency must comply with the hearing officer's decision.[200] DERC's ruling was the direct result of the dispute being adjudicated at the hearing phase where the agency is legally bound to implement the hearing officer's decision. In retrospect, a DERC counselor and the agency's HR manager emphasize that if management had aborted and reinitiated the recruitment process when the aggrieved employee first raised the issue there would have been no dispute about the misapplication of policy or procedure. A senior DERC counselor explains: "If management does not comply with a policy they can go back and redo the process correctly, even if that results in the same decision that caused the dispute. Then there's not a noncompliance issue." But many aggrieved employees disagree with this legal interpretation and one complains that "[t]he State has a set of rules...they break...whenever they want to suit themselves." In concurring, an employee from a different agency adds: "The State has a set of rules, but when they want to break a rule they can get exceptions to it." A closer examination of management's skillful use of the grievance procedure to resolve employees' challenges to management prerogatives illuminates how management can manipulate the formal

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[200]Recall from chapter four that in accordance with Section 2.1-116.07, Code of Virginia 1950, as amended 1995, that the Director of Personnel and Training, not the Director of DERC, is charged with determining whether hearing officers' grievance decisions are consistent with State law and policy (373). In this case DERC is merely ensuring that the hearing officer's decision is implemented. Thus, in accordance with the Code, the HRM official should have challenged the hearing officer's decision with the Department of Personnel and Training (DPT). However, many informants in the study emphasize that DPT does not like to get involved in the grievance process and, therefore, relinquishes its authority to rule on policy issues to DERC.

grievance process to justify and cover its actions with the veneer of legal respectability.

Symbolic Justice and Legitimacy

As discussed in the last chapter, enabling legislation specifically mandates that employee complaints relating solely to management prerogatives "are not grievable and shall not proceed to a hearing" (372). Yet DERC interprets the *Code* to allow all issues to be grieved through the management resolution phase of the grievance process, although they may not qualify for a hearing (DERC Annual Report, 1996, 4). On the one hand, DERC's interpretation affords an expanded source of voice and empowerment to employees. In part it is intended to increase the legitimacy of the Grievance Program by providing a formal opportunity for aggrieved employees to "communicate with second step managers" (DERC Counselor). A rank-in-file employee and VASE member explains the significance of filing a written grievance on any issue with higher levels of management:

> With a written grievance you at least have a written issue. If you talk to someone or you try to work out something with management they are so busy they turn a deaf ear. I don't know, I think they are in a habit of it or something. Then you just take a grievance to them and write it out. Then you hand it to them and say here, I have a copy of this. I would like this to be executed. Then you get their attention--momentarily anyway.

Indeed, prior to the 1995 revisions to the grievance procedure "a lot of managers hid behind the issue of grievability and there was a lot of frustration on the part of employees" (Employee Relations Counselor). But on the other hand, DERC officials

admit that "the real purpose of allowing all grievances to be officially heard is to give upper management a chance to review its policies." An agency HRM official explains: "It is designed for better communication and explanation--issues need to be discussed with people." In this way permitting employees to grieve statutorily protected management rights through the internal review steps serves as a management tool for inculcating and evaluating organizational policies and procedures while symbolically enhancing organizational legitimacy through the use of judicially legitimate procedures.[201]

For instance, in the previous recruitment scenario the aggrieved employee challenged management's misapplication of its recruitment procedure because HRM accepted an application for promotion after the published submission deadline. There was no question that the issue was grievable to the hearing officer level of the grievance process as management admitted it had accepted the application late--a clear misapplication of policy that is statutorily grievable to the hearing phase. However, management could have averted the grievance from becoming eligible to be heard at the formal hearing phase by using its official power to correct its misapplication of the recruitment procedure.[202]

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[201]Here the use of judicially legitimate procedures refers to the procedural due process steps of the management resolution phase of the formal grievance procedure.

[202]See Section 2.1-116.06 C, Code of Virginia 1950, as amended, 1995 Replacement Volume 1, which mandates that complaints relating solely to the following are not grievable and may not be qualified for the hearing: The "means, methods, and personnel by which work activities are taken" or the "[h]iring, promotion, transfer, assignment, and retention of employees" (371-372).

Nonetheless, according to DERC's 1995 revisions to the Employee Grievance Procedure all disputes, even those statutorily defined as nongrievable, are grievable through the management resolution phase of the grievance process. But as reported above, throughout that phase management sustained its use of administrative discretion and rejected the aggrieved employee's argument that it misapplied the recruitment process--a very different resolution than that rendered by the hearing officer. Simply stated, allowing employees to challenge management prerogatives through the management resolution phase of the grievance process serves to empower them with voice. But because the *Code* prohibits such issues from advancing to the hearing phase where management's use of formal authority is subject to review by a neutral third-party, management has little impetus to overrule itself and find in favor of aggrieved employees. In this respect the management resolution phase of the formal grievance procedure functions primarily as a symbolic source of workplace justice and organizational legitimacy while protecting the status quo with the veneer of legal respectability.

Summary

Employees paradoxically have an expanded source of voice and empowerment to question management actions on the one hand, but on the other management knows that the *Code* protects its exclusive right to manage--prohibits grievances from progressing beyond the management resolution phase. Statutorily, any complaint that challenges codified management prerogatives is by law a moot grievance issue and may not advance

to the hearing phase for a neutral, third-party resolution. Thus, allowing employees to grieve management prerogative issues through the internal management resolution phase of the grievance process serves primarily as a form of symbolic, procedural workplace justice and legitimacy. A knowledgeable HRM director concedes: "[I]t gives employees a chance to express themselves and go through the management steps and let that be it."

In sum, management possesses the inherent aptitude, proclivity, and statutory authority to exercise legalistic covers to cleanse questionable actions and ward off the threat of perceived illegitimacy. It can use its official powers to mimic legal process and procedure to cover and legitimize its actions and maintain the status quo. In this context, although the grievance procedure is designed to restrict administrative discretion and ensure workplace justice, it can be used by those in positions of formal authority to cover and legitimize their actions with the veneer of legal respectability--resulting in a justice paradox.

Workplace Justice and The Justice Paradox

The justice paradox is intimately related to the formalization, rationality and power paradoxes. It derives from a reliance on legalistic reasoning and criteria at the expense of humanistic and social considerations. On the one hand, legalistic processes and procedures can protect managers and their organizations against litigation, as well as

promise equity and fair treatment to stakeholders and constituents. But on the other hand, legalization can undermine social goals of justice by fostering a superficial reliance on that which meets the letter over the spirit of the law (Sitkin and Bies, 1994, 31). In this sense the focus of organizational justice is on the fair procedure--adherence to formal, legal rules that mimic judicially legitimate process and procedure, not substantive justice--"fairness made good for particular litigants taking all of their circumstances into account" (Selznick, 1992, 198). In sum, the justice paradox derives from the inherent tension between procedural and substantive justice in complex, public organizations.

In the Commonwealth's Grievance Program the justice paradox is characterized by the tension between procedural fairness and the just outcome. For example, *Section 2.1-116.06 B of the Code of Virginia 1950, as amended 1995*, states that "[m]anagement shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response...shall be prompt, complete, and fair" (371). But contrary to this statutory mandate a seasoned agency human resource manager admits that "[t]here is not a lot of trust between management and employees and [therefore] no shared perspective on workplace justice." In other words, because management relies on legalistic reasoning, criteria and procedures in resolving employees' grievances, many aggrieved employees question management's commitment to substantive justice in the workplace. More precisely, they question the legitimacy of the Program.

The Legitimacy Question: Issues and Considerations

Several rank-in-file employees with previous grievance activity bemoan that "[i]n the grievance procedure everything is stacked against you--its their [management's] procedure. It forces the grievant to know the policy in question--or the arbitrary use of it." Another explains that "[t]he process is a burden on the employee...it is such a stringent process--the cards are stacked against you. It is so intimidating that it keeps some employees from grieving." Similarly, another employee notes that her "ultimate purpose was to go to court--I didn't think that the grievance procedure would resolve the issue." Notably, several experienced hearing officers concur and emphasize the "procedure is stacked in favor of management." But the following grievance scenario illustrates that supervisors and managers are subject to the same treatment:

> I filed a grievance...to the issue [of an incorrect leave balance] directly to my supervisor. He was very detached about it. I just wanted an apology [for my leave being calculated incorrectly]. He said there would be no apology by the clerk who made the mistake. I then took the written grievance to the second step level manager. He yelled at me and was mad that I even sent it to the second step. Finally, he said he'd try to arrange the required grievance meeting. But weather prevented the meeting and I agreed to extend the required time limit for the meeting to take place. That was February [more than a year ago]. I haven't heard a word since. It tells me how things go around here. The grievance has never again been mentioned [by my supervisor]. If it had been a more important issue to management they would have treated the grievance more seriously (Mid-Level Agency Manager).

This aggrieved manager appears to have lost faith in the legitimacy of the grievance process--and management. In a similar way a professional employee with more than thirty years of service with the Commonwealth commiserates that "the grievance procedure was not what I thought it would be. I found that my supervisor had already talked to the second step [manager] and he was part of the action." The employee sorrowfully elaborates:

> It wasn't me against my supervisor anymore--it was me against all of the [agency]. It could afford the time and money I couldn't . You're taking on the establishment. My career...is over due to...filing a grievance. I would have mixed feelings about doing it again--I think I committed *career suicide* [emphasis added]. I didn't think it was very productive to have an adversarial hearing and then have to work together afterwards. I developed a feeling of mistrust of the people above me. We've never gotten back the relationship we had.

This high-level professional employee questions the legitimacy of the Commonwealth's grievance process because it is a legal, adversarial process that emphasizes a "management must win" attitude rather than a problem-solving approach. In short, because management focuses on developing a legal strategy to defend its use of administrative discretion, he questions the organization's commitment to substantive justice in the workplace.

In support of this position another grievant, a rank-in-file employee and VASE member, exposes that

> [i]n our agency the second step of the procedure bypasses the second level supervisor and goes directly to the next higher management level--he won't let anyone answer the grievance until he tells them what to say and write on the form with their signature.

This is corroborated by another aggrieved employee in the same agency who informs that

> [the department head] takes the first-line supervisors and tells them all--`if you get a written grievance you bring it to me. Don't you make no written answer on it until you see me.' So they go to him and he weighs it [and] tells them what to write on it. So they write on there. Then they sign it and date it and send it back to you. They are scared to death not to. They won't answer one on their own, you know, of their own free will. They have got to see him first.

Concurring with a number of other aggrieved employees, he suggests that the grievance procedure is a "rubber stamp process" because higher levels of management blindly support lower level management.[203] Although most managers disagree with this conclusion, he asserts that throughout the management resolution phase of the process

> [management] is gathering information as much as it can. I don't give them much. [I]t is gathering information so it can devise a strategy on how to get around it [grievance]...So what I usually do in the body of the grievance where it says factual basis for the grievance, I write in there: `We will discuss it here [at the grievance meeting] if need be,' and don't put anything else in there. I put a very simple--few words as possible--title to the grievance and down in the body where it says factual information: `refer to or will discuss at the hearing if it goes that far.'

Viewed in this light management is building a legal strategy, learning as much about the grievant's case as possible during the management resolution phase. Not alone in his analysis, the employee contributes a humorous insight into the role of supervisors in and some employees' perceptions of the legitimacy of the grievance process:

> I have had...listen, I have had numbers of [supervisors] look at me and most of them are friendly with me. [His name] you know I can't do

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[203]Other employees relate that (1) "[s]ome managers don't attempt to resolve issues. They have a bureaucratic rubber-stamp mentality," and (2) "[t]hey follow rules blindly and ...are more concerned with rule-following."

> anything about this [grievance]. I said I know, nothing personal, I have got to give it to you, that is the way the grievance procedure is designed. [Supervisor]: You know...they won't even let me give you my answer, I have to go see [upper management supervisor's name] to get an answer. [Employee]: So you know when you go through that a lot and everybody starts to learn about it, it gets to the point like I went into the men's room and sat down in the stall, one of the stalls to use the bathroom, and I happened to look up to the right on the side of the stall, right above the toilet paper hanger--you have a toilet paper hanger with a roll of toilet paper on it, somebody had taken a black marker and says: `State Grievance Forms, use as many as you want. Tear off a sheet.'

This employee also questions the legitimacy of the management resolution phase of the grievance procedure because it is a "management review process" in which management simply reexamines its actions.[204] He suggests that because agency human resource and upper management control immediate supervisors' actions and responses to grievances, in essence, management is ceremoniously sustaining itself. Nonetheless, he claims to have won four separate grievances on the same issue--a bad performance rating as a result of grievance activity: "The supervisor would fight it to the last minute, until it went to a hearing or court [a third-party arbiter]." In supporting this view another aggrieved employee adds: "I received no oral response at all to my grievance. I felt that they [management] didn't care what I had to say...I felt that the department head, the HRM Office, and the Director of the agency had gotten together and decided what they

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[204]Reflecting back on chapter five's examination of the 1995 revisions to the formal grievance procedure, recall that the procedure requires "only one face-to-face meeting within the three management steps" (DERC Annual Report, 1995, 4). The procedure refers to all face to face resolution steps as "meetings" between the employee and management so as not to infer that a formal "hearing" is taking place. It cautions that "[t]he meeting is not to be conducted as a hearing with arguments and cross-examination; the purpose is for fact-finding. The meeting shall not be recorded" (Ibid).

were going to do." Thus, aggrieved employees question the legitimacy of the grievance process and management's commitment to substantive justice in the workplace. A tangential legitimacy concern is one interpersonal responsibility or trust: Reprisal and retribution against those who initiate formal grievances.

Reprisal and Retribution

Section 2.1-116.05, *Code of Virginia 1950*, as amended 1997, specifically mandates that

> [i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees must be able to freely, *and without retaliation* [emphasis added], discuss their concerns with their immediate supervisors and management (66).[205]

But contrary to the *Code*, an employee who has never filed a formal grievance fearfully reveals that "[a]lthough the grievance procedure is in effect, you'd better not use it. There is informal retribution. I feel intimidated by it. You're putting your career on the line to file a grievance" (Rank-in-File Employee). Corroborating this statement, other employees strongly exhort that "[r]etribution for filing a grievance is an issue. Employees are given bad work assignments and harassed by supervisors" (Rank-in-File Grievant). Nonetheless, employees have little recourse as long as the harassment is

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[205]Also see DERC's Employee Grievance Procedure (1997). Retaliation for participating in the grievance process is a grievable issue that qualifies for the hearing phase of the formal grievance process (6).

subtle. A tenured DERC counselor elaborates:

> Harassment of employees is not an issue that would get qualified for a hearing unless it was sexual harassment because that is one of the issues that over the years have hounded employees. A supervisor can harass you all day as long as they don't go over the line of violating a policy.[206] A supervisor can make your life miserable.

