

ADVISORY LABOR ARBITRATION UNDER NEW YORK LAW: DOES IT HAVE A PLACE IN EMPLOYMENT LAW?

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INTRODUCTION

Case law addressing advisory arbitration is relatively sparse compared to that involving the more common, final and binding arbitration.¹ Although there is a significant collection of scholarly books² and articles³ regarding final and binding

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¹ The general scarcity of arbitration award case law is a result of the less than 1% of private sector arbitration awards that result in applications for judicial review. See MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS AND PROBLEMS* 778 (5th ed. 2003). Presumably, a logical inference can be drawn that even a smaller number of advisory arbitration decisions result in requests for judicial review.

Nevertheless, there is a significant body of reported case law concerning final and binding labor arbitration under federal and New York law. See generally THE DEVELOPING LABOR LAW, 1291–1363 (Patrick Hardin et al. eds., 4th ed. 2001); Mitchell H. Rubinstein, *Labor Arbitration Under New York Law*, 64 N.Y.ST. B.J., Sept.–Oct. 1992, at 35–36 (discussing New York case law).

² Some of the better books on final and binding labor arbitration include: BRAND, *DISCIPLINE AND DISCHARGE IN ARBITRATION* (1998); COOPER ET AL., *ADR IN THE WORKPLACE* (2d ed. 2005) (devoting a large part of textbook to labor arbitration); ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* (Alan Miles Rubin et al. eds., 6th ed. 2003); FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 721 (Owen Fairweather & Ray J. Schoonhoven eds., 4th ed. 1999); JULIUS G. GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW* 186–250 (2d ed. 1999) (devoting an entire chapter on labor arbitration).

³ Some of the more enlightening articles include: Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373

arbitration, there is virtually no scholarly material pertaining to advisory arbitration.⁴ More fundamentally, the little that is written about advisory arbitration is often wrong or misleading.⁵

This article summarizes the law surrounding advisory arbitration, with the goal of assisting attorneys and litigants in determining whether advisory arbitration is a feasible form of dispute resolution for their school district, agency, university, or corporation. This article argues two points. First, given its lack of finality, advisory arbitration in public or private-sector labor-management relations serves little purpose. Secondly, however, there may be a place for it in the non-union private or public sector. Specifically, some employers may find it advantageous to offer advisory arbitration because of the lack of finality. Employees and employers will be given an opportunity to be heard, which may decrease the amount of unnecessary court litigation.

Indeed, the role of state law in labor relations is becoming increasingly important. State courts have developed various doctrines governing the field of private-sector employment law.⁶

(1983); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983); Rubinstein, *supra* note 1.

The use of labor arbitration in labor management relations has a long history. See Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of An Award*, 19 OHIO ST. J. ON DISP. RESOL. 561 (2004) (discussing the history of labor arbitration).

⁴ The leading treatise on labor arbitration only briefly mentions advisory arbitration. See ELKOURI & ELKOURI, *supra* note 2, at 1366. The leading treatise on New York Practice only devotes a paragraph to advisory arbitration. See DAVID D. SIEGEL, NEW YORK PRACTICE § 586, at 981 (3d ed. 1999). The lone treatise on New York Education law merely devotes two short paragraphs to advisory arbitration. See SCHOOL LAW §§ 10:80, :82 (30th ed. 2004). Even the major treatise on public sector labor law in New York only devotes only a few paragraphs to advisory arbitration. See PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 818–19 (Jerome Lefkowitz et al. eds., 2d ed. 1998).

⁵ See ELKOURI & ELKOURI, *supra* note 2, at 1366 (describing advisory arbitration as a type of non-binding fact finding process); SIEGEL, *supra* note 4, at 981 (stating that advisory arbitration is where the parties merely agree to consider the advisory award); Harvey Randall, *Advisory Arbitration*, 1999 No. 11 Pub. EMP. L. NOTES 225 (1999) (stating that there is nothing available to the prevailing party to compel compliance with the award); Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. § 7501, at 11 (McKinney 1998) (describing advisory arbitration as non-binding unless both parties accept it).

As discussed herein, the fundamental mistake most of these commentators make is that under New York Law the decision of an employer to accept or reject an advisory arbitration is subject to C.P.L.R. article 78 review.

⁶ See 8 MICHAEL J. CANAN & DAVID L. GREGORY, FEDERAL ADMINISTRATIVE

It is submitted that one such area of state law that should be further developed is advisory arbitration.

Before a substantive discussion of the law concerning advisory arbitration can begin, it is first helpful to understand what it is. Advisory arbitration is a form of alternative dispute resolution, or ADR,⁷ which recommends how a certain dispute may be resolved. Unlike other forms of non-binding ADR, advisory arbitration is a real form of grievance resolution under a collective bargaining agreement by a labor arbitrator or, in the case of a non-union employer, an employee handbook. Advisory arbitration is somewhat different from other forms of ADR because of the nature of labor relations⁸ and because a party cannot simply reject an arbitration award it does not like. As will be discussed in further detail, the decision to accept advisory arbitration is subject to limited judicial review. Limited judicial review is the distinguishing characteristic of advisory arbitration.⁹

PRACTICE § 10609 (3d ed. 2000); SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIAL ON EMPLOYMENT LAW 41–157* (2004) (discussing employment law in relation to employment-at-will doctrine).

⁷ Much is written on Alternative Forms of Dispute Resolution (“ADR”) and this article makes no attempt to analyze the various ADR methods. Some of the preeminent literature on this topic includes: *HOW ADR WORKS* (Norman Brand ed., 2002); Kenneth Cloke, *Journeys into the Heart of Conflict*, 4 PEPP. DISP. RESOL. L.J. 219 (2004); Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1 (2004).

⁸ Parties to a collective bargaining agreement are involved in a continuing relationship. Employees covered by such agreements, who are often the grievants in labor arbitrations, are a type of third party beneficiary under that collective agreement. *See, e.g., J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (discussing the nature of collective bargaining agreements).

⁹ Advisory arbitration is sometimes referred to as “non-binding arbitration.” *See, e.g., Elba Cent. Sch. Dist. v. Newman*, 101 A.D.2d 1003, 1004, 476 N.Y.S.2d 949, 950 (4th Dep’t 1984); *Nassau Chapter of Civil Serv. Employees Ass’n, Inc. v. County of Nassau*, 84 A.D.2d 784, 785, 443 N.Y.S.2d 884, 886 (2d Dep’t 1981). That terminology is particularly used outside the field of public sector labor law. *See, e.g., Kilmer v. Flocar*, 212 F.R.D. 66 (N.D.N.Y. 2002); *Allstate Ins. Co. v. Mottolese*, 803 A.2d 311, 313 (Conn. 2002).

Significantly, however, non-binding arbitration is sometimes used to refer to a method of alternative dispute resolution where one party can reject the non-binding decision, but may be subjected to a penalty if that party does not receive a larger award in litigation. *See Lisa Bernstein, Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2218 (1993); Nancy A. Welsh, *The Place of Court Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 132 n.83 (2004). That type of non-binding arbitration is different from the type of

Advisory arbitration is predominately used today in public-sector labor-management relations.¹⁰ The states where advisory arbitration is utilized include, but are not necessarily limited to, Michigan,¹¹ California,¹² New Jersey,¹³ Ohio,¹⁴ and of course, New York,¹⁵ which is the focus of this Article. The major difference between private-sector labor law and public-sector labor law is that, in most states, such as New York,¹⁶ public-sector unions do not have the right to strike.¹⁷

Advisory arbitration is most prevalent in the field of school district-union labor-management relations. This is demonstrated by the fact that most of the reported decisions involving advisory

advisory arbitration discussed in this Article in that there is no sanction on a party if they reject the award of an advisory arbitrator.

¹⁰ Abrams et al., *supra* note 3, at 1756. This Article does not attempt to survey all the states and industries that utilize advisory arbitration. Rather, the focus of this work is advisory arbitration under New York law.

¹¹ See *AFSCME v. Highland Park Bd. of Educ.*, 542 N.W.2d 333, 335 (Mich. Ct. App. 1995).

¹² See Joseph R. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 50 HASTINGS L.J. 717 (1999) (discussing case law). For a recent example, see *Mullican v. City of Ontario*, No. E035001, 2005 Cal. App. Unpub. LEXIS 1262 (Cal. Ct. App. 2005) (where litigation over employment termination continued after advisory arbitrator rejected employees claim).

¹³ See Ronald T. Hyman, *The Forum Matters: A Union Victory Under a Restrained Court Decision*, 104 EDUC. L. REP. 1 (1995) (discussing case law).

