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GRIEVANCES, DISCIPLINE, &
DISCHARGE

STORY TIME

CASE

The image shows two 'Weekly OT Sign Up' sheets. The top of the sheets has 'Whore Board' written in large, bold, black marker. The sheets are for the weeks of 10/7/2013 (Monday), 10/8/2013 (Tuesday), 10/9/2013 (Wednesday), 10/10/2013 (Thursday), 10/11/2013 (Friday), and 10/11/2013 (Saturday). Each sheet has a grid with columns for 'Day', 'Date', 'Time', and 'Name'. The 'Name' column contains the initials 'LW' for each day.

Weekly OT Sign Up			
10/7/2013 Monday			
Day	Date	Time	Name
			LW

Weekly OT Sign Up			
10/8/2013 Tuesday			
Day	Date	Time	Name
			LW

Weekly OT Sign Up			
10/9/2013 Wednesday			
Day	Date	Time	Name
			LW

Weekly OT Sign Up			
10/10/2013 Thursday			
Day	Date	Time	Name
			LW

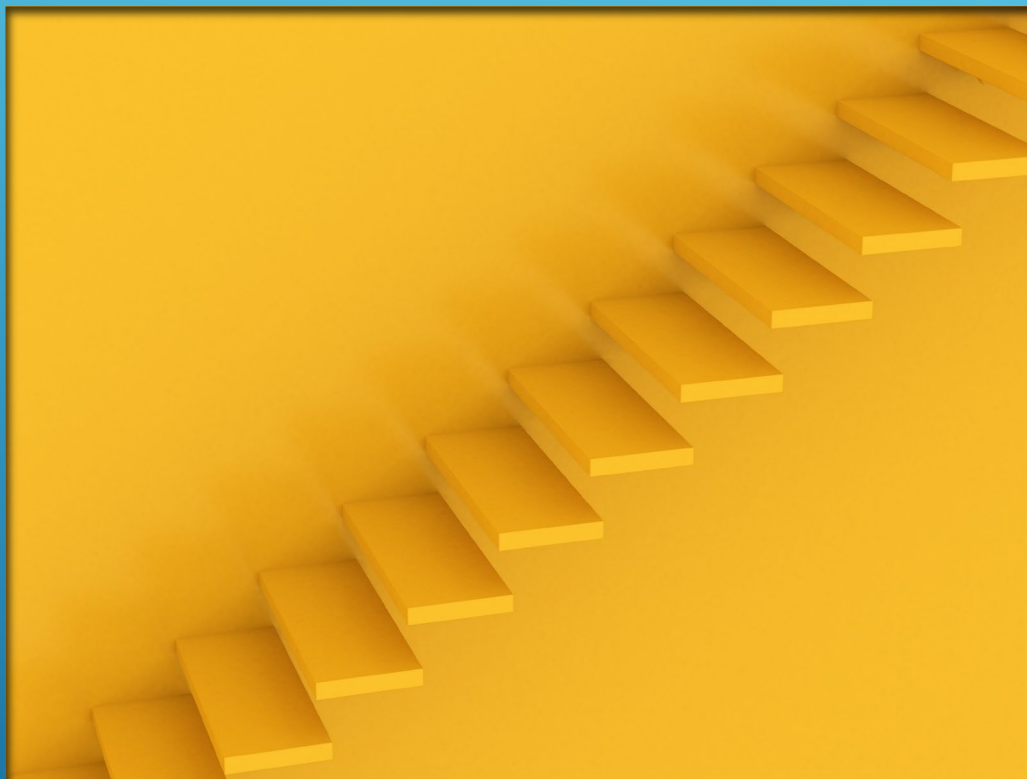
Weekly OT Sign Up			
10/11/2013 Friday			
Day	Date	Time	Name
			LW

Weekly OT Sign Up			
10/11/2013 Saturday			
Day	Date	Time	Name
			LW

- ▶ Employer implemented a new system where employees interested in working overtime were required to write their name on a signup sheet posted in a high traffic area.
- ▶ Employees had engaged in boycotts of the new system by refusing to sign up, and commonly used the term “whore board” as an act of protest of the system.
- ▶ Six months later, an employee wrote “whore board” at the top of two overtime sign-up sheets.
- ▶ The employee admitted to the act. The company suspended him, and later terminated his employment.



