LBAEE

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Nuts & Bolts: Using a Grievance to Enforce Your MOU

Most union workers are familiar with the word "grievance" as it is used in the labor relations field. It is not simply gossip or venting to colleagues about a workplace concern. It is a more formal process. A grievance is a written complaint filed with and against your employer for their alleged violation of your union contract or MOU. The grievance procedure sets forth the life cycle of a grievance. In many agencies, grievances are common. In fact, the first step of most grievance procedures is an informal discussion with the immediate supervisor. The goal is to quickly resolve most disputes at the lowest level possible. Occasionally, grievances escalate to a higher level, such as arbitration or the top step of the grievance procedure. This month, we look more closely at what a grievance entails and how to use the grievance process to enforce violations of your MOU.

What is the Purpose of the Grievance Procedure? The grievance process is a mutually agreed upon procedure to resolve a dispute in the interpretation or application of your contract. It is designed to fix violations of your contract internally without having to resort to the more costly and time-consuming court process. It became increasingly common in the private sector in the wake of World War II. The purpose is to reduce the incidence of work stoppages and slowdowns, which employees and unions had used to protest working conditions, discipline, and stalled contract negotiations. In 1968, the Meyers-Milias Brown Act became law, extending to California local government employees representation rights like those in the private sector under the National Labor Relations Act. The success of grievance procedures in the private sector then carried over to the public sector starting as early as the 1970s. They have been commonplace ever since.

What is a "Grievance"? There is no one-size-fits-all definition. The first place to look is your specific grievance procedure. It is most often found in either your MOU or the Agency's personnel rules or Civil Service rules. The procedure in your MOU will always

control if there is a conflict. Most grievance procedures start by defining a grievance. The key is to determine whether "grievance" is defined narrowly – *e.g.*, as an alleged violation of the MOU only – or if it is defined more broadly – *e.g.*, as an alleged violation of the MOU, personnel rules, Department policy, state or federal law, other written work rules, or past practice. Some definitions may exclude specific matters from the grievance procedure. Employee discipline, for example, may be covered under a separate disciplinary policy. Other common exclusions are performance evaluations, verbal or written reprimands, matters subject to bargaining, or disputes that do not concern wages, hours, and other terms and conditions of employment. A management rights clause may also shield certain managerial decisions from the grievance procedure. However, the agency's exercise of those rights may still be subject to negotiation.

If you have a grievance, the next step is to draft the grievance. This does not require the same legalities or precision as a civil lawsuit, but the agency will hold you to only those allegations that are properly set forth in the grievance. How to phrase or characterize the dispute has consequences, so it is wise to involve your Association or CEA staff to help you draft it. The nuts and bolts of a typical grievance include a statement of the facts supporting the grievance, identifying the specific contractual or policy violation(s), and requesting an appropriate remedy. Some agencies have specific grievance forms that should be completed once the informal discussion at Step 1 is finished. When possible, use the specific form. Otherwise, an official letter format is acceptable.

Who Can File and Control the Grievance Processing? Confirm what your specific grievance process says, but typically a grievance may be filed by any employee, group of employees, or the employee organization itself. The individual or union is considered the "grievant." This means they have the burden of proof to show a violation. If the grievance procedure is a negotiated agreement that is part of your MOU, the employee organization "owns" the grievance procedure, meaning they can control how far to pursue a grievance, if at all, even those filed by an individual employee. This is partly because resolving the grievance can often involve an agreement or determination about what a specific provision of the contract means or how it should be applied beyond the circumstances surrounding the individual who initially brought the grievance. State bargaining law allows the employee organization wide latitude in rejecting, processing, and settling grievances. Generally, a union may refuse to pursue a grievance or stop short of arbitration or the top step of the procedure if that decision is based on a good faith conclusion that it lacks merit or is unlikely to succeed before an arbitrator. *Forslund v. Saddleback Valley Educators Assn.* (1990) PERB Decision No. 828. Very seldom, a union may refuse to pursue a grievance even if it *has* merit if the union determines that doing

so would not be in the best interest of the entire bargaining unit. *McElwain v. Castro Valley Teachers Assn*. (1980) PERB Dec. No. 149.

