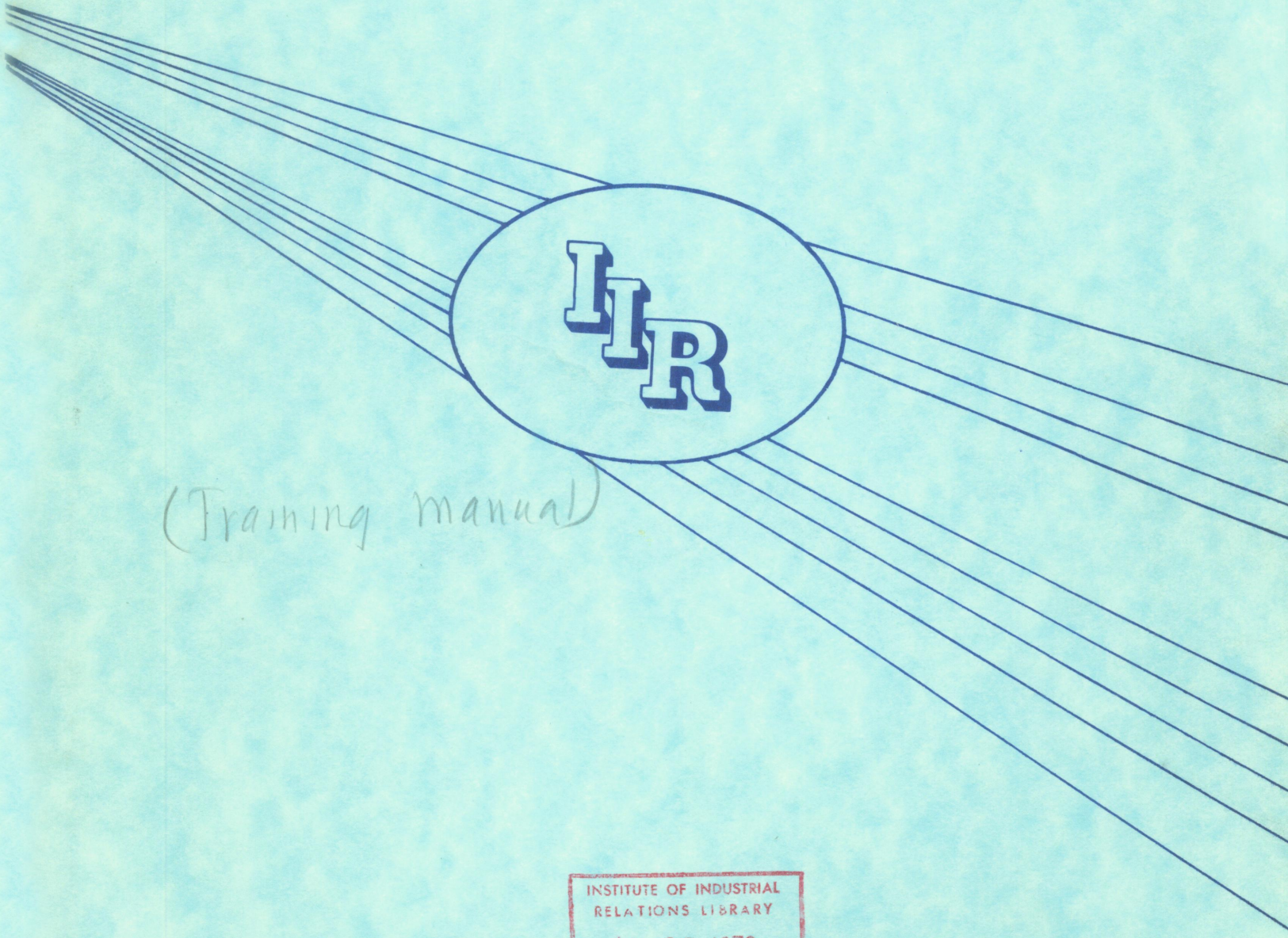
GRIEVANCE HANDLING AND PREPARING FOR ARBITRATION IN THE PUBLIC SECTOR



(Training manual)

INSTITUTE OF INDUSTRIAL RELATIONS
UNIVERSITY OF CALIFORNIA, LOS ANGELES

Published in 1976

Copies of this volume may be purchased at $8.00 each from

Institute of Industrial Relations
University of California, Los Angeles
Los Angeles, California 90024

GRIEVANCE HANDLING AND PREPARING FOR ARBITRATION IN THE PUBLIC SECTOR

Prepared Under the Supervision of

JOHN A. SPITZ, Coordinator

California, University,

INSTITUTE OF INDUSTRIAL RELATIONS, ~~UCLA~~ (Los Angeles)

Frederic Meyers, Acting Director

Paul Prasow, Associate Director

Spec. note.

"This Training Manual was developed under contract to the State of California Agriculture and Services Agency through a grant from the U.S. Civil Service Commission under the Intergovernmental Personnel Act (P.O. 91-648)."

Edited by Susan Astarita

Cover Design by Marna McCormick

$ 8.00

[Los Angeles, 1976]

INSTITUTE OF INDUSTRIAL RELATIONS, UCLA

CENTERS

LABOR RESEARCH AND EDUCATION

Jack Blackburn	Administrator
Geraldine Leshin	Coordinator
James Gallagher	Coordinator
Helen Mills	Program Representative
Janis Okida	Program Representative
Karen Hogan	Program Assistant

MANAGEMENT RESEARCH AND EDUCATION

John A. Spitz	Acting Administrator
Angus MacLeod	Coordinator
Joan Gusten	Program Represenative
Sandra Lind	Program Representative
Rita Stearn	Program Assistant

INFORMATION SERVICES

Felicitas Hinman	Principal Editor
Marlene Shaughnessey	Assistant Researcher
Susan Astarita	Writer
Blair Levin	Assistant Writer
Harry Swanson	Research Assistant

FOREWORD

The Institute of Industrial Relations is happy to present this, the second in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the Federal Government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials.

With the advent of collective bargaining in the public sector, public managers and organizations of public employees are faced with new problems relating to the effective interpretation and application of a contract or memorandum of understanding. Many conflicts are likely to arise; disputes over supervisory decisions, protests about employee discipline and discharge procedures, differences about such of the day-to-day operations of a public agency as are subject to the bargaining process and covered by agreement or understanding. A grievance process is used to handle disputes in a fair and regularized manner.

The grievance procedure is of critical importance for employees, the employee organization, and management. For employees it provides assurance of enforceability of the rights described in the agreement. For the employee organization it provides the means of protecting employee rights and of making the agreement a living document. It gives daily life to the organization's right and obligation of representation. For management it channels real or fancied grievances into an open and orderly procedure which permits testing of their reality and validity. It serves as a channel of communication among personnel at all levels, and permits the identification and resolution of problems which might otherwise fester. When properly administered, it avoids a build-up of discontent and resentment which might otherwise lead to low morale, low productivity or even serious disruption.

A successful grievance procedure must have the full support of management, the employees, and the employee organization. The process must be understood and properly administered. All concerned must know which problems are properly addressed in the grievance procedure and which are not. All concerned need to know sequential steps in the grievance handling procedure and the appropriate roles of the parties involved at each step. All concerned need to know when they have a legitimate argument and how to present it effectively. If an arbitration clause is included in a contract or menorandum of understanding, all concerned need to understand the arbitration procedure and the criteria an arbitrator may use to arrive at a decision. In short, all concerned need to know not only <u>how</u> the process works, but how it works <u>well</u>.

It is our hope that this manual of selected readings will be useful for practitioners who wish to establish and maintain effective grievance handling techniques and that it will assist those who undertake to train public sector practicioners.

Frederic Meyers
Acting Director

April, 1976

TABLE OF CONTENTS

PRINCIPLES, PRACTICES AND PREPARATION FOR GRIEVANCE HANDLING AND ARBITRATION.....TAB D

I. Individual and Group Grievances: Principles

II. Outline of Typical Negotiated Grievance Procedure: Dutes of the Parties

III. The Meaning of Arbitration: A Definition

IV. General Rules: Preparation for Arbitration and Hearing Procedure

V. Checklist on Preparation for Arbitration

VI. Determining the Mutual Intent of the Parties - Arbitrator Criteria in Interpreting Contracts

VII. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

MANUAL OF SELECTED READINGS -- AN OVERVIEW

The materials on grievance handling and arbitration presented here are the work of current public sector practitioners. The underlying assumptions and points of view expressed are those of the authors in each respective section. Our objective in choosing these particular materials is to present grievance program materials which address the topic from a practical rather than a theoretical vantage point.

We believe that effective grievance handling on the part of management or employee organizations depends not only on knowledge of facts or of steps in the process, but on a thorough understanding of the perspectives of all the parties in the collective bargaining relationship. We present here, then, a management perspective in the Grievance Handbook, by Lee T. Paterson and Frank B. Snyder, and an analysis of the grievance handling process from the point of view of an aggressive teacher organization, by Roger P. Kuhn. The materials assembled by Judy Meadow for the City of Los Angeles include written examples, charts, and objectives that may be used to update a grievance procedure and teach grievance handling techniques in a public agency. Arnold Zack, a well-known arbitrator relates grievance handling to the public sector setting and to arbitration procedures.

This manual can be used as a dynamic teaching tool. Checklists and reviews of principles detailing good grievance practices may serve as quick practitioner reference sheets in day-to-day grievance handling.

Finally, for the reader who wishes to conduct an in-depth theoretical inquiry, we have included bibliographies, abstracts, and other references.

We hope that the selection criteria guiding our choices here have produced a practical manual to meet your needs.

JOHN A. SPITZ

A

THE GRIEVANCE HANDBOOK

by

Lee T. Paterson and Frank B. Snyder

Revised and Reprinted by the
Institute of Industrial Relations, UCLA
With Permission of the Authors

Originally Published Jointly by the
Association of California School Administrators and Negotiation Support Service

TABLE OF CONTENTS

***

CHAPTER I

INTRODUCTION

Traditional methods of agency management are undergoing a drastic revolution. Not too many years ago, it was customary for the model administrator to approach his role as a benevolent father figure. When a problem existed it was the administrator's/manager's duty to discuss the situation with "his people" and then to make a decision which was fair and just to everyone. After the decision was made, it was the administrator or manager's duty to see that it was accepted by all concerned. People who couldn't accept it were "troublemakers," "non-professional" or "not suited to be professionals." Similarly, employees were assumed to be good-natured, perhaps incompetent, but under no circumstances were they expected to be loud or aggressive. An employee who did nothing might last in his job forever; an employee who complained would only last until someone found a loophole in the tenure or civil service rules.

Today, both stereotypes have all but faded from management. Administrators have begun to realize that management is a profession on its own. The "Pater Familias" is giving way to the professional manager who uses goal setting, systems analysis and human relations to manage resources and people. At the same time, with the rise of militant unionism, employees are demanding and receiving more input into decisions regarding their salaries, working conditions and the services they provide. Employee organizations have been willing to use whatever tools they have at hand, including political pressure, court suits, publicity campaigns and, of course, strikes, to get more decision making power.

Without a doubt, the major impetus to change for managers is coming from negotiated grievance and arbitration procedures. Most agencies have had "open door" policies for grievances. These "open door" policies, when coupled with tenure, civil service and personnel commissions, worked well in most cases. When an employee was seriously threatened by a disciplinary action, he had state laws for protection. The administrator, on the other hand, had the flexibility on minor issues to run his department as he saw fit. In some instances, this resulted in minor injustices to employees, but in most cases it provided a flexible and responsible method of administering the agency.

However, as employee organizations have become more powerful, they have fought to take away the ability of the administrator, particularly at the first line level, to make decisions based on his own subjective determinations. By negotiating personnel policies based on objective standards such as seniority, and by providing that violation of negotiated personnel policies is subject to grievance and arbitration procedures, the organizations have been successful in curtailing the individual flexibility of supervisors. The result of this has been to create a different type of supervisor, and one who, to protect himself, must work as a team member with all his fellow administrators. As the National Education Association states with particular reference to secondary school administrative problems:

> As soon as his (Principal's) position has been reversed a few times or he has been embarrassed by an arbitrator's questions, he will begin to check up the administrative line with the assistant superintendent or the superintendent, to see if his written answer is in line with the administration's view of the matter. Also, he will begin to check with other principals to see if what he is doing in his building is consistent with what is going on in the rest of the school system. More important, after some experience in grievance processing, the principal will begin to check with his superior and with other principals in advance of his decisions which might give rise to complaints. (Grievance Administration, National Education Association, Washington, D.C. 1971)

In this changed system, both the veteran administrator and the neophyte administrator must learn new rules for dealing with employees and their union representatives. The purpose of this book is to provide agency managers with these new rules and the procedures to implement them. The scheme of the book is also the scheme for a training program for administrators. Chapter 2 provides the philosophic background for the line administrator's approach to grievance procedures. Chapter 3 analyzes the important elements of a grievance policy from the management point of view. Chapter 4 provides the rules for processing grievances at the first step, along with the actions the supervisor should consider before making a response. Chapter 5 discusses the rules for higher administrators in the grievance process, and the last chapter is a training outline to be used to train administrators in grievance handling.

CHAPTER II

MANAGEMENT ATTITUDE TOWARD GRIEVANCE PROCEDURES

As the employee relations process changes more and more public agencies are being faced with demands for grievance and arbitration procedures. Management's initial response to these proposals is almost invariably negative and suspicious. Administrators handle professional problem resolution through frank, open discussion and ultimate resort to a professional relations committee. The adversary approach which often develops in grievance procedures is totally alien to most agency administrators. Almost universally management officials suspect that the real purpose for grievance procedures is to harass and attack management and to build employee organization power. To some extent, management's suspicions are correct. Associations and unions do use grievance procedures aggressively. Some evidence of this can be seen in the following quote from The National Education Association;

> "It (lack of grievances) is also a signal that something may be wrong if grievances never come from a particular school. The contention that 'everything is fine at my school - we had no grievance complaints this year' - is not based on reality. No complaints at all should be a sign to the Association, particularly, that the school should be checked. The grievance representative may not be doing his job."
> (Grievance Administration, National Education Association, Washington, 1971)

There are, in fact, a number of very valid management reasons for negotiated grievance procedures. The most obvious reason, one which the employee organization can support, is that the grievance procedure provide a means for adjudicating conflicts over the meaning of terms of the negotiated agreement. In the private sector, before grievance procedures were popular, it was common in some companies for labor to protest an alleged violation of the agreement by going on strike. In others, grievance settlements were "discussed"

by physically intimidating the first line supervisors. Grievance procedures provide a peaceful method of resolving disputes without having to resort to strikes or threats.

Another important management reason for having grievance procedures is to give employees a channel for their gripes. In many cases an employee will use management as a scapegoat for all of his complaints. With a grievance procedure, the supervisor can suggest that if the employee thinks his complaint is meritorious, he should use the grievance procedure.

Finally, for public agency management, the grievance procedure may provide an indicator that a supervisor isn't handling employee relations effectively. Seventy to eighty percent of all grievances should be settled at the first step. If a supervisor is unable to settle grievances at the first stage, and continually bucks them up to the next step, it may indicate he needs help in performing his job.

In the beginning, handling grievances under an adopted grievance procedure is a major problem for supervisors. Part of the problem can be solved by looking at grievances from an organizational point of view rather than from a personal view. Grievances will be filed; they will be filed against good supervisors and bad supervisors. The effective supervisor will accept the new system and accomplish as much or more than he ever accomplished before. The ineffective supervisor will fight the system and in the long run will be forced out.

Following are a few rules which may help the agency manager adjust to working with a grievance procedure system:

(1) Reflect the Attitude of the Agency

In handling grievances, supervisors often forget that every agency, either explicitly or implicitly, has an attitude towards labor relations. This attitude is usually set by key agency management personnel. In some agencies labor relations are looked upon as a war. Every negotiation or grievance is a battle. Every concession is a loss. Every holding action is a victory. On the opposite end of the spectrum, some agencies approach labor relations as a joint decision making process in which employees, union and management each share in the decision making and responsibility for the operation of the agencies; in these agencies the

negotiated agreement is only a framework for the day to day problem solving and cooperation between labor and management. The majority of agencies, of course, fall between these two extremes: cooperating on some issues and opposing on other issues.

Whatever the attitude of the agency, the important thing is that the supervisor has to work within and reflect that attitude. A supervisor who won't discuss problems with an employee organization representative will be rewarded and praised in an agency with a conflict-oriented attitude, but in an agency with a cooperative attitude, his days are numbered. If the supervisor wants to survive, he has to adjust his personal labor relations attitude to that of the agency.

(2) There is a Difference Between the Employee and the Employee Organization

Management often makes the mistake of saying "The teachers are trying to do away with faculty meetings," or "The power line inspectors don't want to do their jobs." In most cases what they are talking about are actions taken by employee organizations. The goals of employee organizations usually are far beyond the goals of the majority of their members. Where employees are willing to work for the goals of an agency, organization leaders often see these goals as threats, and without the approval of their members they take actions to block supervisors from achieving the goals. In one junior high school building the faculty on its own started a voluntary tutoring program for students during the lunch period. The Teachers' Association leaders were afraid that other principals would pressure their faculties to start similar programs and saw this as a threat to their negotiations package. They immediately filed a grievance against the district on the grounds that the agreement required a duty-free lunch and that allowing the teachers to engage in a voluntary tutoring program deprived them of the duty-free lunch. The principal seeing this grievance on his desk obviously had a number of options. One could have been to call a faculty meeting, present the grievance, and tell the faculty that they could do as they wished with the program. Another might have been to meet with the building representative, the teachers involved and the parents to discuss the problem. Unfortunately, the principal didn't exercise his options; instead he fired back a short "grievance denied" to the Association and they took it to arbitration. The arbitrator ruled

that the district had to provide a duty-free lunch which included forbidding teachers from performing work during their lunch period.

Management has to remember that there is a difference between employees and employee organizations. Supervisors have to work on a close personal basis with employees. Whatever the employee relations attitude, the supervisor has to be fair and reasonable. As much as possible he should be a friend to the employees, working with them, and at the very least should discuss problems and accept suggestions from them.

(3) Work with Employee Organization Representatives

Whatever the relationship between the agency and the employee organization on an individual basis; each administrator has to work with the local employee organization representative. Even in the worst conflict-oriented labor relations situations, no supervisor should take on a personal battle with the employee organization representatives. Working with the employee organization representative doesn't mean always reaching agreements or making concessions, but it does mean communicating with the representative and gaining his respect.

At the first line level in a normal relationship, the supervisor should discuss employee relations problems with the employee representative. If he anticipates a grievance problem such as an involuntary transfer, he should let the employee representative know that the problem is coming. Don't surprise the organization representative. Periodically, he should meet with the employee representative for coffee or lunch just to discuss current situations. Talking to the site representative builds a relationship that can be helpful in resolving later problems.

At the agency level, management representatives have to build credibility with the employee organization. In some agencies this credibility may be accompanied by a militant attitude on both sides. In most, it will be accompanied by open communication and discussion on most issues. An ongoing relationship is valuable to both parties since few districts and fewer employee organizations have the resources or the stomach to maintain a continuous warfare over every management action.

(4) Remember the Representative's Role is Political

Management often forgets that the organization representatives they deal with were elected or appointed to office. As such they have to maintain the support of their peers. Agency supervisors often make comments such as, "What they are asking isn't logical." A good example of this is the standard employee organization response to an agency statement that they can't afford a pay raise. "That's your problem, not ours." From a logical point of view the response doesn't make sense (a better response would be, "O.K., let's look at the budget to see what we can cut"), but from a political point of view it's the only response possible since any other response leaves the organization leaders open to member criticism.

In trying to understand the employee organization's point of view, the agency supervisor has to look at the organization's position from a political viewpoint. An executive secretary engaged in an internal fight with the president of the association isn't going to make compromises with management which could be criticized by the members; to management his actions appear irrational, but to the executive secretary they are extremely logical.

(5) Be Prepared to be Overturned

One of the purposes of successive grievance appeal steps is to allow higher levels of management to review the decisions made at lower levels. Often these reviews result in the final decision being a compromise between the positions of agency management and the employee organization. These settlements are normally the result of a broader view of the problem. For example, the agency may want to settle some minor grievance issues because negotiations are about to begin, or they may want to trade off a wage grievance for a management rights grievance which is more important. First level supervisors often expect management to support their decisions up the line. Sometimes this will happen but lower level administrators may also expect to be reversed periodically.

(6) Support Management

All of the above rules will help the supervisors in dealing with employee relations, but in the last analysis whatever else the supervisor does there is one rule that is paramount: support management. First line supervisors often try to substitute an independent judgment for that of the agency. For example,

a supervisor may not agree that social workers should be required to sign out when they leave the building, so in his office social workers never have to sign out. What he does not realize is that his decision may cause problems for other supervisors in the agency. Similarly, in settling grievances, supervisors are often tempted to ignore the agreement and substitute their own concept of fairness to settle the grievance. If the employee organization can get a few supervisors to do this, they can whipsaw supervisory decisions back and forth until they have the agreement interpreted in a way which was never intended.

Every supervisor has the responsibility of making sure that all retained management rights are preserved, both in grievance settlements and in actual practice. Everything a supervisor does in his job sets precedent which may affect other administrators. Before acting, or failing to act, the supervisor should ask himself if he is supporting his fellow managers.

Conclusion

In the final analysis, grievance procedures are only as effective as the parties that use them. If an agency wants to make its grievance procedure effective it has to see that every participant in the procedure accepts it and reflects the philosophy behind it. If first line supervisors expect to be supported in their handling of grievances, they must support the procedure as written.

CHAPTER III

NEGOTIATING AND ANALYZING GRIEVANCE PROCEDURES

More than any other negotiated provision the grievance procedure is, or should be, a reflection of the relationship between the parties. In writing grievance procedures management first has to determine its basic employee relations philosophy, then assess its relationship with the employee organization. In analyzing a proposed grievance procedure management must ask if the procedure will promote or detract from its philosophy for grievance handling.

Obviously, there are many approaches to grievance handling. However, for simplicity these can be reduced to three basic approaches:

Contract - Legal: A legalistic approach to grievance handling which holds that grievance procedures are only designed to interpret the contract between the parties. This view reflects the attitude that management is conducting a holding action against the erosion of its prerogatives by both employee organizations and arbitrators.

Human Relations: An approach which holds that a grievance procedure should be used as a relief valve for any employee dissatisfaction. This approach also reflects the view that the written agreement is only an outline of the basic relationship between the parties and that a grievance procedure is needed to provide continuous refinement and interpretation.

Middle of the Road: An approach that tries to take the better parts of the contract-legal and the human relations approach by providing a broad definition of grievance with specific exclusion of management rights issues. In this approach, management welcomes resolution of employee complaints over basic issues, such as salaries or working conditions, but resists intrusion of an arbitrator into management rights areas such as agency goals or the budget.

Whichever philosophical approach management chooses, it should attempt to negotiate a procedure which reflects that philosophy. Grievance procedures which do not reflect the basic philosophy of the agency are time bombs waiting to explode. Contract-legal philosophies are not compatible with blue sky definitions of grievances, nor are contract-legal managers compatible with agencies with human relations approaches to meet and confer. Similarly, an agency negotiator trying to negotiate a contract-legal grievance procedure for a human relations oriented agency is setting himself up for an end run by the employee organization.

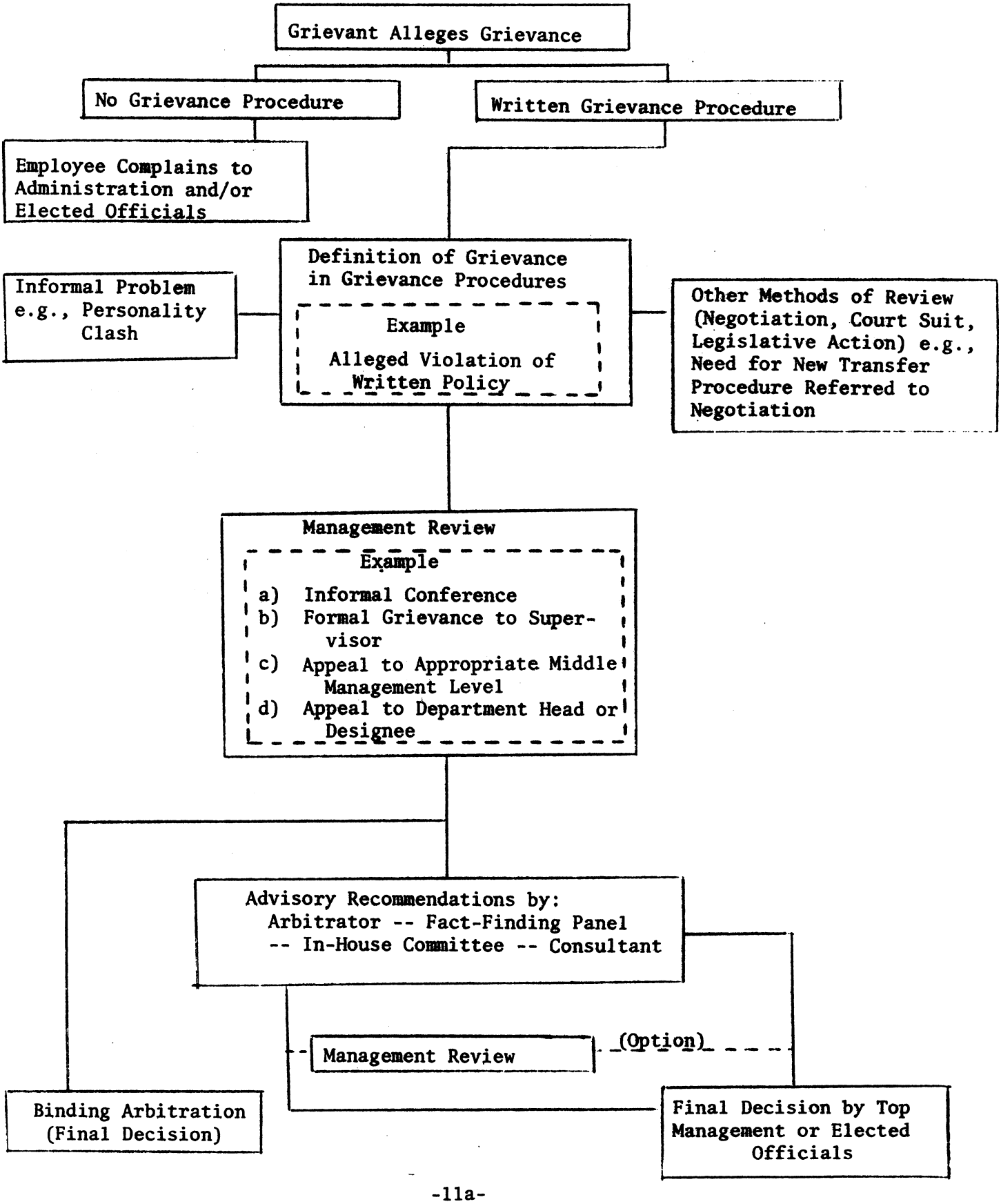
Written grievance procedures can be broken down into two basic sections: First, a two party system which is a formalization of the management decision review process. Secondly, the intervention of a neutral agent when the problem cannot be resolved. Neither of these ideas is a novel concept in public agencies. Public agencies have traditionally used grievance procedures under other names for the resolution of employee problems. Many agencies still have formal policies providing that an employee may take problems through administrative channels all the way to top management.

The general outline of the grievance process can be seen on the Grievance Process Chart on the facing page.

In analyzing grievance procedures it quickly becomes apparent that even though they differ in specific language, virtually all of them can be divided into four key elements:

1) Grievance Definition
2) Procedural Steps for Appealing a Grievance
3) Limitations on Processing a Grievance
4) Methods for Involving a Third Party

GRIEVANCE PROCESS



Definition of a Grievance

There are three types of grievance definitions:

Broad: In the broad grievance definition a grievance is anything that bothers the employee in his work. A broad grievance definition reflects a human relations approach to employee relations. Some examples of grievances under a broad definition are: unfair treatment of other employees by management; benefits given to other employees; attitudes of supervisors towards employees; hiring practices.

A typical broad grievance procedure definition would be:

> "A 'grievance' is any dispute between an employee and the agency."

More subtle examples of broad grievance definitions are:

> "A grievance is a written complaint filed by an employee with his supervisor."

or

> "A grievance is a professional problem between an employee and the agency."

Narrow: In the narrow grievance definition, a grievance is limited to only specific violations of those items negotiated between the organization and the agency management. A narrow definition reflects a contract-legal approach to employee relations. None of the examples used above in the broad definition would normally be grievances under a narrow definition. Only such things as refusal to pay negotiated wages, violations of a transfer policy or failure to distribute overtime as provided in the contract would be acceptable grievances.

A typical narrow grievance definition would be:

> "A 'grievance' is an alleged violation of a specific provision of this agreement by an employee covered by this agreement which adversely affects the grievant in his employment relationship."

Compromise: Most negotiated agreements adopt a half-way approach between the narrow and the broad definition. In these procedures employees may grieve not only over negotiated agreements but also over any adverse actions taken by agency management which affect their own wages, hours or working conditions. Typical grievances allowed by a compromise definition which would not be permitted under a narrow definition, would be unfair promotions, alleged sex discrimination and unsafe working conditions.

A typical compromise grievance definition would be:

> "A 'grievance' shall mean any claimed violation, misinterpretation, or inequitable application of the existing agreement, or of the written rules, procedures, regulations or administrative orders of the agency, or of any state or federal law which adversely affects the grievant; provided, however, that such terms shall not include an action regarding disciplinary proceedings or any other matters which are otherwise reviewable pursuant to law or pursuant to any rule or regulation having the force and effect of law."

Steps in the Procedure

Normally, grievance procedures provide a succession of steps in which the employee presents his grievance to his immediate supervisor and, if unresolved, to successive administrative levels up the chain of command. The number of steps will vary depending on the size of the agency; however, normal grievance procedures will have at least two and at most five administrative review steps. The reason for the successive appeals is to give management a

chance to look at the grievance from a broader and broader point of view and to give both management and the employee organization an opportunity to evaluate the importance of the grievance.

Most procedures provide, as a first step, an informal conference between the employee and his immediate supervisor. Typical language for such a provision would be:

> "The employee shall first discuss the matter in an informal conference with the supervisor with immediate administrative responsibilities for the position to which the employee is assigned."

The rationale for this provision is that the grievant and his supervisor should attempt to resolve the problem before their positions become hardened by a formal grievance. In practice, it is questionable how effective this provision really is. Where a good relationship exists between the employee and his supervisor an informal discussion would occur as a matter of course. Where the relationship is poor the informal conference will likely be either subverted or abrasive, or the employee will ask that his organization representative be allowed to be present and to speak for him.

One major problem with informal conferences is measuring time limits to and from the conference. Some school districts have written provisions stating, "The immediate administrator will give an answer to the grievance within ten (10) days after the informal conference." Since supervisors have continuous meetings with employees it is often difficult for them to pinpoint the day on which they had an informal conference. (In some cases first line supervisors have not even been aware that an informal conference under the grievance procedure had been held until they heard the grievant tell his story to the arbitrator.) In a number of cases employees have used the confusion of time limits in informal conferences to stall or delay the grievance process beyond its normal time limits.

If the informal step fails to resolve the grievance, the next step should be a formal grievance presented, in writing, to the employee's immediate supervisor. At this step, the first level supervisor is put on notice that the grievance is serious and that if he doesn't resolve it, the employee or his organization will appeal the matter up the chain of command. A typical first formal step would be:

> "If the matter is not resolved at the informal conference, the employee may present his grievance in writing to the supervisor with immediate administrative responsibility for the position to which the employee is assigned."

As part of the first formal step, most procedures provide for a conference between the employee and/or his representative and the employee's immediate supervisor. "Before an employee files a grievance, he shall discuss the matter with his immediate superior in an attempt to settle the matter satisfactorily."

One question which often arises in writing the first step of the grievance procedure is, what should happen when the subject of the grievance, or the remedy sought, is beyond the scope of responsibility of the immediate supervisor? Examples of such grievances would be complaints concerning placement on the salary schedule, paycheck shortages, and employee organization rights. Some agencies handle this problem by allowing such grievances to be filed at higher levels (e.g. "Grievances relating to agency level matters may be filed at Step 3."). In allowing grievances to be filed at higher levels, however, management is subverting the basic administrative chain of command. Since the grievance is filed against the agency and since the first level supervisor has to be the representative of the agency with his subordinates, it is a better practice to have all grievances filed with the first level supervisor.

The majority of grievances should be settled at the first step of the procedure. Those that are appealed beyond the first step often are the result

of poor supervision or relate to broader areas of employee relations than just the individual's grievance.

The next steps of the grievance procedure are successive appeals through higher levels of management. The procedure usually provides:

> "If the grievant is not satisfied with the decision of the immediate supervisor, he may within five (5) working days after receiving the decision of the supervisor appeal the grievance in writing to his department head."

Normally the administrative appeals process ends in review either with the Department Head, Department of Personnel, or the Civil Service Commission.

Procedural Limitations

All grievance procedures contain some form of limitation on the processing of grievances. One of the most common restrictions is time limits. Both employee organization and management want time limits on grievances to ensure that evidence is still available on the issues and to ensure that they are handled promptly. Normally, a grievance procedure will have time restrictions on: 1) the period of time in which grievances can be filed, e.g. "grievances must be filed within ten (10) working days after the event giving rise to the alleged grievance occurred" (restrictive) or "grievances must be filed within ten (10) working days after the employee knew of the event giving rise to the grievance" (broad); 2) the periods of time which a supervisor has to answer the initial grievance; 3) the time periods for answers at higher appeal steps and 4) the periods of time which the employee or his representative has to appeal an unfavorable answer by a supervisor. Most procedures also provide that both parties may waive the stated time limits by mutual written agreement.

While time limits are very important, management has to realize that arbitrators will do almost anything to avoid throwing a grievance out because

it was untimely. Time limits must be written clearly and without ambiguity so that the arbitrator can't create his own interpretation of the meaning. First level supervisors have to be cautioned that answering a grievance which was not filed within the prescribed time limit may waive the agency's right to argue that issue before the arbitrator.

Another common procedural limitation is the requirement that the employee present the initial grievance personally rather than allowing the organization representative to file the grievance. Employee organizations usually demand the right to initiate grievances on the ground that the organization represents the rights of all employees. Management, on the other hand, usually insists that employees file the initial grievance because 1) the purpose of the procedure is to resolve employee problems, and 2) they don't want the procedure to be used by the organization or one of its representatives as a harassment technique. A management proposal might be similar to the following:

> "An employee with a grievance shall first present it to his immediate supervisor. Representatives of the employee organization may be present during a grievance conference."

After the first step, some procedures provide that the employee has to initiate any appeal. However, most procedures allow either the employee or his organization to appeal the grievance.

Another common issue is whether grievances should be filed in writing. Some contracts do not mention this subject. Generally speaking, however, the smaller the agency and/or the better the relationship, the less likely management will insist that grievances be presented in writing. However, prevailing practice provides that all formal grievances and appeals be in writing.

Third Party Review

Third party review is the critical denominator in a grievance procedure. In the absence of an independent party reviewing the management and employee

organization interpretations of the problems, the grievance procedure can only be as good as the general relationship between the parties. With third party review, both parties are cognizant in the first steps of the grievance process that they either have to settle the grievance or submit their grievance to outside review.

There are a number of methods of third party review. The three most common types are: 1) factfinding without recommendations; 2) advisory arbitration (factfinding with recommendations); and 3) binding arbitration.

Factfinding without recommendations is a process in which a third party is asked to review the basic facts in dispute between the supervisor and the grievant to determine the essential facts of the problem. This type of third party review is analogous to a data gathering service. Its most valid use is to cut down on frivolous grievances before they go to binding arbitration. Factfinding without recommendations is extremely rare in grievance procedures. However, periodically it is proposed as an interim step to cut down on the cost of arbitration hearings.

Advisory arbitration (factfinding with recommendations) is a process in which the third party is asked to go beyond the basic facts and to make a recommendation for the resolution of the grievance. Advisory arbitration is rare in the private sector but is frequently found in public agencies. The real force behind an advisory arbitration decision is the logic of the third party's argument and the weight of public and employee opinion behind the recommendation.

Binding arbitration is a method of grievance resolution in which a third party is asked to substitute his judgment for that of the employer and the grievant. Since the U.S. Supreme Court legitimized binding arbitration for private industry in the Steel Workers' Trilogy Cases[1], binding arbitration

---

1 Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

has become the predominant method of resolving grievances in the private sector. In the public sector, binding arbitration is gaining in acceptance either through negotiation or legislation.

Normal sources of selection for third parties are referral lists maintained by the Federal Mediation and Conciliation Services, the American Arbitration Association or the State Conciliation Services. However, many grievance procedures provide for a single named arbitrator, for selection by a local professional organization, (e.g. Bar Association) or for selection from a limited group of people (e.g. taxpayers living within the jurisdiction). In a few agencies, both management and the employee organization have become dissatisfied with use of new arbitrators for every grievance and have agreed to name a "permanent umpire" who will sit as the arbitrator on every case.

Conclusion

The grievance procedure is the single most important clause in the agreement. Loose drafting in any other clause can result in the agency simply losing its interpretation of the clause; loose drafting of a grievance and arbitration procedure can result in the agency being forced into positions it never agreed upon. Before negotiations start the agency management should look at the current grievance procedure to see if changes should be made. If so, then needed changes should be the agency's number one priority in negotiations.

Model Grievance Procedure	Commentary
1. Definitions A. A grievance is an allegation by a grievant that he has been adversely affected by a violation of _____ * _____. Actions to challenge or change the general policies of the agency as set forth in the rules and regulations or administrative regulations and procedures must be undertaken under separate legal processes. Other matters for which a specific method of review is provided by law, by the rules and regulations of the Civil Service Commission, or by the Administrative regulations and procedures of this agency are not within the scope of this procedure.	The grievance definition is the single most important element of the procedure. It should reflect management's approach to employee relations, e.g. broad human-relations; narrow; contract-legal. Grievance definitions should avoid giving an employee "another bite at the apple" where he already has one method of review, e.g. employee review. It should be assume throughout the procedure that grievances are filed against the agency not against individual supervisors. If necessary this can be emphasized in the definition.
B. A "grievant" may be _____. Insert one of the following: Example 1. Any non-management employee of the agency covered by the terms of this agreement Example 2. Any employee or group of employees covered by the terms of this agreement Example 3. Any employee group or employees or the Association covered by the terms of this agreement.	The right to file class grievances and the right of the organization to file grievances is usually a major trade off item for management in negotiations.
C. A "day" is any day in which the central administrative offices of the _____ public agency are open for business.	The word "day" is confusing in public agencies because of odd work schedules and irregular work shifts, e.g. rotating shift of hospital workers. The policy either should use calendar days or define days as suggested. A day is not an employee's work day...

