Winning Grievances: Building and Presenting a Strong Case

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Winning Grievances: Building and Presenting a Strong Case

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60 minutes

Presented By Richard Poulson

Grievance Fundamentals – Learn what separates a strong grievance from a weak one and how to avoid common missteps.

The Power of Past Practice – When and how past practices become enforceable contract terms—and how to use them to your advantage.

From Filing to Arbitration – Proven strategies for investigating, documenting, and persuasively presenting your case.

Overcoming Employer Objections – Anticipate and counter common management defenses to strengthen your grievance case.

Richard Poulson has been representing labor unions for his entire career, representing union clients in collective bargaining, interest and grievance arbitration and employment-related litigation. He is a partner with the Philadelphia, Pennsylvania firm of Willig, Williams & Davidson, where he focuses on advising and representing police, fire, paramedic and other uniformed employees regarding municipal affairs and public employment. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick is the Executive Director of LRIS. Since its inception in 1981, LRIS has been a valuable resource for public safety labor relations. LRIS conducts labor seminars, publishes a monthly newsletter, and currently has five books in print.

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OVERVIEW

- Grievance Fundamentals
- From Filing to Arbitration
- The Power of Past Practice
- Overcoming Employer Objections*

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GRIEVANCE FUNDAMENTALS

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Golden Rules On Grievances

1. Your contract means nothing if you don't enforce it.

2. That takes work. Every day.

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What Is A Grievance Procedure?

- A grievance procedure is nothing more than an agreement for an alternate dispute resolution process.
- Grievance procedures are negotiable, including how they begin, how they function, and what the final decision-making process is.

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Grievance Procedures

- **Grievance procedures usually end with binding arbitration, using an arbitrator selected by the parties.**
  - Occasionally a party will file a court challenge to the results of a grievance procedure. The challenges are rarely successful.
  - Grievance procedures sometimes end with a unilateral decision by the employer. Not ideal.

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The Right To Arbitrate

- **Arbitration is the typical last step of a grievance procedure under all private and most public sector labor law systems.**
- **Arbitration represents a *quid pro quo*.**
- **- No strike, but interest arbitration.**
- **- No wildcat, but grievance arbitration.**

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Supreme Court And The Grievance Procedure

- Supreme Court endorses the grievance and arbitration process as constituting "the very heart of the system of industrial self-government."
- "Arbitration is the means of solving the unforeseeable by molding a system of private law for all of the problems which may arise and to provide for their solution in a way which would generally accord with a variant needs and desires of the parties."

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The Right To Arbitrate

- So what does this mean?
  - Employer cannot simply refuse to arbitrate.
  - Employer cannot tell the Union how to write their grievances, or "kick it back" for correction.
  - Employers can either sustain or deny the grievance.
  - If Employer refuses to arbitrate, file anyway, and file a ULP.

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What Is A Grievance?

- A grievance is a complaint alleging a CBA violation
- No magic words
- Gripe or grievance?

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What Can Be Grieved?

- **Grievance procedures can cover more than just disputes over specific contract language. Some public safety grievance procedures cover:**
  - Disputes about the content of work rules.
  - Disputes about whether the employer is complying with its own ordinances and rules.
  - Disputes over compliance with related law.
  - Disputes over *just about anything*.

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What Can Be Grieved?

- **The parties define what constitutes a "grievance" at the bargaining table.**
  - EX: "A grievance is defined as an alleged violation of one or more of the provisions of this Agreement."
  - EX: "A grievance is defined as a dispute over wages, benefits and working conditions."
  - EX: "A grievance is defined as a dispute over the provisions of this Agreement and Employer policies."

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Types Of Grievances

Grievances will generally fall into two categories:

Discipline Disputes

- Employer's burden at arbitration.
- Usually whether discipline supported by just cause.

Contract Interpretation Disputes

- Union's burden at arbitration.
- Usually whether specific provision(s) of CBA violated.
- Past practice arguments.

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Discipline Grievances

- **Best practice is to negotiate "just cause" language in your CBA and subject disciplinary disputes to grievance and arbitration**
  - Ex: "No bargaining unit member may be disciplined without just cause""
  - Makes all employer conduct within its scope arbitrable

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"Just Cause" for Discipline

- **"Just Cause" = Standard for employee discipline.**
- **Widely accepted and nowhere defined.**
- **Doesn't mean "just 'cause we wanted to."**
- **<u>Does</u> mean that employee discipline must reasonable and appropriate.**
- **Most CBAs will allow an arbitrator to modify excessive discipline.**

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Just Cause: The Basics

- Did the employee do something wrong?
- Does the “punishment fit the crime?”

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Seven Questions

1. Was the employee on notice that their conduct could result in discipline?
2. Was the rule reasonably related to the orderly, efficient and safe operation of the department?
3. Did the employer investigate the facts before deciding to discipline?

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Seven Questions

4. Was the investigation fair and objective?
5. Did it reveal sufficient evidence of guilt?
6. Has the employer applied its rules and penalties fairly and consistently?
7. Was the discipline reasonably related to both the seriousness of the offense and the employee's record of service (good and bad)?

