TOP FIVE MISTAKES THE OTHER SIDE MAKES HANDLING GRIEVANCES

HAVE THE PARTIES EXHAUSTED DISCUSSIONS AND ARRIVED AT THE CONCLUSION THAT THE GRIEVANCE MUST PROCEED TO ARBITRATION?

UPPER PENINSULA LABOR MANAGEMENT COUNCIL

2016 ANNUAL CONFERENCE

March 3, 2016

Presented by:

Gary D. Patterson, B.A., J.D.
Masud Labor Law Group

[This presentation and materials are for educational and instructional purposes only. The information presented should not be considered or relied upon as the legal opinion of the presenter or that of Masud Labor Law Group. The views expressed in this paper are the views of the author and do not necessarily reflect the views of all members of the Masud Labor Law Group.]

INTRODUCTION:
GRIEVANCES AS AN EXTENSION OF COLLECTIVE BARGAINING

To begin a discussion of the top five mistakes the other side makes in handling grievances, I begin with the acknowledgement that grievances are fundamentally an extension of the bargaining process. In today's labor relations environment every collective bargaining agreement has a grievance procedure and almost all grievance procedures include final and binding arbitration as the final step of the procedure. As a result, the parties not only recognize that they may have disagreements, but they set forth a formal structure for resolving their disagreements.

The grievance procedure is a recognition that the parties may not always agree on the interpretation or the application of the provisions the parties themselves have agreed to. As a result, the parties agree that their disputes will be resolved through a process that involves discussions at several steps of the procedure. Each step necessarily progresses through consideration by individuals who represent higher levels of authority.

Normally, the procedure includes a requirement for discussion at all levels of the procedure as well as a timeline for when the discussion will take place and a timeframe for both answering the grievance and advancing the grievance to the next step for additional consideration and discussion. In other words, the parties themselves have structured formality into to their procedure for resolving their disputes. The process does not anticipate simply *pro forma* disagreements, rejections and denials. The process anticipates actual discussions (also referred to as negotiations) where the parties attempt to find areas of agreement and disagreement in the same manner that they use when they negotiate the agreement as a whole.

While not really one of the "top five mistakes the other side makes in handling grievances," one mistake frequently made by both sides is the failure or refusal to recognize and embrace the formalities of the grievance procedure. There may be several reasons for this reluctance to really engage in meaningful discussion or negotiations, but the parties have created the structure for a reason. The reason is to first, recognize that they may not always agree; second, to required progressive discussion between individuals who will have greater authority to resolve the case; and third, to assure that the procedure continues to progress without unnecessary or un-agreed upon delays. As a result, the parties must embrace their procedure and use it to fully understand why they have a disagreement and how the disagreement can be resolved to the mutual benefits of both sides.

If the parties themselves cannot reach an agreement to resolve the dispute they each have the ability to request an outside person or arbitrator to resolve the dispute for them. At this stage the parties recognize that their inability to resolve their dispute will result in a third party, someone outside either organization, to resolve the dispute with final and binding effect.

MISTAKE NUMBER ONE: *Failure to Prepare*. No employer or union would enter into the bargaining process over the collective bargaining agreement without extensive preparation. The grievance procedure is no different and should not be approached in a manner that reflects any less preparation. The lack of preparation may be reflected in the fact that the parties skip one or more of the steps in the procedure. Even if skipping a step seems to make sense, the fact that a step is skipped will reflect in lack of preparation at the next step. Fundamentally, the purpose of each step is to engage in discussion and attempt resolution. The only way for there to be a reasonable opportunity to resolve the grievance is to appear at any meeting or hearing with all information available and to engage in discussions that serve to fully explain and understand the issues involved and the facts that are relevant to understanding the issues.

Being fully prepared may be as simple as gathering the information that led to the grievance in the first place. Who was involved? Who are the witnesses? Who is in the best position to explain the meaning of the language being disputed? What did the other side do that resulted in the grievance being filed in the first place? What is the provision of the collective bargaining agreement that was violated? What is the basis for believing that the agreement was violated? When did the violation occur? How was the time of the occurrence established? Where did the violation occur? What was going on at the time of the alleged violation? Are there others who can verify the events? What is the bargaining history and why is the bargaining history relevant to determining whether a contract violation occurred?

MISTAKE NUMBER TWO: *Over Reliance on Past Practice.* Understanding the use of practice and custom and its relevance is clearly important. Custom and practice certainly has a place in the discussions the parties may have over the merits of the grievance. However, the actual impact that past practice may have is almost always limited. Indeed, arbitrators have upheld the use of past practice to help interpret or confirm the interpretation of the agreement. Past practice has also been used to make unwritten, but long standing practices considered as conditions of employment as though they were included in the provisions of the agreement.

Often times though, a party will file a grievance and assert that a one-time event where a bargaining unit member may have been provided a benefit or other consideration establishes the right of all other bargaining unit members to be entitled to the same benefit or consideration. Such an assertion is often time accompanied by a failure to prepare and gather information sufficient to conclude that the past practice has either been extensive and repetitive over an extended period of time and been accepted by both parties as a condition of employment.