* Insert appropriate language, e.g. "the specific provisions of the agreement" or "the written policies, rules and regulations of agency management."

D. The "Immediate Supervisor" is the lowest level administrator having immediate jurisdiction over the grievant who has been designated to administer grievances.

In many cases employees take formal grievances to quasi-administrators such as personnel officers who attempt to settle them in the name of the agency. Formal grievance practices should be limited to designated administrators.

II. Informal Level

Before filing a formal grievance, the grievant should attempt to resolve it by an informal conference with his immediate supervisor.

Informal grievances are easier to resolve since the parties are less likely to take fixed positions.

III. Formal Level

A. Step One

Within ten (10) days after the occurrence of the act or omission giving rise to the grievance, the grievant must present his grievance in writing on the appropriate form to his immediate supervisor.

This statement shall be a clear, concise statement of the grievance, the circumstances involved, the decision rendered at the informal conference, and the specific remedy sought.

Grievance has to be presented promptly so that evidence may be presented, and so that grievances can't be "saved up" to dump on management all at once. Formal grievances should be in writing so that all parties know the matter is serious, the issues are defined, and the issues cannot be changed.

B. The supervisor shall communicate his decision to the employee in writing within ten (10) days after receiving the grievance. If the supervisor does not respond within the time limits, the grievant may appeal to the next level.

Management should respond to the grievance within a reasonable time frame. Failure to respond gives the employee a right to appeal. Be careful of proposals which state "failure to respond results in settlement in favor of the employee."

C. Within the above time limits either party may request a personal conference.

A personal meeting is the most effective way to discuss and resolve grievances.

D. Step II

In the event the grievant is not satisfied with the decision at Level 1, he may appeal the decision on the appropriate form to the

*

(e.g. Department Head or Designee)

within ten (10)days. This statement should include a copy of the original grievance, the decision rendered, and a clear, concise statement of the reasons for the appeal.

The second level of review should be a division level person who can review the grievance from a broader operational perspective and settle if appropriate. Management should not allow grievances to jump from the bottom of the administrative chain to the top. The grievance should move up the organization structure. Anything else breaks down mid-level management authority.

E. _____ *

(e.g Department Head or Designee) shall communicate his decision within ten (10) days after receiving the appeal. Either the grievant or the middle management representative may request a personal conference within the above limits. If the middle management representative does not respond within the time limits, the grievant may appeal to the next level.

F. Step III

If the grievant is not satisifed with the decision at Step II, he may within ten (10) days appeal the decision on the appropriate form to the agency manager or his designee. This statement shall include a copy of the original grievance and appeal, the decisions rendered, and a clear, concise statement of the reasons for the appeal.

G. The agency manager or his designee shall communicate his decision to the grievant within ten (10) days. If the agency manager or his designee does not respond within the time limits provided, the grievant may appeal on the next level.

* Insert appropriate title.

H. Step IV

If the grievant is not satisfied with the decision at Level III, he may within five (5) days submit a request in writing to the agency management for (advisory) arbitration of the dispute. Grievant and the agency management shall attempt to agree upon an arbitrator. If no agreement can be reached, they shall request the State Conciliation Service to supply a panel of five names of persons experienced in hearing grievances in public agencies. Each party shall alternately strike a name until only one name remains. The remaining panel member shall be the (advisory) arbitrator. The order of striking shall be determined by lot.

I. The fees and expenses of the arbitrator and the hearing shall be borne equally by agency management and the grievant. All other expenses shall be borne by the party incurring them.

J. The (advisory) aribitrator shall as soon as possible, hear evidence and render a decision on the issues submitted to him. If the parties cannot agree upon a submission agreement, the arbitrator shall determine the issues by referring to the written grievance and the answers thereto at each step.

Sometimes employee organizations and management bluff each other to the top of the grievance procedure without either party being sure the case is appropriate for arbitration. Formal notice sometimes give both parties a chance to reevaluate their positions.

K. The arbitrator will have no power to add to, subtract from or modify the terms of this agreement.

L. Issues arising out of the exercise by the elected officials and administration of its responsibility referred to in Article _____ (Management Rights) including the facts underlying its exercise of such discretion shall not be subject to this procedure.

M. After a hearing and after both parties have had an opportunity to make written arguments, the (advisory) arbitrator shall submit in writing to all parties his findings and recommendations (which shall be final)

N. Step V
In the event that either party is not satisfied with the recommendation of the arbitrator, he may appeal the decision in writing within ten (10) days to the elected officials.

Optional clause for advisory arbitration procedures. With this clause the decision of the arbitrator is final unless appealed.

O. The elected officials alone have the power to render a final and binding determination of a grievance. The recommendation of the arbitrator shall only be advisory and if, upon review, the elected officials determine that it is unable to render a final determination on the record, they may reopen the record for the taking of additional evidence.

Optional clause for advisory arbitration procedures. This clause states clearly that the procedure is advisory to the elected officals and leaves them with the discretion to hold a hearing.

CHAPTER IV

GRIEVANCE PROCESSING - THE FIRST STEP

Resolving employee grievances is a major responsibility for the supervisor. The attitude which he displays in meeting this responsibility may largely determine whether the grievance can be effectively resolved. Higher morale and better employee attitudes are obvious when grievances are quickly and effectively resolved. The results of poor handling of employee gripes and complaints are quickly felt in increased militancy, poor employee attitudes, and loss of morale. Most agencies have some kind of grievance procedure and it is the Supervisor's responsibility to work with his subordinates and employee organization representatives to fairly and effectively implement that procedure.

Most employee complaints go through a series of stages before they become full-blown formal grievances. The first stage usually begins when an individual is irritated by some job-related problem. Perhaps he didn't get the transfer he wanted, or his room assignment may not be to his liking, or he may feel that his supervisor is showing favoritism in the assignment of extra pay work. The possibilities are innumerable, but the thing to remember is that the problem or irritation is important to the employee. The skilled supervisor develops an ability to anticipate problems and to locate and resolve them before they become formal grievances.

The second stage is when the employee begins to complain about his problem, either to his superior, to other employees, or to his organization representative. At this stage, the employee is trying to resolve his problem by getting responses from other people. It is during this stage that the "grapevine" usually tells the supervisor that trouble is brewing and that an effort should be made to resolve the employee's problem if at all possible.

The final stage is reached when the employee becomes so disturbed that he takes specific steps and in effect "demands" a solution to the problem. He may consult with his organization representative, he may request a conference with his supervisor, he may file a written grievance, or he may do all three. At this point, the supervisor is often in a position to peacefully resolve the problem, or at least offer some compromise solution to it. If the supervisor shirks his responsibility, he will only make the problem worse.

For example, if he puts the blame on a higher supervisor, looks for an easy out, avoids making any decision, or settles the grievance in violation of agency or administrative policy, he will only defer resolution of the problem until later when it has grown larger. Top level administrators and supervisors should watch for this type of supervisor, identify him as a management problem, and take corrective action.

In a formal grievance procedure it is customary in the first step for the employee, with or without his union representative, to present his grievance to his immediate superior. While there is no magic formula which will guarantee that the immediate superior will be able to resolve the complaint to the employee's satisfaction, there are certain practices which supervisors have used successfully to help resolve problems in the first step of the grievance procedure.

1. LET THE EMPLOYEE TELL HIS STORY

One of the most frequently heard complaints by employees is that their superior "doesn't listen" to them. It is easy to forget that employees want to feel that someone is willing to listen to their problems. Very often the most productive way to solve minor gripes is just to "let the employee get it off his chest." If pressures of time cause the supervisor to adopt a defensive posture toward employees each time there is a complaint, he frustrates the employee's need for a sympathetic ear and, in the long run, creates a situation in which employees will refuse to discuss problems with him. Experience shows that employees will then turn to the sympathetic ear of an employee organization representative.

When an employee comes in to express a gripe or complaint, adopt a problem-solving approach and encourage the employee to tell his story. In making responses, do not take the issues personally. Ask only objective questions such as: When did this happen? When did it start? How do you feel this should have been handled? How can I help straighten this out? Is there anything else I should know about the problem?

In asking questions, the supervisor must indicate that he is giving his full attention to the presentation of the grievance. Too often the supervisor allows himself to be constantly interrupted by phone calls or other matters and the employee feels that he never really has the full attention of the person to whom he is speaking. Under all circumstances the supervisor must stay calm and objective even though the employee or his organization representative may beocme abusive and angry. Organization representatives will often deliberately bait or attempt to irritate managers in the hope that he will make some prejudicial remarks which may later be used against the agency.

Many times employee gripes or complaints can be settled just by letting the employee get them out in a frank, open discussion if the basic problem is that the employee is upset not by what was done but the way it was done. The first level supervisor should settle the problem with an apology. Apologizing does not imply that the supervisor is going to change what was done, but it does reflect his interest in good personal relations. This is the only case in which you should give an immediate answer to the grievance.

If this approach is not successful, the immediate supervisor should then take pencil in hand and ask the employee to go back over the story while he makes some notes to make certain that, "I have the facts as you stated them." Then the supervisor should write down all the critical facts about the grievance including names, dates, times, places, the particular section of the agreement, agency policy or administrative regulation which the employee feels has been violated, and the <u>specific remedy</u> which the employee seeks. Quite often the employee is vague about the specific remedy he is requesting. This is particularly true if the remedy would negatively affect another employee. In many instances the employee has never really thought through the consequences of the remedy he seeks and when he realizes, for instance, that another employee would have to be removed from a position, he often declines to pursue the matter.

After getting all the facts in writing, the supervisor should then restate the grievant's story in his own words, and ask the grievant to confirm whether or not he has correctly restated the story.

Listening to the grievance restated in someone else's words often gives the employee the chance to evaluate the reasonableness of his grievance and to back down from all or part of it. In addition, it guarantees that the supervisor has a clear understanding of the grievance and the remedy desired by the employee.

In restating the grievance, the manager may discover whether the employee is stating the real cause of his grievance. Often employees will push a purported problem or a complaint even though their real complaint is hidden and relates to another issue.

As the last step in the initial interview, the supervisor should make an appointment with the employee for a future meeting, at which the employee will get an answer to the grievance. Giving the employee a specific appointment reassures him of management's good faith and gives him something definite to count on. Failure to give him a specific date for an answer leaves him confused and in doubt and may lead to more difficulty in settling the grievance.

2. GET THE FACTS

When the first level supervisor is absolutely certain of his facts, knows the proper answer and feels that an immediate reply will resolve the matter, then a quick reply to the employee is proper. A good test to determine whether to respond in this way is, "Would I be willing to live with my mistake if I am wrong?" Ninety-nine percent of the time it is better to think about the matter at least for a couple of hours.

The first place to start in analyzing a grievance is with the definition of a grievance in the agency policy. Many procedures restrict grievances to specific violations of an agreement, agency policy or administrative regulation - any other problem is a gripe or complaint to be worked out between the employee and his superior and is not subject to any kind of appeal. The supervisor should next check the grievance policy for time limits. Most policies have a limit on the number of days the employee can wait to file his grievance. At the same time the site supervisor can check his time limits to answer. After checking the grievance procedure the supervisor should check the agreement and district policy - particularly the management rights clause and the specific clause(s) the employee alleges has been violated.

Also check the department practice against the district policy in regard to the employee's grievance - very often practice and policy are not the same! It is not unusual to find that an individual supervisor may be using a practice or procedure in his office which is not in conformity with an agency policy. Therefore, the site supervisor has to check not only whether he has been following the agreement or agency policy but also whether his peers are following the policy.

The first level supervisor should check all appropriate records, such as payroll time cards, overtime records, sick leave records, safety records, and other materials which will give him documented facts on which to base his answer and possible defense in an arbitration hearing.

He should ask the personnel office about the disposition of similar grievances in other departments. In doing this he may find the resolution of other grievances has already set a pattern for his decision in the grievance at hand.

The vast majority of grievances tend to revolve around certain key issues; and factual situations; following is a list of questions which are designed to aid the first-line supervisor in organizing his facts. Many agencies have not yet had to deal with the problems raised in some of these examples, but they are listed in order that they may be anticipated.

Job Assignments - Extra Duty Assignments

Employee job assignments are frequent causes for grievances by both individual employees and employee organizations. If an employee complains that his assignment is unfair, and you have determined from your conference with him exactly what the basis is for his feeling that it is unfair, you must then determine:

Is there a written policy or administrative regulation which should have been followed in making this assignment? Was it followed?

Is there any "past practice" which has been followed in making these assignments? Was it followed? If not, why not?

Were there reasons for making the particular assignment which at the time were not made known to the employee?

Are similar assignments distributed equitably to all employees?

How often has this employee's assignment been changed, and why?

Was the assignment made because this employee has particular skills required to perform the work?

In the new assignment, is the employee working within his abilities?

With classified employees, the question of "working out of classification" is often raised. These questions should be considered:

Who has performed this function in the past?

Have employees in one classification invariably performed it in the past, or has it, from time to time, been assigned to workers in other classifications?

Why was the work assigned to the worker in question?

What skills are required to perform the work?

Did the position classification specify these skills?

Were workers in other classifications considered for the assignment?

Rules Interpretation

As additional language is adopted as the result of the negotiations process, questions concerning interpretation of the language used are often the basis for grievances. The interpretation of language concerning the use of sick leave is an example. In preparing responses to grievances of this kind, you must determine the following:

Is this the first time a question concerning interpretation of this particular rule or policy has been raised?

If other questions have been raised, how were they answered and by whom?

If this is the first time a question has been raised, what sources are available to assist in making a correct interpretation? Are minutes of a negotiating meeting or a management meeting available which would contain notes regarding the discussion which took place when this policy or rule was being considered?

How can we determine what the intent of the parties was at the time this policy was being negotiated?

Are there other policies or rules which would assist in interpreting this one?

Assuming the policy is interpreted in the way the grievant feels it should be, would it then be legal?

Evaluations

Performance evaluations by supervisors may be challenged through the grievance procedure on the ground that agency policy or an administrative regulation has not been complied with. For example, an employee may allege that a supervisor did not review his work for the number of times prescribed by the policy, or did not hold evaluation meetings with the employee within the time limits specified in the policy. Recognizing that the volume of work and the detail required in carrying out good evaluation procedures may have caused the evaluator to miss or skip a point in the procedure, it is essential to determine:

Did the evaluator follow the exact steps required by the policy or administrative regulation?

Were all required conferences held with the employee?

Were all required procedures and conferences documented in writing?

Are there records available with the employee's signature on them which will assist in determining that required procedures were followed?

Promotion Grievances

Grievances may arise when management promotes an employee based on ability rather than seniority. In such cases questions like these need answering:

What factors qualified the junior employee and disqualified the senior employee?

If the junior employee's previous on-the-job experience is the basis of the award, what dates was the junior employee on the job? How did the junior employee obtain his experience?

Could the senior employee have received this training if he had been interested in it?

In determining the junior employee's qualifications for promotion, did management consider anything other than previous experience, such as attitude, attendance records or ability to work well with other employees?

What are these records?

In your estimation, do these records actually apply to the job being bid for?

How long did it take the junior employee to learn the job to the extent that he could perform it as well as an average qualified employee?

What help and training were given to the junior employee?

How long do you estimate it would have taken the grievant to become an average qualified employee?

Would the grievant have required more help than the junior employee to learn the job?

Assignment of Overtime

Overtime is one of the most frequent causes of grievances, both among employees who want to work overtime and feel they have been discriminated against in the assignment of premium pay, and among employees who do not want to work overtime and feel that they are being forced to perform extra work. The following questions apply in grievances regarding overtime hours:

> Why was (not) the grievant asked to work overtime?
>
> When was it determined that he would (not) be asked?
>
> What are the grievant's overtime hours in comparison to those of other employees in his classification on his shift?
>
> If the grievant was (not) assigned because he was (not) qualified to perform the overtime work, what (dis)qualified him?
>
> How long would it have taken to train him to a point where he could qualify?
>
> Was the grievant told the reason for the decision? Is that the real reason? Is that the only reason?

Discipline

Discipline grievances are the most serious and costly grievances, since they not only hurt morale and undermine supervisory influence, but they may cost considerable amounts of money in back-pay penalties. Some of the questions that must be answered are:

> Prior to the event that gave rise to the discipline, did the employee know that such action or lack of action would not be tolerated? What evidence do you have of his knowledge?
>
> Was the rule or order reasonable?
>
> Has the rule been consistently enforced?
>
> Are you sure the employee did indeed violate the rule of the order? If so, what supportive evidence do you have?
>
> Why did you choose this particular penalty for this offense?

Have other violators of such rules received the same penalty as the grievant?

What is the grievant's past disciplinary record? Was this record used to decide the nature of the penalty?

Before the discipline was given did you and other management personnel objectively consider the facts?

Did you comply with the law?

Is there any extenuating circumstance that would dictate a lesser penalty? (e.g. long service, age, good record)

Bargaining Unit Work

Grievances in this category are claims by a grieving organization that employees not represented by the organization, or employees who are represented by other organizations, are performing work which is within the jurisdiction of the grieving organization.

Most labor agreements prohibit supervisors from performing bargaining unit work and may prohibit any other non-supervisory employee from performing work except in certain cases such as emergencies, while they are instructing or training employees, when special difficulties are encountered, or for certain maximum periods of time. Other agreements provide that agencies may not sub-contract work. Answers to these questions will help determine the validity of the complaints.

Practice

How long have these employees performed this work?

Has the work ever been assigned to people outside of the bargaining unit in the past?

What is the practice in other districts?

Emergency

What was the nature of the emergency?

How did it differ from normal circumstances?

How long did it take to handle the emergency?

Were employees other than supervisors available to handle it?

Temporary Transfers

From time to time grievances are filed about the duration of a temporary transfer. Questions the supervisor must answer include:

What created the temporary vacancy in the first place?
Whom did you temporarily transfer and for how long?
How long do you expect this vacancy to continue?
Was another person capable of performing the work?
Do you plan to post the position?
Was this an emergency?
Did another person request the position?

3. GIVE A POSITIVE RESPONSE

After fully investigating the facts, the first level supervisor is in a position to respond to the grievance. At this point most experienced supervisors make a preliminary decision and then check it out with their superior or the personnel representative. Consultation with other supervisors after fully investigating the facts and reaching a tentative decision is not a sign of weakness but the mark of a prudent manager. Interaction with other managers also ensures consistent interpretation.

Whatever decision is made he should make every effort to respond promptly. If the supervisor develops a reputation for quick and fair resolution of grievances, he is more likely to settle grievances at the first step.

In responding to the employee, he should call the employee in, explain that he has fully investigated the facts and that he has consulted with other people. He should then give the employee a full response to the grievance. If the grievance is justified, he should be positive about it and try to achieve whatever benefits are possible from granting the remedy sought.

If he rejects the employee's grievance, he should explain the reasons for his rejection carefully. The supervisor owes it to himself to try to sell the employee on the correctness of the decision.

If the employee is still dissatisfied, it is a good practice to explain the grievance procedure at the following steps to make sure that the employee understands his right to appeal the decision to a higher level.

While a detailed oral explanation should be given the employee, a simple written response should be given, such as "Grievance denied -- not a violation of broad policy 3201," or "Grievance resolved -- employee will be transferred to new department."

After this interview, the supervisor should collect all of his notes and records and write up a report for his files. If the grievant is dissatisfied with the response, the supervisor will need the record for the appeal; on the other hand, if the grievance is settled, the settlement may become a precedent for other settlements in the future and it will be important to have a record of it.

4. FOLLOW UP

One of the key elements in grievance processing is to follow up on grievances. The supervisor owes it to the grievant to check to make sure things he promised have been accomplished.

Once he has made his decision he should stick with it. One way to encourage grievances is to back down to the threat of appeal. If the employee organization realizes that the supervisor is unsure of himself or that he gives in to pressure, they know they can single him out as the man to file grievances against. After the answer is given, any change should be made at higher levels in the procedure.

Conclusion

The first level supervisor is the key to effective resolution of grievances. The first level supervisor should be able to prevent problems and gripes from ever becoming formalized. Where grievances are filed he should resolve most of them at the first step. Finally, when they go to arbitration his position should be strong enough that the agency wins them.

CHECKLIST FOR HANDLING GRIEVANCE AT INITIAL STEP

I. GET THE GRIEVANCE

_____ Let the grievant tell his story (listen)
_____ Don't personalize the issues
_____ Take notes, keep a record
_____ Ask the grievant to repeat his story (look for hidden complaint)
_____ Get names
_____ Get times
_____ Get the section of the contract allegedly violated
_____ Get the remedy desired
_____ Repeat the essentials of the grievance to the employee in your own words

II. GET THE FACTS

_____ Check the agreement, policies and regulations
_____ Check the time limits
_____ Check grievability
_____ Check policy and practices
_____ Check previous grievance settlements for precedent
_____ Check the experience of others in similar cases
_____ Seek advice if necessary

III. GIVE YOUR ANSWER

_____ Reach a preliminary decision and check it with your superior or a personnel representative
_____ Settle the grievance at the earliest moment that a proper settlement can be reached
_____ In deciding give the benefit of the doubt to management
_____ Write a simple answer to the grievance
_____ Explain your position orally
_____ Explain the employee's right to appeal

IV. FOLLOW UP

_____ Make sure any action you promised was carried out
_____ Know your employees and their interests
_____ Once it is made, stick to the decision
_____ If you have done all of the above, expect management's support

GRIEVANCE RECORD

(Sample)

DATE:	October 1, 1984
EMPLOYEE(S) INVOLVED:	Will Gripe
UNION REPRESENTATIVE:	Egar Tusu
COMPLAINT:	Gripe and Tusu came into my office on 7/29 at 10:00 a.m. and complained that Gripe should have been placed on the 8/1 overtime work list. Tusu said that Gripe had not been getting equal overtime along with other employees.
REMEDY SOUGHT:	Gripe wants to be assigned to overtime tonight. Tusu agreed but thought Gripe should get some money for the overtime lost.
ALLEGED VIOLATION OF:	Article 8, Section I - Master Agreement
GRIEVANCE FILED WITHIN TIME LIMITS:	Yes.
FACTS INVESTIGATED:	I reviewed Gripe's file and found that he was given equal chance at overtime but turned it down on 1/1, 2/15, 3/4 and 5/12. If he had accepted overtime those days he would be equal with other employees in his classification.
ANSWER GIVEN:	I met with Gripe and Tusu on 8/1 at 8:30 a.m. and reviewed times that Gripe had turned down overtime. Told Tusu I had to deny grievance. Tusu said they would think about it.
ACTION TAKEN:	None.
FOLLOW UP:	None except to work with Gripe on future overtime assignments so he knows he is getting equal chance.

CHAPTER V

THE APPEAL AND ARBITRATION PROCESS

Most grievance procedures provide for three to five appeal steps from the first level supervisor up through line management to a top level administrator. Some procedures also provide that grievances be appealed by higher and higher levels of employee organization officials, starting with the steward or building representative and going up as high as the president or executive secretary.

In a theoretical sense such higher appeals should not be necessary since the steward should speak for the employee organization and the administrator should speak for management. As a practical matter, however, the appeals process gives both parties several opportunities to reconsider their position. In addition, its subjects the grievance to scrutiny by successively broader viewpoints. Finally, it gives both management and the employee organization an opportunity to diplomatically back out of losing grievances which shouldn't go to arbitration.

Just as there are no "magic formulas" for resolving first level grievances, there aren't any at the appeal levels; however, there are some procedures which can be followed which will help find a compromise if one exists.

1. ASK FOR A PERSONAL CONFERENCE WITH THE GRIEVANT

After receiving the grievance appeal,the next level supervisor should ask the employee organization representative to bring in the grievant to discuss the problem. Many times organization representatives misunderstand the basic facts behind a grievance; bringing the employee in keeps the facts straight.

At this conference, you should listen to the employee and his representative and try to get the important facts behind the grievance. You should particularly be alert for any indication that the grievance has been "created" to discredit the first-line supervisor. After listening to the grievance, you should go over the facts and write them down on a record sheet. In addition, you should write down the remedy the grievant is seeking and the agreement provision, board policy or regulation that has allegedly been violated.

2. INVESTIGATE THE FACTS

After getting the basic information from the grievant and the organization representative, the mid-level manager should check with the first-level supervisor. In doing this, he also should review whether the grievance and the appeal were filed within the required time limits, whether the matter was grievable, and whether the supervisor thoroughly investigated the grievance. If there is any doubt every, step of the first level procedure should be completely reviewed.

3. ANSWER THE GRIEVANCE

The same rules for answering grievances for first-line supervisors apply to higher supervision. The grievance should be answered quickly and fairly with a full oral explanation of management's position.

4. FOLLOW UP

Where a grievance has been appealed over the head of a first-line supervisor, it is likely that similar grievances will be filed. One of the most effective ways to reduce the number of grievances is to follow up a grievance appeal with an administrative or departmental management discussion of the grievance and the proper method of handling it. Discussion of the grievance builds the concept of a management team, trains administrators and promotes consistent administration of grievances.

Training line managers in grievance handling is a management responsibility. In some agencies formal grievance training and updating programs for their administrators. Unfortunately, grievance training in many agencies consist of reprimands for poor grievance handling rather than formal training in positive techniques.

5. PREPARING FOR ARBITRATION

Periodically, a grievance cannot be resolved in the appeal process and will be carried to the top level. At that point management will have to decide whether to settle the grievance or go to arbitration.

Before deciding, management should study the case objectively to determine whether it is worth the cost. Management has to ask and answer the question, "How important is winning on this issue?" The agency may be in a good position to "win" a grievance, but in winning it may lose because of the cost in money or the cost in the relationship with the employee organization.

If management decides that the case is worth taking to arbitration, then it should decide to put out the effort necessary to win the case. (Periodically some agencies go to arbitration when they know they will lose just to keep the employee organization "honest." The worth of this strategy is an individual decision.)

Winning a case takes preparation and expertise. An agency that expects to win an arbitration case should expect to spend at least four hours of preparation for every hour of hearing. This means going back over all the facts outlining the case, preparing witnesses for the hearing, and gathering exhibits.

Handling an arbitration case is a job for experts. However, a good management team can help an expert put the agency's case together. In preparing for the case the following are some of the rules experts use.

A. KNOW THE AGREEMENT

The arbitrator's power to decide the case comes from the agreement between the parties. Normally, it is their intention at the time they entered into the contract that he is to interpret for them. That means that management should look at the current agreement and analyze it carefully to see which sections apply to the grievance. Periodically a grievance will be processed on an issue where both parties only looked at one section of the agreement.

For example, on a transfer case the parties may refer only to the transfer clause of the contract. An expert looking at the same facts might investigate the discipline section to see if the transfer could be justified as a disciplinary action or the management rights clause to see if the subjective decisions were excluded from arbitration.

The agency also should look at past negotiating sessions to see what impact they have on the agreement. It may be that the agreement used to read that "an employee may grieve a supervisor's decision to transfer." If that clause has been removed it could have a considerable impact on the arbitrator. Similarly, if the organization proposed such a clause the fact that it was not included will be important to defending management's case.

B. CHECK ARBITRATION DECISIONS

Arbitrators are not like courts. They apply rules of evidence very loosely and they are not bound by other arbitrators' decisions. However, the same arbitrator will tend to rule the same way in similar cases and usually will apply the same general principles as other arbitrators. (Some cynic once remarked, "All it takes to be an arbitrator is to know how to add two numbers together and divide by two.") Therefore, a good advocate should look at similar decisions in other cases and should read as many of the same arbitrator's decisions as he can.

C. GET THE FACTS

At every step of the grievance procedure, if the manager has handled the grievance properly, he has gone out and gotten all of the facts. Therefore, it should be a waste of time for the advocate to go out and get the facts himself. Unfortunately, no matter how well management has done the job the representative owes it to himself and the client to go out and do it again. Too often line managers get "tunnel vision" looking at a case and forget key elements -- most of the time they are negative matters that help the organization but periodically they will be facts that would help their case. In either case the advocate has to know all the facts on both sides.

D. PREPARE A THEORY

As an advocate the agency's representative has to arrange his case in such a way that it points to the unmistakable conclusion that management's position is correct. To do this the representative has to arrange the presentation of his case in such a way that the strong arguments have maximum impact and his weak points appear irrelevant. Inexperienced advocates have a tendency to concentrate on one point or to emphasize minor points. A frequent mistake is the "Perry Mason syndrome" -- an attempt to find a minor inconsistency in the grievant's story and to try to build an attack around it. Unfortunately witnesses rarely come in and confess all on the stand. Much more likely they are telling the truth on most points and the arbitrator is going to ignore minor inconsistencies.

The advocate should look at the case from three sides - management's, the grievant's and the arbitrator's. In each case he should try to anticipate their reaction to the facts and how they would approach the case. He should then build his case to emphasize management's strong points and at least neutralize the weak points.

E. PREPARE DEMONSTRATIVE EVIDENCE

One of the most effective types of evidence that management can introduce in a trial is demonstrative evidence. Arbitrators are used to long hours of oral testimony. Sometimes, however, advocates give them evidence they can see, experience or feel. If for no other reason than its novelty the arbitrator will pay more attention to this kind of evidence than any other.

Some types of demonstrative evidence are photographs, drawings, charts, tape recordings, videotapes, models, displays and visits to the jobsite. For example, if the issue is classroom conditions it may be advisable to ask the arbitrator to visit a classroom run by another teacher. If the issue is whether a bus driver was negligent a picture of an accident particularly showing the danger to students is worth hours of testimony.

F. PREPARE WITNESSES

Managers often talk to the witnesses they intend to put on and then expect to be able to put the same people on the witness stand and get the same story back. Testifying is a unique experience -- no one reacts the same way on the witness stand as they do sitting over a coffee cup in an executive office. Before putting any witness on the stand the management representative should review the questions that will be asked. That doesn't mean witnesses should be coached -- but they should be prepared to tell their story fully and truthfully in a logical order.

6. THE ARBITRATION PROCESS

The agency should have hired an expert to handle the arbitration process (anyone who tries to read a book to learn how to handle an arbitration is doomed to lose from the start). He will be prepared to handle the arbitration process; however, agency management should also know what to expect. Following is an outline of the normal arbitration process:

Submission Agreement

Before the arbitrator can hear the case he has to have some authority. Normally a collective bargaining agreement or an agency policy states the arbitrator's authority. In the absence of such a statement the parties will have to enter into a submission agreement that puts the issues before the arbitrator.

Ordinarily the submission agreement is a simple matter; for example, it might read, "Was Fred Smith transferred from Edison to Monroe properly under the provision of Article X of the agreement?" Sometimes, however, a submission agreement can become a noose around the neck of one of the parties; for example, in the above submission agreement if Fred Smith was transferred for disciplinary reasons there may be nothing in Article X giving management that right but there could be something in the management rights clause. Arbitrators can be very sticky about bringing evidence outside of the submission agreement.

If the parties cannot agree upon a submission agreement then either one or both may request that the arbitrator formulate the issues after listening to all the evidence.

Opening Statement

Normally the party initiating the grievance goes first since the burden is on the initiating party to prove its case. However, in discharge and discipline cases most arbitrators put the burden of proof on management and the agency must put its case on first.

Whichever party goes first should begin with an opening statement which identifies these issues, indicates the fact that will be proven and identifies the decision the arbitrator should reach. The opening statement can be crucial to the entire case. It focuses the arbitrator's decision on the strong points in the evidence and helps him to understand preliminary evidence which at first may appear irrelevant. The opening statement should also cite the sections in the agreement which are relevant to management's case.

Where the employee organization has the burden of proof management may make its opening statement after the employee organization or may reserve its opening statement until after the employee organization has completed putting on its evidence.

Presentation of Witnesses

Any evidence which is not stipulated to be introduced is brought in through the oral testimony of witnesses. Agency records, charts and agreements must be put in through the use of questions and answers directed by management's representative to a witness.

Every witness is subject to cross-examination by the opposing party. Among the purposes of cross-examination are disclosure of facts the witnesses may not have related in direct testimony; correction of misstatements; placing

of facts in their "true" perspective; reconciling apparent contradictions; and attacking credibility of adverse witnesses. In planning cross-examination the advocate has to keep in mind that he only wants to ask questions which build his main points or tear down the credibility of the witness on major issues. Clients often succumb to the "Perry Mason syndrome" and demand that their representative ask questions which they are sure will crack the witness even though the representative knows the answers will hurt the case. An example of that occurred in a case where the association's witness had signed an affidavit that conflicted with his testimony on the stand. The management representative handed the affidavit to the witness and asked him if he recognized it. The witness admitted he did and on further questioning admitted that he signed it under penalty of perjury and that he knew what he was signing at the time he signed it. On re-cross-examination the association's attorney was unable to resolve the conflict. However, when the district's turn came for re-cross-examination the superintendent demanded that the management representative break the witness down by asking him, "Is it your testimony that you deliberately perjured yourself when you signed this affidavit?" The representative against his better judgment asked the question. The witness's response was, "Yes, but the principal was sitting there when I signed it and I was afraid to do anything else."

Closing Argument

Both parties have the right to make a closing argument to the arbitrator either in writing or orally. Just like the opening statement the closing argument can be vital to the case. It is management's opportunity to refocus the arbitrator's thinking back on the important points it has proven through its evidence -- and to point out the irrelevancies in the employee organization's argument. In the closing argument the advocate should summarize the facts, the issues and justify the decision the arbitrator is being asked to make.

7. CONCLUSION

Mid and top level administration have hard decisions to make in handling arbitrations. They have to consider the contract and its interpretation; they

have to consider the effect of the grievance on employee organization/management relations; and they have to consider the integrity of the first line supervisor. It is unusual that a grievance can be settled to everybody's satisfaction. However, if the process is to work higher level management has to review grievances fairly and equitably and settle those that need settling. Where management decides to take an issue to arbitration it should be done with a firm determination to win the grievance. Half-hearted attempts to win an arbitration only increase the chances of more arbitration, in addition to probably insuring the loss of the current grievance.

CHECKLIST FOR HANDLING GRIEVANCE APPEALS

I. THE APPEAL

_____ Ask for a personal conference with the grievant
_____ Ask the employee to repeat his story
_____ Get the union representative's position
_____ Get important facts
_____ Take notes
_____ Repeat the grievance in your own words to grievant and his representative
_____ Get the remedy requested

II. INVESTIGATE THE FACTS

_____ Check time limits
_____ Check grievability
_____ Check with immediate supervisor of employee
_____ Check facts on both sides
_____ Seek advice if necessary
_____ Reach a preliminary decision
_____ Check your preliminary decision with your superior or personnel representative

III. ANSWER THE GRIEVANCE

_____ Answer as soon as possible
_____ Explain your position orally
_____ Write a simple answer to the grievance
_____ Once it is made, stick to your decision
_____ In deciding, give the benefit of the doubt to management
_____ Explain the employee's right to appeal

IV. FOLLOW UP

_____ Make sure any action you promised was carried out
_____ Train your supervisory employees to reduce grievances
_____ Support management
_____ If you have done all of the above expect the support of management

CHECKLIST FOR TESTIFYING AS A WITNESS

_____ Tell the truth

_____ Always remember that as a witness for either management or employee, you have no purpose to serve other than to give the facts as you know them.

_____ You are only to give information which you have firmly in mind. If you do not know certain information, do not give it. If asked, state that you do not know.

_____ Do not answer any question unless you thoroughly understand it.

_____ Answer each question to the best of your ability completely but do not volunteer more than is asked.

_____ Take your time in answering a question.

_____ Pause briefly before answering each question. Gather your thoughts carefully before answering and do not permit yourself to be hurried.

_____ If your representative begins to speak, stop whatever answer you may be giving and allow him to make his statement. If he is making an objection to the question that is being asked of you, do not answer the question until after he has made his objection, and the hearing officer advises you to go ahead and complete your answer.

_____ Never attempt to explain or justify your answer. You are there to give the facts as you know them. You are not supposed to apologize or attempt to justify those facts. Any attempts as such would make it appear as if you doubt the accuracy or authenticity of your own testimony.

_____ Be sure of the facts you supply in answer to a question. Even if you feel you know the answer to a question do not attempt to guess or estimate the answer. If you do not know the answer to a question, say so. Even if you feel an answer of "I don't know" is ignorant or evasive, realize that a guess or estimate is almost always inaccurate. An opponent can then show that you don't know what you are talking about, or imply that you deliberately misstated the truth.

_____ Do not memorize your testimony; instead tell the facts as you know them and in a manner intelligible to those who have no knowledge whatsoever of the case.

_____ Avoid demonstrations of anger, belligerency, sarcasm or discourtesy.

_____ Do not let the opposing representative get you angry or excited.

_____ Your initial testimony will be similar to what follows:

a. You will be called by name and should come forward.

b. You will swear to give honest answers.

c. The counsel who has summoned you will probably ask:

1) your name
2) your occupation
3) your place of work
4) how long you have been at your place of current employment
5) the title of your job
6) the qualifications for the job you perform
7) the type of work you perform
8) your acquaintance with respondent and grievant
9) what occured at a specific time and place
10) any other pertinent questions

d. Following the above, opposing counsel will ask you questions.

CHAPTER VI

TRAINING MANAGEMENT TO HANDLE GRIEVANCES

Very few managers have had enough experience to acquire real expertise in handling grievances. Since ineffective handling of grievances can result in erosion or surrender of management rights and ineffective employee relations, it is critical that the administrator understand the agency's grievance procedure, know how to process grievances and be trained in resolving grievances at an early stage.

Employee organizations consider grievance procedures to be the life blood of any agreement. As an old union axiom states, "What we don't get at the bargaining table, we'll get through grievances." Unfortunately, this axiom has been a reality in many public agencies. Management negotiates with employee organizations and refuses to give in on items only to find that supervisors have given them away at the work site level.

Previously a few school districts have set up formal training programs for management. However, too many districts have assumed that the administrators know how to handle grievances and haven't provided any formal training. Many districts have found they have been losing arbitrations because their first level administrators 1) didn't understand the agreement and 2) didn't understand how to process grievances. One district learned this the hard way when they realized (in front of the arbitrator) that they had processed a grievance which had been filed one year after the time limit for filing! The grievance had expired and related to the selection of textbooks which wasn't a grievance issue.

If the experience of school districts can be used as an example, public agency management teams must be trained to handle grievances well. When a grievance procedure is first negotiated, immediately afterward there should be at least one full day of training for each administrator on the procedure itself and on grievance resolution techniques. After that, the agency should expect to devote at least a half a day a year for review of past grievances, and for updating on anticipated grievances.

This continuing need for in-service training programs for middle management is particularly important for supervisors, who are the first points of contact for the aggrieved employee. One of the primary purposes of such in-service training should be to allay the fears and suspicions of the supervisor that a grievance is somehow a personal reflection upon his competence. This can best be accomplished by pointing out some of the more positive goals and purposes of the grievance procedure.