Simply put, supervisors can misuse their codified management prerogatives to unfairly assign work, transfer employees, and set unattainable performance standards to harass employees who challenge their official authority.[207] A grievance scenario reported by a professional employee illustrates how immediate supervisors can harass employees who challenge management.

An Example of Alleged Reprisal and Retribution

A professional employee with many years of tenure found herself faced with an ethical dilemma over the expenditure of agency funds. On the one hand she believed that agency funds were being misused by her supervisor. On the other hand she perceived that she could not discuss the matter with agency management for fear of reprisal and retribution. Thus, she contacted the Commonwealth's "Hotline" to report the suspected

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[206]Section 2.1-116.05 D, Code of Virginia 1950, as amended 1995, states in part that "[e]mployees' rights to pursue grievances shall not be used to harass or otherwise impede the efficient operations of government" (369). However, the researcher could not find any official policy statement aside from the Code's restrictions against retaliation that prohibits supervisors from harassing employees.

[207]Although closely related to the power paradox previously described, in this formulation management is misusing its formal authority to punish employees for challenging management, as opposed to covering and legitimizing its actions.

misuse of public funds.[208] Her understanding was that the Hotline was a neutral third-party that would anonymously investigate the complaint. However, the Hotline staff contacted her agency by letter asking it to investigate itself. She notes that it was easy for agency management to identify her as the one who made the complaint due to the small size of her division and the fact that she was one of only three employees who could possibly have knowledge of the funds issue.[209]

Shortly thereafter the employee's immediate supervisor began to supervise her more closely. She contends that he gave her unreasonable work assignments with vague performance standards that were beyond her technical capabilities. As a result she could not complete the job assignments and was subsequently suspended from work with a loss of pay. In response she filed a formal grievance that challenged the disciplinary action. But because she feared further reprisal and retribution she did not officially reveal that she was the employee who called the Hotline. Thus, she was unable to adequately defend

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[208]Pursuant to the Governor's Executive Order 13, 1998, the Commonwealth's Hotline is designed as an anonymous way for State employees to report waste, fraud, or abuse in State agencies. The Hotline has a toll-free number (1-800-723-1615). Per a telecon to the Hotline on November 20, 1998, the person answering the Hotline posited that he would not accept any personnel related calls. Personnel issues are referred to DERC or the appropriate agency human resource management department. The operator would not divulge who he was, what arm of the organization he represented, or who actually investigates valid complaints received. Furthermore, the operator would not disclose any information about the Hotline until the researcher disclosed his name, what organization he represented, and the purpose for the inquiry.

[209]The employee corroborates her statement by stressing that when her agency's auditing officer responded to the Hotline investigatory inquiry he sent her a personal copy of the written response. She was the only employee to receive such a copy.

herself against the alleged retaliatory acts and the resulting disciplinary action without publicly disclosing that she initiated the Hotline investigation.

During the management resolution phase of the grievance process management upheld her supervisor's actions. Furthermore, when she presented her case at the hearing phase of the grievance process the hearing officer ruled in favor of management because she did not meet the performance standards established by her supervisor. From her perspective, she was harassed by management for reporting what she perceived to be a misuse of public funds. But this professional employee is not alone in her perception of reprisal and retribution by management.

For example, another employee who claims to have experienced retribution for filing a grievance explains that "[t]here is subtle retribution for filing a grievance--unreasonable, unaccomplishable work assignments with no [established] guidelines or performance standards" (Rank-in-File Employee). Expressing a similar concern, a secretary from a different agency sorrowfully concludes: "I felt like there would be reprisal if I went to the agency directly [with my grievance]. They try to work around you--stop assigning you work, exclude you from information. It's generally hard to prove." But several experienced hearing officers report examples of subtle retribution for filing a formal grievance. One hearing officer exposes that "after a grievant won his hearing, management tried to move that person around to different positions or work schedules." Similarly, another hearing officer declares: "Retribution is a problem for some employees who win their hearing. Many problems result from personality conflicts

between employees and supervisors and if that is the case the employee generally loses."

Conclusion

The justice paradox derives from the inherent tension between procedural and substantive justice in the public work environment. In the Commonwealth's Grievance Program the justice paradox is characterized by the tension between procedural fairness and the just outcome. On the one hand, the formal grievance procedure protects managers and the organization against possible litigation and promises procedural due process protections to employees; but on the other management's strict adherence to procedural fairness elicits an adversarial legal environment in which management reviews its actions and determines its legal liabilities rather than sincerely seeking to resolve employees' grievances. Simply stated, management focuses on legalistic reasoning and criteria at the expense of humanistic and social considerations.

Notably, a very experienced hearing officer concurs and suggests that "[s]ome situations should be negotiated by management prior to a formal hearing, but management waits until the hearing stage before it seriously negotiates." Similarly, another hearing officer muses: "The internal management steps [of the grievance procedure] are a complete joke. The agency head has to support middle-management." Moreover, an experienced paralegal from the Attorney General's Office who regularly defends management in the grievance process admits that "[s]ome agencies are not taking action to prevent hearings. I have had agencies say it isn't a great case, we think we'll lose,

but we want to go forward." Such action by management sends a strong message to aggrieved employees: "[T]he word has gotten around that their procedure is designed to wear you out" (Grievant and VASE Member). Nonetheless, one aggrieved employee sums up the feelings of most employees interviewed in the study: "I am pursuing a grievance because I only want what is fair" (Rank-in-File Employee).

But fairness is amorphous at best and often managers' "good common sense is influenced too much by formal rules and regulations" (Human Resource Manager). For instance, one human resource director in a large agency laments: "As a human resource manager I followed the letter of the law. I always said that I considered the mitigating circumstances, but not really." Thus, management tends to superficially rely on that which meets the letter over the spirit of the law by focusing on what is legally defensible, thereby undermining substantive justice and organizational legitimacy in the public work environment. Next, the concluding chapter discusses the significance of the study and its implications for public administration theory and practice.

VII.

CONCLUSION

> *A responsive institution maintains its integrity while acknowledging the legitimacy of an appropriate range of claims and interests....A spirit of consultation must prevail and authority be subject to criticism and reconstruction, while the institution's basic commitments, and its capacity to function, are preserved and protected.*
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> *- Philip Selznick, The Moral Commonwealth*

This study explored the dynamics of legalization in public sector grievance programs in a nonunion environment by describing how legalization transforms internal dispute resolution (IDR) in the Commonwealth of Virginia Grievance Program. First, a contextual overview of the Program revealed that it is shaped by law-like rules, processes, and procedures that formalize and rationalize IDR and constitute its legal environment. Next, the legalization process was investigated by examining three nascent revisions to the Program promulgated to correct past deficiencies and respond to threats to organizational legitimacy. The revisions closely mirror Sitkin and Bies' (1994) view "that organizations will respond to threats to legitimacy with increased use of legalistic features and the decreased use of nonlegalistic sources of institutional legitimacy" (22). In this sense the revisions expand and institutionalize legalization in the Grievance

Program. But while legalization is frequently positive it can have unintended consequences (28-31).

Hence, the study concomitantly explored the dynamics of legalization by examining its paradoxical nature. It found that although legalization is intended to enhance efficiency, effectiveness, fairness, or legitimacy of the Program, in practice it can obstruct the achievement of these goals and dominate managerial attention at the expense of the long-term health of the organization. This is due in part to the statutorily defined procedural guidelines promulgated by the *Code* as well as DERC in its Employee Grievance Procedure, Handbook for Hearing Officers, and Tips for a Successful Hearing. But the adversarial nature of IDR and the statutory requirement that hearing officers must be licensed attorneys trained in legal process and procedure are contributing factors. As a consequence management is drawn to legal-rational reasoning and criteria in resolving employees' grievances in anticipation of defending its use of administrative discretion at the hearing phase. Therefore, management focuses on what is legally defensible, documenting its actions and developing a legal strategy.

Toward that end agency human resource management (HRM) officials advise managers what to do and say from a legal, technical perspective. This is because they understand their organizational role in the grievance process as a legal one of protecting management from hearing officers' adverse decisions as well as litigation in the courts. But this role encourages agency HRM to circumvent immediate supervisors in the process, thereby obviating first-line authority to resolve grievances informally. In effect,

attempts to reduce legal liability to protect the organization contribute to an adversarial legal environment that shifts attention away from informal, nonadversarial consensus-building and problem-solving approaches based on intimacy and shared responsibility or trust between employees and their immediate supervisors. In this respect, although the intended purpose of the Grievance Program is to restrict administrative discretion and ensure workplace justice in the organization, it serves primarily as a legally-based symbolic mechanism designed to direct dissent into organizationally acceptable forms and channels so as not to permit that dissent to escalate and challenge the very legitimacy of the organization and its leadership (Sheppard, Lewicki, and Minton, 1992, 154). As a result many key informants question the role of agency HRM and their immediate supervisors in the formal grievance process. More fundamentally, they question management's use of administrative discretion, commitment to issues of substantive workplace justice, and, consequently, the legitimacy of the Program.

Thus, the legalization of IDR presents a complex set of positive and negative implications and tradeoffs for the Commonwealth. On the positive side, the institution of legalization through a reliance on formal, procedural safeguards and legitimate, law-like rules in decision making may protect managers and the organization against litigation. Equally important, the legalization of IDR typically results in less discrimination against and dispowerment of various classes of workers--legal remedies provide a source of empowerment (Sitkin and Bies, 1994, 28). But on the negative side, adopting legalistic approaches to IDR to enhance reliability and trust paradoxically creates an adversarial

legal environment that undermines the informal and valued trust that supervisors share with their subordinates by emphasizing legal over social processes--institutionalizing legalization while deinstitutionalizing interpersonal responsibility.

Significance of the Research

This last finding is most important in attempting to understand how the legal environment of complex, public organizations serve to transform social processes for resolving problems and disputes. Recall in this connection that Sitkin and Bies (1994) emphasize that the legalization of IDR processes and procedures can undermine social goals, such as substantive workplace justice, by "fostering a superficial reliance on that which has an acceptable rationale over that which is socially rational (meets the letter rather than the spirit of the law)" (31). They explain the significance of this trend:

> As decisions are increasingly dominated by a concern for what is legally defensible...there is a potential for legalization to dominate attention, decision making, and structure at the expense of the organization's social and economic performance....Balancing the multiple criteria can create paradoxical outcomes when managers attempt to pursue legitimacy and performance criteria--each at the expense of the other. As a result, legalization paradoxically poses serious threats to both an organization's legitimacy and its effectiveness (20).

The key point is that the interactive nature of the employment relationship shapes employees' expectations and perceptions of the organization (Baker, 1985, 38). Thus conceived, *the central role of immediate supervisors in the grievance*

process is critical to both the effectiveness and legitimacy of the Program as their attitudes and official actions determine the overall level of trust and specific expectations within the organization (Creed and Miles, 1996, 19). But *because the legalization of IDR in the Commonwealth tends to result in the circumvention of immediate supervisors in the grievance process*, thereby obviating their positional authority, *it alters the way flexibility, trust, and shared meanings govern the essence of organizational relationships and results in economic and systemic costs (loss of organizational trust and legitimacy) while resulting in little substantive justice* (Stutman and Putnam, 1994, 282; Pfeffer, 1994, 336-344; and Sitkin and Bies, 1994, 20-21).

Explanations of Why Supervisors are Circumvented

One plausible explanation why supervisors are circumvented in the grievance process suggests that many concerns mentioned for filing grievances pertain to the interpersonal relationship between supervisors, managers, and their employees (Youngblood, Trevino, and Favia, 1992, 301). From this perspective first-line supervisors are excluded from making initial grievance decisions because many times their official actions are at issue. This is apparent in the provision of the grievance procedure that provides for an expedited process for adverse employment actions that result in a loss of wages--termination, demotion, or suspension. The expedited process allows written

grievances to be initiated immediately at the second step of the management resolution phase with "[a]n individual designated by the agency who is in *a senior management position* [emphasis added] and has the requisite authority to provide the employee with the appropriate relief" (Employee Grievance Procedure, 1997, 4). However, while immediate supervisors are otherwise empowered by the *Code* and the Employee Grievance Procedure to respond directly to their subordinates' grievances, management often excludes them from making initial grievance determinations in the name of fairness and legitimacy. This explanation is consistent with the study's findings.

Findings further indicate that management tends to prohibit supervisors from making initial grievance determinations for other reasons as well. A second explanation consonant with the IDR literature suggests that supervisory employee relations training is far from well developed and employers offering a guarantee of workplace justice will find an intensified need to train supervisors and managers (Pulhamus, 1991, 488; and Kalish, 1986, 19-20). Indeed, many first-line supervisors in the Commonwealth are insufficiently trained to make appropriate grievance decisions because the major thrust of the State's supervisory grievance training centers on process rather than content--the procedural components of the Program. Consequently, few supervisors understand the legal, technical implications of their official grievance actions in relation to the organization's written policies and procedures. Hence, given the legal environment constituted by the tension between employee rights and management prerogatives in the public workplace, supervisors feel caught between aggrieved employees and upper levels

of management when attempting to resolve employees' grievances. Recall that "[t]he instant reaction of supervisors [to a grievance] is defensive...Supervisors feel threatened and fear what will happen to them. They are scared to death of their employees and terrified of their bosses" (Agency Training Manager). This fear is not unfounded. Pulhamus (1991) reports substantial evidence of significant negative consequences for supervisors involved in grievance actions--lower job ratings and promotion rates, poorer work attendance, and higher turnover rates (488). Although inconclusive, findings suggest that supervisors fear employee grievances because they are inadequately trained to manage the nuances of a legalistic grievance process that mimics law-like rules and procedures. In part this explains why agency HR and upper management intercede and control supervisors' grievance actions and responses in an effort to develop the best possible legal strategy for defending the organization against conceivable legal liabilities.

Perhaps of most importance, a third explanation can be found in the new institutionalism in organizational analysis literature that emphasizes the role of cognitive-cultural processes--common symbolic systems and shared meanings that undergird stability and order in social life (Scott, 1998, 134-135). By way of comparison, the new and old institutionalisms are similar in that they share a skepticism toward rational-actor models of organization, view institutionalization as a process, and emphasize the relationship between organizations and their environments (Powell and DiMaggio, 1991, 11-12). Further, each promises to reveal aspects of reality that are inconsistent with organizations' formal accounts and stresses the role of culture in shaping organizational

reality. But although the new institutionalism has a "distinctly sociological flavor" it diverges in systematic ways from earlier sociological approaches to organizations and institutions (Ibid).

