

ANALYZING A GRIEVANCE

When faced with objectionable management action of any kind, disciplinary or non-disciplinary, use the following checklist to help you think about the issues involved as thoroughly as possible and decide on an effective strategy for a grievance or other response. Ask for help if you are unsure about what a contract provision means or about how to proceed.

CONSIDER THE FACTS

WHAT IS GOING ON?

What is the story, according to: the grievant? management? witnesses? records?

Have you really listened to and understood all of the relevant points of view?

Have you overlooked any relevant source of facts?

Which of the following is involved?

General discipline?

Insubordination?

Gross misconduct?

Or something management has done (or failed to do) unrelated to discipline?

Are there underlying causes: bad policy? unworkable division of labor? Personal animosity?

WHO IS INVOLVED?

Who are the direct participants?

Has any of them been involved in a similar problem before? Is any of them on probation?

Are there important personality issues involved?

Who is affected, and how?

Who are the witnesses, and what role will they play?

WHAT IS THE RELEVANT TIME FRAME?

When did relevant incidents, exchanges, or conditions occur?

When did management act?

When is your own response due?

CONSIDER THE RELEVANT RULES

Look for relevant provisions in sources of rules that are binding on management:

1. **The collective bargaining agreement** is your most common, and most valuable, source of rights. Know it well, and use it first.
2. **Addenda or side letters** may add to or clarify the CBA.
3. **Policies and administrative directives** of the employer.
4. **Laws and regulations.**
5. **Other contracts.** E.g., your employer's funders may have imposed conditions which can work to your advantage.
6. **Past practices.** These "unwritten contract provisions" can be very useful, but be sure you can prove that the practice has actually been followed for a certain period of time. If past practice is involved, is the contract clear, vague or silent on the point in dispute?
7. **Precedents** from past grievances and, more important, from past arbitrations. Knowing about past rulings is important, whether they are helpful or adverse to your grievance. Prepare to argue that the union's position is more consistent than management's with the precedent(s).

If more than one provision, from one or more of the above sources, applies, ask yourself about the relationship between or among them. Which is a higher source of authority? Which is more recent? Which is more specifically relevant? Which is more helpful? If a provision can be interpreted in more than one way, which way is most reasonable?

ANALYSE MANAGEMENT'S ACTION

With regard to each relevant provision, ask yourself:

- Does it support management's action?
- Does management's action violate it?
- If so, is it a violation by omission? commission? misapplication? misinterpretation?

DISCIPLINARY ACTIONS in general raise additional questions.

WAS THERE PROCEDURAL FAIRNESS?

1. Did the procedure followed constitute a violation?
2. Was the grievant adequately informed of the level of performance or compliance expected, either by direct publication or by consistent enforcement?
3. Was management's charge premature?
 - Was the grievant's alleged infraction something that is obviously punishable?
 - If not, was she adequately warned of the consequences?
4. Conversely, was the discipline more than a reasonable time after the alleged act or omission?
5. *Before* imposing discipline, did management:
 - tell the grievant what rule they charged she had violated and how?
 - give the grievant an opportunity to respond?
 - fully investigate and verify the charge?

WAS THERE JUST CAUSE FOR DISCIPLINE?

1. Was the rule or order allegedly violated reasonably related to efficient and safe operations?
2. Did the stated or the real reason for the discipline constitute a violation?
(e.g. Was it retaliation for exercise of contract rights?) Did the real reason, if different?
3. Did the alleged facts amount to anything?
4. Was management's proof sufficient?
 - If the criminal or reprehensible nature of the alleged misconduct stigmatizes the employee or seriously impairs his chances for future employment, was there proof beyond reasonable doubt? Or was management's proof at least clear and convincing (leaving little room for doubt).
 - In other cases, was there clear and convincing proof? If not, was it a preponderance (showing something was more likely than not) or at least substantial (something that could convince a reasonable person?)
5. Was management's action based on hearsay?
6. Did management over-emphasize certain facts and points (perhaps taken out of context) while playing-down those factors which would favor the grievant?

WAS THE DISCIPLINE APPROPRIATE?

1. Did the penalty violate the CBA or another source of rules?
2. Was the penalty inconsistent with the principle of progressive discipline?
 - Was it punitive or vindictive rather than corrective and remedial?
 - Was it reasonably related to the seriousness of the offense and the grievant's past record?
3. Did management discipline one or some for behavior it had deliberately failed to address in others?
4. Conversely, did management punish everyone for the infractions and deficiencies of a few?
5. Did the penalty otherwise infringe on the rights of the grievant, the union, or the other employees?

DISCIPLINE FOR INSUBORDINATION raises still more questions.

1. Was the grievant actually given an order which she could be disciplined for not following?
 - Was it a direct order, as opposed to mere instructions, suggestions, or advice?
 - Was it sufficiently clear?
 - Was it reasonably related to the safe, orderly and efficient operation of the organization?
 - Did it threaten to endanger the health or safety of the grievant?
 - Would it force the grievant to violate a law?
 - Did it threaten to cause undue hardship or irreparable harm?
2. Was the order one which must be complied with, but which is grievable, so that discipline for non-compliance should be waived or mitigated?
 - Did the order itself violate a rule other than a law?
 - Was it arbitrary, capricious, unjust, unfair, inequitable or unreasonable?
 - Did it otherwise infringe on the rights of the grievant, the union, or the other employees in the bargaining unit, collectively or individually?
3. Was the grievant aware that she'd been given a direct order?
4. Was grievant given adequate forewarning of the possible consequences of her alleged refusal to carry out the order?
5. Did the grievant fail to comply?
6. If so, was the failure to comply intentional?
7. Was it even alleged to be intentional?

CONSIDER STRATEGY AND OPTIONS

Once you have fully analyzed management's actions in light of all the available facts and relevant rules, consider a formal written grievance. Ask yourself:

1. Have you anticipated the likely responses of management?
2. Is it a member's grievance or the union's grievance?
3. Are there conflicting interests within the union?
4. Should the union officers be consulted--perhaps even before filing?
5. How can the grievance be won, based on your knowledge of the people, facts, and rules involved?
6. What remedy do you want?
7. How else could the grievance be settled?
8. What can you get?
9. What is the least you'll take?
10. How can the grievance be handled to increase solidarity?

Compare the advantages and possible disadvantages of a formal written grievance to those of other possible responses, such as a demand for bargaining (with a stay) under 8.2D, an informal approach to management, an organized protest, going to the board of directors, etc. Think about combining two or more tactics.