In addition, middle management should be encouraged to consult other staff resources at the agency level at the first sign of trouble, especially if the agency maintains a staff relations or grievance advisor for management personnel. Middle managers need to know, from the agency perspective, the frequency and type of grievance complaints with which they will have to deal. For example, it is important for the supervisor to know if most grievances in the agency have been a result of unsatisfactory evaluations, payroll matters, or interpretations of a particular policy.

Middle managers should be provided a measure of protection from abuse by employee organization representatives. They need assurance that they are in control of all preliminary conferences, and can terminate such conferences if necessary.

Once reassured with respect to the above considerations, the next immediate need is for a cultivation of skills and techniques which will result in the solution of problems at the lowest level and at the earliest possible moment. This, in effect, means a solution at the initial stages of the grievance procedures. The longer grievances are left unresolved, the harder it is to get a settlement of any kind. In addition, antagonism between the parties increases, the employee gathers support for his position among his peers, and the supervisor finds himself caught in an increasingly rigid position as time passes and the matter becomes more widely publicized. A minor dispute between employee and supervisor, if not resolved as early as possible, may become a major issue between the manager and all of the employees.

Any in-service workshop training program for middle management on the subject of grievance procedures should include practical suggestions with respect to the first step in the adjustment procedures. Managers should be advised, and preferably exposed to (by use of demonstration techniques), effective grievance resolution skills. At the very least, managers should be taken through the grievance handling checklist and should be given a thorough understanding of the reason for each step.

In addition, the in-service training program should include an emphasis on the following:

1) The very real importance of being a good listener.

2) The value of taking time to make decisions and give answers in the initial conference.

3) The need for restrained emotions and the "de-personalization" of the issue from the manager's standpoint.

4) The paramount importance of middle managers being thoroughly familiar with agency policies, rules and regulations in order to avoid any obvious misinterpretation of such rules.

Another important skill which must be cultivated by today's managers is the assessment of the organization representative's role in grievance procedures. In-service training programs for managers should emphasize the importance of dealing effectively with the employee organization representative at the work site. Such training, therefore, should include an awareness of the nature of the representative as a political entity, as well as a personality. Managers need to be reminded that the representative has a quasi-political relationship with his fellow employees and with the higher organization levels of the association. It is well to remember that the employee representative must maintain an image with his peers as a person who can present their case firmly and competently, who does not cower in the presence of managers, who can get things done that others cannot because of his negotiating skills, and one who is respected by the administration as a person to be reckoned with.

The employee organization representative must also appear highly competent and reliable to higher officials if he is to get their support on future issues. The first level supervisor must recognize that much of the employee representative's behavior is motivated by his need to maintain this position and image with his fellow employees. In this regard, the employee representative may very often be "acting out a role" for the benefit of an aggrieved employee. Experienced labor relations representatives have found in the private sector that often it is to their benefit to be supportive of the employee association representative. An in-service training program for managers should include this consideration as an effective technique for resolution of grievances at the lowest possible level.

In addition to training programs, the agency should look at other methods of preventing grievance problems. Many agencies have prepared grievance handbooks for all their managers. These handbooks can provide a reminder system for managers who are involved in grievance processing.

Another book that should be in the manager's possession is a contract clause book. In this book, each clause or policy in the agreement should be explained and interpreted from management's point of view. Employee organizations usually conduct training programs for their representatives in which they explain the language in the agreement, particularly where it is ambiguous. In cases where the agency does not do the same, first level supervisors often accept the language interpretation of the employee organization.

A very effective training tool for managers is to send each of them copies of any final grievance adjustments, particularly arbitration decisions which have affected other agency. The entire problem of grievance resolution is often an academic subject for managers until they see it affect someone they know. At that point, learning about effective resolution of grievances becomes top priority.

An in-service training program for middle management, coupled with an effective back-up system to support line supervisors, will ensure the retention of the most positive and worthwhile aspects of the grievance procedures for employees and, at the same time, reduce to a minimum the negative and disruptive features.

CHECKLIST: GRIEVANCE TRAINING

A. KNOWLEDGE

_____ Each manager understands the grievance procedure
_____ Line administrators understand management's interpretation of potentially grievable clauses, policies and practices
_____ Management has the skills to deal with employee organization representatives
_____ Line supervisors know who to call for advice

B. TRAINING

_____ Agency supervisory training workshops
_____ Training films
_____ Outside training workshops
_____ Articles from current publications
_____ Discussion at management meetings
_____ Management newsletter

C. MATERIALS

_____ Each administrator has a copy of:

_____ the agreement
_____ an agreement interpretation book
_____ an agency grievance handbook
_____ grievance and arbitration settlements
_____ agency grievance form

INSTRUCTOR'S OUTLINE

GRIEVANCE HANDLING FOR SUPERVISORS

I. THE NEGOTIATIONS PROCESS

- A. Legal Requirements
- B. Union Demands
- C. Management Responses
- D. Effect of No Agreement (e.g. strikes)
- E. The Parts of the Negotiated Agreement

II. ADMINISTRATION OF THE NEGOTIATED AGREEMENT

- A. Burden of Administration Falls on Management, Specifically on First Line Supervisor
- B. First Line Supervisor's Relationship Sets Tone of Labor Management Relations
- C. The Labor Management Relationship May Affect the Productivity of the Entire Organization

III. UNDERSTANDING THE NEGOTIATED AGREEMENT

- A. Vital to Know Agreement
- B. Equally Vital to Know What has Not Been Agreed to
- C. Supervisors Have to Participate in Negotiations Process so that They Understand Agreement
- D. Supervisors Have to Work with Negotiators so that Negotiators Understand Operation

IV. PAST PRACTICE

- A. Definition: All items not specifically covered in the agreement but followed by one of the parties over a period of time and left unchallenged by the other party
- B. It is Not Advisable to Let Things Happen that May Become Harmful Practices
  1. Past practices can be used by unions in grievances
  2. Arbitrators will look at past practice in reaching decisions
  3. Past practices may give away items which should be subject to negotiation
  4. Past practices are almost as difficult to change as negotiated agreements
  5. In some cases past practice can be used by management to defend its position

V. ROLE OF THE SUPERVISOR

A. In Administering the Agreement, Supervisors Have the Ability to Make Commitments Which will Affect Present and Future Negotiations

B. The Supervisor Must Understand the Agreement

C. The Supervisor Must Have Access to Information Regarding the Intent of the Parts of the Agreement

D. The Supervisor Must Know the Limits of his Authority to Resolve Disputes Over Contract Interpretation

E. Higher Level Supervisors Must Delegate Grievance Resolution to Low Level Supervisors

1. Avoids log jamming of grievances at higher levels
2. Increases employee confidence in first level supervisors' authority

VI. HANDLING GRIEVANCES AT THE FIRST STEP

A. Preventing Grievances - Effective Employee Relations

B. The Informal Conference

C. The First Step Grievances

1. Let the employee tell his story
2. Get the facts
3. Give a positive response
4. Follow up

D. Second Step Grievances

1. The second step process
2. Expect to be overturned

E. The Arbitration Process

1. Testifying as a witness
2. The importance of documentary evidence
3. Rules arbitrators use

F. Follow Up

1. Evaluation system for feed back on effectiveness of program

EXAMPLE: Steps in the Grievance Procedure

Step 1--Immediate supervisor

Informal: Conference between the employee expressing a complaint and his immediate supervisor.

Formal: Submission by grievant of written complaint within five days. This requires a written reply from the immediate supervisor within ten days of receiving the written complaint.

Step 2--Appeal to next appropriate Middle Management Level.

If the decision of the grievant's immediate supervisor is unsatisfactory to the grievant and he wishes to appeal he must submit (within five days of receipt of his immediate supervisor's response) a written appeal to the next higher level of authority whose responsibilities include power to act in the area of the complaint. The manager receiving the grievance shall reply in writing within ten days.

Step 3--Committee of Review

The grievant may request that a Committee of Review be convened to study and report on his claim. Such a request must be made within five days to the Employee Relations Administrator, who (within ten days) shall initiate formation of a Committee of Review. The Committee of Review may conduct hearings. Within 30 days, the Committee shall submit a report to the Department Head or his Designee including the pertinent issues and facts. The report is advisory and confidential.

Step 4--Should the outcome of Step 3 be unsatisfactory to either party, the dissatisfied party wishing to make an appeal to a panel of top agency management shall do so within ten days. The decision of the panel shall be final.

EXAMPLE: KEY FACTORS IN THE GRIEVANCE PROCEDURE

1. Definition --	A grievance is a claim by an employee of a violation of the agreement which is alleged to have adversely affected the employee. It shall not be concerned with the value, equity, purpose, or propriety of any policy, rule, or regulation.
2. Structure --	Four specific and distinct steps are included with definitive time limitations, requirements that statements and responses be in writing, and mechanisms for appeal.
3. Committee of Review --	At Step 3 a review panel is provided. The panel's function is to study the issue, review the facts, and to prepare an advisory report.
4. Final Appeal --	Final appeal may be made by either party to the elected body which shall be the final Board of Review.
5. Protection of Rights --	Nothing in the procedure should be construed as denying to an employee due process in the resolution of any grievance. Parties involved in a grievance conference may invite conferees of their own choosing to participate. Advance notice of such choice must be given.
6. Limitations --	The procedure is not intended to be used for the purpose of resolving complaints, requests, or problems which are appropriate for negotiation. Adequate legal provisions and locally adopted rules exist for processing grievances arising from the evaluation of civil service employees. The grievance procedure outlined here shall not apply in such cases. Complaints related to matters other than those involving violations of the agreement shall not be processed through the grievance procedure.

GUIDES FOR AGENCY SUPERVISORS*

Following are guides to assist supervisors in handling employee grievances. The grievance procedure is the problem-solving dispute-settling machinery by which the employee raises and processes a claim alleging a violation or misapplication of policies or regulations by the agency. The grievance machinery is the formal process that enables the parties to attempt to resolve their differences in a peaceful, orderly, and expeditious manner. If the grievance machinery works effectively, it should satisfactorily resolve most grievance disputes.

No individual in an organization is more important to good employee relations than the immediate supervisor. In the grievance procedure, he is the first representative dealing with the employees on behalf of management.

The chief reason for a grievance procedure is to provide employees with a procedure by which they can raise their differences with the employer, discuss them with him in an orderly and amiable fashion, and resolve them in a manner that is both fair and prompt.

By utilizing accepted principles and practices in their handling of grievances, supervisors and higher management can help the grievance procedure to operate properly and at the same time can protect and preserve management rights that are necessary to maintain efficient and effective operations.

The key to successful grievance processing is the immediate supervisor, who is in a position to solve most problems before they reach the formal stage. A real effort must be made to solve grievances while they still are at the informal stage. As grievances advance through the higher more formal steps of the grievance procedure, usually it becomes more difficult to resolve them to the mutual satisfaction of the parties.

If you have any doubts as to how to process a grievance, or as to the correct interpretation of a policy or regulation, always check with your immediate supervisor before acting. The procedure gives you time to respond to grievances. Take advantage of the time. Be sure your response is correct.

*Adapted from County of Sacramento, Handbook for Supervisors

Investigate all grievances	1. Investigate and handle each grievance as though it eventually may result in a hearing. When the grievance initially is discussed with you, you do not know whether it will go all the way through the process. It is better to treat it carefully and properly at your level than to wish you had done so after it has been appealed to a higher level.
Identify violation	2. Always require the employee to identify the specific policy or regulation allegedly violated. Ask: (1) What provision is allegedly violated? and (2) How did the Agency violate this provision?
Give full hearing	3. Regardless of whether the grievance appears to be legitimate within the definition, always give the employee a good and full hearing on the issue.
Make employee prove	4. In most grievance cases, the employee is the moving party, the one asserting a claim, and therefore it is up to him to present clear evidence supporting his claim. (When a grievance is due to an action taken by you, you should be prepared to explain why you took the action.)
Determine the solution sought	5. Always require the employee to state clearly what he is seeking as a solution to the grievance. The cost of the solution or the precedence involved may be major factors in determining how to handle the grievance.
Do not let grievance processing interfere with operations	6. Do not interfere with Agency operations to facilitate grievance processing. The grievance procedure generally is intended to facilitate the investigation and resolution of grievances in a manner which interferes as little as possible with orderly and efficient operations. However, informal grievances should be discussed as promptly as possible.
Correct your mistakes	7. If the grievance brings out that you have violated a policy or regulation, admit that you are wrong and provide the correct remedy to the situation. Admitting your mistakes will improve your credibility with employees. Also, it is easier to admit mistakes and correct them yourself than to have them corrected by higher management.

Tell employee of corrective action

8. If after considering a grievance you determine that a mistake has been made and corrective action should be taken, make sure you advise the employee of the corrective action you intend to take. Your willingness to correct an error gives you a real opportunity to win employee respect and confidence. Do not lose the opportunity.

Enforce time limits

9. Enforce and comply with the time limits set forth. An informal grievance must be initiated within reasonable time after the event or circumstance occasioning the grievance, and written complaints and appeals must be filed within 5 days. If the grievance is filed after the time limits have passed, deny it on the basis that it is untimely. The purpose of the time limit is to keep stale complaints out of the grievance procedure. If grievances denied as untimely are appealed to higher levels, they will be reviewed on a case by case basis to determine whether there are gross inequities, and under certain circumstances they may be adjusted. This policy is intended to ensure continuing compliance with the time limit provisions of the agreement.

Comply with time limits

10. Make sure you comply with the time limits which apply to your handling of the grievance. An immediate supervisor has ten work days in which to give a decision or response to the grievance.

Do not cause grievant to be untimely

11. Do not do anything to cause the employee to fail to comply with the time limits. Do not deny the grievance as untimely if the untimeliness is caused by you.

Allow latitude but do not take abuse

12. Permit the employee reasonable latitude in presenting the grievance. However, do not permit the employee or his representative to abuse or demean you or other management personnel. If the employee or his representative uses language that is inclined to threaten or to provoke you, adjourn the meeting until the parties are in a better frame of mind to discuss the issues. You are not obligated to endure language that exceeds that normally used on the job.

Be serious and sincere

13. Most grievances are a serious matter to the individual concerned. It is important that you be utterly serious and perfectly sincere at all times in handling grievances. Do not block a grievance or misrepresent anything in connection with a grievance. Do not make a joke out of a grievance.

Do not lose your temper

14. Never let yourself get baited into losing your temper. If you find yourself losing your temper, continue the meeting until some other time.

Have one spokesman

15. In handling grievances, each side should have only one spokesman. This practice expedites discussion and minimizes the possibility of misunderstanding.

Keep discussion on the point

16. Do not let the discussion become bogged down in irrelevant side issues. The grievance at hand is the only issue.

Not bound by past practices

17. Never admit to the binding effect of a past practice. Just because something has been done a certain way in the past does not mean it must be done that way in the future. Of course, it is very sound to let employees know in advance when a change in an important practice affecting employee relations is planned.

Agency has right to make rules

18. A grievance which claims that the Agency is without the right to promulgate a rule or rules generally must be denied, unless the rule involved is in violation of a law. The Agency does have the right to make rules consistent with the law. The Agency will not be able to effectively plan and carry out its operation if its right to make rules ever is seriously compromised.

Examine policies and regulations

19. When the employee claims a violation of particular policies or regulations, always examine those provisions and any other provisions which you believe are related to the issue at hand. If the provisions are unclear or are inconsistent, get an interpretation from higher management.

Visit the work area

20. If the physical location or condition of the work place has anything to do with the grievance, make sure you personally visit the work area so you can see for yourself what the conditions are.

Question other employees

21. If the grievance involves disciplinary-type action or a case of questionable facts or information, question other employees to get information and views.

Determine if Agency has been consistent

22. If the grievance involves the manner in which the Agency has interpreted and applied a provision of policies or regulations, determine whether the Agency's application has been consistent. Has one supervisor or office applied the provision in one manner while another supervisor or office applied it in another manner? If so, guidance from your immediate supervisor should be sought before proceeding.

Look into prior grievance settlements

23. If you are dealing with an issue with which you are unfamiliar, determine whether any prior grievance settlements relate to the issue, such as:

    If the identical issue was raised in a prior grievance and resolved by mutual agreement or other means, the current dispute should be in accord with that prior settlement.

    If the identical issue was raised in a prior grievance but denied by management and not appealed further by the employee, the current grievance should be denied.

    If a similar issue was raised and resolved, the principles and theories utilized in handling the matter may provide helpful guidance.

Obtain records

24. Secure any records that bear on the case and review them carefully.

Record results

25. Record all results of your investigation! Make a full record of the Agency position, arguments, witnesses, evidence, and participants in discussions.

Do not decide while in doubt

26. Do not settle a grievance while in doubt. If you are in doubt, investigate and review the matter further.

Definition determines scope of grievance

27. Resolve grievances on the basis of fact, not emotion. If an employee cannot find a provision in the policies or regulations to support the grievance, he may make the appeal that it is only "fair" to give him the relief he is seeking. The employee should be treated fairly, but the settlement of a grievance must be based on objective data.

This approach can be emotionally very appealing, but you have to resist the temptation. Such broadening of the scope of grievances is not in the best interest of the Agency or of all employees.

Do not negotiate

28. Do not negotiate with the employee on matters not covered by present policies or regulations. If a matter is not covered then no violation has taken place.

Do not give the employee veto power

29. Never make "mutual-consent" agreements regarding future action. Never agree to procedure where you can take an action only if the employee consents to it. On the other hand, it is often desirable to advise the employee in advance of taking an action.

Make no deals inconsistent with policies or regulations

30. When dealing with employees never make "deals" or individual agreements that are inconsistent with policies or regulations that apply to the employee.

Advocate management's position

31. When you are discussing grievances, if you find yourself unable to concur with the positions and opinions of the grievant, you have a responsibility and obligation to present management's position vigorously and affirmatively. You hurt your position as a supervisor if you disassociate yourself from the management or the management position. Do not belittle yourself.

Sell your decision

32. If a policy or regulation gives a clear answer, quote it. Also state the common sense of the situation. It is critical to good employee relations that the employee understand your viewpoint. This cannot be overemphasized. Employees often will accept a decision they are unhappy with, if they can see there is good reason for the decision.

Be aware that employee associations have internal pressures

33. Do not forget that the interests of the employee may be different from the interests and goals of the association. Keeping this in mind may help explain why certain grievances are pressed though they appear to have little merit or are pressed with vigor far beyond the apparent importance of the issue involved. Organization representatives are subject to pressures from their "constituents." Keeping this in mind may help you to look at grievances more objectively, with

less inclination to see the grievance as something directed at you personally.

Do not be pressured into a decision

34. Do not be pressured into making a decision on the spot. Even at the informal grievance level, you have ten work days in which to make a decision or give a response. Unless you are absolutely certain of what your response should be, take the time to look into a grievance before making a response.

If agreement is reached stop discussion

35. If during a meeting on a grievance you arrive at a mutually satisfactory solution, terminate the discussion

Keep grievance denials brief

36. Generally do not give long written grievance answers. If you must deny the grievance, ordinarily it is better to do so orally, then follow up with a brief written denial statement (if the grievance is at the written step). The written denial usually should state: "There is no violation of policy or regulation and therefore, the grievance is denied."

When sustaining grievance, tell why

37. If you are going to sustain a formal written grievance in full or in part, make sure that your written decision is clear and succinct. In sustaining the grievance, point out the specific provisions which allow you to grant the remedy. This helps limit the remedy to the grievance at hand. Do not let it appear that you agree with all the reasons cited by the employee to support the grievance.

Recommend changes to troublesome provisions

38. If you come across a policy or regulation which makes it difficult for you to supervise and manage your unit, make a record of it and let higher management know so the Agency can make an effort to change the troublesome provision.

Do not abdicate to employee organization

39. Do not transfer your authority to the employee organization. If you have an employee problem, you solve it.

Use grievance procedure to resolve disputes

40. If an employee refuses to follow orders because he believes the order violates a policy or regulation, advise him that he has the right to use the grievance procedure to resolve the dispute, but that in the meantime he is obligated to obey orders. It is a commonly accepted rule that employees are obligated to obey instructions (assuming the instructions do not require the employee to jeopardize his health or safety or to commit illegal acts or the like). The rule is "obey first, grieve later." This allows operations to continue in an orderly manner while the employee still maintains the right to resolve the dispute through the grievance procedure.

Understand why your decision might be changed at a higher step

41. Occasionally your decision might be changed at a higher step. If this happens, realize there is a reason for it, such as:

    Additional facts not available to you.

    You slipped up in collecting facts or weighing them.

Original - Immediate Supervisor
Copy 2 - Immediate Supervisor
Return to Grievant
Copy 3 - Department Head
or Designee
Copy 4 - Grievant's File

GRIEVANCE FORM--STEP 1

Submission of Complaint -- All portions of this section must be completed by the grievant

Employee Name _____ Work Location _____

Statement of Grievance _____

_____

_____

_____

Specific policy or regulation alleged to have been violated (cite source) _____

_____

_____

_____ _____
Date Signature

Upon completion of this section, grievant shall present original and copies #'s 2 and 3 to immediate supervisor. Copy #4 should be retained by grievant.

Immediate Supervisor's Response -- _____

_____

_____

_____

_____

_____ _____
Date Signature

Upon completion of this section, immediate supervisor shall retain original, present copy #2 to grievant, and forward copy #3 to Department Head or Designee.

Original - Department Head or Designee.
Copy 2 - Return to Grievant
Copy 3 - Immediate Supervisor
Copy 4 - Grievant's File

GRIEVANCE FORM--STEP 2

Appeal to Department Head or Designee --All portions of this section must be completed by the grievant. Copy #2 of completed Grievance Form--Step 1 must be attached.

Reason for appeal _____

_____

_____

_____

Remedy sought _____

_____

_____

_____ _____
Date Signature

Upon completion of this section, grievant shall present original and copies #'s 2 and 3 to the appropriate Department Head or Designee. Copy #4 should be retained by grievant.

Department Head or Designee -- _____

_____

_____

_____

_____ _____
Date Signature

Upon completion of this section, Department Head or Designee shall retain original and forward copy #2 and copy #2 of completed Grievance Form--Step 1 to grievant, and copy #3 to grievant's immediate supervisor.

Original - Staff Employee Relations Administrator
Copy 2 - Return to Grievant
Copy 3 - Department Head or Designee
Copy 4 - Top Management Panel
Copy 5 - Grievant's File

GRIEVANCE FORM--STEP 3

Request for Committee of Review--This section must be completed by the grievant. Copy #2 of completed Grievance Forms--Step 1 and Step 2 must be attached.

I hereby request that a Committee of Review be convened to consider the grievance outlined on the attachments. My representative is

_____

_____ _____
Date Signature

Upon completion of this section, grievant shall present original; copies #'s 2, 3, and 4; and all attachments to the Staff Employee Relations Administrator. Copy #5 should be retained by grievant.

Report of Committee of Review--Signed copies of the report of the Committee of Review shall be attached. Original shall be presented to the Staff Employee Relations Administrator, and copies #'s 2, 3, and 4 forwarded to the Department Head or Designee who rendered decision at Step 2.

_____ Date of formation of Committee of Review

_____ Date of submission of report of Committee of Review

Staff Employee Relations Administrator's Conclusion _____

_____

_____

_____

_____ _____
Date Signature

Upon completion of this section, the Staff Employee Relations Administrator shall present the grievant with copy #2, retain copy #3, and send copy #4 to the Top Management Panel.

Original - Top Management Panel
Copy 2 - Return to Grievant
Copy 3 - Department Head or Designee
Copy 4 - Grievant's File

GRIEVANCE FORM--STEP 4

Appeal to Top Management Panel --This section must be completed by the grievant. Copy #2 of completed Grievance Forms--Steps 1, 2, and 3 and the report of the Committee of Review must be attached.

I hereby request that the grievance outlined on the attachments be reviewed by a Top Management Panel.

_____ _____
Date Signature

Upon completion of this section, grievant shall present original, copies #'s 2 and 3, and all attachments to the management panel. Copy #4 should be retained by grievant.

Management Panel's Reply _____

_____

_____

_____

_____

_____ _____
Date Signature

Upon completion of this section, copy #2 will be presented to grievant and copy #3 to the the management representatives who signed Steps 2 and 3. The original and all attachments shall be filed.

B

TAKE SIDES!

How to Win Teacher Grievances

by

Roger P. Kuhn
Regional Director
California Teachers Association
Southern Section
Los Angeles County

1970

MESSAGE FROM THE EXECUTIVE SECRETARY

As implications of teacher advocacy become apparent, it is increasingly necessary to change chapter structure and procedure to meet the demands and functions of such advocacy.

In a bygone era, the Association conceived of itself as a "collegial enterprise" in which teaching and administrative professionals and school board officials worked in a fraternal relationship for the education of pupils. The model used for shaping the Association was the structure and policy of the self-employed professions of medicine and law.

"Cooperative determination" and "problem processing" were thought to be the professional way to proceed. Collective bargaining and grievance processing with binding arbitration were thought unprofessional and rather "blue collar."

The professional models of law and medicine, however, have proved unsatisfactory for education precisely because they ignore an essential element of the teaching profession -- the employer-employee relationship. Moreover, since doctors and lawyers by law control entrance into their occupation, they are therefore responsible for policing their own ranks in a way that teachers as public employees cannot successfully imitate.

Teachers have come to realize that they cannot come to terms with their profession until they come to terms with their employment. Or in other words, they cannot practice as professionals until they win independence from their lay employer and its administration. Collective contracts defining their professional rights and ethical conditions of employment and enforceable through final and binding arbitration of grievances are increasingly the rule throughout the nation.

"Mutual agreement" is replacing "unilateral authority" of school boards in the determination of professional working conditions.

This booklet is intended not as a policy statement but as an educational aid for chapters to measure their structure and practice with the demands of teacher advocacy. It is hoped that this booklet will make clear how chapters can successfully defend teachers' rights that have been established at the bargaining table.

PREVIEW

1. Establish rights: Negotiate a master contract (See "More! booklet).

2. Enforce rights: Negotiate a grievance procedure with final and binding arbitration as part of master contract. Model Procedure.

3. Don't judge -- Defend!

4. Set up a Grievance Committee of three nonsupervisory members who are knowledgeable, hardheaded, common-sense types, at least one of whom should have served on the negotiating team. The grievance committee does the following:

   a. Trains and assists Building Reps to win grievances at Step 1 with Principal. (A committeeman may substitute for an insecure BR at Step 1.)

   b. Rules on appeals from members whose grievance requests were refused by Building Reps; advises member of right to appeal rejection to Executive Board and membership.

   c. Handles second step grievances with superintendent. Initiates Association grievances at Step 2, with the superintendent.

   d. Recommends to Executive Board which cases should go to arbitration.

   e. Represents Association at arbitration hearings. (Let staff handle or assist at Step 2 and at arbitration when the Association is large enough to afford staff or when it shares staff with other associations.)

   f. Recommends from its grievance experience new proposals on wages, hours, and working conditions to negotiating team of the Association.

Appendix A: Two opinions on arbitration in public sector.

Appendix B: Digests of several arbitration awards involving teachers.

Appendix C: Voluntary labor arbitration rules of the American Arbitration Association.

Appendix D: Seven tests for "just cause".

Appendix E: Grievance Report Form.

I.

HOW TO WIN

1. ESTABLISHING RIGHTS

Employee rights are negotiated away from Management -- they don't just happen. These rights are codified into a formal contract or agreement covering the wages, hours, and working conditions of all teachers in a school district.

Agreements are as comprehensive as an Association has the stamina to negotiate. Included are such items as salaries, fringes, leave rights, participation in curriculum development, class size limits, fair evaluation policies, student discipline backup guaranteed prep periods, adequate supplies and texts, relief from nonprofessional chores, increased supportive staff for disruptive pupils, dignified retirement, accountable assignment, transfer and promotion policies, etc., etc.

The master contract is renegotiated when it runs out, usually after a year; improvements are made at each successive negotiation, and school reform becomes a reality as teachers improve their lot, not just put up with it.

2. ENFORCING RIGHTS

All the rights won at the table would not accomplish a thing if there were not a built-in enforcer in the master agreement -- final and binding arbitration of grievances, which provides not only a hearing but relief. Arbitration gives negotiating power to an Association to win a settlement from Management before going to arbitration. Both the expense and the precedential nature of arbitration make Management avoid it if possible.

Printed below is an "ideal grievance policy for teachers." It is recommended that this be put on the bargaining table if an Association is serious about winning teacher grievances.

Perhaps a more "ideal" procedure would read: "Any grievance not settled within 15 days of initial filing may be brought to arbitration by the Association." Such an ideal, however, may have to wait until both Management and teacher organizations become more sophisticated in the art of resolving disputes.

Examine the ideal grievance procedure below.

First, note who can file a grievance. Employers frequently try to limit grievances to individual employees and only grudgingly to a group of employees. Great resistance is frequently offered against allowing the Association to process a grievance on its own.

The second paragraph defines what a grievance is. Note that the grievance is defined in a positive manner in that it is called a "statement" that a controversy, dispute or disagreement exists over the interpretation application of the collective contract or any Board rule, policy or practice; or a "statement" that an employee has been discriminated against, or that Management is failing to provide healthy and safe working conditions.

By including "controversy, dispute or disagreement" in the definition, the question of arbitrability is handily taken care of, for the Association does not have to prove that a contract violation, for example, is involved before an arbitrator can proceed to the substance of the complaint.

From an arbitration standpoint, the broader the grievance definition, the easier it will be to bring all manner of employee complaints to the bar of justice.

Note also that the definition requires that a grievance be written. Unless a grievant is willing to put his complaint in writing, he cannot be serious enough about it to see it through the process. Writing also forces one to define the exact nature of his complaint. Ordinarily the complaint is written up after the Building Rep and the grievant have had an informal conference with the Principal, and the Principal refuses to grant satisfactory relief.

In Section 2, note that management at both steps 1 and 2 has deadlines for giving a decision before a grievant may appeal to the next step. Management typically likes to have no deadlines or, at best, lengthy periods in which to be forced to a decision or face appeal. Frequently Management will want to insert time limits on the ability of the grievant to file an appeal, so that when such a deadline passes, the grievance is deemed waived and may not be resubmitted.

In Step 3, the issue of "arbitrability" is neatly taken care of along lines up-held by the United States Supreme Court.

The most important sentence in Step 3 is the last. "Final and binding" arbitration is what makes the grievance procedure work. Without it, you may have your day in court and may be able to hold forth with great eloquence, but you will not obtain relief. A grievance procedure without final and binding arbitration is worthless.

Conflict of interest is excluded from grievance representation by the last paragraph in Section 3.

Section 5 places the grievance processing within the ordinary work day (and not after school) in view of the important service that grievance adjustment renders the school district.

MODEL GRIEVANCE PROCEDURE

Section 1. Definitions

A "Grievant" shall mean an employee or group of employees or the Association filing a grievance.

A "grievance" shall mean a written statement by a grievant that a controversy, dispute or disagreement of any kind or character exists arising out of or

in any way involving interpretation or application of the terms of this Agreement or of an existing board rule, policy or practice, or that an employee has been treated unfairly or inequitably, or that there exists a condition which jeopardizes employee health and safety.

"Employer" shall mean the Board of Education or its administration.

"Days" shall mean working days.

Section 2. Procedure and Steps

Within a reasonable time following knowledge of the act or condition which is the basis of the complaint, the grievant may file a grievance with the school Principal or his immediate supervisor.

Step 1. The school Principal or his designated representative, or the immediate supervisor or his designated representative, shall have five days to give a written decision after receipt of the grievance.

Step 2. If the grievance is not settled in Step 1, the grievant may move it to Step 2 by written notice to the Superintendent of Schools. The Superintendent of Schools or his designated representative has ten days to give a written decision after receipt of the grievance.

Step 3. Arbitration. If the grievance is not settled in Step 2, the grievant may move the matter to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. Neither party to this agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable. If a question of the arbitrability of an issue is raised by either party, such questions shall be determined in the first instance by the arbitrator. The parties further agree to accept the arbitrator's award as final and binding upon them.

Section 3. Association Representation

All employees shall have the right of association representation at each step of the grievance procedure and shall not be required to be present at any step.

Any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the Association as long as the adjustment is not inconsistent with the terms of the Agreement, and the Association has been given opportunity to be present and make statements at such adjustment. Copies of employer decisions given at any step of the grievance procedure in any grievance whatsoever shall be speedily delivered to the Association. No grievance may be submitted to arbitration without the consent of, and representation by, the Association.

The Association on its own may continue and submit to arbitration any grievance filed and later dropped by a grievant provided that the grievance involves the application or interpretation of the Agreement.

A grievant shall not be represented by any person who might be required to take action, or against whom action might be taken, in order to adjust the grievance, or by a representative of any other employee organization.

Section 4. No Reprisals

No reprisals shall be invoked against any employee for processing a grievance or participating in any way in the grievance procedure.

Section 5. Released Time

Grievances will ordinarily be processed during the regular work day, and released time shall be provided for all participants in the investigating and processing of grievances, including the grievant, association representatives, and witnesses.

# # #

3. DON'T JUDGE -- DEFEND!

The role of an employee organization is not to put its members on trial but to defend and protect them from a Management that has all the power just because it is Management.

Teachers are very much employed. A school board and its administration hire, fire, assign, transfer, promote, evaluate, and establish other conditions of employment for teachers. Not only are teachers subject to dismissal by their local school board, but their license to teach can be lifted by a state credentials commission. A chapter should not put a teacher in triple jeopardy by imposing yet another threat on his job security by conducting a "study" before a grievant goes to face Management.

Members pay dues to be protected, not tried by their organization. Self-assured, confident teachers, not cautious toadies build a healthy profession. Inquisitions by self-appointed guardians of "professionalism" assure the dominance of sycophants and incompetents.

Management can take care of itself, and the Association takes on Management's role at the peril of its members and the profession.

Management cannot have a grievance; only employees can. Management has the inherent power to obligate; employees the right to complain, file a grievance and, if no settlement is reached, go to arbitration for relief. Confusing the roles only stifles employee rights and causes wounds to fester.

Over 60% of Associations which have negotiated exclusive agreements nationwide are administrator-free, apparently because they have learned that such confusion is all tooeasy in organizations where Management representatives are free to undermine teacher assertiveness.

The role of the Association is to listen to the complaint of a member, devise the best strategy for securing his interest, and set about securing

it the best way possible. The truth of the complaint will come out in the grievance process.

If a teacher has a complaint against another teacher, it is not the Association's business to resolve it unless it can be turned into a complaint against management, although a conscientious Building Rep may try to mediate informally. The Association is an employee organization, not a religious sect.

4. STRUCTURE & JOB OF THE GRIEVANCE COMMITTEE

The president with the advice and consent of his Executive Board should appoint three competent, articulate members to be the Grievance Committee. It is helpful for at least one of the members to be a member of the negotiating committee as well. A grievance committee of over five members is cumbersome; three have a better chance of getting together frequently to conduct business. The members can function as "Grievance Representatives" individually at Step 2 conferences with the superintendent, or preferably together, as they choose. When acting together, one should be spokesman, and another should be recorder; the third might act as "detective" in gathering information and documentation. The committeemen will learn how to work smoothly as they gain experience. Clearcut grievances will be easily recognized and processed without formal committee meetings.

4a. BR Training

In order to initiate grievances properly and settle them at the lowest possible step, it is necessary to train your Building Reps. BR's become the frontline of teacher defense. They should be elected by all the nonsupervisory Association members at a school -- permanent and nonpermanent -- on a yearly basis; election ensures their accountability to the membership. Released time (say 3 periods a week) should be negotiated for them to handle grievances and other Association business.

These are pointers that the BR will need to know:

1. When the member comes to you with a grievance, get all the facts.

2. Check the collective bargaining agreement for the applicable clauses.

3. Make inquiries of other non-administrative employees involved in order to check the accuracy of the complaint.

4. Give the member your opinion about whether it is a grievance to be handled through the grievance procedure or a complaint to be handled differently. Use persuasion. Give the member the benefit of the doubt.

5. Don't judge a grievance yourself. That's the arbitrator's job. Instead, seek to represent the interest of the aggrieved. Act like his counsel.

6. Don't go in alone.

7. Take the member in with you (unless you and the member agree it is not advisable). Prepare him ahead of time (cool him down). Make him understand that sound procedure requires one spokesman only.

8. Don't humble yourself. For instance, if there are not enough chairs in the Principal's office, have the Principal drag some in. Remember you are the Association. This is not a "hearing" conducted by the Principal; it is a "meeting" or "conference" between equals -- the Association rep and the Management rep.

9. Start by getting Management's side. Ask neutral questions of the Principal.

10. Then, if the new facts don't prompt a change in your strategy, state why the Association disagrees and what is desired (nature of complaint and remedy sought).

11. Caucus when other members of the grievance committee or the aggrieved have fresh facts or new ideas, when a change in strategy is needed, or when things need to be cooled off.

12. Don't get sidetracked. Stick to the facts and to what is wanted.

13. If you disagree, disagree amicably. Be calm, but firm.

14. Notify the Association grievance committee. Take it to the next step. Write it up, if the Principal refuses an informal settlement.

15. Don't horse trade with the principal. Don't trade away one grievance in order to win another. It is not fair to the member.

16. When you write up the grievance after the conference with the Principal, you give him so many days to make a written reply. Your determination to appeal to Step 2 may cause him to reconsider before his deadline passes. Look for a reasonable settlement. In grievances involving the central administration such as personnel or payroll office, the Principal should act as the school board's representative and secure relief from the central office. The idea is to make Management settle at the lowest step.

4b. Deciding Grievability

The Grievance Committee should hear appeals from teachers who were turned down by their BR on taking up a grievance. If the committee upholds the grievant, a committeeman should initiate the grievance at Step 1 if it looks like the BR will not put his heart into it.

There are six questions to ask in ascertaining the grievability of a complaint:

(1) Is it a violation of the collective agreement (including arbitration awards)?

(2) Is it a violation of law?

(3) Is it a violation of past practice?

(4) Is it a violation of administration's or the board's own rules?

(5) Is it an inherent area of employer responsibility, such as health or safety?

(6) Is it discriminatory treatment compared to the way other employees are treated?

If the complaint is outside the purview of the employer, such as the lifting of a credential, relief should be sought from the appropriate state agency, and use of the grievance procedure would be improper unless district administration is at fault or implicated.

The benefit of the doubt should be given to the grievant in "borderline" grievances where there is no clearcut violation of employer responsibility (such grievances frequently result in a doubtful or implicit employee right becoming certain and explicit -- "refining the contract"). Even when a complaint does not qualify as a grievance, a conscientious BR or committeeman can sometimes mediate the dispute, give counsel, and exercise persuasion.

