



Valerio
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Responding to Grievances and Navigating Arbitration

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Topics

Part I: Responding to Grievances

Part II: Arbitration

Part III: Q&A

Part I

Responding to Grievances

The Grievance Process

Step 1: Date stamp receipt of the grievance (retain the email with the date)

Step 2: Review the applicable CBA. Each CBA has its own unique grievance and arbitration provisions.

Step 3: Review relevant information and, if required or warranted, hear the Union's presentation of the grievance

Step 4: Answer the grievance in accordance with the procedures in the CBA.

The Grievance Process

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Step 1: Receiving the Grievance

When you receive a grievance, immediately date stamp the grievance with the date you received it. (Also retain the envelope with the postmark if it was mailed.)

If it is attached to an email, keep the email with the grievance document.

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Step 2: Review the CBA

The Labor Relations Law, M.G.L. c. 150E, gives employees the right to form and join unions and engage in concerted activities, which includes, filing and processing grievances for Union members. **However, not all issues are subject to the grievance procedure.**

- Review the applicable CBA to identify what can be grieved.
 - The CBA will most likely contain language, that **excludes** certain issues from the grievance and arbitration procedure, such as:
 - Only violations of expressed provisions of the CBA;
 - Discharge or discipline, either entirely or during an employee's probationary period;
 - Non-renewal or non-reappointment;
 - Extensions or approvals of a leave of absence.
- Consider whether the grievance impinges on a Core managerial right such as the right of the Police Chief to make specialist assignments without regarding to seniority.

Step 2: Review the CBA

Review the grievance steps in the applicable CBA to determine if the grievance was properly filed and who should respond. For example, a CBA may provide for the following grievance steps:

Step 1: Immediate Supervisor (either informally/verbally or in writing)

Step 2: Department Head

Step 3: Personnel Board, Select Board, or Town Manager

Arbitration: follows if the grievance is not resolved at the lower step.

What Should the Grievance Include

Identity the aggrieved employee or employees (by name);

Date of the alleged act or omission giving rise to the grievance;

Provision(s) of the CBA purportedly violated;

Description of the purported violation;

Remedy requested; and

Dates the grievance was presented at the earlier Steps.

Procedural Defects

Failure to comply with timelines for filing the grievance and/or for moving the grievance to the next step

Failure to present the grievance at the correct level

Failure to identify the articles and sections of the CBA alleged to have been violated
(Citing “*and any or all other articles of the CBA that may apply*” does not identify the purported violation.)

Failure to state the circumstances of the incident precipitating the grievance

Failure to process the grievance to subsequent steps within the required time periods

Example 1

Ted Mosby was hired as a 911 Dispatcher for the Town on August 2, 2023. Ted's friend, Marshall Erickson, is also a 911 Dispatcher for the Town. Marshall has been a Dispatcher for the Town since January of 2018. 911 Dispatchers are represented by the Teamsters Union.

One month into Ted's employment, Ted and Marshall are caught sending inappropriate messages over the Computer Aided Dispatch (CAD) System. The Town immediately discharges Ted and Marshall. The Union grieves their terminations.

1) What is the First Step?

The applicable CBA states:

“New employees hired on or after August 1, 2023, and those hired after a break in continuity of service will be regarded as probationary employees for the first nine (9) months of employment or reemployment. Probationary employees may be discharged for any reason during their probationary period without recourse to the grievance or any other procedure of this Agreement.”

2) Are the terminations grievable?

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Step 3: Review Relevant Information

Obtain and review relevant information regarding the grievance including:

- Documents submitted as part of the grievance process, from both the employer and the union/grievant and all prior grievance steps;
- Relevant policies, work rules, and operating procedures;
- Other relevant information, such as prior grievance responses to a similar grievance; video or audio footage; interview employees; obtain written statements; prepare your own case summary.

Step 3: Hearing the Grievance

Determine whether hearing the union's presentation of the grievance is required by the CBA. Even in situations where a meeting it is not required, determine whether it would be advantageous to propose a meeting.

If the Select Board is hearing the grievance, it must be posted in accordance with the Open Meeting Law, M.G.L, ch. 30A, sec. 21(a) for the following purposes:

- (2) to conduct a collective bargaining session with the <Insert name of the Union>, specifically to hear a grievance regarding _____.
- (3) to discuss strategy with respect to collective bargaining, specifically to consider and respond to the <Union's> _____ grievance.

