11 Private sector ombudsman conference 1985-1996

PRIVATE SECTOR

OMBUDSMAN CONFERENCE

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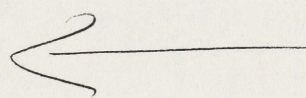

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• *Here is a device, adapted from Scandinavian governmental procedures, to help make sure that management decisions are just to employees.*

The CORPORATE OMBUDSMAN

By Isidore Silver

"The modern corporation is no longer merely a unit of economic production; it is a dispenser of justice." Although this quote is mythical, it does not differ significantly from a statement by Frank Abrams, retired chairman of the board of Standard Oil:

> "The job of professional management is to conduct the affairs of the enterprise in its charge in such a way as to maintain an equitable and workable balance among the claims of the various interested groups — stockholders, employees, customers, and the public at large." [1]

A management text points out, "No one can exercise power effectively these days without conveying the conviction that he does so responsibly, that is, with justice." [2] Thus some concept of justice is certainly close to, if not encompassed within, the heart of corporate awareness of its social responsibilities.

Yet corporate justice, especially to the company's nonunion employees — as envisaged by Abrams — is incomplete unless some mechanism to review management decisions is established by top management itself. The function of such a mechanism would be to assure an impartial outlet for an employee's dissatisfaction with decisions adverse to him. If the corporation is to provide fair and equal treatment to employees, it should ideally combine the virtue of fair-mindedness with the necessities of thrift and efficiency. Such an impartial grievance outlet exists in the political world and, I would argue, could readily be adapted to the corporate realm. It is the institution of the ombudsman.

The ombudsman has come to America's startled attention as a kind of Scandinavian fairy tale. A superficial reading of the press (which, these days, is filled with intriguing speculation on the subject) could lead one to believe that this strangely named fellow is a knight-errant, armed with great investigative and punitive powers, who will save us all from overweening bureaucracy. Accordingly, he is conceived of as the representative of an aggrieved citizenry, cutting through red tape and bureaucratic boondoggling, reversing unfair decisions, and righting numerous (if not continuous) official wrongs. Unfortunately, but inevitably, such a simplistic view describes a Don Quixote rather than a harried Scandinavian public servant.

Who He Is

If the ombudsman is not Douglas Fairbanks, then who is he? What does he do? And why does he set the hearts of all "little men" aflame? The ombudsman is, quite simply, a person of some eminence, learned in the law, who is appointed by a legislative body to inquire into complaints against administrative officials and to make periodic reports about his findings. He is responsible only to the appointing authority.

The ombudsmen who now operate in Sweden (where the system started in 1809), and in Denmark, Norway, Finland, and New Zealand

[1] Quoted in "Have Corporations a Higher Duty than Profits?" *Fortune*, August 1960, p. 108.

[2] Benjamin M. Selekman, *A Moral Philosophy for Management* (New York, McGraw-Hill Book Company, Inc., paperback edition, 1959), p. 75.

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(much more recently) have varying powers. In Sweden, for instance, the ombudsman is empowered to commence prosecutions against officials who have violated the law in particular administrative situations. In Denmark, he can comment on the quality of administration and suggest better administrative methods. In all countries, he is empowered to investigate the basis of any decision, whether or not there has been a complaint, and to make his findings public. The system has been favorably commented on by those Americans who have studied it, and it is the subject of much serious discussion in respectable political circles.

Manifold Advantages

Although he has no power to change any decisions, the mere possibility of criticism by the ombudsman encourages administrators to find sufficient reasons for their decisions. Some countries publicize the ombudsman's findings, and this imposes yet another constraint. Observations seem to confirm that administrative decisions are often made more thoughtfully now than in pre-ombudsman days.

The ombudsman has the great virtue of being "visible." Persons aggrieved by administrative decisions know that there is someone they can turn to for impartial investigation. They may not know where else they can go in the bureaucratic maze, but the ombudsman is there. Generally, even when the political ombudsman dismisses a particular claim as being insubstantial, he satisfies the claimant's desire for a full and fair investigation, although the investigation itself may only consist of an appraisal in an office and a courteous letter denying the claim. Thus the raw edges of conflict are rubbed smooth, and in human affairs this is no inconsiderable achievement.