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Investigating Discipline

- Every discipline grievance must be grounded in fact – facts dictate outcomes.
- Good investigations lead to strong facts.
- Strong facts support solid legal arguments.

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Gathering Facts – The Five W's

- Who? What? When? Where? Why?
- Answer every question, every time.
- Talk to every possible witness (including managers).
- Get it in writing! Document every interview, get signatures where possible.

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Election Of Remedies

- Arbitration or administrative proceedings?
- Best practice is to provide a choice in the CBA
  - Called an "Election of Remedies" provision
- Utilization of legal counsel in deciding where to proceed may limit liability.

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Contract Interpretation Cases

- **Arbitrator's job is to interpret the contract – what did the parties mean?**
- **Union bears the burden of proof.**
  - Unlike in discipline cases.
- **Clear language will prevail.**

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The Importance Of Language

- **It all starts with negotiations.**
- **Best way to avoid disputes is to negotiate clear contract language.**
  - Say it plain. Keep it simple
  - Try to limit the "legalese"
  - "10 cent words" are priceless

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Clear Language Wins

- Arbitrator's job is to enforce the CBA, nothing more.
  - "Creature of contract"
- Clear and unambiguous language will be enforced as written.
- Back to negotiations – make sure you get it right!

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Ambiguous Language

- Ambiguous CBA language is language that is open to more than one meaning.
  - "Well, I read it this way . . ."
- The arbitrator's job is to determine what the parties *really* meant.
- Bargaining history and practice are very important.

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History And Practice

- **Good notes and records are key.**
  - Not just in negotiations.
- **What is bad bargaining history?**
  - Think both offensively and defensively in bargaining.
- **Importance of documentation.**

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FROM FILING TO ARBITRATION

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How Does It Work?

- Most grievance procedures consist of steps leading to final and binding arbitration.
- Grievance “steps” are intended to be opportunities to resolve the dispute in a mutually acceptable manner.
- Most disputes don’t make it to a formal grievance. And most grievances don’t make it to arbitration.

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How Does It Work?

Most procedures usually have three or four steps, each of which involves union action and an employer response:

- Step 1, typically, Department level.
- Step 2, typically, HR/Administration level.
- Step 3, typically, Elected Body level.
- Step 4, typically, Arbitration level.

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The Grievance Procedure

- **Know your contract – what you have, and what you don't have.**
  - That means you have to *do something* – WHAT?
- **Know your facts – do the legwork.**
- **Keep expectations reasonable.**
- **Document, document, document.**

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Step One

"Any employee or the Association claiming a breach of this Agreement may refer the matter in writing to the Police Department."

- Need an employee have the union's permission to file or process a grievance?
- Are the employer's rules grievable?
- Are violations of external law grievable?
- With whom is the grievance filed?

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Contents Of A Grievance

- Need a grievance be signed?
- What about email filing of grievances?
- How specific must a grievance be?
- How lengthy must a grievance be?

- Your contract answers these questions. And if not, an arbitrator will.

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Initiating The Grievance

- **Write it down and keep it simple.**
  - "On X date, the Employer violated Article X and any other relevant provision of the Agreement by . . ."
  - Don't write a book.
- **Ask for a remedy.**
  - "[What we want them to do, plus] . . . And make the Association and all affected members whole."

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Navigating Time Frames

- **Grievance procedures establish time frames for the submission of and responses to grievances.**
  - "The grievance shall be presented within twenty (20) calendar days from the date of the alleged violation.
  - "The supervisor shall respond to the grievance within fifteen (15) calendar days and shall make such response to the grievant and the Association."

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Grievance Procedure Timelines

Should you specify calendar days rather than workdays?

Extensions and "tolling" of time – how to document.

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Sample Tolling Agreement

- **Parties can always agree to extend grievance timelines to facilitate possible resolution:**
  - "This will confirm that the Association's agreement to give the City until [DATE] to provide its Step 3 response in the overtime grievance matter."
  - "This will confirm the parties agreement to hold the overtime grievance in abeyance pending resolution of related litigation."
- **Always confirm extensions in writing.**

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Processing The Grievance

- **Keep a file on each grievance.**
  - Dropbox, Basecamp, etc.
  - Or do it the old-fashioned way – *hard copies!*
- **Document timelines.**
  - Spreadsheets help. Or checklists.
- **Document extensions. Using work email is best.**
  - "This will confirm …"

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Presenting The Grievance

- Prepare every grievance as if you are going to arbitration.
- Get the other side's position in writing where possible.
  - That may prove useful later in the process.
- Keep the grievance moving.
- Keep an open mind!

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Presenting The Grievance

- Be professional.
- Listen and take notes.
- Be objective: Consider the other side's viewpoint.
- Be an advocate: Respond to the other side's charges.
- Pin the other side down on the facts.