When Should I File My Grievance? Your specific grievance process should identify the precise deadlines. But, generally, a grievance must be filed *quickly*, for example, within the first 7-10 calendar days after you discovered or reasonably could have discovered the alleged violation. Grievances that are not timely filed may be rejected on procedural grounds. This means that you might not get a substantive response to your grievance, much less the remedy you sought. So, file your grievance as soon as possible. In some cases, there may be grounds to assert a "continuing violation," which is where the violation began on a certain date but continued to repeat thereafter (*e.g.,* every pay period). In other words, each subsequent violation is a new violation that starts the grievance timelines over again. But even if this applies, your remedy will still probably be limited to the date you filed the grievance, not the date of the original violation. That difference – especially if it involves pay – can be significant. So do not wait! Finally, do not be surprised if your agency still tries to argue that your grievance is not timely or is procedurally defective in some way. This is a common management tactic. If your union contract includes grievance arbitration, know that under the Meyers-Milias Brown Act, Gov't Code Section 3505.8, the Agency's procedural defenses – for example that a grievance is not timely – must be submitted to the arbitrator. It cannot be a basis for refusing to process the grievance to arbitration.

What Does the Process Entail? Your grievance procedure should identify grievance "steps." As mentioned above, the first step is often an informal discussion with the immediate supervisor. Step two may be a grievance meeting with the Department Director. The Human Resources Director could be another step, followed by the City Manager or General Manager. In addition to the informal discussion, there is typically a formal grievance meeting at some point, if not at each step. Some procedures also have a final step involving mediation, arbitration, or a Personnel Commission or Civil Service Commission hearing. Relatively few grievances escalate to this final step, but it is good to know where your grievance could conclude when you file.

Who Do I Need to File a Grievance With? File at the lowest level in your grievance procedure that is conducive to resolving the grievance. Most often, this is Step One, or an informal discussion with the immediate supervisor. If you file at a higher step, identify in your grievance the step and person you are filing with and that you are waiving the earlier steps. Also, let your Association know when you initiate a grievance.

What is Grievance Arbitration? Grievance arbitration is a dispute resolution mechanism. The agency and the employee organization agree to submit the grievance to a neutral third party (the arbitrator) who issues a decision (or award) resolving the dispute. Arbitration is more involved than a grievance meeting. The process resembles a trial because the arbitrator's decision is based on testimony, evidence, and arguments presented at a hearing. The arbitrator's decision may be binding, or it may be advisory to the elected officials. In either case, there is only an extremely limited ability to overturn or "vacate" the final decision under California Code of Civil Procedure Section 1094.5. Not all grievance procedures include arbitration. For those that do, few grievances go all the way to a formal arbitration decision. Arbitration is costly and time consuming. Many arbitration clauses specify that the costs are split equally between the agency and the employee organization. The costs, including court reporter transcripts, can run up to tens of thousands of dollars, depending on the complexity of the case and the number of days needed for hearings. The entire process can typically last several months or longer.

In union contracts that include grievance arbitration, the union typically has the sole right to decide whether to arbitrate. In those cases, if the union decides not to arbitrate, the individual grievant cannot go to arbitration. The union's decision not to arbitrate must be fair and reasonable and not arbitrary, discriminatory, or in bad faith. However, the union may consider costs as well as the likelihood of losing and the consequences that an adverse determination would have on the interests of all the employees in the unit. *See, e.g., Vaca v. Sipes* (1967) 386 U.S. 171, 190; *Castro Valley Unified Sch Dist.* (1980) PERB Dec No. 149; *Logan v. Southern Cal Rapid Transit Dist* (1982) 136 Cal.App.3d 116, 129; *Flowers v. IBEW Local 1245* (2009) PERB Dec No 2079-M.

What about Mediation? In contrast, grievance mediation occurs when a neutral third party (mediator) attempts to persuade the parties to reach a settlement, either in a joint session or separate meetings. It is less formal than an evidentiary hearing and is focused less on which side is right and more on negotiating an acceptable solution for both sides. Mediators are available through both the Federal and State Mediation and Conciliation Service at either no-cost or substantially reduced cost compared to a private arbitrator. Mediation can be negotiated into a grievance procedure as an additional "Step," or it can be requested and conducted by mutual agreement of the parties in any grievance. If the parties have not mediated the case, often an arbitrator will attempt mediation if there is interest prior to conducting an arbitration hearing.