In contrast, the new institutionalism differs from the old in analytic focus, views of conflict and change, images of individual action, and approach to the environment (15). It focuses on "nonlocal environments, either organizational sectors or fields roughly coterminous with the boundaries of industries, professions, or national societies" (13). Powell and DiMaggio expound:

> Environments, in this view, are more subtle in their influence; rather than being co-opted by organizations, they penetrate the organization, creating the lenses through which actors view the world and the very categories of structure, action, and thought....[N]eoinstitutionalists view institutionalization as interorganizational in locus. Organizational forms, structural components, and rules, not specific organizations, are institutionalized (13-14).

Viewed through this lens organizational structures are manifestations of powerful institutional rules that function as highly rationalized myths (Meyer and Rowan, 1991, 44). Meyer and Rowan elaborate that myths are rationalized and impersonal prescriptions that identify various social purposes as technical ones and specify in a rule-like way the appropriate means to pursue these technical purposes rationally (Ibid). They are highly institutionalized and thus in some measure beyond the discretion of any individual participant or organization. They must, therefore, be taken for granted as legitimate, apart from evaluations of their impact on work outcomes. Organizations that adhere to the prescriptions of myths demonstrate that they are acting on collectively valued purposes

in a proper and adequate manner. In a word, they become legitimate. The HRM profession, employee relations programs, and related legal-rational reasoning and criteria in decision making are highly institutionalized rules that act as rationalized myths in complex, public organizations (44-50).

The Commonwealth's HRM and Grievance Programs, consisting of administrative and statutorily mandated regulations, policies, and procedures, represent institutionalized cultural rules that operate as highly rationalized myths (Scott, 1998, 136). Institutionalized as environmentally legitimated elements of the formal organizational structure, these myths connote that personnel services and employee grievance procedures are valuable to organizational efficiency and effectiveness (Meyer and Rowan, 1991, 58). Therefore, State agencies are predisposed to trust HRM programs, procedures, and officials to resolve employees' grievances, as well as the law-like procedural components of the formal Employee Grievance Procedure, because they exude "a general aura of confidence" and validity (Ibid). Simply stated, their use symbolizes organizational legitimacy with internal and external constituencies (Sitkin and Bies, 1994, 21; and Scott, 1994, 9).

Thus, while the extant IDR literature hints that supervisors may be circumvented in the grievance process because their official actions are often at issue and, broadly speaking, many are inadequately trained to make legal, technical grievance decisions, the new institutionalism in organizational analysis literature contributes another part of the answer. It suggests that agency management circumvents and thus obviates supervisors'

grievance authority because the HRM profession and related legal technologies are powerful institutional rules that serve as highly rationalized myths of how best to resolve employees' grievances while maintaining bureaucratic control--developing a legal strategy to defend the organization against possible legal liabilities.[210] But in this respect *HRM's attorney-like role in the grievance process alters the way flexibility, trust, and shared meanings govern the essence of organizational relationships by transforming tacit interpersonal bonds of trust between supervisors and employees into something that is suddenly external and open for question and debate* (Sitkin and Bies, 1994, 39). For example, recall the words of the aggrieved professional employee with more than thirty years of exemplary service:

> It wasn't me against my supervisor anymore--it was me against all of the [agency]....You're taking on the establishment...I think I committed career suicide....I developed a feeling of mistrust of the people above me. We've never gotten back the relationship we had.

In other words, HRM's impersonal, taken-for-granted role in the grievance process tends to decrease interpersonal sensitivity, responsibility, and interactive justice because HRM decisions are often subject to labor laws, affirmative action requirements and other legal considerations that constrain decision makers to rely on or justify decisions in terms of legal-formal control mechanisms (Sitkin and Bies, 1994, 39; Roth, Sitkin and House, 1994, 162; Shapiro and Kolb, 1994, 317; Youngblood, et al., 1992, 286; and

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[210]More so than other types of collective actors, the professions exercise control by defining social reality--by devising ontological frameworks, proposing distinctions, creating typifications, and fabricating principles or guidelines for action (Scott, 1998, 211).

McClelland, 1987, 24).[211]

Thus, although the notion that legal-rational methods of managing IDR can protect institutional legitimacy, the *findings support the legalization literature that suggests legal substitutes for interpersonal responsibility create rather than resolve differences and fail to produce an environment of trust* (Pfeffer, 1994, 338). The adoption of statutorily mandated, legal-rational IDR policies and procedures and the intervention by HRM officials who are officially responsible for managing agency grievances sends mixed signals to employees regarding institutional trust and legitimacy. In practice mixed signals authenticate a power imbalance that tends to produce continuing conflict in the absence of a relationship of trust and mutual respect. In short, distrust weakens legitimacy (McClelland, 1987, 24). This is most evident, for instance, in the response of the HRM informant who discloses that "[t]here is not a lot of trust between management and employees and [therefore] no shared perspective on workplace justice;" as well as the responses of several rank-in-file employees who report that "[m]y department head went to the human resource management office first with every [grievance] issue I raised before he would talk to me about them. He always does that;" and "[i]n the grievance procedure everything is stacked against you--its their procedure." As a result aggrieved employees question the legitimacy of the grievance process and only

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[211]As used here interpersonal sensitivity means treating employees with respect and dignity by listening without interruption, and showing empathy and understanding. Interactional justice refers to using sensitive interpersonal techniques in resolving employees' grievances.

the most severe cases of dissatisfaction surface--discipline and discharge (Denton and Boyd, 1990, 59-60).[212] These insights from the IDR, new institutionalism, and legalization literature enrich our understanding of why supervisors' are circumvented in the grievance process.

An Unexpected Consequence of the Hearing Officer Process

Another salient finding is hearing officers' rulings against management tend to motivate agency HRM officials to negotiate and bargain with aggrieved employees rather than adjudicate grievances at the hearing phase of the grievance process. IDR literature emphasizes that equity perceptions of trust regarding an outcome for a grievance procedure are enhanced if the procedure is viewed as fair (Brockner and Siegel, 1996, 398-401; Brockner and Wisenfeld, 1994, 392; Youngblood, et al., 1992, 286; Denton and Boyd, 1990, 59-60; Klaas, 1989, 453; Westin and Feliu, 1988, 223; and McClelland, 1987, 24). Notably, Youngblood, et al., persuasively argue, "employees' perceptions of the fairness of grievance programs are based on the maintenance of trust issues as perceived by the use of neutral third-party arbiters" (286). But while evidence suggests that the majority of employees and hearing officers interviewed perceive the use

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[212]Recall that when averaged for FY 92 through FY 96 disciplinary actions accounted for 60% of all grievance issues filed (DERC Annual Report, 1996, 4). Also see appendix 1 for a comparison of Commonwealth of Virginia grievance data for FY 95-96 that reports discipline accounted for 54 percent of all grievances filed in FY 95 and 51 percent in FY 96 (DERC Annual Reports, 1995, 3 and 1996, 4).

of neutral third-party arbiters to enhance trust, fairness, and legitimacy in resolving employees' grievances, agency HR and upper management paradoxically share a different perspective.

There are discernable good reasons for this dichotomist view that stem from the economic and systemic costs inherent in the formal hearing process (Pfeffer, 1994, 334-339). The economic costs to the Commonwealth and aggrieved employees are obvious. Evidence reveals a legal system that monetarily benefits appointed hearing officers and other attorneys associated with the formal administrative hearing. Indeed, aggrieved employees must pay private attorneys to represent their individual interests in the formal hearings, and public law requires State agencies to pay appointed hearing officers for their legal services. This is one reason why State agencies perceive the hearing process to be unfair--they sustain the direct economic burden of funding the hearing officer system.

However, there are intractable systemic costs to the Commonwealth as well. Most importantly, *findings indicate that State agencies fear a loss of bureaucratic control over grievance outcomes at the hearing phase*. This is consonant with the IDR literature that implies the use of neutral third-party hearing officers privatizes IDR and obviates agency decision making (Lan, 1997, 31). Unlike the management resolution phase of the grievance process where agencies are biased parties to their own adjudication, at the hearing phase agency management must defend its use of power and administrative discretion to a neutral, third-party arbiter. But although hearing officers have broad

statutory authority to conduct formal hearings and render legally binding decisions based on findings of fact, there are no published precedents; albeit decisions must comply with public law and policy. Thus in practice hearing officers frequently render disparate rulings based on similar evidence. Many times these inconsistent rulings are against management. As a consequence, ironically, agency managers perceive that hearing officers circumvent managerial authority to resolve internal grievances by second-guessing their use of official power and administrative discretion and applying legal-rational reasoning and criteria in decision making.

Viewed in this light, although DERC concludes that the 1995 hearing officer revision to the formal grievance procedure has been a major enhancement, unintended consequences are emerging (DERC Annual Report, 1996, 4). *Hearing officers' adverse decisions are influencing agency HR managers to search for alternative methods to conclude employees' grievances prior to the hearing phase of the grievance process as a means of preserving bureaucratic control over economic and systemic IDR costs.* For example, reflect back on the explanation offered by an experienced agency HR director:

> My experience with the hearing officers influences how I deal with grievances. All of the more serious ones must be approved [by personnel officials] before action. I don't want to deal with the hearing officer unless absolutely necessary. Now I negotiate and resolve them at the agency level if remorse is shown on the part of the employee. I am not impressed with the hearing officers thus far.

In other words, agency management fears the loss of bureaucratic control over grievances at the hearing phase where neutral third-party arbiters' rulings are expensive,

unpredictable, final, and legally binding.

At first glance HRM's inclination to negotiate and bargain immediately prior to the hearing phase tends to delegalize IDR and mirror alternative dispute resolution (ADR) techniques similar to those reported in the Commonwealth's Mediation Program. But one important aspect of a viable mediation process is both parties have control over the outcome of the dispute or grievance (Shapiro and Kolb, 1994, 304). Mediation is inherently an interactive process of persuasion that is oriented toward the relationship of the parties (Ibid). Conversely, however, HRM's negotiation tactic mirrors the management resolution phase of the grievance process--protect management from hearing officers' adverse decisions. In a similar way HRM tends to exclude immediate supervisors from the negotiation process and dictate the terms and conditions of grievance settlements to employees. In effect HRM's bargaining and negotiation process is a defensive legal maneuver that displaces the social and administrative objectives that aim at achieving due process and substantive workplace justice (Bolman and Deal, 1997, 186; and Lan, 1997, 31). Thus, *HRM's legal strategy to internally negotiate rather than externally adjudicate at the hearing phase may persuade agency management to focus on narrow legal issues to the detriment of broader institutional ones such as loss of trust and legitimacy* (Shapiro and Kolb, 306).

Summary

Study findings tend to support Sitkin and Bies' (1994) contention that as IDR decisions are increasingly dominated by a concern for what is legally defensible there is a potential for legalization to dominate attention, decision making, and structure at the expense of the organization's social and economic performance (20). Although the intended purpose of the formal Grievance Program is to enhance efficiency, effectiveness, and trust through the use of legitimate, law-like procedural safeguards, evidence suggests legal substitutes for interpersonal responsibility paradoxically create rather than resolve differences and fail to produce an environment of trust (Pfeffer, 1994, 338). Indeed, the Program constitutes an adversarial legal environment that undermines the informal and valued trust that supervisors share with their subordinates by sending mixed signals to employees regarding institutional trust and legitimacy. More precisely, agency HRM's tendency to circumvent immediate supervisors in the grievance process and propensity to use legal-rational reasoning and criteria in decision making poses threats to the Commonwealth's effectiveness and legitimacy, as it alters the way flexibility, trust, and shared meanings govern the interactive nature of the employment relationship that shapes employees' expectations and perceptions of the organization (Creed and Miles, 1996, 19; Stutman and Putnam, 1994, 282; Pfeffer, 1994, 336-344; Sitkin and Bies, 1994, 20-21; and Baker, 1985, 38).

Limitations of the Study

This exploratory case study does not claim to measure behavioral and policy outputs or direct cause and effect relationships. Alternatively, a phenomenological or naturalistic inquiry perspective frames the research as a methodological philosophy or research mode that focuses on what people experience and how they interpret the world. From this paradigmatic perspective human activity is seen as a collection of symbols expressing layers of meaning, and, therefore, context is critical to understanding and involves interpreting and constructing social reality (Miles and Huberman, 1994,8; and Sjoberg, et al., 1991, 31). However, *case study research is only generalizable to theoretical propositions and not to populations or universes* (Yin, 1994, 10). *It does not represent a "sample," and its purpose is to expand and generalize theories (analytical generalization) and not to enumerate frequencies (statistical generalization)* (Ibid). This study aims to inductively and holistically understand human experience in a context-specific setting that describes the individual case by exploring the dynamics of legalization in the Commonwealth of Virginia Employee Grievance Program to better understand how the legal environment of complex, public organizations serve to transform social processes for resolving problems and disputes (Patton, 1990, 37). In this respect the study's findings have significant implications for public administration theory and practice.

Lessons for the Public Administration Field

Public Administration Theory

There are two important lessons from the study for the public administration field. The first supports Scott's (1998) admonition that we must be cautious in celebrating the truism that organizations that are better adapted to their environments are more effective (363). He correctly warns that *adaptation can be achieved in numerous ways, many of which contribute to the survival of the organization but fail to serve the interests of internal and external constituencies* (Ibid). In this context mimicking law-like IDR process and procedure serves as a legal-rational method for public organizations to adapt to their immutable legal environments. The litigious model of conflict resolution can lead to loose coupling among organizational units and be particularly adaptive when institutional demands (e.g. legal requirements) diverge from economic-competitive requirements (Sitkin and Bies, 1994, 28). Hence, the law-like components of formal employee grievance procedures provide a formal due process mechanism that serves as a legal-rational source of legitimacy and protection for public organizations (Ibid). In theory formal grievance programs that mimic judicially legitimate process and procedure serve as viable tools for complex, public organizations to adapt to the legal environment constituted by the insoluble tension between management prerogatives and employee rights in the public work environment.

However, the use of legal rules and procedures to resolve employee grievances tends to displace substantive aims of justice as public administrators focus on formal rules and procedures, adversarial relations, legalistic rhetoric, and legal sanctions and criteria in decision making (the letter rather than the spirit of the law). Consequently, the legalization of IDR can paradoxically alter the way flexibility, trust, and shared meanings govern the essence of organizational relationships and result in a loss of institutional trust and legitimacy (Stutman and Putnam, 282; Pfeffer, 336-344; and Sitkin and Bies, 20-21). Thus understood, public administration organization and management theorists should renew efforts to understand how organizational forms, structural components, and legal rules (the institutional environment) transform organizational relationships (social and technical environments) in complex, public organizations. This scholarship and insight will educate and empower public administrators to better manage the political, administrative, and institutional change sanctioned by the downsizing, reinvention, and reengineering government reform movement.

