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The Grievance – From Beginning to End
Tom Young, Esq.
Mediator/Arbitrator/Special Magistrate

Introduction

Grievances are an inevitable aspect of labor management relations. In part, this discussion is intended to lessen the likelihood of grievances being filed. Attention must be given to the negotiation of contract language, the training of staff regarding implementation of the collective bargaining agreement and, equally importantly, understanding why grievances are filed. Once a grievance is filed, the discussion will consider how to successfully resolve the grievance including the preparation for, and conduct of, a successful presentation in arbitration.

A Little History

- NLRA - Binding Arbitration

- 1968 Constitutional Amendment – Article I, Section 6
  Right to work.—*The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.*

- Personal

- PERA – 1/1/1975
  447.301 Public employees' rights; organization and representation.—
  (2) Public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment. *Public employees shall have the right to be represented in the determination of grievances on all terms and conditions of their employment.* Public employees shall have the right to refrain from exercising the right to be represented.
  (4) Nothing in this part shall be construed to prevent any public employee from presenting at any time, his or her own grievances, in person or by legal counsel, to his or her public employer and having such grievances adjusted without the intervention of the bargaining agent, if the adjustment is not inconsistent with the terms of the collective bargaining agreement

then in effect and *if the bargaining agent has been given reasonable opportunity to be present at any meeting called for the resolution of such grievances.*

447.401 Grievance procedures.—Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the *settlement of disputes* between employer an employee, or group of employees, *involving the interpretation or application of a collective bargaining agreement.* Such grievance procedure shall have as its *terminal step a final and binding disposition by an impartial neutral*, mutually selected by the parties; . . .
However, an arbiter or other neutral *shall not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement*. . . .
All public employees shall have the right to a fair and equitable grievance procedure administered without regard to membership or nonmembership in any organization, except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. . . .

447.501 Unfair labor practices.—
(1) Public employers or their agents or representatives are prohibited from:
(a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part.
. . . .
(f) *Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement* with either the certified bargaining agent for the public employee or the employee involved.

(Emphasis added)

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I. Negotiations

The ultimate resolution of any grievance depends not only on the facts of the case, but also on the language of the CBA.

- What is the single most important provision of the CBA?
- What is the definition of a grievance in the CBA - why does it matter?
  (See italicized language in Section 447.401 re: definition of a grievance.)
- Are there times when ambiguous language is appropriate/necessary?
  - If the case goes to arbitration, and the language is not clear and unambiguous, the parties' intent during negotiations and/or the existence of an established past practice may be presented at hearing.

II. Resolution of the Grievance Short of Arbitration

- Settling a grievance before arbitration is in management's best interests – *Why?*
- Understanding *why* the grievance was filed is critical to its early resolution.
- What are the important determining factors regarding a resolution of a grievance short of arbitration?
- A settlement of a previous grievance is NOT typically accepted by an arbitrator at hearing, or, if it is accepted, it is seldom given much weight by the arbitrator *(Why not?)*
- Considering the potential fiscal impact of a decision may encourage management to consider settlement. (Examples)

III. Grievance Lessons

- What can management learn from the filing of a grievance?

IV. Selection of the Arbitrator

- What do you want in an arbitrator?
- How do you find the one you want?

(Some say the case is decided when the arbitrator is selected)

V. Preparing the Case *(Do you need a lawyer?)*

If you are NOT the advocate, the following should nevertheless be considered by you and discussed with the attorney. Do not leave the preparation of the case solely in the hands of the attorney. You know the facts and the witnesses. You will be there after the case is resolved . . . the attorney will not.

A. What does the CBA provide regarding arbitration?

- What is the definition of a grievance?
- Does the CBA limit the authority of the arbitrator? If so, how? Why is this important?
- Is the nature of the remedy discussed in the CBA?
- What is the length of time given the arbitrator after the close of the hearing to render the decision?

