

EVALUATING THE MERITS OF A GRIEVANCE

Stewards must always be evaluating and re-evaluating the merits of a grievance. A steward may at one point be completely convinced that a grievance is (or is not) meritorious. Later, the steward, upon learning of new facts or hearing counter arguments realizes that his or her original evaluation was wrong, or not as accurate as originally thought. This can happen to the most experienced advocate! The grievance procedure involves give and take. If either party adopts a rigid position instead of maintaining an open mind, the procedure cannot work properly.

Given an open mind and respect for the other party in the dispute, the steward should approach the investigation of a grievance in an objective and disciplined manner.

The following preliminary facts should be investigated.

Facts to Get From the Grievant

Q: Who is the Grievant?

A: Detailed information about the grievant is essential: name; title; current mailing address; home email address; home and work telephone numbers; classification; seniority date; department or agency; work location; last 4 digits of their social security number; name of immediate supervisor; shift worked; and days off. If the steward fails to get this information, it may lead to extra delays in processing a grievance.

Grievances can be filed for more than one individual (see Section 25.01 (B) of the grievance procedure). Grievances can also be filed on behalf of the Union.

Q: What is the problem?

A: This means that the problem is spelled out. For example, “payment for overtime was not granted”, “past days were inappropriately scheduled” or “the grievant is being treated unfairly by the supervisor.”

Q: Is this a grievance?

A: A complaint, even an important complaint, may or may not be a basis for the filing of a grievance under the collective bargaining agreement.

It is essential that the steward review the definition of a grievance as contained in the contract. If OCSEA and management disagree on whether something is a grievance, the question of whether it is a grievance may well become the primary issue in the grievance procedure. This question may, itself, need arbitration to determine whether the case’s merits will ever be judged.

The steward must ask the following questions concerning problems with the State Contract:

1. Specifically, what contract article(s) was violated?
 - Are you clear on the intent of each article that allegedly has been violated?
 - Is there evidence to support the claim(s) made against management?

2. Is the proposed grievance filed within the time requirements reflected in Section 25.02 Step One or Section 25.02 Step 3?
3. Does the employer action violate state statutes, regulations, rules or Appointing Authority directives where the contract is silent? (Section 44.02)
4. Is the employer action a past practice as defined in Section 44.03?
5. Is the employer action an unfair labor practice?
6. Is there a better remedy that can be offered by another administrative procedure in or outside the contract? (For example, EEOC, Article 19, OSHA, FLSA, court action.)
7. Does the problem better lend itself to labor/management resolution? (overtime procedures)

Q: Where did it happen, when did it start, and who is involved?

A: It is important to be as accurate as possible about dates, times, places and persons involved. This information is essential not only in fashioning a remedy but also in evaluating how big the problem is. While some claims may have only minor implications, others may affect many employees or involve large amounts of money and major managerial principles.

Grievances may be filed for more than one person. It makes sense that only one grievance be filed if management is taking a single action (or not taking an action) which affects a number of people. If each individual is required to file a separate grievance on the same issue, then the grievance machinery for the Union would be slowed down. It is important that everyone who is affected be identified on the group grievance as required by Section 25.01 (B) of the State Contract. Also, it is important that the group of affected employees be described, e.g. "all second shift Hospital Aides on B ward at the Central Ohio Psychiatric Hospital". Please keep in mind that the group of employees should include all employees who should benefit from the remedy sought.

Q: How does this action pose a problem to the grievant?

A: Why is the employee considering filing a grievance? Feelings of unjust treatment loom large in this area. At this stage, many employees feel they have been unfairly treated. Care must be taken to determine whether the action is regarded as "unfair" simply because one does not like it or because it is contrary to certain rights guaranteed by the contract. If there is no violation of the contract, a grievance should not be filed.

A brief comment on how management's actions affect employees might also be included in the statement of facts, to help judge how severe the problem is.

Q: What corrective action should be taken?

A: The requested remedy must be one that management can grant. If the employee wants compensation that cannot be provided, the grievance will simply waste the participants' time at each level. For example, a request that a management employee be reprimanded or disciplined is not a proper remedy; an arbitrator will not grant it.

Investigate the harm to the grievant to clarify whether the remedy sought would “make the grievant whole”. Don’t just say that the grievant be made whole- be as specific as possible.

Examples of specific remedies for a removal case include:

- back pay
- no loss of seniority
- pay for lost overtime opportunities, and
- reinstatement
- accrued vacation and sick leave
- holiday pay.

There may be other remedies in addition to the above listed ones which you may want to request.

Q: Were there any witnesses?