Public Administration Practice

The second lesson for the public administration field is that the legal environment of complex, public organizations can have significant negative consequences on the governance role of immediate supervisors who are responsible for ensuring that organizational performance criteria are met on a day to day basis. This is an especially

important lesson for public administrators at all levels because immediate supervisors shape employees' expectations and perceptions of public organizations. Their attitudes and official actions determine the overall level of trust, and, ultimately, technical performance. Public employees can not be expected to trust their immediate supervisors if HR and higher levels of management circumvent and thus obviate official supervisory authority to resolve employee grievances in the formal IDR process. In other words, *interpersonal responsibility or trust is critical to public organizations' technical effectiveness and institutional legitimacy*. Thus, public administration practitioners should strengthen the role of supervisors in the IDR governance process. This will require a more holistic view of IDR that focuses on the interpersonal relationship between employees and their immediate supervisors and emphasizes nonadversarial, problem-solving techniques. Public organizations will need to train managers and supervisory personnel in employee-management relations and interpersonal skills so they can fully participate as equal members in the formal IDR process. In this respect IDR training should emphasize how supervisors can be more reflective and discriminating in applying legal rules and criteria in the formal grievance process. This strategy has the potential to strengthen interpersonal sensitivity, responsibility, and interactive justice while enhancing organizational effectiveness and institutional legitimacy.

Implications for The Commonwealth of Virginia

In light of the above lessons the Commonwealth of Virginia should *renew efforts to resolve employee disputes as informally as possible to strengthen interpersonal sensitivity, responsibility, and interactive justice.* This will require cooperation between the Department of Personnel and Training (DPT) and the Department of Employee Relations Counselors (DERC) to *develop and implement a strategic plan to enhance the role of first-line supervisors in the formal grievance process.* First, DERC should rescind that portion of the Employee Grievance Procedure that allows all eligible employees to pursue any grievance issue through the management resolution phase of the procedure. Employees do not understand that the *Code* statutorily prohibits management prerogative issues from proceeding to the hearing phase for neutral, third-party arbitration. In short, the Employee Grievance Procedure is not in compliance with the *Code.*

Although DERC's intentions are good--to open organizational lines of communication between employees and management--*it has compromised the legitimacy of the IDR process by sending mixed signals to aggrieved employees that weaken organizational trust and legitimacy.* Furthermore, *relying on the formal grievance procedure as a means of communicating with employees is a bad management practice* that encourages both parties to close down communications by withholding information to protect their own interests or prevent the other party from developing a legal strategy out of fear of conceivable legal liabilities.

Second, *DPT should perform a training needs assessment and require intensive, formal interpersonal skills training for all supervisors and managers* that includes alternative dispute resolution (ADR) techniques so that employee grievances can be resolved by informal, nonadversarial means when possible. Of equal importance, as the agency responsible for oversight of the Commonwealth's Human Resource Management Program, *DPT should institutionally redefine agency HRM's attorney-like role under the Employee Grievance Procedure to a consultative one of problem-solving facilitator*. This task will demand that all agency HRM officials in the Commonwealth also receive intensive interpersonal sensitivity and interactional justice training to develop a nonadversarial, problem-solving culture in the organization. In sum, the Commonwealth should pursue efforts to resolve employees' complaints, concerns, and disputes using nonadversarial ADR techniques that strengthen the role of first-line supervisors by focusing on substantive rather than procedural justice--the spirit rather than the letter of the law.

Finally, *nonadversarial processes such as consensus-building, joint problem-solving, negotiation, and mediation should supplement, not replace, the Commonwealth's formal Employee Grievance Procedure*. Responsibility for the establishment and administration of the formal Employee Relations Program rests with the Director of DERC, not DPT or agency HRM. Therefore, DERC should administer all formal grievance and mediation processes for the agencies as well as maintain grievance and mediation documentation for statistical and other purposes. This should enhance the

legitimacy of the Commonwealth's Program because all grievance and mediation documentation is located outside agencies where it can be incorrectly used against aggrieved employees or those who have resolved their differences through mediation. In short, DERC should administer the formal Employee Relations Program and agency HRM should facilitate resolving problems, complaints, or other work related disputes. Thus, HRM should provide consultative ADR services to and serve as an advocate for employees as well as management to enhance the employee-management interpersonal, interactive relationship. These recommendations are important to the success of the Commonwealth of Virginia's initiative to empower employees, build teamwork, and provide quality service to internal and external constituencies.

Directions for Future Research

This dissertation explored how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes by examining the dynamics of legalization in the Commonwealth of Virginia Grievance Program. The study does not purport to investigate or report direct cause and effect relationships. Using a naturalistic inquiry perspective, it focused on what people experience and how they interpret the world and aimed to inductively and holistically understand human experience in a context-specific setting that describes the individual case. Consequently, the findings are not generalizable to other populations or universes.

However, case study research is generalizable to broader theories, although a theory must be tested through replications of the findings (Yin, 1994, 36). Thus, the study's findings represent a prelude to further inquiry that should attempt to replicate the findings reported herein to strengthen the external validity and generalizability of the theoretical propositions that frame this project.

Selznick, in his book The Moral Commonwealth (1992), reminds us that legal norms of legitimacy, regularity, and fairness often decay to legalism--the mechanical or mindless following of rules and procedures without regard for purposes and effects such that substantive aims of justice and public policy are lost to view (330-331):

> Unless form unites with substance, procedure becomes arid and self-defeating. To sustain that union--to avoid the degradation of legality to legalism--we must recognize the importance of "process values." These are the values at stake in procedure, not specific rules or forms. The process values of law include eliminating bias, providing opportunities for reasoned argument, assuring accurate and reliable determination of facts, and upholding legal stability. The focus is on method--a way of making judgments...but method is broadly conceived and is efficacious only insofar as it leads to the achievement of substantive justice (Ibid).

In other words, "rules and legal principles are not ends in themselves and have no intrinsic worth. They are judged according to their contribution to substantive justice, which is the ultimate criterion" (198). Selznick elaborates:

> Every institution has process values, embodied in policies and procedures that reflect the institution's distinctive character and mission. Every institution is vulnerable to the degradation of those values. Any enterprise can do better, and be better morally as well, if its process values are made explicit. And it can benefit from recognizing that the most prevalent form of degradation is the reduction of process to procedure. When this occurs, letter prevails and spirit decays....What constitutes the spirit of the law [or]

> a policy...cannot be wholly explicit and predetermined. It is not prior to or independent of perception, interpretation and interaction. Hence the need for sustained and intimate experience (333).

Thus, future research should focus on the tenets of the HRM profession to better understand how HRM myths are institutionally reproduced and communicated in complex, public organizations. This is an important research task because "[m]ore so than other types of collective actors, the professions exercise control by defining social reality--by devising ontological frameworks, proposing distinctions, creating typifications, and fabricating principles or guidelines for action" (Scott, 1998, 211). This knowledge and insight may lead to new and innovative ways to affect change of the public HRM culture that institutionalizes the fair procedure over the just outcome.

In conclusion, the fate of organizational justice in a Weberian legal-rational society is closely tied to public administrators' ability to design institutions capable of fulfilling their social responsibilities in self-preserving ways (Selznick, 1992, 151). This will require a better understanding of how legal structures and rules transform social processes for resolving employees' grievances in complex, public organizations. This dissertation attempts to lay the foundation for that endeavor.

APPENDIX A

A SELECTIVE REVIEW OF THE CONSTITUTIONAL PROTECTION OF PUBLIC EMPLOYEES

First Amendment Rights and Protections

Oaths of Office

Article VI of the U.S. Constitution requires, in part, that "[t]he Senators and Representatives...and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution" (Rohr, 1986, 202). In general, however, elected and appointed public officials may not be required to take an oath broader than an oath of allegiance.[213] The Supreme Court, in Cole v. Richardson (1972), struck down several different kinds of oaths that were too vague and uncertain or asked citizens to surrender their constitutional rights of free speech or belief (O'Neil, 1993, 27).[214] For example, newly hired public employees may not be required to take an oath that rejects the Communist Party.

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[213]For a discussion and application of oaths of office, see John A. Rohr, To Run A Constitution: The Legitimacy of the Administrative State (Kansas: The University Press of Kansas, 1986) and Ethics for Bureaucrats: An Essay on Law and Values 2ed. (New York: Marcel Dekker, 1989).

[214]405 U.S. 676 (1972).

Freedom of Association

Nothing in the U.S. Constitution limits freedom of association to political, social and/or personal groups. Although much of the early history of First Amendment freedom of association controversies involved political groups, courts have held that job applicants for public employment have "the right to associate with any person of one's choosing for the purpose of advocating and promoting legitimate, albeit controversial, political, social and economic views" (32).[215] In a similar decision, a federal appeals court held that the freedom of association also applies to purely social and personal associations.[216] This includes religious associations, and, in Torcaso v. Watkins (1961), the U.S. Supreme Court held that applicants for public employment could not be required to take a religious oath to god.[217] Finally, the Court settled the issue of religious liberty, in McDaniel v. Paty (1978), when it held that states could not bar any persons from holding public office because they are members of the clergy (33).[218]

Prior to the 1970s the practice of patronage was quite common and accepted as a fact of political life (49). Party affiliation had been used as a basis for hiring and firing in the public sector. However, in Elrod v. Burns (1976) the Supreme Court was

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[215]See Bruns v. Pomerlau, 319 F. Supp. 58 (D. Md. 1970).

[216]See Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984).

[217]367 U.S. 488 (1961).

[218]435 U.S. 618 (1978).

presented with the question of whether a government employee in a nonmerit, nonpolicy-making position could be discharged on the basis of his/her partisan political affiliation.[219] At issue was public employees' First Amendment right to freedom of association. The question arose when Elrod, the newly elected sheriff of Cook County, Illinois, summarily terminated several workers in the sheriff's office because they were not members of the Democratic party. The Court concluded patronage dismissal to be an abridgment of free expression in that it severely restricts political belief and association protected by the First Amendment. It opined that forcing a government employee to relinquish those rights would be "tantamount to coerced belief."[220] Significantly, however, in balancing the state's interest against the rights of individual employees the Court held that patronage dismissals should be limited to policy-making positions. The rationale being that government needs to insure that policies that the electorate has sanctioned are effectively implemented. Yet the Court provided no guidance as to what distinguishes a policy-making position from a nonpolicy-making position. It left that burden to the hiring authority (Lee, 1992, 45).

The Court revisited the issue in Branti v. Finkel (1980).[221] It reaffirmed the Elrod decision and sought to define more clearly what employees were subject to patronage actions. The case involved county assistant public defenders who were about

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[219]427 U.S. 347 (1976).

[220]427 U.S. at 355.

[221]445 U.S. 507 (1980).

to be terminated by Branti, the newly appointed county public defender, because they belonged to the wrong political party. The Court opined that

> [i]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency....party affiliation is not necessarily relevant to every policy making or confidential position (445 U.S. 507, 517-518 (1980)).

Thus, the Court announced that in determining what nonmerit positions are subject to patronage dismissal the ultimate inquiry should not be whether the position is one that makes policy or is confidential. The hiring authority must be able to demonstrate "that party affiliation is an appropriate requirement for the effective performance of the public office involved."[222]

The Elrod and Branti cases dealt only with patronage dismissal, and, until recently "the legality of other uses of patronage remained in doubt, though government agencies continued to apply political tests to almost everything but dismissal" (O'Neil, 1993, 62). But the Court addressed this issue in Rutan v. Republican Party of Illinois (1991).[223] At issue was Governor James Thompson's hiring freeze for all public positions under his control. His executive order required express permission by the Governor's Office to create or fill any new position or vacancy. To that end, his office screened all applicants to determine their financial or other support to the Republican Party. The Rutan

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[222]Id. at 518.

[223]111 L. Ed. 2d 52 (1991).

plaintiffs challenged this practice alleging that they had repeatedly been denied various promotions and positions because they lacked Republican credentials (Lee, 1992, 46-47). In applying the Elrod test, the Court held that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees"[224]

Freedom of Speech

Speaking out can often get public employees in trouble (O'Neil, 1993, 26). At issue is whether the employee's speech is internal or external to the agency, addresses a public concern or a private interest, and its affect on organizational efficiency and effectiveness. O'Neil explains:

> Excessive controversy aired in public or in the press might impair the efficiency of an agency, the morale of its staff, or even the credibility it needs to serve its clientele. Moreover, government must appear neutral in ways that could be imperiled by outspoken staff members. There may also be certain kinds of information, not technically classified but highly sensitive, the effects of which may justify limits on the speech of those who possess such information (34).

In Pickering v. Board of Education (1968) the Supreme Court held that an Illinois public school teacher could not be dismissed for statements he made to the local media criticizing school board policy without "proof of false statements knowingly and

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[224]Id. at 4875.

recklessly made" (Ibid).[225] In finding in Pickering's favor, the Court stressed that the statements were written by the teacher on his own time and with no use of school facilities, made no personal attacks on immediate supervisors or fellow workers, and only rendered a general critique of the school board's policy. In leaving many questions unanswered, the central element to the Court's decision was that the teacher's employee speech addressed a matter of "public importance" or "public concern" (Ibid).

The Court revisited this issue in Connick v. Myers (1983).[226] The Connick case involved an assistant district attorney in Louisiana who had been dismissed for circulating to her peer co-workers a questionnaire asking their opinion about office morale, policies, confidence in supervisors, need for a grievance procedure, and pressure to participate in political campaigns. The attorney brought suit alleging that her dismissal abridged free speech under the Pickering doctrine. However, the Court found that the attorney's actions did not meet the "public concern" standard established in Pickering. A key variable in the Connick decision was the degree to which internal agency speech may impair morale or otherwise jeopardize the internal working of the agency. The Court spoke to this issue:

> We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action (Connick v. Myers, 461 U.S. 138, 168 (1983)).

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[225]391 U.S. 563 (1968).

[226]461 U.S. 138 (1983).

In a later case, Rankin v. McPherson (1988), the Supreme Court further qualified its previous decision in Connick making it clear that "a claim of harm to internal morale and efficiency must be used sparingly" (O'Neil, 1993, 37).[227] The case involved freedom of speech by a Texas county clerical worker who remarked to a coworker after the 1981 attempt on President Reagan's life that "if they go for him again, I hope they get him" (Ibid). After being dismissed, the worker, Ardith McPherson, brought suit, which was ultimately adjudicated by the U.S. Supreme Court. The Court held that although Mrs. McPherson's statements were provocative, made at the work site, and heard by some co-workers, "there is no evidence that it interfered with the efficient functioning of the office."[228]

In Waters v. Churchill (1994) the Court was unable to agree on an opinion in determining whether a public hospital nurse was fired because of alleged disruptive statements made in the workplace that were protected under the First Amendment.[229] Although the Court agreed that the lower court's decision should be vacated and the case remanded for a determination as to the actual motivation for the firing, the Court's conclusions are instructive and indicative of its future direction in balancing the interests of government against the individual rights of public employees. It concluded that

[t]he Connick test should be applied to what the government employer

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[227]483 U.S. 378 (1988).

