



Employment Issues

Grievance Arbitration

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General Information

Most private and public sector collective bargaining agreements contain grievance procedures that set forth a multi-step system for the prompt and peaceful resolution of contractual disputes. The system usually ends in final and binding arbitration.

A "grievance" is typically defined as a dispute involving the interpretation, application or alleged violation of a specific provision of the agreement. This definition is extremely important because only those matters that constitute a grievance can be processed through the grievance procedure. Only issues involving the interpretation, application or the alleged violation of a specific contract provision can form the basis for an actionable grievance. Other matters, even if they pertain to some aspect of the employment relationship, are not grievances and need not be resolved through the grievance process.

For example, if the contract does not contain a provision permitting employees to grieve ratings they receive on a performance evaluation, then any challenge to the specific performance ratings an employee received is not a grievance and the school corporation can refuse to process the grievance.¹ The same rule applies to a dispute regarding a school corporation's decision to discharge or discipline an employee. Discipline and discharge are permissive bargaining subjects. Absent a contract provision pertaining to discipline and discharge, such matters are not subject to the

contract's grievance procedure and need not be submitted to final and binding arbitration. In some circumstances, school corporations may allow employees to submit all claims to arbitration, including discrimination complaints regarding the employee's discharge. The school, however, may not force an employee to submit his or her claims to the grievance procedure. If the employee elects to submit his or her claims to the grievance procedure, the employee may then be precluded from seeking relief in other forums, including the courts.

The Grievance Process

Most grievance procedures begin with an informal discussion between the aggrieved employee and his or her immediate supervisor. This initial step is typically required because the grievant's immediate supervisor is usually in the best position to cure any contract violation that might have occurred. Many grievances are resolved at this stage. If the grievance is not resolved through an informal discussion with the grievant's immediate supervisor, the grievance is then presented, usually in writing, to the employee's next level of supervision, which is often the principal or classified employees' department head. Following a written response, an unresolved grievance is then appealed to the next level of management which, in most school corporations, is the superintendent.

The superintendent or designee discusses the grievance with the employee and also reviews the responses given to that point. The superintendent then issues a final response granting or denying the grievance. That response is usually the last in-house step and represents the employer's position should the matter proceed to final and binding arbitration. While in most cases the school corporation's board of directors is not directly involved in the grievance process, the superintendent should keep the board informed of

all grievances and obtain the board's approval before taking a grievance to arbitration.

Most grievance procedures contain specific time limits for processing grievances at each step and provide that failure to comply by the grievant or association bars further processing of the grievance. These time limits expedite grievance processing to avoid long, protracted disputes. The timelines can be waived by the parties at each level of the grievance procedure. Most procedures also require the grieving party to file a grievance within a certain number of days after the grievance claimed contract violation occurred. A grievance filed after the specified period is not timely and need not be resolved. All grievances should be reviewed to determine if they are timely filed.

Whether a grievance is timely filed can be somewhat confusing if it involves a continuing violation of a provision in the collective bargaining agreement. A continuing violation is one that repeatedly occurs and is not isolated to a particular date or event. For example, a school corporation's failure to pay an employee the wage rate or salary established under the terms of the collective bargaining agreement is a continuing violation and the employee involved is not necessarily required to file a grievance within the specified period after the employee receives his or her first paycheck. If the grievance is not, however, filed until after a period has elapsed, the school corporation can still argue that the employee has perfected his or her grievance only with respect to payments made during the grievance filing time period.

Most grievance articles provide for the invocation of arbitration, the selection of an arbitrator, the arbitrator's authority and the time for the issuance of an award. Section 20.18 of the PERA requires that the employee organization approve the use of arbitration, except the aggrieved employee must approve if he or she is the [grievant](#).¹ The employee organization and the public employer can informally agree on an arbitrator, or the parties can obtain a list of arbitrators from the American Arbitration Association, Federal Mediation and Conciliation Service or the PERB.

The Arbitrator's Authority

Arbitration is a creature of contract. To avoid labor unrest during the term of the contract or agreement, employer and the employee's bargaining

representative agree to arbitrate any contractual disputes, which may arise. The authority of the arbitrator to resolve a given dispute arises from and can be limited by the contract. Arbitrators, unlike judges in civil court, are not granted authority to resolve disputes by statute or common law.