The ombudsman also serves to vindicate administrative decision making where such decision is just. Interestingly, most administrative decisions, even the contested ones, are reasonable. The Danish ombudsman, for example, censures officials in only 5% of the cases before him. Indeed, he takes only 15% of the complaints submitted. Extant information clearly demonstrates that administrators now regard the ombudsman system as a protective device — rather than a hindrance at worst, or a nuisance at best. Since most of the investigated administrative decisions have proved to be just, the initial bureaucratic antipathy toward the ombudsman has become transformed into wholehearted acceptance. Walter Gellhorn, the leading authority on the subject, concludes, "The ombudsman's work has indubitably had a tonic effect upon public administration." [3]

Prescribed Limitations

Much of this acceptance of the ombudsman is engendered by certain prescribed limitations on his authority. He can only investigate and recommend; he cannot reverse particular decisions. He cannot attack an exercise of discretion (except in Norway, where he may find that a particular decision is "unjust," and in New Zealand, where he may think it is "wrong"). He cannot make policy decisions, although he is empowered to make recommendations for policy changes on the basis of his investigative findings. The available evidence indicates that the policy recommendation aspect of his function is the weakest; thus, his primary role is to act in limited defense of the "little man" against the arbitrary "bureaucrat" and not to reform basic procedures.

Why Justice Is Needed

Lest anyone doubt the necessity of providing justice to employees, let us pause a moment. There are two primary reasons for this need:

(1) Management itself genuinely believes the corporation has evolved so that it is now a socially responsible institution. Understandably, however, there is some confusion about the precise meaning of justice in the corporate context.

(2) It is clearly in the long-range interest of the corporation to seek mechanisms to effect employee justice. If justice is a dominant value of American life, there can be no question that corporate employees bring this value into the office in the morning and leave with it at night. Employees expect justice in their lives and cannot arbitrarily divorce their existence into "work" and "leisure" components. People do not create such simple categories, in either their conscious or their psychological lives. An employee who feels that his legitimate grievances are being justly dealt with cannot help but be a better employee, and more importantly, a better citizen.

Existence of Conflict

Another reason why justice is needed is related to what might be called the "communica-

[3] *Ombudsmen and Others* (Cambridge, Harvard University Press, 1966), p. 36.

tions gap," which often creates organizational conflict. Indeed, one of the great problems of corporate life, and a cause for frequent grievance, is not the unfairness of management actions, but the inexplicability. It is ironic that in our overcommunicative society, communications breakdowns frequently occur. Even in corporations — where internal communications networks are the lifeblood of their activity — decisions are sometimes made without adequate explanation. Often, such decisions appear to be arbitrary when in fact they are not. Equally often, work discontent is caused by a lack of understanding as to the reasons for such apparently unfavorable decisions. Even what at first blush appears to be "insubordination" may well be nothing more than a communications gap. One arbitrator observes:

> "Authority is exercised by people. Insubordination is always man against man. It involves tempers, personalities, problems of communication, and differing points of view. Did the employee understand the order? Did he realize beyond all question that he was violating it? . . . Did he try to make amends . . .?" [4]

The failure is by no means one-way. "Clearing the air" is frequently more efficacious to everyone involved than "changing the decision."

Management should not, and generally does not, deceive itself about the existence of conflict within organizations. The wise corporate manager recognizes the existence of conflict (what the employee's superiors in the organization want him to do and what others who influence him want him to do) and job ambiguity (what he is supposed to do). These forms of conflict result in stress (not only job stress), and recent studies confirm this: "Conflict and ambiguity are among the major characteristics of our society, and . . . are among the unintended consequences of . . . the growth of large-scale organizations." [5]

The existence of conflict does not end there. The modern corporation finds itself greatly in need of ever more skilled and, indeed, professional employees. A modern enterprise simply cannot maximize its economic and technological goals without an educated, intellectually equipped cadre. Educated people come to the corporation with great expectations; they want more intellectual comforts — in the form of autonomy and responsibility — than their predecessors desired. They want to do "meaningful" work and to have their work respected by their superiors. These desires are not unreasonable, and they must be recognized if the corporation is to retain a fair proportion of these educated employees.

Further, professional people such as lawyers, accountants, and scientists are imbued with professional goals which include peer esteem, job integrity, and opportunity for research. But these goals often conflict with corporate goals based on other considerations (the need to meet competition or the need to control the innovative process). Neither of these sets of goals — professional and corporate — is good or bad per se; both are worthy, and their reconciliation is a legitimate concern of corporate management. Astute management should reasonably move to meet the expectations of professional employees, despite those inherent conflicts with corporate goals. Often, of course, this does not happen, and the professional turnover rate mounts.

Even beyond the issue of conflicting employee-company goals, contemporary managers of economically powerful modern corporations are currently pondering the problem of deciding to what primary ethic the company feels itself bound. Is its duty to the shareholder? If so, how can management justify charitable contributions which result in a lessened dividend? Is there a duty to the community in which the company operates? If so, can management ever move a plant from a town dependent on it? If the community is in the South, should management adhere to local mores and not hire Negroes, for instance?