GOALS AND OBJECTIVES



- ▶ Review the grievance and arbitration process
- ▶ Talk through pitfalls and challenges
- ▶ Offer opportunity to ask questions

OVERVIEW

- ▶ 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 and 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

The relationship
of the grievance
procedure to
the CBA

Grievances as
an indicator of
climate

OVERVIEW

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- ▶ Definition of grievance
 - ▶ Controls scope of obligation to process
 - ▶ Can define post-CBA expiration obligation
- ▶ Steps and time frames (and consequences for missing)
- ▶ Hearing processes (i.e., selection of arbitrator, scheduling, costs, ...)
- ▶ Arbitrator authority (and possible limits)

KEY PROCEDURE ELEMENTS

1) DISCIPLINARY

2) CONTRACT
INTERPRETATION

WHAT KIND OF GRIEVANCE IS IT?



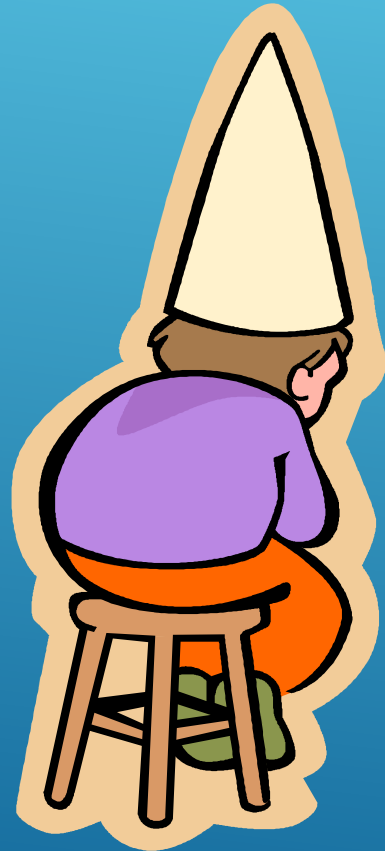
Management has burden of proof on discipline

- ▶ If no standard specified, could be anything from preponderance of the evidence to “clear and convincing”

Union has burden for contract interpretation/
breach

CONTRACT INTERPRETATION PRINCIPLES

WHAT IS DISCIPLINE?



- ▶ Webster's dictionary defines discipline as an act of correcting or punishing.
- ▶ In the employment context, it is important to think of discipline as an act of correcting or modifying behavior and not as punishment.

PRE- DISCIPLINARY ACTION

The heart of avoiding litigation
is in this phase.



Before administering corrective
action, it is important that you:

Understand the
rule allegedly
violated

Investigate the
facts surrounding
alleged violation

Don't administer
corrective action
out of anger or
"knee jerk"
reaction

PROGRESSIVE DISCIPLINE

Progressive Discipline is defined as “a system of escalated penalties made known to employees in advance and imposed with increasing severity of repeated infractions.”

The rationale behind this concept is that discipline should be corrective rather than punitive.

Progressive discipline is recommended because courts and arbitrators are more likely to uphold a discharge on appeal if the employer made every reasonable effort to “salvage” the employee.

Discipline


Do

- Communicate expectations
- Identify the policy violated
- Apply rules equally
- Consider employee's prior performance and disciplinary record

Don't

- Act impulsively
- Discipline in anger
- Discipline in an embarrassing fashion
- Impose or change rules arbitrarily
- Fail to document

GRIEVANCE PROCESSING

- ▶ Multi-step processing is typical
 - ▶ Common attributes
 - ▶ Initial step may be considered verbal or informal
 - ▶ Usually have time frames
 - ▶ Low level settlements non-precedent setting
 - ▶ Lack of management response permits next step
 - ▶ When in a CBA, the end game is almost always arbitration
- 

Grievance processing involves both fact gathering AND formulating an institutional response

If you do one without the other, you decrease the odds of success

ACTUAL
PROCESSING

Decorative white lines consisting of several parallel lines of varying lengths and orientations, extending from the bottom right towards the center of the slide.



