

DUTY OF FAIR REPRESENTATION IN A NUTSHELL

Exclusive Representatives Must Fairly Treat All Unit Members

- A Union, acting as the exclusive representative, must fairly treat all bargaining unit members. Specifically, the Educational Employment Relations Act (EERA) mandates:

“The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.”

CAL. GOV. CODE § 3544.9
- EERA’s Duty of Fair Representation applies to the activities of an exclusive representative involving:
 - Collective bargaining,
 - Administering the Collective Agreement, and
 - Enforcing the Collective Agreement.
- EERA’s Duty of Fair Representation does not apply to the activities of an exclusive representative involving:
 - Matters related to enforcement of most statutory rights (*e.g.*, alleged violations of the EDUCATION CODE, Civil Rights laws, *etc.*).

Exclusive Representatives Must Make Reasonable Decisions

- A Union, acting as the exclusive representative, must make decisions and base its action on reasonable grounds.
 - Simply, the exclusive representative must have good reasons for all decisions related to bargaining, administering, and enforcing the collective bargaining agreement.
 - Union representatives must act reasonably, fairly, and honestly toward all bargaining unit members.
- A Union, acting as the exclusive representative, violates EERA’s Duty of Fair Representation if its decisions are motivated by:
 - Desire to Discriminate.

Unlawful grounds for discrimination include unit members’ race, religion, place of national origin, sexual preference, or union membership.
 - Bad Faith Motivation.

Bad faith typically involves basing decisions on personal dislike or animosity.
 - Arbitrariness.

Arbitrary action involves a decision or inaction “without a rational basis or devoid of honest judgment.”

GRIEVANCE PROCESSING: **HOW & WHY**



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Grievance Processing:

How and Why

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ESTABLISHMENT OF RIGHTS

Without the **Education Employment Relations Act (EERA)**, which was passed in 1975 and provided for "Collective Bargaining" between school employees and their employer, there would be no need for grievance training. Since July 1977, school employees have had the right to negotiate contracts which spelled out their "Terms and Conditions of Employment" and which can be **enforced by the use of a grievance procedure** that culminates in binding arbitration.

The following is provided as a brief history of the means by which school employees have used to have their employer deal with their concerns.

Prior to 1950 No Voice

1950-65 Right to Address the Board of Trustees

Winton Act - "The professional answer to collective bargaining" provided for:

- **Proportional Representation of Organizations**
- **CEC - Certificated Employees Council**
 - **Non-members unrepresented**
 - **"Meet & Confer"**
 - **Written or verbal agreement were not required**

1975 The professional pendulum swung to provide all school employees the right to bargain

1975-Present The "Rodda Act," provided for:

- **Defined units for representation**
- **Exclusive Representation for units**
- **PERB to oversee implementation**
- **Right to bargain binding contract**
- **Binding Arbitration permitted**
- **Impasse procedure**



The law generally places the final say on most issues of import to our members in the hands of the district school trustees. However, when the legislature passed the EERA, the relationship between Districts and employees changed forever. The right of management to make the "RULES" without regard to the opinion of its staff came to a screeching halt. **It must be remembered that employee rights are negotiated away from management -- they don't just happen.** These rights are codified into a formal contract covering the wages, hours, and working conditions of the employees in a school district. These agreements are only as comprehensive as the Association has the power and stamina to negotiate. Once negotiated it is the Associations responsibility to insure Management follows its bilateral agreements. That's where the **GRIEVANCE PROCEDURE** comes in.

NEGOTIATIONS/GRIEVANCES

The negotiated contract is legally binding on the parties and can be enforced. In the absence of a binding arbitration clause, the contract can be enforced through the Public Employment Relations Board (PERB) as an "Unfair Practice" and/or the courts as a "Breach of Contract."

Every grievance filed not only helps define the contractual language, it also has an impact on the subsequent bargaining process. It is nearly impossible to make needed improvements in the contract if there have been no grievances filed concerning the specific language. Management's pat response will be: "It's worked well up to now, why change it?"

DON'T JUDGE – DEFEND



Along with the right to serve as the **"Exclusive Representative"** comes the duty and responsibility to represent all members of the bargaining unit in a fair and impartial manner. The "Duty of Fair representation" (DFR) is the most important concept that an Association Representative (AR) must understand. **The role of an employee organization is not to put its members on trial and judge them, but to defend and protect them from management that has all the power simply because it's Management.**

Every bargaining unit member represented by the Association is very much an employee. The School Board, is free, unless limited by the bargained contract, to hire, fire, assign, transfer, promote, evaluate, discipline and establish other conditions of employment for the employees. **A chapter should not put an employee in double jeopardy by imposing yet another threat on his/her security by conducting a "study" before agreeing to assist the employee who has to face Management.**

Members deserve and pay dues to be protected, not tried by their organization. **They deserve an "Advocate."** Self assured, confident employees, not cautious toadies build a healthy organization. Inquisitions by self appointed guardians of "professionalism" assure the dominance of sycophants and incompetents.

Management can take care of itself. **When the Association takes on Management's role it does so at the peril of its members.** Only employees can file a grievance, management cannot. Management has the inherent power to obligate. Employees however, thanks to collective bargaining, have the right to complain, file a grievance and, if no settlement is reached, go to arbitration for relief. Confusing the roles stifles employee rights and causes wounds to fester and if left long enough kill the organization.