¹⁴ See *Ohio Ass'n of Pub. Sch. Employees v. Westerville City Sch. Dist. Bd. of Educ.*, 735 N.E.2d 493, 494 (Ohio Ct. App. 1999).

¹⁵ Because there are several reported decisions on this topic from the New York Court of Appeals, this Article focuses on New York Law. See *Benjamin Rush Employees United v. McCarthy, Jr.*, 76 N.Y.2d 781, 782, 559 N.E.2d 652, 653, 559 N.Y.S.2d 958, 959 (1990); *Plainedge Fed'n of Teachers v. Plainedge Union Free Sch. Dist.*, 58 N.Y.2d 902, 903, 447 N.E.2d 50, 51, 460 N.Y.S.2d 502, 503 (1983); *Bd. of Educ. of the Yonkers City Sch. Dist. v. Yonkers Fed'n of Teachers*, 46 N.Y.2d 727, 728, 385 N.E.2d 1297, 1298, 413 N.Y.S.2d 370, 371 (1978). There are also several appellate level decisions that collectively make up a body of law, albeit limited, given the small numbers involved, which can be examined. See *Thomas v. County of Nassau*, 10 A.D.3d 359, 360, 780 N.Y.S.2d 296, 296 (2d Dep't 2004); *Carter v. County of Nassau*, 8 A.D.3d 603, 603, 778 N.Y.S.2d 911, 911 (2d Dep't 2004); *Nassau Chapter of Civil Serv. Employees Ass'n v. County of Nassau*, 249 A.D.2d 472, 473, 671 N.Y.S.2d 665, 665 (2d Dep't 1998); *Hempstead Classroom Teachers Ass'n v. Bd. of Educ.*, 112 A.D.2d 267, 267, 491 N.Y.S.2d 716, 716 (2d Dep't 1985); *Berlyn v. Bd. of Educ. of the E. Meadow Union Free Sch. Dist.*, 80 A.D.2d 572, 573, 435 N.Y.S.2d 793, 794 (2d Dep't 1981), *aff'd*, 55 N.Y.2d 912, 433 N.E.2d 1278, 449 N.Y.S.2d 30 (1982).

¹⁶ See generally, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, *supra* note 4, at 727-28.

¹⁷ 8 CANAN & GREGORY, *supra* note 6, § 10763.

arbitration involve school districts and their unions.¹⁸ There does not appear to be any particular reason for this. In the context of public-sector labor-management relations, many typical labor-relations matters are subject to advisory arbitration;¹⁹ for example, disputes over the use of personal days,²⁰ sabbaticals,²¹ employee discharges,²² sick leave,²³ coverage of substitute teachers under a collective bargaining agreement,²⁴ job responsibilities,²⁵ class schedules for teachers,²⁶ reduction in hours,²⁷ salary,²⁸ and placing material in an employee's personnel

¹⁸ A Lexis search (advisory w/2 arbitration) in the New York cases directory on November 1, 2004 yielded twenty-four reported cases involving advisory arbitration. Significantly, seventeen of those decisions, or about 59% of the reported cases, involved public education. Of perhaps greater significance, all of the New York Court of Appeals decisions involving advisory arbitration were in the field of public education. *See supra* note 15.

However, these statistics are probably not completely accurate for several reasons. First, New York, like many jurisdictions, does not report all court decisions. Some of these decisions, however, may be available online through the state court system's website, www.courts.state.ny.us. Many commentators have been critical of this practice. *See* Maria Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003). Second, as mentioned earlier, advisory arbitration is sometimes referred to as "non-binding arbitration." However, some forms of "non-binding arbitration" refer to alternative forms of dispute resolution that materially differ from advisory arbitration. *See supra* note 9 and accompanying text. If the court does not use the term "advisory arbitration," it may not show up on a search.

The fact that advisory arbitration is often utilized in the field of public education is also demonstrated by the fact that advisory arbitration is discussed in the only treatise on New York Education law. SCHOOL LAW, *supra* note 4, §§ 10:80, :82

¹⁹ This list is merely intended to be illustrative; not an exhaustive list of issues that have been subject to advisory arbitration.

²⁰ *See* *Elmont Elementary Teachers' Ass'n v. Bd. of Educ. Elmont Union Free Sch. Dist.*, No. 8704/03 (Sup. Ct. Nassau Co. Jan. 21, 2004), *aff'd*, 11 A.D.3d 687, 782 N.Y.S.2d 918 (2d Dep't 2004).

²¹ *See* *Bd. of Educ. of the Yonkers City Sch. Dist. v. Yonkers Fed'n of Teachers*, 46 N.Y.2d 727, 728-29, 385 N.E.2d 1297, 1298, 413 N.Y.S.2d 370, 371 (1978); *O'Brien v. Bd. of Educ.*, 71 A.D.2d 605, 606, 418 N.Y.S.2d 124, 125 (2d Dep't 1979).

²² *See* *Benjamin Rush Employees United v. McCarthy, Jr.*, 76 N.Y.2d 781, 782, 559 N.E.2d 652, 653, 559 N.Y.S.2d 958, 959 (1990).

²³ *See* *Plainedge Fed'n of Teachers v. Plainedge Union Free Sch. Dist.*, 58 N.Y.2d 902, 905, 447 N.E.2d 50, 54, 460 N.Y.S.2d 502, 505 (1983).

²⁴ *See id.* at 905, 447 N.E.2d at 54, 460 N.Y.S.2d at 505.

²⁵ *Sec. & Law Enforcement Employees Dist. 82 v. Hartnett*, 119 A.D.2d 877, 878-98, 500 N.Y.S.2d 571, 572 (3d Dep't 1986); *Ohio Ass'n of Public Sch. Employees v. Westerville City Sch. Dist. Bd. of Educ.*, 735 N.E.2d 493, 494 (Ohio Ct. App. 1999).

²⁶ *Post-Adjunct Faculty Ass'n. v. Bd. of Tr. of Long Island Univ.*, 127 A.D.2d 644, 644, 511 N.Y.S.2d 874, 875 (2d Dep't 1987).

²⁷ *Berlyn v. Bd. of Educ.*, 80 A.D.2d 572, 435 N.Y.S.2d 793 (2d Dep't 1981), *aff'd*, 55 N.Y.2d 912, 433 N.E.2d 1278, 449 N.Y.S.2d 30 (1982).

file.²⁹

I. ADVISORY ARBITRATION UNDER NEW YORK LAW

A party does not have *carte blanche* to reject an arbitration decision simply because it is advisory. The New York Court of Appeals held that, after an advisory arbitration, a party's decision to either accept or reject the arbitrator's determination is subject to limited judicial review under article 78 of the New York Civil Practice Law and Rules (C.P.L.R.). In *Plainedge Federation of Teachers v. Plainedge Union Free School District*, after a public employer prevailed in an advisory arbitration, the school district adopted the arbitrator's determination.³⁰ The Union sued, claiming the employer's decision to accept the award was arbitrary and capricious and therefore improper under article 78.³¹ In upholding the public employer's decision, the

²⁸ Bd. of Educ. v. Farmingdale Fed'n of Teachers, 92 A.D.2d 599, 600, 459 N.Y.S.2d 790, 791 (2d Dep't 1983).

²⁹ Bd. of Coop. Educ. Serv. v. BOCES Teachers' Association, 111 A.D.2d 168, 168, 488 N.Y.S.2d 797, 798 (2d Dept. 1985).

³⁰ *Plainedge Fed'n of Teachers v. Plainedge Union Free Sch. Dist.*, 58 N.Y.2d 902, 903, 447 N.E.2d 50, 51, 460 N.Y.S.2d, 502, 503 (1983).

³¹ *Id.* at 903, 447 N.E.2d at 51, 460 N.Y.S.2d at 503. Article 78 of the New York C.P.L.R. is a procedural statute whereby certain actions of public bodies, as well as corporate bodies, can be judicially reviewed. See SIEGEL, *supra* note 4, § 557, at 916. Under C.P.L.R. article 78, courts pay deference to the determination made by the body or corporation and its review is limited. See *City of New York v. O'Connor*, 9 A.D.3d 328, 329, 780 N.Y.S.2d 590, 592 (1st Dep't 2004).

The standard of review employed by a reviewing court depends upon the nature of the article 78 proceeding. There are three basic categories of these proceedings: (1) *certiorari*, which typically involves a review of an administrative determination taken after a "judicial" or "quasi-judicial" hearing; (2) *mandamus*, which compels a body to take certain action which is required of it under the law; and (3) *prohibition* which prevents a body from exceeding its own jurisdiction. SIEGEL, *supra* note 4, § 557, at 917.