Perhaps one answer to the problem is to recognize a duty to these and other groups, but to argue that the primary duty is to the enterprise itself — to ensure future growth and continued functioning as a profit-making supplier of goods and services.

Of course, management perceives other goals which take precedence over profit. The corporation pays taxes because what is good for society is good for the corporation. It contributes to charity both because it is "right" to do so and to enhance its image and sense of participation in the community. It pays dividends to retain favor among present shareholders and to make

[4] Orme W. Phelps, *Discipline and Discharge in the Unionized Firm* (Berkeley, University of California Press, 1959), pp. 98–99.

[5] Robert L. Kahn et al, *Organizational Stress* (New York, John Wiley & Sons, Inc., 1964), p. 3.

itself attractive to potential shareholders. It curbs its own initiatives to avoid costly economic and legal battles with others (and also because it recognizes its substantial economic power).

Surely, there is as great an interest in satisfying employees, and that interest should properly be countervailing to any interest in short-term profits. Indeed, an interest in long-term profits may be more directly enhanced by recognizing the claims of its employee-citizens than by acknowledging some of the previously mentioned demands.

Current Procedures

Given the need for corporate justice, is an ombudsman necessary? Does the corporate community presently have the mechanisms for dispensing equity? Are other grievance institutions available? There is little hard information on hand, since grievance procedures, if any, are kept flexible and informal. Apparently, particular grievances are resolved by (a) "grinning" (or grudging) and "bearing" them, (b) resigning from the corporate community, or (c) using available "political" means within the corporate hierarchy to compel a reversal of the adverse decision.

None of these existing grievance mechanisms are desirable, from either the corporation's or the employee's point of view, since the likely results are impaired efficiency, in (a) and (c); costly retraining, in (b); or fellow employee or immediate superior resentment, in (c). Clearly, the ends of corporate justice are not satisfied by these unpleasant alternatives; in addition, economic costs are increased.

Formal Systems

Some corporations, including IBM, utilize the famous "open-door" policy, whereby aggrieved employees are encouraged to step in and see some executive (or perhaps even a member of the board of directors).

The significant question here is whether the procedure is effective; and, lacking hard evidence, the pragmatic answer would seem to be *no.* An employee who feels he has a legitimate grievance may not necessarily know where to go. He may accost a harried executive who, in effect, shrugs him off. He may be confronted by a superior who may not wish to "weaken" a position taken by another manager. If a particular factual dispute exists, an executive may not have the time to investigate the facts. Also, an executive approached at a particular moment by a particular employee may lack the information to determine how other employees similarly situated have been treated. Moreover, however great his goodwill and sincerity of interest, the average executive may simply be unequipped to deal with the ramifications of an apparently innocuous complaint.

On the other hand, the inclination not to waste an executive's time with a trivial complaint may result in an employee's acquiescence to the adverse decision — and increased personal tensions.

Beyond these factors, there is always the imponderable middle-management ethic that a gentleman does not resort to these procedures, even if they are available. If a subordinate finds himself unable to work out a decent relationship with a superior, he may quit (or at least seek a transfer) before overtly challenging management authority. Certainly, an outstanding characteristic of all management appeal systems, including those discussed in this article, is the failure to utilize them, often in situations fully appropriate for such use. Here, both the corporation and the employee suffer in the name of a dubious ethic. Also, there may be a belief that future promotion may depend on *not* using the available system.

While some corporations have institutionalized other forms of appeal, such as a one- or two-step review of initial management action, the effectiveness of these procedures is always questionable. Such systems tend to be rigid and time-consuming for all involved, and the harassed judge, rather than take the time necessary to review the case thoroughly, often makes the all too human choice to substantiate a lower-level decision. Moreover, a lower-level decision tends to place a strong burden of proof on the aggrieved — as one political ombudsman observes:

> "The first decision, even if made at a relatively low official level, tends to generate its own defenses. . . . The official bias is toward maintenance of the original decision, and accordingly an objection must generally bear the onus of demonstrating manifest error. . . ."[6]

Even more lamentable, there is no fact-finding mechanism to resolve the more serious dis-

[6] The New Zealand Ombudsman, as quoted in Gellhorn, op. cit., p. 146.

putes; indeed, it is often difficult to ascertain what the first supervisor regarded as a "fact."

Informal Appeals

Corporations frequently operate according to informal, rather than formal, procedures. It is conceivable that personnel departments might play crucial roles, especially where the ultimate management sanction — dismissal — is contemplated. Some corporations might require a countersignature of the vice president in charge of industrial or personnel relations under these circumstances, and a "strong" vice president might well "fight for" someone he believes to be a victim of caprice.