CAUTION: MEMBER vs. MEMBER



If a member has a complaint against another member, it is not the Association's business to resolve it unless it can be turned into a complaint against management. Even though a conscientious Rep may try to mediate the dispute informally, remember that there is no grievance if management cannot be made accountable for its resolution. The Association is an employee organization, not a counseling service. (**See appendix: Union Code of Conduct**)

DUTY OF FAIR REPRESENTATION

"The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit." *Government Code 3544.9*

GENERAL DUTY OF FAIR REPRESENTATION

Application of the general duty of fair representation to specific situations has resulted in the development of the following specific duties that a union owes to all unit employees:

1. **Duty** to represent all unit employees.
2. **Duty** to negotiate on behalf of all unit employees and consider non-joiner views concerning negotiations.
3. **Duty** to be familiar with the contract.
4. **Duty** to advise unit employees of their legal rights in the context of the contract.
5. **Duty** to process grievance in a non-arbitrary, non-discriminatory and good faith manner.
6. **Duty** to investigate grievances.
7. **Duty** to satisfy contractual time limits.
8. **Duty** to notify a Grievant of union decisions.
9. **Duty** to present a good arbitration case.
10. **Duty** to allow a Grievant to have his/her attorney present at arbitration proceedings.



**FAIR
REPRESENTATION
NOW**

ASSOCIATION'S ROLE

The role of the Association is to train its representatives to listen to the complaint of a member, devise a "best" strategy for securing his/her interest, and set about securing it. **The truth and/or value of a complaint will come out during the grievance process.**

To initiate grievances properly and settle them at the lowest possible level, it is necessary for the Association Representatives to become the first line of defense for the employee.



COMMON GRIEVANCE SOURCES

ADMINISTRATION: Fear of the administrator, lack of knowledge of job requirements, personality conflicts, favoritism, unclear orders without explanation, unjustified criticism, ignoring complaints, breaking promises, inadequate work instructions, use of threats, ignoring or repelling suggestions for work improvement, penalizing worker for conditions beyond his/her control, layoff without notice, ignoring good job performance.

WORKING CONDITIONS: Haphazard planning of work, unguarded work dangers, poor tools or equipment out of order, uncomfortable or unhealthy conditions, excessive rules and regulations, changed work schedules.

COMPENSATION: Basic pay out of line, unequal pay for same jobs, failure to promote when eligible, unexplained pay shortages, failure to review or explain lack of employee progress.

CHANGE: Is a prolific breeder of grievances. Changes in policies, rules, methods, equipment, processes, practices, wage plans, work assignments, etc. Any change, which has an impact on people, should be a "signal" for the possibility of grievances.

PRESSURE: Is another common source of grievance. Pressure for production, for quality, for cost reduction, for efficiency. When the employer puts pressure on people for any reason, this is a potential cause of grievances.

IGNORANCE: Is often the cause for grievances. Ignorance of the employer's reasons for decisions or actions which have an impact on people. Ignorance of the real need or necessity for decisions or actions or of the eventual benefits or advantages, or of the real impact on those who will be affected. Whenever people are "in the dark" on a management decision or action which will have an impact of them, there is a source of trouble.

INCOMPATIBILITY: Which simply means the inability of some people to get along with each other. The absence of cooperation between people, and the presence of friction between them, can and often does breed grievances. So, incompatibility is a definite "signal" for potential problems.



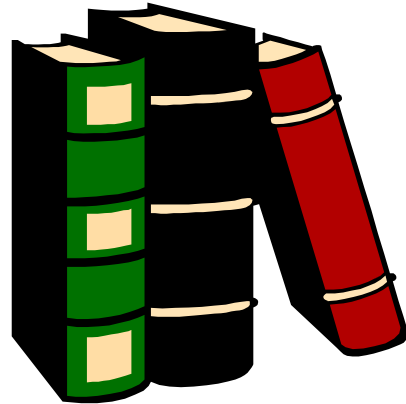
ALTERNATIVES TO GRIEVANCE

STATE

- Education Code
- Title V - Uniform Complaint
- Fair Employment & Housing Act
- Equal Pay Act
- Family Rights Act
- Labor Code

FEDERAL

- Family Medical Leave Act
- Americans with Disabilities Act
- Title VII of the 1964 Civil Rights Act
- COBRA Regulations



Discrimination or Harassment can be based on:

- Race
- Age (over 40)
- Ancestry/National Origin
- Gender
- Religion
- Disability
- Marital Status
- Sexual Orientation
- Medical Condition

Contact for the enforcement:

- CA Department of Fair Employment & Housing
- CA Department of Industrial Relations
- Cal/OSHA
- CA Employment Development Department
- CA Labor Commissioner
- U.S. Equal Employment Opportunity Commission
- U.S. Department of Labor

Look for additional protections in the following areas:

- Safe/Healthy Workplace
- Threats, Violence & Vandalism
- Sexual Harassment
- Participation in political activities
- Voluntary participation in drug rehabilitation
- Complaints about safety/health concerns
- Refusal to perform dangerous work

WHAT IS THE GRIEVANCE PROCEDURE?