A: Although witnesses are more commonly used in suspension or discharge cases, witnesses are also used in contract disputes. Witness statements may be needed to prove past or present management actions or policies. Witness statements may be necessary to verify the grievant’s statement and may be necessary at the various steps in the grievance procedure. It is also important to know who management witnesses will be. Sometimes it is necessary that the Union use a witness who will be hostile to the Union. It helps to know in advance whether a witness will be hostile or friendly to the Union.

Q: What is the accepted interpretation of this problem?

A: Do not judge whether a management action violates the contract by first reactions. Once the applicable provisions are identified, they should be read thoroughly. It is possible that the true meaning of a provision- what the parties intended when they wrote it, and how it has been interpreted – can be shown only through further investigation.

A cardinal rule is: **If you aren’t sure about the meaning or intent of a provision, ask.** Stewards have a network of other stewards. The OCSEA staff representatives have been trained on the intent of the contract language to help them answer these questions. Chapter officers and assembly officers are other rich sources of information.

Q: Who should be consulted?

A: Stewards can direct their questions to the OCSEA staff representatives. Stewards can also turn to their chief steward or the chapter steward committee for help.

Q: Are there any records which shed light on the problem?

A: Where such matters as pay, attendance and leave, hours of work, distribution of overtime, seniority, Workers’ Compensation, and leave with pay are in question, an investigation of appropriate records is important. Past discipline records are essential to understand whether progressive discipline was used. Position descriptions are necessary to successfully argue qualifications for promotion. McBee cards or other attendance records are necessary for discipline involving absence or tardiness. In addition to other State-maintained records, information from a personnel file is often important. Make requests for records in writing at each step of the grievance process. If the State does not make documents available, the Union has documentation to argue that the discipline should be lessened because of a procedural violation.

Q: Has a similar problem happened before?

A: A review of previous grievances and arbitration summaries may help. Also, informal discussions with other OCSEA stewards may show how a similar problem was handled before it rose to a grievance. If the same type of grievance was filed in the past and withdrawn because it lacked merit, a new grievance on the same issue with the same facts should not be filed.

Q: What are the time limits?

A: In the case of the State Contract, a contract interpretation grievance cannot be presented more than 10 working days from the date the grievant became aware of – or should have become aware of - the act giving rise to the grievance. In any case it can be no longer than 30 days after the event giving rise to the grievance happened.

After the grievant signs the grievance form and it is filed, the time clock begins running on the grievance process. In the absence of a timely grievance hearing, or in the event of a late grievance response, the steward must appeal the grievance to the next step. There is no contractual penalty on management if it does not timely respond. But if the Union doesn't timely respond, the grievance is treated as withdrawn. Remember, under the State Contract, time limit extensions must be in writing.

Q: Are there previous settlements on this issue that provide precedent?

A: Here, OCSEA stewards should evaluate earlier arbitration decisions and stipulated settlements on the particular issue. It is often helpful to look to other settlements on the particular issue. It is often helpful to look to other settlements for ideas and general guidance for what has proved to be acceptable or workable – even when they may not be precedent setting. Even if an issue has been settled in an agreement which can't be introduced into an arbitration, it is a strong indication of what management can do in a similar instance to resolve a problem. Stewards' committees often provide a rich pool of experience and knowledge that can be used to identify what has been done in the past.

Q: Should other employees or supervisors be interviewed?

A: There is no substitute for firsthand information. Relying on another person's "say-so" without going to the original source can be dangerous. Often there are other people in an institution, facility, agency, or department who have immediate knowledge about the facts of a particular case, and their views should be sought and reviewed. When making an evaluation, the steward should only rely on proven facts, not a general belief about what has taken place. When and if a case gets to arbitration, the Union should use only the best evidence i.e., original sources, not hearsay.

Q: Should the work area be visited?

A: The OCSEA stewards may find it useful to go the grievant's work site to gain a better understanding of the problem. This step should be taken if it is likely to provide useful results. Remember, a picture is often worth a thousand words.

Once facts are collected determine what is important

Fact: Separate disputed from undisputed facts.

A brief meeting between the OCSEA steward (and sometimes the grievant) and management should quickly establish those facts relevant to the case which both parties agree upon. Once these facts are recognized, the parties can focus their attention on the areas of disagreement.

Fact: Evaluate sources of information.

Evidence may be oral or documentary. “Oral evidence: is verbal; “documentary evidence” is generally in writing. Documentary evidence can also take the form of charts, tables and pictures. It may make sense to take evidence such as McBee cards for different employees and create an exhibit which summarizes the information contained in the McBee cards so that the attendance record of different employees can easily be compared.