[228]Id. at 389.

[229]511 U.S. 686 (1994).

> reasonably thought was said, not to what the trier of fact ultimately determines to have been said....the key is the government employer's interest in achieving its goals as effectively and efficiently as possible....On the other hand, courts must not apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. It is necessary that the decision maker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith alone is sufficient under the First Amendment. Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision... (690-691).

The Court's controversial conclusions in the Waters case raise some interesting questions. On the one hand, the Court concluded that the Pickering test must be applied to actual and/or hearsay speech before an adverse employment decision can be determined.[230] It also concluded that once the test has been applied by a reasonable manager, the public employee can be rightfully terminated from employment based on hearsay evidence, irrespective of whether the evidence is true and correct. The key factor in such determinations is the government's interest in achieving efficiency and effectiveness. Thus, in balancing the interests of the state against those of individual public employees the Waters case demonstrates the Court's tendency to swing the pendulum toward the state's interest. Further, it illustrates the qualified, limited, and

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[230]The Pickering test should not be confused here with the Connick test. The Connick test refers to whether the speech in question was internal or external agency speech and the degree to which it was disruptive to the efficiency and effectiveness of the organization. The Pickering test refers to whether the alleged protected speech was based on a public or private concern. If based on a "public concern" it would be deemed protected speech under the First Amendment.

changing environment of constitutional protection of public employee rights.

Fourth Amendment Rights and Protections

Workplace Privacy: Searches and Seizures

Personal privacy in the workplace has long been a concern for those entering the public service (Cooper, 1988, 332). Frequently, public employers request personal information from prospective employees about their backgrounds, personal finances, and, in the case of some public safety positions, their sexual preferences. Once employed, many public employees are faced with organizational policies and procedures which prohibit specific personal conduct and subjected to physical searches of lockers, desks, and personal effects on the job. In addition, new workplace privacy issues such as AIDS and drug testing of job applicants and public employees has emerged in the past decade. Yet, the courts have provided only limited guidance to public employees and agencies in their decisions (O'Neil, 1993, 73).

The U.S. Supreme Court first addressed the "zone of privacy" issue in O'Conner v. Ortega (1987).[231] At issue was the Fourth Amendment protection against unreasonable search and seizure. The case involved the searching of Dr. Ortega's desk which produced damaging evidence that was used as the basis for disciplinary action against him. In its decision, the Court "remanded the case to the trial court and thus did

[231]480 U.S. 709 (1987).

not fully define the scope of an employee's constitutional zone of privacy, but...announced principles that offer at least partial guidance" (Ibid).

The Ortega Court held that workplace searches of public employees and their effects must be judged by Fourth Amendment standards and, therefore, government employees have a "reasonable expectation of privacy."[232] They do not lose their Fourth Amendment rights "simply because they work for the government."[233] However, the Court qualified and limited the Fourth Amendment's guarantee against unreasonable search and seizure when it held that "requiring an employer to obtain a warrant...would seriously disrupt the routine conduct of business and would be unduly burdensome."[234] The Court further held that particular searches require validation prior to agency action that must be "justified at the inception" and "permissible in its scope" (74).[235] In short, public employees' "zone of privacy" is diminished where an agency can demonstrate a strong policy behind its intrusive practice.

In a random drug testing case, National Treasury Employees Union v. Von Raab (1989), the Court held a similar opinion.[236] At issue was the government's need to deter drug use among employees eligible for promotion to sensitive positions. The Court held

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[232]Id. at 717.

[233]Id.

[234]Id. at 720.

[235]Id. at 726.

[236]489 U.S. 656 (1989).

that such an agency interest presents "a special need that may justify departure from the ordinary warrant and probable cause requirements."[237] Although the Court recognized that random drug tests were a search to which the Fourth Amendment applied, it determined that the government's interest was greater than the privacy interests of the employees. This balancing turns on the strength of the governmental interest as well as the nature of the sensitive position(s) at issue. Interestingly, the plaintiffs did not challenge the random drug tests as warrantless searches, but argued that the government lacked probable cause. Relying on the sensitivity of the positions in question, the Court upheld the suspicionless, warrantless drug testing (82).

Fifth and Fourteenth Amendment Rights and Protections

Procedural Rights of Public Employees

Procedural rights afford public employees due process in vindicating their rights and interests, generally, in the form of any agency administrative hearing (Cooper, 1988, 151-153). However, constitutional due process protections are "complex, confusing, and evolving" (O'Neil, 1993, 123). Prior to 1972, procedural rights of public employees were thought to only exist in those remedies promulgated by statute, agency regulation, or collective bargaining agreement. However, a series of U.S. Supreme Court decisions brought the emergence of a limited and qualified employee's claim to a due process

[237]Id.

hearing. Due process is founded in the Fifth and Fourteenth Amendments of the U.S. Constitution. The Fifth Amendment applies to the federal government and requires, in part, that "[n]o person shall be...deprived of life, liberty, or property without due process of law..." (Rohr, 1986, 203). The Fourteenth Amendment, in part, extends due process requirements to state governments: "[N]or shall any State deprive any person of life, liberty, or property without due process of law" (205).

In Board of Regents v. Roth (1972) the Court held that the simple, routine denial of a year-to-year employment contract did not require a hearing. It announced that a constitutional right to a hearing would obtain only when the dismissal abridged an independent constitutional right; violated the employee's property rights; or when the governmental worker's constitutional interest in liberty was violated by an agency action. The Court ruled that Mr. Roth had no "property interest" in employment and, therefore, no claim of entitlement to reemployment or a pretermination hearing. In the Roth decision the Court focused on written policy in connection with the expectation of employment. However, in a companion case, Perry v. Sindermann, the Court dealt with the nature of expectation that might arise from the organization's de facto policy, custom, or usage (Lee, 1992, 19-20).[238] It opined that although the Texas state college system had no formal tenure system a de facto tenure program engendering the expectancy of continued employment existed. Such an expectancy demonstrates that a property interest in continued employment exists.

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[238]408 U.S. 593 (1972).

In the Roth and Sindermann decisions, the Court established that a hearing was required where a governmental employee could demonstrate a "property" interest in continued employment. That interest was to be defined by law and required proof of a "legitimate claim of entitlement" to the job.[239] Subsequently, in Bishop v. Woods (1976) the Court provided further guidance and qualified the scope of its decisions in Roth and Sindermann.[240] The case involved a North Carolina police officer who was discharged after three years service from his position which was classified as "permanent." The Supreme Court, in upholding the federal district court, held that a property interest did not exist and the employee served at the will and pleasure of the city.[241] In Bishop, the Court gave greater weight to state law and its interpretation by the state courts because the property interest was a state issue (Ibid).

Later in Cleveland Board of Education v. Loudermill (1985) the Supreme Court proffered a broader view of property interest.[242] The case involved a security guard who was dismissed for making a false statement on his employment application. Under Ohio state law, he was classified as a civil service employee and entitled to retain his

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[239]Id. at 577.

[240]426 U.S. 341 (1976).

[241]Id. at 354.

[242]470 U.S. 532 (1985).

position during good behavior and efficient service. Therefore, he could only be dismissed for misfeasance, malfeasance or nonfeasance in office. The federal district court held that such wording found no property interest, however, the Court of Appeals reversed. The U.S. Supreme Court agreed that a property interest was present and held that "the private interest in retaining employment" and the "opportunity for the employee to present his side of the case" outweighed the "governmental interest in immediate termination."[243]

The Roth and Sindermann cases also addressed the issue of a public employee's liberty interest. In those cases, the Court held that a dismissal might deprive a public employee of liberty by the objective consideration of employment deprivation or the subjective consideration of social stigma (O'Neil, 1993, 127). But the Court went on to add that the "routine, unexplained denial of continuing employment would not give rise to a `liberty' interest based hearing any more than it would generate a `property' interest."[244] In short, proof of a substantial deprivation would be required to trigger a liberty interest claim.

In Codd v. Velger (1977)[245] and Siegert v. Gilley (1991)[246] the Court further qualified liberty interest claims. In the Codd case, the Court held that a liberty interest

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[243]Id. at 542-544.

[244]Roth v. Board of Regents, 564, 575 (1972).

[245]429 U.S. 624 (1977).

[246]114 L. Ed. 2d 277, reh'g denied, 114 L. Ed. 2d 1084 (1991).

leading to a hearing could be lost or jeopardized if the employee did not challenge the truth of the allegedly stigmatizing statements. The purpose of the hearing, it opined, was to provide the person an opportunity to clear his name. The Court explained that "[i]f he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him" (128).[247]

The Siegert case added another dimension and qualification to a legitimate liberty interest claim. At issue were derogatory statements made by a supervisor to a prospective employer about an employee who was in the process of challenging his dismissal. Significantly, the Court had previously held in Bishop v. Woods (1976) that no matter how serious, or how erroneous, the charges might be, they could not trigger a due process hearing unless they had been communicated to others.[248] When the employee, Siegert, was not selected for the new position, he filed suit claiming that his liberty interest was violated and sought a due process hearing based on the issues communicated by the supervisor. The Court rejected his claim based on the fact that the negative statements were made after he left the job and not during the termination process (128-129).

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[247]429 U.S. at 628.

[248]426 U.S at 348-49.

APPENDIX B

A SELECTIVE REVIEW OF THE STATUTORY PROTECTION OF PUBLIC EMPLOYEES

A comprehensive review of the statutory protection of public employee rights is beyond the scope of this project. However, three areas of the public employment environment illustrate how extensive statutory protections have become: Partisan political activities, discrimination in employment, and collective bargaining for federal employees. Toward that goal, this selective review (1) focuses on the *Hatch Act of 1940*, (2) provides an overview of the evolution of discrimination law in the United States; and (3) concludes with a brief historical review of collective bargaining rights for federal employees.

The Hatch Act of 1940

In 1940 Congress passed the *Hatch Act* which protects public employees from patronage while barring them from taking an active part in politics. The *Act* limits the political activity of public employees far more extensively than would be permissible for citizens at large (O'Neil, 1993, 53). It originally applied to employees at all levels of government until 1974 when Congress exempted state and local employees from the restrictions on taking part in or directing political campaigns, but most states have passed *Hatch Acts* which apply to their local governments (52). Although the federal and state

Hatch Acts have been challenged (1947,[249] 1973,[250] 1982,[251] and 1990[252]), they have survived judicial scrutiny.

Intimately related to the issue of regulating civil servants' partisan political activities is the practice of patronage--basing personnel decisions on party affiliation. Lee (1992) explains that the civil service reform movement was not intended to eliminate patronage practice in its entirety (43). It sought only to eliminate patronage practice in the appointment of competitive, civil service positions, not political appointments and federal judgeships. This is clearly evident in the *CSRA* with the establishment of the SES. Thus, much of the emerging patronage case law has focused on nonmerit, noncompetitive civil service positions.[253] But in addition to the political patronage protections afforded by the *Hatch Act* many federal statutes and executive orders protect

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[249]See United Public Workers v. Mitchell, 330 U.S. 75, 102-4 (1947). The Court upheld the provisions of the Hatch Act.

[250]See United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 547, 579 (1973). The Court held that it is in the best interests of the country that the federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees and others on the electoral process should be limited.

[251]See Clements v. Fashing, 457 U.S. 957 (1982). The State of Texas Hatch Act was challenged. The Court held that Texas could bar certain State officers from seeking other elective offices or even announcing candidacy during the term they currently served.

[252]See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1991). The Court held that affiliation to judge or place public employees violated the Constitution's guarantees of free speech.

[253]For example, the Elrod, Branti, and Rutan cases discussed in appendix a.

the employment rights of civil servants at the federal, state, and local levels. An overview of federal law prohibiting discrimination in employment and providing for federal government collective bargaining illustrates.

Discrimination in Employment

A chronological, noncomprehensive list of federal laws governing discrimination in employment depicts the increasing statutory protection of employee rights in the public workplace (Ledvinka and Scarpello, 1991, 30-32). *The Civil Rights Acts of 1866 and 1870* (based on the Thirteenth Amendment) prohibit race discrimination in hiring, placement, and continued employment. *The Civil Rights Act of 1871* (based on the Fourteenth Amendment) prohibits the deprivation of employment rights under cover of state law.[254] *The Equal Pay Act of 1963*, as amended, prohibits sex discrimination in payment of wages to women and men performing substantially equal work in the same establishment. *Title VI, Civil Rights Act of 1964* prohibits employers receiving federal financial assistance from discriminating based on race, color, religion, sex, or national origin. *Title VII, Civil Rights Act of 1964*, prohibits all private and government employers with 15 or more employees from discriminating based on race, color, religion,

[254]Three years after the ratification of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1871 imposing civil liability for state and local governmental bodies and officials involved in the deprivation of rights guaranteed by the Constitution and other laws. The basis of the Act was the Equal Protection Clause of the Fourteenth Amendment which literally guarantees equal protection of all under the laws.

sex, or national origin. *Executive Order 11246* (1965), as amended, prohibits any agency contracting with the federal government from discriminating based on race, creed, color, national origin or sex.[255] *The Age Discrimination Act of 1967*, as amended, protects applicants and employees 40 years of age or older from discrimination on the basis of age in hiring, promotion, discharge, compensation, terms, conditions or privileges of employment. *Title I, Civil Rights Act of 1968* prohibits interference with a person's rights due to race, religion, color, or national origin. *Executive Order 11478* (1969) prohibits discrimination in federal government based on race, color, religion, sex, national origin, political affiliation, marital status, or physical handicap. *The Equal Employment Opportunity Act of 1972* amends Title VII of the Civil Rights Act of 1964 by extending its coverage to the public sector. In addition to Title VII protections, *Title VI* of the Act prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. Employment discrimination is covered by Title V if the primary objective of the financial assistance is provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such program. *Title IX of the Education Amendments of 1972* prohibit educational institutions receiving federal financial assistance from discriminating based on sex. *Section 503 of the Rehabilitation Act of 1973*, as amended, prohibits job discrimination because of handicap and requires affirmative action to employ and advance

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[255]Executive Order 11246 was amended by Executive Order 11375 on October 13, 1967. The amendment prohibits agencies contracting with the federal government from discriminating based on sex.

in employment qualified individuals with handicaps, who, with reasonable accommodation, can perform the essential functions of a job.[256] *The Vietnam Era Veteran's Readjustment Act of 1974* prohibits the federal government from discriminating against disabled veterans and Vietnam-era veterans and requires affirmative action.[257] *The Uniform Federal Guidelines on Employee Selection Procedures* (1978) provides a uniform standard for determining the adverse impact of employment decisions.[258] *The Americans with Disabilities Act of 1990*, as amended, protects qualified applicants and employees with disabilities from discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, classification, referral, and other aspects of employment on the basis of disability. The law also requires that covered entities provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship. Finally, the *Rehabilitation Act of 1992* prohibits discrimination based on physical or mental handicap and requires affirmative action. Yet in addition to statutory protections, many employee rights are gained and protected by collective bargaining agreements between unions and management.[259]

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[256]Section 504 of the Act, as amended, prohibits employment discrimination on the basis of handicap in any program or activity which receives federal financial assistance.

