

# Effective Grievance Handling

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## **I. Introduction**

The stakes in grievance handling are higher than they appear to lay eyes. In the spectrum of possible grievance outcomes there lies at one end, a resolution that all sides accept as a fair and final end to the controversy. The membership sees the value in the grievance procedure and respects the way that the union representatives and management conducted themselves. The labor management relationship is thereby strengthened and enriched. Productivity improves. Union members consider their dues to be an investment that produces an exceptional return of value.

At the other end of the spectrum exists a violation of the union's duty of fair representation, universal dissatisfaction with the process, and the potential for years of expensive and time consuming litigation. This is reflected in the membership with antipathy for both the union officers and management. Productivity falls. Union members look upon their dues as a waste of their money.

Where along this spectrum your grievance will fall depends on a number of variables. Some of these are in your control; others are not. Recognizing the difference, and developing the knowledge, experience and resources to overcome challenges and maximize strengths will help you achieve an outcome that is close to the positive end of the spectrum.

## **II. Understand The Legal Framework Of The Labor Management Relationship.**

Grievance handling, like any other contact sport, is most effective when the representatives have a journeyman's understanding of the governing legal framework. Just as an NFL wide receiver is more effective if he understands the virtue of touching two feet in bounds after each reception, a management or union representative will be more successful if he understands the rules of this game.

The first step towards an understanding of the legal framework is the statute that requires management to negotiate with the union. Most employers in private enterprise, for example, are governed by the National Labor Relations Act ("NLRA"). Airlines and railroads, however, fall under the Railway Labor Act ("RLA"). This difference is important because of the nature of these two laws.

The NLRA was enacted in 1935. It created, among other things, the duty in bargain in good faith, and the creation of sanctions for a variety of employer and (compliments of the Taft Hartley Act) union labor law violations ("Unfair Labor Practices"). The government agency it created ("the NLRB") is primarily involved in overseeing two functions: representational elections and the resolution of Unfair Labor Practices. It is unconcerned with the results of the bargaining process, and neither forces mediation nor proffers arbitration.

The RLA, made law in 1926, is the oldest labor relations statute in existence. The agency created by the RLA, the National Mediation Board ("NMB"), is on some respects

a reverse image of the NLRB. The NMB, for example, allocates the lion's share of its resources to mediation. It lacks authority to resolve Unfair Labor Practice allegations.

Public employees in Georgia are not covered either by the NLRA or the RLA. Their bargaining relationship with their governmental employers may be covered by an Act of the legislature (as with MARTA), or some other statute or court precedent. Whatever it is, the respective representatives need to be familiar with how it works and how it affects the grievance procedure.

The second significant element of the legal framework is the "law of the shop." This is the law that the parties have created for themselves. It includes the collective bargaining agreement, every letter of agreement and memorandum of understanding, certain past practices between the parties, the work rules and personnel policies of the employer, the arbitration history and precedents between the parties and the resolution of previous grievances. It may also include or be influenced by company specific intangibles, such as the history and tradition of the employer or the industry and the nature of the franchise. An effective representative has a general understanding of these sources of law, and knows where to access specific details.

In addition to knowing the law of the shop, the effective representative is aware of general arbitration precedent. Labor arbitrators publish their decisions through a variety of outlets. A number of comprehensive reviews of the general consensus of arbitrators are published periodically. Management tends to consult Owen Fairweather's book, *Practice and Procedure in Labor Arbitration*. Labor gravitates to Frank and Edna Elkouri's *How Arbitration Works*. Both are published by BNA and both are available on amazon.com. There are also a variety of publications that deal with more narrow topics

within the field. (See, e.g., Tia Schneider Denenberg, *Alcohol and Drugs in the Workplace*, BNA (1983); Norman Brand, *Discipline and Discharge in Arbitration*, BNA (1998).