Care must be taken, however, not to "straw boss," that is, to take on Management's role of directing teachers. Teachers don't need another supervisor. Where a lack of policy is discovered,an attempt may be made to negotiate one. Bargaining can be a continuous process by mutual agreement and supplements added to the master contract.

4c. & d. Step 2 Grievances

Step 2 is an extension of the negotiating process. All the tactics of negotiations apply: a single spokesman; a written record (notes); caucuses; compromise after exhausting every avenue for "more," or a notice of appeal to arbitration. A settlement can be reached even after the arbitrator has been selected -- in fact any time before the arbitrator renders his award.

The Association Executive Board should vote to take a grievance to arbitration upon recommendation by the Grievance Committee. The Executive Board should also decide a grievant's appeal against the Grievance Committee's refusal to recommend arbitration, the final appeal being to the representative council or the membership.

The decision to carry a case to arbitration is a serious one; arbitration is expensive, the average cost running from two to five hundred dollars, split equally by the Association and the school board. If an award is likely to be less than the cost of arbitration (either monetarily or in longterm negotiations value), then arbitration should not be sought; a settlement between what is "right" and what Management will give should be sought, or the grievance dropped. The overriding criterion, of course, is -- <u>can we reasonably expect to win</u> the arbitration?" Remember -- a loss before an arbitrator can have a

deleterious effect on future interpretation of a contract provision. You must weigh both the member's interest and the membership's interest.

A negotiated settlement provides speedier justice than arbitration: the industry average for the period from filing a grievance to an arbitration award is five months! Speed is worth something in the settlement. In any event, the possibility of arbitration gives the Association a lot of power towards a negotiated settlement (after all, arbitration was Management's tradeoff for the no-strike clause at the bargaining table).

Association grievances, involving the right of the Association itself or of an Association representative, should be initiated with the superintendent at Step 2. Likewise, an employee grievance can be handled as an Association grievance in the interest of speed and filed at Step 2 in the name of the Association. It is important that the Association be able to file a grievance when a teacher is afraid or unwilling, and the grievance involves an important employee right with application to other teachers. The BR should inform the Grievance Committee when such a possibility arises.

4e. Arbitration

Read the following free pamphlets of the American Arbitration Association: "Labor Arbitration Procedures and Techniques," a brief but comprehensive view of arbitration; "Voluntary Labor Arbitration Rules of the American Arbitration Association"; "Nine Ways to Cut Arbitration Costs". AAA has been designated by NEA, AFT, and the National School Boards Association as official repository for school arbitration awards, which are digested and published monthly for subscribers under the title "Arbitration in the Schools" (AAA,140 W. 51st Street, New York 10020). (AAA Los Angeles: 213/381-6511, AAA San Diego: 714/239-3051)

Briefly, arbitration works like this:

(1) Draft a joint Submission Agreement with Management, stating the issue or issues in the form of questions: "Was the board justified in cancelling the sabbatical leave of Mrs. Elizabeth Jones? If not, what is the remedy?" You may include the name of the arbitrator if you and Management have informally agreed on one. AAA will make the arrangements and set a date convenient to the arbitrator and the parties. Secure submission forms from AAA.

(2) If you and Management cannot agree on the wording of the issue, submit a Demand for Arbitration to AAA on the appropriate form, describing the complaint and the remedy sought.

(3) Select an arbitrator. AAA will send a list of arbitrators to both parties to strike off objectionable ones and give numerical preference to acceptable ones. If after several tries, no agreement can be reached, AAA will appoint an arbitrator (this is rare).

(4) At a time and place agreeable to the parties, the Hearing will be held. Your job is not to convince Management but to convince the

arbitrator! The proceeding is rather informal and usually conducted at a conference table in the following order:

(a) Opening statement by Association, followed by Management's. (It's good practice to write your opening statement and give it to the arbitrator, summarizing your arguments.)

(b) Presentation of evidence, witnesses, and arguments by the Association.

(c) Cross examination by Management.

(d) Presentation of evidence, witnesses and arguments by Management.

(e) Cross-examination by the Association.

(f) Summation by the Association and by Management.

After the hearing, the parties may want to file written briefs with the Arbitrator, although this adds to the expense of "study time" by the arbitrator and should be done only in more significant grievances. The arbitrator has 30 days for study time to draft his decision, called an "award", either from the close of the hearing or from the date of receipt of the briefs (which are sent to AAA not to the arbitrator -- no communication is allowed by either party with the arbitrator except in the other's presence).

To keep costs down: Avoid court reporting; take notes instead. Sometimes on simple grievances without contract interpretation significance, you and Management may want jointly to ask the arbitrator not to draft an opinion justifying his award but simply to make the decision with little or no opinion. Avoid citing innumerable precedents from other arbitration awards as this adds to study time, and precedent is not as important in arbitration as in courts of law.

A note about AAA: NEA and AFT prefer AAA arbitration because it is a non-political adjudicating body, an important factor for public employees whose employers are politicians who affect appointments to such public agencies as state conciliation and mediation services. Plus, AAA is the private authority in arbitration.

4f. Negotiating Proposals

After awhile the Grievance Committee becomes the source of expertise in policy matters and should communicate with the negotiating committee its recommendations for the next go-around of negotiations, or for some policy that can be worked out prior to the next contract by mutual agreement. The committee should also hold meetings with Building Reps to solicit their proposals based on their experience at Step One grievances.

SUMMARY

Any Association that is free from administrator domination can begin agressively to prosecute its members' interest by establishing rights through collective bargaining and enforcing those rights through an orderly grievance procedure with final and binding arbitration. All it takes is leadership, courage, and dedication to the ethics of personal freedom for adult professionals.

APPENDIX A: Two opinions on arbitration in the public sector.

Reprinted from "Negotiation Research Digest" (NEA) January 1970

WISCONSIN

ADVISORY ARBITRATION OF GRIEVANCES TERMED "AN EXERCISE IN FUTILITY"

In delivering an advisory opinion on a complicated case between the Superior Board of Education and the Superior Federation of Teachers, an independent arbitrator strongly criticized advisory arbitration:

Nothing has been accomplished other than to deepen frustrations and do violence to the collective bargaining relationship. So-called "Advisory Arbitration" is, in the opinion of the undersigned, an exercise in futility. It has the potential to become, in and of itself a part of the problem that final and binding arbitration is designed to mitigate.

The case before the arbitrator involved four disputes; the arbitrator sustained the board in two and the federation in two, even though "the parties. . .indicated no intent whatsoever to either accept or reject the opinion of the arbitrator."

The initial dispute concerned conflicting contract provisions which stated first that previous teaching experience "shall be considered as experience within the district on a year for year basis to a maximum of five (5) years," and second that "newly employed teachers shall be placed on the salary schedule according to degrees held and credits earned and given full year for year credit for actual teachers." Five teachers who were employed at the beginning of the school year after teaching outside the district for a half-year contended that their salaries should be based upon a full year's teaching experience. They referred to a third contract provision which held that "one-half year of experience shall be considered a full year of experience in determining position on the salary schedule." The arbitrator upheld the teachers and the federation by deciding that the third provision determined the salaries of teachers hired at the start of the agreement, while the other two provisions applied only to teachers hired during the course of the agreement.

In the second dispute, however, the arbitrator sustained the board in its denial of reimbursement for a third day of personal leave when the contract specified only two days' personal leave each school year. A teacher had taken a third day of personal leave to attend the federation's state convention, and the union claimed that because leave always had been granted for the convention, the two days' leave provided in the contract were additional days. Explaining that personal leave is a negotiable item, the arbitrator found that the contract provided no reopener on any negotiable items discussed in the process of negotiating the agreement.

The third dispute involved a union request for above-scale pay for a teacher of visually handicapped students. An agreement had been reached with a previous superintendent, but the board then rescinded the agreement. Finding that the contract provides higher pay for specialized instructors, the arbitrator sustained the union's claim.

In the fourth issue, the arbitrator sustained the board in finding no contract support for the union's claim that veterans of less than 24 months' military service be credited with such service for purposes of pay and experience. But he suggested that the board and the federation clarify future agreement provisions applying to military veterans with previous teaching experience.

In concluding his opinion, the arbitrator discussed advisory arbitration, stating that his observations were intended "to be neither facetious nor offensive":

As the parties hereto surely understand, final and binding arbitration is a mutually-embraced, orderly and expeditious process for the disposition of issues arising during the term of their agreement. It is a creature of their contract. As such it is not an adversary proceeding in the commonly accepted sense. What does it do? It settles disputes at least for the life of the contract. It provides immediate guidance to the parties and it may also define and clarify issues for future negotiations. A panacea it is not. No one, least of all the undersigned, would proclaim it a cure-all; however, it is no longer seriously argued that final and binding arbitration is not a desirable substitute for "trial-by-combat" in the troublesome arena of labor relations.

What about "Advisory Arbitration?" What does it do? The more kindly disposed among us might say that it is a step in the right direction and that it can pin-point issues to be resolved at some future date. The undersigned, however, is persuaded that its inherent shortcomings far outweigh any benefits inuring to parties who would indulge in the proceeding. Why? The submitted issues, as in the instant case where the parties have indicated no intent whatsoever to either accept or reject the opinion of the arbitrator, are not settled. Furthermore, the grievants involved, having had their day in court, are nonetheless denied relief. Neither party—winner or loser—is able to "breathe easier," so to speak, because nothing has been determined.

(*Board of Education, Joint City School District No. 1, City of Superior, Wisconsin, and Superior Federation of Teachers*, September 4, 1969).

APPENDIX A

(Continued)

NEW YORK

GRIEVANCE ARBITRATION LEGAL IN PUBLIC SECTOR

In denying a school district's motion for a stay of arbitration in a dispute with teachers associations, the New York Supreme Court for the County of Onondaga ruled that "once a valid agreement has been entered into providing for arbitration, any controversy arising between the parties to the contract which is within the compass of those provisions must go to arbitration." The agreement between the parties to this case provided that an arbitrator's decision "shall be final and binding."

The court handed down its decision on a dispute over a contract provision on "teacher load" between the East Syracuse-Minoa Teachers Associations and Central School District No. 1. The contract stipulated that "the Board of Education shall make every effort to maintain the 1968-69 teacher specialist-pupil ratio," but this ratio increased during the 1969-70 school year when the number of nurse-teachers was reduced, and dental hygienists were eliminated. Claiming that the district failed to comply with this contract provision, the Associations unsuccessfully attempted to initiate grievance proceedings and then arbitrate the matter; the school system sought a court stay of arbitration.

Noting that "there exists a dispute between the parties to this contract under which respondents make a reasonable claim of arbitrability," the court explained that the school system could not contest the claim:

> It is for the arbitrator to interpret the contract and to determine whether or not the dispute is arbitrable. It is the national public policy, recognized by this state, that labor disputes under collective bargaining contracts are presumptively arbitrable and it is for the arbitrators to determine the procedural and substantive issues of arbitrability. . . . The court's function is limited to finding that a dispute of some kind under a valid contract does, in fact, exist. If the contracting parties would avoid this presumption, then they must use carefully drafted words of exclusion.
>
> It is said that rules developed in the private sector, in this case, the presumption of arbitrability, are not and should not automatically be adopted for public employer-employee relations. That is the broad statement of *Civil Service Employees Association v. Helsby*. . . . It has been codified by the legislature in *Civil Service Law* Section 209-a(3). But that decision referred to and the statute deals with unfair labor practices. . . . It would fly in the face of the state policy of the legislature found in *Civil Service Law* Section 200 which encourages grievance and arbitration procedures to hold that the ruling of *Long Island Lumber Company v. Martin*, supra, was limited to the private sector.

The court stressed that "if the issue involved is solely one of construction or interpretation, it is for the arbitrators to decide the meaning of the contract." Moreover, it pointed out that "the only exceptions in which a court will enjoin arbitration are: (1) where there is fraud or duress, (2) where there is no bona fide dispute between the parties, (3) where the performance which is the subject for the demand for arbitration is prohibited, or (4) where a condition precedent to arbitration under the contract has not been fulfilled."

The school system had argued that the contract deprived an arbitrator of jurisdiction, and that no valid contract existed because the agreement delegated non-delegable duties to an arbitrator. In rejecting the first argument, the court held that contract provisions defining an arbitrator's authority merely "limit the arbitrator's power and do no more than state his legal duty." The school system's second argument also was rejected on grounds that "the courts have recognized the authority of governmental units to bind themselves to commercial arbitration," and that "the exercise of sovereignty includes the power to contract and to contract to arbitrate disputes." (*Central School District No. 1 of the Towns of Dewitt, Manlius and Cicero v. Stanley L. Litz, et al.*, New York Supreme Court for the County of Onondaga, October 16, 1969).

APPENDIX B: Digests of several arbitration awards involving teachers.

As reported in "Arbitration in the Schools" February 1970

1-F-2 PAID LEAVE FOR SELF-TREATED ILLNESS - DISTINCTION BETWEEN REGULAR AND SUBSTITUTE TEACHERS

Under a contract giving teachers paid sick leave without requiring a statement from a physician "for a total of no more than four days in any school year," the Board of Education did not have the right to treat regular substitute teachers differently from regularly appointed teachers. The contract used the word "teacher", "in its generic sense," not distinguishing between regular teachers and any other kind. It was therefore wrongful to deny to a regular substitute teacher pay for two of four non-consecutive, self-treated illnesses during one term.

SIDNEY L. CAHN 1/1/65 Board of Education of the City of New York and United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO 6 pages

---

1-W-10 COMPENSATION FOR INCREASED TEACHING LOAD

Under a contract stating that "whenever possible" the work load of teachers would be maintained at a certain level (25 periods per week, 30 pupils per class and 150 pupils per week), it was a violation to add to the work load of a teacher, who already had one of the heaviest teaching loads, the class which the chairman of the mathematics department was relinquishing, the Board of Education having failed to sustain the burden of proof that: (1) it was absolutely necessary for the chairman to give up that class; and (2) if relinquishing the class was necessary, the grievant was the teacher to whom it should have been assigned.

LOUIS YAGODA 5/16/69 Central High School, District 3, Board of Education (Nassau County, N.Y.) and Teachers Association, Central High School, District 3 9 pages

---

1-W-11 ASSIGNMENT OF HIGH SCHOOL TEACHER TO NON-TEACHING TASK

A contract requiring the Board of Education to provide "an average" of eight full time aides in order to relieve academic high school teachers of non-teaching assignments did not bar the assignment of teachers to hall locations where they could be on call for any problems that might arise in study halls supervised by the aides. The fact that twenty-three teachers were assigned to study hall supervision in the past, coupled with the fact that the contract calls for only eight aides, on the average, makes it impossible to uphold

the union contention that the assignment of aides to all non-teaching tasks was mandatory under the agreement.

AARON HORVITZ 9/22/63 Board of Education of the City of New York and United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO 5 pages

---

1-R-12 PAY FOR FAILURE OF SCHOOL TO MEET CONTRACTUAL GUARANTEE OF PREPARATION PERIODS PER WEEK

Under a contract stating that teachers will receive extra compensation if they are not given at least five preparation periods "per week," teachers who had fewer than five preparation periods during a certain week when they were assigned to monitoring examinations were entitled to extra compensation. The Board of Education was not upheld in its view that the number-of-preparation-period guarantee could be met by averaging on an annual basis.

RONALD W. HAUGHTON 7/6/67 Board of Education of the School District of Highland Park, Michigan and Highland Park Federation of Teachers 9 pages

---

1-D-16 REFUSAL OF TEACHER TO CHAPERON SATURDAY NIGHT DANCE

Where the agreement stated that the responsibility of teachers "requires the performance of duties that involve the voluntary expenditure of time beyond the normal school day," and the preceding agreement had not contained the word "voluntary," it was not proper to impose a two-day disciplinary suspension on a teacher for his refusal to accept an assignment as chaperon at a Saturday night dance. The clause "must be given the meaning intended by the last amendment of the parties."

WILLIAM J. FALLON 4/29/69 Groton Board of Education (Conn.) and Groton Education Association 8 pages

---

1-W-17 SELECTION BASED ON PERSONAL KNOWLEDGE OF SUBJECTIVE FACTORS WITHOUT ADEQUATE INVESTIGATION OF APPLICANT HIGHER IN OBJECTIVE FACTORS

The employer did not comply "fully" with a clause which provided that vacancies were to be filled on the basis of "experience, competence, qualifications..., length of service and other relevant factors" when the principal and department chairman selected a teacher to fill a vacancy based on their personal knowledge of his personality, while failing to make an "adequate" investigation concerning the personality traits of a second

applicant, who, in terms of the available objective measurements of the applicants, had a "clear edge" over the teacher selected.

HOWARD A. COLE 8/26/68 Board of Education of Bay City, Michigan
and Bay City Education Association 7 pages

APPENDIX C: Voluntary labor arbitration rules of the American Arbitration Association.

AMERICAN ARBITRATION ASSOCIATION VOLUNTARY LABOR ARBITRATION RULES

1. **Agreement of Parties**—The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Rules. These Rules shall apply in the form obtaining at the time the arbitration is initiated.

2. **Name of Tribunal**—Any Tribunal constituted by the parties under these Rules shall be called the Voluntary Labor Arbitration Tribunal.

3. **Administrator**—When parties agree to arbitrate under these Rules and an arbitration is instituted thereunder, they thereby authorize the AAA to administer the arbitration. The authority and obligations of the Administrator are as provided in the agreement of the parties and in these Rules.

4. **Delegation of Duties**—The duties of the AAA may be carried out through such representatives or committees as the AAA may direct.

5. **National Panel of Labor Arbitrators**—The AAA shall establish and maintain a National Panel of Labor Arbitrators and shall appoint arbitrators therefrom, as hereinafter provided.

6. **Office of Tribunal**—The general office of the Labor Arbitration Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. **Initiation Under an Arbitration Clause in a Collective Bargaining Agreement**—Arbitration under an arbitration clause in a collective bargaining agreement under these Rules may be initiated by either party in the following manner:

(a) By giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute and the remedy sought, and

(b) By filing at any Regional Office of the AAA two copies of said notice, together with a copy of the collective bargaining agreement, or such parts thereof as relate to the dispute, including the arbitration provisions. After the Arbitrator is appointed, no new or different claim may be submitted to him except with the consent of the Arbitrator and all other parties.

8. **Answer**—The party upon whom the demand for arbitration is made may file an answering statement with the AAA within seven days after notice from the AAA, in which event he shall simultaneously send a copy of his answer to the other party. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

9. **Initiation under a Submission**—Parties to any collective bargaining agreement may initiate an arbitration under these Rules by filing at any Regional Office of the AAA two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties and setting forth the nature of the dispute and the remedy sought.

10. **Fixing of Locale**—The parties may mutually agree upon the locale where the arbitration is to be held. If the locale is not designated in the collective bargaining agreement or submission, and if there is a dispute as to the appropriate locale, the AAA shall have the power to determine the locale and its decision shall be binding.

11. **Qualifications of Arbitrator**—No person shall serve as a neutral Arbitrator in any arbitration in which he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

12. **Appointment from Panel**—If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party an identical list of names of persons chosen from the Labor Panel. Each party shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have power to make the appointment from other members of the Panel without the submission of any additional lists.

13. **Direct Appointment by Parties**—If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of such Arbitrator, shall be filed with the AAA by the appointing party.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA may make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

14. **Appointment of Neutral Arbitrator by Party-Appointed Arbitrators**—If the parties have appointed their Arbitrators, or if either or both of them have been appointed as provided in Section 13, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA may appoint a neutral Arbitrator, who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the

appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that the Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 12, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

15. Number of Arbitrators—If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the parties otherwise agree.

16. Notice to Arbitrator of His Appointment—Notice of the appointment of the neutral Arbitrator shall be mailed to the Arbitrator by the AAA and the signed acceptance of the Arbitrator shall be filed with the AAA prior to the opening of the first hearing.

17. Disclosure by Arbitrator of Disqualification—Prior to accepting his appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

18. Vacancies—If any Arbitrator should resign, die, withdraw, refuse or be unable or disqualified to perform the duties of his office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in the same manner as that governing the making of the original appointment, and the matter shall be reheard by the new Arbitrator.

19. Time and Place of Hearing—The Arbitrator shall fix the time and place for each hearing. At least five days prior thereto the AAA shall mail notice of the time and place of hearing to each party, unless the parties otherwise agree.

20. Representation by Counsel—Any party may be represented at the hearing by counsel or by other authorized representative.

21. Stenographic Record—Whenever a stenographic record is requested by one or more parties, the AAA will arrange for a stenographer. The total cost of the record shall be shared equally among parties ordering copies, unless they agree otherwise.

22. Attendance at Hearings—Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

23. Adjournments—The Arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his own initiative, and shall adjourn when all the parties agree thereto.

24. Oaths—Before proceeding with the first hearing, each Arbitrator may take an Oath of Office, and if required by law, shall do so. The Arbitrator may, in his discretion, require witnesses to testify under oath administered by any duly qualified person, and if required by law or requested by either party, shall do so.

25. Majority Decision—Whenever there is more than one Arbitrator, all decisions of the Arbitrators shall be by majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required.

26. Order of Proceedings—A hearing shall be opened by the filing of the oath of the Arbitrator, where required, and by the recording of the place, time and date of hearing, the presence of the Arbitrator and parties, and counsel if any, and the receipt by the Arbitrator of the Demand and answer, if any, or the Submission.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator. The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

The Arbitrator may, in his discretion, vary the normal procedure under which the initiating party first presents his claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.

27. Arbitration in the Absence of a Party—Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

28. Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and all of the parties except where any of the parties is absent in default or has waived his right to be present.

29. Evidence by Affidavit and Filing of Documents—The Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he deems proper after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing but which are arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

30. Inspection—Whenever the Arbitrator deems it necessary, he may make an inspection in connection with the subject matter of the dispute after written notice to the parties who may, if they so desire, be present at such inspection.

31. Closing of Hearings—The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make his award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

32. Reopening of Hearings—The hearings may be reopened by the Arbitrator on his own motion, or on the motion of either party, for good cause shown, at any time before the award is made, but if the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless both parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have 30 days from the closing of the reopened hearings within which to make an award.

33. Waiver of Rules—Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

34. Waiver of Oral Hearing—The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

35. Extensions of Time—The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

36. Serving of Notices—Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or the entry of judgment on an award made thereunder, may be served upon such party (a) by mail addressed to such party or his attorney at his last known address, or (b) by personal service, within or without the state wherein the arbitration is to be held.

37. Time of Award—The award shall be rendered promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by the law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the Arbitrator.

38. Form of Award—The award shall be in writing and shall be signed either by the neutral Arbitrator or by a concurring majority if there be more than one Arbitrator. The parties shall advise the AAA whenever they do not require the Arbitrator to accompany the award with an opinion.

39. Award Upon Settlement—If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

40. Delivery of Award to Parties—Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

41. Release of Documents for Judicial Proceedings—The AAA shall, upon the written request of a party, furnish to such party at his expense certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

42. Judicial Proceedings—The AAA is not a necessary party in judicial proceedings relating to the arbitration.

43. Administrative Fee—As a nonprofit organization, the AAA shall prescribe an administrative fee schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing shall be applicable.

44. Expenses—The expenses of witnesses for either side shall be paid by the party producing such witnesses.

Expenses of the arbitration, other than the cost of the stenographic record, including required traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrator in his award assesses such expenses or any part thereof against any specified party or parties.

45. Communication with Arbitrator—There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

46. Interpretation and Application of Rules—The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by majority vote. If that is unobtainable, either Arbitrator or party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

APPENDIX D: Seven tests for "just cause."

As defined by Arbitrator Carroll R. Daugherty.

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer's business?

3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the employer's investigation conducted fairly and objectively?

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the employer?

The arbitrator explained that:

A "no" answer to any one or more of the above questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the Arbitrator to substitute his judgment for that of the employer.

APPENDIX E: Grievance Report Form

Grievance #_____ _____School District

Distribution of Form
1. Superintendent
2. Principal
3. Association
4. Teacher

GRIEVANCE REPORT

Submit to Principal in Duplicate

Building	Assignment	Name of Grievant	Employee #	Date Filed

STEP I

A. Date Cause of Grievance Occurred_____

B. 1. Statement of Grievance_____

2. Relief Sought_____

_____ _____
Signature Date

C. Disposition by Principal_____

_____ _____
Signature Date

D. Position of Grievant and/or Association_____

_____ _____
Signature Date

STEP II

A. Date Received by Superintendent or Designee_____

B. Disposition of Superintendent or Designee_____

_____ _____
Signature Date

C. Position of Grievant and/or Association_____

_____ _____
Signature Date

(NOTE: Continued on next page)

STEP III

A. Date Submitted to Arbitration _____

B. Disposition & Award of Arbitrator _____

_____

_____

_____

Signature of Arbitrator | Date of Decision

If additional space is needed in reporting Sections B1 & 2 of Step I, attach an additional sheet.

NOTE: All provisions of Article _____ of the Agreement dated _____. 197 , WILL BE STRICTLY OBSERVED IN THE SETTLEMENT OF GRIEVANCES.

II.

FIRST SEMINAR

Task I. *Analyze the attached model grievance procedures*

Rate the clauses of each procedure

"A" - *No retreat (Essential)*
"B" - *Preferred (Desirable but not essential)*
"C" - *Trade-off (Harmless)*
"D" - *Avoid (Dangerous or undesirable)*

Task II. *Discuss and check you ratings with those supplied by your Seminar Facilitator*

Task III. *Evaluate and discuss the "Short Form Grievance" supplied by your Facilitator.*

MODEL GRIEVANCE PROCEDURE
(from "Take Sides")

Section 1. Definitions

A "Grievant" shall mean an employee or group of employees of the Association filing a grievance.

A "grievance" shall mean a written statement by a grievant that a controversy, dispute or disagreement of any kind or character exists arising out of or in any way involving interpretation or application of the terms of this Agreement or of an existing board rule, policy or practice, or that an employee has been treated unlawfully or inequitably, or that there exists a condition which jeopardizes employee health or safety.

"Employer" shall mean the Board of Education or its administration.

"Days" shall mean working days.

Section 2. Procedure and Steps

Within a reasonable time following knowledge of the act or condition which is the basis of the complaint, the grievant may file a grievance with the school Principal or his immediate supervisor.

Step 1. The school Principal or his designated representative, or the immediate supervisor or his designated representative, shall have five days to give a written decision after receipt of the grievance.

Step 2. If the grievance is not settled in Step 1, the grievant may move it to Step 2 by written notice to the Superintendent of Schools. The Superintendent of Schools or his designated representative has ten days to give a written decision after receipt of the grievance.

Step 3. Arbitration. If the grievance is not settled in Step 2, the grievant may move the matter to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. Neither party to this agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable. If a question of the arbitrability of an issue is raised by either party, such questions shall be determined in the first instance by the arbitrator. The parties further agree to accept the arbitrator's award as final and binding upon them.

Section 3. Association Representation

All employees shall have the right of association representation at each step of the grievance procedure and shall not be required to be present at any step.

Any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the Association as long as the adjustment is not inconsistent with the terms of the Agreement, and the Association has been given opportunity to be present and make statements at such adjustment. Copies of employer decisions given at any step of the grievance procedure in any grievance whatsoever shall be speedily delivered to the Association. No grievance may be submitted to arbitration without the consent of, and representation by, the Association.

The Association on its own may continue and submit to arbitration any grievance filed and later dropped by a grievant provided that the grievance involves the application or interpretation of the Agreement.

A grievant shall not be represented by any person who might be required to take action, or against whom action might be taken, in order to adjust the grievance, or by a representative of any other employee organization.

Section 4. No Reprisals

No reprisals shall be invoked against any employee for processing a grievance or participating in any way in the grievance procedure.

Section 5. Released Time

Grievance will ordinarily be processed during the regular work day, and released time shall be provided for all participants in the investigating and processing of grievances, including the grievant, association representatives, and witnesses.

MICHIGAN MODEL GRIEVANCE PROCEDURE

A claim by a teacher or the Association that there has been a violation, misinterpretation or misapplication of any provision of this Agreement or any rule, order or regulation of the Board may be processed as a grievance as hereinafter provided.

In the event that a teacher believes there is a basis for a grievance, he shall first discuss the alleged grievance with his building principal either personally or accompanied by his Association representative.

If, as a result of the informal discussion with the building principal, a grievance still exists, he may invoke the formal grievance procedure through the Association on the form set forth in annexed Appendix C, signed by the grievant and a representative of the Association, which form shall be available from the Association representative in each building. A copy of the grievance form shall be delivered to the principal. If the grievance involves more than one school building, it may be filed with the superintendent or a representative designated by him.

Within five (5) calendar days of receipt of the grievance, the principal shall meet with the Association in an effort to resolve the grievance. The principal shall indicate his disposition of the grievance in writing within five calendar days of such meeting, and shall furnish a copy thereof to the Association.

If the Association is not satisfied with the disposition of the grievance, or if no disposition has been made within five calendar days of such meeting (or ten calendar days from the date of filing, whichever shall be later) the grievance shall be transmitted to the superintendent. Within seven calendar days the superintendent or his designee shall meet with the Association on the grievance and shall indicate his disposition of the grievance in writing within five calendar days of such meeting, and shall furnish a copy thereof to the Association.

If the Association is not satisfied with the disposition of the grievance by the superintendent or his designee, or if no disposition has been made within five calendar days of such meeting (or ten calendar days from the date of filing, whichever shall be later), the grievance shall be transmitted to the Board by filing a written copy thereof with the Secretary or other designee of the Board. The Board, no later than its next regular meeting or two calendar weeks, whichever shall be later, shall meet with the Association on the grievance. Disposition of the grievance in writing by the Board shall be made no later than seven calendar days thereafter. A copy of such disposition shall be furnished to the Association.

If the Association is not satisfied with the disposition of the grievance by the Board, or if no disposition has been made within the period above provided, the grievance may be submitted to arbitration before an impartial arbitrator. If the parties cannot agree as to the arbitrator within five calendar days from the notification date that arbitration will be pursued, he shall be selected by the American Arbitration Association in accord with its rules which shall likewise govern the arbitration proceeding. The Board and the Association shall not be permitted to assert in such arbitration proceeding any ground or to rely on any evidence not previously disclosed to the other party. The arbitrator shall have no power to alter, add to or subtract from the terms of this Agreement. Both parties agree to be bound by the award of the arbitrator and agree that judgment thereon may be entered in any court of competent jurisdiction.

The fees and expenses of the arbitrator shall be shared equally by the parties.

If any probationary teacher for whom a grievance is sustained shall be found to have been unjustly discharged, he shall be reinstated with full reimbursement of all professional compensation lost. If he shall have been found to have been improperly deprived of any professional compensation or advantage, the same or its equivalent in money shall be paid to him.

The time limits provided in this Article shall be strictly observed but may be extended by written agreement of the parties. In the event a grievance is filed after May 15th of any year and strict adherence to the time limits may result in hardship to any party, the Board shall use its best efforts to process such grievance prior to the end of the school term or as soon thereafter as possible.

Not withstanding the expiration of this Agreement, any claim or grievance arising thereunder may be processed through the grievance procedure until resolution.

NEW JERSEY MODEL GRIEVANCE PROCEDURE

A "grievance" is a claim by a teacher or the Association based upon the interpretation, application, or violation of this Agreement, policies or administrative decisions affecting a teacher or a group of teachers.

An "aggrieved person" is the person or persons making the claim.

A "party in interest" is the person or persons making the claim and any person who might be required to take action or against whom action might be taken in order to resolve the claim.

Purpose. The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting teachers. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.

Procedure. 1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school year and, if left unresolved until the beginning of the following school year, could result in irreparable harm to a party in interest the time limits set forth herein shall be reduced so that the grievance procedure may be exhausted prior to the end of the school year or as soon thereafter as is practicable.

3. Level One - A teacher with a grievance shall first discuss it with his principal or immediate superior, either directly or through the Association's designated representative, with the objective of resolving the matter informally.

4. Level Two - If the aggrieved person is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within five (5) school days after presentation of the grievance, he may file the grievance in writing with the chairman of the Association's committee on Professional Rights & Responsibilities (hereinafter referred to as the "PR&R Committee") within five (5) school days after the decision at Level One or ten (10) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance, the Chairman of the PR&R Committee shall refer it to the superintendent of schools.

5. Level Three - (a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within ten (10) school days after the grievance was delivered to the superintendent, he may, within five (5) school days after a decision by the superintendent or fifteen (15) school days after the grievance was delivered to the superintendent, whichever is sooner, request in writing that the Chairman of the PR&R Committee submit his grievance to arbitration. If the PR&R Committee determines that the grievance is meritorious, it may submit the grievance to arbitration within fifteen (15) school days after receipt by the aggrieved person.

(b) Within ten (10) school days after such written notice of submission to arbitration, the Board and the PR&R Committee shall attempt to agree upon a mutually acceptable arbitrator and shall obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator or to obtain such commitment within the specified period, a request for a list of arbitrators may be made to the American Arbitration Association by either party. The parties shall then be bound by the rules and procedures of the American Arbitration Association in the selection of an arbitrator.

(c) The arbitrator so selected shall confer with the representatives of the Board and the PR&R Committee and hold hearings promptly and shall issue his decision not later than twenty (20) days from the date of the close of the hearings or, if oral hearings have been waived, then from the date of the final statements and proofs on the issues are submitted to him. The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and conlusions on the issues submitted. The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this Agreement. The decision of the arbitrator shall be submitted to the Board and the Association and shall be final and binding on the parties.

(d) The costs for the services of the arbitrator, including per diem expenses, if any, and actual and necessary travel, subsistence expenses and the cost of the hearing room shall be borne equally by the Board and the Association. Any other expenses incurred shall be paid by the party incurring same.

Rights of Teachers to Representation. 1. Any aggrieved person may be represented at all stages of the grievance procedure by himself, or, at his option, by a representative selected or approved by the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the grievance procedure.

2. No reprisals of any kind shall be taken by the Board or by any member of the administration against any party in interest, any representative, any member of the PR&R Committee or the Association, or any other participant in the grievance procedure by reason of such participation.

If, in the judgment of the PR&R Committee, a grievance affects a group or class of teachers, the PR&R Committee may submit such grievance in writing to the superintendent directly and the processing of such grievance shall be commenced at Level Two. The PR&R Committee may process such a grievance through all levels of the grievance procedure even though the aggrieved person does not wish to do so.

Decisions rendered at Level One which are unsatisfactory to the aggrieved person and all decisions rendered at Levels Two and Three of the grievance procedure shall be in writing setting forth the decision and the reasons therefore and shall be transmitted promptly to all parties in interest and to the Chairman of the PR&R Committee. Decisions rendered at Level Three shall be in accordance with the procedures set forth in Section C, paragraph 5(c) of this article.

All documents, communications and records dealing with the processing of a grievance shall be filed in a separate grievance file and shall be kept in the personnel file of any of the participants.

Forms for filing grievances, serving notices, taking appeals, making reports and recommendations, and other necessary documents shall be prepared jointly by the superintendent and the Association and given appropriate distribution so as to facilitate operation of the grievance procedure.

All meetings and hearings under this procedure shall not be conducted in public and shall include only such parties in interest and their designated or selected representatives, heretofore referred to in this Article.

ANSWER SHEET
FIRST SEMINAR

1. *A Suggested Ratings of Grievance Clauses*

2. *"Short Form Grievance Procedure"*

For distribution by Seminar Facilitator <u>after</u> discussion of grievance clauses.

SUGGESTED RATINGS OF GRIEVANCE CLAUSES

Subjects	Objectives	Ratings
1. What is grievable?		
1.1 terms of contract only	limited scope -- fear of flooding	Depends on contract
1.2 contract plus board policy or practice	open definition, desire to surface complaints	prefer
1.3 any complaint	remove debate on grievability	avoid
2. Who may grieve?		
2.1 member(s) of unit	to represent more than just association member	prefer
2.2 organization for unit	remedy in event contract rights abridged	prefer
2.3 organization for members	minimize problem of fearful member	trade-off
2.4 board or administrator	to allow management another weapon in addition to its disciplinary powers	avoid
3. Initiation and Processing		
3.1 parties: aggrieved, immediate superior, association, and representative	seek to optimize the information flow	no retreat
3.2 informality	less rigidity before the written record	prefer
3.3 written demand or appeal	keeps the issues clearly identified	prefer
3.4 written answer	all actions must be defended by reasoning	no retreat
3.5 initiation time limit after occurrence or knowledge of occurrence	to give employee plenty of time before "statute of limitations"	prefer
3.6 time limits for appeal	maximum from step 1 to arbitration award should not exceed ninety (90) days	prefer
3.7 grievance conferences	every level should assure face to face confrontation, last hearing should be all out	no retreat
3.8 information copies up, over and down	visibility reduces negative incentives	prefer
3.9 group grievances	initiation at level two is more efficient	prefer

Subjects	Objectives	Ratings
4. Grievance Impasse		
4.1 Final & binding arbitration	final and binding arbitration: a true neutral with power to decide	No retreat (procedure worthless without this)
4.2 arbitrability	whatever is grievable	prefer
4.3 costs	both share in costs	prefer
4.4 who initiates	only the recognized association may call for arbitration	no retreat
5. General Procedures		
5.1 mandatory consideration by management	assures the aggrieved control over his grievance (automatic appeal and forfeiture)	prefer
5.2 association representation	a) association present at all meetings, hearings, appeals b) grievance representatives selected and certified by association	no retreat
5.3 individual rights	right to select own representative at any stage (except in arbitration)	accept
5.4 conflict of interest	a) grievance rep member not a party in interest b) respondent may not be member of unit	prefer trade-off
5.5 association right to know	board will furnish information requested for the processing of any grievance	no retreat
5.6 released time for participants	to recognize the service that grieving provides the employee in maintaining good morale and administration	prefer

GRIEVANCE PROCEDURE -- SHORT FORM

IS THIS A GOOD GRIEVANCE PROCEDURE FOR A CONTRACT?

"The Association may appeal any grievance to final and binding arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association, provided that

a) the grievance is filed in writing with the Superintendent by the Association, an employee, or group of employees;

b) the grievance concerns the interpretation or application of this Agreement; and

c) the grievance has not been settled to the satisfaction of the Association within 15 working days from the date of filing."

☐ Yes ☐ No

REASONS:

Discuss your answers and reasons in the group. (AAA Rules are reprinted in "Take Sides".)

III.

SECOND SEMINAR

Task I. *Discuss and analyze the attached defective grievance clauses proposed by management. Tell why they are defective and what is desirable.*

Task II. *Compare your remarks with those on the answer sheet supplied by your Seminar Facilitator.*

EXAMPLES OF DEFECTIVE CLAUSES FROM GRIEVANCE PROCEDURES

CONFERENCE PARTICIPANTS ARE ASKED TO READ THE CLAUSES BELOW TAKEN FROM SELECTED CONTRACTS AND AGREEMENTS ACROSS THE COUNTRY AND TO DETECT THE MAJOR WEAKNESSES IN EACH ONE. A WORK SHEET IS ATTACHED FOR YOUR USE WITH THIS EXERCISE.