Advisory arbitration would probably fall into the *mandamus* category. In an article 78 proceeding in the nature of *mandamus*, courts review determinations under a "substantial evidence test." *Id.* Under this standard, a reviewing court examines the entire record to determine whether there is a rational basis for the decision. The evidence must be more than "seeming or imaginary," however, this standard is less than the "preponderance of the evidence" standard. Where there is room for choice, courts will defer to the administrative determination. See *300 Gramatan Ave. Ass'n. v. State Div. of Human Rights*, 45 N.Y.2d 176, 182, 379 N.E.2d 1183, 1187, 408 N.Y.S.2d 54, 57 (1978).

In reality, the lines between these three categories, which stem from the old common writs, are blurred, SIEGEL, *supra* note 4, § 557, at 917, and, not surprisingly, the standard of review is also blurred. For example, the test for *mandamus*—whether the action complained of is arbitrary and capricious—is

Court explained:

The appropriate standard of review of the determination of the district, therefore, is that applicable to article 78 proceedings. Under this standard, it cannot be said as a matter of law that the district's determination was arbitrary or capricious. Its determination, based in large part on "careful consideration [of] the recommendations of the arbitrator" in accordance with the agreement of the parties finds support both in the plain terms of the agreement and in the prior bargaining history between the district and union. The determination, therefore, was properly upheld.³²

Thus, although admittedly subject to limited judicial review, a party cannot simply sit back and reject an advisory determination that it does not like—there is *some* judicial review. It is the parties' ability to seek judicial review that distinguishes advisory arbitration from other so-called "non-binding" forms of ADR.³³ Yet, the distinguishing characteristic of advisory arbitration as being subject to judicial review is something that commentators have regrettably overlooked.³⁴

In labor arbitration, arbitrators often try to get the parties to agree on a submission: a simple statement of the issue(s) to be decided. The issue in a typical discharge case, for example, is often framed as "whether the grievant was discharged for just cause; if not what shall the remedy be?"³⁵ However, if the

indistinguishable, according to Professor Siegel, from the substantial evidence standard discussed above. *Id.* § 561, at 927–28.

Note that under the arbitrary and capricious standard courts do not interfere unless there is no rational basis for the decision. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974). The arbitrary and capricious standard is chiefly concerned with whether a particular action is without foundation in fact. *Id.* at 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839. It is beyond the scope of this article to examine C.P.L.R. article 78 proceedings in any greater detail.

³² *Plainedge*, 58 N.Y.2d at 904, 460 N.Y.S.2d at 503, 447 N.E.2d at 51 (alteration in original) (citations omitted).

³³ *See supra* note 9 and accompanying text.

³⁴ *See supra* note 5 and accompanying text.

³⁵ A leading labor arbitration treatise states:

Sometimes the parties agree to a statement of the issue during the course of the hearing, when the evidence places the dispute in sharper focus. The arbitrator also may initiate a discussion to clarify the issue and its scope, which could produce a different statement, perhaps worded by the arbitrator and accepted by the parties. In many cases, the arbitrator must clarify the issue. The parties may request it or the contract may provide that if the parties do not agree on the issue, it will be determined by the

arbitration is advisory, the parties must carefully formulate the submission. If the submission is not carefully formulated, the parties may unwittingly convert an otherwise advisory arbitration into one that is final and binding. That is precisely what happened in *Board of Education Yonkers City School District v. Yonkers Federation of Teachers*.³⁶

In *Yonkers*, the New York Court of Appeals was faced with the issue of whether a particular dispute was subject to advisory or final and binding arbitration under the parties' agreement. The Court did not decide what the collective bargaining agreement required. Rather, the Court held that the stipulation concerning the remedy transformed the advisory arbitration into a final and binding arbitration:

Even assuming that the terms of the agreement mandated that the award be advisory only, the submission of the grievance to the arbitrator expressly empowered him to fashion a remedy to resolve the controversy. This stipulation in and of itself, divested the courts of power to inquire into the procedural standards used by the arbitrator in rendering the award.³⁷

Twelve years later, the Court of Appeals revisited the issue of advisory arbitration and held that the submission of the issue—"was the discharge of grievant . . . for just cause? If not, what shall the remedy be?"—did *not* transform an advisory arbitration into a final and binding one.³⁸ The Court distinguished *Yonkers* on its facts and based its subsequent decision on the wording of the particular arbitration clause at issue:

This argument ignores the language of the clause at issue, which makes arbitration awards definitively advisory "unless accepted by both parties." The parties have an express contractual option to accept or reject a decision after the arbitrator renders it. Petitioner's transformation, therefore, would render the clause a nullity.

[*Yonkers*] is not to the contrary. The arbitration clause there

arbitrator. The arbitrator may incorporate the parties' separate submissions into one of his or her own wording, or adopt one party's wording as an accurate statement of the issue.

ELKOURI & ELKOURI, *supra* note 4, at 296–97.

³⁶ 46 N.Y.2d 727, 385 N.E.2d 1297, 413 N.Y.S.2d 370 (1978).

³⁷ *Id.* at 729, 385 N.E.2d at 1298, 413 N.Y.S.2d at 37 (citations omitted).

³⁸ Benjamin Rush Employees United v. McCarthy, Jr., 76 N.Y.2d 781, 782, 559 N.Y.S.2d 958, 959, 559 N.E.2d 652, 653 (1990).

was binding only as to the specific issue submitted, and the agreement provided that the arbitrator was to be so notified. The parties waived the advisory nature of the arbitration by requesting a remedy without including any limitation on the arbitrator's power to bind them. Here, the clause made the arbitration undeviatingly advisory unless the parties expressly and affirmatively elected to be bound.³⁹

If an arbitration award is advisory, it cannot be confirmed under the C.P.L.R., which, in turn, means that it cannot be converted into a judgment.⁴⁰ Significantly, however, either before or after an advisory arbitration, the parties can still sue for breach of contract vis-a-vis the collective bargaining agreement⁴¹ absent clear contractual language that would bar such an action.⁴²

Accordingly, in *CSEA v. Plainedge Union Free School District*,⁴³ after the union prevailed in an advisory arbitration, the employer rejected the advisory arbitration award; yet, instead of instituting an article 78 proceeding, the union brought an action for breach of contract under the collective bargaining agreement. The court affirmed summary judgment in favor of the union on the breach of the collective bargaining contract claim. In reaching its decision, the court applied familiar principles of contract law and concluded that the employer breached the contract.⁴⁴

However, in two recent appellate division decisions, the court

³⁹ *Id.* at 782, 559 N.Y.S.2d at 959, 559 N.E.2d at 653.

⁴⁰ *Id.* at 782, 559 N.Y.S.2d at 959, 559 N.E.2d at 653; *see also* Civil Serv. Employees Ass'n v. County of Nassau, 249 A.D.2d 472, 473, 671 N.Y.S.2d 665, 666 (2d Dep't 1998).

⁴¹ *See* Thomas v. County of Nassau, 10 A.D.3d 359, 360, 780 N.Y.S.2d 296, 296 (2d Dep't 2004); Carter v. County of Nassau, 8 A.D.3d 603, 603, 778 N.Y.S.2d 911, 911 (2d Dep't 2004); Hempstead Classroom Teachers Ass'n v. Bd. of Educ., 112 A.D.2d 267, 267, 491 N.Y.S.2d 716, 717 (2d Dep't 1985); Civil Serv. Employees Ass'n, Inc., v. Plainedge Union Free Sch. Dist., N.Y. L.J., July 15, 2003, at 21, col. 1 (Sup. Ct. Nassau County).

⁴² *See, e.g.*, Berlyn v. Bd. of Educ. of the E. Meadow Union Free Sch. Dist., 80 A.D.2d 572, 573, 435 N.Y.S.2d 793, 794 (2d Dep't 1981) (dismissing the breach of contract action after advisory arbitration because the collective bargaining agreement provided that the parties' exclusive remedy was the grievance procedure), *aff'd*, 55 N.Y.2d 912, 433 N.E.2d 1278 (1982).

⁴³ 12 A.D.3d 395, 786 N.Y.S.2d 59 (2d Dep't 2004).