An additional set of laws to consider are the federal and state employment laws. At the federal level these laws include Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Family and Medical Leave Act, the Sarbanes-Oxley Act. Some states (other than Georgia) provide additional protections in the form of state Equal Employment Opportunity laws and statutes that prohibit discipline for off duty misconduct (New York, North Dakota and Colorado) or for the expression of political ideas (California). The Georgia Open Records Act and the Freedom of Information Act are essential to the handling of public sector grievances.

Given the minefield described above, representatives are well advised to consult with their labor lawyers whenever they suspect that the substantive or procedural challenges are beyond their ken.

### **III Grievance Triage**

The categorization of a grievance as Contractual, Disciplinary or Benefit Related is important for two reasons: First, at arbitration the burdens of proof and persuasion are vastly different in each category. A union alleging a contract violation, for example, must bear the burden of establishing, by a preponderance of the evidence, the existence of the contract violation and the damage that flowed from it. In Benefit cases, the challenge

is typically restricted not to the establishment of the grievant's entitlement, but to whether the Company's administrative review process was arbitrary or capricious. Management almost always bears the burden of proof of the existence of "just cause" in discipline cases.

The second important reason to triage grievances is because the applicable legal analysis in each category is very different. Contractual grievances are generally resolved by references to the rules of contract construction. These rules include (but are not limited to) the following concepts:

- Ambiguities should be construed against the drafter of the language.
- Ambiguities may be resolved by reference to past practice.
- Past practice will not override contractual language that is clear.
- The expression of one exception eliminates the possibility of others.
- Words have the same meaning throughout the contract.
- A clause that expressly deals with the subject will govern over more general conflicting language.
- Contracts should be given a "reasonable" interpretation in view of the intent of parties.

The "just cause" analysis in a disciplinary setting involves a vastly different set of considerations. Assuming that management can establish that the grievant actually committed the misconduct, there are seven classic defenses that are available to the union representative. These are (in order of effectiveness):

1. The punishment does not fit the crime because the discipline is too severe.  
In practice, this defense is most effective when employed for senior

employees. Although there is no “seniority exception” to the just cause standard, the parties should not be surprised when an arbitrator appears to cut a little slack for employees with greater tenure.

2. The discipline of this grievant is disproportionately severe in comparison to the discipline, or lack of discipline, meted out to other employees who have committed similar acts. The key to this defense is to prove that management knew or should have known about the other similar acts.
3. The work rule that management seeks to invoke is unpublished, unreasonable or illegal. An employee can escape discharge in arbitration if he can establish that he was unaware of the rule and that he had no reason to be aware of the rule.
4. The conduct for which the grievant has been disciplined occurred off premises, off duty and generated no negative publicity for the employer. The lack of negative publicity can be a case turning distinction.
5. The discipline violates a past practice, contractual provision, rule book, statute, ordinance or personnel policy manual.
6. The grievant has not been afforded procedural due process. Where the grievant has not been given an opportunity to tell his side of the story before the decision to discipline was made, he may be reinstated under the notion of procedural due process. Unless there is contractual language mandating an interview of the employee, however, this defense is not likely to be successful if applied in the absence of any other defense. It can, however, help sway an arbitrator when other defenses are available.

7. The discipline is inconsistent with the concept of progressive discipline.

This is also referred to as “corrective discipline.” It is the notion that the purpose of discipline in an employment setting is to rehabilitate and not to punish. In practice, this defense is of limited utility in the absence of other defenses.

## **IV Grievance Preparation**

Armed with a general understanding of the legal framework and the law of the shop, and having correctly categorized the dispute as contractual or disciplinary, the union representative has three primary responsibilities when he learns of the possibility of a grievance: First and foremost, he must ensure compliance the time limits of the grievance. Second, he must conduct a thorough factual investigation. Third, he must develop a theory of the case.

Every grievance that is lost because of time limits is a forfeiture of the rights that were hard-won on the battlefield of collective bargaining. The effective union representative avoids this needless tragedy by developing a redundant safeguard system. This system should have two elements: First, the union representative must have an in depth understanding of the grievance section of the contract, and the time limits therein. Second, the union’s administrative personnel must be trained in the grievance time limits and provided with form letters and other documents that will be sent out automatically, by certified mail, as a default position.