The Grievance Process

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Step 4 Answering the Grievance

- Review responses from lower steps;
- Include all applicable procedural and substantive defenses;
- Include dates that grievance was received and heard;
- If there is no contractual violation, deny the grievance;
- Whether a detailed denial response is necessary is up to your discretion but you should consult counsel before issuing a substantive denial;
- If there is a contractual violation:
 - Refer the grievance for adjustment; or
 - Adjust the grievance.
 - Include language that the adjustment is non-precedent setting.

Other Grievance Considerations

Grievance documents are maintained in grievance files – NOT in employee personnel files.

Should you explore settlement of the grievance prior to issuance of a decision?

If you cannot hear or respond to the grievance within the contractual timeline, request that the Union agree to extend the time for you to respond; all agreements to extend the timelines should be in writing (or by email).

Recap

- Follow the contract
- Ask before acting
- Respond to grievances within the required time period
- Remember to identify and include all procedural defects in your grievance answer.

Example 1

J.J. Junior is the most junior custodian for Terrific Town. In October of 2023, the Town posted a custodian position for the night shift. No day shift custodians applied for the night shift. On November 15, Junior was notified that he was being transferred to the night shift effective November 30, 2023.

Junior filed the following grievance:

To: Department Head

Re: Step 1 Grievance

On November 30th I was forced to transfer to the night shift. I didn't want to work nights and I didn't apply to work nights. This violates the collective bargaining agreement. I want to return to the day shift.

Signed: J.J. Junior

Dated December 5, 2023

Example 1 Cont'd

The applicable CBA provides as follows:

Step 1: The Union steward and or representative, with the aggrieved employee shall take up the grievance or dispute in writing with the employee's immediate supervisor within ten (10) days of the occurrence or failure of occurrence, giving rise to the grievance. Any grievance not timely filed at this step will be null and void. The supervisor shall respond to the steward in writing within five (5) working days.

Example 1 Cont'd

What actions should you take when you receive Junior's grievance?

- Date stamp the grievance upon receipt
- Review the grievance:
 - Look for procedural defects
 - Is the grievance in writing
 - Has the union steward and/or representative signed the grievance
 - Was the grievance filed within the required timeline
 - Is the aggrieved employee identified
 - Does the grievance identify the provision or provisions of the CBA is alleged to have been violated

Example 1 Cont'd: Answering the Grievance

How would you respond to Junior's grievance?

- Don't forget to raise procedural defects!

Example 2:

Answer the Step 1 Grievance below and identify any other action you should take.

September 1, 2023

To: Immediate Supervisor

Re: Step Increase

Dear Immediate Supervisor:

You denied Step increases to two employees in violation of Article XXII. They are great employees and I think that the denial of their step increases is unfair and because they are women.

Remedy: grant the two employees step increases.

Example 3

Answer the Step 1 Grievance below and identify any other action you should take.

December 4, 2023

To: Department Head

From: Union Steward and Greg Grievant

Re: Step 1 Grievance

Grievance: The Town has violated the CBA by issuing a written reprimand to Greg Grievant on December 1, 2023, for destruction of Town property. Mr. Grievant did not pour coffee on the printer and leave work before the end of his shift.

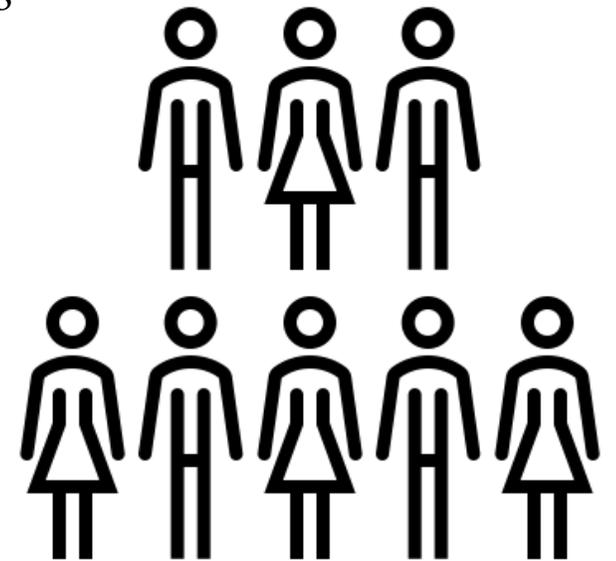
Remedy: remove the written reprimand from his personnel file and make Mr. Grievant whole in every respect.