- ▶ Rule of thumb: Employers should only take disciplinary action for “just cause”.
- ▶ Generally, just cause is defined as some substantial shortcoming that renders the employee’s continuance in employment unacceptable.
- ▶ In other words, discipline is appropriate when the employee has deviated from acceptable levels of performance or behavior through: (1) violations of policies and procedures; (2) engaging in disruptive conduct; or (3) engaging in off duty conduct that negatively affects work performance.

“JUST CAUSE”

JUST CAUSE

- ▶ 7 steps" are
 1. Was the employee pre-warned of the consequences of the conduct?
 2. Was the employer's rule reasonable?
 3. Did management fully investigate the issue before taking disciplinary action?
 4. Was the investigation conducted in a fair and impartial manner?
 5. Was there supportive evidence of guilt?
 6. Were the rules and penalties applied in an evenhanded and consistent fashion?
 7. Was the penalty reasonable, given the offense?

- ▶ One factor to consider is whether the employee who has been disciplined was aware that the conduct he or she was engaging in was unacceptable or in violation of work rules or policies.
- ▶ Generally, problems arise when an employer is unable to show either:
 - ▶ The conduct was in violation of written or unwritten policies or rules; or
 - ▶ The conduct was such that a reasonable person would have known the conduct was inappropriate.

NOTICE

JUST CAUSE

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CONDUCTING THE INVESTIGATION



Identify Goals of the Investigation

Neutrality
Fairness
Thoroughness



Planning the Investigation



Investigative Interviews

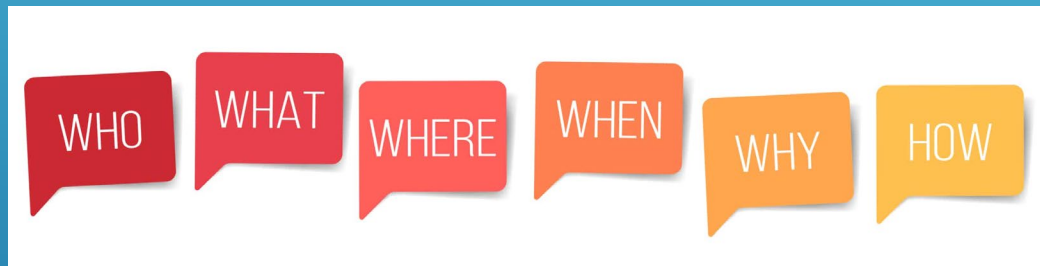


Preparing the Report



Reaching a Conclusion & Communicating Outcome

PLANNING THE INVESTIGATION



- ▶ **What** is being investigated?
- ▶ **When** should the investigation commence?
- ▶ **Who** is going to investigate?
 - ▶ HR? In-house counsel? Outside counsel? A combination?
- ▶ **How** is it being investigated and documented?
- ▶ **Where** will the investigation take place?

INTERVIEWS: COMPLAINANT

- ▶ Your first interview should be of the complainant.
- ▶ Explain the process. Make no promises of confidentiality.
- ▶ Assurance of no retaliation.
- ▶ Take detailed notes – formulate a timeline if possible.
- ▶ Consider having two people present for the interview.
- ▶ Consider what documents you will need to collect.
- ▶ Determine who else would have relevant information of the circumstances/incident, i.e., witnesses.

INTERVIEWS: WITNESSES

- ▶ Interview each separately and try not to share information that others have shared.
- ▶ Do not share investigative impressions with others.
- ▶ Explain the process. Make no promises of confidentiality.
- ▶ Assurance of no retaliation.
- ▶ Take detailed notes – formulate a timeline if possible.
- ▶ Consider having two people present for the interview.
- ▶ Consider what documents you will need to collect.
- ▶ Consider circling back to a previously interviewed witness if you learn new or conflicting information.