1. **What is the definition of a grievance?**
2. **Does it have exclusions? If so, what are they?**
3. **Are employees protected from reprisals?**
4. **Who may present a grievance? May a group present a grievance?**
5. **May the Association grieve?**
6. **Is there a record kept of proceedings and outcomes? Is so, where is it kept?**
7. **Who pays for expenses involved in carrying out procedures such as arbitration?**
8. **How is confidentiality protected?**
9. **Is the administration required to cooperate in providing facilities and official records?**



THE PROCESS

GET THE FACTS: When a unit member comes to you with an alleged grievance, take time to get the facts. If there is not adequate time at that instant, schedule a time and place that will permit confidentiality and a thorough review. A member will not usually lie to you, although it has and will happen. Human nature will cause their story to be slanted. Therefore do not be surprised if "Management" has a different perception of what happened. **It is O.K. to investigate the situation by making inquiries of other unit members to check the accuracy of the complaint.**

GET IT IN WRITING: It is always helpful to have the Grievant write down his/her interpretation of what has happened. Have the Grievant formulate what he/she wants as a resolution. In any case, the Association Rep should take notes at the meeting or immediately following for later reference. This will provide background information in case the Association Rep should need the assistance of the Association Grievance Representative (GR) or Primary Contact Staff (PCS). **Facts win arbitrations, not emotions.**

LET THE PROCESS WORK: Don't be the judge of a grievance yourself. **Let the process prove the merits of the grievance.** That's what an arbitrator is paid to do. Your job is to represent the interest of the aggrieved. You may give the member your opinion about the grievance. Should it be handled through the grievance procedure or as a complaint? Use persuasion. **Give the member the benefit of the doubt.**

COMPLAINT EVALUATION: The Association must investigate every complaint, obtain the information needed and make a determination of the most advantageous course to pursue to resolve the grievance. The initial fact-finding phase is conducted by answering the following six questions:

1. **WHO:** are the persons involved? are the witnesses? is the administrator in charge? can resolve the grievance? will stand behind the claim?
2. **WHAT:** is the real or imagined complaint? is asserted to have been done or not done? rule, regulation, or policy have been violated? are the areas of the Contract that might apply?
3. **WHEN:** did the incident occur? (Is it within the time limits of the grievance procedure?)
4. **WHERE:** is the violation alleged to have occurred? is the appropriate level to enter the grievance?
5. **WHY:** did it occur? (Is it a result of misunderstanding?) is such an incident grievable under the terms of the contract, board policy or administrative directive?
6. **HOW:** is the Association affected? (Does it have a position regarding the provision violated?) has the member been affected? have such matters been resolved in the past? should this matter be processed?

GRIEVANT INTERVIEW FORM

DATE: _____

Grievant's Name: _____

Position: _____

Site: _____

Work Phone: _____ Home Phone: _____

I. **WHAT** is the complaint? _____

II. **WHO** is involved? _____

Administrator? _____

Witnesses? _____

III. **WHERE** did the incident occur? _____

IV. **WHICH** provisions are impacted? (Cite specific contract Articles and sections) _____

V. **HOW** has the employee been affected? _____

VI. **WHAT remedy** does the employee seek? _____

VII. Does the effected employee want to grieve?	Y	N	
At what level should the grievance be filed?	II	III	IV
Are we within the grievance time lines?	Y	N	
What is the last day that we can file the grievance?			

Comments: _____

NAME OF INTERVIEWER: _____

Work Phone: _____ Home Phone: _____

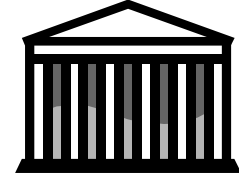


THE WEINGARTEN RULE:

AN EMPLOYEE HAS THE RIGHT TO HAVE A UNION REPRESENTATIVE AT A MEETING WITH THE EMPLOYER IF HE OR SHE HAS A REASONABLE EXPECTATION THAT DISCIPLINE MAY RESULT.

This is a private sector rule that has been made applicable to Public School employees under the EERA. (See *Redwood CCD v. PERB* (1984) 159 Cal.App.3d 617)

THE COURT'S GUIDELINES



- 1. The employee must request the representative.** The right arises only in situations where the employee requests representation. The employee may and will forfeit this right if he/she goes ahead and meets with management without an Association Representative.
- 2. There must be a reasonable belief that discipline will result from the investigatory meeting.** Regular "run-of-the-mill" conversations with management such as review of job requirements or training will not be covered. However the right to representation exists even in cases where no discipline does result from the interview. The right to representation is based on the reasonable belief of the employee, not anyone else in the situation.
- 3. The employer is not required to interview the employee.** The employer may decide not to interview the employee, if the employee requests the presence of a union steward, but may continue the investigation. The employer does not have to justify his/her refusal to allow union representation. The employer is free to carry on the inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that may be derived from one. If the employee refuses to be interviewed without his/her Rep, the employer would then be free to act on the basis of information obtained from other sources.

Though this appears to leave the union and employee a choice to make, there is, in fact, nothing to be gained by meeting with management without one's union representative. An employer who is serious about resolving a problem should welcome a union's participation. The choice, then, remains with the employer.

- 4. The employer has no duty to bargain with the union representative at an investigatory interview.** The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.

INSUBORDINATION

DEFINITION: Insubordination is defined in Black's Law Dictionary as "State of being insubordinate; disobedience to constituted authority. **Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer.**" Webster defines insubordinate as "not submitting to authority, rebellious."

IT CAN GET YOU FIRED! Insubordination is one of the major contributing factors in many employee dismissals and is one of the easiest charges to prove. However, it is a concept that is misunderstood by many employees and as a result they place themselves in the position of being insubordinate. In order to avoid this hazard, a thorough understanding of the concept is necessary.

REMEMBER WHO'S BOSS! First, it is important to understand that the principal or immediate supervisor has some management rights simply because he or she is the "boss". Any principal or immediate supervisor has the right to exert leadership, to direct the institutional operations, to enforce rules, policies, reasonable orders and directions so long as they conform to the contract and are clear and unambiguous, not injurious to your health, applied uniformly, and justly administered.