[257]See 38 U.S.C. 4212.

[258]See Federal Register, vol. 43, no. 166 (August 25, 1978).

[259]Collective bargaining rights, privileges, and protections for public employees at subnational levels of government vary. For example, some states, such as the Commonwealth of Virginia, prohibit their public employees from participating in collective bargaining in the employment context. Consequently, local governments in the

Protection of Employee Rights Through Collective Bargaining[260]

In the early years of this century, the collective activity of public employees was frustrated by the anti-union attitude of postal authorities and by executive regulations prohibiting federal employees from seeking to influence legislation except through the chain of command of their respective departments. With the passage of the *Lloyd-LaFollette Act of 1912* these obstacles were removed. Although only specifically protecting the organizational activities of postal employees, the *Act* also prohibited interference with petitions to Congress by any person or group of persons in the civil service of the United States. Prior to 1962, the *Act* was the only federal law pertaining to public employees.

In 1962 President Kennedy issued *Executive Order 10988* that provided for the exclusive, formal or informal recognition of federal public employee organizations. His *Order* prescribed the promulgation of a *Code of Fair Practices and Standards of Conduct* that, ultimately, was prepared by the Department of Labor and the Civil Service Commission. To that end, these entities studied and adopted ideas from an array of labor relations statutes which dealt with the private sector and included the *National Labor*

Commonwealth are also prohibited from participation under the "Dillon's Rule" concept.

[260]This brief overview of collective bargaining in the United States is based on a presentation to the Virginia Department of Mental Health and Mental Retardation's Human Resource Development and Management Quarterly Forum by Mr. Cyril Coombs, Deputy Director for the Virginia Department of Employee Relations Counselors, September 18-20, 1996, in Staunton, Virginia.

Relations Act, the *Wagner Act of 1935*, as amended by the *Taft-Hartley Act* and the *Lardrum-Griffin Act of 1959.* The resulting *Standards of Conduct* imposed restrictive conduct only on the internal organization and government of the employee unions.[261]

The *Code of Fair Practices* prescribes certain unfair labor practices for agency management and employee organizations. On the one hand, for agency management it is an unfair labor practice (1) to interfere with the rights of employees granted by *Executive Order 10988*, (2) to discriminate in the hiring or retaining of employees, (3) to dominate union activity, (4) to discipline an employee because he testifies or files a complaint pursuant to the *Standards of Conduct* or the *Code of Fair Practices*, (5) to refuse appropriate recognition of unions or organizations, or (6) to refuse to negotiate when required to do so by the Order. On the other hand it is an unfair labor practice for unions (1) to interfere with the rights granted employees under the *Order* or to induce management to do so, (2) to discipline members performing duties which are demanded by their jobs, (3) to slow down or strike, or (4) to discriminate in granting union membership. The *Code of Fair Practices* also prohibits strikes, work slow downs or stoppages.

In sum, *Executive Order 10988* authorized federal employees to organize, gain exclusive recognition and bargain collectively within established parameters. The subsequent creation of the Federal Labor Relations Authority (FLRA) and Merit Systems

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[261]The Standards restricted conduct relative to fiscal reporting requirements, conflict of financial interests, etc.

Protection Board (MSPB) speak to the evolution of federal employees' right to collectively bargain with management. Albeit many states, counties, and municipalities have granted their governmental units authority to enter into collective bargaining agreements by the enactment of statutes, ordinances, resolutions, and executive orders, some refuse to grant public employees that right. The Commonwealth of Virginia is an example.

APPENDIX C

INFORMED CONSENT FOR PARTICIPANTS OF INVESTIGATIVE PROJECTS

Virginia Polytechnic Institute And State University

Title of Dissertation Project: "Internal Dispute Resolution: A Study in the Legal Environment of Complex, Public Organizations."

Investigator(s): William M. Haraway III, Doctoral Candidate.

I. **Purpose of this Research/Project:**

The purpose of my dissertation project research is to describe the dynamics of legalization in public sector grievance programs to further public administration management and organizational theory and practice. Description of the model is best obtained from participants knowledgeable of the grievance process. Therefore, I will interview employees, managers, employee relations counselors, public and private attorneys, and human resource management and employee union officials. Since the study is exploratory and purely voluntary participation is being solicited, the total number of participants cannot be precisely specified. However, I anticipate interviewing no fewer than twenty five participants.

II. **Procedures:**

I am seeking employees in public organizations who voluntarily agree to be interviewed about internal dispute resolution and the grievance process. In addition, I am seeking the voluntary participation of attorneys, employee union officials who represent grievants, and others who participate in or have knowledge of the grievance process.

If you voluntarily agree to participate in the study, I will initially interview you individually and privately for approximately one hour using open-ended questions so that I may hear your point of view. Rather than asking structured questions, I will be conducting what is termed an unstructured interview. Essentially, I will frame the topic of my research as attempting to find out how disputes are resolved in public organizations. Then I will ask an initial open-ended question to begin the interview. I will follow your lead after that so you can tell me what you think is important for me to know. I am interested in hearing your stories, examples, and perspectives that will help me understand and then describe how employee grievances are resolved. Following the initial interview, I will look for patterns and themes you presented. As a voluntary participant, you have the right to decline to answer any question that I may pose.

III. **Risks:**

Based on the above described format and the type of data I am seeking, I do not anticipate any risks to you, either physically, emotionally or mentally. However, if you feel that a particular response you may give potentially may jeopardize your working relationships with other organizational members, you have the right to decline to give such information, or to retract subsequently any response previously uttered. Additionally, any scheduled interview that unexpectedly interferes with your responsibilities can and will be rescheduled to a time and location more convenient for you.

IV. **Benefits:**

Although I do not anticipate that you will derive any tangible benefits from your voluntary participation in the study, I hope that the interview process will afford you an opportunity to reflect upon how employee grievances are resolved in public organizations.

On a broader scale, I anticipate that your participation will enable me to describe the dynamics of legalization in the grievance process. If my study is fruitful, I hope that it will provide public administrators and managers with a better understanding of how to manage issues of workplace justice and organizational legitimacy.

V. **Extent of Anonymity and Confidentiality:**

I will assure your anonymity and confidentiality to the utmost extent possible. I will assign you a code which will be used in all written or recorded documents and materials associated with the study. The code will be stored in a locked file cabinet at my private office. I will not share your responses with any other member of your organization.

If you agree orally and in writing, I will audiotape the interview solely for my use and, if needed, my dissertation chair's review. Any audiotaped interviews serve as the primary source for data collection and analysis. The purpose of the audiotaping is to enable me and my chair, if the need arises, to recheck any specific wording or phrases uttered by you during the interview. You will be given the opportunity to edit your audiotape prior to inclusion of any material in the study. Audiotapes will not be transcribed unless you request a hard copy for editing purposes. Until all data has been collected and analyzed the audiotape of your interview will be labeled with your assigned code and stored in a locked file cabinet in my private office. After the study is complete, you have the option of having me destroy or return your individual audiotapes.

Confidentiality is limited, however. In the event that you reveal any information involving harm or threat of harm to self or others, statutes require that such information be reported to proper authorities.

VI. **Compensation:**

No monetary or intangible contribution is associated with your participation in this study.

VI. **Freedom to Withdraw:**

You have the right and privilege to withdraw your participation from this study at any time during the study without penalty. You are free to not answer any question posed during an interview. You have the right to retract any statement you utter, as well as the right and opportunity to edit your interview responses.

VII. **Approval of the Research:**

This research project has been approved, as required, by the Institutional Review Board for Research Involving Human Subjects at the Virginia Polytechnic Institute and State University and by the Center for Public Administration and Policy, Virginia Polytechnic Institute and State University.

IX. **Subject's Responsibilities:**

I voluntary agree to participate in this study. I have read the following responsibilities:

1. To be available for up to two separate interviews approximately one hour in length per interview.

2. To specify convenient times and locations for the interview and to reschedule in a timely manner any interviews that unexpectedly interfere with other responsibilities.

X. **Subject's Permission:**

I have read and understand the Informed Consent and conditions of this project. I have had all my questions answered. I hereby acknowledge the above and give my voluntary consent for participation in this project. I understand that I may withdraw at any time during the study without penalty. I agree to abide by the rules of this project.

_____ _____

Signature of Participant Date

_____ _____

Witness Date

APPENDIX D

PROTOCOL FOR IRB EXEMPTION REQUEST

Virginia Polytechnic Institute and State University

Title of Dissertation Project: "Internal Dispute Resolution: A Study in the Legal Environment of Complex, Public Organizations."

Investigator(s): William M. Haraway III, Doctoral Candidate.

I. **Justification of Project:**

The purpose of this dissertation study is two-fold: (1) One is to make a scholarly contribution to public administration management and organizational theory, (2) The other is to provide public administrators and managers with a better understanding of how to manage issues of workplace justice and organizational legitimacy in a turbulent environment characterized by downsizing, reinvention, and reengineering. To that end, the study will investigate how the legal environment of complex, public organizations serve to transform--to legalize--social processes for resolving problems and disputes. Human subjects will be used as the primary source of data collection as the model is best obtained from participants in the grievance process. Therefore, voluntary participation will be solicited from State public employees as well as private attorneys and union officials who participate in the Commonwealth's grievance program. The study will seek to understand and describe how employee grievances are resolved in public, complex organizations.

II. **Procedures:**

The study seeks employees in the State work force who voluntarily agree to be interviewed about internal dispute resolution and the grievance process. It also seeks the voluntary participation of private sector attorneys, employee union officials, and others who have direct and/or indirect knowledge and experience with the Commonwealth's Grievance Program. Since the study is exploratory and purely voluntary participation is being solicited, the total number of subjects cannot be precisely specified. However, the study will include not fewer than twenty five subjects. There is no formal selection criteria for subjects other than knowledge and/or direct and indirect knowledge of or experience with the Commonwealth's formal Grievance Program.

Volunteer subjects will be interviewed individually and privately for approximately one hour. Interviews, if written permission is granted, will be audiotaped. Interview questioning

will be unstructured and based upon the study's central theme of legalization and how disputes are resolved through the State's grievance process. Volunteer subjects must commit to a total of two one hour interview sessions. However, it is anticipated that only one interview will be necessary in most situations. Subjects will be encouraged to select an interview site that is comfortable for them personally. Each subject will be required to sign an approved written Informed Consent form prior to participation. In addition, subjects will have the option of editing interview tapes and withdrawing from the study at any time.

III. **Risks and Benefits:**

There are no risks anticipated as the result of participating in this study. All data will be held in the strictest confidentiality and subjects' identities will be anonymous. To that end, each volunteer subject will be assigned an alphabetical code by which data will be collected. Completed audiotaped interviews will be maintained by the investigator in a locked file cabinet in his private office. As audiotaped interviews are the primary source of data collection, the investigator will use valid pattern matching analytical methods central to the study's themes. Access to research data will be limited to the investigator and the investigator's dissertation chair and committee, as necessary. Upon completion of the study, all audiotaped interviews will be destroyed, except those returned to subjects per their written request.

IV. **Informed Consent:**

See attached Informed Consent Form.

V. **Biographical Sketch:**

The following is a biographical sketch of the investigator: William M. Haraway III, Doctoral Candidate, Center for Public Administration and Policy, Virginia Polytechnic Institute and State University.

EDUCATION

Virginia Polytechnic Institute and State University, *Doctor of Philosophy in Public Administration and Public Affairs*, ABD, Doctoral Candidate, 1992-Present.

James Madison University, *Master of Public Administration*, May 1991.

Christopher Newport College of the College of William and Mary, *Bachelor of Science in Governmental Administration/Urban Management*, May 1977.

EXPERIENCE

August 1992-Present: *Doctoral Graduate Research Assistant.* Center for Public Administration and Policy, Virginia Tech University, Blacksburg, Virginia. Responsible for conducting research and providing consultation services to the Virginia Department of Social Services. Participated in the Statewide Random Moment Study to determine work standards; served as a Facilitator for the Customer Service Improvement Project; and provided research on Welfare Reform to the Governor's Empowerment Commission. Conducted Program Evaluations of State Programs.

January 1990-May 1991: *MPA Teaching Assistant.* Department of Political Science, James Madison University, Harrisonburg, Virginia. Prepared and presented course work and lectures. Full classroom responsibility for two undergraduate Introduction to Political Science courses per semester.

July 1987-December 1989: *Front Office Manager.* Mountainside Villas Owners Association (MVOA), Massanutten Resort, McGaheysville, Virginia. Responsible for the management, financial administration and supervision of the Association's Front Office.

May 1977-December 1985: (1) *Placement/Employment Manager*, (2) *Employee Management Relations Manager*, (3) *Personnel Analyst*, and (4) *Personnel Intern.* City of Hampton Human Resource Management Office, Hampton, VA. Performed professional HRM duties and responsibilities in the areas of recruitment, placement, merit promotions, EEO/AA, reduction-in-force, position classification and compensation, budgeting, supervision, training, testing, interviewing, and discipline and grievance handling. Responsible for advising the City Manager and department heads on all grievance and discipline actions.

August 1973-March 1974: *Night/Weekend AeroClub Manager.* Langley AeroClub, Langley Air Force Base, VA. Responsible for supervision of the aeroclub during evening and weekend hours of operation. Part-time position while attending college. Possess a private pilot's license. Member of the Experimental Aircraft Association (EAA) and the International Aerobatic Club (IAC).

November 1969-August 1973: *Administrative Specialist.* 316th Tactical Airlift Wing Flight and Ground Safety Office, Langley Air Force Base, Virginia. Sergeant. Responsible for all administrative duties of the Wing Safety Office. Served in Southeast Asia in 1971. Honorable Discharge in 1973.