Do I Have the Right to Representation in a Grievance Meeting? Yes. State labor relations statutes, including the Meyers-Milias Brown Act, provide an expansive right to union

representation in all matters of employer-employee relations. Your right to representation under state bargaining law, and likely your grievance procedure, allows for representation at every level of the grievance process. This includes having the help of any paid professional staff who your employee organization may hire to assist with labor relations matters, such as CEA. Or, if you prefer, you can have one of your employee organization leaders present instead.

Conclusion: The grievance procedure may seem complicated, but you do not have to navigate it alone. Your Agency cannot retaliate against you for filing a grievance or for enlisting the support of your union to enforce your rights under the contract. If you feel the Agency violated a provision of your union contract, contact your employee organization or staff for assistance. They can help you figure out whether your potential grievance has merit. They can also assist with drafting, filing, and processing the grievance at all levels of the formal grievance procedure. In many instances, a grievance serves as an effective and efficient way to enforce your MOU. The truth is many public employees will never file a single grievance during their career. But there may come a time when filing a grievance is necessary. If that is your case, do not hesitate to file a grievance. Your employee organization fought hard to secure good pay, benefits, and working conditions. A grievance is one way to ensure you get the benefit of your MOU.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

1.4% - CPI for All Urban Consumers (CPI-U) Nationally

1.5% - CPI-U for the West Region

1.5% - CPI-U for the Los Angeles Area

2.0% - CPI-U for San Francisco Bay Area

1.9% - CPI-U for the Riverside Area (from November)

1.6% - CPI-U for San Diego Area (from November)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I had an investigatory meeting last month. My representative was present. The Agency was investigating me for poor performance. I testified truthfully about the incident. The meeting concluded, and so far, I have not yet heard anything since. If I resign before an investigation is concluded what, if anything, goes into my personnel file? Can future employers see my personnel file? Can I access my personnel file after I resign? Can I appeal the investigation results after I resign and leave the Agency? I am thinking of taking another job and want to know my options.

Answer: If you resign before an investigation concludes, it is likely that nothing further will go into your personnel file. The investigation records might be kept in your Agency's Internal Affairs files, and then purged after a certain amount of time but the investigation should conclude once you leave employment.

You have the right to access your personnel file as a current or former employee under California Labor Code 1198.5. Submit your request to receive a copy of your personnel file in writing.

Because you work for a public agency, parts of your personnel file might be available to future employers under the California Public Records Act (CPRA). The CPRA does not require disclosure of: "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Government Code Section 6254(c). But courts have held that personnel files are subject to disclosure in certain narrow instances, for example, if the public interest in disclosure outweighs your privacy interest.

It is generally a good idea to request your file to see what it contains. If you are applying for a public safety position, you will likely be asked to sign a waiver that allows the prospective employer to see your personnel file before they hire you.

As for your last question, you probably cannot appeal any investigation results after you resign and leave the Agency because you are no longer an employee. But check any procedures outlined in your Association's contract or the Agency's personnel rules. If you leave before the investigation concludes, however, the Agency is likely to close out the file without making a determination.

Question: The Agency moved an Executive Assistant II into Human Resources without opening the position for others to apply. Several of us (Executive Assistant I's) were interested in that opportunity and are not happy about the transfer. The Agency says they have other positions that will open shortly for Executive Assistant II's, but instead of keeping them in-house, they will open it to the public. The employee who was moved is the sister-in-law of a Director and was told her position in her former Department was a conflict of interest. The nepotism policy says relatives of employees should not get preferential treatment during the recruitment and selection process. A relative is defined as "blood, by adoption, or stepparent, spouse or registered domestic partner, sibling, child or in-law, and their children and children in-law." Does moving her into HR violate the policy? For example, what if an employee has a complaint about that Director and it is filed through HR, wouldn't that be a conflict?

Answer: As you point out, the nepotism policy says *relatives* of employees should not get preferential treatment during the recruitment and selection process. While the definition of relatives includes "siblings," it does not explicitly include "siblings in-law." You might be able to argue that it is inferred, based on the ambiguous language. But the Agency will likely say she is not a relative under this definition. If so, moving her into HR would not technically violate the nepotism policy.