RULE # 1: The best rule to follow in regards to insubordination is "**Don't be.**"

WORK, THEN GRIEVE RULE: If a worker at your site comes to you and questions a directive issued by the immediate supervisor or principal, advise him or her to discuss the objections with the principal. If the principal insists that the order be obeyed, advise the member to comply unless it is a threat to the health or safety of the staff member or students. Then file a grievance. **This is the "Work, then Grieve" rule.**



GUIDELINES FOR AN ADMINISTRATIVE MEETING

1. Be cordial, business as usual, and don't feel out of place. You have an official role. You should expect everything to be conducted in a professional manner. **Don't get emotional.**
2. Do advise the administrator that **you are there to assist in clarifying the issues** with the purpose of seeking a resolution of the situation at this level of the grievance procedure.
3. Sit next to the employee or at an angle next to the employee which will enable you to observe both the administrator(s) and the employee, but where the dialogue with the employee is also to you. **Be within touching distance of the employee.**
4. **Listen** carefully, using a great deal of eye contact - make your presence felt.
5. Take notes, but not too copiously; get a "feeling" of what is happening. Place on the record direct factual statements or accusation. Don't write too much of the employee's response. **The employee doesn't have to respond to any thing and probably shouldn't.** You both should only be asking questions and seeking clarifications. Make note of the time, place, those present and their titles, and when the meeting ends.
6. **Ask** for copies of any documentation shown or referenced.
7. Normally at this first meeting, the representative does not need to present a defense. Dialogue should be limited to questions and paraphrases. The representative may need to nudge the employee or state to the administrator, "We will have to take it under advisement," or "Give us time to think about it," or "We will get back to you on this issue." **Nudging the employee is primarily to have the person keep quiet** and not make a direct response. The only direct response should be denial --"No, that is not true."
8. **Don't be defensive.** The objective is to find out as much as possible about the situation and what the intent of the administrator is at the time and whether the issue can be settled.
9. **SILENCE IS GOLDEN.** Don't feel the pressure to respond or to say something when there is a void in the conversation or when you've been asked a question and don't know how to respond. You can always say you need to think about it longer, seek advice or ask "What is the reason for the question?"



The Informal Meeting

1. Be sure it is clear that the meeting is a grievance meeting at the informal level and that the Association is the grievant.
2. State the facts of the grievance.
3. When did the grievance occur?
4. Identify the specific contract provision(s) violated.
5. Specify the relief desired.
6. Ask for a response or arrange for a response.

PRESENTING THE GRIEVANCE

MAINTAIN A UNITED POSITION: Don't go it alone. **Take the effected employee along with you.** It prevents getting caught "holding the bag."

KNOW YOUR FACTS -- BE CONFIDENT: Don't try to outsmart the immediate supervisor and don't anticipate being outsmarted or outwitted. Don't carry a chip on your shoulder. Know your contract, the rights under it and stick to them. State the facts plainly. Avoid opinions or hearsay evidence. Grievances are lost without facts to support it. Rarely does the actual presentation of the grievance win. **It takes facts.**

STICK TO THE POINT -- BE BUSINESSLIKE: As discussion progresses on a grievance, the Immediate Supervisor may try to side track the real issue and lead you into a discussion of irrelevant issues, or inject additional complaints against the employee. **Insist on discussing the issue raised by that grievance only ... nothing else.**

SETTLE THE GRIEVANCE AT THE FIRST STEP: It is most desirable to have the grievance settled at the first step. This prevents the bogging down of grievance machinery. The grievance committee may then devote more time and effort to problems of general concern to all the members. Listen to what the administration is saying and offering. **Do not talk your way out of a good settlement.** Do not try to prove your case once it is won.

TAKE A POSITIVE POSITION – DON'T BE DEFENSIVE: Don't be timid or convey the feeling to the Immediate Supervisor that you are presenting the grievance solely because it is an obligation on your part. Avoid being apologetic. Impress on the supervisor that the grievance has merit and should receive equable treatment. You have the right to be there. **The law and custom place you at an equal footing with the supervisor.**

BURDEN OF PROOF IS ON IMMEDIATE SUPERVISOR Let the Immediate Supervisor try to justify and prove that the action they have taken is correct. You don't have to try to show the supervisor where he/she is wrong! Let the supervisor, instead, carry the burden of showing why they are right. Try not to place the Immediate Supervisor in a position whereby he/she can't retreat without a great deal of embarrassment. If possible, leave the door open for an easy way out. Permit him/her to save face. Let the Immediate Supervisor do most of the talking. **A good rule of thumb is that he/she should do 75% of the talking and you 25%.** Don't respond immediately to every statement. If you have doubts on how to continue, call a caucus and talk it over with the Grievant.



WRITING IT UP

The easiest to explain but most difficult to accomplish is the actual writing up of a grievance. It is the bugaboo of many local associations and its leadership.

There are two basic rules of thumb in writing up a grievance.

K.I.S.S. METHOD

The secret is to keep it simple. Briefly state what has transpired.

Statement of Occurrence:

The District violated Article XII, Safety and Article III, Nondiscrimination when the Immediate Supervisor failed to replace the light in the Woman's Restroom.

Remedy Requested:

Adherence to the contract. Replace the bulb.

It is not necessary to write a ten (10) page dissertation on the subject. The relevant facts can be brought out at the informal or formal level.

DO assert violations of every Article and/or Section that have even the remotest relevancy.



YOU CAN'T LOSE A GRIEVANCE AT THE FIRST LEVELS

You may not win or you may be persuaded that it has no merit, but you can always appeal the Immediate Supervisor's decision.