OTHER TRAINING, ASSOCIATIONS, PUBLICATIONS

Labor Law Conferences, Virginia Bar Association, 1980-83, Charlottesville, VA.

State Labor Relations, International Association of Chief's of Police, Selma, AL.

Federal Labor Relations, Office of Personnel Management (OPM), Philadelphia Region, Norfolk, VA.

Employee Discipline and Grievance Handling, Babcock Graduate School of Management, Wake Forest University, Winston-Salem, NC.

Quality Circle Facilitator Training, Productivity Development Systems, Inc., Clearwater, FL.

Co-Author: *"State Administration And The Founding Fathers During The Critical Period,"* Administration & Society, vol 28, no. 4, February 1997: 511-530.

Doctoral Dissertation: *"Internal Dispute Resolution: The Legal Environment of Complex, Public Organizations."*

Member: *Pi Alpha Alpha*, The National Honor Society for Public Affairs and Administration, Virginia Tech University Center for Public Administration and Policy Chapter, May 1996.

Member: *American Society for Public Administration (ASPA)*, Southwest VA Chapter, 1992-Present.

Member: *Law and Society Association (LSA)*, 1994-Present.

Past Member: *International Personnel Management Association (IPMA)*, 1980-85, Virginia Chapter. Member of the Committee for Professional Development--1984.

Past Member: *International City/County Management Association (ICMA)*, 1994-1996.

Other professional and academic training available upon request.

Virginia Tech
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

Office of Sponsored Programs
301 Burruss Hall
Blacksburg, Virginia 24061-0249
(540) 231-5013 Fax: (540) 231-4822

July 11, 1996

MEMORANDUM

TO: William M. Haraway
6913 Everview Road
Richmond, Virginia 23226

FROM: Tom Hurd
Director

SUBJECT: IRB EXPEDITED APPROVAL/"Internal Dispute Resolution: A Study in the Legal Environment of Public Organizations"
Ref. 96-169

I have reviewed your request to the IRB for the above referenced project. I concur that the activity is of minimal risk to the human subjects who will participate and that appropriate safeguards have been taken. Therefore, on behalf of the Institutional Review Board for Research Involving Human Subjects, I have given your request expedited approval.

The approval is valid for 12 months. If the involvement with human subjects is not complete within 12 months, the project must be resubmitted for re-approval. We will prompt you about 10 months from now. If there are significant changes in the protocol involving human subjects, those changes must be approved before proceeding.

Best wishes.

HTH/pli

cc: Dr. Joseph V. Rees

APPENDIX F

A REPORT ON THE COMMONWEALTH OF VIRGINIA GRIEVANCE PROCEDURE

November 19, 1997

I. INTRODUCTION:

The following is a synthesis of the results of the dissertation study conducted by William M. Haraway through the Center for Public Administration and Policy at Virginia Polytechnic Institute and State University (Virginia Tech) during the Summer/Fall of 1996. The dissertation, titled Internal Dispute Resolution: A Study in the Legal Environment of Complex Public Organizations, is a case study in the dynamics of legalization in public sector grievance programs in a nonunion environment. It is designed to investigate and describe how legalization, as illustrated by the Commonwealth of Virginia Grievance Program, affects internal dispute resolution. To that end, twenty-eight interviews were conducted by the researcher in four State agencies,[262] as well as six interviews with neutral third-party hearing officers appointed by the Virginia Supreme Court.

A. APPROVAL OF THE RESEARCH:

The research was approved in advance by the Institutional Review Board for Research Involving Human Subjects and the Center for Public Administration and Policy, Virginia Polytechnic Institute and State University. As required in some instances, the research was also approved by the Institutional Review Board(s) for Research Involving Human Subjects in individual State agencies. The project was coordinated through but conducted independently of the Virginia Department of Employee Relations Counselors (DERC). Participation in the study was voluntary and the identity of the participants is strictly confidential.

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[262]Agency interviews included managers and supervisors at all levels, human resource and employee relations managers, paralegals from the Attorney General's Office, counselors from the Department of Employee Relations Counselors, rank-in-file employees, grievants, and active employee members of the Virginia Alliance of State Employees (VASE).

An Informed Consent for Participants of Investigative Projects was used to inform participants of the purpose of the research, research procedures, risks and benefits of participation, the extent of anonymity and confidentiality, compensation (no monetary or intangible contribution is associated with participation in this research study), freedom to withdraw at any time, approval of the research, subject's responsibilities, and gain the subject's written permission/consent to participate. In addition, written permission to audiotape interviews was obtained from each participant.

B. PURPOSE OF THIS REPORT:

The purpose of this report is to provide feedback to the participants of the research study. It is designed specifically for that and no other purpose and focuses on issues for the purpose of identifying ways to fine-tune the newly revised State Grievance Procedure. Recipients of this report should be cognizant of the fact that this is a synthesis of the actual study results that are reported in the dissertation using a different method of presentation.[263] All research data are the sole property of the researcher and may not be used for **any purpose** without written permission.

C. INTERPRETING THIS REPORT:

The information provided in this report reflects the views and perceptions of the research subjects about the State's Grievance Procedure as interpreted by the researcher. It should be noted, however, that this report does not reflect every possible theme discussed by the participants of the study. It reports important recurring themes and patterns as identified by the researcher. The researcher has attempted to verify the importance of these themes by triangulating data between policy, procedure, and three groups of participants: Management, Employee/Grievants, and Neutral Third-Party Hearing Officers. This report assumes the reader is completely familiar with the State's Grievance Procedure prior to and after the revisions made effective July 1, 1995.

In summary, as reported in the Department of Employee Relations Counselor's 1996 Annual Report, the newly revised State grievance procedure streamlined the process without changing substantive rights. A major focus of the change allows all employee issues to be heard by management (although not all issues many qualify for a hearing). Those issues that do qualify are adjudicated by a hearing officer appointed by the

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[263]The research data are presented in the dissertation using a theoretical, conceptual model: The Paradoxes of Legalization, as espoused by Sim B. Sitkin and Robert J. Bies in The Legalistic Organization (California: Sage, 1994).

Supreme Court of Virginia rather than by a three member grievance panel. Hearing officer decisions must comply with State policy and procedure and noncompliance rulings by hearing officers can be officially challenged to the Department of Personnel and Training.

II. PERCEPTIONS OF THE REVISED GRIEVANCE PROCEDURE BY GROUP:

A. Management:

Management perceives the newly revised grievance procedure to be better than the previous one. Management reports that it now has better communication with employees and can identify problems easier through the management review steps. This is attributed to the fact that all issues are considered grievable through those steps and managers and supervisors can not hide behind issues of grievability. It notes that disputes can now be resolved much faster than under the previous system. This is attributed to the new Hearing Officer provisions which replace the previous Panel Hearing system. Management also reports that there has not been an enormous increase in the number of grievances through the management review steps as expected.[264] However, some human resource management officials are not sure that allowing all issues to be grievable is the best way as it formalizes them as grievances which may have a negative connotation and institutionalize an adversarial relationship between management and employees.

Further, there are mixed perceptions by management about the newly revised hearing officer procedure. Some view it as fairer to all parties as it does away with "professional panel members." Others perceive the hearing process to have become more formal, legalistic, and adversarial--focusing more on legal matters and employment law rather than an informal, administrative hearing process.

In general, management reports that the hearing officer process is very expensive for agencies in that they are required to pay the cost of the hearing officer in addition to administrative costs associated with preparing and presenting management's side at hearings. Management does not believe that the Attorney General's Office is providing adequate attorney representation to them at the hearing stage of the process. Although management reports that paralegals from that office do an adequate job, it believes that it should be represented by A.G. attorneys against grievants' attorneys and in front of hearing officers. Finally, management reports that it is less likely to pursue bad cases

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[264]These findings correspond to those reported in the Department of Employee Relations Counselors 1996 Annual Report, pp. 4-6.

to the hearing level because of the expense involved and its lack of trust that hearing officers will support its action(s).

B. Employees/Grievants:

Employees/Grievants perceive the newly revised procedure to be fairer than the previous one, however, there is a consensus by most grievants that the grievance procedure is (a) not neutral, (b) stacked against the employee, (c) too legalistic and formal, and (d) can be manipulated by management. This group perceives that management tries to avoid valid grievances whenever possible and pursues bad cases to the hearing level. A central concern for this group is that although all issues are grievable through the management steps first-line supervisors have little authority to make grievance decisions at their level. They maintain that the management review steps do not work well because most management actions which culminate in a grievance have already been coordinated upward through the management levels. This results in management automatically supporting management at each review step. The general feeling is that the management review steps are ineffective and used by management as a means of "discovery" to collect information and build a case for the hearing stage of the grievance process rather than a sincere effort to resolve the dispute at issue.

Given this perspective, grievants note that they tend to hold back many details about their grievances until the hearing level. They perceive that the grievance process is very expensive as a result--that is, they feel the need to hire an attorney to represent them at the hearing level. Consequently, it is their view of how well the management review steps work that tends to shape their overall perspective of the efficacy of the grievance procedure. In sum, they view the procedure as management's and express that "employees feel that the procedure is management's and there is no way to win," "[f]iling a grievance is the same as committing career suicide," and "[f]iling a grievance is the same as taking on the establishment and all of its resources." Therefore, grievants tend to view the grievance procedure from a formal, legalistic perspective.

C. Neutral Third-Party Hearing Officers:

Hearing Officers also prefer the newly revised grievance procedure to the Panel system. Some HOs prefer the panel system because they believe that the panel members could provide specific context to grievance issues. They suggest that without that expertise it is now more important for representatives on both sides of a grievance to make sure that context specific information is presented during hearings. This is particularly important because some HOs explain that they don't understand State policies

and procedures very well.

Interestingly, a number of HOs interviewed expressed that management lay-representatives and some A.G. paralegals are a problem. They express that some lay-representatives for management do not perform well in hearings, and that "paralegals don't always understand the issues in hearings and sometimes over-try their cases--they are under pressure to win." On the grievants' side, some HOs expressed that grievant attorneys complicate the process because of their "must win" attitudes.

VI. THE ADMINISTRATIVE HEARING PROCESS AND DECISIONS:

A. Management:

On the positive side, management reports that the hearing process is faster than the old panel system and does away with "professional panel members." However, on the negative side, management notes that the hearing officer process is more expensive due to the fact that HOs adjudicate all qualified grievances rather than only termination grievances as under the old procedure. Management also views the administrative hearing as too formal, legalistic, and adversarial. One participant suggested that there is a "conflict between informality and structure in the hearing process," and another notes that "there are no set guidelines for how to conduct the administrative hearing." Again, the expense associated with the hearing process is a major concern for management, as well as the unpredictability of the HO's decision. Management perceives HOs to have unchecked authority and does not trust HOs to be fair and impartial. In short, management believes that HOs are biased against it. Management believes that HOs should only make hearing decisions that comply with State policy and procedure and should be careful not to substitute HO judgment for that of management's. Based on these perspectives, a number of HRM officials indicated that they try to avoid the hearing process by resolving the grievance during the management review steps, rather than face the expense and unpredictability of the hearing process--even if they believe that they can win the hearing decision.

Another issue for management is that HOs are "requesting more formal documentation prior to hearings." This, it is maintained, can be a problem as some information on distributive justice concerns (equal treatment and decisions in like actions such as discipline) is confidential and personal to other employees. This is a particular concern for HRM officials. Finally, management reports that HOs need to be better trained in State policy and procedure and that management lay-representatives need to be better trained in legal procedure, etc.

B. Employees/Grievants:

Employee/Grievants perceive the hearing level process to be overly formal, legal, and adversarial, yet fairer than the panel system. They perceive the use of neutral third-party hearing officers to be a "welcomed amendment to the grievance process," and that HOs are truly neutral and fair.

C. Neutral Third-Party Hearing Officers:

Hearing Officers report that there is no set format for conducting the hearing process, per se, and that newer, younger HOs tend to conduct the hearing process in a more legalistic manner. They note that they can not enforce attendance at the hearings and that although their decisions must comply with State policy/procedure, overall, they do not understand State policy/procedure very well. HOs report that they can order the parties to a grievance to exchange evidence and exhibits prior to a hearing and that management should settle some grievances before they get to the hearing level. At least one HO noted that "many problems at the hearings result from personality conflicts between employees and supervisors. If that is the case, the employee generally loses."

HOs have a mixed perception of grievance representatives. Some contend that legal/technical hearings require Attorneys on both sides, as opposed to lay representatives. Others maintain that attorneys at hearings can be a problem with their win/lose attitudes. Still others suggest that paralegals don't always understand the issues involved in various grievances and over-try their cases because of pressure to win.

Finally, HOs report that although pre-hearing conferences are available and encouraged, they are requested and used very little. Additionally, they maintain that there is a push for better written HO decisions so as not to leave room for appeals based on legal wording. Further, they note that mitigating circumstances generally play a small role in the actual decision process, as opposed to facts based on policy/procedure issues and that they tend to give more weight to written evidence (documentation) rather than oral testimony and prefer oral testimony that supports written evidence.

VI. HUMAN RESOURCE MANAGEMENT'S ROLE IN THE PROCEDURE:

A. Management:

Human Resource Managers' report that their role is to coordinate the grievance process in the agencies. HRM does not see itself as an employee advocate. HRM's loyalty lies with management. However, in some agencies this perspective is changing. Some HRM officials are beginning to investigate grievance issues more thoroughly rather than blindly accepting management's representation of the issue. But this is not a widespread perspective and the greater majority of HRM officials view the grievance process as a win/lose situation for management. They feel that they have to win a grievance if it gets to the hearing level. Overall, HRM officials perceive the hearing officer process as legal, formal, expensive, and unpredictable.

B. Employees/Grievants:

This group reports that HRM is not neutral and they don't trust it in the grievance process as managers and supervisors consult with HRM officials before taking controversial or adverse actions. Grievants maintain that HRM officials control the grievance process in the agencies (telling first-line supervisors what to do and say), determine issues of grievability for agency directors (from a formal, legal stance), and blindly support and pursue bad cases to the hearing level.

C. Neutral Third-Party Hearing Officers:

Hearing officers also report that HRM is "generally involved in hearing disputes by giving advice to the supervisor who took the action resulting in the grievance." Some note that "supervisors follow the rules and policies that HRM tells them," and that "HRM in the agencies is not so good at communicating grievance information to low level employees." Others suggest that HRM controls all documentation involved in grievances and does not easily share that information with grievants.

VII. DERC'S ROLE IN THE GRIEVANCE PROCESS:

A. Management:

Management has mixed perceptions about DERC's role in the grievance process. Overall, management notes that its relationship with DERC has improved over the past few years and views DERC as a neutral participant in the process; only explaining options and procedure to management and grievants alike. However, at least one participant suggested that DERC may only give employees/grievants options, but explains to management the finer details about how to win a grievance at the hearing level. This position was not pursued but should be considered in relation to the following employee/grievant perceptions.

