

WHAT IS A GRIEVANCE

A grievance is a dispute between the Union and the Employer concerning the application of understandings of employment policy found in the collective bargaining agreement , employee handbook, or school board policy to an employee or group of employees that is addressed through the grievance procedure outlined in these documents. Successful grievances protect employees' rights and strengthen the Union.

A disciplinary grievance challenges the Employer's discipline or termination of an employee covered by the policies above. A disciplinary grievance can utilize the a "just cause" standard as outline in the policies. In a disciplinary grievance the burden of proof is on the Employer.

A contract/policy interpretation grievance challenges the Employer's violation of a non-disciplinary term of policies such as wages, overtime, bidding, lay-off, recall, holiday, etc. The burden of proof is on the Union in a contract/policy interpretation case.

Procedural Requirement: The policies indicate grievance procedures that can provide time limits for initiating a grievance. The grievance procedure typically sets forth the steps at which the parties address the grievance dispute. Typically, the first step of the grievance procedure begins at the worksite, immediate manager level. If unresolved at that level, each successive step involves higher levels of Union and Employer authority. In many policies, a grievance can be initiated verbally at the first step of the grievance procedure and is not required to be reduced to writing until the second step. An untimely grievance, or one filed at the wrong step, is procedurally deficient and therefore subject to dismissal.

Substantive Requirement: A successful grievance requires sufficient facts to prove the claimed contract violation. Your investigation of the dispute giving rise to the grievance requires engaging in the 5 Ws inquiry:

- **Who** is involved in the dispute?
- **What** occurred and what article/section of the CBA was violated?
- **When** did the alleged violation occur?
- **Where** did the alleged violation occur?
- **Why** did the dispute arise?

Keep in Mind

A grievance unsupported by contract language or sufficient facts is "substantively deficient" and will not succeed.

TIME-LIMITS

Almost all policies provide a time limit for filing grievances. You should avoid filing meritless grievances, however sometimes a member may request a grievance based on events that occurred several days or weeks prior. In such a case, even if you question the merit of the grievance, file it, even before you conduct your due diligence grievance investigation. By doing so, you will avoid missing the contractual time-limit for grieving the dispute. You can always withdraw the grievance later if you subsequently determine that the grievance is without merit.

BEST PRACTICES

- Listen to the member's explanation of the complaint; and
 - Learn when the dispute occurred; and
 - Review the filing time-limits in the contract; and
 - If there is insufficient time to conduct an initial investigation write and submit the grievance at the appropriate step of the grievance procedure.
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WRITING THE GRIEVANCE

Most Local Union's have standard grievance forms. If you have such form use it. However, a contractual prerequisite that a grievance be reduced to writing does not require utilization of a specific form. Any writing will do provided it sets forth: (a) the grievant's name; (b) date of grievance; (c) the contract article(s) alleged violated; (d) the date of the violation; (e) a brief description of the violation; and (f) the remedy sought. Generally, the less written the better.

SAMPLE DISCIPLINARY GRIEVANCE

Name of Grievant _____;

Date of Grievance _____;

Contract Article(s) Violated _____;

Date(s) Contract Violated _____;

Description of Violation: On or about March 13, 2021, the employer terminated grievant Billy Joe Smith without just cause as required in Article XV and in violation of the contract as a whole.

Remedy Sought: Reinstate grievant, remove the discipline, and make grievant whole in every way.

SAMPLE CONTRACT VIOLATION GRIEVANCE

Name of Grievant _____;

Date of Grievance _____;

Contract Article(s) Violated _____;

Date(s) Contract Violated _____;

Description of Violation: On or about March 13, 2021, the employer, in violation of Article XVI and the contract as a whole, denied grievant Abe S. Lincoln holiday pay for the contractual President Day holiday.

Remedy Sought: Provide Abe holiday pay consistent with the terms of the contract.

DETERMINE WHETHER THE GRIEVANCE HAS MERIT

Not every member's complaint or request for a grievance represents a policy violation that warrants a grievance. A Union's duty to represent its members does not require pursuit of a meritless grievance. However, a Union is obligated to make an **informed decision** about whether the grievance has merit. Making an informed decision takes time and effort. This requires discussing the dispute with the grievant, the Union, the Employer, and the witnesses. An informed decision requires considering the contract language and any evidence relied upon by the Employer for the action(s) that gave rise to the grievance, as well as any other evidence you discover. You are entitled to this information. You need this information. Ask for it.

BEST PRACTICES

Always accompany a grievance with a **written** information request.

DO NOT simply rely on the Employer's version of events. Do your own investigation.

