

# *Employee Grievances: Tips and Strategies for Putting Forward Your Best Case*

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## Topics for Discussion

- Overview
- Key CBA grievance procedure elements (and why they matter)
- Contract interpretation principles
- Grievance processing
- Preserving defenses
- Avoiding collateral litigation

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## Overview

- Purpose
- Historical backdrop (the NLRA trade-off)
- PERA's legal requirement for a grievance procedure
- Other reasons to have a grievance procedure

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## Overview (cont.)

- The relationship of the grievance procedure to the CBA
- Why “less can be more” in CBA drafting
- Grievances as an indicator of climate
- How the Public Records Act relates to grievance processing

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## Key Procedure Elements

- 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)

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## Contract Interpretation Principles

- Every arbitrator is different and no principle is guaranteed
- However, they can be a good framework of general understanding to inform the grievance handler
- Start first with agreement to arbitrate

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## Contract Interpretation Principles (cont.)

- Type of case should control burden of proof
- Management has burden of proof on discipline
  - If no standard specified, could be anything from preponderance to “clear and convincing”
  - At least know what the “7 steps” are
  - Mitigation always a possibility unless CBA precludes
- Union has burden for contract interpretation/breach

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## Contract Interpretation Principles (cont.)

- Timeliness and other procedural issues usually for the arbitrator
  - Management usually has burden on timeliness
  - Is bifurcation an option?
- If CBA language clear, arguably intent, bargaining history, and past practice irrelevant

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## Contract Interpretation Principles (cont.)

- 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

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## 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

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## Actual Processing

- Grievance processing involves both fact gathering AND formulating an institutional response
- If you do one without the other, you decrease the odds of success

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## What Management Needs to Know

- 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

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### What Management Needs to Know (cont.)

- If contract interpretation claim, what is the basis for the union's arguments (i.e., why specifically is a violation claimed):
  - CBA ambiguity and intent?
  - past practice?
  - CBA language error?
  - external law theory?
  - other?

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### Preserving Common Defenses

- Not arbitrable (specific exclusion)
- Not arbitrable (managerial right)
- Timeliness
- Process not properly followed

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### Collateral Litigation

- PERC deferral process
- Election of remedies

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## 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. 1<sup>st</sup> DCA 2010))
- Understanding PERC ULPs over refusal to process grievances (*Negron v. Broward Transit*, 41 FPER ¶ 98 (2014))

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## In closing...here is a checklist of questions to answer

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;

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## 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.

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## Disclaimer

- The information contained in these materials is intended as an informational report on legal developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

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## Speaker Information

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## Questions?

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