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California Law

Multi-step grievance procedure in agreement between union and employer satisfies the employee's right to due process, even though it vests the union with the exclusive authority to decide whether to request arbitration of a grievance.

Jones v. Omnitrans (4th App. Dist., Dec. 23, 2004) No. E035295, 2004 WL 2966496

By Jason A. Geller and Jordan Rojas

Plaintiff Jeffrey Jones was employed by Omnitrans, a local public transit agency, as a coach operator. In 2002, Omnitrans dismissed Jones for misconduct involving a verbal altercation with a security guard. Jones requested arbitration of his dismissal. However, Jones' union declined to take the matter to arbitration and Omnitrans refused to proceed without the union's participation.

The Memorandum of Understanding ("MOU") between the union and Omnitrans provided for an optional informal grievance procedure and a three-step formal grievance procedure. The last step permitted arbitration of a grievance but vested with the union the exclusive authority to request arbitration.

Jones contended that he was deprived of his constitutionally protected property interest in continued employment with Omnitrans, a public transit agency, without due process of law because Omnitrans dismissed him and refused to afford him a post-termination arbitration hearing to contest the dismissal.

The trial court dismissed Jones' claim from which he appealed. The Court of Appeal stated that a public employee who is subject to dismissal only for cause has a constitutionally protected property interest in continued employment and may not be dismissed without being afforded procedural safeguards that are sufficient to satisfy the employee's right to due process. Procedural due process requires at a minimum that the employee be given notice of the reasons for termination, an opportunity to respond to the charges, either orally or in writing, and an evidentiary hearing either before or after discharge at which the employer bears the burden of proving the facts supporting the decision to terminate the employment.

The right to due process is a personal one, and California courts have held that a collective bargaining agreement may not waive an employee's right to due process. However, the Court here followed *Armstrong v. Meyers* (9th Cir. 1992) 964 F.2d 0948, and held that due process is satisfied by a collective

bargaining agreement that affords the employee notice, an opportunity to be heard and the opportunity for arbitration of his dismissal, even though the employee's union has sole authority to request the hearing, as long as the union is acting under a duty of fair representation.

The Court reasoned that due process is flexible and calls for such procedural protections as the particular situation demands. Although the employee's interest in keeping his job is substantial, a central feature of the majority of collective bargaining agreements is a process for the resolution of disputes between employers and employees, and there is a strong public and private interest in maintaining an effective grievance process to settle such disputes.

The Court reasoned that union discretion in determining which grievance to arbitrate is essential to the functioning of the collective bargaining system. Through the good faith attempts of the union and the employer to settle grievances short of arbitration, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently.

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism.

Finally, the risk of an erroneous determination in the grievance and

arbitration procedure is not large because, although the union may decide not to take a grievance to arbitration, it does so under a duty of fair representation, and may be sued for breach of that duty if its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

The Court concluded that the grievance procedure between Omnitrans and Jones' union afforded Jones sufficient procedural due process because Jones received written notice of the reasons for his dismissal, he had the absolute right to submit his grievance in writing and have a meeting with two levels of management, and receive a written response to his grievance. The union also had a duty of fair representation to Jones and could not act arbitrarily.

Comment: A MOU which vests exclusive authority with a union to request arbitration of an employee's grievance must include the requisite procedural safeguards in order to comport with due process requirements. The employee must be given notice of reasons for termination, opportunity to respond, and opportunity for a hearing.

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