SAMPLE INFORMATION REQUEST TO THE EMPLOYER

Dear _____,

In connection with the grievance dated March 13, 2021 on behalf of Willie B. Nelson, please provide a copy of the grievant's personnel file including his disciplinary record, the Employee Handbook, investigation report, witness name(s), witness statement(s), video and/or other recording(s), and any specific rule, policy or report relied upon for the disciplinary action. Please forward this information to me as soon as possible but in any event prior to the step 2 grievance meeting.

Thank you,

INFORMING A MEMBER THAT THE GRIEVANCE WILL NOT BE PURSUED

Sometimes you will conclude that a grievance is without merit and should not be pursued. In some cases, you will reach this conclusion before the grievance has been filed. In other cases, this may not occur until the last step of the grievance procedure. If you reach an **informed decision** that the grievance is without merit, you must explain to the grievant the Union's reason for not pursuing the grievance. This is especially so if the grievant is unhappy with the Union's decision not to pursue the grievance. Simply refusing a member's grievance without providing the member an **informed explanation** as to why the grievance is meritless risks a disgruntled member, and a weaker Union.

BEST PRACTICES

When the Union has reached an informed decision not to pursue a member's grievance, provide the member a written explanation. This should be done by the Union Business Agent – not the Union Steward.

SAMPLE OF AN INADEQUATE GRIEVANCE DENIAL LETTER

Dear _____,

The Union has investigated your grievance and has determined that it is without merit and will not pursue it further.

Sincerely,

SAMPLE OF AN ADEQUATE GRIEVANCE DENIAL LETTER

Dear Willie B. Nelson,

The Union has completed its investigation of your grievance dated 03/13/2021 claiming that the Employer terminated you without just cause. Unfortunately, the Employer's video evidence clearly revealed you outside the shop on Valentine's Day while you were on the clock and not on break. As you know, this is a violation of Company Rule 14. The video also shows you filling your green and purple bong with marijuana and taking several hits from your bong before bursting forth "in song" in a cloud of smoke. You have previously been warned to leave your bong at home. Furthermore, your disciplinary record reveals that you were previously disciplined for testing positive for marijuana and warned that a second occurrence would result in termination, pursuant to Company Rule 17 and Article XX. The Union has withdrawn the grievance and will take no further action in this matter.

Sincerely,

SAMPLE OF AN ADEQUATE GRIEVANCE DENIAL LETTER

Dear _____,

The Union has investigated your grievance dated 03/13/2021 claiming a violation of your job bidding rights pursuant to Article XV. That article provides the employer the right to fill a position based on co-equal considerations of seniority, skills and ability. Skills are defined in the contract as having the proper training and certification to perform the work. Ability is defined in the contract to include attendance and disciplinary record. While it is true that you have six weeks more seniority than your co-worker chosen by the Employer to fill the job vacancy, you do not hold the certification necessary for the job. In addition, your attendance and disciplinary record compare unfavorably to that of the employee awarded the position. Accordingly, the grievance disputing the Employer's decision to award the job to your co-worker is without merit. The Union has withdrawn the grievance and will take no further action in this matter.

Sincerely,

DEFENDING A DISCIPLINARY GRIEVANCE

The Employer has the burden of proof in a disciplinary case. In a disciplinary case, the Union plays defense. Therefore, in the grievance meeting you should politely but firmly insist that the Employer explain the evidence and reasons relied upon for the disciplinary or termination decision. Too often the Employer turns the table on the Union and request that the Union or the grievant start the meeting by providing an explanation of why the discipline or termination decision is not appropriate. Avoid proceeding in this fashion. Be polite but firm.

BEST PRACTICES

In the grievance meeting, ask the Employer to provide its evidence and reasons for the disciplinary decision. Use the Just Cause standard as your guide for:

- Requesting Information
 - Questioning witnesses
 - Undermining the District's case
 - Defense arguments
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JUST CAUSE

Just Cause is the underlying theory of every disciplinary or termination case. Understanding Just Cause will greatly assist you in your disciplinary grievance advocacy. Such understanding will guide your subsequent request for information, your investigation - including your questioning of witnesses and decision makers. It will inform the arguments you make during a grievance meeting.

Just Cause is a term of art that may be interpreted differently by Employers, Unions, and arbitrators unless it is specifically defined in the CBA. In its most basic application, the contract's Just Cause standard simply requires fairness. A widely accepted application of Just Cause includes seven elements summarized as follows:

1. **NOTICE:** Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. **REASONABLE RULE OR ORDER:** Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?
3. **INVESTIGATION:** Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. **FAIR INVESTIGATION:** Was the Employer's investigation conducted fairly and objectively?
5. **PROOF:** At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. **EQUAL TREATMENT:** Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. **PENALTY:** Was the degree of discipline administered by the Employer in a peculiar case reasonably related to (a) the seriousness of the employee's *proven* offense, and (b) the record of the employee in his service with the Employer?