Yet the few studies on the subject, and my own personal observations, indicate that the personnel department generally regards itself as a service adjunct to the other divisions of the corporation. Rarely does it seriously question a decision from the "line" — and justifiably so, since it has no independent role within the corporation. In fact, many of the corporations which have attempted to institute an appeals policy do not even use the personnel department as a primary feature of their system.

In sum, corporate appeals procedures — where they exist — are ineffective. As one scholar of the subject puts it:

> "In recent years, a few firms have introduced a form of appeals procedure which permits non-union employees to question management decisions, but the number of these firms is small and the handicaps great." [7]

Clearly, then, corporate justice is not being achieved. This is not because of existing arbitrariness or maliciousness, but because of a lack of knowledge — both of facts and of defined standards by which human conduct is to be judged.

It must be emphasized that corporate injustice is not the primary reason for having an ombudsman. In New Zealand, "The ombudsman was created not to clean up a mess, but, rather, simply to provide insurance against further messes." [8] Preventive medicine is often more vital than harsh cures. Corporations can, and should, regard the ombudsman proposal as a valuable device to prevent future injustice.

Where He Fits In

How would the ombudsman operate in the corporate context? To whom would he be responsible? What are the limits of his functions? If corporate justice means that an aggrieved employee must be provided with a fair and effective means of stating "his case" to an impartial person who has investigative powers, then it is clear that the ombudsman must be understood to be just such a person. Hence, he must be "of" rather than "in" the corporation. If the ombudsman is thought of as just another management functionary, then his most important attribute — that of perceived impartiality — is destroyed.

Chancellor's Role

In addition, the ombudsman must be thought of as something more than a mere "stage" in a dispute-resolution process. He must be deemed to represent the ultimate decision-making authority in the corporation, and he can only do this if he is a member of the president's personal staff. The president of the corporation is recognized (in both corporate and political society) as the embodiment of the corporation. He is the ultimate authority within the corporation and stands in much the same position as did the medieval king to his society.

The prerogative of the medieval king extended to the rendering of "justice," to the granting of clemency even where justice had been achieved, and to the exercise of the "conscience" of the state. The same is true of the corporate president; by virtue of his position and authority, he is perceived to be the conscience of the corporation. Just as the king exercised his powers to dispense justice through a chancellor, so the president needs someone with the time and facilities to conduct investigations, and to render advice. In effect, the ombudsman would stand in the role of chancellor to the president.

The role of the president itself must be more than formalistic. While political society provides the means to review administrative decisions which substantially affect the lives and liberties of individuals, such safeguards do not exist on the corporate level. Whereas political decisions often affect only a portion of a person's total interests, a corporate decision may affect his continued presence in the organization or even his future chances for gainful employment. Since most corporations do not provide any formal means of appeal and reconsideration of particular decisions, and indeed are

[7] Phelps, op. cit., p. 5.
[8] Gellhorn, op. cit., p. 103.

seldom geared to do so, the role of the president becomes crucial.

The corporate ombudsman must be a member of the president's personal staff to ensure prestige. He must have an independence similar to that enjoyed by his political counterpart. In corporate terms, he must have a long-term contract at substantial pay. In a fundamental sense, he should function as the "eyes" and "ears" of the president and should acquaint higher management with the problems he perceives at lower levels. A wisely used ombudsman would serve as a source of information about personnel problems. (This is often true of the role of the arbitrator in union-management disputes.) In addition, of course, the ombudsman would be management's conscience.

Broad Authority

The ombudsman's powers should — within their proper sphere — be broad. Therefore, he should have the authority to investigate *any* written complaint by *any* aggrieved employee (with certain exceptions to be discussed later). And he should also have the authority to dismiss any complaint, with or without a hearing, subject to the duty of stating reasons for such a dismissal in writing.

The value of detailed, complete, and informative answers to a complaint cannot be overlooked. Management literature is replete with statements to the effect that "no one ever actually told me what they expect of me." As one analysis concludes:

> "Much as he would like to 'do right' by the organization, [an employee] does not know what doing right means. Moreover, he learns only indirectly that he has failed; his job is taken away without explanation, or at least one that he can understand and accept. It is perhaps understandable that his feelings of helplessness and futility are expressed with a touch of bitterness." [9]

Where two "languages" are spoken, the ombudsman's most vital role may well be that of interpreter.