B. Employees/Grievants:

On the positive side, the majority of this group interviewed perceives DERC as fair and the best source for grievance information (particularly in relation to HRM's participation in the process). However, on the negative side, Employees/Grievants perceive DERC to be very pro-management, because they are part of management, not independent of the State organization, and receive a State paycheck. Therefore, some grievants report that they don't trust DERC in the grievance process for these reasons and "don't trust DERC to keep grievance information confidential..."

C. Neutral Third-Party Hearing Officers:

HOs perceive DERC's role in the grievance process positively and note that DERC is responsible for ensuring that HO decisions comply with State policy/procedure. However, some HOs suggest that DERC is very pro-management.

VIII. THE STATE'S MEDIATION PROGRAM:

A. Management:

Management (primarily HRM) reports that mediation works best when a third-party mediator from outside the agency is used. It notes that many employees don't trust the mediation process and, therefore, choose the more formal grievance process instead.

Further, management maintains that the mediation process is very expensive because it is time-consuming. One manager/supervisor reported that he used mediation with an employee because his agency HRM official recommended it as a method for documenting a problem employee for possible use in later personnel actions.

B. Employees/Grievants:

Overall, this group knows very little about the mediation program/process. A great majority of those interviewed did not know such a program existed or what it was about. However, those who have used the mediation program report that it can only be successful if a third-party mediator outside of their agency is used. One employee/supervisor who had experienced the mediation process suggested that "mediation is a management tool that is formal, not confidential, and used to collect information against employees."

C. Neutral Third-Party Hearing Officers:

Some HOs report that reference to mediations are used infrequently in formal hearings. Mediations are used in hearings against employees by management in some situations if the employee admitted guilt or if the mediation is used to demonstrate prior counseling. Other HOs report that they have never heard mediations used by management in the administrative hearings.

IX. IDENTIFICATION OF SIGNIFICANT INSTITUTIONAL ISSUES AND RECOMMENDATIONS FOR IMPROVING THE STATE'S GRIEVANCE PROCEDURE: (Available Upon Request).

APPENDIX G

PARADOXES OF LEGALIZATION WORKSHEET

INTERVIEWEE: TAPE NO. DATE:

I. POWER PARADOX: Misuse of formal, legal authority which is designed to restrict administrative discretion and ensure justice and fairness in organizations. [Administrative discretion is used to cover and legitimize management actions--administrators use of codified law, admin. procedures, and other legal authority to justify, cover, and/or legitimate their actions.]

INTERVIEW THEMES:

II. RATIONALITY PARADOX: Administrative reliance on the use of legitimate, law-like procedures in decision making. Such reliance provides an "apparently authoritative basis of justifying managerial decisions, "however, it may actually undermine organizational rationality by limiting administrators' discretion to respond immediately to change."

INTERVIEW THEMES:

PARADOXES OF LEGALIZATION WORKSHEET

PAGE 2 OF 2

INTERVIEWEE/TAPE NO.

III. FORMALIZATION PARADOX: Results from adopting legalistic approaches as a means of institutionalizing informal practices that may have been particularly successful. "The very act of formalizing a successful practice may remove the sense of intimacy or interpersonal responsibility that was the cornerstone of its success." [it may undermine the informal and valued trust that managers share with their subordinates.]

INTERVIEW THEMES:

IV. JUSTICE PARADOX: Derives from a reliance on legalistic reasoning and criteria at the expense of humanistic and social considerations. [Such legalization can undermine social goals [like fairness and justice] by fostering a superficial reliance on that which meets the letter of the law over that which meets the spirit of the law].

INTERVIEW THEMES:

June 1996 Researcher: William M. Haraway III/Va Tech

APPENDIX H

Commonwealth of Virginia
FY 95 Grievances

Issue	*Number*	*Percentage*
Discipline	715	54
Work Conditions	172	13
Performance	146	11
Compensation	119	9
Other	172	13
Totals	1324	100

Discipline: (nontermination, termination, suspension); Work Conditions: (supervisory conflict, OSHA, safety, security, records); Performance: (arbitrary/capricious, misapplication, termination, re-evaluation); Compensation: (overtime, annual, sick leave, worker's compensation); Other: (benefits, discrimination, methods and means, position classification, mediation, separation.)

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APPENDIX I

Commonwealth of Virginia
FY 96 Grievances

Issue	*Number*	*Percentage*
Discipline	591	51
Work Conditions	58	5
Performance	81	7
Compensation	162	14
Other	266	23
Totals	1158	100

Discipline: (nontermination, termination, suspension); Work Conditions: (supervisory conflict, OSHA, safety, security, records); Performance: (arbitrary/capricious, misapplication, termination, re-evaluation); Compensation: (overtime, annual, sick leave, worker's compensation); Other: (benefits, discrimination, methods and means, position classification, mediation, separation.)

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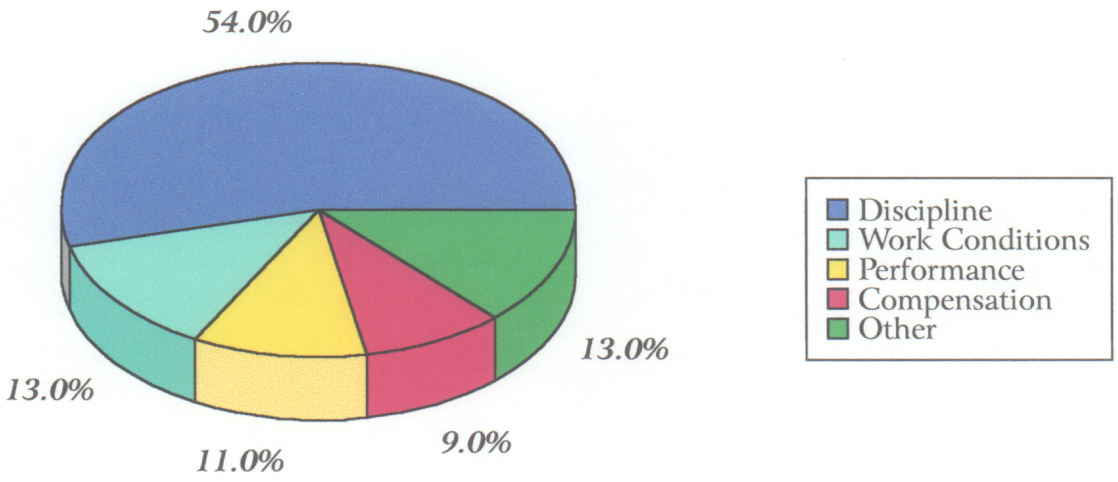
APPENDIX J

Commonwealth of Virginia Grievance Issues

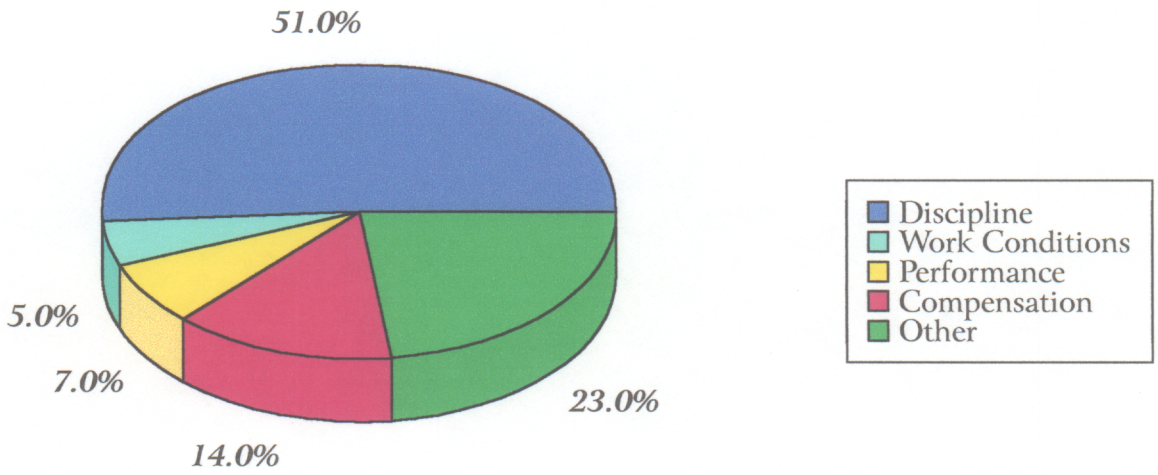


FY 95

DERC 1995 Annual Report, 1995, 3

APPENDIX K

Commonwealth of Virginia Grievance Issues

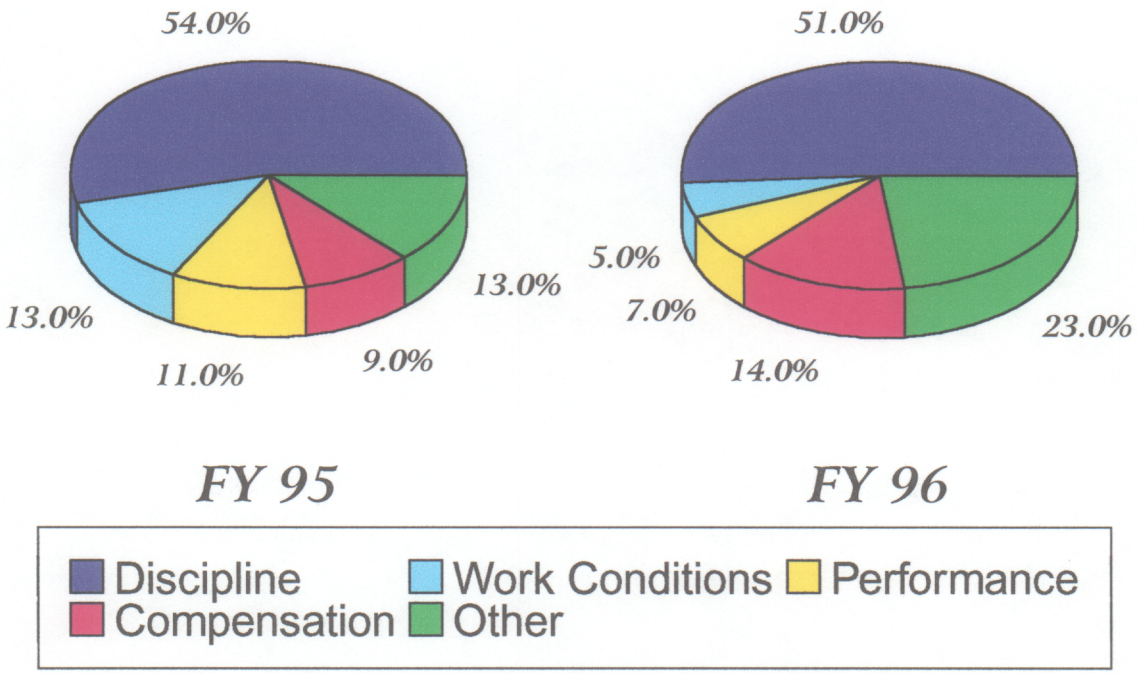


FY 96

DERC 1996 Annual Report, 1996, 4

APPENDIX L

A Comparison of FY95-96 Commonwealth of Virginia Grievance Issues



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James Madison University, *Master of Public Administration*, May 1991.

Christopher Newport College, *Bachelor of Science in Governmental Administration/Urban Management*, May 1977.

EXPERIENCE

January 1997-Present: *Adjunct Professor.* Department of Political Science, James Madison University, Harrisonburg, Virginia. Teach undergraduate courses: Public Administration, American Government, State and Local Government, and Interest Groups and Public Policy.

August 1992-August 1996: *Doctoral Graduate Research Assistant.* Center for Public Administration and Policy, Virginia Tech University, Blacksburg, Virginia. Responsible for conducting research and providing consultative services to the Virginia Department of Social Services. Participated in the Statewide Random Moment Study to determine work standards; served as a Facilitator for the Customer Service Improvement Project; and provided research on Welfare Reform to the Governor's Empowerment Commission. Conducted Program Evaluations of State Programs.

January 1990-May 1991: *MPA Teaching Assistant.* Department of Political Science, James Madison University, Harrisonburg, Virginia. Prepared and presented course work and lectures. Full classroom responsibility for two undergraduate Introduction to Political Science courses per semester.

July 1987-December 1989: *Front Office Manager.* Mountainside Villas Owners Association (MVOA), Massanutten Resort, McGaheysville, Virginia. Responsible for the management, financial administration and supervision of the Association's Front Office.

May 1977-December 1985: (1) *Placement/Employment Manager*, (2) *Employee-Management Relations Manager*, (3) *Personnel Analyst*, and (4) *Personnel Intern*. City of Hampton Human Resource Management Office, Hampton, VA. Performed professional HRM duties and responsibilities in the areas of recruitment, placement, merit promotions, EEO/AA, reduction-in-force, position classification and compensation, budgeting, supervision, training, testing, interviewing, and discipline and grievance handling. Responsible for advising the City Manager and department heads on all grievance and discipline actions.

August 1973-March 1974: *Night/Weekend AeroClub Manager*. Langley AeroClub, Langley Air Force Base, VA. Responsible for supervision of the aeroclub during evening and weekend hours of operation. Part-time position while attending college. Possess a private pilot's license. Member of the Experimental Aircraft Association (EAA), the International Aerobatic Club (IAC), and the Aircraft Owners and Pilots Association (AOPA).

November 1969-August 1973: *Administrative Specialist*. 316th Tactical Airlift Wing Flight and Ground Safety Office, Langley Air Force Base, Virginia. Responsible for all administrative duties of the Wing Safety Office. Served in Southeast Asia in 1971. Received an Honorable Discharge in 1973.

OTHER TRAINING, ASSOCIATIONS, PUBLICATIONS

Labor Law Conferences, Virginia Bar Association, 1980-83, Charlottesville, VA.

State Labor Relations, International Association of Chief's of Police, Selma, AL.

Federal Labor Relations, Office of Personnel Management (OPM), Philadelphia Region, Norfolk, VA.

Employee Discipline and Grievance Handling, Babcock Graduate School of Management, Wake Forest University, Winston-Salem, NC.

Quality Circle Facilitator Training, Productivity Development Systems, Inc., Clearwater, FL.

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Member: *Pi Alpha Alpha*, The National Honor Society for Public Affairs and Administration, Virginia Tech University Center for Public Administration and Policy Chapter, May 1996.

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Past Member: *International Personnel Management Association (IPMA)*, 1980-85, Virginia Chapter. Member of the Committee for Professional Development--1984.

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