Koven & Smith, Just Cause – The Seven Tests, BNA Books, 2d Ed. 1992, pp. 23-24).

An answer of "no" to any of the above seven elements suggests that the discipline or termination decision was unfair and reflects a lack of just cause.

BEST PRACTICES

When handling a discipline or discharge case apply the elements of Just Cause to the facts in order to find weaknesses in the Employer's case and a viable defense for the Union's case. Not all are covered under these standards. Some have other policies that apply

ZERO TOLERANCE, CARDINAL SIN, PROGRESSIVE DISCIPLINE

The term "Zero Tolerance" is often misunderstood and misapplied in the context of discipline cases. Zero tolerance simply means that the conduct for which there is "zero tolerance" will not be tolerated. A "zero tolerance" workplace rule without more, simply means that any employee who breaches that rule will suffer consequences. It does not mean that the employee has been placed on notice that a breach of that rule will result in termination.

However, a workplace rule characterized as "zero tolerance" that also provides that a violation "shall result in termination" is a "cardinal sin" rule. When employees are placed on notice that a breach of a rule "shall" or "will" result in termination then progressive discipline does not apply. Termination will generally result from a single breach of such rule.

However, if the language of the "Zero tolerance" rule provides that a violation "*may result in discipline up to and including termination,*" then termination for an initial breach of that rule likely runs counter to just cause. That is because the phrase "may result in discipline up to and including termination" is progressive discipline language. In such a case, a violation is addressed thorough successively harsher punishment, i.e., a verbal warning, a written warning, and then a suspension, prior to termination.

BEST PRACTICES

When handling a discipline or discharge case review the language of the rule upon which the discipline or discharge is based to determine whether it is structured as a "cardinal sin" rule or as a "progressive discipline" rule.

PURSUING A CONTRACT / POLICY INTERPRETATION GRIEVANCE

In a contract/policy interpretation dispute the burden of proof is on the Union. In such a case, the Union plays offense. In other words, the Union must prove that the contract /policy language supports the Union's grievance. A common misperception is that a grievance can challenge any unfair conduct by the Employer. This is wrong. A grievance cannot remedy every injustice. It can only remedy a violation of the contract./policy

Simple contract/policy interpretation grievances generally settle prior to reaching arbitration because the cost of arbitration (where it is allowed) often exceeds the cost of remedying the violation. This is especially so when the evidence clearly demonstrates the grieved violation.

Complex contract/policy interpretation grievances based on **ambiguous** language are more difficult. In order to prevail, the Union must do more than simply make a reasonable argument. The Union must provide evidence that the language means what the Union claims it means. Without sufficient evidence to support the argument the Union cannot prevail. Pursuing a contract interpretation grievance without adequate evidence is dangerous because once the Union loses the case the Employer's interpretation will become the prevailing standard.

In contract/policy interpretation cases that are able to move to arbitration, the Arbitrators do not consider fairness. They consider the language and the parties' intent of how that language is to be applied. It is the Union's burden to provide sufficient evidence to prove the claimed interpretation. The rule of thumb is that a party cannot win in arbitration what the party did not already win in the contract/policy. Without sufficient evidence to prove the Union's interpretation of the ambiguous language, such contract interpretation grievances should be avoided.

BEST PRACTICES

Don't pursue a contract interpretation grievance without sufficient evidence.

FACTS MATTER

Facts matter in the grievance/arbitration procedure. Getting all the facts in a case is the best way to make certain that the Union is doing the "right thing" and properly representing the membership.

Let the facts that emerge through your investigation guide you to the final result. Often times the facts will demonstrate that a member has already had the benefit of progressive discipline or has breached a cardinal sin rule for which employees had notice that termination would result.

Other times, the facts will demonstrate that although the Employer had Just Cause to discipline the member, the level of discipline was too severe. In such case, the Union's grievance may succeed in reducing the level of discipline. Sometimes the facts will demonstrate that the Employer's disciplinary action was simply wrong. In such case, the Union's grievance may reverse the discipline and make the employee whole for all contractual losses suffered.

Fulfilling the Union's duty of representation requires leader and staff investigate, investigate, and investigate in order to achieve the fairest and most efficient result for the membership and the Union. Investigate when time permits before filing the grievance. Investigate further based on information learned from witnesses and reports. Use the grievance procedure to flush out the facts. A management labor attorney once said: "The case that comes in the front door seldom looks like the same case going out the rear door." That is because the investigation brings to light additional facts that impact the merit of the case, making it weaker or stronger. Investigate, and let the facts lead you to the proper result.

BEST PRACTICES

Don't Rely on the Employer's conclusions.

Don't Rely on hearsay, rumors or assumptions.

Let Facts be your guide.

INVESTIGATE, INVESTIGATE, INVESTIGATE – THE EARLIER THE BETTER!