Why this virtually unlimited power to entertain complaints? As we shall see, his function requires that certain types of complaints be dismissed. But this is far different from arguing that he should not have the power to entertain them, and to make the initial determination of whether they fall within his competence. As an arbitrator has said, "Whether a man has a grievance or not is primarily his own feeling about the matter. Generally speaking, if a man thinks he has a grievance, he has a grievance." [10]

This power to assume jurisdiction is vital; it assures every employee (within certain categories) that the complaint will be looked at and will not merely be dismissed out of hand, with no explanation or a feeble statement relating to jurisdiction. It assures even the employee whose complaint is dismissed that his particular case at least has been looked at. Most importantly, having broad powers frees the ombudsman from getting embroiled in arguments about his jurisdiction and the inevitable discords and irritants which follow jurisdictional determinations.

How He Functions

Once he assumes jurisdiction and decides that a complaint is meritorious *on its face*, his power to act should parallel that of his political counterpart. Thus he may call for the employee file if the question raised can be answered by an examination of that record. He should have the power to obtain that information.

If a factual dispute is involved, the ombudsman should be able to call in company witnesses for informal conferences in a *nonadversary* setting. (If the problem involves technical considerations — such as measurement of the quality of work — the ombudsman should be able to call in any technical expert from within or, if necessary, from outside the corporation for his opinion.) On the other hand, if the facts remain in dispute, an *adversary* confrontation might be called for, and the ombudsman might act as "devil's advocate" for both sides. At any stage of the process, the ombudsman should have the sole discretionary power to dismiss the complaint.

Policy Interpreter

After a complaint is filed, the ombudsman must ascertain and interpret corporate policy on the matter at issue. For example, perhaps the practice of the corporation has traditionally been to permit a certain form of conduct which technically breaks a rule. If the rule is now to be invoked against a particular individual, there should be a reason for such deviation from the traditional practice. If the corporation decides,

[9] Kahn, op. cit., p. 81.

[10] Quoted in Frank Elkouri, *How Arbitration Works* (Washington, Bureau of National Affairs Press, 1952), p. 65.

as a matter of policy, to enforce the regulation, then the employees should be forewarned about it. Since corporate "law" consists of what is knowingly tolerated as well as what is formally forbidden, fairness demands that prior warning of potential violation be afforded. Thus the legal principle of *nulla poena sine lege* ("no punishment without law") should be honored.

If a particular manager is attempting to enforce what he conceives to be corporate policy when, in fact, such policy either is nonexistent or is not adhered to, then the ombudsman has the duty to point this out. Indeed, to quote Gellhorn again, his "greatest effectiveness appears in cases that involve departures from accepted norms, and not in cases where he must deal with clashes of values." [11] In short, the ombudsman should function to clarify true, as distinct from formal, corporate policy, and to acquaint the unknowing with that policy.

Decision Recommender

Once the ombudsman makes a ruling in a given case, he should write it down and submit it both to the complainant and to the manager involved before the president ever sees it. It should be remembered that the ombudsman's ruling is cast in the form of a recommendation, and its only value is persuasive. The reason for initial submission to the disputing parties is obvious: they may well concede that the "decision" is reasonable and voluntarily agree to adhere to it. Sometimes, and this has occurred, his recommendation contains additional facts to justify an ultimate reversal of the original management decision.

Agreement is likely, since most disputes are the result of (a) misunderstanding about the nature of the initial action taken by management, (b) lack of knowledge of the factual basis for the initial decision, or (c) a misunderstood corporate policy which constitutes the basis for that decision. There can be little doubt that the primary function of the ombudsman here, as in political life, is simply to clarify the basis for a particular and generally correct decision.

If the manager disagrees with the ombudsman's finding, he may wish to hold a conference for the purpose of presenting more facts or to argue that there is an error in the ombudsman's reasoning. This is perfectly compatible with the ombudsman's functions and should be encouraged. The ombudsman, in turn, should reconsider any of his recommendations, on the request either of the manager or of the aggrieved — and he may find that he should change the recommendation in the light of a new perspective.

Of course, this procedural flexibility should never be thought of as a convenient means of placating an irate manager. The intrinsic value of the system is severely undermined if the ombudsman quakes in the face of a managerial storm. On the other hand, the ombudsman must often be a politician — in the legitimate sense of the word — and if he can achieve a particular goal indirectly, he should do so. After all, a respected politician is called a statesman.

In cases where the manager contests the recommendation, the ombudsman may refer the entire matter to the president. At that point the ombudsman's function ceases, and the final outcome lies within the president's discretion. Of course, the president may call on the ombudsman (a) to explain or to amplify the reasoning underlying the recommendation, or (b) to consider possible revisions or novel factors that might change the recommendation. And the ombudsman may choose to do so, just as the president may choose to follow or to reject the advice which he is offered. The two functions, recommending and deciding, remain completely separate, and no power in the world should force one on the other.