1. "All grievances should first try to be channeled through the chain of authority before being turned over to the PR&R Committee."

2. "If you have a grievance, get in touch with the chairman of the Ethics Committee. The Ethics Committee will make available a list of names (fifty or more) who have agreed to serve as grievance representatives."

3. "The employee shall first take his grievance to his immediate supervisor not to fellow teachers, community, or Board members."

4. "Professional employees in each building of the school system will elect their building grievance representative."

5. "Written reports of all grievances cases shall be destroyed."

6. "Board employees are assured the right of representation of their own choosing in seeking adjustment of grievances."

7. "The Grievance Committee shall remain as impartial as possible. Its function shall be to decide whether to recommend that the problem be pursued to a higher level or dropped."

8. "The teacher may pursue any of the following channels in pursuit of his grievance: (a) County Superintendent, (b) State Association, (c) NEA-PR&R (d) the courts."

9. "If the aggrieved wishes privacy or confidentiality to be preserved, he may elect to attend the meetings without representation."

10. "An aggrieved employee must be present when a grievance is originally filed with his immediate supervisor and at each subsequent oral appeal. He may be accompanied by only one representative."

11. "An aggrieved person may represent himself or he may select a representative from the organization to which he belongs."

12. "ARTICLE XV

Violation of Agreement

Any violation of agreement shall be resolved in conformance with State Statutes.

When there is disagreement over interpretations and alleged violations of this agreement, advisory mediation shall be employed. Both parties agree that advisory mediation shall mean that any mutually accepted mediator will be called upon to study the existing problem using the procedures needed for fact finding and to advise both parties as to what he thinks is the proper solution to the problem. Both parties agree to share equally the expenses of said mediation.

ARTICLE XVI"

13. "A grievance exists when an employee thinks he has not been treated in accordance with established rules, regulations, or policies, or when he thinks he has been treated in an unfair, unreasonable, abusive or discriminatory manner. Disagreement with applicable rules, regulations or policies does not constitute a grievance."

14. "Appeals to the superintendent shall be in writing and accompanied by the original claim and copies of all previous decisions. The superintendent shall evaluate the evidence and render his decision within five days."

15. "If the steps to be followed in processing a grievance do not fit a given position, the Assistant Superintendent for staff Personnel Services shall interpret the procedure and establish a fair and equitable process."

16. "As promptly as possible after filing of a grievance in Step Three, it shall be considered jointly by the Superintendent, a designated committee of the Board and Teachers Club Committee. Each party may bring witnesses, legal or consultative representative(s) as it determines should appropriately be present."

17. "Level Four: If the grievance is not settled at Level Three and if the PR&R Committee at an officially announced meeting of said Committee in accordance with existing by-laws of the Association, determines by majority recorded vote that the grievance is meritorious and involves the interpretation, meaning or application of any of the provisions of this agreement, it may, within thirty (30) days after written reference to the Committee and upon the written request of the aggrieved person, refer it to arbitration..."

18. "School administrators or the board of education through the superintendent can initiate and process grievances at Step 2 in the procedure."

19. "The Grievance Committee will be made up of three categories: elementary teachers, secondary teachers, and administrative personnel."

20. "A 'grievance' shall mean an alleged violation in the application of rules, regulations, or policies of the school district."

21. "If at the end of the three (3) school days following the occurence of a grievance or the date of first knowledge of its occurence by any employee affected by it, the grievance shall not have been presented at Level One of the procedure set forth in Section 5*, the grievance shall be deemed to have been waived."

22. "STEP 5. If the Association is dissatisfied with the decision of the Board of Education,the Association may within twenty school days

    a. submit any grievance under this Agreement to advisory arbitration under the labor arbitration rules of the American Arbitration Association, at the equal expense of the parties;

    b. or if the Association so requests, the Board or its representatives will meet further with the Association to consider fairly and in good faith any other methods of settlement which might be mutually agreed upon, including private (non-governmental) mediation, and binding arbitration."

23. "An aggrieved employee may be present when a grievance is originally filed with his immediate supervisor and at each subsequent oral appeal. He may be accompanied by only one representative."

WORK SHEET

Briefly note the reasons for the defectiveness of each clause, and indicate what is desirable.

1.

2.

3.

4.

5.

6.

7.

8.

9.

10.

11.

Work Sheet Continued

12. _____

13. _____

14. _____

15. _____

16. _____

17. _____

18. _____

19. _____

20. _____

21. _____

22. _____

23. _____

ANSWER SHEET
SECOND SEMINAR

Answer to Defective Clauses

For distribution by Seminar Facilitator after discussion of defective grievance clauses.

WORKSHEET ANSWERS ON DEFECTIVE CLAUSES

1. Procedures replace administrative channels, not add to it. Suggest that grievances go quickly to PR&R Committee.

2. Grievance and Ethics Committees have each a separate function. The Ethics Committee should confine itself to those matters involving the Code of Ethics, not the grievance procedure. Also, the list of 50 names is an internal matter within the Association and should not be written into the procedure. Suggest that PR&R Committee be contacted. Suggest that listing be removed.

3. Teachers should not be limited as to whom they can approach i.e.: a grievance. Suggest that the statement either be dropped or that it be made clear that the first formal step be the immediate supervisor.

4. Not professional employees. Clarify the term. Again the phrase is an internal Association housekeeping chore. Suggest removal on the explanation that in each building there will be a specific person selected by the Association in each building who will be grievance spokesman.

5. No! SAVE these records. They assist the negotiating committee in making amendments to the Agreement (if one exists) as well as to provide a valuable record of actions taken. If confidentiality is the goal then, suggest deliberations will remain confidential and that the Board and Association will each maintain their own files of actions.

6. Statement is adequate if (Suggest) a phrase is added guaranteeing the Association the right to be present and express its views.

7. No! The Grievance Committee is the advocate and must be partial. The second sentence is an internal housekeeping matter.

8. The very purpose of a local grievance procedure is subverted with this suggestion, B and C, may be pursued while the grievances are in process for assistance purposes. D may be followed as a last resort if the Association feels strongly that its constituent rights are being abrogated. Suggest removal of entire phrase from the procedure.

9. One does not maintain confidentiality by removing the teacher advocate. Suggest a phrase demanding confidentiality of proceedings.

10. This phrase is restrictive and intimidating. The aggrieved can be represented by the Association beyond the initial confrontation if he wishes. Suggest removal or, as a compromise, end the clause after the word "supervisor".

11. One organization is the responsible representative for all teachers whether they are members or not. Both arbitration and court decisions defend the exclusive rights of the recognized agent.

12. This is the whole procedure. No steps, time limits, ROLES, or especially, arbitration. Suggested total new grievance procedure.

13. Last sentence negates the latitude of the first sentence. First sentence is weak with inclusion of the word 'treated' to read misapplication.

14. There is no provision made for a hearing. Suggest the addition of a hearing whereby the teacher advocates (Association) can present its case.

15. If steps do not fit a given situation, then suggest that flexible language be added to the procedure. Unilateral interference by Administrative officers is to be discouraged. Suggest that any interpretation be written into actual procedural language.

16. Words 'as promptly as possible' be removed. Suggest specific time limits such as 'within 10 days'.

17. Three major weaknesses - 'majority recorded vote', 'officially announced meeting' and 'written request of the aggrieved person'. The latter point is again housekeeping and has no proper place within the written procedure. The former, also housekeeping, has more serious implications. Recording how members vote is not the administration's affair, Suggest that amendments be added simply that PR&R decide whether or not the grievance is meritorious. Once a grievance is filed, the permission of the aggrieved is not necessary. Suggest deletion.

18. Boards and administrators now have wide powers. The purpose of the procedure is to provide an avenue for employees. Suggest dropping the entire clause.

19. The make-up of the Grievance Committee is an Association internal concern. If the Board demands to know the consistency of the Committee suggest that there will be at least one grievance representative per building.

20. The word alleged is restrictive. Suggest using the very broad definition from the morning session's sample.

21. The last phrase waiving the grievance is much too restrictive. The aggrieved would have but three days. Suggest a broader phrase.

22. Advisory arbitration is very poor. Such an expense not to have a decision binding on both parties is most dismaying. Suggest binding arbitration and remove the total section b.

23. Same answer as #10.

IV.

THIRD SEMINAR

Task I

A. Skim and discuss contents of attached "Training of Chapter Leaders for Grievance Processing."

- and -

B. Pages 5-8 of "Take Sides," starting with Section 4 (Structure and Job of the Grievance Committee) thru Section 4c 6d (Step 2 Grievances)
- A recap of Grievance Committee role can be found in the Preview of "Take Sides"

- and -

C. Attached paper "How Grievance Processing Affects School Management."

Task II

A. Discuss pages 11 and 12 of "Take Sides" on the necessity and legality of binding arbitration (See also the legal opinion from Arnold, Smith & Swartz.)

B. Role Play. "You-be-the-Arbitrator!"

Seminar Facilitator will hand out the actual decision after you have discussed and decided the case.

TRAINING OF CHAPTER LEADERS FOR GRIEVANCE PROCESSING

I. Training is Essential

A. Burden of representation, which association has sought, is to train members to process grievances

B. Increases likelihood that contract will become meaningful document

1. Vehicle to test the relationship agreed to in the master contract

C. All groups need training, but not the same for each group

1. Focus on separate groups and provide specialized training

II. The teacher as the Aggrieved

A. Reality: Interest will be cursory until he has a grievance

1. A copy of the master contract, including grievance procedure, to each but likely will not be studies in full

2. Training should be brief, general

B. Give what he needs to know

1. To whom he grieves

2. Identity of his grievance representative

3. Time limits on initiation of grievance demand after first learning of cause

4. Matters that are not grievable

5. The manner in which he grieves; when oral, when written

6. Time limit to wait for answer before moving on

7. When an appeal is in order; time limits; when he is foreclosed

C. Provide a copy of form used to initiate grievance demand; something he can attach to

III. The Building Grievance Rep as Detective

A. Define his role

1. To identify instances of contract violation by school management

2. To encourage initiation of grievance

3. To defend Association's rights in the contract; accountability is to the Association

B. Knowledge of the contract is essential

1. Others in the building will not know the contract
   a. Teachers will only look at certain sections
   b. Principal will not be motivated to study limitations of his authority

2. Only with knowledge of contract can contract violations be identified

3. Association must bear burden of drilling representative; select eight or ten main issues in contract for drill

IV. The PR&R Committee as Advocate

A. Define the role

1. Represent the member's interest in every grievable matter; screening is not appropriate until the arbitration level

2. Checking up: review of grievance demands for correction of error or identifying stronger positions

3. Carry up: keep grievance representative involved in issues: follow-through enhanced and training advanced

B. Special knowledge is demanded

1. Depth knowledge of the contract

2. Familiarity with the grievance flow

3. Identification of equity defenses: things to look for in the case, facts to help win the case

4. Familiarity with procedural due process: preparedness to respond to violations by the school district

5. Acquaintance with the special rules of the committee

V. Filmstrip: "A Chance to Serve" for Chapter Grievance Workshops

Copies available on short term loan from CTA/SS Regional Directors

GRIEVANCE PROCESSING AND SCHOOL MANAGEMENT

Martha L. Ware
Associate Executive Secretary
NEA PR&R Commission

We have been considering in some detail grievance procedures: What they are; how to negotiate them; how to recognize good and bad clauses; how to train those most directly involved in the procedures; we will consider how arbitration works.

Once a grievance procedure has been established, it is fair to ask what impact, if any, it will have on the school district, on the local association, on negotiation and ultimately on student's education.

We know that the consequences of collective negotiation is shared policy making. What is the consequence of a grievance procedure? It seems clear that grievance processing truly extends negotiation, if not collective negotiation, to the school building level. A grievance settled requires an interpretation of the contract and that interpretation may actually expand the meaning of the contract. Some have even termed grievance processing "fractional negotiation."

Thus, grievance processing is shared management. It is quite obvious that shared policy making--collective negotiation-- causes changes in the way school systems and local associations act. But much less attention has been paid to how shared management--grievance processing--causes school districts and local associations to change.

EARLY DIFFICULTIES

The most difficult time in grievance processing is when the procedures are new adopted. The expectations of teachers may be higher than that which can be accomplished through the use of grievance processing. Also in some systems many grievances of long standing, which have been long hidden, may surface as soon as the procedures is established.

Administrators, particularly principals, may resent what they view as a loss of authority and so resist the whole process. Teacher grievance representatives will be new at the grievance process and must learn what problems can be treated by the procedure and what kinds of settlements can be expected.

In the first few months, therefore, as those involved in the grievance processing are forced to move from the security of the traditional ways of doing things, there will be some anxiety. This must be expected after the establishment of a grievance procedure. The change may be more painful to some than to others. Although this is unavoidable, it can also be expected that within a reasonable period of time--a year or so--those involved will say, at the least, "well if this is the way it has to be, I might as well accept it."

INCONSISTENCY, CENTRALIZATION, DECENTRALIZATION

In the absence of grievance procedures in most school systems, school policies are inconsistently applied. There is variation from building to building, and there are variations within buildings -- some teachers are treated differently from others. There may be several reasons for this inconsistency in applying and interpreting school policies, but the primary one is that there is no effective pressure to centralize and make consistent the applications of school policy.

Under a grievance procedure which meets the standards we have been discussing at this seminar, grievance processing will be an effective pressure that causes a change in previous methods of operation.

In the beginning, consistency will be achieved through centralizing interpretation of school policies at the higher levels of administration. As experience in grievance processing is gained, there will be an informed decentralization, where principals take more responsibility for interpreting policies within the limits of the contract and under precedents set in grievance settlements.

This pattern of change in the school system from inconsistency to centralization to decentralization will also occur in the local association.

It will be helpful to review what is about grievance processing which causes the school system and the association to change in this manner.

Step one of grievance processing involves the grievant, the grievance representative and the principal. It is at this point, therefore, that the impact of the procedure is first and most often felt.

One of the most immediate results of the process at this level is that both the principal and the grievance representative will make mistakes in the process which will cause them to begin to check with others; with those above, with their colleagues, with each other.

Principal

Grievance processing forces on the principal a series of behaviors that can be expected to be resisted strongly at first. Principals will feel that grievance processing is too time consuming and is concerned with matters too petty to deal with. A principal will feel that "I have a difficult enough job to carry on the education program of the school without having to be concerned with formal involvement in the grievance procedure."

Indeed, much of the literature on this topic directed to principals suggests that the principal not always be step one in the grievance process as has been here recommended. And yet past practice in many school systems prior to the establishment of grievance procedures shows that teachers with complaints often have gone around the principal to a chief administrator who says "my door is always open."

While this approach may be satisfying to the chief administrator, it weakens the principal's authority and morale; the teacher may rightfully question the necessity of discussing problems with his immediate superior when he can achieve quicker solutions by going around his superior to the top man, This bypassing of the principal to the top administrator may blow up an issue out of proportion. This approach also denies the chief administrator the opportunity to assess the effectiveness of principals to handle teacher complaints. And it makes it easier for weak principals who don't wish to assume their responsibility for handling problems in their buildings to avoid doing so with impunity. The establishment of a grievance procedure of the kind we have been discussing will end this practice of bypassing the principal.

Despite the resistance of the principal to the process, he is required by it to do several things. First he must meet the grievant and his representative to listen (not just hear) and to discuss the complaint. If there is no settlement, he must answer the grievance in writing, providing reasons to justify his actions. If the matter is pursued, he may have to participate in conferences at the second level in the grievance process. Last, he may have to defend his answer before an arbitrator.

What effect does this have on the principal's behavior? As soon as his position has been reversed a few times, or he has been embarrassed by an arbitrator's questions, he will begin to check with others. In the beginning he will probably check up the administrative line with the assistant superintendent or the superintendent to see if his written answer is in line with the administration's view

of the matter. Also he will begin to check with other principals to see if what he is doing at his school is in line with what is going on in the rest of the school system.

More important, after some experience in grievance processing the principal will begin to check with his superiors and with other principals in advance of his decisions which might give rise to complaints.

Some principals will also begin to discuss actions they intend to take with the association grievance representative and with those teachers his action may affect. This can be a good testing of his proposal and may help him to avoid decisions which could give rise to a grievance. There is also some danger inherent, however, to the grievance representative which I will discuss later.

The effects of checking on administration are several. It can tighten administrative decision making and communication. Each school in the district will cease to be a fiefdom, for similar decisions will be made and applied throughout the system. It tightens administration in the schools, for the central administrator will want to be sure that the principals are giving consistent grievance responses.

Principals will be encouraged to check with their superiors. Superiors will recognize that a principal probably doesn't have, or won't take time to be familiar with all the contract details. And, his supervisors don't want him to misinterpret the contract or settle the grievance in conflict with other grievance settlements in the district. The effects of checking by the principal, therefore, can be that administrative decision making is centralized and is consistent throughout the system.

As I mentioned earlier, after two or three years experience under a grievance procedure, the centralization of administration -- which has replaced inconsistent policy application or administration in the school system -- will give way to an informed decentralization. That is, as principals become more comfortable with the procedure and more knowledgeable of their authority under it and the contract they will be willing to make non-precedential decisions and decisions within established precedent.

The Local Association

Checking will also be required within the local association. The grievance representative in the local building will learn when to check with the association's grievance committee chairman on a difficult case. The grievance committee itself will learn to check with the state association, and sometimes the national, for precedent before proceeding to extensive and costly arbitration. It may learn that several cases have gone the other way and that it really doesn't have a chance at winning on behalf of the teacher.

The association must also recognize and prepare its members for what our experience to date shows: That initially most grievance settlements will favor the grievant and the association. But as times goes on, the administration will tighten and there will be a sharp drop in cases won by the association.

The grievance representative must not be passive. It is his job to assist in enforcing the contract by detecting violations and getting them filed. If he finds violations in his building, but fails to produce a grievant, he may check with the grievance committee chairman. The chairman's obligation will be to determine if similar violations are occuring in other buildings and if so, to seek a case to settle the matter.

If the grievance chairman cannot find an individual who is willing to complain the grievance committee itself may grieve on behalf of the association on some types of grievances. For example, if the contract provides that there be an

association bulletin board in each building and in one the principal requires it to be in an inconvenient and nearly inaccessible place. This is an association grievance which the grievance committee can bring at step two.

When a principal checks in advance of some of his decisions with the grievance representative, the representative must guard against overuse of this device. He must not let himself be put in the position of making decisions for the principal. Weak principals will tend to do this, they may use a frank discussion on whether this or that approach will be acceptable to the teachers against the grievance representative by prefacing their announcement of a decision to teachers with "I've talked it over with your representative and he agrees with me that its o.k." A few unpopular decisions by a principal with that kind of preface will destroy the effectiveness of the grievance representative.

As within the school system, this checking with the association -- by the grievance representative with the grievance committee chairman, by the chairman with the committee, and by the local committee with the state association -- will tend to improve communications and to provide consistent protection and treatment to members.

Also, the grievance process forces the association through its grievance representatives and committee to perform its duty under the contract: That is, to scrutinize administration on behalf of its members. It is the association's job to see that the administration will direct teachers according to rules and regulations, not according to whim or favoritism; to assure that official policies are administered and interpreted fairly and equitably. Grievance processing forces the association to perform those duties.

FEEDBACK BEHAVIOR

An extremely important outcome of grievance processing is feedback. It affects all teachers and administrators, not just those involved in a particular grievance settlement.

Top administration feeds back to its principals the results of a settlement. In effect, it says to them "as a result of this decision you will have to behave differently."

The association also feeds back to its members. It says you have new rights which were in doubt before.

This simultaneous feedback within the system and the association gives everyone a different understanding about their relationship.

DETECTING HOT SPOTS

Grievance processing may alert both the administration and the local association to some basic difficulty if a great many grievances are arising from one school. A disproportionate number of grievances from one school in a system is bound to be noticed and may be indicative of some basic trouble with which top administration should deal, such as a principal not following the agreement. Or, it may be an overzealous grievance representative with whom the association must deal. In any event, it is a signal to the administration and to the association to check the problem out. The problem could be serious but might never have come to the attention of the administration or the association in the absence of the grievance process. It is also true that something is wrong if grievances never come from a particular school. It is ridiculous to contend as some would, "Everything is fine at my school. We had no grievance complaints this year." No complaints at all should be a sign to the association, particularly, that the school should be checked. The grievance representative may not be doing his job. Thus, the grievance process can be an advantage to the administration and to the local association by indicating trouble spots in the system.

NEGOTIATION

One of the more obvious and quite important effects of grievance processing is on negotiation of subsequent contracts. The kinds of complaints that are processed and their history as they move into the machinery of grievance review provide an excellent means of appraising the quality and content of the contract and of other school district policies which may not be incorporated in the contract.

Experience in grievance review can help answer the general question "Is the contract inclusive, does it cover all necessary areas?"

Many of the grievances will be indicators of

- unclear contract language, which should be tightened
- contract language, which though clear, is detrimental to many members when enforced, and
- gaps in the contract, --instances where contract language is needed, but is not in the present agreement.

The association grievance committee has the obligation to review grievances processed and to inform the negotiation team of these points so that the team can take them into account when negotiating the next contract.

EFFECT ON MEMBERS

There is at least one other effect of grievance processing which should not be overlooked. The fact that it is less obvious, perhaps than those just discussed does not make it less important. That is the effect on the local association of member participation, attraction and retention.

It seems clear that a primary reason for teacher interest in grievance processing is a desire to be fully heard when he has a grievance complaint. It may be that the grievance is not settled to the interest of the teacher but satisfaction is often obtained when he feels that his needs have been seriously considered and listened to both by his colleagues, through the association, and by the administration to which he is complaining. Being heard may be almost as satisfying as prevailing.

The obligatory consideration which must be given to a teacher's complaint by the principal and by other up the line if the grievance is pursued, explains why teachers do not think the grievance procedure is failing even when, as mentioned earlier, the rate of success in the teachers' behalf drops. Teachers still want to grieve and, indeed, they should.

Too often in local associations most members have a small role in formal procedures on matters of substance. The exceptions are in times of crisis, as in the case of a strike, or when it is time to ratify a contract.

Grievance processing permits substantive participation by members in their working environment. The grievance takes place where the member is and gives him an opportunity not only to be heard by the administration, but to discuss his problems with his colleagues. If he is satisfied with the way his case is handled by the association whether the settlement is in his favor or not, he is likely to remember that when it is time to pay dues again. So will his colleagues.

Sophisticated beginning teachers, and many experienced teachers considering a move, are asking as many questions these days about local associations as they ask about the school districts. And one of the questions is how well the local association represents its members. Effective grievance processing is an important part of the answer to that question.

CONCLUSION

It is fair to conclude that grievance processing does cause change in school system and in local association.

That local association is required to operate more effectively in behalf of its members by

- representing individual grievants
- keeping the administration honest - enforcing the contract
- improving subsequent contracts

The school administration is required to operate more effectively to the benefit of teachers and students by

- processing complaints of teachers in a fair and orderly manner, and at the point closest to where the complaint arose
- making administrative decisions that are free from discrimination or arbitrary application and are consistently applied,
- centralizing authority by strengthening the administrative line which is an important part of effective personnel administration.

YOU BE THE ARBITRATOR! .

Role play of an actual arbitration (from a script)

(You will find it better <u>not</u> to read the script while 6 members of your group play it out.)

Make your decision, based on the role play and the attached documentation, on the evaluation sheet <u>before</u> reading or discussing the actual decision, which will be supplied by your Seminar Facilitator.

ARBITRATOR

I open these preceedings at this time, 10:00 a.m., Saturday, February 28, 1970. Case of:

The Board of Education
Warren Consolidated Schools

-And-

Warren Education Association

The attorney for the Association is Mr. George Shea. The attorney for the School Board is Mr. Paul Putnam.

My name is Thomas Patterson.

I shall dispense reading with the demand for arbitration by referring you to the copy of the demand you have in your possession. The initiating party is the Association. No answer to the demand has been received from the school board. Therefore, we shall begin with the opening statements. Mr. Shea, you may start.

ASSOCIATION ATTORNEY

We shall show that the dismissal of Mr. Nowak as head football coach violated due process and two provisions of the contract. We can prove how the dismissal-- was excessive, not reasonable, unfair and certainly not for just cause. Hence Article III, Section 2 and Article XIII, Section 1,B, of the contract has been violated.

SCHOOL BOARD ATTORNEY

We shall show that Mr. Nowak's dismissal was the result of a disciplinary action justly deserved. Mr. Nowak has demonstrated his incompetency in five areas:

A. Failed to follow instructions

B. Gradual deterioration in the football program.

C. Treated two boys improperly.

D. Conduct and appearance of the players was sometimes poor.

E. Mr. Nowak's conduct was poor as a coach and spectator.

We will prove these five charges.

ASSOCIATION CASE

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
Information contained in answers:	Questions should contain			1A-The Association demand arbitration so as the initiating party they will present their case first, call your first witness.
C -Name - Steve Nowak ; Physical Education Teacher at high school since 1962; Head football coach 1962 - June 1967; I receive $800 for coaching football	1B-For our first witness we'll call Mr. Nowak. Please state your Name, position held in the school system, coaching salary and length of service.	Due Process violated questions 3 - 10		
B-Principal - Mr. Eschenburg Athletic Director, Mr. James, met in Principal's office Meeting held November 1966 Told that I was dismissed from coaching at the end of this football season.	2A-Tell us about the afternoon meeting you had in the principal office. The meeting that started this grievance.			
B-Four reasons - given orally-dumbfounded - didn't copy them down. Got the idea that the whole thing had already been decided.	3A-What were the reasons given for your dismissal?			
B-This is a funny situation. The day after I had the meeting in the office, I requested the charges in writing from the athletic director. I never received the charges to this date.	4A-Were the charges ever given to you in writing?			
B-Yes, they have been requested at every step of the grievance procedure. The association received a copy of charges after we consummated step 3 of the grievance procedure about 1 1/2 years after I was dismissed.	5A-Have the charges been requested more than once?			

ASSOCIATION CASE

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
6B-That's correct.	6A-The four charges have been given to you orally but you have never received them in a written form?			
	7A-If you have never seen the written charges than you certainly have no knowledge of the specifics of those charges.			
8B-I don't understand what you mean by a hearing.	8A-Did you have a hearing on the four reasons you were orally given for dismissal?			
9B-No, nothing like that ever took place.	9A-Explains the purpose of a hearing-confronted with charges, copy of procedure to be used, opportunity to defend self, cross examine witnesses, etc.			
	10A-Make your point that due process has not been followed. Cite reasons why.		10B-I object, he is calling for a conclusion-summarizing part of his case-hasn't heard all the witnesses	10C - This is an Informal procedure; not in court; no jury to impress; I can separate facts from opinions. If either you or he get over winded, I'll slow you down to expedite the proceedings. Unlike court procedure, I shall allow all statements during proceedings.

ASSOCIATION CASE

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
11B-Athletic Director, Mr. James	11A-As a coach, who is your immediate superior?	Violation of Article XIII Section B of contract questions 11 to 15		
12B-Don't know if evaluated. Never discussed any evaluation with me.	12A-Article XIII, Section B read, it starts with "In addition ..... To This end, decision based on good faith evaluation....."			
13B-Same Answer	When has your coaching been evaluated by the athletic director?			
14B-Same Answer	13A-Has your coaching been evaluated by the principal?			
	14A-Has anyone ever evaluated your coaching?			
	15A-Some evaluation must have been made to arrive at a decision of dismissal, yet you have not been told of that evaluation nor had it been discussed with you.		15B-Objection-drawing a conclusion	15C-Youre right-but this is not a formal proceeding and I won't be swayed until I hear both sides of the issues and all the facts presented-so his statements at the time will be taken as an observation.
	The School Board has violated due process and now we have seen how they have violated Article XIII, Section B of the contract.			

ASSOCIATION CASE

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
	16 -School Board has conceded that your dismissal was a "disciplinary action". Therefore we have another part of the contract we should look at, Article III Section 2 Read it.	Violation of Article III, Section 2 questions 16 to 20		
17B-No one has ever told me that I was or had been doing a poor job of coaching.	17A-When were you told that you were doing a poor job of coaching?			
18B-Never told by anyone.	18A-Who told you and when were you told that you were in danger of losing your coaching position?			
19B-That's correct -- neither the athletic director nor the principal--for that matter, no one.	19A-You were never made aware that you had to perform your work better in order to retain your coaching position.			
	20 -Make your point that: Article violated: not told doing a poor job, had to do a better job such advance warning is an essential ingredient in any fair disciplinary procedure			

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
21B-Yes		Cross examine try to show he was aware of reasons for dismissal and was aware of some dissatisfaction about the way he performed some of the responsibilities required of a head football coach.	21A-You were given the reasons at this meeting in Nov. 1966, for the dissatisfaction with your teaching.	
22B-No		Questions 21 to 28	22A-At this meeting-were you prevented from defending yourself.	
23B-No			23A-Did you question the charges?	
24B-Yes			24A-Were given the opportunity to resign?	
25B-Yes, I have.			25A-You say your coaching has not been evaluated. Have you received any communications from the Director of Athletics concerning your responsibilities and duties as a coach?	
26B-I would say no to that question. I received communications on a few occasions from the Director of Athletics, but his complaints were either not true or he didn't do anything to evaluate my responsibilities and my job.			26A-Did these written notices to you by the Athletic Director contain a number of items that obviously would show his dissatisfaction with the way you handled your responsibilities.	
27B-Yes, he wrote to me concerning those items.			27A-Did Mr. James, the Athletic Director, write to you concerning an editor in the school newspaper criticizing the officiating at a football game; did he not also write to you concerning damaged football equipment because of the poor way it was stored; as well as the unsportsmanship contact of your team when the players were engaged in a free-for-all.	
28B-No I didn't, as a matter of fact....			28A-Yet you didn't consider these letters, these written memorandums as an evaluation of your duties and responsibilities?	
28C-(doesn't speak on his feet when School Board Attorney speaks for the second time)			28C-YOU HAVE ANSWERED MY QUESTION. A SIMPLE "YES" OR "NO" IS ALL THAT IS REQUIRED.	

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
29 -Suggest that we take the examples that were put to me in the question, one at a time. Oct. 30, 1964 school newspaper contained an article critical of the officiating in a game with Utica High School. I received a note from athletic director. He cited the practice of having the "sports editor" clear his articles with me. I did not know of this practice and had never been told about it. I did not see the article before it was published. I also felt that the article was completely improper in its criticism of officials. On Dec. 1, 1964, written procedures regarding my responsibility for student articles were distributed. Another example cited was damage to the equipment due to the poor way it was stored. The student managers put the equipment away and did so on the night of Nov. 3, 1966. The tackling dummies and blocking shields were left in a covered area on the floor of the stadium. It snowed that night and because of a leak in the stadium the melting snow created puddles on the floor and the equipment got wet. This was the only time this happened. As for the example on sportsmanship of the team when they were in a free-for-all, I say this could happen to any coach and has only happened twice since I have been coach. It is a very difficult thing to control.				28D-Gentlemen, just a moment please. The question was answered correctly but we have latitude in an informal meeting. Besides I can see that the attorney for the association will only redirect in order to allow the coach to further answer the question. Let us avoid any additional arguments on procedure. Please complete your answer to the question, coach.
30D-Same answer as you gave for number 3. Also add "needed time to think, was not going to give any off-the-cuff replies." That is why I requested written charges the next day.	30A-Redirect-one further question, why didn't you write the charges down, defend yourself, question the evidence supporting the charges.		30B-I object-we have already been over that ground	30C-The answer required by the question may be related to a reply made previously, but this question in this wording has not been

First Witness - Coach	Attorney	Object	School Board Attorney	Arbitrator
				asked before so I see no harm in allowing the witness to answer it. Let me remind everyone this is not a court of law, these are informal proceedings. The question is appropriate so I'll allow it.
				31- If no further questions--that is all that will be required of you, Mr. Nowak.
	Call Mr. Tate as our next and last witness			
32B-John Tate, Teacher of Physical Education at Cousino High School for past seven years. Former head football coach at that school.	32A-Name, position, school system and length of service.			
33B- Yes, happens to all coaches.	33A-Has a team under your coaching been involved in a free-for-all?	To prove the premise that a free-for-all by members of a football team is difficult to control and not uncommon nor fault of the coach. Questions 31 to 33.		
34B-Not likely, but on a rare occasion you could. Usually it would be spontaneous.	34A-Could you foretell such an event?			
	35A-Thank you. Do you have any questions?		35B-No questions.	
	That Concludes Our Case			

SCHOOL BOARD CASE

Third Witness	Attorney	Object	School Board Attorney	Arbitrator
		Five Charges	For our first witness we will call Mr. James.	You may proceed call your first witness.
36B-Robert James, Director of Athletics at Warren High School and have been prior to Mr. Nowak's employment in 1962 as football coach.		A. Failed to follow instructions B. Gradual deterioration in the football program. C. Treated two boys improperly D. Conduct and appearance of the players was sometimes poor E. Nowak's conduct was poor as a coach and spectator	36A-Tell us your name, position and length of time in that position.	
37B-Failed to attend a Bi-County League meeting on Sept. 20, 1966. Coaches Handbook states that coaches "attend all rules, leagues, officials, etc. meetings pertinent to the sport you coach." He didn't attend. Another incident was when he failed to follow my written instructions that the varsity field should not be used for the JV game. The coach should have contacted my office for permission before disregarding my orders and using the varsity field.		Questions 35 to 44	37A-In our opening statement we listed five areas where the coach has not fulfilled his duties or responsibilities. Will you give me some examples dealing with the charge "Mr. Nowak failed to follow instruction."	
			Our next charge deals with the gradual deterioration in the football program during Mr. Nowak's tenure as coach.	
38B-100 candidates in 1962 60 in 1966			38A-Do you have the figures of football candidates that tried out for football in 1962 when Mr. Nowak assumed his present position and the number of students that cam out in 1966, the coach's last season?	

Third Witness	Attorney	Object	School Board Attorney	Arbitrator
39B-Coach's failure to promote the sport through football banquets, team parties, dad's nights, etc. Also his "won-lost" record was not particularly good, winning 52% of the games vs. 70% of the games won by his predecessor.			39A-To what do you attribute this decline in candidates?	
40B-The first string quarterback played in every game except the "homecoming day" game. His father told me that he had come home crying for he had been given no explanation for being kept out of the game. The center on the team was unable to appear at all practice sessions one week in Oct. 1966 due to the death of a relative. When I asked him why he quit he told me "the coaches made fun of him."			40A-Now let us turn our attention to the improper treatment of football players. Tell us about examples pertaining to this charge.	
41B-I complained to the coach in Sept. 1966 about "long hair" on some of the football players, and how such a condition would be regarded as "unhealthy" and in conflict with their image as "clean, wholesome individuals." He told me he would see what he could do to correct the situation.			41B-Tell us what you can about the charge that the conduct and appearance of the players was sometimes poor.	
42B-No			42A-Did you notice any change in the team's appearance after you talked with the coach?	
43B-The whole attitude of the team is manifested in their actions onthe field. They have misbehaved on the field and on the sidelines. I saw team members slam their helmets on the ground, kick the sideline markers, and throw their packs aside. Players have been thrown out of a game for personal fouls.			43A-Can you give us any further examples of this charge?	

Third Witness | Attorney | Object | School Board Attorney | Arbitrator

44B-I received a complaint from the coaches at Utica. It seems Mr. Nowak was watching a JV game at Utica and left the bleachers to walk to the other side of the field. He was told to get off the field and away from the sidelines I instructed him to apologize to the Utica coaching staff.

Early in 1964 - a referee penalized the team for "unsportsmanlike conduct" and threatened to remove him from the game.

The coach has also allowed his players to criticize officials.

The doctor, team physician, for 5 to 7 years, quit. He told me he quit because "working with Nowak was impossible."

44A-We can teach a desirous trait, attitude or behavior by example. Our last charge deals with Mr. Nowak's conduct Will you tell us about the poor conduct Mr. Nowak displayed as a coach and spectator.

45 -Thank you. Your witness.

Third Witness	Attorney	Object	School Board Attorney	Arbitrator
46B-I don't know, I do know he failed to attend that meeting.	46A-Lets go back, Mr. James, to your reply about Mr. Nowak not attending a Bi-County League meeting. How many meetings did he fail to attend?	To discredit the school board case questions 46 to 68		
47B-No, I didn't.	47A-Did you ask him his reason for not attending that meeting?			
	48 -You condemn a man for not attending a meeting. You state this publicly but yet you don't bother to find out why.			
49A-Yes, I did	49A-You stated that Mr. Nowak failed to follow your instructions and played the JV football game on the varsity field. Did you speak to the principal about this situation?			
50A-Excessive glass on the field and the bleachers were too close to the field.	50A-What reasons did the coaches give the principal that persuaded him to allow the varsity field to be used for the JV game?		50B-Just a moment, the principal should be asked that question. Otherwise, it is just hearsay.	50C-If this witness has knowledge of this incident, then his answer may make it unnecessary to call the principal. Hence, the proceedings will not be prolonged unnecessarily. I'll allow the question. Please answer it.
51A-I didn't mean to give that implication. He did some of these things.	51A-You mentioned that Mr. Nowak failed to promote the sport through football banquets, team parties, dad's nights. The implication I got from your reply was that he never did any of these things, Is that true?			
52B-That's right.	52A-Then you thought that he didn't do enough of these promotional activities, right?			
53B-No, I didn't.	53A-Did you ever tell Mr. Nowak that you thought he did not do a sufficient number of these activities to promote football?			
54B-The team lost 7 and won 1.	54A-Let us move on. Your figures on the win and lost games of the team were on the tip of your tongue. So tell us the number of games lost and won by the team in 1961, the year immediately prior to Mr. Nowak's appointment as coach.			

SCHOOL BOARD CASE

Third Witness	Attorney	Object	School Board Attorney	Arbitrator
55B-The team lost 4 and won 4.	55A- What was the team's record the first year under Mr. Nowak.			
56B- The team lost 1 and won 3.	56A-And the second year under Mr. Nowak.			
57B-Yes, it could have been.	57A-Now for questions on the improper treatment of football players. The boy who cam home crying because he didn't play in the "homecoming day" game. That young man was on crutches the Monday before the game. he had suffered a thumb, leg, and back injury. Could that have been the reason he was not allowed to play in the game?			
58B-Yes, he is the son of the Chairman of the Board.	58A-Is that boy any relation to a member of the school board?			
59B-No, it was the line coaches	59A-You told us about a boy who quit the team because "the coaches made fun of him". Was Mr. Nowak one of the coaches that made fun of him?			
60B-I suggested that a boy could not be removed from the team for this reason but that there are other ways of eliminating him such as not having him play in games.	60A-You said that you brought to the coach's attention the "long hair" of some team members. Mr. Nowak told you he would see what he could do. What did you suggest he do?			
61B-That's right.	61A-You mean bench him-arbitrarily and capriciously have him sit on the bench-correct?			