Iowa school corporation contracts have contained a variety of clauses regarding the arbitrator's authority:

- Some clauses expressly exclude an article or matter from arbitration (for example, a discretionary leave or the school corporation's determination of the need for staff reduction).
- Some clauses contain a "selection of forum" provision providing a complaint before a court or agency will bar a grievance or arbitration case based on the same facts.
- Most common are clauses where the agreement provides an arbitrator has no authority to add to, delete from or otherwise alter or amend the contract.

Sometimes, it is useful in any arbitration case to remind the arbitrator his or her authority is limited by the terms of the contract and his or her primary function is to interpret the provisions contained in the collective bargaining agreement and not to forge a new deal or understanding between the parties. Some arbitrators ignore the clear language of the contract to reach a result the arbitrator believes, as a purely personal matter, to be more equitable or just. When this occurs the arbitrator exceeds his or her authority and is subject to further review by the courts.

Judicial Review of Arbitration Decisions

In three private sector cases known as the "Steelworkers [Trilogy](#),"² the United States Supreme Court established the following principles regarding the judiciary's role in the arbitration process. Those principles are:

1. Arbitration is contractual and neither party can be required to arbitrate a dispute it has not agreed to arbitrate.
2. Substantive arbitrability (whether the subject matter of the dispute is arbitrable) is for the courts to decide, unless the parties empower the arbitrator to decide the issue.

3. The courts, in deciding substantive arbitrability issues, must resolve all doubts in favor of coverage and not deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."
4. A court should not determine the merits of the dispute since "whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."
5. Although courts should give deference to the expertise of an arbitrator, an arbitrator "does not sit to dispense his own brand of industrial justice" and "his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Later cases have held that issues of procedural arbitrability, as opposed to substantive arbitrability, are for the arbitrator to resolve and not the courts. Procedural arbitrability is whether the grieving party has followed correct procedures when advancing the dispute. Arbitration awards have been vacated when they ignored or violated specific contract provisions or the awards are contrary to public [policy](#).³ In summary, it is difficult to convince a court a dispute is not grievable or that enforcement of an award should be denied.

The Iowa Supreme Court has applied the principles stated above to public sector cases involving grievance [arbitration](#).⁴ Like their federal counterparts, Iowa courts are hesitant to tamper with an arbitrator's award if the award draws its essence from the terms of the collective bargaining agreement and does not violate a clear public policy of the [state](#).⁵ Most arbitration awards, no matter how illogical or wrongly decided, will meet this standard. Appealing an arbitrator's decision to Iowa district court is usually futile.

If you believe a dispute is not grievable either because it involves a non-contractual matter or the grievance is not timely filed, state those defenses in your answer. With respect to timeliness, the answer should simply state "the grievance is untimely" and cite the contract provision barring the processing of untimely grievances or requiring employees or the

association to file a grievance within a specified period. If the untimeliness of the grievance is not clear-cut, the answer you prepare should also discuss the merits of the case. That way, you can preserve any substantive arguments you have in the event the arbitrator later finds that the grievance was timely and decides the case on the merits. As a general rule, your answer should not merely state "grievance denied." It should cite facts and contract provisions that support your denial.

The arbitration hearing is less formal than a courtroom trial and is limited to the specific contract issue raised by the grievance. The parties generally stipulate the issue(s) to be decided (if not, the arbitrator will formulate the issue). The parties should always frame the issue in terms of the contract, since the arbitrator draws his or her authority from the contract and not from the arbitrator's personal view concerning what is "equitable" under the circumstances. Thus, the issue, when properly framed, is not whether the school corporation's actions were "fair" or "reasonable," but whether the particular action grieved violated a specific article or provision of the contract. The parties can also stipulate whether or not there are procedural issues for the arbitrator to resolve before deciding the grievance on the merits and stipulate to the receipt of the contract, grievance and answers in evidence as joint exhibits. The hearing will proceed more quickly if those matters are agreed to before the hearing begins and not left to the arbitrator to sort out during the hearing.