MANAGING GRIEVANCES

There are several important aspects of grievance management. The Association must always be aware of its duty of fair representation with regard to grievances and contract enforcement. The chapter must also constantly be in touch with the sites to surface grievances. Here are some things to keep in mind as you monitor the grievances in your chapter:

- Establish a numbering system for all grievances. Make sure that all grievances contain the appropriate dates, contract article and site code.
- Establish a central location for the filing and maintenance of all grievance documents. Don't allow grievances to be floating around the District without the Association's knowledge.
- **Keep a large supply of blank grievance forms** and make them available to the members.
- Be sure that the Grievance committee monitors all active grievances for time lines.
- Decide who will be ultimately responsible for the managing of the paperwork. (Office secretary, Grievance Chair)
- **Publish the outcomes of grievances filed in your chapter newsletter.** Maintain confidentiality, but let the members know that the Association is actively enforcing the Contract.



GRIEVANCE MEDIATION

Mediation as a means of resolving bargaining impasses is well known. However, the California State Medication and Conciliation Service also provides assistance using mediation to resolve employee grievances. Here is their description of the low-cost services they provide:

With the average cost of arbitration beginning at \$3000 and seven months between the request for a panel from AAA and the award, it's no wonder that grievance mediation is being resurrected. One significant difference in grievance mediation is that the grievance is present and must agree to accept the outcome.

Grievance mediation is quick and inexpensive. Several cases generally can be handled in a single one-day session. Preparation and presentation time for all concerned is substantially reduced. No pre - or post-hearing briefs are required, and there are no court reporters, transcripts, or lengthy written awards. It provides a framework for resolving grievances in which the parties do not become polarized.

If saving time and money is not sufficiently persuasive, then the prospect of better remedies ought to be considered. Through mediation, creative remedies can be fashioned that would be unlikely to result from arbitration. Such remedies can provide creative solutions that satisfy the grievance's need for recognition, do not otherwise violate the agreement, and settle the grievance.

The presence of a state mediator helps the employer and the union search for a mutually acceptable resolution, and provides reassurance to the Grievant that his or her issue is taken seriously and dealt with fairly. If the parties reach agreement through this process, the Grievant should sign the agreement to indicate acceptance. This takes care of "duty of fair representation."

Should the grievance medication process fail to produce an agreement, the last resort the grievance mediator is to provide the parties with a private, informal, non-binding assessment of how most arbitrators would decide the case. Some parties will want to continue with their desire to have their grievance heard before an arbitrator; however, this assessment frequently will induce a settlement of the grievance.

It is easy to see how grievance mediation helps assure that only quality cases reach the arbitration level. Yet, any agreement reached in mediation is far better than an award that is imposed by a third party. The Grievant and the employer also may agree that the settlement is non-precedent setting. This relieves the parties of political pressure on any similar situation in the future.

THE DECISION TO ARBITRATE: THE GRIEVABILITY OF CONTRACT LANGUAGE



DETERMINING THE APPROPRIATENESS FOR ARBITRATION

1. **SCOPE:** Is the grievance within the scope of the collective bargaining agreement?
2. **TIMELINESS:** Is it timely (within in the timelines of the grievance procedure)?
3. **VALIDITY:** How valid is our position? Do we have credible evidence and arguments to support our position?
4. **APPROPRIATENESS:** Is the matter more appropriately for negotiations?
5. **EFFECT:** What is the effect of win? A loss?
6. **DFR:** Is there a possible claim of breach of fair representation?
7. **FEASIBILITY:** What feasible settlement is possible?
8. **JUSTIFICATION:** Can the case be justified for organizational, morale, or public relation reasons?
9. **COST:** Is the cost of the arbitration worth the economic and political gains sought?

RIGHTS ARBITRATION

Grievance arbitration is often referred to as rights arbitration. This term describes the concept that arbitration of grievances enables the contract rights of the employees to be determined. As a general rule there is no need for interpretation unless the agreement is ambiguous. Most persons experienced in collective bargaining recognize the collective bargaining agreement as a comprehensive, but necessarily flexible instrument which governs the relations between the parties.

The negotiator writing proposals or counter proposals should be cognizant of the following criteria or standards used by arbitrators for interpreting contract language:

1. **LANGUAGE WHICH IS CLEAR AND UNAMBIGUOUS:** If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties.
2. **INTENT OF THE PARTIES:** In determining the intent of the parties, inquiry by the arbitrator may be made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can possibly be read into the language. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.
3. **NORMAL AND TECHNICAL USAGE:** Arbitrators give words their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense, or that the parties intended some special colloquial meaning. For instance, the word, "may" has been given its ordinary "permissive" meaning in absence of strong evidence that a mandatory meaning was intended.
4. **AGREEMENT TO BE CONSTRUED AS A WHOLE:** The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties. And to interpret the meaning of the questioned word or part with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Ordinarily, all words and clauses used in an agreement will be given effect.
5. **TO EXPRESS ONE THING IS TO EXCLUDE ANOTHER:** Arbitrators frequently apply the principle; to expressly state certain exceptions indicates there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees. Thus the phrase, "included but not limited to," became popular with labor negotiators.
6. **DOCTRINE OF "E JUSDEM GENERIS":** Where general words follow an enumeration of specific terms the general words will be interpreted to include or cover only things of the same general nature or class as those enumerated unless it is shown that a wider sense was intended.

