

Should I use the Contractual Grievance Procedure or an Alternate Procedure?

The choice of whether to use the contractual grievance procedure or an alternate procedure depends on the nature of the dispute. Also the nature of the relief sought can significantly affect the choice of what procedure to use.

Selected Administrative Agencies

There are several administrative agencies which are specifically charged with the responsibility to resolve certain types of disputes.

1. Department of Labor-Wage and Hour Division

The U.S. Department of Labor is charged with the responsibility to administer the Fair Labor Standards Act (FLSA) which guarantees basic benefits to employees including minimum wage, and overtime pay, as well as definitions of which hours of work require payment. The FLSA normally has a two year statute of limitations. This means that an employee can receive back wages for a violation of the law back to two years prior to when the complaint is resolved.

It is the Union's experience, based on several arbitration decisions, that arbitrators will not read the FLSA into our contract (Decision # 100 and #146). Therefore, in almost all cases where the State's action is a violation of the FLSA and not a clear violation of the contract, the employee should file a claim with the Department of Labor, rather than filing a grievance on the issue. You can contact area offices of the Wage-Hour division in Cleveland, Akron, Columbus, or Cincinnati.

2. Occupational Safety and Health Act (OSHA)

The rights and protections of employees which are extended to employees by OSHA is extensive. OSHA provides standards for protection against safety hazards, noise, chemicals, and radiation. In the State of Ohio the OSHA provisions are administered by the Public Employees Risk Reduction Program (PERRP). Enforcement is by state health and safety inspectors. Employees have the right to request an inspection if they think there are hazardous conditions in their work place. They also have a right to have a union representative accompany an inspector and to find out the results of an inspection. The law also requires that the union have access to information on injuries, and chemicals in the work place. In addition the National Institute for Occupational Safety and Health (NIOSH) can also provide information and advice on hazards.

An individual or the Union has a right to request an inspection by filing a complaint alleging dangerous or unhealthful conditions. Complaints are usually done with the use of an OSHA complaint form requesting an inspection or by a letter of request. Such complaints should be made without delay to help insure the inspector can properly evaluate the situation. Specific attention should be given to the protections in Article 11 of the agreement to see if any of the sections cover the complaint. Before you file a complaint your staff representative can help you determine if there is a violation of the code. The Public Employee Safety and Health Section can be contacted in Columbus, Cleveland, and Cincinnati.

3. State Employment Relations Board (SERB)

The Union or an individual may file a complaint called an unfair labor practice (ULP) with SERB if a violation of the collective bargaining law (ORC 4117) has occurred. Revised code section 4117.11 (A)

sets forth unlawful acts by the employer that constitute unfair labor practices. General categories include interfering with employee rights to form a union; refusing to bargain over mandatory subject of bargaining, establishing a history or pattern of denying the union ability to process grievances, using lockout or other work stoppage tactics to bring pressure upon the Union or employees to resolve a labor relations dispute or compromise the Union's position; and causing the union to commit an unfair labor practice.

An overlap can occur between the rights identified in the contract and the rights guaranteed by ORC 4117. A category in which overlap of jurisdiction is likely to occur is in the area of interference with employee rights. For example, section 4117.03 (A) guarantees employees the right to act collectively in good faith without retaliation from the employer; the right to present grievances ; and the right to be free from discrimination on the basis of the exercise of rights protected by the law.

A ULP must be filed within ninety (90) days of the occurrence of the unfair labor practice. In those instances of potential overlap where specific contract language has been violated, a grievance should be filed. At this time it is recommended that your staff representative be contacted. If the staff representative believes that an unfair labor practice has been committed, he/she will make a recommendation to his/her supervisor. To assure a consistent practice which reflects the policies of the Union, ULP's are filed through the OCSEA Central Office. Consultation with the OCSEA Office of General Counsel by your assigned staff rep is required before OCSEA will file a ULP. SERB then requires a detailed account of the facts.

4. Ohio Civil Rights Commission (OCRC) and Equal Employment Opportunity Commission (EEOC)

Under state and federal laws, it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin, handicap, age or ancestry. In addition, the OCSEA contract and Governor's Executive Orders prohibit discrimination on the basis of political affiliation, sexual orientation or family relationship. An employee can file administrative charges, a grievance or a lawsuit.