Complaint Denier

If the ombudsman decides to deny the complaint, then the matter is ended. Although in some ideal sense it might be desirable to permit the employee to "appeal" over the ombudsman's head, this would be valueless to the corporation. It would diminish the importance of the ombudsman; he would come to be regarded as only the first step in the corporation's appeals procedure, rather than as the focus of that procedure. Since most complaints are insubstantial, any institutionalized form of appeal would serve to duplicate unnecessary work and would, in effect, constitute a return to an inadequate open-door policy.

Perhaps a fastidious president, concerned with the problem of who serves as the "conscience" of the "conscience," would request the ombudsman to submit copies of all denials of complaints to him. Thus an occasional unconscionable decision (and ombudsmen are doubt-

[11] Op. cit., p. 44.

lessly capable of making them) might be overruled by this informal method.

Specific Boundaries

Certain formal limitations should be imposed on the ombudsman's authority. For instance, two classes of employees automatically excluded from the system would be unionized personnel and top management.

Exempt Personnel

Top management — a term including corporate officers and divisional vice presidents, and somewhat ambiguously including others beyond them — simply functions too intimately with the president to come under the ombudsman's jurisdiction. At the top management level, the relationships are too personal, the conflicts too broad, and the standards for questioning judgments simply too ill-defined for an ombudsman. To turn to a political analogy, the president of a corporation is to his top executives as the President of the United States is to his Cabinet. The subordinates in each case are the president's "men" and serve only at his pleasure (although the corporate board of directors may have an additional role here).

Jurisdictional coverage at the top level by an ombudsman would embroil him in the kind of fundamental battles that are beyond the scope of his position. After all, he functions to carry out corporate policy (or to define it in narrow situations) and not to participate in its creation. Just as the U.S. Supreme Court never enjoins a war, so the ombudsman never interferes with the fundamental decision-making rights of top management.

For equally compelling reasons, employees subject to labor union contracts that contain grievance procedures are also exempt. They already have a system which affords a considerable degree of protection. In addition, union-management relations, always difficult at best, would be strained further by a procedure which excludes union influence on the dispute-resolution process.

Policy Issues

The ombudsman likewise exercises no jurisdiction where the contest involves clear company policy of general application. As Gellhorn points out, "The broad contours of . . . administration . . . are primarily questions for political determination."[12] For example, a mandatory policy of retirement at age 65, operating equally (or unequally) but rationally, should preclude claims by the production manager who wants to stay on after 65. Policy questions such as this are simply beyond the reasonable scope of any powers conferred on an ombudsman.

Yet there may be an area where the company has a general policy which works a particular hardship either on an individual or on a limited group of individuals. Here the ombudsman need not necessarily dismiss a complaint. For instance, in a company which has a mandatory policy of job relocation as new plants or offices in different cities open up, all staff employees are subject to relocation. But if a particular employee has a strong reason for contesting such an assignment (e.g., if he has already moved twice in the past four years, or he has a sick relative and someone else in his department can more readily be moved), any grievance on that issue falls within the jurisdiction of the ombudsman.

Note that the essential differences between the two situations just discussed involve a general corporate policy applicable to all (mandatory age 65 retirement) and a policy applicable to only a limited group (those who are actually asked to move). In the first case, the policy is defeated by granting a particular claim; in the second, it is not.

But policy issues are of little significance in the corporate context, since most problems arise because of the exercise of management discretion. Policy is often stated broadly, but its implementation is generally discretionary. Thus employees are urged to act in the "best interests" of the company. But what does this mean? Who defines it? What standards are being used? These questions of discretion constitute the vast majority of present personnel problems, and they would certainly constitute the focus of a corporate ombudsman's concerns.

Corporate Fears

There are, of course, legitimate objections to a corporate ombudsman system. Clearly, a manager who must submit a particular decision to someone else's scrutiny (and perhaps have to defend it personally) is bound to be somewhat restrained in making that decision. Yet the restraint often can be a beneficial one, since it

[12] Op. cit., p. 47.

allows him to weigh, in advance, the utility of the action against the potential harm to an individual. He may even see possible (and perhaps better) alternatives before he takes an action that may create conflict. It may even help managers at all levels to understand what is happening and to require subordinates to exercise discretion reasonably.

Would some managers "freeze" into immobility and refuse to act? Perhaps. But the manager who believes his action is correct should not freeze; if he believes that his action cannot be rationally justified, why should he take it in the first place? There are few emergency situations which compel completely unpremeditated action. When an emergency arises, the dynamic manager "acts," and the last concern on his mind is that of accountability to someone else. If the situation is less urgent, perhaps precipitous action is unwarranted, and accountability is then a consideration in the manager's mind.