The breadth of the factual investigation in any case will vary considerably depending on the nature of the grievance. At a very minimum, the effective union representative will collect a thorough statement from the grievant, and copies of the relevant documents (e.g., the grievant's personnel file) from management. The union representative should also collect statements from other witnesses and other relevant documents.<sup>1</sup> Finally, the factual investigation should include informal discussions with management to discern their perspective on the matter.

Management should not be surprised when the union displays the temerity to grieve a management decision or mount a defense to employee discipline. Anticipation of, and inoculation against these defenses is an integral part of a well prepared management case. An employer would do well, for example, by being prepared to satisfactorily explain or distinguish the cases that the union has put forth in support of a disparate treatment defense.

Developing a theory of the case early on helps to provide focus to the efforts of the effective union representative. It should be capable of being stated on a postcard. For example, the theory could be stated as follows:

The Company violated Section 3.B.6. of the contract when furloughed the grievant out of inverse seniority order. The union seeks reinstatement of the grievant with full back pay and seniority.

or

The Company violated the binding past practice of the parties when it failed to schedule vacations in January 2006. The union seeks recognition of the binding past practice and compensation for affected employees.

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<sup>1</sup> The documents you collect at the initial stage of a grievance may one day be marked and put into evidence in arbitration. It is advised, therefore, that the representative avoid sharing his commentary in margins, or otherwise writing on the document.

or

The Company violated Section 21.2 of the contract when it terminated the grievant without just cause. The union seeks reinstatement of the grievant with full back pay and seniority.

## **V First Step or Informal Level of the Grievance**

### **Procedure**

Almost every grievance procedure provides for an informal or first step grievance meeting. These are generally one on one meetings between the union representative and his management counterpart, and may or may not include the grievant. The representatives should approach this meeting with the mindset that a resolution is possible. He should be prepared to give a detailed factual overview of the union or management position and an argument as to why the grievance should be granted or denied. He should consciously keep his mind open for the possibility of settlement.

The argument at the initial level need not be confined to precise contract language or even the contract itself. Non contractual arguments (e.g., “We’re only asking the Company to do the right thing”) are appropriate and sometimes effective at this level.

The ability to listen effectively is crucial at this stage. Never interrupt your counterpart when he is talking. Instead, take notes; ask him to give examples and explanations. Restate what he said in your own words in order to demonstrate to him that you have been listening. Search for common ground. If you think that the opportunity

for settlement exists, test your hunch by asking your counterpart how he thinks the case ought to be resolved.

On many occasions, the management representative at the informal stage will simply lack the discretion to agree to the type of settlement the union representative had in mind, and the meeting will end without a resolution of the case. The meeting might also be continued, while one side or the other expands their factual investigation as a result of things learned at the meeting, or addresses their chain of command in search of settlement authority.

If a settlement is reached, be prepared to record it in a written document, if only in bullet point form, that is initialed by both sides before leaving the meeting. If a settlement is not reached, the representative should create a memorandum for the file, which relates the substance of the informal stage of the grievance procedure.

## **VI Formal Level of the Grievance Procedure**

Most contracts contain a second or formal level to the grievance procedure. This general involves labor relations representatives as opposed to operational managers, and full time union officers or staff members. The representatives often time have the benefit (and/or disability) of distance that may provide more objectivity. The grievance will have been reduced to writing at this stage. The contractual basis of the grievance is specifically set out in that writing, as is the request for a remedy. If the grievance is not resolved at this level, most contracts will require that management similarly create a formal written response to the grievance.

## **VII Mediation**

Mediation is a process in which both sides invite a neutral third party to assist them in reaching a settlement. Some contracts require mediation. With others, it is typically permissible, with the consent of both parties.

