

# GRIEVANCE AND ARBITRATION SEMINAR



NFOP Labor Services

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## WELCOME

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## DISCLAIMER

Nothing contained in this Seminar is intended to be legal advice. This Seminar is a suggested guide on how to generally prepare grievances and represent members in the grievance and arbitration processes. Before undertaking any representation, a thorough review of all applicable laws, regulations, policies, contract provisions, and any other relevant authorities should be conducted, including consulting with experts and professionals in the jurisdiction for advice and counsel.



## What is a Grievance?

- Whatever the parties to a collective bargaining agreement define it to be.
  - Very Broad-*Any* disagreement between employer and the union or an employee
  - Very Narrow- The CBA limits its use and excludes certain actions by the employer from the grievance procedure (e.g. termination of a probationary employee; promotions)
- Ultimately, a grievance is a complaint.



## Two Types of Grievances

- There are two types of grievances
  - Contract interpretation grievances
    - The parties cannot agree on the interpretation of the language of the CBA
    - The union has the burden of proof
  - Disciplinary grievances
    - An employee has been disciplined and the parties cannot agree on whether the discipline is justified
    - The employer has the burden of proof



## The Collective Bargaining Relationship

- Collective bargaining is a source of power that gives employees some leverage and equality in the employer-employee relationship
- The relationship must be maintained and, where possible, improved
- Credibility is crucial to the integrity of that relationship



## The Collective Bargaining Relationship

- Grievances can be an effective tool to help improve the relationship between management and labor
  - Identify and set boundaries
  - Identify and correct weaknesses in the CBA
- Grievances can destroy the relationship
  - Unwarranted bad faith grievances
  - Unreasonable conduct



## Avoiding Grievances

- The Duty of Fair Representation
  - A union must represent all members
    - without hostility or discrimination
    - honestly
    - in good faith and not arbitrarily
  - All grievances must be fully investigated
    - to determine the merits
    - in accordance with the CBA
    - to determine the likelihood of successful adjustment
- If a grievance has no merit, it should not be pursued



## The Collective Bargaining Agreement

- All roads lead back to the CBA
- Grievances and how they are processed are governed by the CBA and can affect the successor CBA
- Grievances can lead to new or improved contract provisions
  - Ambiguity in CBA language
  - Missing/limited provisions
  - Cumbersome processes



## Writing the Grievance

- When writing the grievance you must:
  - Determine who the grievant is
  - Whether a loss has been suffered
  - Identify the Article of the CBA at issue
- You must interview the grievant
- Beware of privilege issues!



## Writing the Grievance

- Forms and checklists
  - Identify the grievant
  - List the CBA Articles violated (get them all)
  - Identify the loss (suspension/demotion/termination)
  - Identify the remedy
- Too much is better than too little
- If it is not in the CBA, it cannot be grieved
- If it is not in the grievance, it cannot be arbitrated



## Grievance Format

Name of Employee      Roger Mayberry  
Classification          Patrolman  
Immediate Supervisor   Sgt. Weisman  
Date                      August 22, 2008

### STATEMENT OF GRIEVANCE:

List Applicable Violation: Article 1 and Article 2 – The City terminated Officer Mayberry without just cause. The City did not follow the termination article in the CBA.

Adjustment Required: To have Officer Mayberry reinstated with full back pay and benefits as if he were never terminated. To have the City remove any and all references to this matter from his file. To mandate that the City follow the termination article of the CBA in all future cases. **TO OTHERWISE MAKE OFFICER MAYBERRY WHOLE, and such other and further relief necessary.**

Date: 8-22-08      Signature of Employee \_\_\_\_\_



## Presenting the Grievance

- Follow the CBA requirements to the letter!
- Deadlines and time limits/ASAP
  - Cannot be filed after deadline
  - Cannot be advanced after time limit
  - Calendar days vs. working days
- Grievances can be withdrawn in whole or in part unilaterally by the union
- Cannot be amended w/o mutual consent
- Be consistent at each step



## Settling the Grievance

- Can you be flexible?
- Grievances can be settled in whole or in part at any step
- Grievant must be consulted
- Grievant does not have to like it
- When you should settle
- What does the Duty of Fair representation require?



## Arbitration

- The last step in the process
- All else has failed
- When does arbitration begin?



## Just Cause: The 7 Tests

1. Reasonable rules and orders;
2. Notice;
3. Investigation;
4. Fairness of the investigation;
5. Proof;
6. Equal treatment; and,
7. Fairness of the penalty.

DUE PROCESS





## 1. Reasonable Rules & Orders

- Is there a specific policy that the officer is accused of violating?
- Can the agency consistently explain its own rules and policies?
- Are the policies consistent?
- Has there been training?
  - What type of training?
  - Was conduct consistent with training (Rodney King)?
  - Was training consistent with policy?
  - Was the training done properly?
  - Was the grievant proficient in the trained subject?



## 2. Notice

- Have the officers been issued policies and procedures?
- Is the specific policy at issue in writing?
- Is the policy clear and unambiguous?
- Has the policy been recently changed?
- Do the policies specify penalties for categories of violations?