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Disposition Of Grievances

- *Keep it moving* – resolve, withdraw or move forward.
- Don't pursue weak cases.
- Keep the member informed and explain decisions.
- On tough calls, consult legal counsel.
- Member should "sign off" on all resolutions.
- Keep a written record of all grievances.

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Arbitration – Should We Go? Do We Have To Go?

- **Must we arbitrate? No.**
  - Normally, the Union decides whether to arbitrate.
  - Significance of precedent, legal counsel.
  - Consult local lodge, legal aid options.
- **Union operates under a duty to fairly represent its members.**
  - What's a "member" for DFR purposes?

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Arbitration – Should We Go? Do We Have To Go?

- **Should we arbitrate? It depends.**
- **Evaluate the merits – can we prevail?**
- **Evaluate the costs of arbitration.**
  - Should the Union arbitrate a grievance over 1 hour of overtime? Over a verbal warning?
- **Evaluate possible negative ramifications.**

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THE POWER OF PAST PRACTICE

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Effect Of Past Practices

- **A labor "agreement" need not be limited to the words on the page of the CBA.**
  - But they are pretty important!
- **Past practices can fill the blanks.**
- **But past practice can be difficult to establish.**

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The Uses Of Past Practice, From The Supreme Court

The Supreme Court, through Justice Douglas:

- "Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators."
- "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the past practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it."

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 US 574 (1960)
https://supreme.justia.com/cases/federal/us/363/574/.

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The Five Elements Of A Past Practice

1. Clarity and consistency
2. Longevity and repetition
3. Acceptability
4. The underlying circumstances
5. Mutuality

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What Does "Clarity" Mean?

- A past practice is clear if it is "known" to both parties.
- Can a binding past practice …
  - Be established in a fire department if the employer's HR or labor relations entity is unaware of the practice?
  - Be created by low-level supervisors?
  - By mistake?
  - By the actions of a third party?

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What Does "Consistency" Mean?

- **Close to absolute consistency is necessary.**
  - If the employer does something 75% of the time, there is no binding past practice.
- **Ex: A law enforcement employer assigns a non-bargaining unit lieutenant to cover a patrol vacancy, resulting in a grievance.**
- **How would the consistency of the past practice be evaluated?**

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What Does "Longevity And Repetition" Mean?

The more something is repeated, the less longevity it takes to establish the event as a past practice.

- Something that occurs once a year will take years to establish as a past practice.
- Something that occurs daily may only take months to establish as a past practice.

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What Does "Acceptability" Mean?

- The importance of intervening contract negotiations.
- If a practice is not repudiated in negotiations, it may be said that parties assumed the practice would continue in force.
- By their silence, parties can endorse existing modes of procedure.

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What Are "The Underlying Circumstances?"

- A work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift.
- Every practice must be carefully related to its origin and purpose.

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What Does "Mutuality" Mean?

From *Mittenthal*:

Practices need not be negotiated to become binding, but they must be known and at least implicitly accepted.

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Implementation History

- A practice that develops after the addition of ambiguous contract terms may evidence what the parties thought would result from the language being adopted.
- The presumption is that the parties' intended meaning is reflected in their subsequent application of the contract language.

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Implied Contract Terms

Arbitrators will generally acknowledge a "common law of the shop."

- Where a contract is completely silent on an issue, past practice creates an implied term of the contract.
- "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties."

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Implied Contract Terms - Examples

Though the contract is silent on the issue . . .

- **The employer has consistently reimbursed employees at whatever the then-current IRS rate for mileage was.**
- **Employees working overtime on a holiday are paid at 2.5x instead of 1.5x.**
- **Employees are given 24 hours' notice of a disciplinary interview.**

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Contradicting The Contract

- **Some arbitrators find that a past practice can even contradict the explicit terms of a contract.**
- **Important factors are the length of the practice, and intervening bargaining opportunities.**
  - Ex: The contract specifies a $25 prescription co-pay, but for years the co-pay has actually been $20.

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Contradicting The Contract

Words from the leading court decision:

- "To require a party to bargain anew before enforcing a right set forth in the contract requires proof that the parties knowingly, voluntarily, and mutually agreed to new obligations."
- "To vary the clear written mandates of the contract, the understanding or past practice must be evidenced by substantially stronger evidence than when utilized to interpret ambiguous language or to fill in areas where the contract is silent."

Port Huron Education Ass'n v. Port Huron Area School District, 452 Mich. 309, 550 N.W.2d 228 (Mich.1996)

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Maintenance Of Benefits Clauses

"The employer shall maintain all wages, hours, and negotiable working conditions in effect as of the signing of this agreement."

Sometimes called a "retention of benefits" or a "past practices" clause.

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Management Rights v. Maintenance Of Benefits

What is the relationship between a management rights clause and a maintenance of benefits clause?

- A management rights clause seeks to gain discretion for the employer to take unilateral action without negotiating.
- A maintenance of benefits clause seeks to gain for the union the ability to block mid-contract changes in negotiable topics unless it voluntarily agrees to the change.

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