The Mediator will typically first meet with both sides together, and afterwards with each side individually. He may urge one side or the other to move to a more reasonable position, or submit a “mediator’s proposal” for the parties consideration. The important thing to remember is that mediation is not binding on the parties. The mediator can’t force one side or the other to reach an agreement. Some mediators, however, are particularly skilled in achieving settlements that the parties were incapable of reaching on their own.

## **VIII Arbitration**

### **A. *Arbitrator Selection.***

Arbitrators come from a wide range of background, experience and temperament. Their perceptions of management, the union and the grievant will be colored by their prejudices and predilections. Effective case preparation, therefore, requires research into the arbitrator’s background.

Some arbitrators have little or no regard for rules of evidence, for example, while others approach the process in an overly legalistic manner. Some arbitrators issue quick decisions; others drag on for months, sometimes years, before reaching a resolution. Some arbitrators spend considerable energy trying to fashion a settlement at every

hearing. Others simply assume that settlement is futile and the case is ripe for hearing. Some arbitrators have an expansive view of the just cause standard and seem to err on the side of overturning discipline. Others are loath to substitute their judgment of what is acceptable discipline for the judgment of the managers on the scene. Some arbitrators have extensive questions for witnesses. Others barely speak. Some arbitrators have special knowledge of different agencies or industries. For others, your case may just be their first impression in your field.

Consider your arbitrator's record before she considers the record in your case. Get an understanding of how she conducts a hearing. How your arbitrator comes down in all these areas may have a substantial impact on the outcome of your case. Failing to understand the proclivities of the forum you're appearing before, therefore, is a blind bet that you may regret.

There are many sources of information regarding arbitrator backgrounds. BNA's *Labor Arbitration Reports*, for example, contains arbitrator biographies. cursory information is also available through AAA and FMCS. The best source of information, however, comes from word of mouth. Contact people who may know about an arbitrator and ask for their recommendation. You can do this internally within your own institution, or reach out to professional networking groups. Organizations like the Labor and Employment Relations Association (LERA) are good places to locate first hand accounts of individual arbitrators.

## ***B. Case Preparation***

The arbitrator will usually arrive at the hearing without the benefit of your perspective on the necessity to terminate the employee or, conversely, on the injustice that the employer has perpetrated on the employee. To the extent that you fail to give the arbitrator a comprehensive view of your perspective, the odds increase that the arbitrator's award will vary from your concept of justice. Most people tend to come to the same decision when confronted with the same set of facts. Plan to paint a picture that gives the arbitrator an opportunity to share the facts that you understand.

Good arbitrators know that one size does not fit all. Each Company has a collective personality that is distinct from others. In some places disciplinary entries are written like parking tickets, and the arbitration process has evolved to the point of an elaborate procedure. Other employers may be relatively new to the whole concept of alternative dispute resolution. There may be something peculiar about the teachers in your county, or the procedures followed by your employees. Be aware of what makes your institution unique, and help the arbitrator understand that distinction.

Give some advance thought to the structure of your opening and closing statements. Think of the elements of just cause, for example, and build a simple yet effective presentation. When this is done well, you can sometimes see the scales peel away from an arbitrator's eyes.

Ideally, exhibits should be copied, marked and exchanged between the parties before the hearing begins. In many places, there are agreements and protocols that allow for a pre-hearing exchange of exhibits. This procedure has the benefits of: (1) saving time at the hearing; and (2) limiting the opportunity for unfair surprise. More importantly, it

tends to focus the parties on the merits of their cases, and, by extension, of the potential for settlement, before they scale the courthouse steps.

Witness preparation also requires your pre-hearing attention. Witnesses often benefit from a structured approach that enables them to tell the truth efficiently and effectively. They should be prepared to not only tell their story in logical way, but also to anticipate and withstand cross examination. Their testimony should be simple, direct, and to the point. Witnesses who give confusing accounts unwittingly harm their own credibility.

It is, of course, time consuming to prepare and revise your witness's direct testimony. Rest assured that the effort will pay off in a superior presentation.