'Flood of Litigation'

Possibly, the very existence of an ombudsman would encourage filing of numerous frivolous complaints; managers would spend all of their time answering baseless accusations, and corporate efficiency would be impaired. In law, this is called the "flood of litigation" argument. However, such fears usually prove to be unfounded. Rarely does the trickle of complaints become a flood. Arbitration was questioned on these very grounds initially, but statistics show that there was little cause to worry. To cite one example:

> During an 8½-year period, Bethlehem Steel experienced 17,000 initial protests against management decisions. Of these, 30% were bargained out prior to arbitration, 58% were dropped altogether, 12% went to arbitration, and only 5% were actually settled by the arbitrator.[13]

Since the ombudsman would enjoy the prerogative of dismissing complaints, he would doubtlessly weed out most of the frivolous ones at their inception. As we have seen, the Danish ombudsman regularly dismisses without any investigation about 85% of all complaints.

Usurpation of Rights

While it is clear that the ombudsman system would tend to weaken the prerogatives of management, the danger that its exercise may be abused is minimal when appropriate institutional safeguards have been provided. Perhaps the best argument against this understandable reservation can be gleaned from political experience. The political ombudsman has served to protect administrators from *their* superiors more often than he has invoked the citizen's interest against the "bureaucrat." Initial bureaucratic animosity toward the ombudsman, evident in every country when the system was originally instituted, rapidly became enthusiastic approval, for that precise reason. Today, a manager may feel his prerogatives are being undermined; tomorrow, he may wish that his superior's "arbitrariness" toward him could be curbed. It is often a matter of whose prerogatives are being gored.

Of course, the ultimate question is really whether the ombudsman system keeps fundamental decision making in the hands of management. If the answer is *yes* — as it is here — then abstract shibboleths should not be invoked to defeat an otherwise reasonable proposal. After all, our society suffers enormously by furnishing criminals with a highly sophisticated system of justice, but most of us agree that we prefer this to living in a society which does otherwise.

Disruptive Intrusion

Another real fear centers about the possible snooper's role of an ombudsman. Would he constantly wander through executive offices, rummage through files, startle secretaries, peer over trembling shoulders to read what someone is writing, and in general play Sherlock Holmes? Such conduct would admittedly disrupt management functioning and create serious problems. The question, while entirely legitimate, fails to take into account the ombudsman's truly limited role.

As I view the corporate ombudsman in this proposal, he generally sits in an office and receives complaints — when and if filed. He conducts an appropriate investigation, often one involving written communications or requests for files. If more information is needed, he calls in the manager involved and requests a conference at a mutually convenient time. Very few cases go further, although it is conceivable that a visit to a particular place might be necessary. Certainly, this can be arranged tactfully and with little disruption. As Gellhorn, in reference to a New Zealand ombudsman, observes:

[13] Phelps, op. cit., p. 15.

"Without exception the interviewed public agencies maintained that the ombudsman's access to informal staff notes and other working papers had not had the feared adverse effects." [14]

If a complaint, or a sequence of them, indicates substantial irregularity, then the ombudsman might well become a snooper. But, then, there might well be a substantial problem worth investigating. Most likely, any general problem raised by several complaints would not involve a disruptive investigation; it would merely be the subject of a report to the president. Remember, the ombudsman exists to serve the corporation, not to destroy it. A reasonable sense of tact on his part would preclude any "bull in the china shop" attitude; and unless the corporation is totally mismanaged, there would be no necessity for substantial intrusion into daily operations. If the corporation is totally mismanaged, it is highly unlikely that its management would even consider having an ombudsman.

Are we giving the ombudsman too much power? He has the power only to advise and to dismiss unjustified complaints. He gets no more money or prestige for finding management "guilty." He is not paid by the number of cases he adjudicates. He has no vested interest — such as his own job — to defend. He competes with no one in the organization for power or for limited resources. In short, he is just there. His role is to be objective. His only concern is for the maintenance of corporate integrity toward employees and for the incidence of arbitrary action at almost any level of decision making.

Standards & Sources

But how can we be sure that this "saint" will not be governed by whim and caprice, that he will act on a case-to-case basis, or in accordance with some "eternal" principle? If the ombudsman is to be something more than an "uncontrolled" (and erratic) conscience, he must act within a framework provided by the recognized concepts of "due process" of law and the industrial concepts of "just cause" for discipline. If discipline is the issue, for example, due process requires:

- That the policy be known (or at least published) prior to the act.
- That the standard allegedly violated be fairly specific.
- That the charge be stated.
- That some sort of proof in support be adduced at an impartial hearing (if a factual dispute exists).
- That the punishment be appropriate to both the "crime" and the "criminal," which automatically means a curb on the punishment of dismissal.