INTERVIEWS: ACCUSED

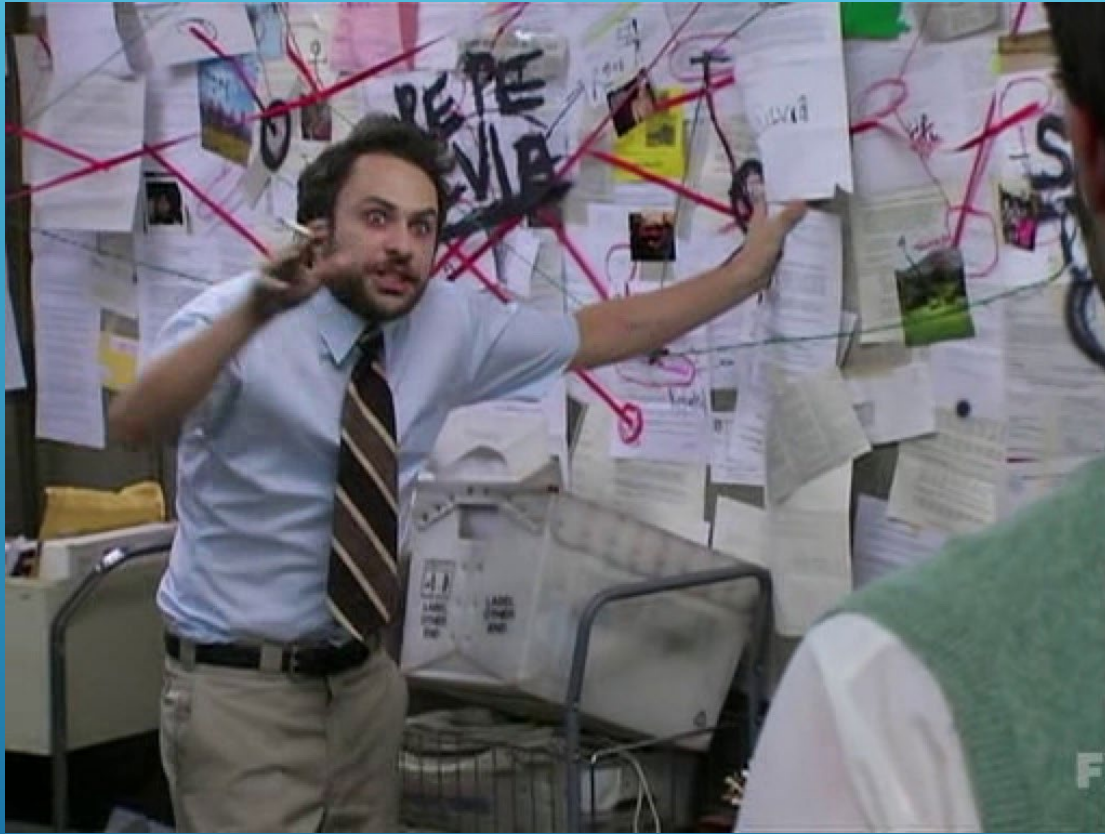
- ▶ Typically, the accused is interviewed last.
- ▶ Tell the accused what the complainant has said and why they are being investigated. Include specifics like:
 - ▶ Did the conduct occur?
 - ▶ If no, why would the complainant have said so?
 - ▶ If yes, did you know the conduct was wrong/inappropriate?
- ▶ Gather names of any witnesses who can support the explanation given by the accused.
- ▶ Discussed accused's familiarity with School Board policies.
- ▶ Warn against retaliation against the complainant or witnesses!

CREDIBILITY DETERMINATIONS

- Factors to consider:
 - Demeanor
 - Are they taking this seriously?
 - Are they making eye contact?
 - Are they refusing to engage?
 - Are they emotional and reactionary?
 - Are there corroborating documents or corroborating witness testimony?