The arbitrator defers to the parties as to whether witnesses are sworn. The burden of proof in a contract interpretation case rests with the grieving association or employee since the employee or the union must show a contract violation occurred to prevail.

A different rule is applied in discipline or discharge cases where the burden of proof rests with the school corporation because it must establish the employee violated a rule, or engaged in other misconduct, to support the discipline imposed. The school corporation need not prove that the level of discipline given was appropriate or it "matched" the offense. Most arbitrators are hesitant to second guess an employer's decision regarding what level of discipline to impose and do not require employers to prove that the penalty was justified if

the employer has been consistent over time and has not abused its discretion. An arbitrator described the general rule and the rationale supporting the rule as follows:

Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equal men differ. A consideration which would weigh heavily with one man will seem of less importance to another. The circumstance which heavily aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment in discretion for the judgment in discretion honestly exercised by management, then the functions of management would have been advocated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been an abuse of discretion.

Relevant witnesses or documents can be subpoenaed through the arbitrator. While the issuance of an award usually ends an arbitrator's jurisdiction, arbitrators will entertain joint requests to clarify an ambiguous award and occasionally retain jurisdiction to assist in remedying a contract violation.

The extensive damages that are available to plaintiffs in civil litigation are not available to grievants. Generally, prevailing grievants receive only a "make whole" remedy, which means the

arbitrator attempts to place the grievant in the same or similar position the grievant would have been in had a contract violation not occurred. Arbitrators generally have no power to award punitive damages, interest on awards or attorney [fees](#).⁶ Back pay beyond the effective date of the contract is not permitted (and usually runs from the date on which the grievance alleges a contract [violation](#)).⁷

Discipline and discharge are not mandatory bargaining subjects under the PERA, so most public sector contracts do not include a clause requiring "just cause" for discipline or discharge. Therefore, most arbitration cases involving public employers concern contract interpretation issues (for example, whether the school corporation was arbitrary in denying a discretionary leave, whether a teacher was properly placed on the salary schedule, or whether an employee's qualifications warranted a transfer or reduction). Arbitrators decide contract interpretation cases based on the express language of the contract. The negotiations history of the provision involved and past practice are also reviewed if the language of the contract is ambiguous. Past practice to be binding, must be longstanding and mutually accepted. When deciding contract interpretation cases, arbitrators frequently apply the following guidelines:

1. Clear and unambiguous contract language should be applied as written, despite contrary practice.
2. The contract should be construed as a whole, giving effect to all relevant provisions.
3. Contracts should be interpreted to avoid harsh or absurd results.
4. Specific language prevails over conflicting general provisions.

Notes taken during negotiations can be instrumental in determining what the parties actually intended the language at issue to mean and will assist in fleshing out the relevant negotiation history.

Endnotes

1. [Steele v. Dept. of Corrections](#), 462 N.W.2d 299 (Iowa App. 1990).
2. [United Steelworkers v. American Mfg. Co.](#), 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); [United Steelworkers v. Warrior & Gulf Navigation Co.](#), U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; [United](#)

- Steelworkers v. Enterprise Wheel and Cart Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).
3. [See Elkouri and Elkouri](#), *How Arbitration Works* (4th Ed.), Ch. 1, pp 29-32.
 4. [City of Des Moines v. Central Iowa Public Employees Council](#), 369 N.W.2d 442 (Iowa 1985); *Sergeant Bluff-Luton Educ. Ass'n v. Sergeant Bluff-Luton Comm. School Corp.*, 282 N.W.2d 144 (Iowa 1979).
 5. [Iowa City Comm. School Corp. v. Iowa City Educ. Ass'n](#), 343 N.W.2d 139 (Iowa 1983).
 6. [Stockham Pipe Fitting Co.](#), 1LA 160, 162 (McCoy 1945); see Elkouri and Elkouri, *How Arbitration Works* (4th Ed.), Ch. 15, pp. 664-670 (discussion regarding arbitrator's authority to modify penalties imposed by management).
 7. [Hill and Sinicropi](#), *Remedies and Arbitration* (2d Ed. 1987), Ch. 11, pp. 197-206 Ch. 9 pp. 184-192