⁴⁴ *Id.* at 396, 786 N.Y.S.2d at 60. The court reasoned that contracts are to be construed in accordance with the intent of the parties, the best evidence of the parties' intent is the written contract, and that a clear written agreement must be enforced according to the plain meaning of its terms. *Id.*

dismissed article 78 proceedings challenging the rejection of advisory arbitration, reasoning that the award was not subject to an "arbitrary and capricious" standard of review.⁴⁵ While both courts recognized that a cause of action for breach of the collective bargaining agreement was properly pled, it is difficult to reconcile these decisions with *Plainedge Federation of Teachers v. Plainedge Union Free School District*, as both courts performed little to no substantive analysis. One can only theorize that these two decisions—involving not only the same public employer, but also the same causes of action for breach of contract and a second cause of action pursuant to article 78—were based upon specific collective bargaining agreement language that limited article 78 court review when a breach of contract action was also filed.⁴⁶

In labor law, an action for breach of contract would certainly be unusual, but not unheard of. A leading text on labor-management relations has recognized that "[n]ot all collective bargaining agreements provide for arbitration."⁴⁷ Further, in a treatise on federal administrative practice and labor relations, Professor David L. Gregory explained that where a collective bargaining agreement does not contain final and binding arbitration, other resolution techniques may be adopted, including having the issue resolved by management, by a joint union-management committee, or even by a labor strike.⁴⁸ Where there is no final and binding arbitration under a collective bargaining agreement, the United States Supreme Court has repeatedly recognized that an action for breach of a collective bargaining agreement may be maintained.⁴⁹

⁴⁵ See *Thomas*, 10 A.D.3d. at 359, 780 N.Y.S.2d at 296; *Carter*, 8 A.D.3d at 603–04, 778 N.Y.S.2d at 911.

⁴⁶ If this is in fact the case, the question of whether the parties to a collective bargaining agreement can limit judicial review of article 78 proceedings is an interesting legal issue which is beyond the scope of this Article. However, whether parties to an agreement which provides for final and binding arbitration can limit judicial review is also a developing area of the law. See Samuel Estreicher & Steven C. Bennett, *Eliminating Judicial Review of Arbitration*, N.Y. L.J., Mar. 12, 2004, at 3.

⁴⁷ GETMAN ET AL., *supra* note 2, at 189.

⁴⁸ 8 CANAN & GREGORY, *supra* note 6, § 10763; see also *Groves v. Ring Screw Works*, 498 U.S. 168, 169 (1990) (illustrating where a collective bargaining agreement permitted parties to utilize economic weapons after exhausting the grievance procedure which did not provide for any final form of dispute resolution such as arbitration).

⁴⁹ See *Groves*, 498 U.S. at 175–76; *Reed v. United Transp. Union*, 488 U.S. 319,

II. VALUE OF ADVISORY ARBITRATION

Because of the limited nature of advisory arbitration, Professor David D. Siegel, in his seminal treatise on New York Practice, questions whether there is any value in advisory arbitration.⁵⁰ Although an advisory award may not be binding, a party who agrees to advisory arbitration can be compelled to arbitrate.⁵¹ Therefore, the law implicitly recognizes that advisory arbitration does serve a purpose.

While final and binding arbitration is the gold standard in dispute resolution in labor relations, there is certainly some value in having advisory arbitration. For the employer the value is obvious. The award is non-binding so the employer does not have to comply with it—at least where the employer has some rational basis for rejecting the award.

However, the union also obtains some benefit. Advisory arbitration affords the union an opportunity to be heard and, at the same time, requires that the employer consider the advisory arbitration award. In perhaps the most significant case in labor arbitration history, the United States Supreme Court recognized that the process of arbitrating claims may have a therapeutic value even if the underlying grievance is frivolous.⁵²

Nevertheless, given the uncertainty of advisory arbitration,

329–30 (1989); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700 (1966).

Indeed, at least one Circuit has held that if an employer refuses to arbitrate a grievance under a collective bargaining agreement, its actions constitute a repudiation of the collective bargaining agreement with respect to that particular grievance. Therefore, an individual grievant can bring an action in court for breach of contract. *See Sidhu v. Flecko Co., Inc.*, 279 F.3d 896, 897 (9th Cir. 2002).

⁵⁰ SIEGEL, *supra* note 4, § 586, at 981. Professor Siegel states:

It has even been held that a merely “advisory arbitration,” i.e., one not binding on the parties but whose result they agree to “consider,” is permissible under this provision, but such an “award,” if that it be, may be too elusive to confirm into a judgment. One may even wonder what is gained by such a transmutation, since an unenforceable judgment is not much better than an unenforceable award.

Id.

⁵¹ *See Citibank N.A. v. Bankers Trust Co.*, 221 A.D.2d 222, 222, 633 N.Y.S.2d 314, 314 (1st Dep’t 1995); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Cracovia*, 36 A.D.2d 851, 852, 321 N.Y.S.2d 496, 497–98 (2d Dep’t 1971); Alexander, *supra* note 5, at 307.

⁵² Justice Douglas, writing for the Court in *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960), stated: “The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.” For a critical analysis of whether arbitration does indeed have such therapeutic values, see Abrams et al., *supra* note 3.

one might ask, "Why would a union voluntarily agree to this?" The answer, though not subject to exact proof, is quite simple. It is a question of economic and political power. No union, or more accurately, almost no union, would want to agree to advisory arbitration. The issue is not what the union wants or desires, but what the union can achieve through collective bargaining. In the private sector, a union may not be strong enough to insist on final and binding arbitration to the point of a strike, or, in the public sector, to the point of an impasse. Alternatively, a union may decide that a wage increase or a certain fringe benefit is more important than final and binding arbitration. Employees in a certain industry or location, who are covered by a collective bargaining agreement, may be in great demand. Therefore, final and binding arbitration may be less important to them because they could easily obtain equivalent employment.

This, in turn, raises the question of whether it is in the unionized employer's interest to agree to advisory arbitration as distinguished from final and binding arbitration. As noted earlier, employers will probably say yes initially, but, upon closer analysis, may wish to reconsider. Advisory arbitration can actually cost the employer more in terms of time and money. In addition to the costs associated with the advisory arbitration, the employer may be subjected to an article 78 proceeding if it rejects the advisory determination and/or a plenary action for breach of the collective bargaining contract.⁵³ Thus, advisory arbitration may be the first step in a lengthy and costly litigation process. In such circumstances, advisory arbitration would serve little value.

On the other hand, advisory arbitration might serve some benefit. Specifically, each side would see their adversary's position and the respective strengths and weaknesses in a party's case might be exposed. Further, if a party simply rejects advisory arbitration, it leaves the dispute open. This does not appear to be in anyone's interest, and one must question the value of such categorical rejections. The employer's ability to reject the award is tempered by the union's ability to commence additional litigation against the employer. These competing policy concerns must be weighed and balanced by both sides in deciding whether advisory arbitration is in their best interests.

Today, labor arbitration is a firmly established fact of life in

⁵³ See *supra* note 44 and accompanying text.

labor management relations.⁵⁴ One can conclude that the scarcity of case law concerning advisory arbitration is a direct result of the paucity of its use, owing in no small part to the competing factors and policy concerns described above. This is particularly telling, given the preferred status of labor arbitration in this country.⁵⁵

III. ADVISORY ARBITRATION IN THE NON-UNION WORKPLACE

In examining the utility of advisory arbitration, it is important to note that its use is not limited to public-sector labor relations. Advisory arbitration has been utilized in some private-sector collective bargaining contracts,⁵⁶ as well as in some commercial agreements.⁵⁷

While advisory arbitration has little value in public and private-sector disputes under a collective bargaining agreement, it may have a certain appeal to employers and employees who are not covered by a collective bargaining agreement. Only 7.9% of the nation's private-sector work force is unionized, while 36.4% of the public sector is unionized.⁵⁸ These percentages leave the vast majority of the American work force without coverage under a collective bargaining agreement.⁵⁹

⁵⁴ One study concluded that 98% of collective bargaining agreements contained labor arbitration provisions. Presumably, this study was referring to final and binding arbitration. See Abrams et al., *supra* note 3, at 1756 n.17.

Indeed, in *NLRB v. A-1 King Size Sandwiches Inc.*, 732 F.2d 872, 876 (11th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984), the court referred to language in a collective bargaining agreement which required "just or sufficient cause" to discipline or terminate an employee as "a common non-controversial clause."

⁵⁵ See, e.g., *AT&T Tech. v. CWA*, 475 U.S. 643, 648 (1986) (stating that "arbitration is the preferred method of resolving disputes" under collective bargaining agreements); *United States Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 197 F.3d 631, 639 (2d Cir. 1999) (stating that "arbitration is favored in our judicial system"); *Bd. of Educ. v. Christa Constr., Inc.*, 80 N.Y.2d 1031, 1032, 608 N.E. 2d 755, 755, 593 N.Y.S.2d 178, 178 (1992) (stating that the New York Court of Appeals "has repeatedly held that arbitration is a favored method of dispute resolution in New York").