Body of Precedent

The ombudsman should create, and reasonably follow, a body of precedent. If incompetence is the issue, then the ombudsman should ascertain whether reasonable job requirements for the position existed and were known to the aggrieved employee. If a new job requirement is necessary because the nature of the job has changed, perhaps some advance notice of this — as well as an opportunity to acquire the new skills — should have been afforded. "Insufficient supervision" may well be a defense to disciplinary action, for management has a reasonable retraining obligation. For instance, an ombudsman might well be upset if a production manager who had suddenly been required to write formal reports was discharged because he could not do so at first.

The significant aspect of the ombudsman's role is that he brings sophisticated concepts to an institution whose function is narrow but whose importance is great. A reasonable ombudsman might decide that the right to counsel is unnecessary, since the proceeding is investigative, but that prior warning or inadequate job performance is a prerequisite to disciplinary action.

Then, if there is a hearing, the ombudsman should neither feel bound to strict legal rules of evidence nor permit the introduction of illegally obtained evidence. To use illegal evidence is to encourage antisocial practices; and this is acknowledged by both courts and arbitrators. In particular, damaging evidence *unrelated* to the charge should not be introduced (unless a "second offense" situation is involved), while, on the other hand, some consideration should be given to a previous good employment record.

Thus, within the constraints imposed by corporate life, operative principles of adjusting disputes can be formulated.

Background Possibilities

The ombudsman might be drawn from any one of several sources. He could be a lawyer familiar with corporate operations; it is obvi-

[14] Op. cit., p. 126.

ously most desirable to have someone familiar with both environments. Accordingly, an experienced member of the corporate legal division might well serve this function.

Another possibility might be an arbitrator, or ex-arbitrator, who has served in a particular industry and is familiar with its problems. Because such a person has been conditioned by an environment of "industrial jurisprudence," he is likely to have a "feel" for both human relations and corporate necessity, as well as an appreciation of the process of dispute resolution.

A former top executive who has retired or who is interested in human relations problems might also be an effective ombudsman. Although such a man is not likely to be thoroughly familiar with legal principles, he may benefit from numerous educational opportunities in large communities. A night college or even law school course and some intensive reading could provide him with the requisite background. Since due process in this context is often little more than applied wisdom, the basic resources should be present within the individual himself.

It is even conceivable that management might designate a certain official to act as ombudsman and educate him to the role. However, this should not be done as a matter of grace, and it will appear to be just that if he either serves on a part-time basis or is thought of as merely a "management man." If this modus operandi is adopted, he should clearly demonstrate his independence in accordance with the recommendations previously discussed (long-term contract, salary, and so forth).

Conclusion

The concept of the corporate ombudsman should not be regarded as an expedient or a temporary device — or worse, as a gimmick. If the institution is to mean something, and not merely be a waste of time, money, and hope, then top management must be prepared to live with it.

The role of the ombudsman is to serve as an embodiment of the corporate conscience. The system proposed in this article is inexpensive. It does not unduly hamper corporate functioning. It should ultimately, if not initially, create a better corporate climate, even if rarely used. As one observer notes:

> "An ombudsman's achievement cannot be measured solely by the frequency with which he criticizes administrators. He serves especially well when he dampens hostile suspicions and helps create the public confidence upon which democratic government must be based." [15]

If in the above we substitute the terms "employee" for "public," "corporate" for "democratic," and "should" for "must," we have succinctly stated the ombudsman's true value. Indeed, the corporations that are most likely to adopt this system are probably those *least* in need of it — as is true of their political counterparts. The operative word here is "least," for all human enterprises need an ombudsman. All enterprises involve stress and conflict of one sort or another, and no one can legitimately claim that "his" organization is a haven for his associates. As fallible beings, we may conclude, as does one group of organizational observers:

> "The issue, then, is not the elimination of conflict . . . from organizational life; it is the containment of this condition at levels and in forms which are at least human, tolerable, and low in costs, and which might at best be positive in contribution to individual and organization." [16]

A better definition of the need and the role of the ombudsman cannot be found.

The experience of the political ombudsman has demonstrated that he is a most useful tool to society. Nobody, including his initial detractors, wants to give him up. Yet society must be willing to accept him as a check on its accidental and intentional excesses. He can only be successful in his limited role if he is allowed to be; all the power in the world without support is of no consequence.

Ultimate justice obviously cannot be achieved on earth. The ombudsman is not the great panacea for social ill implied by much of the folklore. He has always been, and will continue to be, most effective in cases of petty dimension. Yet political society has found him to be truly indispensable. In all enterprise, justice *felt* is often justice *achieved*. The corporation, in our time, is a "dispenser of justice" — both actual and perceived.

[15] Gellhorn, op. cit., p. 142.
[16] Kahn, op. cit., p. 387.