Past practice and custom is also typically used in interpreting and applying ambiguous contract language. It seems obvious that contract language that is clear and unambiguous should be interpreted and applied as written. However, if language is ambiguous, consideration of how the language has been applied under similar circumstances in the past is clearly relevant. Citing

Arbitrator Clyde W. Summers' decision in *Standard Bag Corp.*, 45 LA 1149,1151 (1965), Elkouri and Elkouri noted that the parties need to use caution because, as Arbitrator Summers stated, "In interpreting a collective agreement probably nothing is more capable of constructive use or susceptible to serious abuse as appeals to custom and practice."[1]

MISTAKE NUMBER THREE: *Over Reliance on the Seven Tests of Just Cause*. Arbitrator Carroll R. Daugherty's seven tests of just cause have become almost a standard of presentation in arbitration cases involving discipline and discharge. But even Arbitrator Daugherty referred to the tests as "a set of guidelines or criteria" to determine whether the Arbitrator should substitute his judgement for that of the employer.[2] Arbitrator Daugherty also stated that frequently "The facts are such that the guide lines cannot be applied with precision."[3]

While the "seven test" can be very useful in determining whether an individual has been disciplined or discharged for just cause, the seven tests should be used where they point to a real defect in the other side's decision making (sufficient to allow the arbitrator to conclude that he or she should substitute his or her judgement for that of the employer). I happen to believe that the term "just cause" can be simply stated as whether the employee has been advised of the rule violation or performance deficiency and has been given the opportunity to improve. In other words, if there has been an unmistakable attempt to allow an employee to improve performance and/or behavior, the failure to correct the problem should result in disciplinary action.

Even if we accept that corrective or progressive discipline is appropriate in many cases, it does not always lead to a conclusion that the seven tests should apply in every discipline case. Moreover, there are many situations where progressive discipline would not be appropriate and discharge on the first offense is appropriate. For example, in today's world of nearly daily reports of violence in the workplace or employees being subjected to bullying or other inappropriate abuse, the application of the seven tests may be less relevant.

MISTAKE NUMBER FOUR: *Failure to Accept a Reasonable Compromise*. The grievance process is necessarily a process where the parties are expected to engage in meaningful dialogue and explore ways to resolve the case. The parties should be discussing the case, reviewing the facts and issues and narrowing those issues upon which they disagree. The question often comes down to deciding how to go forward once the parties know what they agree upon and what the parties disagree upon. If they understand the case and agree upon various facts and they agree on what the contract says (perhaps without agreeing to how the contract should be interpreted or applied), the parties should be able to reach an agreement or compromise on how they are going to go forward with a resolution.

In this regard, one of the biggest and most frequent mistakes I see is the failure to compromise or accept what seems to be a recognition of both parties agree upon and what still

remains as an item of disagreement. In many ways this seems to stem from a failure of one party to truly understand the facts or the issues or even the words of the agreement (sounds like *lack of preparation*). They may also not accept the consequences of losing in the long run (that is, if the arbitrator rules against them). In almost every case that I have prevailed in arbitration, I have presented the other side (notably, the union) with an offer of resolution where the union could have avoided arbitration and actually achieved more in the settlement than they did by losing in arbitration. I believe this mistake highlights other mistakes as well. Many times the failure to accept a reasonable compromise stems from a lack of preparation. It also may stem from a failure to truly understand the weaknesses of the case.

MISTAKE NUMBER FIVE: *Failure to be Prepared for Discussion or Hearing.* I am not sure whether I believe this is a mistake or simply one of my "pet peeves." On contract interpretation cases, the burden of proof is on the union. As a result, I do not believe that it is too much to ask that the union be prepared to provide copies of documents to the arbitrator and to the other side. There is nothing more annoying than making everyone wait while the appropriate number of copies are made. The hearing is either delayed or interrupted while everyone is waiting for things to be completed that should have been completed before arriving at the meeting or the hearing. While I would love a process where all of this is taken care of days in advance, that is not usually the case in grievance arbitration. I can say that where the burden of prove is on the employer, such as discipline and discharge cases, I always have sufficient copies for the arbitrator, the union and witnesses.

I would love to walk into a grievance meeting and have the union prepared to present documents it believes supports its case. However, more often than not the union comes in without the necessary documentation or does not have sufficient copies of the documentation it believes is relevant. In addition, I find that the union may show up at a grievance meeting and not even be prepared to discuss the issues or doesn't have a clear understanding of what the issues are. Again the process of preparation (See Mistake Number One) has not been completed.

IN SUMMARY: Be prepared, understand the facts and issues, and develop a theory of the case that increases your chances to prevail. That is, don't over rely on those theories and arguments that are not going to help your case. Be prepared for every discussion on the grievance whether those discussions are taking place at the earliest levels of the grievance procedure or the last step of the procedure. Respect the parties and their positions and respect the process. Nobody wins every case and the only person who says they win every case is the person who hasn't tried enough cases.

---

[1] Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, BNA Books, 1985, page 451.
[2] Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, BNA Books, 1985, page 666, citing Arbitrator Daugherty in *Enterprise Wire Comp.*, 46 LA 359, 362-365 (1966).
[3] *Enterprise Wire Comp.*, 46 LA 359, 362-365 (1966).