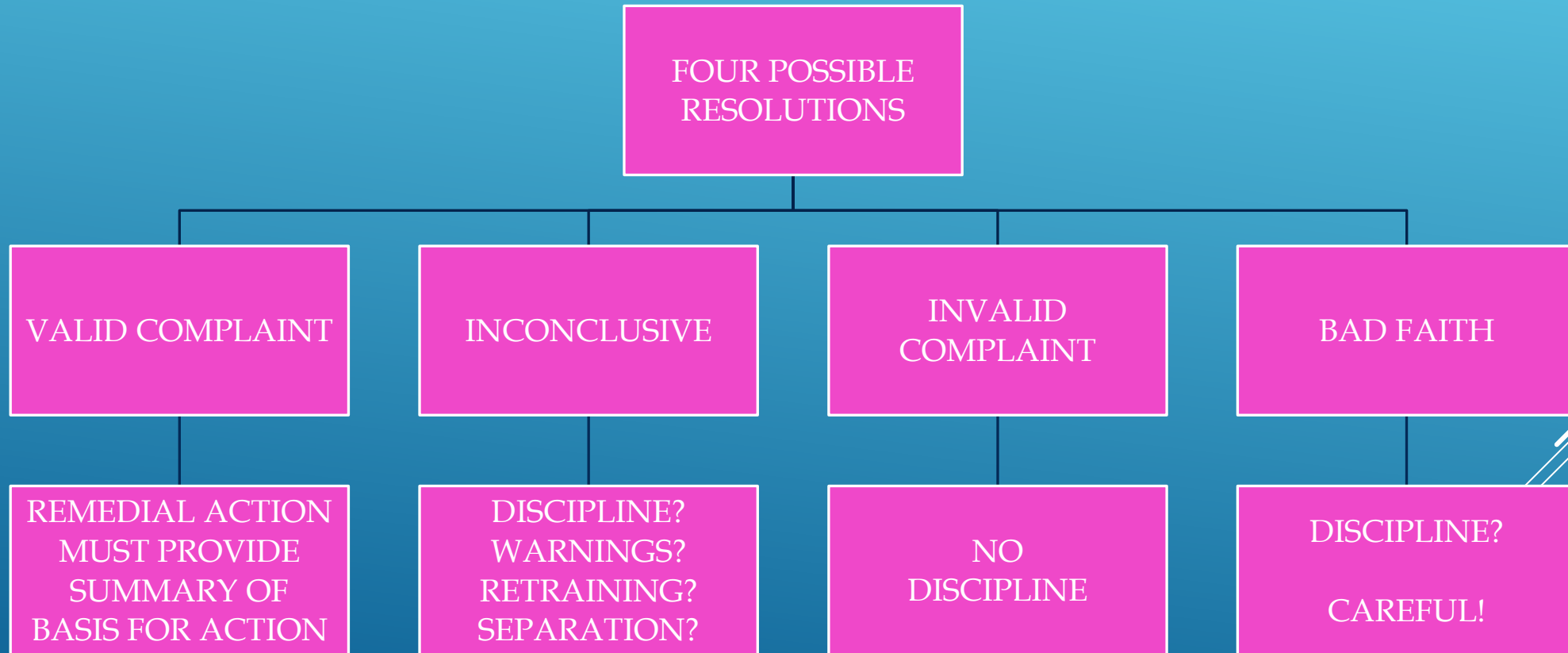
PREPARING THE REPORT



Once you're satisfied that you've gathered all the facts and evidence, it's time to put together the report.

- How detailed should it be?
 - Credibility determinations
 - Finding of whether the misconduct occurred
 - Finding of violation of laws/policies/rules/regulations
- Who are you providing the report to – Internal? Counsel?
 - Should you consider a hybrid report – part written/part oral?
 - Are there safety or privacy concerns?
 - What is the overall tone of the report?

REACHING A CONCLUSION



A photograph of a business meeting in progress. Several people in professional attire are gathered around a table. One person is holding a tablet, another is holding a smartphone, and a coffee cup is visible. The scene is brightly lit, suggesting an office environment.

COMMUNICATING THE OUTCOME

- At the conclusion, you should communicate the outcome to the complainant, the accused, and necessary supervisors.
- Each communication will be different to each of these people.
- This communication does not have to be and should not be detailed.
- Continued monitoring of the situation may be necessary.