Part II

Arbitration

Selecting an Arbitrator

- The American Arbitration Association (“AAA”) and the Labor Relations Connector (LRC) provide biographies of the Arbitrators.
- The DLR simply lists a set of hearing officers for the parties to individually rank without biographies.
- A contract may also provide a procedure in which the sides can agree on an arbitrator outside of the AAA procedure.
- Before selecting an Arbitrator:
 - Consult with labor counsel
 - Examine the lists and biographies closely
 - Read some decisions by Arbitrators on the list
 - Consult with your colleagues



Selecting an Arbitrator Cont'd

- You may strike some or all names on the initial list provided.
- If there is no match on the first list, AAA will send you a second list.
- When you receive the second list, you can resurrect names from the initial list that you previously struck. You must order the names from the first list by preference and then order the names on the second list. You can strike names from the second list **for cause**, such as conflicts and cost.

Preparing for Arbitration: Outline your case

- What are the issues in the case?
- Which party has the burden of proof?
- What do you need to prove/rebut?
- Who will testify? Will you need to engage an expert?
- What documents, exhibits, photos, views will you need?
- How do you handle a request for information from the union prior to the arbitration date? What are you obligated to provide?
- Outline your post hearing brief – so you don't forget to introduce any evidence.

Preparing for Arbitration: Case preparation

- Fact Investigation
- Identify & Interview Witnesses
- Evaluate Witnesses
- Get all relevant documents, videos, etc.
- Determine if you will need photos, maps, etc.
- Identify potential exhibits for arbitration
- Identify if the arbitrator will need to view a location

Witnesses

Thorough witness preparation is essential to success. Witnesses often make or break your case!

- It is important to fully understand the grievance, contract terms, and facts **before** conducting witness preparation.
- Obtain subpoenas for uncooperative witnesses and for witnesses in the same bargaining unit as the grievant. Do witnesses called by the union get paid for their attendance? Witnesses called by the employer?
- Describe the process for witnesses. An arbitration is not a trial but it is still an uncomfortable setting for witnesses. Explain that there are:
 - **No judges**
 - **No juries**
 - **No spectators**

Preparing Witnesses

- There is no such thing as over-preparation.
- Make sure witnesses understand that answers:
 - Should be clear and concise
 - Respond only to the question posed
 - Do not volunteer information
 - Should be “yes” or “no” if that is all the question calls for
 - State “I don’t know” or “I don’t remember” if that is the only honest answer available.
 - Do not anticipate unasked questions
 - Just because they are asked for the same information in different ways under cross examination does not mean they need to revise their answer

Utilize “trial runs”

A “trial run” of mock direct/cross examinations is often helpful to lower anxiety for nervous witnesses.

Prepare a question-by-question outline with answers to questions.

During the trial run:

- Review documents and relevant exhibits with witnesses
- Go through key points and testimony with witnesses
- Remind witnesses to carefully listen to the question and ask that the question be repeated or clarified if necessary.

When Witnesses Are Unavailable

- *Affidavits:* Arbitrators may allow affidavits of non-present witnesses, but often give little weight to statements in affidavits where there is no cross examination.
- Consider other means to obtain testimony of absent witnesses:
 - Video conferencing
 - Telephone testimony

Consider the Location for the Hearing

- AAA offices
- Municipal offices
- Other location

Stenographic Record

- Consider
 - Cost of transcript to value of the case.
 - Parallel cases where the transcript could be of value to the employer.
 - Time to brief (need to cite)
- Remember: give the opposing party notice in accordance with AAA rules if you plan on having a stenographer present.

Judicial Review of Arbitration Awards

Final and Binding: Courts are reluctant to second-guess and Arbitrator's decision unless the award is

- Contrary to law
- Does not draw from the “four corners” of the contract
- Is the result of fraud or collusion
- Violates public policy

Big Picture

- Take each grievance seriously from its outset and consider it to be on track for arbitration
- Assess likelihood of success. If an error was made, correct it and resolve the grievance.
- The outcome of arbitration is inherently uncertain and unpredictable. Arbitrators are individuals who may look at evidence and testimony completely different from how you have evaluated it prior to the arbitration. Consider the cost of settlement and the cost of litigation and make a business decision with respect to settlement.

Hypothetical Questions & Hypothetical Answers For Training Purposes

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