⁵⁶ See *Post-Adjunct Faculty Ass'n v. Bd. of Tr. of Long Island Univ.*, 127 A.D.2d 644, 644, 511 N.Y.S.2d 874, 875 (2d Dep't 1987).

⁵⁷ See *Citibank N.A. v. Bankers Trust Co.*, 221 A.D.2d 222, 222, 633 N.Y.2d 314, 314-15; *In re Todd Shipyard Corp.*, 67 A.D.2d 646, 646, 412 N.Y.S.2d 376, 377 (1st Dep't 1979) ("[E]ven advisory arbitration awards are not unknown to the law."), *aff'd*, 49 N.Y.2d 809, 403 N.E.2d 964, 426 N.Y.S.2d 980 (2d Dep't 1980).

⁵⁸ U.S. Department of Labor, *Union Members Summary*, available at <http://www.bls.gov/news.release/union2.nr0.htm> (last modified Jan. 27, 2005).

⁵⁹ In states like New York, because of the employment-at-will doctrine, non-

To achieve industrial due process, some enlightened employers may actually find that it makes good business sense to agree to advisory arbitration in order to reduce employee strife.⁶⁰ If advisory arbitration can be utilized in the public sector to contest an employee's termination,⁶¹ there are no policy or legal reasons why it could not be utilized in the private sector.⁶² Indeed, in the unionized sector, labor arbitration is considered a substitute for industrial strife.⁶³ Advisory arbitration can and, in some instances, should be considered as a similar substitute in a non-union workplace.

However, if private-sector employers agree to include an advisory arbitration provision in an employee handbook,⁶⁴ for example, the decision of the employer to accept or reject the advisory arbitration would be subject to the same article 78 review as those in the public sector. By deciding to include an advisory arbitration provision the employer would inevitably relinquish some level of control but, given the highly deferential standard of review in article 78 proceedings, such relinquishment would be minimal.

While article 78 is not generally understood as applying to private corporations, it is indeed applicable.⁶⁵ In fact, there are several reported decisions challenging corporate determinations

union employees are left with virtually no protection against arbitrary discipline. See *infra* notes 79–80 and accompanying text.

⁶⁰ The public policy of the United States is to reduce industrial strife and unrest because that can burden or obstruct interstate commerce. 29 U.S.C. § 151 (2000). While this policy is set forth in the National Labor Relations Act, a little known fact is that some provisions of the National Labor Relations Act apply equally to non-union employees. That concept has been referred to as the “one of the best-kept secrets of labor law.” IBM Corp., 2004 N.L.R.B. LEXIS 301, at *87 (2004) (Liebman and Walsh, dissenting) (quoting William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002)).

⁶¹ As discussed herein, there is little value to advisory arbitration to resolve disputes under a collective bargaining agreement. See *supra* Part II.

⁶² See Benjamin Rush Employees United v. McCarthy, Jr., 76 N.Y.2d 781, 782, 559 N.E.2d 652, 653, 559 N.Y.S.2d 958, 959 (1990).

⁶³ See United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960).

⁶⁴ Relatively few non-union employees have formal employment contracts. Those most likely to have them are executives or other employees with special skill or knowledge. See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.2 (3d ed. 2005).

⁶⁵ 24A CARMODY-WAIT 2D §145:1141 (2000); Alexander, *supra* note 5, § 7802, at 289.

under article 78.⁶⁶ Additionally, there are a significant amount of reported decisions challenging decisions of private universities under article 78.⁶⁷ Article 78 has even been expanded to apply to unincorporated associations, at least where the association or its members are chartered by the state.⁶⁸

The rationale supporting the application of article 78 to private corporations is based on the fact that corporations are legal entities created by the government. Therefore, the law implies that courts have “a supervisory or visitorial power . . . to see that corporations act agreeably to the end of their institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises.”⁶⁹

Thus, corporations and educational institutions⁷⁰ are considered quasi-governmental bodies which can be compelled, via article 78, to comply with statutory obligations as well as obligations imposed by their own internal regulations or bylaws.⁷¹

For example, in *Maas v. Cornell University*,⁷² the Court of Appeals stated that a professor at a private university could bring an article 78 proceeding against Cornell University alleging that the University failed to follow its own procedures in

⁶⁶ See, e.g., *Hanchard v. Facilities Dev. Corp.*, 85 N.Y.2d 638, 640, 651 N.E.2d 872, 873, 628 N.Y.S.2d 4, 5 (1995) (article 78 challenging termination of employee under employee handbook provisions); 24A CARMODY-WAIT 2D, *supra* note 65, § 145:1141; 6 N.Y. JUR.2D *Article 78 and Related Proceedings* §114 (1997) (adding that a private non-for profit corporation may also be subject to article 78); Alexander, *supra* note 5, § 7802, at 289.

⁶⁷ See, e.g., *Berkeley-Caines v. St. John Fisher Coll.*, 11 A.D.3d 895, 895, 782 N.Y.S.2d 309, 310 (4th Dep’t 2004) (article 78 proceeding challenging the denial of tenure); *Postol v. St. Joseph’s Coll.*, 8 A.D.3d 289, 290, 777 N.Y.S.2d 699, 699 (2d Dep’t 2004) (article 78 proceeding challenging the denial of tenure); *Gray v. Canisius Coll. of Buffalo*, 76 A.D.2d 30, 31, 430 N.Y.S.2d 163, 164 (4th Dep’t 1980) (article 78 proceeding challenging dismissal of tenured teacher).

⁶⁸ See *Brodsky v. Friedlander*, 191 Misc. 2d 459, 459–60, 744 N.Y.S.2d 795, 796 (Erie County 2002) (article 78 proceeding brought by professor challenging the determination of an unincorporated association to close a Otolaryngology residency training program for doctors).

⁶⁹ *Gray*, 76 A.D.2d at 33, 430 N.Y.S.2d at 166 (4th Dep’t 1980) (quoting *Weidenfeld v. Keppler*, 84 A.D. 235, 237, 82 N.Y.S. 634, 636, (1st Dep’t), *aff’d*, 176 N.Y. 562, 68 N.E. 1125 (1903)).

⁷⁰ See, e.g., *Carr v. St. John’s Univ.*, 17 A.D.2d 632, 231 N.Y.S.2d 410 (2d Dep’t 1962), *aff’d*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Kwiatkowski v. Ithaca Coll.*, 82 Misc. 2d 43, 368 N.Y.S.2d 973 (Sup. Ct. Tomkins County 1975); *Ryan v. Hofstra Univ.*, 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup. Ct. Nassau County 1971).

⁷¹ *Gray*, 76 A.D.2d at 33, 430 N.Y.S.2d at 166.

⁷² 94 N.Y.2d 87, 721 N.E.2d 966, 699 N.Y.S.2d 716 (1999).

investigating a sexual harassment complaint filed by a student against a professor.⁷³

Similarly, in *Drucker v. Hofstra University*,⁷⁴ a professor brought an article 78 proceeding against his employer, a private university, challenging his removal from his position as department chair. In *Gray v. Canisius College*, an article 78 proceeding was brought against a private college challenging a professor's termination,⁷⁵ and in *Berkeley-Caines v. St. John Fischer College*, a professor brought an article 78 proceeding against a private college challenging the denial of tenure.⁷⁶

In *Hanchard v. Facilities Development Corp.*, a terminated employee sued his former employer, a private corporation, under C.P.L.R. article 78, claiming that his termination was arbitrary and capricious because the employer did not follow its own pre-termination procedures set forth in its employee handbook.⁷⁷ Though the Court of Appeals dismissed the article 78 proceeding based on the employer's substantial compliance with its own policies, and any departure from those policies was due to the petitioners failure to cooperate, *Hanchard* is instructive because the Court held that a terminated employee could bring an article 78 proceeding against his or her private employer if the employer fails to follow its employee handbook.⁷⁸ Thus, if an employer provides for advisory arbitration in its handbook, the employer's decision to accept or reject the award of the advisory arbitrator will be subject to article 78 review.

The question then becomes: Why would any private employer agree to advisory arbitration? There are several reasons in support of an employer's decision to do so. First, there are the equities at bar in the matter. There are many states, such as New York, which still hold to the common law

⁷³ See *Id.* at 90, 721 N.E.2d at 967, 699 N.Y.S.2d at 717; see also *Stoll v. Cornell Univ.*, 94 N.Y.2d 162, 164-65, 723 N.E.2d 65, 66-67, 701 N.Y.S.2d 316, 317-18 (1999) (article 78 proceeding challenging a decision of a private university).