7. **NO CONSIDERATION TO COMPROMISE OFFERS:** In the interpretation of an ambiguous agreement consideration will be given to compromise offers or to concessions offered by one party and rejected by the other during negotiations which preceded arbitration.
8. **EXPERIENCE AND TRAINING OF NEGOTIATORS:** Whether or not an arbitrator will apply a strict interpretation to an ambiguous agreement may, to some extent, depend upon the training and experience of the negotiators. If the arbitrator finds that they were laymen untrained in the precise use of words, he/she may refuse to apply a strict construction.
9. **CUSTOM AND PAST PRACTICE OF THE PARTIES:** One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of custom or past practice of the parties. Reference to custom and practice of the arena in which the parties operate may shed light upon the unintended meaning of an ambiguous provision.
10. **INTERPRET LANGUAGE AGAINST PARTY SELECTING:** It is incumbent upon the proponent of a contract provision either to explain what is contemplated or to use language which does not leave the matter in doubt. Where doubt exists, any ambiguity not removed by any other rule on interpretation may be removed by construing the ambiguous language against the party who proposed it.
11. **REASON AND EQUITY:** It is widely recognized that if a contract is clear and unambiguous it must be applied in accordance with its terms despite the equities that may be present on either side. Arbitrators strive where possible, however, to give ambiguous language a construction which is reasonable and equitable to both parties rather than one which would give one party an unfair and unreasonable advantage.



GRIEVANCE COMMITTEE STRUCTURES

An Association must have appropriate structures in order to carry out essential grievance functions. Adaptations for size of the Association have to be made, but all leaders with grievance functions should be trained. It is also advisable to have staggered multi-year terms for grievance committee members to provide for continuity.

DUTIES AND RESPONSIBILITIES

PRESIDENT:

- Oversees the establishment and operation of the grievance program
- Appoints the grievance chairperson
- Appoints the grievance committee (approximately five members, including the chairperson)
- Coordinates grievance program with Executive Board and governance body

EXECUTIVE BOARD:

- Advises President on the appointment of grievance committee
- Aids in establishing and operating grievance program
- Assists in developing or revising by-laws pertaining to grievance program
- Establishes channel for appealing a decision not to arbitrate
- Makes decision on whether a case goes to arbitration

GOVERNANCE BODY:

- Adopts a policy statement on the grievance program
- Adopts revised by-laws as needed
- Adopts budget for grievance processing

SITE GRIEVANCE REPRESENTATIVE:

- Knows contract, policies, rules and regulations
- Surfaces grievances
- Represents members in grievance processing at Informal level
- Consult with the grievance committee
- Represents members in grievance processing at higher levels upon request
- Starts grievance filing and documentation
- Provides guidance for members with potential grievances



GRIEVANCE COMMITTEE:

- Operates Association grievance program
- Represents and advises members in grievance processing
- Recommends grievance processing budget
- Aids in securing site grievance representatives
- Evaluates potential grievances
- Counsels and advises members with problems
- Develops Association position on grievances
- Advises site grievance reps regarding Level 1 grievance filing and processing
- Represents Association at grievance meetings
- Makes recommendations on whether a case goes to arbitration
- Utilizes staff and other resources as appropriate
- Develops, secures and maintains grievance forms and records
- Observes timelines in processing grievances
- Helps in selection of arbitrators for the Association
- Works with staff in handling the case
- Prepares appropriate grievance publicity
- Has thorough knowledge of contract, policies, laws and regulations
- Assists in the development, negotiation and refinement of the grievance policy
- Make recommendations to bargaining team on issues to be bargained

STAFF – PRIMARY CONTACT STAFF – CHAPTER CONSULTANT:

- Advises and counsels members and representatives at all phases of grievance processes
- Represents members and Association in meetings where appropriate and requested.
- Communicates with California State Mediation & Conciliation Service (CSMCS) or other agencies regarding mediation or arbitration
- Represents members and Association in mediation and arbitration hearings
- Trains Association leaders and grievance committees in grievance processing
- Provides resources of CTA and NEA related to grievance processing.



CHAPTER GOVERNANCE DOCUMENTS

In addition to negotiated contract language regarding the Association's grievance procedure, a chapter should have clearly stated by-laws and standing rules, which govern the grievance process. The composition of the grievance committee and their duties, and the submission of grievances to arbitration, including an appeal process, should be addressed.

BY-LAWS:

The by-laws are a blueprint for the Association's policy-making machinery and the related organizational structure of the chapter. Custody of the by-laws is usually delegated to the Representative Council except as may be directed by the active membership.

STANDING RULES:

The standing rules are a means by which the daily organizational business of the Association is accomplished. They can provide the additional procedures and information needed to ensure proper interpretation of the by-laws. Custody of the standing rules is usually delegated to the Representative Council except as may be directed by the active membership.

SAMPLE LANGUAGE FOR ASSOCIATION BY-LAWS

STANDING COMMITTEES

GENERAL

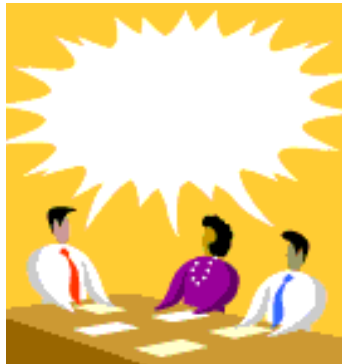
1. Standing committees are to be functional with respect to the executive responsibilities assigned to the Executive Board by the Representative Council.
2. Such committees are to be designed and constituted to assist the Executive Board in the accomplishment of the objectives or programs of the Association.
3. The number, composition, qualification of membership, terms of office, specific powers and duties, and specific methods for selection of such standing committees, not otherwise stated in these by-laws, shall be determined by the Representative Council.
4. Standing committees shall meet as deemed necessary.