Matters relating to discrimination often require a level of expertise because the investigation and the meaning of the law is critical in determining whether you have a case which meets the requirements of the law. It is advisable to take a complaint to the intake procedure that is required by OCRC. This procedure is required before a formal charge can be filed. At this time a trained investigator can review your case and indicate the strengths or weaknesses of your complaint and whether you have the type of case that warrants filing a charge. The same level of detail is required to support your charge filed at OCRC as it is at arbitration. The expertise and time devoted by an experienced investigator who can also help negotiate a settlement is often considered superior to the grievance procedure, particularly as most arbitrators have little training or experience with discrimination cases.

The time limit for filing a charge of discrimination under the Ohio law is six (6) months, and three hundred (300) days under the federal law. An aggrieved employee may want to file a lawsuit and administrative charges, in which case he/she should secure legal counsel. OCRC has offices in every major city in the state. Filing an administrative charge does not require an attorney.

Suspensions and Removals

Where a suspension or removal occurs and it is alleged that the employer's action is at least in part motivated by discrimination, a grievance should be filed within the required fourteen (14) days of notification of the discipline. In an overwhelming majority of the cases the best protection is the standard of just cause which can be complemented by an Article 2 violation if sufficient evidence exists regarding discrimination. In the case of suspensions and removals an employee should always seek advice from his/her attorney before he/she determines to file a lawsuit or administrative charge.

Helpful Criteria for Determining the Proper Administrative Remedy

Where there may be doubt as to whether a grievance should be filed your staff representative should be consulted. It can be helpful to review the following criteria.

1. **Expertise of the Administrative Agency.** OSHA investigators are knowledgeable concerning the law and applicable standards. OCRC and EEOC have investigators who can make a thorough investigation of alleged discrimination and who have expert knowledge of state and federal laws.
2. **No Specific Provision.** Sometimes the spirit of the contract is well known but no specific contract section applies to the situation which needs correction. For example violations of the FLSA can result in recovered compensation when the contract is not specific about when employees should be in a pay status. The assignment of new classifications to an exempt status without SERB approval is best addressed by a ULP.
3. **Authority and Expertise of an Arbitrator.** The arbitrator is limited to disputes involving the interpretation, application or alleged violation of a provision of the agreement and he/she cannot impose a limitation or obligation not specifically required by the express language of the agreement. Punitive damages or the recovery of costs associated with the complaint can be requested under the FLSA and in a discrimination law suit. Arbitrators are not permitted to negotiate settlement unless both parties mutually agree to extend such authority. Arbitrators are rarely trained in matters of discrimination and frequently lack expertise in this area.
4. **The Length of Time to Obtain a Final Result.** Regardless of which administrative remedy is selected, there is no guarantee on the length of time it will take to reach a final conclusion. Similarly the filing of a non-contract complaint or a contract grievance is not a guarantee that it will be adjudicated by the agency or arbitrated by the Union. The administrative agency can be contacted to determine the probable time of their intervention. This can be compared to an estimate of when a grievance would be arbitrated.
5. **The Final Result You Want to Obtain.** The impact of filing a grievance or a non-contract complaint may have a different effect on the employer. Sometimes the intervention by an investigator from an administrative agency can have the effect of modifying the employer's behavior. For example, the threat of a citation by an OSHA inspector can modify management's behavior.

Hints on How to Improve Decisions on Whether to File a Grievance or to File with an Administrative Agency

The following are suggestions that may assist your evaluation of what procedure to follow:

1. If you have questions contact your staff representative. Early involvement can preserve possible options.
2. An early review by the Chapter stewards committee can be instrumental in determining if the grievance has merit. If it lacks merit perhaps another administrative remedy is appropriate.

Where to Get More Information on Administrative Agencies

The OCSEA Education Department has distributed and made available on the OCSEA web site fact sheets which provide addresses, phone numbers and additional facts about non-contract administrative remedies. The following are relevant fact sheets #400-Discrimination, #500-Fair Labor Standards Act, #600-Sexual Harassment, #700-How to Make a Healthy and Safe Work Environment, and #800-What is an Unfair Labor Practice ?