Third Witness	Attorney	Object	School Board Attorney	Arbitrator
62B-Not to my knowledge.	62A-Did the coach take your suggestion?			
	63 -Good for him! I don't know how you can expect anyone to promote the sport and obtain a good win-lost record by implementing your suggestion.			
64B-I don't believe I have	64A-We have heard you tell about the attitude of the team and how they have behaved on and off the field. How they have kicked the sideline markers and slam their helmets on the ground. We have also heard today how you have issued memos to Mr. Nowak or spoken to him about taking care of equipment, checking student newpaper articles, eliminating "long hair" on athletes. Have you ever informed Mr. Nowak of your concern, if it is that, about player's behavior on or off the field?			
65B-Yes, he is.	65A-The referee who penalized the team for "unsportsmanlike conduct", is this referee a member of the school board?			
66B-No, I don't know that.	66A-Did you know that the game in which this happened the punter had been knocked down 3 times without officials calling a penalty for "roughing the kicker"?			
67B-No, I haven't	67A-Have you ever heard Mr. Nowak criticize officials in the presence of the team or otherwise?			
68B-No, but I have not heard him try to prevent it either.	68A-Have you ever heard him condone criticism of officials by the players?			
			69 -That concludes our case.	
	No further questions.			
				70 -Gentlemen, we have arrived at the time and place appropriate for summation. Would you please begin. (Attorney for the association)

ASSOCIATION ATTORNEY SUMMATION

Summation points:

1. Due process not afforded
   a. requested - didn't receive written charges
   b. was not confronted with the evidence
   c. no opportunity to defend himself
2. Article XIII, Section B violated
   clause mentions good treatment of personnel so that high morale may be attained. Decisions relating to individuals shall be based on good faith evaluation.
   a. Evaluate a person's performance to improve it. Mr. Nowak never informed of evaluation, naturally assumed his work was satisfactory
   b. A dismissal decision, under this article, should have been made on an evaluation, and made in good faith.
3. Article III, Section 2 violated - rules and regulations governing conduct of Mr. Nowak must be reasonable. Not reasonable to fire someone who never was told:
   a. that he was or had been doing a poor job
   b. in danger he would lose his job unless he improved
   c. never told what was expected of him (supervising articles in the school paper)
   d. how to improve
4. Article III, Section 2 also states
   that enforcement of discipline will be fair and for just cause
   a. Mr. Nowak condemned for not attending a Bi-County League meeting, but the school authorities didn't bother to find out why he didn't attend
   b. It was judged that the coach did not arrange enough banquets and other activities to promote football -- yet not told he should arrange more.
   c. If long hair is a problem it should not be handled by a coach keeping such player on the bench.
   d. Criticized for not explaining to a player why he didn't play in a game. should have been obvious to everyone concerned that the injuries of the player prevented his playing.

The case against the coach certainly does not sustain the action against him. Hence, the discipline was unfair and not for just cause.

SCHOOL BOARD ATTORNEY

Summation points:

A. Mr. Nowak had the opportunity to:

   1. hear the charges against him

   2. respond to these charges

   3. opportunity to resign to protect his reputation that is certainly fair.

   4. Mr. Nowak was informed frequently by the athletic director concerning conduct and actions that were not satisfactory (his behavior at games). This in itself is an evaluation.

   5. When these things were brought to his attention again (at the dismissal meeting) the coach found himself speechless.

B. Was the discipline (the dismissal) fair, no other discipline would have been logical.

   1. Coach is instructed to apologize to another schools coaching staff for poor conduct - this is discipline.

   2. Mr. Nowak is informed of poor performance (did not appropriately supervise storing of equipment) Warning of poor work and not doing the job -- more important, it is a form of discipline.

   3. only other discipline left was to fire him.

The last and final discipline action we could take against "incompetence".

ASSOCIATION ATTORNEY

71C-Well, I'll have to file one.

SCHOOL BOARD ATTORNEY

71B-I wish to do so.

ARBITRATOR

71A-Gentlemen, do you wish to file briefs?

72 -The rules of the arbitration board require me to render a decision within thirty days, so please be prompt with your briefs. Send them to the board of arbitration within ten days.

These proceedings are closed.

DOCUMENTATION

Arbitration Clause from Contract

A. A grievance dispute which is not resolved at the level of the superintendent under the grievance procedure herein may be submitted by the Association, as specified herein, to an arbitrator for decision if it involves a violation, misinterpretation or misapplication of any provision of this Agreement or any existing rule, order or regulation of the school board or administrative directive which implements or applies to the terms of the Agreement, or if any disciplinary action including non-renewal, discharge, demotion or retirement.

B. The proceedings shall be initiated by notifying the superintendent of the Association's desire to arbitrate the grievance. The notice shall include a statement setting forth precisely the issues to be decided by the arbitrator and the specific provision of the agreement involved.

C. Within five (5) days after such notice of desire to arbitrate, the superintendent and the Association will agree upon a mutually acceptable arbitrator and will obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator or to obtain such a commitment within the specified period, a demand for arbitration may be made to the American Arbitration Association by either party.

D. The parties will be bound by the Voluntary Labor Arbitration Rules of the American Arbitration Association regardless of how the arbitrator is selected; except that neither the Board nor the Association nor any grievant shall be permitted to assert any ground in arbitration if such ground was not disclosed to the other parties in interest prior to the decision being appealed to the arbitrator, or to assert any evidence known but not disclosed prior to the decision's being appealed.

E. The arbitrator shall limit his decision strictly to the application and interpretation of the provisions of this agreement, and it shall be binding upon all parties involved.

F. The costs for the services of the arbitrator will be borne equally by the Board and the Association.

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Rules

DEMAND FOR ARBITRATION

Date: March 14, 1968

TO: (Name) .....WARREN.CONSOLIDATED.SCHOOLS.....

(Address)....Superintendent's Office.....

(City and State).....Warren, Michigan.....

The undersigned, a party to an Arbitration Agreement contained in a written contract, dates

which agreement provides as follows: (Quote Arbitration Clause)

Article V, Section 3
Step 3: "If the issue is not resolved in the foregoing manner, either party shall have the right, within five (5) days after the expiration of the time allotted to the School Board for replying to the protest at Step 2, to submit the grievance to final and binding arbitration under the rules of the American Arbitration Association which shall act as administrator of the proceedings. Neither party shall be permitted to assert in such arbitration proceeding any grounds or to rely on any evidence not disclosed to the other side at least by the second step."

hereby demands arbitration thereunder.

SAMPLE LIST OF ARBITRATORS

A list similar to this is sent to you by the American Arbitration Association when you file a Demand for Arbitration.

NAME: CAYTON, Hon. Nathan (Chief Judge, Retired) Washington, D.C. 3/68

OCCUPATION: Arbitrator

QUALIFICATIONS: Arbitrated since 1939. Familiar with job evaluation, time study and wage incentives. Considerable experience as arbitrator in various industries. Form: Chief Judge, Dist. of Columbia Court of Appeals, 29 years; Member of Law Faculties, Howard Univ., Geo. Washington Univ. and Catholic Univ; chmn., Industry Committees in Puerto Rico, Chmn., Presidential Emergency Boards.

		DATE					DATE
EDUCATION: COLLEGE		( )	GRADUATE	Geo. Wash. U.	LLB	( )
				" " "	LLM	

PER DIEM CHARGES: $ 200.00

NAME: GAMSER, Howard G., Esq. Washington, D.C. 10/69

OCCUPATION: Attorney - Educator

QUALIFICATIONS: Of Counsel to Dutton, Gwirtzman, Zumas, Wise & Boasberg. In private practice since 1953, except during Government Service. Also, Adjunct Professor of Law, Georgetown Law Center since 1965; Has extensive experience in arbitration. FORM: Member & Chairman National Mediation Board, 1963-69; Chief Counsel, U.S. House of Representatives, Committee on Education & Labor, 1961-63; Mediator with New York State Mediation Board, 1954-60; WSB, 1952-53; NLRB, 1946-52. Published articles on Labor Law.

		DATE				DATE
EDUCATION: COLLEGE CCNY	BSS	(1940)	GRADUATE	Columbia	MA	(1941)
				New York Law	LLB	1952

PER DIEM CHARGES: $ 175.00

NAME: HORLACHER, Dr. John Perry — Philadelphia, Pennsylvania — 12/68

OCCUPATION: Educator

QUALIFICATIONS: Prof. & Chmn., Univ. of Penna., Dept. of Political Science, Arbitrated since 1946. Considerable experience as arbitrator in various industries. Form: Chmn, WSB 1951-53. Executive Dir., WLB 1944-45. Has written numerous articles for journals relative to various aspects of the labor field.

			DATE			DATE
EDUCATION: COLLEGE	Ashland Coll.	AB	(1922)	GRADUATE Univ. of Penna.	PhD	( )

PER DIEM CHARGES: $ 200.00

NAME: HOWARD, Prof. Wayne E. — Philadelphia, Pennsylvania — 1/65

OCCUPATION: Educator

QUALIFICATIONS: Assist. prof. of Industry, Wharton School, Univ. of Pa. Arbitrated since 1954. Serves on ad hoc basis. Considerable experience in various industries. Form: Spec. assist. to Director, Federal Mediation & Conciliation Serv. 1961-62.

			DATE			DATE
EDUCATION: COLLEGE	Wharton Sch., Univ. of Penn.	BS	( ) 1943	GRADUATE	Wharton Sch. U. of Pa. MBA	( ) 1948
					Graduate Sch., U. of Pa. PhD.	1957

PER DIEM CHARGES: $ 150.00

NAME: JAFFEE, Samuel H., Esq. — Washington, D.C. — 11/68

OCCUPATION: Attorney

QUALIFICATIONS: Arbitrated since 1946. Permanent arbitrator: Allied Chemical Corp. & District 50; Sylvania Electric Products Inc., and Electrical Workers (UE); American Viscose Division, FMC Corp. and Textile Workers Union; and others. Form: Atty., Commerical Telegraphers Union, 1950-63; represented management, 1950-53; Lecturer, Labor and the Law, American Univ., 1951-52; Labor Relations Consultant, Dept. of the Interior, 1946; Associate Chief Trial Examiner, NLRB, 1937-46; Publisher, Times-Herald, Worcester, Mass., 1934-37. Author of several articles on arbitration.

			DATE			DATE
EDUCATION: COLLEGE			( )	GRADUATE Boston Univ. Law School	LLB	(1922

PER DIEM CHARGES: $ 150.00

NAME: ROCK, Eli, Esq. Philadelphia, Pennsylvania 2/68

OCCUPATION: Arbitrator

QUALIFICATIONS: Arbitrator since 1952. Permanent arbitrator on all supplement unemployment benefit matters, United State Workers of America and eleven other major steel companies; Also experience with plastic, automotive, machinery industries. Form: Served on Presidential Emergency Board for Airline disputes, 1962-63. Permanent arbitrator for Goodyear Aircraft Corporation, U.A.W. and others, Labor Relations Consultant, City of Philadelphia, 1952-62. Vice-Chairman, War Stabilization Board, 1951-52. Disputes Director, War Labor Board, 1943-44.

			DATE				DATE
EDUCATION: COLLEGE	Univ. of Roch.	BA	(1937)	GRADUATE	Yale Law School	LLB	(1940

PER DIEM CHARGES: $ 200.00

NAME: SEIBEL, Laurence E., Esq. Washington, D.C. 3/68

OCCUPATION: Attorney

QUALIFICATIONS: Arbitrated since 1951. Permanent umpire under agreements in steel, rubber and shipyards and ad hoc arbitrator in various industries. Specializes in fringe benefits in labor agreements. Form: Emergency Fact-Finding Board, United Air Lines-I.A.M. 1963, Fact-Finding Board, West Coast Shipping Strike, 1962; Adjunct Professor, Georgetown University Law School, 1955-59; Executive Director & Public Member, Construction Industry Commission (W.S.B.), 1951-53.

			DATE				DATE
EDUCATION: COLLEGE	City Coll. of N.Y.	BS	(1939)	GRADUATE	George Washington Univ. Law School	JD	( ) 1946
					Harvard Univ.	LLM	1951

PER DIEM CHARGES: $ 200.00

NAME: SEIDENBERG, Jacob, Esq. Falls Church, Virginia 1/67

OCCUPATION: Attorney

QUALIFICATIONS: Arbitrated since 1947. Serves as full time ad hoc arbitrator; consultant in the areas of labor and industrial relations and race relations. Form: Chairman, Industry Committee to Set Minimum Wages in Puerto Rico, 1960-63; Director, President's Committee on Government Contracts, 1953-60; Consultant, Manpower Utilization Problems to the President's Committee on Government Contract Compliance, 1952-53; Attorney, Wage Stabilization Board, 1951-52; served on the Faculties Wage Stabilization Board, Phila., 1947; Asst. to the General Counsel, National Wage Stabilization Board, 1946; Economist and Attorney, War Labor Board, Philadelphia, 1943-46; Labor Attorney, U.S. Army, 1941-43. Author of "Labor Injunction in New York City, 1935-1950," Cornell Univ., 1951, and several others in the field of industrial and labor relations.

			DATE				DATE
EDUCATION: COLLEGE	Temple Univ.	BS	(1937)	GRADUATE	Univ. of Pa. School of Law	LLB	(194
					CORNELL Univ.	PhD	195

PER DIEM CHARGES: $ 200.00

NAME: STRONGIN, Seymour, Esq. Washington, D.C. 8/69

OCCUPATION: Arbitrator

QUALIFICATIONS: Assistant to the Impartial Umpire for Bethlehem Steel Corporation and the United Steelworkers of America since 1965. Familiar with job evaluation and wage incentives. Form: National Labor Relations Board, Office of the General Counsel: Appellate Trial Attorney, 1961-64 and Regional Advice Attorney, 1960-61.

			DATE				DATE
EDUCATION:	COLLEGE	Syracuse Univ.	BA (1952)	GRADUATE	Maxwell Grad Schl.	MPA	(1953
					BROOKLYN LAW SCHL.	LLB	(1959)

PER DEIM CHARGES: $ 200.00

CONTRACT PROVISIONS INVOLVED IN THE ARBITRATION CASE:

Warren Education Association

- and -

The Board of Education,
Warren Consolidated Schools

ARTICLE II - EFFECT OF AGREEMENT

Section 4: The Board shall remain vested with the right to effectively administer and regulate the school system, subject to the specific terms and conditions provided for in this Agreement.

ARTICLE III - GUARANTEE OF RIGHTS

Section 2: The School Board agrees that its Rules and Regulations governing employee conduct will be reasonable and that enforcement of discipline will be fair and for just cause.

ARTICLE V - GRIEVANCE PROCEDURE

Section 2: A claim by any teacher or the Association that there has been a violation, misinterpretation or misapplication of any provision of this Agreement or any existing rule, order or regulation of the School Board or Administrative directive which implements or applies to the terms of the Agreement, or of any disciplinary action less than specific and outright discharge, demotion or retirement shall be deemed a grievance under this contract and will be subject to the provisions of Article II, Section 3 and will follow the grievance procedure hereinafter provided.

ARTICLE VIII - COMPENSATION

Section 3: Supplementary pay for specific, selected activities out of the normal, contract extra curricular activities shall be as set forth in Schedule B which is attached to and incorporated in this Agreement.

ARTICLE XIII - DEFINITION OF RESPONSIBILITIES

Section 1: The parties to this Agreement acknowledge their responsibilities as set forth herein and recognize the inter-relationships and inter-action of the responsibility of each upon the other:

a. Teachers. Teachers are responsible for maintaining a continuous high level of professional dedication to the welfare and benefit of the student-body. Teachers, therefore, are responsible to discharge their

teaching assignments with professional proficiency and, to this end, to plan adequately and make conscientious efforts to meet, as required and within reason, with children, parents and/or consultants. Teachers are responsible to volunteer or accept invitations to serve on committees and in programs and projects established by the School Administration to insure and promote the legitimate, student-oriented objectives of the School District. Teachers are also responsible to faithfully discharge extra-duty assignments for which they receive special compensation. In addition, teachers are individually responsible to participate, on a voluntary basis, in the variety of student-oriented related activities which exist from time-to-time, to the extent that their interest in an activity and personal convenience will prompt them to offer their services.

b. School Board. The School Board, through its administration, is responsible to continuously and sincerely foster the dedication expected of the teachers by planning constructively to provide the best possible teacher-facilities attainable within the limits of prudent expenditures. The School Administration is responsible to assist teachers in the advancement of their skills and techniques by providing meaningful and useful seminars and programs. The School Administration is also responsible to continually review and analyze the needs of the School District so that all committees, programs and projects will relate directly to legitimate, student-oriented objectives either by reason of seeking improvements in teaching methods, tools, techniques and/or professional standards of excellence or by reason of seeking improved efficiency, economy of operation and/or consideration of ways and means to satisfy the mandatory need for student-body progress and attainment. In addition the School Administration is responsible for equitable treatment of its teacher personnel so that morale may attain the highest possible level. To this end, decisions relating to individuals shall be based on good faith evaluation of all factors in every situation, including proportionately equal distribution of student-oriented related activities when sufficient volunteers are not available.

c. Joint Responsibilities. In addition to the foregoing individual responsibilities of the parties which inter-act upon each other, the parties collectively and respectively recognize that they are responsible to conserve the assets of the School District by every means open to them under the terms and spirit of this Agreement and, also, they are responsible to promote efficiency and student benefit in the operation by every permissable and legitimate means which, on the one hand, is compatible with and upholds the human dignity and contract status of the teachers and, on the other hand, is consistent with the public responsibility and statutory obligations and authority of the School Board.

SCHEDULE B

(1) Extra Pay for Extra Duties

The Board of Education shall grant extra pay to those who are selected by the Superintendent of Schools to perform the following extra curricular (beyond the school day) duties.

Remuneration (annual) for a given extra duty bears a percentage relationship to the appropriate level on the bachelor's schedule. The appropriate level is that represented by the teacher's previous years of experience in directing a given activity in Warren Consolidated Schools plus credit for not to exceed five (5) years outside experience (per current credit policies for experience in the same activity).

(a) Athletics

	Percentage of Base
Aqua Gems, High School	2
Baseball Head, High School	8
Baseball Reserve, High School	5
Baseball, Junior High Coach	3
Basketball Reserve, High School	7
Basketball, 9th grade	6
Basketball, Junior High (7-8)	5
Cheerleaders, High School	4
Cheerleaders, Junior High	2
Football Head, High School	10
Football Assistant, High School	7
Football Reserve, High School	6
Football Reserve Assistant, High School	5
Football, 9th grade	6
Football, Junior High (7-8)	5
G.A.A.	4
Basketball Head	10
Swimming Head, High School	8
Swimming, Junior High	3
Track Head, High School	8
Track Assistant, High School	5
Track, Junior High	3
Cross Country	5
Wrestling	8

EVALUATION SHEET - WARREN ARBITRATION CASE

Association Case

The School Board violated the contract because:

	Valid	Invalid	Reason
1. Due Process not allowed	____	____	
2. Dismissal was not fair and for just cause	____	____	
3. Decisions relating to individuals shall be based on good faith evluation of all factors in every situation -- was not made	____	____	

School Board Case

The coach is incompetent and should be dismissed because:

1. Failed to follow instructions	____	____
2. Gradual deterioration in the football program	____	____
3. Treated two boys improperly	____	____
4. Conduct and appearance of the players was sometimes poor	____	____
5. Mr. Nowak's conduct was poor as a coach and spectator	____	____

ANSWERS TO THE WARREN CASE
THIRD SEMINAR

A summary of the actual arbitration award follows. See how close you come and for what reasons. Discuss.

(The actual award is also attached)

SUMMARY OF ARBITRATOR'S DECISION

The charges against Nowak are divided into five general categories. The school board alleges that:

I. Nowak on several occasions failed to follow rules or instructions.

A. Mr. Nowak had no knowledge nor was told he was to clear articles on sports for the school newspaper. Written procedures regarding the coach's responsibility for student articles were finally formulated and distributed after the appearance of the student article in question. Under these circumstances, Nowak can in no way be blamed for the article cited.

B. Use of the varsity field for the J.V. game.

The matter was referred to the Warren High School Principal who decided, pursuant to the coaches' recommendation, to move the game to the varsity field. James complained that Nowak should have contacted his office for permission to use the varsity field. He does not claim--given the coaches' concern for the players' safety--that he would not have granted permission. Thus, the School Board's complaint against Nowak involves no more than a matter of procedure.

C. Concerning damage to equipment caused by poor storage.

Because of a leak in the stadium, the melting snow created puddles on the floor and the equipment got wet. Although he is responsible for "the care and condition of the equipment", he surely cannot be considered to have been negligent in this situation.

II. There was a gradual deterioration in the football program during Nowak's tenure as Head Coach.

Neither the number of games won and lost nor the reduction in the number of candidates for the football team substantiates this charge.

III. Treated two boys improperly--there is absolutely no merit in this charge

A. Considering the facts that a boy was on crutches the Monday prior to the game in which the boy did not play, it should have been apparent to everyone (the boy included) why he did not play. Mr. Nowak showed good judgment in placing a higher value on the boy's health than on the team's need for a first string player.

B. The boy who quit the team because of criticism did not receive this criticism from the head coach. Nowak cannot be blamed for the line coach's error in this circumstance.

IV. Conduct and appearances of the players was sometimes poor.

A. It was presented that Mr. Nowak talked with "long haired" members of the team. Beyond that, there is little he could do. His decision not to deny a boy the privilege of playing on account of a question of taste seems sound to me.

B. The coach was properly criticized for his squad being involved in "free-for-alls". However, it was testified by the coach from Cousino High School that this type of situation happens to most coaches and is not always predictable. A momentary loss of control in a game so full of emotion and body contact is understandable.

V. Nowak's conduct was poor as a coach and spectator.

A. In a game the team was penalized for Mr. Nowak's conduct. The penalty occurred only after he had protested to the officials about the punter being knocked down three times and a penalty for "roughing the kicker" had not been called.

B. The coach was reprimanded for his behavior as a spectator and rightly so.

C. However, the doctor's statement about Nowak was vague and pure heresay. There is absolutely no proof of any wrongdoing on Nowak's part.

To summarize, most of the charges against Nowak are not supported by the evidence. The few charges which have been proven certainly do not justify his dismissal as Head Football Coach.

It has become quite apparent that not once during Mr. Nowak's tenure as a coach was he apprised that his work was unsatisfactory or that his work must improve. He was never really on notice that he was in danger of losing his coaching position. Such notice is an essential ingredient in any fair disciplinary procedure. The school board concedes that the removal of Nowak as head football coach was "disciplinary action" because most of the charges against him have not been borne out by the evidence and because the school board failed to provide him with any notice of the need for improvement, I find that the discipline was neither "fair" nor "for just cause". His removal was a violation of Article III, Section 2.

Award

Nowak should be returned to his position as Head Football Coach for 1968-69 school year and should be compensated for his loss of extra-curricular pay as Head Football Coach for 1967-68 school year. No further relief is appropriate.

COPY

ARBITRATION AWARD
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Case No. 5430-0023-67
May 25, 1968

THE BOARD OF EDUCATION,
WARREN CONSOLIDATED SCHOOLS

-and-

Grievance No. 66-14

WARREN EDUCATION ASSOCIATION

Subject: Discipline: Removal of Head Football Coach

Statement of the Grievance: "On November 16, 1966 at a meeting in the Warren High School's prinicpal's office with Mr. E. Eschenburg and Mr. R. James, Mr. Nowak was told that he was being relieved as head football coach of Warren High School. We hold that this violates all standards of just treatment and fair enforcement of discipline set forth in the Agreement.

"[Request] immediate termination of any and all proceedings to relieve Mr. Nowak as head football coach at Warren High School and reaffirmation of his good standing in that position."

--signed November 22, 1966

Contract Provisions Involved: Article II, Section 4; Article III, Section 2; Article VIII, Section 3; Article XIII, Section 1; and Schedule B of the September 14, 1966 Agreement.

Statement of the Award: The grievance is granted. Nowak should be returned to his position as Head Football Coach for the 1968-1969 school year and should be compensated for his loss of extra-curricular pay as Head Football Coach for the 1967-1968 school year. No further relief is appropriate.

BACKGROUND

This grievance protests the removal of S. Nowak as Head Football Coach at Warren High School. The Association maintains that the Agreement assures all teachers that "their employment status, wholly or in part, will not be altered to their detriment without just cause and due process." It believes that the procedures followed by the School Board in this case denied Nowak "due process" and that his dismissal was neither "fair" nor "for just cause."

Nowak has been a Physical Education Teacher at Warren High School since 1962. He was also Head Football Coach for five years, September 1962 through June 1967. His pay included a yearly salary for his teaching duties and additional compensation, approximately $800 in the 1966-1967 school year, for his extra-curricular duties as Head Football Coach.

A meeting was held at Warren High School on November 16, 1966. Present were the Director of Athletics (R. James), the Principal (E. Eschenburg) and Nowak. James explained he was dissatisfied with Nowak's coaching work, alleging (1) that the football program had gradually deteriorated, (2) that the football players had behaved badly at games, (3) that the football squad's lack of control had caused other high schools to question the advisability of scheduling games with Warren High School, and (4) that parents, players, coaches, officials and athletic directors were in general displeased with the squad. He said that, for these reasons, he was not going to recommend Nowak for reemployment as Head Football Coach the following year. He suggested that Nowak think about the matter and that if he chose to resign the School Board would accept his resignation.

Nowak's version of the conversation was substantially the same. He was called into this meeting without knowing what its purpose was. He was given various reasons why James felt his coaching performance was inadequate. He was told that he had a choice of either resigning or being dismissed and that he should go to another school district if he wished to continue coaching football. His impression was that James had previously reviewed his situation with "higher authorities" and that the matter had already been decided.

Nowak wrote to James the next day, November 17, 1966, requesting "a written copy of the charges you mentioned in the meeting yesterday..." He never received a copy of such charges. The Association filed a grievance in his behalf on November 22, 1966. The Superintendent of the Warren Consolidated Schools replied that "this grievance does not fall within the purview of the contract." And, after a Step 2 meeting was held on this grievance, the Superintendent stated to the Association:

> "...I am concurring with and upholding the recommendation of Mr. Robert James, Director of Athletics, that Mr. Steve Nowak not be assigned to the position of head football coach at Warren High School for the 1967-1968 school year. Accordingly, the grievance is denied."

The School Board permitted Nowak to complete his work as Head Football Coach for the 1966-1967 school year. It decided, however, that he would not serve in that capacity for the 1967-1968 school year. Nowak is still a Physical Education Teacher at the Warren High School. He has only been relieved of his duties as a football coach.

The parties first submitted this case to me solely on the question of arbitrability. The School Board argued that Nowak's protest could not be deemed a "grievance" and was therefore not arbitrable. That argument was rejected by my decision on June 10, 1967. The award stated:

> "To summarize, the Association complains (1) that Nowak's removal constitutes 'disciplinary action less than specific and outright discharge [or] demotion' and that such discipline was unjustified and (2) that his removal was a 'violation, misinterpretation or misapplication' of certain provisions of the Agreement. On either ground, Nowak's complaint qualifies as a 'grievance.' This dispute is therefore arbitrable..."

The merits of Nowak's case were then heard. The School Board contends that a football coach is responsible for more than the instruction of young men in the fundamentals of the sport and the improvement of their physical fitness. It says a coach must also develop good sportsmanship, build morale within the team and student body, and maximize student participation in the sport. It believes Nowak failed to meet these latter responsibilities. It alleges, as proof of his failure, that he has been deficient in the following respects:

> "(1) Gradual deterioration of the football program... during Mr. Nowak's regime.
> (2) Conduct of players on field.
> (3) Sideline conduct of players.
> (4) Appearance and personal habits of players.
> (5) Conduct...at games where he was coach and at athletic contests where he was a spectator.
> (6) Harassment of boy playing for him to the extent the boy quit the squad.
> (7) Handling of a player in a vindictive and malicious manner.
> (8) Lack of control of squad to the extent other area high schools were dubious of scheduling Warren High School.
> (9) Permitting publication of derogatory article in school paper about athletic officials.
> (10) Allowing players under his charge to criticize officials.
> (11) Failure to follow orders regarding use of football field facilities.
> (12) Improper care of equipment and supplies.
> (13) Non-attendance at league meetings.
> (14) Conduct to the extent that team physician quit.
> (15) General dissatisfaction of parents, players, athletic officials, other coaches, and athletic directors with Mr. Nowak's Football Squad.

(16) Won-lost record as a coach"*

The School Board argues, in other words that Nowak was removed from his coaching position because of "incompetence." The Association disagrees. It contends that the charges against Nowak have either not been proven or are "remote, trivial and unconvincing." It claims he was dismissed as Head Football Coach because of "organizational activities protected by" the Public Employment Relations Act and because of "personal spite and vindictiveness." It insists therefore that the dismissal was "arbitrary and capricious." It asserts too that he was denied "basic procedural rights," e.g., the School Board's failure to give him "written notice of the charges against him throughout the grievance procedure." It concludes that the discipline here was neither "fair" nor "for just cause" and that the School Board did not make a "good faith evaluation of all factors" in Nowak's case.

DISCUSSION AND FINDINGS

The charges against Nowak can be divided into five general categories for purposes of discussion.

First, the School Board alleges that Nowak on several occasions filed to follow rules or instructions. This involves charges 9, 11, 12 and 13.

Charge 9. An article appeared in the October 30, 1964 school newspaper which was critical of the officiating in a game with Utica High School. James immediately wrote Nowak, citing the practice of having "the Sports Editor clear any articles or editorials with the Head Coach" and suggesting he follow that practice in the future. The evidence reveals that Nowak had no knowledge of this practice and had never been told to review student football articles prior to publication. Nowak did not see the October 30 article before it was published. He too felt that the criticism of officials in this article was completely improper. Written procedures regarding the Head Coach's responsibility for student articles were finally formulated and distributed on December 1, 1964. Under these circumstances, Nowak can in no way be blamed for the article in question.

Charge 11. James wrote to Nowak on September 14, 1966, that "the Reserve [JV] Football Game with Lincoln High School...October 13th will be played...on the field at the west end of the [Warren] High School." He did not want to use the varsity field for the game. However, a short time before the game, the coaches became concerned about "an excessive amount of glass on the playing field" and the bleachers being too close to the field. The matter was referred to the Warren High School Principal who decided, pursuant to the coaches' recommendation, to move the game to the varsity field. James complained that Nowak should have contacted his office for permission to use the varsity field. He does not claim--given the

*The first 15 allegations were set forth in the School Board's opening statement at the hearing; the 16th allegation was added during the course of the hearing.

coaches' concern for the players' safety--that he would not have granted permission. Thus, the School Board's complaint against Nowak involves no more than a matter of procedure.

Charge 12. James went to the Warren High School stadium on Thursday, November 3, 1966, to check conditions for the game the following night. He found some "football [tackling] dummies and blocking shields" laying on the floor in a puddle of water. He wrote to Nowak, protesting this careless handling of equipment. Nowak explained that the dummies and shields had been left in a covered area on the floor of the stadium the night before. Student managers put the equipment away. It snowed that night. Because of a leak in the stadium, the melting snow created puddles on the floor and the equipment got wet. The damage was slight. There is no proof that this kind of damage had ever occurred before during Nowak's tenure as Head Football Coach. Although he is responsible for "the care and condition of the equipment," he surely cannot be considered to have been negligent in this situation.

Charge 13. James asserts that Nowak failed to attend a Bi-County League meeting on September 20, 1966. The Coaches Handbook states that coaches must "attend all rules, league, officials, etc. meetings pertinent to the sport you coach." Nowak's explanation for his absence was that he never received notice of the meeting. He knew in general when meetings were held but he had always been given a written reminder. Here, the Faculty Manager either misplaced or lost the notice. Nowak was not reminded and simply forgot about the meeting. There is no real evidence as to whether Nowak was absent on other occasions and, if so, whether such absences were justified. Nor has the School Board established that Nowak was any less diligent than other coaches in attending Bi-County League meetings. His absence on September 20, 1966, by itself, does not suggest any lack of responsibility in the performance of his job.

Second, the School Board alleges that there was a gradual deterioration in the football program during Nowak's tenure as Head Coach. This involves charges 1 and 16.

James emphasizes that although school enrollment has remained substantially the same for some years, the number of young men trying out for football decreased from 100 in 1962 to 60 in 1966. He attributes this decline in student interest to Nowak's failure to promote the sport through football banquets, team parties, dad's nights, etc. He stresses too that Nowak's "won-lost" record was not particularly good, winning just 52 percent of the games as contrasted to his predecessor who won 70 percent of the games.

These claims are extremely difficult to evaluate. Student interest in football could be affected by a variety of socio-economic factors which have no relationship to the effectiveness of a Head Coach. It may be that participation in all sports declined at Warren High School and that the number of students trying out for other teams is also lower. It may be that other high schools have experienced similar declines in student parti-

cipation in the football program. It may be that less participation is simply a reflection of what some consider to be a national problem, a declining level of physical fitness in our youth. There is no evidence before me on any of these points. In view of such uncertainty, the decrease in student interest at Warren High School cannot fairly be attributed to Nowak. The fact is that new high schools constructed in the area may have reduced the number of athletes available to Warren High School.* Nowak did arrange some special activities, although not as many as James would have liked. But this matter was never called to Nowak's attention. As for his "won-loss" record, I note that the team was 1-7 in 1961 before Nowak arrived and then 4-4 in 1962 and 7-1 in 1963 under Nowak. The best he could do in the next three years was 4-4. But I find it difficult to believe that a high school coach's worth can be measured in this way. His ability to mold character-- to instill in his charges a sense of determination, team play, sportsmanship and self-discipline--is far more important. He can achieve these goals without winning games. For these reasons, charges 1 and 16 are not persuasive.

Third, the School Board alleges that Nowak treated two boys improperly, harassing one to the point that he quit the squad and handling the other in a vindictive and malicious manner. This involves charges 6 and 7.

There is absolutely no merit in these charges. The first string quarterback in the 1966 season was the son of the then President of the School Board. He started every game except one. He neither started nor played in the "homecoming day" game, his service being limited to holding the ball for the conversion attempt after a touchdown. His father testified that his son was crying when he came home for he had been given no explanation for being kept out of the game.** Nowak explained that the boy had several injuries (thumb, leg, back) and had been on crutches the Monday before the game. He stated that the boy had difficulty throwing the ball because of his injured thumb. Therefore, he planned early in the week to use someone else as quarterback. He could not recall whether he offered an explanation to the boy. But, given these circumstances, it should have been apparent to everyone (the boy included) why he did not play. Nowak showed good judgment in placing a higher value on the boy's health than on the team's need for its first string quarterback.

The center was unable to appear at all the practice sessions one week in October 1966 because of the death of a relative. He later quit the squad. When James asked him for an explanation, he said "the coaches made fun of him" for missing practice. James held Nowak responsible even though there are four coaches on the team. Nowak explained that the line coach told the linemen at a half-time "pep talk" that this boy had missed practice during the week, insinuating that "the boy hadn't done his job." The line coach apparently did not know the reason for the boy's absence. When Nowak discovered what had happened, he told the line coach he was "wrong" to speak as he did. Nowak cannot be blamed for the line coach's

---

* The Principal of Warren High School stated at the January 6, 1967 grievance meeting that "the quantity of Warren High School athletes had been affected by Cousino High and Mott draining some of these and by the opening of the Warren Woods High School..."

** This young man was not called upon to testify at the hearing.

error in this kind of situation.

Fourth, the School Board alleges that the conduct and appearance of the players was sometime poor. It believes Nowak should be held accountable for such deficiencies. This involves charges 2, 3, 4 and 8.

Charge 4. James complained to Nowak in September 1966 about "long hair" on some of the football players, a condition he regarded as "unhealthy" and in conflict with their image as "clean wholesome individuals." Nowak replied he would see what he could do to correct the situation. The record does not reveal what steps he took to eliminate "long hair." James did not notice any improvement during the rest of the season. There are, however, limits to Nowak's power. He can attempt to persuade boys to cut their hair. But, beyond that, there is little he could do. James suggested that a boy could not "legally" be removed from the team for this reason but that "there are other ways of eliminating him... such as not having him play in games." Nowak evidently did not take the latter course. His decision not to deny a boy the privilege of playing on account of a question of taste (i.e., hair style) seems sound to me.

Charges 2, 3 & 8. James states that football players have misbehaved on the field and on the sidelines. He saw them slam their helmets on the ground, kick the sideline markers, and throw their parkas aside. He noted that players have occasionally been thrown out of a game for a personal foul. He emphasized that there have been two "free-for-alls," one in 1964 and another in 1966, in varsity games with Utica High School. Nowak concedes there has been some misconduct but insists it has been quite limited. The testimony indicates that even the most disciplined football squad has occasional lapses. A momentary loss of control in a game so full of emotion and body contact is understandable. It would be extremely difficult for a coach to anticipate such conduct. The dispute between James and Nowak really concerns the dimensions of this problem. If players had been guilty of continual misconduct, as James suggests, it seems to me that the matter would have been called to Nowak's attention. But, apart from conversations about the "free-for-alls" at Utica, James never spoke to Nowak about player conduct on the field or on the sidelines. James obviously felt free to criticize Nowak's performance as a coach, issuing memoranda to him about the care of equipment, the checking of student newspaper articles, the elimination of "long-haired" athletes, etc. His silence about player conduct suggests that this was not as serious a problem as he later made it out to be. Nowak was of course properly criticized for his squad being involved in "free-for-alls."*

Fifth, the School Board alleges that Nowak's conduct at games as a coach or as a spectator was poor, It says his behavior caused the team physician to quit. It claims there was "general dissatisfaction" with Nowak among "parents, players, athletic officials, other coaches, and athletic directors." This involves charges 5, 10, 14 and 15.

---

* The former Head Football Coach at Cousino High School (now Executive Secretary of the Association) testified that his team was also occasionally involved in a "flareup" or "altercation" on the field.