B. What's the Issue?

Use *extreme* care in drafting the issue - the issue agreed upon by the parties (or determined by the arbitrator) will bind the arbitrator whose sole responsibility is to decide *the issue presented.*

- *e.g.,* Discipline cases: Whether the employer had just cause to discipline the employee. If so, what should the remedy be?
- e.g., Contract interpretation cases: union will pose an issue seeking the broadest possible issue and employer will seek the narrowest.

C. Is There a Question About Arbitrability?

If there is a question of whether the grievance is arbitrable - i.e., whether the arbitrator may hear the case, *decide <u>NOW</u> how and when you want this question resolved.*

- What does the CBA say concerning the question of arbitrability?
- Should there be a separate hearing on the question of arbitrability?
  What are the implications of the two options?
- if there is a separate hearing, should the same arbitrator hear both cases?

GET A STIPULATION IF THERE IS <u>NOT</u> A QUESTION OF ARBITRABILITY!

D. What are the facts of the case?

A *thorough* investigation of the facts leading up to the filing of the grievance is *critical!*

- There are at least two "sides" of the story – *get both sides*

E. Theory of the Case

The theory of the case is a short, simple rationale for why your side should prevail *(If you are not the advocate, prepare a draft of the theory of the case anyway and share it with the advocate. You should be able to state the theory of your case in 3 sentences.)*

- It will be the theme of your case throughout
- Review chronology of facts/events and relevant contract language
- Assess the strengths and weaknesses of your case *and of the other side*
- Explain why you should prevail.

F. Selecting *and Preparing* the Witnesses

- Interview all prospective witnesses to determine what they know, and determine the strengths and weaknesses of each witness. *(This is appropriate whether you are the advocate or not.)*
- Determine which piece of documentary evidence will be introduced and authenticated by the witness, and then, if you are the advocate, *practice the introduction of the evidence* with the witness.
- Prepare written questions for each witness.
- If you are the advocate, practice both direct *and cross* examination with the witnesses.
- If possible, you and/or the advocate should conduct a group conference with all witnesses and explain your theory of the case so they understand the importance of their testimony
- advise witnesses to avoid immaterial and irrelevant testimony
- advise witnesses to avoid opinions, arguments, feelings and beliefs - stick to the facts
- advise witnesses to avoid volunteering information
- encourage strong positive testimony
- discuss proper attire and demeanor
- explain the rule of sequestration
- prepare witnesses for cross examination;
  - do not show hostility
  - do not volunteer information
  - do not argue with opposing advocate *or the arbitrator*
  - ask for clarification if a question is not understood
  - think before speaking
  - attempt to explain answers if a "Yes" or "No" answer is misleading

If you are the advocate, PRACTICE!

G. Decide on location of hearing *(home field advantage?)*

H. Discovery

Is Discovery addressed in the CBA? *(If not, it should be!)*
Discovery should be addressed in the preliminary hearing. The amount and nature of discovery permitted is within the arbitrator's discretion. (If the arbitrator does not schedule a prehearing conference, you should request one to avoid "surprises" at the hearing.)

- Submit written request for documents with timeline for compliance
- If the grievant requests a document that is a public record, provide it
- Exchange witness lists (timeline)
- Exchange exhibit lists (timeline)
- Subpoenas?

J. <u>Before the hearing</u>, seek stipulations to the issue, and to evidence regarding "undisputed facts"

Stipulations should be carefully worded to avoid ambiguity.

I. Prepare Exhibits

(If you are <u>not</u> the advocate, discuss the exhibits to be presented with the attorney – it will typically be your responsibility to handle the exhibits at hearing. This will be much easier if you are the one who prepared them for the hearing.)

- Organize, number and label your exhibits, make a master list, and place them in individual file folders or a three-ring binder.
- Prepare a set of exhibits for the arbitrator, the witness, opposing counsel and court reporter.
- Before the hearing, agree to as many **Joint Exhibits** as possible. *Why?*

K. Decide whether to use Court Reporter - verbatim transcript

Why use one - advantages and disadvantages?

VI. Sequence of Events at Hearing

(If you are NOT the advocate, it is still important for you to understand the sequence of events in order to assist the advocate.