You can also argue the Agency previously viewed her as a *relative* by finding that her position in her former Department was a conflict of interest. Still, it appears that she was not given preferential treatment during the recruitment and selection process because there was no recruitment or selection process. She was transferred to avoid a conflict of interest, not to fill an open position. This may not violate the nepotism policy but check if it violates other rules, for example on recruitments or transfers.

You are correct that there could be a conflict of interest if an employee has a complaint about that Director and it is filed through HR. Contact your professional staff to determine if this type of conflict is covered under the policy. Even if it is not, check to see if this employee will be screened from any complaints involving that Director.

Question: I received a written reprimand for not effectively communicating with my supervisor about the fact that I had a jury summons. Our jury duty policy does not have a specific timeframe for when I must notify my boss about a summons. It is true that I have had the summons for several weeks. But that does not

mean that I knew I would have to report in-person to jury duty on any given day. During my jury duty week, I checked each night if I had to report the following day. One night, it said I had to report the next day and I immediately informed my supervisor. I think my supervisor is upset that I missed that day of work, but I do not see why that is my fault. Jury duty is a civic obligation. I told him once I knew I would miss work. Can I get it removed from my file?

Answer: You are correct that jury duty is a civic obligation, and your Agency cannot reprimand you for missing work to serve on a jury as required by law.

Your Agency might argue that you should have notified your supervisor as soon as you received your jury summons, but that does not seem to be required under the policy itself. If your Agency's jury duty policy does not state a specific timeframe for when you must notify your supervisor about your jury summons, you should still give *reasonable* notice about your potential need for jury duty leave.

In your case, it was reasonable for you to inform your supervisor immediately on the night you learned that you would have to miss work the next day to report for jury duty. But it is also reasonable for the Agency to ask you to let them know when you get a summons next time. Contact your Association staff if you need help requesting that the reprimand be removed, or in the alternative, for help drafting and submitting a written rebuttal to attach and include with the reprimand as part of your file.

Question: Are other agencies reimbursing employees for items utilized during remote work from home? I thought the Agency must comply with California Labor Code Section 2802, which basically says that employers cannot pass their operating expenses on to employees. I think the Agency should pay for items like our cell phone, internet service, laptop, electricity, heat, supplies, *etc.* Do they have to? The webinar that I attended that introduced me to Section 2802 did not say anything about whether it applied to public agencies. I am curious to know if it does and if I can get reimbursed for these types of expenses.

Answer: The California Supreme Court held that provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 330. Unfortunately, Labor Code Section 2802 does not explicitly state that it applies to public agencies. Therefore, your Agency is likely not obligated to comply with it.

However, check your MOU and personnel rules. Reimbursement for these expenses may be covered there.

Or perhaps your Agency has a COVID-19 or Telework policy that covers such expenses. If not, your Association might consider bargaining for this during the next MOU negotiation. You can also ask if the Agency would provide a work-issued cellphone or laptop instead of having to use your own equipment.

Question: Our City previously announced a "hard" hiring freeze for this fiscal year due to the financial consequences of COVID-19. But due to one employee retiring and another re-locating out of state, I am now the only one left who knows how to fix the fire trucks. For a City our size, it is not reasonable to put that entire responsibility on one person, and none of the other fleet mechanics are certified to work on the fire engines. If I leave, there will be no one. The trucks will sit there waiting to be fixed for at least another 6 months. Is there anything we can do about softening the so-called "freeze," or allowing for an exception in my case, to get someone in here right away? The sudden staff shortage has caused a serious public safety issue. If they originally budgeted for three positions, I do not see why they cannot open a recruitment for at least one of the two vacancies.

Answer: Yes, even "hard" hiring freezes have exceptions. For example, certain positions might be necessary to fill for legal or public safety reasons. Some agencies may therefore exempt specific positions from hiring freezes because of the essential or high-priority services they provide. But even if a position is not exempted, your Agency could still seek approval for an exception to the hiring freeze for good cause. For example, it might be less costly to fill a position than to leave it vacant. Similarly, as you point out, there might be justification for backfilling specific positions that had already been included in the budget.

Ultimately, it is the City's decision whether to fill a position or leave it vacant. But the staff shortage should not be something that negatively impacts your working conditions. Contact your professional staff if it does, or if you need help communicating with your HR Department about the need to fill the vacancy. As you point out, failure to hire another person to fix the fire trucks could impact public safety. In your situation, you make a strong case for an exception.