Charge 5. Nowak was watching a JV game at Utica High School in October 1965. He and an assistant left their bleacher seats to walk to the other side of the field. According to the Utica coaches, Nowak was told to get off the field and away from the sidelines but he refused. Some unpleasant words followed. According to Nowak, he left the field and returned to the bleachers when asked to do so. He says this was just "a misunderstanding." He was instructed by James to apologize to the Utica coaching staff and he did so. His conduct evidently deserved censure.**

A referee (also the Secretary of the School Board) at a game in early 1964 described Nowak's conduct as "boisterous and loud," assessed a 15-yard penalty against him for "unsportsmanlike conduct," and threatened to remove him from the game. Nowak explained that this occurred after the Warren punter had been knocked down three times without the officials calling a penalty for "roughing the kicker." He went on the field to protest, an act which calls for a penalty for "unsportsmanlike conduct." He should be censured. However, this does happen occasionally to football coaches. The former Head Football Coach at Cousino High School described an almost identical incident in which he received a 15-yard penalty for "unsportsmanlike conduct" in walking on the field to object to an official's ruling. He testified that he has seen this penalty imposed on other coaches as well. There is no evidence that Nowak was guilty of such misconduct more than once.*

Charge 10. James asserts that Nowak "allowed" his players to criticize officials. However, nothing in the record suggests that Nowak ever condoned such behavior. As soon as he learned that the officiating was being criticized, he sought to stop it.

Charge 14. Dr. Messina was the team physician for five to seven years. He quit this position during the 1964 season or at the end of 1965 season. James met him sometime later at a social function. He testified that the doctor told him he quit because "working with Nowak was impossible." Dr. Messina did not testify at the hearing. Nowak claimed the doctor was too busy to take care of the team and said they parted by "mutual understanding." He knew of no problem between them. The doctor's statement about Nowak was extremely vague; the School Board's charge against Nowak was pure hearsay. There is absolutely no proof of any wrongdoing on Nowak's part.

Charge 15. James contended that parents had complained to him about the players' conduct and the football program. He had no record of the number or the precise nature of these complaints. Nor is there any evidence as to whether the number of complaints was greater at Warren

---

**There was also an "incident" in a pre-season scrimmage with Avondale High School in 1963. James says he first learned that Avondale was critical of the Warren team in November 1966. It is not at all clear who was to blame for this "incident"--the Warren players, the Avondale players, all the players, or the fact that there were no referees present to handle the scrimmage.

*This referee was also critical of Nowak's actions at a basketball game in the spring of 1964. Both men were spectators. He contends Nowak stood up and booed an official in front of many Warren High School students. This kind of behavior is reprehensible even though it occurs while a teacher-coach is off duty.

High School than elsewhere. In any event, it should be apparent that these complaints would probably be as unfounded as most of the charges in this case. The players showed their dissatisfaction by hanging Nowak in effigy on August 25, 1966. But that act was evidently prompted by the players' anger over the fact that the team did not start football practice as scheduled. The delay was the result of a contract dispute between the School Board and the Association. The players also sent a letter to James in November 1967, asking that Nowak's replacement for the 1967-1968 school year be retained as Head Football Coach. However, Nowak's rights under the Agreement are not dependent upon a vote of the football squad. The dissatisfaction of others has already been discussed in this opinion.

To summarize, most of the charges against Nowak are not supported by the evidence. The few charges which have been proven certainly do not justify his dismissal as Head Football Coach.

There is still another serious flaw in the School Board's case. James maintains that Nowak's performance as Head Football Coach grew progressively worse between 1964 and November 1966. He issued some memoranda to Nowak, complaining about his failure to take proper care of the equipment, his failure to attend league meetings, and so on. He spoke to him about some other matters. But not once in this entire period did he apprise Nowak that he was dissatisfied with his overall performance or warn Nowak that he would recommend his dismissal if no improvement took place. Nowak was never really put on notice that he was in danger of losing his coaching position. He was never made aware that he had to perform his work better in order to retain his coaching position. Such notice, such advance warning, is an essential ingredient in any fair disciplinary procedure.

The School Board concedes that the removal of Nowak as Head Football Coach was "disciplinary action." Because most of the charges against him have not been borne out by the evidence and because the School Board failed to provide him with any notice of the need for improvement, I find that the discipline was neither "fair" nor "for just cause." His removal was a violation of Article III, Section 2. In reaching this conclusion, I have considered and rejected the Association claims that his removal was caused by "personal spite and vindictiveness" or by his "organizational activities."

Nowak should be returned to his position as Head Football Coach for the 1968-1969 school year and should be compensated for his loss of extra-curricular pay as Head Football Coach for the 1967-1968 school year. The Association asks for a substantial award of damages beyond mere back pay on the ground that the School Board acted "capriciously and recklessly" and that Nowak has suffered an "impairment of his reputation, loss of prestige in his profession, and psychological injury." I cannot grant this request.

The School Board removed Nowak from his position in the mistaken but good faith belief that it had complete and unfettered discretion with respect to extra-curricular coaching appointments. It did not act "capriciously and recklessly." There is no indication of any "psychological injury." Any damage to his reputation should be repaired by this award which makes it

perfectly clear that his dismissal was unjustified. No interest on the back pay is required. The Association's demand for "litigation costs" is denied.

AWARD

The grievance is granted. Nowak should be returned to his position as Head Football Coach for the 1968-1969 school year and should be compensated for his loss of extra-curricular pay as Head Football Coach for the 1967-1968 school year. No further relief is appropriate.

/s/ Richard Mittenthal, Arbitrator
Richard Mittenthal, Arbitrator

V.

FOURTH SEMINAR

Task I — Read and discuss the Introduction and the 10 "Just Cause Arguments" with examples. (Another form of these arguments can be found in "Take Sides", Appendix D)

Task II — Skim "The Carman Case"
Summary of Arguments (White)
Documentation (Blue)

Task III

A. Read and discuss each brief, looking for examples or violations of the "just cause arguments" discussed earlier.

B. Read and discuss the arbitrator's award (Which will now be supplied by the Seminar Facilitator) and see if your "equity analysis" squares with his. What "Just Cause Argument" were "winners" in this case?

INTRODUCTION TO EQUITY AND DUE PROCESS IN ARBITRATION

Arbitration is the application to employer-teacher relations of the principles of due process appropriate to the educational environment. Such remedy as is provided results in equity for the teacher.

Due process is one of the hallmarks of a democratic society. Such procedural and substantive principles aid in the interpretation and application of the provisions in an agreement. The balancing of the discretion of the employer with the rights and interests of the teacher produces the compromise and consensus necessary to maintain the dominant social values of society and the educational system. Such remedy as is provided results in equity for the teacher.

Equity is defined by Webster as justice according to natural law or right; specifically; impartiality. Equity means that the process of arbitration and the remedy is just, fair, and right; not in a legal sense or based upon law, but rather in consideration of the facts and circumstances of the specific case consistent with the application and interpretation of the applicable provisions of a negotiated agreement.

Procedural due process in arbitration is manifested by the fairness of the proceedings. The burden of proving a violation rests upon the employer. The equal application of the provisions of the grievance and arbitration procedures coupled with adherence to established policy or practices provides the essential elements of procedural due process.

Substantive due process in arbitration is provided by requiring a decision to be reached based upon an actual violation and an equitable application of a provision of the agreement. The decision of the arbitrator is usually limited to an interpretation of the provisions of the agreement. The arbitrator generally will not apply any provision not specifically enumerated in the agreement.

Arbitration decisions in teacher cases, have not been of sufficient number to indicate the specific issues to be raised in conflict resolution within the educational sphere. However, the decisions reached by arbitrators in public and private employment have raised specific questions which have not been previously considered by school administrators and teachers in resolving conflicts. Since the procedures and techniques used by labor and management are widely accepted we can reasonably assume that many of these same principles will apply in school management.

The teacher will more and more seek equity through arbitration. It behooves us then to be cognizant of the rationale and substantiation offered to support the decisions of issues submitted to arbitration. Equity in the resolution of grievances in public education depends on the consistent application of common principles founded on reasonableness and justness.

The arbitrator will be guided by the written contract; he may not alter the basic agreement. In the absence of a contrary provision the arbitrator will apply standards consistent with those past practices of the particular school

system and those of the profession in general. Those who assume the role of advocate for a grievant need to develop the capacity to see in general factual situations the position or defense which they can advance with the arbitrator which will increase the likelihood of a favorable decision.

The following are some of the basic defenses to be raised by the teacher-advocate in countering the actions of a school administration.

Knowing how or why administrative actions are overturned by the arbitrator is essential to prepare a defense in an arbitration procedure. An insight into some of the problems which arise in the application and interpretation of the terms of an agreement is provided in the following "errors" which might result in a favorable award. Each is a principle of equity.

"JUST CAUSE ARGUMENTS" OR EQUITY DEFENSES IN ARBITRATION

1. The Conduct of the Grievant is Unrelated to the Policy Cited.

   Mrs. Teacher was discharged for "incompetency", in that she failed to "submit lesson plans, as required, at weekly intervals." The arbitrator concluded that, at most, she could have been punished under a policy requiring the "timely submission of appropriate reports and records." The conduct alleged did not directly or remotely establish the competency of the teacher in the classroom.

2. The Policy is Unreasonable.

   The policy states that "no teacher may engage in any activity, outside of school hours for which any remuneration is received." Mr. Teacher is discharged when it is learned that he is employed by a large supermarket for four hours per day Monday through Friday and all day Saturday.

   The school board cannot show that such employment interferes with efficiency of the teacher in the classroom, it does not reflect unfavorably on the school system and it does not have a deleterious effect on the students. Such a policy would be unreasonable.

3. The Policy is so Broad or Vague That it Does Not Clearly Indicate Prohibited Behavior.

   The policy states that: "A teacher may be discharged for failing to present a neat appearance while in the performance of his duties."

   Mr. Teacher, during the summer vacation grew a beard. It is short and well-trimmed. Teacher returns to school in September and in October is discharged.

   The policy does not state or imply an ascertainable standard. Unless the term "neat appearance" is defined, it fails for vagueness. The teacher cannot realistically comply with the policy.

4. There is Insufficient Evidence to Prove the Alleged Violation.

"Unsatisfactory performance is cause for non-renewal of contract." Mr. Teacher is teaching in his third year. In each of the two previous years he was rated "satisfactory". An annual rating is prepared in April. The principal observed Teacher for five minutes. There is no other evidence of observation, counseling, criticism or assistance being rendered by the principal.

There is a lack of conclusive evidence to support a charge of unsatisfactory performance.

5. Application of the Rule is Discriminatory.

The policy states that: "absences in excess of three days may require a doctor's certificate before being authorized as chargeable against sick-leave."

For many years the school administration has credited sick-leave upon receipt of the leave form signed by the teacher and the principal. Mrs. Teacher, head of the association grievance team, is absent five days but does not see a doctor. She applies for credit to sick-leave. When she fails to furnish a doctor's certificate, the absence is classed as unauthorized and she is made to forfeit five days pay.

Singling out Teacher and demanding something from her which has not been required of all teachers in order to have sick-leave credited, is discriminatory. There is a need to be fair and equitable in the treatment of all employees.

6. Teacher has a Right to Know the Regulation in Advance of Its Application.

Mr. Teacher was suspended without pay for two weeks for violation of a policy which forbade teachers "to work in the school building on weekends (Saturday and Sunday) without prior approval of the principal."

It was shown that this policy was contained in the policy manual in the principal's office. Teachers were not required to read the policy manual. This particular policy had been verbally communicated to the principals, but had not been disseminated to the teachers nor had it been posted on a bulletin board customarily used for school announcements.

Failure to make Teacher aware of the policy is sufficient basis to nullify the punishment and to require making Teacher whole by removing the adverse personnel action from his file and to reimburse him for all pay and allowances which were forfeited.

7. The Policy Has Not Been Consistently Enforced.

"Teachers who are late will be warned orally twice, then given a written warning."

The policy was applied to Mrs. Teacher who then grieved. She pointed out that Mr. Teacher--who rode to school every day with the principal--had been late five times more than any other teacher in the school. Mr. Teacher had never been warned orally or in writing. This was substantiated by other teachers who had to cover Mr. Teacher's classes in his absence and by a perusal of his personnel file.

The reprimands would have to be removed from the files of Mrs. Teacher because the policy had not been consistently enforced against all teachers.

8. Failure to Adequately Warn of the Penalty to be Imposed for the Action Taken.

Mr. Teacher has received three written warnings for tardiness. When he is again tardy he is discharged.

Mr. Teacher conclusively shows that he was not aware that after three written warnings he would be discharged. This was not a penalty which had been published. Further, Mr. Teacher was not told after the third warning that any subsequent violation would incur such drastic punishment. Teacher must be warned of the penalty involved if further actions of the same or a similar nature are committed.

9. Extenuating Circumstances Were Not Considered in Assessing the Penalty.

a. "Teachers who are late will be warned orally twice, then given a written warning."

Mr. Teacher was late and issued a written warning. Teacher had been teaching in the system for ten years. Five years ago he received two verbal warnings for being late.

Mr. Teacher successfully argued that the long period of time between incidents should have been considered in assessing the penalty. The arbitrator agreed that this is a proper consideration. Although the company had no established policy in this respect, the arbitrator's criterion would be the standards in the profession generally.

b. Principal censures the action of Mrs. Teacher. He then berates her in front of the class and she retires to the faculty lounge. Mrs. Teacher is suspended for ten weeks for leaving the class unattended and for using abusive language towards the principal.

Teacher had been a competent teacher for eight years and had no record of any previous offenses. The indident cited was "one isolated, emotional outburst" and it was shown that the principal, by his actions, had provoked the teacher. Further, the teacher returned to her class within about ten minutes after regaining her composure.

These extenuating circumstances are worthy of consideration and warrant reduction of the punishment to a lesser penalty.

c. High school is experiencing difficulty locating a teacher for social studies. Mr. Teacher, a history instructor, is prevailed upon by Principal to teach two sections of social studies. His history sections are correspondingly reduced so that his time is equally divided between the two subject areas.

Principal evaluates Teacher monthly and records unsatisfactory ratings as regards Teacher's competence in social studies. At the end of the year Teacher is charged with incompetence and not recommended for renewal.

The arbitrator would rightly consider, in extenuation, that Teacher was satisfactory in his performance within his subject area. The fact that he was teaching outside his area of competence would be a relevant consideration. Teacher could not be reasonably expected to perform adequately in an area for which he was not qualified, therefore he could not be punished for such failure.

10. Punishment was Unreasonable in Relation to the Provision Violated.

The policy requires the teacher "to be present in the classroom fifteen minutes prior to the start of school."

Mrs. Teacher arrives ten minutes late. Prior to her arrival one of the students throws a piece of chalk causing a child to lose the sight of one eye. Mrs. Teacher is discharged for tardiness resulting in a serious injury to a pupil.

Mrs. Teacher successfully argues that the only violation she has committed was the one of being late. The punishment should be no greater than that usually administered for such infractions. The resultant injury to a pupil was not the direct result of negligence on Teacher's part and therefore was not a proper consideration in determining the penalty.

"THE CARMAN CASE" - SUMMARY OF ARGUMENTS

SETTING:

Flint, Michigan, Dillon Elementary School, Carmen School District

PARTIES IN THIS ACTION:

Mrs. Thomasine Vee - Probationary Teacher
Mr. Spencer - Principal
The Association: Carman Education Association (CEA)
The Board: Carman Board of Education

FACTS IN ISSUE:

1. Mrs. Vee was a probationary teacher for the academic year 1967-68 ending on June 7, 1968.

2. On March 29, 1968 Mrs. Vee was advised by letter from the school board that she was not to be offered a contract for the 1968-69 school year.

3. Classroom visitation evaluation sheets were prepared by Spencer on Mrs. Vee on October 10, 1967. Mrs. Vee found this first evaluation sheet dated October 10, 1967 in her school mail box. She was not interviewed on or around that date. Mr. Spencer did not recall exactly what took place.

4. On February 2, 1968 a "self-evaluation" sheet was prepared by Spencer and the markings were gone over in detail with Mrs. Vee.

5. On April 16, 1968 Mrs. Vee filed a grievance to the effect that she was "unjustly released from the Carman School District." The grievance states that the grievant is entitled to hear reasons for her dismissal under the provisions of Article XI, Section C of the contract.

6. The "Nature of Dispute" submitted to the arbitrator was "unjustly released by the Carman School Board." The remedy sought: "Full reinstatement with full reimbursement for compensation lost."
(This is provided in Article XVIII, F-7.)

BOARD ARGUMENTS:

1. The Carman Board of Education submitted that it had never participated in, or been given an opportunity to hear and decide, at levels, #1, #2, and #3 and the Labor Mediation Board in Level #4, on the alleged grievance of compensation (violation of Article XVIII, F-7), as specified in the demand for arbitration.

2. Mrs. Vee was not unjustly released. The terms of the Tenure Act were fully applicable and were complied with by the Board. In support of this the Board submitted that:

   a. The Tenure Act was promulgated at a later date than the Act granting collective bargaining therefore the provisions of the Tenure Act apply.

   b. The letter of termination complies with the provisions of Article 2 of the Act.

   c. Neither the Board, nor the CEA, can contract in violation of the Legislature's pronouncement that the provisions of the Tenure Act provides just cause dismissal to tenured teachers only and it has denied the same to nontenured teachers.

3. Mrs. Vee was not discharged but rather her contract was not renewed. Article XVIII, F-7, does not therefore apply since Mrs. Vee was not discharged.

Professional Grievance Report

School District: Carman Grievance Number: 20

School: Dillon Elementary Date of Violation: 3/26/68

Date of Grievance: 4/16/68

Subject to provisions of the professional negotiations agreement between the Board and the Association, I hereby authorize the representative or representatives of the Association recognized by the Board as my collective bargaining representative to process this request or claim arising therefrom in this or any other stage of the professional grievance procedure, including arbitration, or to adjust or settle the same.

STATEMENT OF THE GRIEVANCE: I feel that I was unjustly released from the Carman School District

REMEDY REQUESTED: Article XI, Section E of this year's contract states that I am entitled to hear reasons for my dismissal.

"In the event a probationary teacher is not continued in employment, the Board will advise the teacher of the reasons therefore, and his rights under the Tenure Law, in writing."

I am requesting this right be given me.

s/ Harold A. Murray
Association Representative

s/ Mrs. Thomasine Validzich
Signature of Grievant (use reverse side for additional signature if more than on grievant)

Date: April 16, 1968

s/ Mrs. Beulah Waller

Principal's Disposition: I signed and returned the form on April 16, 1968.

Date: _____

s/ Robert Spencer
Signature of Principal

Association's Disposition:

Date: April 18, 1968 Satisfactory _____ Unsatisfactory X

Superintendent's Disposition:

Date: _____

_____
Signature of Superintendent

Association's Disposition:

Date: _____ Satisfactory _____ Unsatisfactory _____

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Rules

DEMAND FOR ARBITRATION

DATE: August 14, 1968

TO: (Name) .....Carman School Board.....
(of party upon whom the Demand is made)

(Address) ....G 3475 W. Court Street.....

(City and State) ...Flint, Michigan 48504.....

The undersigned, a party to an Arbitration Agreement contained in a written contract, dated
which agreement provides as follows: (Quote Arbitration Clause)

See Attached Agreement - Article XVIII, Section D, paragraph 5

Parties did not agree on an arbitrator, thus in order to avoid further delay in the matter, we hereby petition the American Arbitration Association.

hereby demands arbitration thereunder.

NATURE OF DISPUTE:

Grievance - Unjustly released by the Carman School Board

REMEDY SOUGHT:

Full reinstatement with full reimbursement for compensation lost.

You are hereby notified that copies of our Arbitration Agreement and of this Demand are being filed with the American Arbitration Association at its ..... Regional Office, with the request that it commence the administration of the arbitration.

Signed..../s/ Harold A. Murray.....

Title....Chairman, CEA PR&R Committee.....

Address.....4705 Lennon Road.....

City and State.....Flint, Michigan 48504.....

Telephone.....313/232-0279.....

To institute proceedings, please send three copies of this Demand and the Arbitration Agreement, with the administrative fee, as provided in Section 43 of the Rules.

IV, 9

STATUTORY PROVISIONS

The following pertinent provisions of the Michigan Teacher Tenure Act, as amended are cited as information and for consideration by the arbitrator.

SECTIONS 1, 2, AND 3 OF ARTICLE 2

This article makes general provision for "a period of probation" for teachers during their first two school years of employment by a controlling board. It also provides: "At least sixty (60) days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory: Provided, That failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory, And: Provided further, That any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified at least sixty (60) days before the close of the school year that his services will be discontinued."

ARTICLE 3

This article states, in part, that "After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act."

CONTRACTUAL PROVISIONS

The following are pertinent Contractual provisions of the Agreement between the Carman Education Association and the Carman School Board.

ARTICLE X (Professional Behavior)

D. "No teacher shall be disciplined, reprimanded, reduced in rank, or compensation, or deprived of any professional advantage without just cause. Any such discipline, reprimand, or reduction in rank compensation or advantage, including adverse evaluation of teacher performance asserted by the Board, or representative thereof, shall be subject to the professional grievance procedure hereinafter set forth. All information forming the basis for disciplinary action will be made available to the teacher and the Association."

ARTICLE XI (Teacher Evaluation)

A. "The work performance of all teachers shall be evaluated in writing. Probationary teachers shall be evaluated at least three times during the school year."

B. "A copy of the written evaluation shall be submitted to the teacher at the time of such personal interview, or within ten (10) days thereafter, and the teacher shall have the opportunity to review the evaluation report with the evaluator, if they so desire."

C. "No later than March 15 of each probationary year, the final written evaluation report will be furnished to the Superintendent covering each probationary teacher. A copy shall be furnished to the teacher. If the report contains any information not previously made known to, and discussed with the probationary teacher, the teacher shall have an opportunity to submit additional information to the Superintendent. In the event a probationary teacher is not continued in employment, the Board will advise the teacher of the reasons therefore, and his rights under the Tenure Law, in writing."

ARTICLE XVIII (Professional Grievance Procedure)

F-7 "If any non-tenure teacher for whom a grievance is sustained shall be found to have been unjustly discharged, he shall be reinstated with full reimbursement of all professional compensation lost. If he shall have been found to have been improperly deprived of any professional compensation or advantage, the same or its equivalent in money shall be paid to him."

F-8 (Abstract of Arbitration Clause)

Any dispute, claim or grievance arising out of or relating to the interpretation or the application of this agreement shall be summitted to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. The parties further agree to accept the arbitrator's award as final and binding upon them.

BOARD POSITION ON DISCHARGE/NONRENEWAL

Discharged means to be terminated during a period of obligation.

Nonrenewal means not to be rehired, or not to be given a new contract for a new period of time.

The distinction between discharge of a tenure teacher and not rehiring a probationary teacher is the continuing contract effect of tenure status, so that the teacher has an employment period that continues year after year, and to be dismissed from that continuing employment is a discharge. A probationary teacher, hired on a year to year basis, has no expected obligation of continuing employment.

ASSOCIATION POSITION ON DISCHARGE/NONRENEWAL

The word discharge as defined by the Board does not consider the rather unique and peculiar employment relationship that exists between school boards and teachers. This relationship is based on the mutual signing of an individual contract on an annual basis. This is the case not only with probationary teachers, but with tenure teachers as well.

The Tenure Act gives evidence of continuing employment by the setting of deadlines for notification of any adverse action affecting the employment status of tenured and nontenured teachers.

Where there is a discontinuation of the employment relationship, initiated by the employer, then this would constitute a "discharge". This is consistent with the use of the term discharge of a tenured teacher which is a denial of the annual contract for the ensuing year.

Carman School District

Flint, Michigan 48504

March 29, 1968

Mrs. Thomasine Vee
4006 Proctor
Flint, Michigan

Dear Mrs. Vee:

Please be advised that The Carman Board of Education in official session March 27, 1968 and in accordance with The Michigan Teacher Tenure Act (State of Michigan, Act. No. 4 of the Public Acts of the Extra Session of 1937, as amended), voted to terminate your services June 7, 1968 and not to offer you a contract for the 1968-69 school year, on the ground that your work is not satisfactory.

/s/ Wayne D. Ainsworth

Wayne D. Ainsworth
President
Board of Education

CARMAN SCHOOL DISTRICT
CLASSROOM VISITATION REPORT

Teacher visited	Mrs. Vee	Date	October 10, 1967
Grade or Subject	3rd	Time Entered	8:50
		Time left	9:30

Comments:

Mrs. Vee was teaching a math class. The group was well behaved and busy. In the most part they appeared to understand the directions and were having no difficulty with the assignments. Extra help was being given to those who were having trouble.

The room was neat and pleasant. The bulletin boards were nicely done.

The lesson plan book was fairly well up to date and was reasonably complete. I did not happen to see any mention of the weekly books or scholastic magazine. There was a definite indication of writing being done on a formal basis, which I feel is a good idea. I would hope that dictionary usage is also involved at this time.

Recommendations:

The only area that I felt was a little weak was science. This subject is shared with library and art and perhaps is not stressed enough. The social studies is a little difficult to evaluate, but it could be an area that will need a little more planning as the year passes.

Principal's Signature /s/ Robert Spencer

Teacher's Signature

Use other side for additional comments:

In general I feel the class is going very well. Please see me if you have any problems you would like to discuss concerning teaching.

CARMAN SCHOOL DISTRICT
CLASSROOM VISITATION REPORT

Teacher Visited Mrs. Vee Date Dec. 4, 1967

Grade or Subject 4th Time Entered 8:55

Time Left 9:40

COMMENTS: Mrs. Vee was teaching a math class. The directions given the students by the teacher were clear and concise. The teacher moved around the room helping children who were having difficulty. Classroom discipline was good and the room was neat. I did not look at lesson plans today, but recently I did find the plan a little light in content. In general, however, lesson plans are probably adequate.

RECOMMENDATIONS:

1. In teaching how to borrow it might be well to stress that you borrow ten from the number at the left instead of one. The concept is very important.

2. Not being in the room I am unable to say what actually might have taken place between 8:30 a.m. and 9:00 a.m. and perhaps Mondays is an unusual day, but for the most part I would have children in the habit of opening books at 8:30 a.m. each day.

3. I would schedule Miss Johnson if possible to give special help to Alta and Craig in all language arts areas. She could possibly come into the room for several minutes each week.

4. I would like to see you very soon to discuss some teacher-pupil and teacher-parent problems that have come to my attention.

Teacher's Signature _____

Principal's Signature /s/ Robert Spencer

Use other side for additional comments.

CARMAN SCHOOL DISTRICT

SELF EVALUATION SHEET

Teacher's Name: Vee

DATE: _____

SKILLS:	Unobserved	Excellent	Good	Average	Needs Improvement	Not Acceptable
1. Lesson planning and organization.				X		
2. Keeps and use complete records.				X		
3. Uses special services when needed.			X			
4. Demonstrates a knowledge of subject matter.			X			
5. Knowledge of child growth and development.				X		
6. Exemplifies oral communication					X	
7. Exemplifies written communication skills.				X		
8. Atmosphere conducive to learning					X	
9. Exhibits skill in evaluating pupil growth.				X		
10. Skill in reporting pupil progress.				X		
PROFESSIONAL CHARACTERISTICS						
1. Demonstrates an interest in the profession.					X	
A. Present position					X	
B. Participation					X	
1. Professional Groups					X	
2. Curriculum Committees					X	
3. Parent-Teacher Organizations					X	
4. Staff Meetings				X		
2. Shows interest, loyalty and responsibility.					X	
3. Accepts responsibility for non-instructional details.					X	
4. Shows evidence of good human relations.					X	
A. Teacher-pupil rapport					X	
B. Teacher-parent rapport					X	
C. Teacher-staff rapport				X		
5. Is ethical in discussions of school affairs.	X					
6. Professional improvement.			X			
PERSONAL CHARACTERISTICS						
1. Demonstrates emotional stability.						X
2. Is dependable.				X		
3. Shows mature judgment.				X		
4. Show initiative.				X		
5. Exhibits poise and self confidence.					X	
6. Has pleasant voice.			X			
7. Gives and takes suggestions.						X
8. Is physically fit.		X				
9. Personal appearance and Hygiene.			X			
Total Teacher Effectiveness:					X	

Date February 2, 1968

Recommendation for Mrs. Vee for 19____

1. Should continue in present position and grade level _____

2. Should be reassigned. See general comments. _____

3. Should be considered for a promotion _____

Type of promotion suitable _____

_____

_____

4. Should be placed on a third year of probation _____

5. Should be placed on Tenure _____

6. Should not be placed on Tenure XXX

GENERAL COMMENTS:

Mrs. Vee has been here only a short time. She has moved from school to school in the past several years and apparently has not been too happy. I feel that she is not too happy at Dillon and at one time stated our kids were worse than any she had ever seen. She indicated that she wasn't too happy here and perhaps should have stayed in Flint. Also, she is critical of the supplies and materials we have available in the classroom. Since I must make a decision on Mrs. Vee on the basis of a few months observation due to tenure laws I feel the Carman Dist[illegible] should not employ her again. I think it might be better for everyone concerned.

/s/ Robert Spencer
Signature of Person making Recommendation

MICHIGAN EDUCATION ASSOCIATION

SAMPLE

GRIEVANCE

ARBITRATION

1. Association Brief
2. School Board Brief
3. Association Reply Brief
4. School Board Reply Brief
5. Arbitration Award

(contents taken from actual case of
Carman Education Association)

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN

CARMAN EDUCATION ASSOCIATION

and

CARMAN BOARD OF EDUCATION
FLINT, MICHIGAN

Case 5430 0318 68
Grievance of Thomasine Validzich

BRIEF SUBMITTED IN BEHALF OF THE CARMAN EDUCATION ASSOCIATION IN SUPPORT OF MRS. THOMASINE VALIDZICH AND CEA GRIEVANCE # 20

Thomasine Validzich, in whose behalf this grievance has been filed, was notified on March 29, 1968, by way of a written communication under the letterhead of the "Carman School District" and over the signiture of Mr. Wayne D. Ainsworth, President of the Board of Education, (see copy of letter attached) that her teaching services with the Carman School District would be terminated as of June 7, 1968, and further that the Carman School Board would not offer her a contract for the 1968-69 school year on the grounds that her work was not satisfactory.

The Association claims that dismissal of Mrs. Validzich was not in accord with the Master Agreement then in existence between the Board and the Association, therefore claiming that the dismissal was in violation of the aforementioned agreement from a "procedural" point of view. Further, the Association claims that on examination of the written teacher evaluations and alleged evaluations and as made obvious during the verbal testimony of her

principal, Mr. Robert Spencer, that the "substantive" nature of these evaluations could in no way represent adequate grounds for dismissal of Mrs. Validzich, or, for that matter, any other teacher from a position they sought to continue within a school district.

From first, the procedural argument in this case, which counsel for the Board agreed was an appropriate concern of the arbitrator,"I would refer to the Master Agreement between the parties, Article XI, Section A, which states that, "work performance of all teachers shall be evaluated in writing." The Association would agree that Mrs. Validzich did receive two (2) evaluations in writing, but would not agree that Association Exhibit # 4, titled "Self Evaluation Sheet," and representing no more than a check list, could possibly represent a written evaluation as called for above. The placing of a series of X's on such a sheet does not represent the common understanding of the word "written;" nor should anyone other than the person being evaluated fill in any of the spaces on a "Self Evaluation Sheet." Section A further goes on to require at least three (3) evaluations during the school year. We have just pointed out above that we see no evidence to the effect that this requirement has been complied with.

Article XI, Section D, requires that a copy of the written evaluation shall be submitted to the teacher at the time of such personal interview, or within ten (10) days thereafter. We maintain that it is clearly intended from this language that the written evaluations will be delivered to the teacher in conjunction with and at the same time the "personal interview" is taking place. Mrs. Validzich testified that she found her first evaluation sheet, dated October 10, 1967, in her school mail box, and that no such

personal interview took place on or around that date. Mr. Spencer did not recall exactly what had taken place.

Article XI, Section E, last sentence--"In the event a probationary teacher is not continued in employment, the Board will advise the teacher of the reasons therefore, and of his rights under the Tenure Law, in writing." Apparently the aforementioned and attached letter, dated March 29, 1968, to Mrs. Validzich, and over the signature of Mr. Wayne D. Ainsworth, President of the Board of Education, was the Board's version of complying with this provision in the Agreement. However, by no stretch of the imagination can it be said that within this letter, the Board advised the teacher of the reasons therefore. All that could be said for Mr. Ainsworth's letter in this regard was that he wrote, "on the grounds that your work is not satisfactory," which we would declare is not in itself satisfactory to meet the obligations this Board previously took upon itself when it ratified, signed, and became a partner to the Master Agreement between the Board and the Association.

Still, in the area of "procedural violation" of the agreement by the Board, Article XVIII, Section F, Paragraph 7 (Grievance Rpocedure) seems clearly to allow for the possibility that a non-tenure teacher, which Mrs. Validzich was, for whom a grievance is sustained, which is within the power of the arbitrator, and without any written reference or restriction based only on the procedural aspects of the grievance, that such non-tenure teacher found to have been unjustly discharged (whether this was based on procedural or substantive grounds) shall be reinstated with full reimbursement of all professional compensation lost.

In view of the Association's position as held in the above paragraph, we would turn our attention now to the "substantive nature" of the grounds for dismissing Mrs. Validzich from the continuation of her teaching career in the Carman School District.

Mrs. Validzich, during the 1967-68 school year was in her fifth year as a teacher. Her third year of teaching was also with the Carman School District. The Board in its presentation of its case in support of the dismissal of Mrs. Validzich at no time indicated anything of a negative nature that it may have experienced with Mrs. Validzich during that first year in the system. In fact, Mr. Spencer apparently had not even looked at Mrs. Validzich's personal file to see if there were any negative criticisms of her teaching during that year that he might have used to alert himself of any problems, if there were any to be concerned with. It seems at this point, more than a little strange that the school district was ready to continue Mrs. Validzich in employment following her teaching during the school year 1965-66; but then last year, in view of the fact that the teacher had in the meantime gained another year of teaching experience, this new principal decides to recommend no contract for Mrs. Validzich even though from his classroom visitation evaluation sheets that were dated October 10, 1967, and December 4, 1967, both of which reflected (as Mr. Spencer agreed during cross-examination) far more in the way of positive factors than negative factors. Both Mr. Spencer and Mrs. Validzich agreed during the hearing that a basic purpose of teacher evaluation was to help the teacher by pointing out weak areas and suggesting ways by which they could be overcome.

In the first evaluation (October 10, 1967) the only point resembling a criticism was that the science area might be a little weak. This observation was not repeated, however, in the second evaluation (December 4, 1967), apparently indicating that this possible weakness had been cleared up. In the second evaluation, a difference of opinion over a conceptual approach to borrowing in subtraction appeared to be the only negative factor. Both of these, in the case of the first and second evaluation, represent precious little in the way of any criticism; and, under no conceivable measure of human performance, could these cirticisms stand up as adequate grounds for the dismissal of a professional person from her position.

In the second evaluation, and as pointed out in Association Exhibit # 3, point number two under the "Observations" column, the comment is made that, "In general lesson plans probably adequate." We bring this up only because the lesson plan book which was presented to the arbitrator as Association Exhibit # 7, is such an outstandingly excellent example of a teacher lesson plan book that it seems indicative of Mr. Spencer's determination to find, even by way of professional fantasy, something that he might hope to hang his negative evaluation hat on in the case of this teacher. I would propose that there would be few other teachers in the Carman School District that maintain as complete a set of daily lesson plans than those submitted as evidence and which can well represent the work of Mrs. Validzich. We submit that the two evaluations received by Mrs. Validzich contained absolutely nothing that would imply that her continued employment in this district was in even the most minute peril.

The teacher-pupil/teacher-parent problem was an isolated case and one not a bit uncommon in any school system today. It was merely a misunderstanding that was taken care of more adequately by the teacher, as it turned out, than by the principal. Possibly this was threatening to the principal.

Now from the December 4, 1967 evaluation up to the February 2, 1968, alleged evaluation (Self Evaluation Sheet) there was no evidence of further classroom visitations or evaluations having been made of Mrs. Validzich by Mr. Spencer. Any principal who is consciously carrying out his responsibilities in the area of teacher evaluation, personnel relationships, and professional growth, we would maintain would be doing more in the way of visitation, evaluation, and counseling of a probationary teacher than was done in this case prior to dropping a recommendation for non-renewal of contract on the teacher's head as early as February 2, 1968.

Page 2 of the Self Evaluation Sheet, under GENERAL COMMENTS, seems to represent the perfect capsulation of a totally ineffective and inefficient attempt at teacher evaluation finally culminating in a dismissal. These remarks represent a pitiful effort to say something like, "She isn't a bad teacher, but she doesn't seem to be too happy in my building; and, since I'm so rushed for time, she had better go someplace else next year." Again, there is nothing of substance in these "general comments" that represent the last remarks to accompany the dismissal recommendation for a teacher. It is with some real degree of professional embarrassment and shame that I make any remarks relative to the quality of the comments found on page 2 of the Self Evaluation Sheet.

IN CONCLUSION: on behalf of the Association and Mrs. Thomasine Validzich and in accord with the Master Agreement, Article XVIII, Section F, Paragraph 7, we ask that the arbitrator find on the basis of verbal testimony exhibits and this brief, that Mrs. Validzich was, in fact, unjustly discharged by both procedural and substantive grounds; and, since she is currently under contract with another school district, that she be offered a contract to teach in the Carman School District for the 1969-70 school year; that said contract reflect on the salary schedule to be in effect at that time, six years of previous teaching experience so that she would suffer no loss or discrimination for having not taught in the Carman School District this year. Further, that she be reimbursed for professional compensation lost in the amount of $1,314, which represents the difference between the current Carman Salary Schedule, for the sixth year with a B.A. degree plus 15 additional credit hours or $9,019 as compared to her present contract in the amount of $7,705. Further since Mrs. Validzich has been, as a result of her dismissal improperly deprived of the professional advantage of convenience in transportation between her home and her place of employment, whereby while teaching in the Carman School District such transportation required the daily round-trip driving of sixteen (16) miles, as compared to the required driving of twenty-eight (28) miles as a result of her current employment, reflecting a difference of twelve (12) miles per day, over a minimum period of one hundred and eighty (180) days during the school year, at the rate of ten cents per mile, it is our recommendation that a total inconvenience damage of $216 be reimbursed to her. This represents a grand total of $1,530 in reimbursement and compensation that we claim a just and

equitable financial settlement as the result of this unjust discharge. Finally, it is recommended that such contract of employment for the 1969-70 school year be offered no later than June 1, 1969, and that the financial settlement be paid to Mrs. Thomasine Validzich no later than ten (10) days following the receipt by the parties of the arbitrator's award.