- Notice of appearances
- Stipulate that the case is properly before the arbitrator *(unless that is at issue).*
- Invoke the Rule of Sequestration?
  Why? What type of case would suggest that the Rule be invoked?
- Stipulation of issue *(if possible)*
  Why is this important?
- Introduce Joint Exhibits
- Who goes first? *Which advocate has the burden of proof*

- Opening statements *(If you are NOT the advocate, draft an opening statement anyway and share it with your attorney – the theory of the case will be important regarding the relationship of the parties after the grievance is resolved. Why?)*

The purpose of the opening statement is to provide the arbitrator with an overview of the dispute from your point of view. It is like a road map of the case. In it, the advocate should inform the arbitrator of the theory of his/her case, the evidence to be introduced, the witnesses who will testify, the facts the advocate intends to prove and the reasons why the advocate should prevail.

Do not ignore the strengths of the opposing case!

- Should the Defensive party reserve its opening statement until conclusion of opposing advocate's case in chief?

- Moving party introduces evidence and testimony through direct examination.
- Cross examination *(**only if necessary**! . . . and make it "surgical."*
If you are NOT the advocate, make a list of questions for cross during direct examination of the witness. This will assist the advocate who will also be making such a list – two heads are better than one.)
- Moving Party rests
- Defense introduces evidence and testimony through direct examination.
- Cross ***(only if necessary!)***
- Rebuttal testimony and evidence
- Cross ***(only if necessary!)***

VII. Closing Arguments/Post Hearing Briefs?

Closing argument or waive and file post hearing briefs? *(Unless the grievance is extremely simple with only one or two witness and few if any exhibits, a party should **ALWAYS** file a brief rather than offer a closing argument.)*

(This should have agreed upon by the parties before the hearing. If the Grievant refuses to agree and requests a closing argument rather than a brief, insist at hearing upon your right to file a brief in lieu of closing argument.)

Before the close of the hearing, agree upon a briefing schedule and agree that the record will be closed when the briefs have been submitted. *Why?*

VII. Briefing

A. State the issue to be decided

B. List the relevant CBA provisions

C. State the facts that are material and relevant to the resolution of the issue *(make references to the transcript if verbatim transcript is available).*
Organize facts either chronologically, by topic or by witness.

D. Present your argument *and rebut opposing party's argument.*

E. Clearly state the decision that should be reached by the arbitrator - typically the employer will simply ask that the grievance be denied in its entirety.

G. If this is a discipline case, or if there is a significant fiscal impact implicit or explicit in the grievant's proposed remedy, management should ***clearly point out the fiscal impact*** if the decision is for the grievant.

H. The union will always ask for a make whole remedy - *what does this mean?*

I. Consider asking the arbitrator to retain jurisdiction for a period of time (60 days) to resolve disputes regarding the implementation of the remedy.

(Understand how an arbitrator might approach the drafting of the decision and structure your brief accordingly.)

IX. "Short Shots"

- ***Ex Parte Communications - DON'T!***

Do not call or meet with the arbitrator without the presence of the opposing party. If you communicate by email with the arbitrator, always simultaneously cc: the opposing party

- ***Contract negotiations*** **- YOU GET WHAT YOU WROTE, NOT WHAT YOU MEANT!**
- ***Formal rules of evidence do not apply.***
- ***Objections***
  Use them sparingly.
- ***Cross examine only when necessary***
  NEVER ask questions beginning with Who, What, When, Where, How or Why! *Why not?* if you don't know the answer to the question, do not ask it! Put your words in the witness's mouth – e.g., "Isn't it true that" . . . , "Wouldn't you agree that" . . . .
- ***Hire a court reporter – get a transcript.***
- ***Arbitrators do not appreciate "trial by ambush."***
- ***Do not take "losers" to arbitration.***
  If the facts of the grievance indicate the language is the problem, address it in negotiations. (MOU?) If the facts indicate that your staff is the problem, address it through training or other forms of "behavior modification."

QUESTIONS?