⁷⁴ 279 A.D.2d 472, 719 N.Y.S.2d 263 (2d Dep't 2001).

⁷⁵ 76 A.D.2d at 31, 430 N.Y.S.2d at 164.

⁷⁶ 11 A.D.3d 895, 782 N.Y.S.2d 309, 310 (4th Dep't 2004).

⁷⁷ 85 N.Y.2d 638, 641, 651 N.E.2d 872, 873, 628 N.Y.S.2d 4, 5 (1995). Presumably, the plaintiff in that case did not belong to a union. However, there is no discussion in the decision whether or not the employee belonged to a union. Had he belonged to a union, his employment would have been subject to the collective bargaining agreement.

⁷⁸ *Id.* at 642, 651 N.E.2d at 874, 628 N.Y.S.2d at 6 (citing *Mitchell v. Dowdell*, 172 A.D.2d 1032, 569 N.Y.S.2d 291 (4th Dep't 1991)).

employment-at-will doctrine.⁷⁹ Under this doctrine, which has been the law in New York since the nineteenth century, there is a presumption that employment is at will and therefore, may be freely terminated at any time with or without cause,⁸⁰ so long as the termination does not violate some other statutory proscription, such as statutes outlawing discrimination. Permitting an employee to challenge his termination in an advisory arbitration allows the employee to “have his day in court” and may serve the same therapeutic value as final and binding arbitration.⁸¹ This may result in less litigation, particularly if the employee does not prevail in the advisory arbitration.

Essentially, labor arbitration provides unionized workers a form of job security by requiring that an employer have just cause prior to taking action against an employee. The lack of job security is one of the reasons why employees may look to unions for support. If the employer provides for advisory arbitration, this may take away some of the incentives for employees to unionize. Of course, organized labor will counter that advisory arbitration is very different from labor arbitration and, therefore, advisory arbitration does not effectively provide the same level of job security as labor arbitration. Ultimately, the decision turns on whether or not the employee wants to unionize, as well as how important arbitration is to the employees.

Advisory arbitration is also a check on the power of management. If a corporation loses in advisory arbitration, it may bring certain personnel problems caused by lower level supervisors to the attention of senior management.

Even with advisory arbitration, the employer still has some flexibility to reject the proceeding, given the deferential standard of judicial review applicable in article 78 proceedings.⁸² However,

⁷⁹ *Id.* at 641, 651 N.E.2d at 874, 628 N.Y.S.2d at 6.

⁸⁰ There have been a number of New York Court of Appeal decisions that upheld the employment-at-will doctrine. *See* *Horn v. New York Times*, 100 N.Y.2d 85, 96–97, 790 N.E.2d 753, 759, 760 N.Y.S.2d 378, 384 (2003); *Wieder v. Skala*, 80 N.Y.2d 628, 633, 609 N.E.2d 105, 107, 593 N.Y.S.2d 752, 754 (1992); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333, 506 N.E.2d 919, 920, 514 N.Y.S.2d 209, 211 (1987); *Murphy v. Am. Home Products Corp.*, 58 N.Y.2d 293, 300–01, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983); *Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 462–63, 443 N.E.2d 441, 443–44, 457 N.Y.S.2d 193, 195–96 (1982); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E.416, 417 (1895).

⁸¹ *See supra* note 52 and accompanying text.

⁸² *See supra* note 31.

employers must consider the costs of advisory arbitration in determining whether to implement such a policy. The costs of advisory arbitration include lawyers' fees, staff, lost productivity time as witnesses will not be at work, and the arbitrator's fee.⁸³ In the end, the employer who is considering advisory arbitration is the one who must weigh the benefits with the costs. As a practical matter, the individual employee is not going to have enough bargaining power to insist on advisory arbitration. Indeed, if the individual employee had this power, he or she probably would insist on some type of binding arbitration.

The thought of utilizing advisory arbitration to resolve employment-related disputes in the non-union workforce is not as radical as it might seem. Under New York Civil Service Law Section 75,⁸⁴ permanent civil servants, whether they are in a union or not, are entitled to a hearing to protest proposed discipline and/or termination, but the public employer retains the authority to reject the decision of the Hearing Officer—subject to an article 78 standard of review.⁸⁵ In a sense, the process is similar to advisory arbitration.

Finally, although not required in New York because it is an employment-at-will state, some employers may effectively require "just cause" for their actions due to concerns over possible claims of employment discrimination.⁸⁶ Therefore, advisory arbitration may not change the policies of employers already

⁸³ According to one survey done in 2004, per diem fees for labor arbitrators ranged from \$350 to \$2,400 per day with an average fee of \$826 per day. COOPER ET AL., *supra* note 2, at 21. Additionally, on average each case decided by an arbitrator involves two days of study for each day of hearing. During this "study time," arbitrators review the record, undertake research, and draft a written arbitration opinion and award. *Id.*

⁸⁴ N.Y. CIV. SERV. LAW § 75 (McKinney 1998).

⁸⁵ See *Tottey v. Varvayanis*, 307 A.D.2d 652, 654–55, 762 N.Y.S.2d 543, 544–45 (3d Dep't) (article 78 proceeding filed after employer rejected recommendation of Hearing Officer), *appeal denied*, 1 N.Y.3d 501, 807 N.E.2d 288, 775 N.Y.S.2d 238 (2003); *Spry v. Delaware County*, 277 A.D.2d 779, 779, 716 N.Y.S.2d 728, 729 (3d Dep't 2000)

Civil Service § 75 hearings are regarded by many as not providing employees with effective due process protection. For a critical discussion of the Civil Service § 75 process, see James A. Brown, *Fixing A Broken Disciplinary System*, N.Y. L.J., April 21, 2004, at 4. Though Mr. Brown makes some very good points, for non-union employees limited protection is better than no protection.

⁸⁶ MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 115 (6th ed. 2003). Indeed, as the authors point out, because of the enactment of the various statutes which outlaw employment discrimination employers are well advised to have just cause for their actions." *Id.*

applying a “just cause” standard. However, it would provide the employee with a forum to be heard.

Although advisory arbitration is predominately used in public-sector school district-union labor-management relations,⁸⁷ there does not appear to be any legal reason why it could not be applied to private-sector labor and employment matters. In fact, in labor and employment matters, courts adjudicating private-sector disputes have looked to public-sector decisions for guidance. For example, in *NLRB v. Transportation Management Corp.*,⁸⁸ the United States Supreme Court adopted the National Labor Relation Board’s (“NLRB”) mixed motive test where it is alleged that an employee was discharged for anti-union animus and the employer claims that it would have terminated the employee anyway. In adopting this test, the Court looked to a First Amendment decision involving the discharge of a public employee for guidance and held that it was proper for the NLRB to initially draw an analogy to that First Amendment case.⁸⁹

Similarly, in employment law, courts have often looked to decisions interpreting the older National Labor Relations Act (“NLRA”)⁹⁰ for guidance in interpreting legal issues such as those involving employment discrimination.⁹¹

IV. THE LIMITS OF ADVISORY ARBITRATION AS COMPARED TO FINAL AND BINDING ARBITRATION

Since 1991, there has been an explosion in the use of final and binding arbitration to resolve employment disputes.⁹² In

⁸⁷ See *supra* note 18 and accompanying text.

⁸⁸ 462 U.S. 393, 401–02 (1983).

⁸⁹ *Id.* at 403. Similarly, in *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993), in interpreting the National Labor Relations Act, the court followed a decision which interpreted the Federal Service Labor Management Relations Act, 5 U.S.C. § 7101–35 (2000), which governs labor-management relation matters between the federal government and its unions.

⁹⁰ 29 U.S.C. § 151–169 (2000).

⁹¹ Indeed, the NLRA has been referred to as the “grandparent of most labor laws.” See Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees’ Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 12 (1990). In fact, the term “affirmative action” used in Title VII is derived from the NLRA. *Id.* at 12 n.68.