DUTIES OF CHAIRPERSONS

1. Serve as ex-officio members of the Representative Council.
2. Report as necessary to the Executive Board and the Representative Council.
3. Each committee shall submit periodic reports to the Executive Board and the Representative Council.
4. Serve as resource persons in the areas of their respective responsibilities when the bargaining team is considering issues within their committee's purview.

COMMITTEES AND THEIR DUTIES

1. There shall be the following standing committees: Budget Committee, Contract Committee, **Grievance Committee**, Membership Committee, Political Action Committee, WHO Committee, and Ethnic and Minority Affairs Committee.
2. The **Grievance Committee** shall be appointed by the President and be responsible for implementing the Association's grievance program. Committee members shall receive training in grievance procedures to retain membership on the Committee.
3. It shall:
 - a. Under the direction of the President, provide assistance to representatives in processing grievances.
 - b. Represent the Association at grievance proceedings whenever a member of a bargaining unit is processing a grievance.
 - c. Make recommendations to the Executive board regarding the budget for grievance processing and arbitration costs, and shall keep the Executive Board informed regarding the operations of the grievance program.
 - d. Consider carefully the merits of each grievance and make recommendations to the Executive Board regarding the submission of a grievance to arbitration.



SAMPLE LANGUAGE FOR ASSOCIATION STANDING RULES

GRIEVANCES:

A unit member desiring to file a grievance should initially review the procedures outlined in the Master Agreement to insure that the timelines specified therein are being followed. He/she should immediately contact the site grievance representative. Upon request, the Association shall provide continual assistance to unit members throughout the pre-arbitration levels of the grievance procedure.

The site grievance representative may recommend the Grievant meet with a member of the grievance committee or with the entire committee if deemed appropriate for further guidance.

If the grievance is not settled prior to the arbitration step, the Grievant may request in writing that the Association takes the grievance to arbitration.

The grievance committee may be asked by the Executive Board to make a recommendation on whether or not to have the grievance proceed to arbitration.

ARBITRATIONS

All decisions to take grievances recommended for arbitration reside with the Executive Board. If a case is presented to the Executive Board and the Board votes against taking the case to arbitration, the unit member (Grievant) may submit a written request for an appeal.

The appeal process will include the unit member or a designee presenting the grievance to the Representative Council, in Executive session. The rationale for the Executive Board's decision will also be presented. A majority vote of the Representative Council will determine if the grievance is moved, *on appeal*, to arbitration.



UNION CODE OF CONDUCT



I will not criticize any union colleague except to the individual directly.

If any union colleague is being criticized in my presence, I will confront the criticism and ask that it stop.

I will not participate in any conversations with management that criticize, or negatively speculate about, any union colleague.

I will settle my differences with colleagues within my union.

I will engage in debate, offer others every opportunity for debate and respect minority viewpoints, but I will observe and support the majority mandate of my union.

Grievance Procedure Checklist:

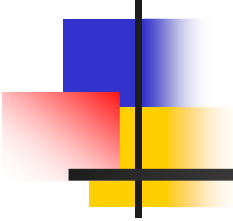
The grievance procedure is the heart of the agreement. It is the article which provides the enforcement mechanism for all other articles of the agreement.

This provision sets forth a clearly defined procedure for resolving disputes arising out of a violation, misinterpretation or misapplication of a provision of the agreement or of a board policy, rule, practice or regulation, including the right to fair and equitable treatment. It is important to allow the process to play out in an equitable manner. Payment for arbitration should be negotiated and should never include language that would allow the outcome to determine which side will pay.

As an optimum the grievance procedure contains the following elements:

1. Definitions
 - a. A grievance
 - b. A grievant
 - c. A day
2. Minimum number of steps:
 - a. Immediate supervisor
 - b. Superintendent (or designee)
 - c. Mediation using the State Mediation and Conciliation Service
 - d. Binding arbitration by a neutral third party
3. Right of the Association to file a grievance
4. Right to Association representation at all levels
5. Reasonable time limits between steps. (Define steps)
6. Arbitrator selected using the procedures of the American Arbitration Association
7. The arbitration proceedings conducted under the rules of the American Arbitration Association
8. Process for dealing with the grievability or threshold problems
9. A separate file for grievance matters
10. Association determination of what grievances are submitted to arbitration
11. Cost of arbitration equally shared by the Association and the District
12. Released time for grievance processing
13. Class action or group grievances handled like a single grievance
14. Use of expedited arbitration
15. Grievance forms developed by the Association. Forms printed by the District and made available via the Association and the District

[illegible]



High Desert Service Center Las Vegas, NV Nov. 17, 2012

Grievance Processing

Susana Salas, Regional UniServ Staff
Ontario RRC

Andrew Oman, Regional UniServ Staff
Santa Maria RRC

Morgan Brown, Executive Director
Associated Pomona Teachers



To get started:

- Find someone you do not know
- Introduce yourself
- Finish this sentence, “In our chapter, grievances....(up to 10 words)”



Topics to be discussed:

- What are you most concerned about?
 - (Ten words or less)
- Before the grievance
- Your responsibilities
- What to do and to avoid



Be ready to defend the CBA!

- Know your CBA, especially the grievance procedure.
- Help members know the CBA.
- Develop an environment where members bring issues to the Union.
- Remember connection between grievance and negotiation. (page 2)



Member vs. Member

- The Association enforces the CBA.
- The CBA does not govern relationships between members.
- In some cases, Member vs. Member is really Association v. Management.
- Be careful – it is usually a no-win situation. (page 3)



Duty of Fair Representation

“The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.”