### 3. Investigation

- Was there an investigation?
- Were the statements & other evidence preserved?



### 4. Fairness of the Investigation

- Did the investigator explore ALL the facts or the just the incriminating facts?
- Were all potential witnesses questioned?



## 5. Proof

- Did the investigation reveal evidence of the alleged violation?
- Was there evidence of mitigation?
- Was there evidence of justification?



## 6. Equal Treatment

- If guilty, were other officers punished in the same way as other officers also guilty of the same offense or an offense of the same degree?
- Did the other guilty officers have similar employment histories? Are they truly similar/equal?
- Has there been a disciplinary policy change?



## 7. Fairness of the Penalty

- Does the punishment fit the offense?
- Has mitigation or justification been taken into consideration?
- Has employee history been taken into consideration?
- Evaluations consistent?
- Was the agency harmed or disrupted?
- Was the discipline "progressive"?
  - Blind progression (any offense will do)
  - Progression of similar offenses/penalties
  - Were corrective measures taken
- Was there some other bias?



## Discovery

- There is no mandatory discovery unless the CBA requires it
- Public records requests/enforcement
  - All grievant's personnel files wherever kept ("private files")
  - Witnesses' files
  - Similar case files
  - Duty logs, dispatch tapes, transcripts, previous arbitration awards—there is no limit
  - Subpoenas duces tecum



## Finding an Arbitrator

- Does the CBA require a method
  - FMCS
  - AAA
  - Permanent panels
  - Labor Board/PERC/PERB
- Selection by mutual agreement
- Alternate striking



## Research the Arbitrators

- Subscription services
- Westlaw
- BNA
- LRIS—Labor Relations Information System  
[www.lris.com](http://www.lris.com)
- LRP—Public Employment on the Web  
[www.lrp.com](http://www.lrp.com)
  - Graphical data on awards
- Non-subscription services
  - Google
  - Yahoo
  - Labor Forum [www.fop.net](http://www.fop.net)



## Selecting the Arbitrator

- Review résumés (previous positions and associations)
- Read prior decisions
  - Is there a decisional trend?
  - Have there been any reversals?
- What do your colleagues know?
- What is the arbitrator's fee?
  - What about costs?
  - Who pays?
- Write the arbitrator regarding the selection



## Preparing the Case

- Preparation, preparation, preparation
- Research
  - Review your requested records
  - Talk to everyone and find documentation to support what you are being told
- Develop a theory of the case (be consistent but flexible)
- Prepare witnesses for direct *and* cross examination
- Don't be afraid to approach other party's witnesses but ASK, don't TELL
- Meet with opposing party to determine stipulations, exhibits, witness lists, the issue (CAUTION)



## Presenting the Case

- Demeanor
- Rules of Evidence (R.H.A.B.C.)
- Opening Statement
  - State the issue, what the evidence will show, and the remedy sought.
  - DON'T FORGET THE REMEDY!!
- Direct Examination
- Cross Examination
- Closing Argument or Written Brief
- ALWAYS concede that which you should concede!!



## Examining Witnesses

- Direct Examination (remember your theory)
  - Your witnesses telling the story as you see it
  - Who, what, when, where, and how?
  - Non-leading questions
- Cross Examination
  - Challenging their story as they have told it
  - Leading questions: "Isn't it true...."
  - Never ask a question you do not already know the answer to
  - You cannot win on cross, but you can definitely lose
  - The "one question too many" and "low hanging fruit"
- It is not the witnesses' job to win the case; it is the witnesses' job to answer all questions truthfully—  
PERIOD



## Closing Argument or Written Brief?

### ■ Closing Argument:

- Done right away when the case is fresh in your mind
- Once done, you are finished with nothing to do but wait
- Very little time for reflection and analysis

### ■ Written Brief

- Done over time, usually 30 days
- After the transcript comes in, it will take weeks to prepare
- Full review of the transcript and evidence and time to prepare good arguments



## Why I Like to Brief

- There is more time to reflect on the case and refine the argument
- Using verbatim quotes from witnesses
- The arbitrator is not going to rule on the spot
- There are always three cases
  - The case you prepare;
  - The case you present; and,
  - The case you remember
- **DON'T FORGET THE REMEDY!!**
  - Prepare alternative remedies





## The Award

- Arbitrators' decisions are called "Awards"
- Binding vs. Non-binding/Advisory
- Clarifications
  - *Functus officio* (office performed)
    - Mistake
    - Open/unresolved issue or question
    - Ambiguity
- Enforcement
- Appeal



## Miscellaneous

- ALWAYS keep the grievant informed and involved—this is a partnership
- Get a court reporter and a transcript—who pays?
- Arrive on time
- Disclose witness problems up front (taking witnesses out of order)
- Be gracious
- Blow-up exhibits
- Extensions of time
- Pay the bills—on time!



## What It Takes

*" I firmly believe that any man's finest hour, the greatest fulfillment of all that he holds dear, is the moment when he has worked his heart out in a good cause and lies exhausted on the field of battle— victorious"*

*--Vince Lombardi*



## Contact Information

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**THANK YOU**