⁹² In 1991, the Supreme Court ruled that an unrepresented employee could be compelled to arbitrate his or her statutory claim because he executed a predispute arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200–01 (2d Cir. 1998) (discussing increased use of arbitration of statutory rights), *cert. denied*, 526 U.S.

fact, a new term of art has been coined: "employment arbitration."⁹³ Interestingly, outside of final and binding arbitration before a labor arbitrator, many arbitrators issue awards without any written opinions. New York has historically not required an arbitrator to set forth his or her reasoning for the award.⁹⁴ This practice, which is not unique to New York,⁹⁵ has been judicially criticized.⁹⁶

Since 1991, there is a significant amount of litigation over the issue of whether or not an employee is barred from raising a statutory claim in court by virtue of a pre-arbitration agreement.⁹⁷ In the Second Circuit, however, the law is settled—an employee generally does not give up his or her right to pursue a statutory claim because of an arbitration agreement.⁹⁸

Nevertheless, if the dispute is in a jurisdiction outside the Second Circuit, advisory arbitration of employment disputes should not be understood as replacing litigation of statutory

1034 (1999); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. Rev. 1344 (1997) ("Over the last decade, the Supreme Court . . . has expanded the role of arbitration in the resolution of legal disputes . . .").

Given the explosion of ADR in this country, some commentators believe that attorneys may have an obligation to inform their clients about ADR alternatives. See Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 244 (2004).

The law surrounding the contours of employment arbitration outside of collective bargaining is still developing. ROTHSTEIN ET AL., *supra* note 64, at § 1.28.

⁹³ Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. 853, 853 (2002).

⁹⁴ *Halligan*, 148 F.3d. at 204; *Sussco Exterior Systems, Inc. v. Hercules Construction Corp.*, 120 A.D.2d 532, 533, 502 N.Y.S.2d 41, 42 (2d Dept. 1986); *Banc of America Securities v. Knight*, 4 Misc. 3d 756, 767, 781 N.Y.S.2d 829, 837–38 (Sup. Ct. N.Y. County 2004).

⁹⁵ R.D. Hursh, Annotation, *Necessity That Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969–74 (1962) (surveying various jurisdictions).

⁹⁶ Indeed, in *Halligan* and *Banc of America Securities* the courts went so far as to state that the absence of an explanation for the arbitration award may result in a court having less confidence in it. See *Halligan*, 148 F.3d at 204; *Banc of America Securities*, 4 Misc.3d at 767, 781 N.Y.S.2d at 837–38.

⁹⁷ Dana T. Blackmore, *An Employer's Guide to Understanding the Arbitration of Statutory Claims*, 13 WORLD ARB. & MEDIATION REP. 103, 104–07 (2002); Erica F. Schohn, *The Uncertain Future of Mandatory Arbitration of Statutory Claims in the Unionized Workplace*, 67 LAW & CONTEMP. PROBS. 321, 324 (2004) (discussing cases in connection with unionized workers). It is beyond the scope of this Article to further discuss arbitration of statutory claims.

⁹⁸ *Fayer v. Town of Middlebury*, 258 F.3d 117, 123 n.2 (2d Cir. 2001); *Rogers v. New York Univ.*, 220 F.3d 73, 75 (2d Cir. 2000). This Article cites to Second Circuit case law in this regard because this Article is predominately about New York law.

rights. Even final and binding arbitration must contain procedural due process safeguards to preserve its finality. A biased arbitration, for example, is akin to no arbitration.⁹⁹ Where the arbitration forum is inadequate, courts have held that agreements to arbitrate were unenforceable.¹⁰⁰ It would appear that advisory arbitration would be an inadequate forum to present statutory claims due to the lack of finality.

Additionally, in the private sector, arbitration is considered the quid pro quo for an agreement not to strike.¹⁰¹ In the private sector, this policy is so significant that the law will imply that the parties to a collective bargaining agreement have agreed to a no-strike clause, if the agreement provides for final and binding arbitration.¹⁰²

However, if advisory arbitration were to be used in a private-sector collective bargaining agreement, in lieu of final and binding arbitration, it should not be thought of as a quid pro quo for an agreement not to strike. Advisory arbitration not only lacks the essential element of finality but, moreover, the law surrounding final and binding arbitration is radically different. Final and binding arbitration is intended to be just that—final and binding. A final and binding arbitration is usually held before one arbitrator, but in some industries, parties also select partisan arbitrators. In such situations, the partisan arbitrators

⁹⁹ As Professor Nolan explained: “It is simply not conceivable that the Supreme Court intended to relegate employees with arbitration agreements to the mercies of a system biased against them and their statutory claims.” Dennis R. Nolan, *supra* note 93, at 867 (discussing, in detail, procedural and substantive requirements for minimal fairness in order for arbitration to be final and binding).

Additionally, lopsided arbitration agreements which, for example, impose prohibitive costs on employees or give the employer undue control over the selection of the arbitrator, are generally not enforced. *COOPER ET AL.*, *supra* note 2, at 617–18.

¹⁰⁰ *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (arbitration provision which gives employer unfettered discretion is illusory and not enforceable); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999) (explaining that an arbitration agreement that gives the employer the right to select arbitrators utilizes biased rules that allow the employer to vacate the award, allows the employer to transcribe the proceeding, and limits the presentation of proof by employees is unenforceable); *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (for arbitration of statutory rights to be enforceable arbitration must include both substantive protection and access to a neutral forum in which to enforce those protections); *Geiger v. Ryan’s Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 997 (S.D. Ind. 2001) (arbitration agreement unenforceable due to inadequate forum).

¹⁰¹ *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957).

¹⁰² *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104–05 (1962).

usually vote along party lines with the neutral in effect making the decision.¹⁰³

Section 7511(b)(1) of the New York C.P.L.R. sets forth the basis upon which a party that has participated in an arbitration may seek to vacate the resulting award.¹⁰⁴ There is an extremely narrow standard of judicial review. As the Court of Appeals has explained:

An arbitration may be vacated on three narrow grounds: "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power."¹⁰⁵

The Court of Appeals has held that vacatur is only appropriate in "limited circumstances" and that courts must pay particular deference to arbitration. In *New York State Correction Officers v. New York*,¹⁰⁶ the Court described the scope of its judicial review as follows:

Collective bargaining agreements commonly provide for binding arbitration to settle contractual disputes between employees and management. In circumstances when the parties agree to submit their dispute to an arbitrator, courts generally play a limited role. Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration

¹⁰³ See Seth H. Lieberman, Note, *Something is Rotten In The State of Party-Appointed Arbitration: Healing ADR's Black Eye That Is "Nonneutral Neutrals,"* 5 CARDOZO J. CONFLICT RESOL. 215, 223–26 (2004).

¹⁰⁴ New York C.P.L.R. § 7511(b)(1) provides that an award may be vacated if the court finds that the rights of a party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of defect and without objection.

N.Y. C.P.L.R. § 7511(b)(1) (McKinney 1998).

New York law is often ignored in private-sector labor-management relations due to the misguided perception that federal law preempts state law in this area. See Rubinstein, *supra* note 1, at 35.

¹⁰⁵ *United Fed'n of Teachers v. Bd. of Educ.*, 1 N.Y.3d 72, 79, 810 N.E.2d 827, at 832, 769 N.Y.S.2d 451, 456 (2003) (quoting *Bd. of Educ. v. Arlington Teachers Ass'n*, 78 N.Y.2d 33, 574 N.E.2d 1031, 571 N.Y.S.2d 425 (1989)). For a discussion of the law concerning final and binding arbitration under New York law, see Rubinstein, *supra* note 1.

¹⁰⁶ 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (1999).

award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice.¹⁰⁷

Thus, the party seeking to vacate an arbitration bears a “heavy burden.”¹⁰⁸

There are only a few exceptions to the concept of finality. One exception exists where a union breaches its duty of fair representation.¹⁰⁹ A breach of such a duty is quite rare and only occurs when the union acts in an arbitrary, discriminatory, or bad-faith manner towards its members.¹¹⁰ Another exception

¹⁰⁷ *Id.* at 326, 726 N.E.2d at 465–66, 704 N.Y.S.2d at 912–13.

¹⁰⁸ *See* *Erie County Sheriff's Police Benevolent Ass'n v. County of Erie*, 299 A.D.2d 857, 858, 750 N.Y.S.2d 544, 544 (4th Dep't 2002).

¹⁰⁹ *Hines v. Anchor Motor Freight*, 424 U.S. 554, 561–62 (1976) (applying private-sector federal law); *Bd. of Educ. v. Ambach*, 70 N.Y.2d 501, 517 N.E.2d 509, 522 N.Y.S.2d 831 (1987) (applying New York law).