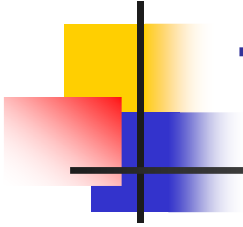
-- Government Code 3544.9 (page 4)



Duty of Fair Representation

- True or False:
 - The Association must seek out the views of agency fee payers?
 - The Association must investigate a grievance that is clearly “silly.”
 - If the site representative is sick, the contract timelines will be extended.
 - All grievances must go to arbitration.

Where do grievances come from?





What if...

Article 5: Working Days and Hours

...

5.2.1 Lunch Time. All bargaining unit members shall have forty-five (45) minutes of duty free lunch each day, except when inclement weather or an emergency situation requires it to be reduced to thirty (30) minutes.



What is the procedure?

- Each CBA is different – know yours!
- To be prepared, be able to answer the questions on Page 8.
- Process every grievance (page 9)
- Keep track of the facts (page 10)
- **KNOW YOUR TIMELINES!**



Weingarten Rights

An employee has the right to have a union representative at a meeting with the employer if he or she has a reasonable expectation that discipline may result. (Page 11)



Insubordination

- In a word – Don't!
- Being insubordinate can get you fired.
- Work – then grieve. (page 12)



An Administrative Meeting

- Remember, when you are representing a member at an administrative meeting, you are an equal. Stay professional, not emotional. (page 13)



The “Informal”

- Most CBAs call for an attempt to resolve the grievance informally.
- Many grievances can be resolved here.
- Be aware of timelines!!! (page 14)



The “Formal”

- Keep it simple and clear.
- Look for any and all potential violations.
- Again, watch the timelines! (page 16)



Mediation

- Inexpensive (usually free)
- Could lead to resolution
- Offers in mediation are not enforceable beyond mediation. (page 18)



Arbitration

- Expensive
- Final
- Could permanently change the interpretation of language
- Should be considered carefully (page 19)



More details

- Committee structures
- Sample language
- Union Code of Conduct
- Grievance procedure checklist



Questions?

- Thank you for your attention!

Evaluating A Grievance

In evaluating a grievance, the Association considers criteria such as these:

- 1. What rule, regulation, law, policy or practice has been violated?**
- 2. Does it involve a violation of past practice?**
- 3. Does it fall within the definition and time limits of a grievance as contained in the grievance policy?**
- 4. Does it have serious implications for other members and does it involve an import rule, regulation or working condition? Is it precedential or incidental?**
- 5. Can sufficient documentation be obtained in support of the member's case?**
- 6. Are serious political considerations involved?**
- 7. What are the probable consequences for the Association if the grievance is pressed to a conclusion, or not supported?**
- 8. Does the Association have the financial resources to see it through?**
- 9. Can the matter be resolved without using the grievance procedure?**
- 10. How will the grievance have to be pressed to the final step of the grievance procedure?**
- 11. Are the means available to establish the intent of the policy under dispute?**
- 12. Will the grievance have to be pressed to the final step of the grievance procedure?**
- 13. Has the administration used just cause?**
- 14. Has a similar grievance been resolved in the past on the problem at hand? If so, how?**
- 15. Will it be advisable to have expert assistance from staff or an attorney in handling the grievance? Will a stenographic record be advisable?**
- 16. Would the remedy be worth the time, effort and money expended in attempting to resolve the grievance?**

Perception and Language

Read the following situational prompt and answer the questions below by circling the correct answer. Circle T if the statement is true and F if the statement is false.

A businessman had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. The contents of the cash register were scooped up, and the man sped away. A member of the police force was notified promptly.

1. A man appeared after the owner had turned off his store lights. T F
2. The robber was a man. T F
3. The man did not demand money. T F
4. The man who opened the cash register was the owner. T F
5. The store-owner scooped up the contents of the cash register and ran away. T F
6. Someone opened a cash register. T F
7. After the man who demanded the money scooped up the contents of the cash register, he ran away. T F
8. While the cash register contained money, the story does not state how much. T F
9. The robber demanded money of the owner. T F
10. The story concerns a series of events in which only three persons are referred to: the owner of the store, a man who demanded money, and a member of the police force. T F
11. The following events were included in the story: someone demanded money, a cash register was opened, its contents were scooped up, and a man dashed out of the store. T F

Perception and Language – Answer Sheet

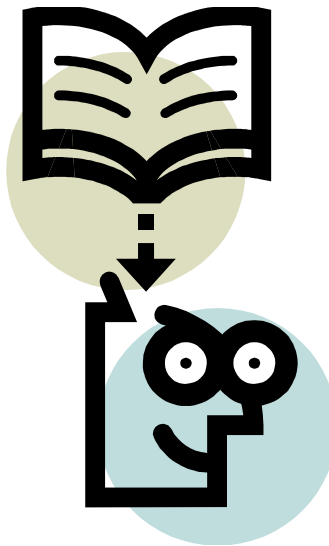
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IGNORANCE IS NO EXCUSE

Along with all employment situations there are usually certain rules which the employees are expected to follow. If the employment situation is governed by a master agreement or board policies, those rules must fall within the structure set up by the agreement or policies. Therefore, the rules must be reasonable. A rule related to the employment status and conditions of a teacher cannot be arbitrary, capricious, or violate any constitutional rights. In addition, the teachers must have ample opportunity to know of the rule. If teachers are informed of a new and unreasonable rule, that is the time to grieve.



Perception and Language

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