Finally, regardless of whether you are new to the process or an old hand, you should periodically take the opportunity to watch how other people conduct hearings. Should the situation present itself, attend a hearing that has nothing to do with your case. As Yogi Berra once said, "You can observe a lot just by watching."

### ***C. Arbitration Presentations by Non-Lawyers***

Non-lawyers present and defend grievances before arbitrators with increasing regularity. This can be hazardous because we are rarely at our best when we attempt to be what we are not.

Arbitrators tend not to expect non-lawyers to operate with the same procedural precision as members of the bar. That being said, it is important to remember a couple of basic "quasi-legal" points.

First, build a foundation for everything you put into evidence. If you're putting a photograph into evidence, for example, begin by having your witness tell how, why and

when it was taken, and then ask him if it accurately represents whatever it is supposed to accurately represent. If you have an occurrence witness to present testimony on what he saw, ask him how far away he was from the action, how bright the lighting was, who else was present, and similar questions before asking him to tell the arbitrator what happened.

Building a foundation takes only a minute or two at the hearing. It is nonetheless invaluable, because it sets the arbitrator up to receive the information you are about to give him, in an inquisitive state of mind.

Second, reserve your evidentiary objections to evidence that actually hurts your theory of the case. Arbitrators are not impressed by a management or union representative who rises to object every couple of minutes. When we object just because we can, we unwittingly dilute the effectiveness of a subsequent objection that we need.

Third, verify that you have followed to the letter each and every procedural rule that is binding on you. The arbitrator will usually care about the process. Have the appropriate section of governing documents, whether it's a labor agreement, rule book, personnel policy manual, statute or local ordinance, flagged and ready for explanation. Better yet, make a copy of the provisions regarding process a joint exhibit.

Fourth, refrain from asking any question that you don't already know the answer to. Case-breaking revelations at trial are the stuff of fiction, not real life. Management and union representatives who nonetheless venture into these waters often return with a profound appreciation for this principle.

Fifth, when an arbitrator makes an evidentiary or procedural ruling overruling your contention, it's best not to pout. Proceed as if you had expected that ruling and move on. Attempts to make an arbitrator change his mind achieve no return and violate



Fitzpatrick's First Rule of Holes: "Once you discover that you are in a hole, stop digging!"

***D. Hearing Demeanor***

"Since when do you have to agree with people to defend them from injustice?"

Lillian Hellman

Termination cases often bear the hallmarks of a messy divorce. A breach of trust may have been alleged. Someone's livelihood is at stake. It is not unusual for both the terminated employee and the official who made the decision to terminate to feel tense, bitter and antagonistic. These emotions can easily spill into the hearing. Worse yet, they can be reflected by the behavior of the representatives whose presentations take on the appearance of a scorched-earth campaign.

Rude gestures and comments at a hearing are not only bad form; they often prove harmful to your case. They can shift the arbitrator's focus away from the important issues, or cause her to suspect that there's a big part of the story that's not being told. When this happens, the parties risk the issuance of an unsatisfactory award and the expansion of workplace disruption.

"Tact," said Isaac Newton, "is the knack of making a point without making an enemy." Treat the other side with respect in the hearing room. Be conscious of your body language when they are presenting their case. Don your best poker face (but leave the sunglasses at home), and listen as intently as possible. Write down their misstatements of fact as they occur so that you can correct them when you have the floor. Try to pick up on what the arbitrator appears focused on so that you can stress those points in your closing statement.

*E. The Decision and Beyond*

Your best chance for a satisfactory decision lies in your thorough preparation and your professional presentation. The best game plans, however, sometimes fail to achieve victory. All of us have been or will be disappointed by an arbitrator's award at some point in our careers. We may be shocked at a credibility finding or jolted by a peculiar application of the just cause standard. When this happens, it is helpful to lay the document down and look at it after some time has passed.

When our emotion wears away and we look at the decision more objectively, we sometimes discover that scales are falling from our eyes. As Governor Bob Casey once said, "The view from the canvas can be illuminating."