¹¹⁰ With respect to the duty of fair representation (“DFR”) New York Courts have adopted the same DFR standards as federal courts. *See* *Symanski v. E. Ramapo Cent. Sch. Dist.*, 117 A.D.2d 18, 502 N.Y.S.2d 209 (2d Dep't 1986); *Albino v. City of New York*, 80 A.D.2d 261, 438 N.Y.S.2d 587 (2d Dep't 1981). The duty of fair representation may be traced to federal law. *Baker v. Bd. of Educ.*, 70 N.Y.2d 314, 319, 520 N.Y.S.2d 538, 540 (1987). A cause of action for breach of the DFR is actually a hybrid action involving the Board's breach of contract and the union's breach of duty. *Obot v. N.Y. State Dep't of Corr. Serv.*, 89 N.Y.2d 883, 886, 675 N.E.2d 1197, 1198, 653 N.Y.S.2d 245, 246 (1996). As stated by the United States Supreme Court:

“To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of the duty by the Union”

DelCostello v. Teamsters, 462 U.S. 151, 165 (1983) (alterations in original) (quoting *UPS v. Mitchell*, 451 U.S. 56, 66–67 (1981) (Stewart, J., concurring) and *Hines*, 424 U.S. at 570–71 (1976)); *see also* *Commodari v. Long Island Univ.*, 89 F. Supp. 2d 353, 370–72 (E.D.N.Y. 2000) (holding that DFR cause of action could not be established because no breach of duty was found), *aff'd*, 62 Fed. Appx. 28 (2d Cir. 2003).

Under the duty of fair representation, the law recognizes that a labor union is not legally accountable to an employee for any and all working conditions, problems or conflicts that the employee has on the job. Rather, the law provides that a union which is the exclusive bargaining representative of a defined group of employees, has a duty to fairly represent employees. *See* *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (stating that DFR breach occurs if union actions are arbitrary, discriminatory or in bad faith).

In *Civil Service Bar Ass'n, Local 237 v. City of New York*, 64 N.Y.2d 188, 474 N.E.2d 587, 485 N.Y.S.2d 227 (1984), the Court of Appeals recognized that a Union's basic purpose is to address the needs of unit members who at times face conflicting or different situations. *Id.* at 197, 474 N.E.2d at 591, 485 N.Y.S.2d at 231. In *Jacobs v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 64 A.D.2d 148, 409 N.Y.S.2d 234 (2d Dep't 1978), *appeal dismissed*, 46 N.Y.2d 1075 (1979), the Second Department

concerns the finality of labor arbitration decisions in cases that are also representational in nature under the NLRA.¹¹¹ In this type of case, the determination of questions concerning representation involves the application of statutory policy and criteria.¹¹² Perhaps the most significant exception occurs in so called "deferral cases," where the issue could be an unfair labor practice under the NLRA,¹¹³ as well as a breach of the collective bargaining agreement.¹¹⁴ A classic example of this occurs when a

held that the courts should not become involved in second guessing unions. *Id.* at 157–58, 46 N.Y.S.2d at 239.

Similarly, in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), the Supreme Court reaffirmed that union's must be given a "wide range of reasonableness' . . . to make discretionary decisions and choices, *even if those judgments are ultimately wrong.*" *Id.* at 45–46 (emphasis added) (quoting *Air Line Pilots Ass'n-Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) and *Ford Motor Co. v. Huffman* 345 U.S. 330, 338 (1953)). Judicial review of a union's actions is considered to be "highly deferential." *See Spellacy, Jr. v. Air Line Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999); *see also Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

A breach of the duty of fair representation is an improper practice under the New York Taylor Law. N.Y. CIV. SERV. LAW § 209-a (1998); *see also In re Grassel*, 33 N.Y. PERB ¶33-3038 (2000) (applicable to public sector employees in New York), *aff'd*, 301 A.D.2d 522 (2d Dep't 2003). It is also an unfair labor practice under the National Labor Relations Act. *See Breininger v. Sheet Metal Workers' Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 78, 86–87 (1989) (applicable to most private sector employers).

It is beyond the scope of this Article to discuss the duty of fair representation in greater detail. For a description of some of the issues that come up in this area, see Mitchell H. Rubinstein, *A New York Court Recognizes a Labor Union Evidentiary Privilege*, 9 LAB. LAW. 595 (1993).

¹¹¹ A typical representation matter before the NLRB, the administrative agency created by the NLRA, occurs when a group of unrepresented employees desire a union. These employees can petition the NLRB for a secret ballot election to determine whether or not a majority of the employees in an appropriate unit for bargaining desire a union. *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 1, at 444–758.

¹¹² *See NLRB v. Paper Mfr. Co.*, 786 F.2d 163 (3d Cir. 1986); *Tweedle Litho, Inc.*, 337 N.L.R.B. 686 (2002); *Ziegler Inc.*, 333 N.L.R.B. 949 (2001); *Williams Transp. Co.*, 233 N.L.R.B. 837 (1977).

¹¹³ 29 U.S.C. § 158 (2000).

¹¹⁴ Under *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), and its progeny, there are several criteria that must be met if the Board is to defer to an arbitrator's decision. They are as follows: (1) The unfair labor practice must have been presented to and considered by the arbitrator; (2) the arbitration proceeding must appear to have been fair and regular; (3) all parties to the arbitration must have agreed to be bound; and (4) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Id.* at 1082; *see also* 8 CANAN & GREGORY, *supra* note 6, § 10779 (discussing NLRB's deferral policy); GETMAN ET AL., *supra* note 2, at 226–42 (discussing NLRB's deferral policy) If the NLRB "defers" to the arbitrator, they will not decide the case.

terminated employee asserts that he or she was terminated without “just cause” under a collective bargaining agreement and, additionally, because of his or her union activities in violation of the NLRA.¹¹⁵

CONCLUSION

Advisory arbitration is not for everyone. Its value in private and public-sector labor relations is certainly questionable. However, it may offer some measure of protection and industrial due process to unrepresented employees. In the United States, just cause protection for non-union workers is virtually non-existent.¹¹⁶ At the very least, it offers employees the chance to formally argue their case. By providing employees with this forum, corporations may actually save money because it may decrease the amount of litigation. Sometimes just giving an employee the opportunity to tell his or her side of the story and giving the employer the opportunity to formally explain its actions may have a therapeutic effect, which in turn may decrease the amount of litigation. However, since unrepresented employees have virtually no bargaining power, the employer is the one who must decide whether or not it will unilaterally offer advisory arbitration.

If advisory arbitration takes hold, written opinions, though not required under current law, would certainly be in the parties’ interest. Written opinions provide a record that a reviewing court could examine. In time, they may also form a body of case law outlining employment rights and responsibilities. Of course, requiring arbitrators to issue a formal written opinion increases the time and expense of the advisory arbitration. Unlike the unionized sector, where unions typically pay one-half the cost of the arbitration, the employer probably would have to foot the entire bill, unless the employee agrees to do so. However, there is a material difference between a union servicing its members by paying for part of an advisory arbitration, and having an individual employee pay that same amount.

Due to the lack of finality, advisory arbitration is not an

Under New York’s Taylor Law, PERB also defers to decisions of arbitrators. *United Univ. Professions*, 37 N.Y. PERB ¶ 37-4546 (2004) (citing *New York City Transit Auth.*, 4 N.Y. PERB ¶ 4-3031 (1971)).

¹¹⁵ See *THE DEVELOPING LABOR LAW*, *supra* note 1, at 1371.

¹¹⁶ See *HARPER ET AL.*, *supra* note 1, at 721.

appropriate forum to litigate statutory rights, unless the employee retains the right to bring his statutory claim in court. Additionally, because of the lack of finality, advisory arbitration in the private sector should not be considered as the quid pro quo for an agreement not to strike.

Though advisory arbitration is basically a product of public-sector labor-management relations in the field of public education, there are no policy reasons why it could not be adopted in the private sector.¹¹⁷ In fact, in employment law, courts often look to other labor statutes for guidance.¹¹⁸

Suggesting that employers voluntarily agree to advisory arbitration may not be a radical idea when one considers that most of the American workforce is without any real due process protection against arbitrary employer action. Indeed, Professors Julius G. Getman, David L. Gregory, and attorney Bertrand B. Pogrebin suggest that it might be appropriate to have some form of labor arbitration in the non-union environment in order to provide non-union employees with industrial due process.¹¹⁹ While I certainly would favor this, it does not appear realistic. It seems as though a useful middle ground in the unorganized sector may, in fact, be advisory arbitration.

¹¹⁷ See *supra* notes 10–18 and accompanying text (describing the use of advisory arbitration).

¹¹⁸ See *supra* note 91 and accompanying text.

¹¹⁹ GETMAN ET AL., *supra* note 2, at 240–42.