DISCIPLINARY ACTION: WRITTEN COUNSELING

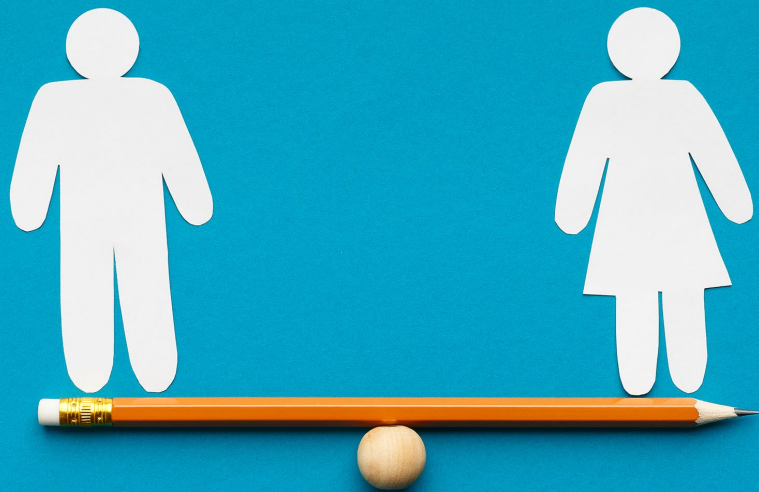
- Use specific and consistent verbiage in the counseling document, with reference to specific School Board policies violated.
- Present documentation face-to-face if possible
- Consider a script for the meeting based on clear and consistently applied policies and expectations.
- Consider the presence of a witness.
- Allow the employee the space to respond.

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DISPARATE TREATMENT

Theory often raised by disciplined employees who claim they were treated differently by their employer compared to other employees who committed similar offenses.





DISPARATE TREATMENT

- ▶ Disparate treatment claims should not prevent employers from varying penalties when circumstances warrant it. Rather, where reasonable factors exist for treating a similar offense differently, the employer should consider:
 1. Prior Warnings
 2. Knowledge of Work Rules
 3. Prior Disciplinary or Performance Record
 4. Length of Time in Employment
 5. A Significant Policy Change
- 

- ▶ To be effective, documentation supporting disciplinary action should indicate:
 1. That the employee has failed to perform his or her job; and
 2. That the supervisor was supportive in trying to help the employee succeed.

- ▶ The employer's role in accomplishing this involves gathering facts, setting objectives, formulating solutions, and taking action.

TIPS FOR DOCUMENTING EMPLOYEE DISCIPLINE



DOCUMENTATION IS KEY!


- ▶ Time is not your friend
- ▶ Permanency
- ▶ Oral communication is inefficient and inaccurate
- ▶ Memorialize verbal discussions
- ▶ Reminder/Record of discussions
- ▶ Documents speak louder than words



- ▶ What is the grievance about
- ▶ What facts support the claimed violation
- ▶ What specific section(s) of the contract were violated
- ▶ If no specific section can be named, what is the basis for the grievance (i.e., past practice or some other theory)
- ▶ If disparate treatment alleged, who are the comparators

WHAT MANAGEMENT NEEDS TO KNOW

PRESERVING COMMON DEFENSES

- ▶ Not arbitrable (specific exclusion)
 - ▶ Not arbitrable (managerial right)
 - ▶ Timeliness
 - ▶ Process not properly followed
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

OTHER ISSUES

- ▶ Bifurcation options when jurisdiction or timeliness at issue
- ▶ Obligation to process generally (*Pensacola Junior College Faculty Ass'n v. Pensacola Junior College Bd. of Trustees*, 50 So.3d 700 (Fla. 1st DCA 2010))




- ▶ If CBA language clear, arguably intent, bargaining history, and past practice irrelevant

CONTRACT INTERPRETATION PRINCIPLES




CONTRACT INTERPRETATION PRINCIPLES

- ▶ Outcome should not negate any language or result in ludicrous outcome
 - ▶ Mutual mistakes may result in reformation, but unilateral mistakes usually do not
 - ▶ Failure to present evidence under a party's control can result in adverse inference
- 

IN CLOSING...A CHECKLIST

1. What type of case is this (discipline v. contract interpretation);
2. What specific CBA language is at issue;
3. Does the CBA specifically address the issue clearly and unequivocally;
4. If either the CBA is silent, or ambiguous, regarding the issue at hand, does a clearly defined past practice exist;

CHECKLIST (CONT.)

5. Does a bargaining history regarding the CBA language (or lack thereof) exist which might support your position; and
 6. Are there other circumstances (for example, timeliness, error or mistake, disparate treatment, mitigation, or other factors) which might need to be addressed.
- 



Questions?



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