Get information from the individual who is most likely to know about the truth of a matter (for example, the person responsible for record keeping, as opposed to a manager more removed from the case). Get those records or documents that can provide the most reliable and detailed information (for example, actual time and attendance records, as opposed to a memo in which someone notes his or her recollection of the matter).

In evaluating oral testimony, the grievance representative should consider whether the person has firsthand or personal knowledge of a situation or is basing his or her statements on hearsay. Also to be considered is whether that individual has an accurate memory, is truthful, and is reliable (i.e., does the person tell his story the same way each time he/she tells it).

Among the standards that are used in evaluating credibility are demeanor (appearance, voice, attitude, conduct); character of the testimony (overall manner in which questions are answered); quality of perception, recollection, and communication (the ability to see, hear, or experience something and then to remember and tell about it); consistency or inconsistency (with other known facts); inherent probability; bias, interest, or other motive; character; and admissions about lying.

Fact: Distinguish between allegations, assumptions, opinions, & facts.

When asked about their views on an issue, some people take a strong position with little to back it up. Others will draw conclusions based on a limited range of facts. Conclusions should be limited to the verified facts which can support that conclusion.

So, in examining testimony and evidence, care should be taken to distinguish between unfounded opinions, evidence that is circumstantial, and evidence that is direct. In some situations, strong circumstantial evidence may be enough, but never should unfounded statements and assumptions be given much weight.

Fact: Weigh the evidence you gather.

Before deciding whether to file a grievance, it may be wise to consider whether there is enough proof to substantiate the position to be taken

Technically, there are varying degrees of proof, ranging from a preponderance of the evidence, to clear and convincing proof, to proof that is beyond a reasonable doubt. Stewards

at Steps One and Two should, based on all the known facts, be convinced that the grievance has merit. In a contract case, this means being assured that:

- the grievant is covered by the clause or practice in question;
- that there is a valid question of whether the grievant was harmed by management's action or inaction; and
- that there are enough facts, based on such factors as contract interpretation and management policy, to support the Union's position.

Summary

When a steward evaluates a grievance, there are several basic questions that should be asked or facts that must be determined. Listed below are areas that need to be covered.

Keep Good Records.

- ✓ Maintain a file on grievances and use the OCSEA grievance Log Book which shows proper time limits for both OCSEA and management. Every grievance that goes beyond Step 3 must have a fully completed Appeal and Preparation Sheet filed in a timely manner.
- ✓ Establish a research bank with information on contract provision and relevant cases. The chapter should maintain past grievance files. The arbitration summaries should be reviewed. Past grievance settlements should also be saved. Records of disparate treatment in absence and tardiness cases should be kept.

Investigate Grievances Thoroughly.

- ✓ Use the OCSEA Appeal and Preparation Sheet as your guide for information gathering.
- ✓ Gather facts from the grievant: name, title, address, social security number, home and work telephone numbers, classification, department or agency, work location, name of immediate supervisor, nature of problem, date of employment, date of appointment (seniority date if different), date of occurrence, remedy sought, witnesses, shift worked and days off, home email address.
- ✓ Gather facts from other sources: applicable contract provisions, State rules or regulations, personnel file, etc. For example, if you grieve Article 44.02, get a copy of the relevant statute, rule or regulation.
- ✓ Explore the meaning of a contract provision through discussions with other stewards, review of records and materials, and an examination of arbitration decisions and previous grievance settlements. Discuss the negotiation intent of the contract language with the staff representative.
- ✓ Determine whether the problem has occurred before and if so, whether there is an accepted local arrangement or system wide practice for handling it.

- ✓ Interview other employees and supervisors and write down their statements.
- ✓ Make a work-site visit, if appropriate.

Be Sure There is a Full and Fair Grievance Review.

- ✓ Before the review:
 - Conduct a thorough, independent investigation.
 - Evaluate management's position.
- ✓ During the review:
 - Establish facts and clarify information on individuals involved in the grievance, dates, statements of issues, and remedy sought.

Carefully evaluate the Merits of the Grievance.

- ✓ Separate disputed from undisputed facts.
- ✓ Evaluate sources of information.
- ✓ Distinguish between allegations, assumptions, opinions, and facts.
- ✓ Weigh the evidence.

<u>Conclusion</u>

A knowledgeable steward is in the best positions to fashion a fair resolution of a grievance. An informed steward also develops credibility with the grievant as well as with management. By proper investigation, non-meritorious grievances can be screened out. This helps the Union to prioritize the most important grievances which need to be arbitrated.