By Thomas J. Patterson

Thomas J. Patterson, Counsel for
Carman Education Association
Michigan Education Association
P.O. Box 673
East Lansing, Michigan

Dated: November 1, 1968

VOLUNTARY LABOR ARBITRATION TRIBUNAL

AMERICAN ARBITRATION ASSOCIATION ADMINISTRATOR

In the Matter of the Arbitration between

Carman Education Association — Case No. 5430 0318 68

-and- — Brief of Carman School District

Carman Board of Education
Flint, Michigan
Grievance #20 and 21 - Teachers release — Thomasine Validzich
Grievance #20

****

TO: Carman Education Association
Harold A. Murray
Tom Patterson

Carman School District
John Wm. Thomas, Attorney

American Arbitration Association
Harold A. Cole, Esq., Arbitrator

I. GRIEVANCE HEARD & DECIDED

In accordance with joint Exhibit #2, Grievance #20 by Mrs. Thomasine Validzich was dated March 23, 1968, and recited that in Article II, Sec. E of the contract between the parties (joint Exhibit #1), that she was unjustly released and was entitled to hear the reasons for her dismissal, and that the Board violated their duty to advise the teacher for reasons for the dismissal, and her rights under Tenure Law. It says "I am requesting this right be given me."

This grievance (joint Exhibit #2) then went through levels #1, #2, #3 and #4, to reach the current stage of level #5, Arbitration. This was the grievance that was heard and decided in each of the levels. This is a condition precedent to arbitration in level #5, that the grievance be heard and decided in the prior levels.

On August 14, 1968, the CEA filed with the American Arbitration Association a demand for arbitration, reciting that this grievance #20 arises because the teacher was unjustly released by the School Board, and the teacher demands reinstatement, with full disbursement for compensation lost, which is the provisions of Article XVIII, F-7 of the contract. Whereas Article XI, Sec. E is specifically spelled out in the grievance heard and decided, dated March 26, 1968, and which was stamped "received by the Office of Professional Negotiations, August 6, 1968", the demand August 14, 1968, of the CEA was for a grievance under Article XVIII, F-7.

Carman School District hereby submits that it has never participated in, or been given an opportunity to hear and decide, at levels #1, #2 and #3, and the Labor Mediation Board in level #4, an alleged grievance of violation of Article XVIII, F-7, as specified in this August 14, 1968, demand for arbitration. The alleged grievance of violation of Article XI, Sec. E, was so heard and decided in the levels. The alleged violation of Article XVIII, F-7 has never been heard or determined in the levels; and, therefore, the Board of Education submits that arbitration does not have jurisdiction over an alleged grievance of Article XVIII, F-7, because the condition precedent of levels #1 through #4, under the contract, were not fulfilled.

II. UNLAWFUL RELIEF SOUGHT

Herein we speak of Act 4 of P.A. 1937 (MCL38.71; MSA 15.1971) as amended. It is noted that the PERA Acts granting the right of collective bargaining for public employees are laws passed in 1966 and before. The

amendments to the Tenure Act include Act 216 of P.A. 1967, which amends the Sections, including Sec. 3 of Article 2, Sec. 2 of Article 4, Sec. 2 of Article 3, among others. It is submitted that if there is any conflict between the PERA Acts and these amended provisions and re-adopted sections of the Tenure Act, the latter is later, being effective July 10, 1967, for the first time, and such conflicts must be resolved in favor of the Tenure Act amendments.

Sec. 2 of Article 4 (amended Act 216 of P.A. 1967) sets up the duty to prepare a written statement of charges against the teacher, and to provide for a hearing of the teacher if the Board, under Article 4, Sec 1, wants to discharge said teacher, and that said charges shall show that the discharge is for a reasonable and just cause. Sec. 4 of Article 4 sets up the way of holding this hearing.

In Article 2, Sec. 3 of this Tenure Act (which was re-enacted by amendment contained in Act 216 of P.A. 1967) sets up the Board's duty of providing a probationary teacher with a written statement of whether the work is satisfactory or unsatisfactory, and to give a notice in writing at least 60 days before the close of the year that he will not be rehired (note that the statute does not say discharged).

In Sec. 4 of Article 2, it says that these duties of (now the statute uses the word discharge) the tenure teacher for a reasonable and just cause, and a written list of the charges, and the hearing, etc.*** "shall not apply to any teacher deemed to be in a period of probation."

Had the Legislature been silent and the Tenure Act been silent, we could agree that the terms of Article XVIII of joint Exhibit #1 might have placed a duty on the Board of Education of giving a probationary teacher a list of charges showing reasonable and just cause, and a hearing and anything else the two parties wished to agree to. BUT the Legislature has spoken. The Legislature has usurped and pre-empted this field. It has ruled that charges against a probationary teacher of not being rehired, and services discontinued, shall be told to the teacher in written form that the work was satisfactory or not satisfactory. The Legislature has ruled that the probationary teacher is not to be discontinued and not rehired, only in the event of reasonable and just cause not to do so. The Legislature has said that these things for the tenure status teacher "shall" (not may) not apply to this grievant.

Neither the Board, nor the CEA, can contract in violation of the Legislature's pronouncement: "Shall not apply (to Mrs. Thomasine Validz ich, a probationary teacher)". Just cause dismissal is a grant the Legislature desires to give to tenure teachers only, and it has denied the same to non tenure teachers.

If the grievant was correct in maintaining that Article XVIII gives the grievant everything that the Tenure Statute gives a tenure teacher, we have lost the intent of the Legislature to give a higher status to tenure teachers. We have then repealed the enactments that make a distinction between probationary teachers and tenure teachers. We have nullified the legislative purpose. The Legislature has not given us the right to do so, has pre-empted the field, and Article XVIII of joint Exhibit #1 cannot be interpreted as grievant requests in the abortive demand for arbitration August 14, 1968.

III. READING OF ARTICLE XVIII, F-7

It is submitted that this Article means that within a contract period of a teacher's binding contract, if a teacher is expelled, suspended or discharged, they get their pay anyway, unless such suspension, discharge or expulsion, is with cause.

Such a reading does not lead to the conclusion that this clause has abrogated the Board of Education's right to give tenure status, or not, in its discretion. Article XVIII, F-7 would need a few hundred extra choice words to say what the grievant would have us believe it says; that it abolishes the distinction between probationary teachers and tenure teachers, and gives the probationary teachers everything that Article 4 gives the tenure teachers, or most of the things.

This clause does not say that if a teacher is NOT REHIRED, or NOT GIVEN TENURE, she gets these things specified. It says "discharged". For this clause to say that these things shall be given to a teacher who is NOT REHIRED, or given to a teacher who has not been given a NEW CONTRACT for a NEW PERIOD of time, or to be given to a teacher who is NOT GIVEN TENURE by the Board of Education--it would take, again, a few hundred choice words to have put these meanings into this paragraph 7.

Because this paragraph cannot contradict the legislation of the State of Michigan, it is submitted that the clear meaning that can be given to this paragraph is that if, during a contracted period of employment, a teacher is "discharged", these things accrue to her. It is two different meanings: (1) to be discharged during a period of obligation; and (2) to be not rehired, or not given a new contract.

IV. WAS THE BOARD'S DECISION WITHIN THE BOARD'S DISCRETION

It seems elementary, but, for clarity, the law of what constitutes an act by the Carman School District, is reviewed. For an act to bind the Carman School District, it is required that there be a lawfully called Board of Education meeting, which must be public, and the district can only act by the resolution adopted in said meeting, that was voted by more than a majority of those elected; Sec. 561 of the School Code (MSA 15.3561; MCL 340.561); Hazen vs Lerche, 47 Mich. 625; McLaughlin vs Board of Education, 255 Mich. 667; Michigan Civil Jurisprudence 22:82. A Board speaks only through its minutes and resolutions--Travener vs Elk Rapids School District, 341 Mich. 244. A school district is a state agency (319 Mich. 436), Board of Education vs Superintendent of Public Instruction; and is a municipal corporation, Rasmussen vs Lincoln Park School District, (4 Mich. App. 278), and has those powers that are expressly given to it by the statutes, Foster vs Board of Education, School District #10 (326 Mich. 272), Sengas vs L'Anse Creuse Public Schools (368 Mich. 557); McQuillan Municipal Corporation 3d 46.03.

The next concept in Public Corporation Law may seem strange to some. It is that the school district is not liable for the acts of its agents or employees, even though tortious. When the Vice-President of General Motors says something, he binds General Motors Corporation. When the Principal of the school district says something, that does not bind the school district, because its acts are only through the resolution of its Board in a lawful meeting, which resolution was voted on by more than a majority of those elected. The school district is not liable for the acts of its agent, like a principal, or its

employee, like a principal, nor, for that matter, by an individual Board member who acts privately and not as a part of a resolution. This is true, even though the agent or employee causes harm to another, and our heart bleeds to repair that harm with a considerable money judgment.

> Recent cases in this field in Michigan, include Sayers vs School District #1 Frl., 366 Mich. 217; Bacon vs Kent-Ottawa Metro. Water Authority, 354 Mich. 159; McDowell vs State Highway Commissioner, 365 Mich. 268; Picard vs Greisinger, 2 Mich. App. 96; Keenan vs County of Midland, 377 Mich. 57; Myers vs Genesee County Auditor, 375 Mich. 1; Williams vs Primary School District #3, 3 Mich. App. 468, and many others.

The application of this doctrine in the instant case is that when Principal Spencer said something, it does not bind the Carman School District; and what does bind the Carman School District is the resolution of the Board of Education not to give tenure to this teacher, and thus, not to rehire her, and thus, to give her a sixty day notice that her work was unsatisfactory and that she would not be re-employed.

It might be a shock to some to learn that the doctrine Respondeat Superior is inapplicable to public corporations, such as this school district. This is the uniform law of public corporations. Here are two recent cases, one on each coast to illustrate the doctrine: People vs Standard Accident Insurance, 42 Cal. App. (2d) 409; 108 Pac. 2d 923; Lemieux vs City of St. Albans, 112 Vt. 512; 28 Atl. 2d 373. Thus, in private corporations, a corporation is responsible and liable for the wrongful acts of its agent. In this situation, the Carman School District and the Board of Education are responsible only for its own lawful acts (Board meeting, majority vote, etc.), so, we turn our attention to the Board's use or abuse of its discretion in making its decision not to give tenure.

The first part of this look-see is the burden of proof. It is submitted that the grievant bears the burden of proof of showing that the Board abused its discretion. The alleged grievance is against the Board's not rehiring her and not giving her tenure. She didn't want to be not rehired, and this is her grievance. Yet there is not one word of testimony as to the Board's resolution to not rehire her, what factors and how many recommendations and reports were considered before they voted. There are seven elected to this Board, and it is necessary that four vote on every resolution for one to be adopted. There was no showing of whether four voted on this, or how many more. There was no showing about any other recommendations that came to the Board, except the review of Principal Spencer's evaluations. All we know is that Principal Spencer's ratings brought him to send a recommendation to the Board not to give this teacher tenure (see Exhibit #4, page 2 recommendation not to give tenure). Yet, from the testimony, we don't know that the Board ever saw Spencer's recommendations, or ever acted on them; whether they acted because of them, or in spite of them; and we don't know anything about the decision of the Board after it had received all the recommendations on the issue. All proofs are missing. The grievant hasn't shown that the Board acted without cause, and hasn't shown why the Board acted at all. It is submitted that no proofs is not sufficient. A prepondenance of evidence is a grievant's responsibility. No proofs constitutes NO EVIDENCE.

The Michigan Supreme Court has drawn the line clearly just where a Court may step in and replace a decision of a Board of Education. The latest pronouncement, again showing that there must be a showing of abuse of discretion, is contained in Hiers vs Detroit Superintendent of Schools, 376 Mich. 209.

An earlier case is Chandler vs The Board of Education of Detroit, 104 Mich. 292. In Chochran vs Mesick, 360 Mich. 390, these lines were drawn and the following language is quoted in the Hiers case with approval from the Chochran case:

> "The Court will not attempt to substitute its judgment for that of the Board, but will inquire whether such acts are arbitrary and unreasonable. The presumption is always in favor of the reasonableness and propriety. Only when there is a clear showing of abuse will the Courts interfere." Pages 234 and 235 of Vol. 376, Michigan Supreme Court Reports.

Does an arbitrator hearing an aggrievance have more power than the Michigan Supreme Court? It is submitted that the arbitrator cannot replace the Board's discretion.

After the February 2, 1968, two page report was made by Principal Spencer (Association Exhibit #4), he went over in detail with the grievant. She saw his grading of her work, of her attitude and of her performance. She didn't agree with her marks then (and I am equally sure she doesn't agree with her marks now). She had copies of Association's Exhibit #1, October 10, 1967, and Association's Exhibit #2, December 4, 1967, of earlier evaluations of the same teacher. I dare predict that she doesn't agree with any criticisms therein either. But, this is true of every human being. We cannot expect any human being, controlled by human nature, to agree when his own self-appraisal is so much higher than the appraisal of an outsider. It isn't human nature for Mrs. Validzich to sit with Mr. Spencer and go over his February 2nd ratings, and agree with him. She didn't agree with him then, she doesn't agree with him now, and she will never agree with him.

Because she does not agree with him does not destroy the value of the ratings. She must show fraud in their making. Actually, they were made by an experienced administrator in his regular routine of his assignment. Another administrator in the same circumstances could have rated her differently, even lower. Until she shows dishonesty in her ratings; or fraud, which she hasn't; she cannot destroy these ratings. She does not destroy these ratings because she doesn't agree with them.

Yet, unless there is shown NO basis for his evaluations, we cannot now superimpose our opinions (from the testimony in the limited hearing) upon his judgment under the actual conditions and circumstances then. As shown above, even a court won't impose its opinion on that of the Board until there is an abuse, fraud, dishonesty, no basis, etc. Has an arbitrator the power to go further than the Michigan Supreme Court?

V. WAS NOT DISCHARGED

Lastly, it is submitted that the teacher who is the grievant was not discharged. Principal Spencer did not recommend that she be discharged. A discharge is defined by Webster's Seventh Collegiate Dictionary to be "a release from an obligation; to dismiss from employment".

Black's Law Dictionary says that a discharge is to "unloose the obligation of a contract; where the employment is broken off before complete execution; to discharge a person is to liberate him from a binding force of an obligation."

Principal Spencer recommended the not giving of tenure to this teacher. The Board of Education did not grant a new contract for a new term of employment to this teacher. Had they done so, they would have locked her in her

employment by granting her tenure. The Board, in its discretion, decided not to give her tenure. This is in accordance with the statutes of the State of Michigan. Other states have this same tenure requirement. Recently, in Ruch vs Greater Egg Harbor Regional School District, New Jersey Commissioner of Education, January 29, 1968, it was held again that the probationary teacher not yet under tenure, was not entitled to a statement of reasons for non renewal of his contract. In Michigan we look at Article 2, Sec. 4 of the Tenure Law, which says that Article 4 (the Article setting forth the procedure for charges to justify just cause for discharge and a hearing, etc.) "shall not apply to any teacher deemed to be in a period of probation", (MSA 15.1984; MCL 38.84). What is the distinction between discharge of a tenure teacher and not rehiring a probationary teacher? It is the continuing contract effect of tenure status, so that the teacher has an employment period with the Board that continues year after year after year, and to be dismissed from that continuing employment is a discharge. Contrary, in a probationary teacher, hired on a year to year basis, the failure to rehire does not violate any obligation of continuing employment, because there was none.

Therefore, if the arbitrator should hold that the August 18th recitation of violation of Article XVIII-F-7 of joint Exhibit #1 is the grievance, and that it was decided on all the four preliminary levels, so that the arbitrator now has jurisdiction at level #5, it is submitted that this teacher was not discharged in accordance with the provisions of this said subsection 7. She was paid in full for her obligation to teach for the school year 1967-68.

Her problem is that she wasn't given tenure by being rehired with a new contract with a new term. Because she was not given this, it is submitted, does not violate the clear language of subsection 7.

VI. DUTY TO MITIGATE DAMAGES

The spokesman for the grievant spoke briefly in the hearing of alleged damages. If damages are to be considered, it is the duty of the grievant to mitigate them in law (53 ALR 924; 41 ALR 2d 955; 75 ALR 2d 473; 10 Mich. Law Review 315; Carter vs State Farm, 350 Mich. 535; Rich vs Daily Creamery Co., 296 Mich. 270). In the spring of 1968, and through July of 1968, third and fourth grade teachers were required at the following named schools, according to their requests filed with the Intermediate Board of Education: Flint Community Schools, Atherton Community Schools, Beecher Schools, Flushing Community Schools, Swartz Creek Schools, Bentley Schools, Kearsley Community Schools, Westwood Heights, Grand Blanc Schools, Davison Community Schools, Mt. Morris Schools and Clio Area Schools.

Many of these schools are closer to the plaintiff's home than assignments in the Carman School District. Instead of taking the most far distant one (Lake Fenton School District), the duty to mitigate damages requires her to take employment closer in, and to avoid all mileage.

Likewise, in the salary scale, the City of Flint and Grand Blanc pay the highest prices. The duty of this grievant was to accept employment with either of those districts at pay scales as high, or higher, than Carman, in order to mitigate the damages in the claim differential between Lake Fenton's low pay scale and her former scale at Carman. The plaintiff did not apply at the higher paying schools to cut down the difference in salary and to fulfill her duty of mitigating damages to the Carman Board of Education.

One other point remains to be discussed. At the end of the hearing, Exhibit #7 was admitted, as identified by the grievant as her lesson plans for the subject year. Previous testimony by Principal Spencer was that he had examined her lesson plans when a substitute teacher was required, so that he could assist the teacher to pick up the class where the grievant left it, and found that there were not entries for certain days. On October 28, 1968, pursuant to previous agreement, he inspected the Exhibit #7 for the subject dates, December 15th and December 18th of 1967. His testimony was from his written notes made on the subject day, that there were "little or no lesson plans for those days". At the present time Exhibit #7 contains a complete, very detailed, and most adequate plans for the same subject days, to-wit: December 15, 1967, and December 18, 1967. Principal Spencer's testimony was that when he inspected the lesson plans book originally, on the subject days, these entries were not in there, and he concludes that they have been put in since December 18, 1967. Therefore, the Board of Education admits that Exhibit #7, Lesson Plans, are now self-serving, were not completely filled in, and are not now in the condition they were in the original state on the subject days. However, a perfect and complete set of lesson plans does not change the problem of the grievant in showing the Board's abuse of discretion in their discretionary power to determine to whom they give tenure in the Carman School District.

Wherefore, Carman School District asks the arbitrator to uphold the decision of each of the levels #1 through #4, and deny the grievance and all remedies.

CARMAN SCHOOL DISTRICT
By Carman Board of Education
By s/ John Wm. Thomas
John Wm. Thomas, Attorney

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN

CARMAN EDUCATION ASSOCIATION

and

CARMAN BOARD OF EDUCATION
FLINT, MICHIGAN

Case 5430 0318 68
Grievance of Thomasine Validzich

REPLY BRIEF SUBMITTED IN BEHALF OF THE CARMAN EDUCATION ASSOCIATION IN SUPPORT OF MRS. THOMASINE VALIDZICH AND CEA GRIEVANCE # 20

In reply to the brief submitted on behalf of the Carman School Board and in reference to the Carman Education Association Grievance # 20, the Association will follow the Respondent's brief where a reply seems warranted under the specific section numbers of said brief.

I. GRIEVANCE HEARD AND DECIDED: In the Association's Demand for Arbitration, we would note that under the section, "Nature of Dispute," the Association did not specify any particular Article or Articles of the Agreement that had been violated, but merely stated that the grievance was based on the unjust release of two teachers by the Carman School Board.

As was indicated during the hearing on this matter, the original grievance form as written, through lack of experience in this area, was not as accurate as it should have been for purposes of resolving the issue. The grievant and the Association agree that the release or discharge was completed in

violation of the Master Agreement then in effect. Therefore, the Association charges that on the basis of procedural and substantive nature of this case, Mrs. Validzich (who's employment relationship had been discontinued as stated in the letter dated March 29, 1968, addressed to her from Mr. Wayne D. Ainsworth, President of the Board of Education) should now be reinstated, with appropriate restitution of damages incurred.

II. UNLAWFUL RELIEF SOUGHT: The Association would claim, in this instance, that the Tenure Act is not relevant to the case before the arbitrator. The Tenure Act places basic responsibilities on Boards of Education and allows basic rights to teachers who have gained tenure status. We see nothing in the Tenure Act or the Public Employment Relations Act that prohibits the extention of any of these rights and privileges to any party to a "Master Agreement" under PERA. The grievance and the arguments in support thereof are based on the language set forth in the Carman Master Agreement which extended particular rights to all teachers covered under the Agreement. Such mutually agreed to extention of rights are not in conflict with the Tenure Act or any other statute, to our knowledge, in the State of Michigan.

III. READING OF ARTICLE 18F-7: From the sense in which this Master Agreement was negotiated, and certainly the intent and understanding of the Association, this article does not include any limitations, specific details, or restrictions; but it does, in fact, grant the right to an arbitrator to determine whether or not the discharge of a teacher who later files a grievance was just or unjust. Further, this language allows consideration of this question of just or unjust discharge to be examined and ruled on from both

the procedural and substantive points of view, since again there is no limiting language that appears here.

IV. WAS THE BOARD'S DECISION WITHIN THE BOARD'S DISCRETION: Counsel for the Board attempts to make a point here that the school district is not liable for the acts of its agents or employees. It would not appear that in any of the cases cited to support this conclusion, a set of similar circumstances would be evident. In short, those cases did not deal with a violation of a Master Agreement between a school board and a teacher bargaining unit.

Beginning at the bottom of page six (6) of the Board's Brief, it would appear that a point is being held out that possibly the Board took no such action as to terminate employment, discharge or dismiss Mrs. Validzich. Again, I would refer to the above mentioned letter to Mrs. Validzich, from Mr. Ainsworth, dated March 29, 1968. This should leave little doubt as to the Board's action.

V. WAS NOT DISCHARGED: Now the Board relies on some technical argumentation based solely on semantics. First, it would be our contention that Black's Law Dictionary and the definitions found therein quite possibly did not consider a definition of the word "discharge" that would adequately treat the rather unique and peculiar employment relationship that has, and still does, exist between school boards and teachers. In most cases, this relationship is based on the mutual signing of an individual contract on an annual basis. This is the case not only with probationary teachers, but with tenure teachers as well. The Tenure Act itself gives evidence to a

continuing employment concept when it puts requirements on the relationship as to deadlines that must be adhered to by both parties when it comes to notification of dismissal or resignation. In other words, where a teacher has once been employed by a school board and that teacher has not at some time tendered a resignation, then a discontinuation of this employment relationship initiated on the part of the employer would constitute a "discharge" in the true sense of the word, and certainly in the mind of the employee who wishes and plans to continue employment in a school district for the next and future school years.

The term "discharge" appears in the Tenure Act and does not in any way qualify its meaning along the lines suggested by the Board's counsel in his brief. Quite to the contrary, the Tenure Act has as its primary consideration, a hearing and appeal procedure designed and most often used to consider appeals relative to the "discharge" of a teacher at the end of an individual contract term, not by any means restricted to the discharge of a teacher only during the term of her individual contract. Finally, I would point out the use of three specifically different terms in the Master Agreement which appear but which all have the same ultimate meaning, understanding, and affect in this case: (1) In joint Exhibit #1, the Master Agreement, Article XI, Section E, "In the event a probationary teacher is not continued in employment....." (2) Mr. Ainsworth's letter, dated March 29, 1968, to Mrs. Validzich, "voted to terminate your services June 7, 1968, and not to offer you a contract for the 1968-69 school year..." (the last part of that phrase recognizes that there is expectation on the part of the employee that a continuation of the employment relationship would continue during the next school year). (3) Article XVIII, Section F,

Section 7, "If any non-tenure teacher for whom a grievance is sustained shall be found to have been unjustly discharged....." These make further argumentation on semantic grounds a flimsey, false, and unjustifiable basis for consideration on this matter.

VI. DUTY TO MITIGATE DAMAGES: The Board contends at this point that there were a number of schools in the area that had third and fourth grade openings through July of 1968. There has been no proof submitted at any time that this condition in fact did exist; and on that basis, the Association would question such a statement. Further, in paragraph three (3) of the Board's brief, there appears a statement that the plaintiff (grievant) did not apply at the higher paying schools.....; and again the Association would challenge this statement on the basis of no oral or written testimony or proof shown that this, in fact, was true.

Certainly there are many conditions of employment that must be considered by a prospective employee before a decision to accept a contract can be made. Salary and the costs of transportation to and from the place of employment are but two of these considerations. These two items do, however, represent items that can reasonably have dollar amounts attached to them. It was Mrs. Validzich's intention, considering all conditions of employment, to remain in the Carman School District. When this became impossible, then many factors came into play relative to the ultimate decision as to where she would teach.

The fact that she sought and took employment at all should be sufficient proof that she accepted all reasonable responsibility to minimize the financial

damage done her as a result of her discontinued employment with the Carman School District.

Now to quickly remark on the last paragraph under this section of the Board's brief, which deals with the lesson plan book belonging to Mrs. Validzich. There is conflicting testimony, although at the time of the hearing Mr. Spencer was by no means sure of his recollection and claim in regard to the lesson plan book and the two dates of December 15th and December 18th in question. If there was a problem here, and we make no admittance that there was, it represents only one isolated instance. We would not intend to argue that point any further, but would firmly maintain that this lesson plan book will stand on its own merits and inspection. It is an outstanding example of this one particular teaching tool; and I'm sure that if Mr. Spencer had been seriously concerned with the inadequacy of the book, he would have again inspected it on other occasions to see if improvements were made, which he did not do, erasing in our mind any thought that he was not satisfied with the work represented in that book.

Therefore, on the basis of the hearing on this grievance, the original brief submitted in behalf of the grievant and this reply to the brief submitted in behalf of the Board, the Association asks the arbitrator to uphold the claim of the grievant and support the resolution sought by the Association on Carman Education Association Grievance # 20.

By Thomas J. Patterson

Thomas J. Patterson, Counsel for
Carman Education Association
Michigan Education Association
P.O. Box 673
East Lansing, Michigan

Dated: November 8, 1968

(COPY)

VOLUNTARY LABOR ARBITRATION TRIBUNAL

AMERICAN ARBITRATION ASSOCIATION ADMINISTRATOR

In the Matter of the Arbitration between

Carman Education Association

-and-

Carman Board of Education
Flint, Michigan
Grievance #20

Case No. 5430 0318 68

Thomasine Validzich
Grievance #20

Reply Brief

* * * * * * * * * * * * * * * * * * *

TO: Carman Education Association
Harold A. Murray
Tom Patterson

Carman School District
John Wm. Thomas, Attorney

American Arbitration Association
Howard A. Cole, Esq., Arbitrator

NOT SATISFACTORY vs FOR CAUSE

The March 29th letter to the alleged grievant was intended by the Carman Board of Education to be Article II, Sec. 3 letter of the Tenure Act, and the Legislature has determined the wordage of such letter as to be informing the probationary teacher "whether or not his work has been satisfactory.".

The 'for cause' requirement to dismiss a teacher is, again, the words of the Legislature in Article IV of the Tenure Act, and was not intended by the Legislature to be a synonym, or have the equal and same meaning as the words 'satisfactory' in Article II, Sec. 3, for the probationary teacher. The Carman Board of Education has no intention in this contract of giving the tenure teachers rights to a probationary teacher, in violation of the Tenure Law, or as a set of rights for the probationary teacher exclusive of the Tenure Law. See Attor-

ney General's Opinion 4583, that where a Board of Education desires a power (for instance, to give a probationary teacher the Tenure Law benefits), that Board is prohibited from doing so under the rule of statutory construction in Sebewaing Industries, Inc. vs Village of Sebewaing, 337 Mich. 530, where the canon expressed by the Michigan Supreme Court, that when the Legislature has made express provision of the rights of the tenure teacher and the rights of a non tenure teacher, or probationary teacher, this excludes any possibility of the Board of Education having an implied authority to change these rights (such as attempting to give a probationary teacher rights of a tenure teacher). The Legislature has, on many occasions, considered the rights that a tenure teacher is to have, add the rights a probationary teacher is to have, and it cannot be assumed now that the Legislature intended to confer an implied authority on the Board of Education to grant additional tenure or probationary rights and privileges. Reichert vs Peoples State Bank for Savings, 265 Mich. 668.

ALLEGED PROCEDURAL VIOLATION

It is the position of the Board of Education that if the Board has complied with the literal words of Article XI of the contract, and procedurally did the things that they should have thereunder, the Board has then fulfilled its obligation to this alleged grievant, and there is no violation of this contract.

To obtain the artful interpretation of Article XI, desired by the grievant, a few extra choice words will have to be added to the present language. In A is the requirement that the work performance of a teacher shall be evaluated in writing. There is no requirement that the probationary teacher shall have three work performance evaluations in writing. The first sentence simply

says that the work performance of the teacher shall be evaluated in writing, and once the Board does that it has fulfilled that sentence. Its second sentence requires the probationary teacher to be evaluated at least three times during the school year. If the Board has caused a probationary teacher to be evaluated three times in the school year, it has performed that sentence. In D, "the" written evaluation then must be submitted to the teacher for her to review. What is submitted to the teacher? --"the written evaluation". When shall it (the one) be submitted? --At the time of SUCH PERSONAL INTERVIEW (not interviews). Thus, we see there must be one written evaluation, and we see that the written evaluation is to be submitted to the teacher at the time of such interview (not at the time of each of the interviews).

This interpretation of Article XI is borne out with the language in E. It connotes that the teacher wouldn't have known all the information in the final evaluation, because it provides that the information not known by the teacher is now to be made known to the teacher, and that the teacher should not have an opportunity to submit additional information to the Superintendent. If, as grievant alleges, there is a requirement for three written evaluations, each of which is to be made known to the probationary teacher in each of the three following personal interviews, then there would be no meaning for these words in E:

> "... any information not previously made known to, and discussed with, the probationary teacher..."

If the grievant wants to read Article XI as she argues, then the grievant should have proposed apt verbiage in the bargaining sessions and endeavored to get the Board of Education to agree. All the present language

is verbatim from the proposed language by the CEA, except for three words in the Article. The MEA and CEA proposed this language, put it on the bargaining table, and got the Board to accept it (except for three words). Therefore, if there is any ambiguity in its clauses, the ambiguity is to be read against the one who proposed the language.

This additional argument is to be incorporated and made a part of the original Brief of the Carman Board of Education.

CARMAN SCHOOL DISTRICT

By Carman Board of Education

By s/ John Wm. Thomas
John Wm. Thomas, Attorney

ANSWER TO THE CARMAN CASE
FOURTH SEMINAR

Skim the Arbitrator's Award after you have analyzed the arguments of briefs from both sides.

KEY QUESTIONS

HAVE YOU DISCUSSED THESE "KEY QUESTIONS"?
If not, do so and then read the award.

1. Is the issue as set forth in the Arbitration Demand arbitrable?

2. May the arbitrator consider any provision of the agreement not stated in the grievance, if it has a bearing on the issue?

3. Was the release of the grievant in violation of the Agreement? Was there a procedural and/or substantive violation of Article XI-E (the original grievance claim)?

4. Does Article X, Section D of the Agreement apply to a nontenured teacher?

5. Does the term "discharge" in Article XVIII, F-7 bar consideration of a termination termed a "nonrenewal?"

6. Does the Tenure Act prohibit the extension of any of the rights contained therein to any party covered under a negotiated agreement?

7. Was there just cause for the action of the board? Did the board show sufficient proof? Under the Tenure Act does the board have to show just cause?

8. Do the teacher's evaluation forms establish performance or conduct of a nature to warrant termination?

9. Does the Agreement prescribe the remedy which the arbitrator must respect?

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between	AAA No. 5430 0318 68
THE CARMAN EDUCATION ASSOCIATION	Grievance No. 20
and	and Grievance No. 21
THE BOARD OF EDUCATION OF THE CARMAN SCHOOL DISTRICT, Flint, Michigan	

DECISION OF ARBITRATOR

FOREWORD

Hearings in these grievances were held before the undersigned arbitrator at the Carman School District's Administration Building, Flint, Michigan, on October 23, November 2, and November 9, 1968. Each party filed a posthearing brief and a reply brief in each grievance.

The spokesman for the Association was Thomas J. Patterson of the Michigan Education Association. The spokesman for the Board was John William Thomas, Attorney.

CONTRACTUAL AND STATUTORY PROVISIONS

Article X (Professional Behavior), Section D of the applicable September 1, 1967 Agreement between the parties provided:

> "No teacher shall be disciplined, reprimanded, reduced in rank, or compensation, or deprived of any professional advantage without just cause. Any such discipline, reprimand,or reduction in rank, compensation or advantage, including adverse evaluation of teacher performance asserted by the Board, or representative thereof, shall be subject to the professional grievance procedure hereinafter set forth. All information forming the basis for disciplinary action will be made available to the teacher and the Association."

Article XI (Teacher Evaluation) of the Agreement provided:

> "A. The work performance of all teachers shall be evaluated in writing. Probationary teachers shall be evaluated at least three times during the school year. Tenure teachers shall be evaluated at least once every two years.
>
> "B. Evaluations shall be conducted by the teacher's immediate supervisor, or an administrator working in the same building or otherwise familiar with the teacher's work.
>
> "C. All monitoring or observation of the work of a teacher shall be conducted openly and with full knowledge of the teacher. The use of eavesdropping, closed circuit television, public address or audio systems, and similar surveillance devices shall be strictly prohibited.

"D. A copy of the written evaluation shall be submitted to the teacher at the time of such personal interview, or within ten (10) days thereafter, and the teacher shall have the opportunity to review the evaluation report with the evaluator, if they so desire.

"E. No later than March 15 of each probationary year, the final written evaluation report will be furnished to the Superintendent covering each probationary teacher. A copy shall be furnished to the teacher. If the report contains any information not previously made known to, and discussed with, the probationary teacher, the teacher shall have an opportunity to submit additional information to the Superintendent. In the event a probationary teacher is not continued in employment, the Board will advise the teacher of the reasons therefor, and his rights under the Tenure Law, in writing.

"F. Each teacher shall have the right upon request to review the contents of his own personnel file, excluding college credentials, letters of recommendation, and medical records."

Article XVIII of the Agreement was entitled "Professional Grievance Procedure". It defined "grievance" as "an action instituted on the belief that there has been a violation, misinterpretation, or misapplication of any provision of this Agreement, or any existing rule, order, or regulation of the Board, or any other provision of law relating to wages, hours, terms, or conditions of employment." It provided for processing of a grievance at four described levels, and it further provided for submission to arbitration of a grievance not satisfactorily resolved at Level Four. Article XVIII, Section F - 7 provided:

"If any non-tenure teacher for whom a grievance is sustained shall be found to have been unjustly discharged, he shall be reinstated with full reimbursement of all professional compensation lost. If he shall have been found to have been improperly deprived of any professional compensation or advantage, the same or its equivalent in money shall be paid to him."

Article XIX (Miscellaneous Provisions), Section E provided that "If any provision of this Agreement or any application of the Agreement to any employee or group of employees shall be found contrary to law, then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law, that all other provisions or applications shall continue in full force and effect."

The arbitrator's attention has been directed to several provisions of the Michigan Teacher Tenure Act as amended (including amending Act No. 216 of the Public Acts of 1967, effective July 10, 1967). Article 2 of the Act makes general provision for "a period of probation" for teachers during their first two school years of employment by a controlling board. It also provides: "At least sixty [60] days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory: Provided, That failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory, And: Provided further, That any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified at least sixty [60] days before the close of the school year that his services will be discontinued."

Article 3 of the Act states, in part, that "After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act." Article 4 of the Act declares that "Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice,

hearing, and determination thereof, as are hereinafter provided...." Article 5 deals with the effect of resignation or leave of absence, and Article 6 covers appeal to the State Tenure Commission. It is provided (in Article 2) that "Articles 4, 5 and 6 shall not apply to any teacher deemed to be in a period of probation."

- - - - - - - - - - - - - -

GRIEVANCE NO. 20

The grievant herein is Mrs. Tomasine Validzich. She was employed as a third grade teacher at Carman's Dillon Elementary School for the entire 1967-68 school year. Prior thereto, she had taught for a total of four years in four different parochial and public schools, including Carman's Fenton Lawn Elementary School in the school year 1965-66. The Board decided not to offer her a contract for the 1968-69 school year. Its decision in this regard was communicated to her in a letter dated March 29, 1968 over the signature of Wayne D. Ainsworth, President of the Board. The letter read:

> "Please be advised that The Carman Board of Education in official session March 27, 1968 and in accordance with The Michigan Teacher Tenure Act (State of Michigan, Act. No. 4 of the Public Acts of the Extra Session of 1937, as amended, voted to terminate your services June 7, 1968 and not to offer you a contract for the 1968-69 school year, on the ground that your work is not satisfactory."

Grievance No. 20 was filed by Mrs. Validzich under date of April 16, 1968. It reads in here relevant part:

> "STATEMENT OF THE GRIEVANCE: I feel that I was unjustly released from the Carman School District.
>
> "REMEDY REQUESTED: Article XI, Section E of this years contract states that I am entitled to hear reasons for my dismissal.

"In the event a probationary teacher is not continued in employment, the Board will advise the teacher of the reasons therefore, and his rights under the Tenure Law, in writing." I am requesting this right be given me."

On August 20, 1968, a Demand for Arbitration was received from the Association. It demanded arbitration of Grievance No. 20 and sought the following remedy: "Full reinstatement with full reimbursement for compensation lost." In its presentation in arbitration, the Association has requested: that Mrs. Validzich be found to have been unjustly discharged by both procedural and substantive grounds; that, since she is currently under contract with another school district, she be offered a contract to teach in the Carman School District for the 1969-70 school year; that said contract reflect on the salary schedule to be in effect at that time, with credit for six years of previous teaching experience; that she be reimbursed for professional compensation lost in the amount of $926.00, representing the difference between what she would be receiving this year under the Carman salary schedule and what she is receiving under her present contract; that she also be paid $216.00 for transportation inconvenience; and, that her 1969-70 contract be offered no later than June 1, 1969, and the financial settlement be paid to her no later than ten days following receipt by the parties of the arbitrator's award.

The Board has denied all alleged procedural violations. It has contended that the arbitrator has no jurisdiction over alleged violation of Article XVIII-F-7 of the Agreement, arguing that the grievance cited only Article XI-E, and that the alleged Article XVIII-F-7 violation was never heard or determined in Levels 1 through 4 of the grievance procedure. It has maintained in effect that Article

XVIII-F-7 protects a probationary teacher only for the period of that teacher's individual contract. It has insisted that Mrs. Validzich was not "discharged" but simply not rehired and given tenure. It has contended that the relief here sought would conflict with the Tenure Act, which it says gives a higher status to tenure teachers and, by legislative pre-emption, excludes probationary teachers from tenure and the reasonable and just cause dismissal rule. It has declared that the Board's decision was within its discretion. Finally, it has claimed that Mrs. Validzich did not fulfill her duty to mitigate damages.

Discussion

The basic claim of Mrs. Validzich's written grievance was that she was unjustly released. The grievance citation of Article XI-E was in connection with the there requested remedy. There is no good reason to regard the grievance citation of that single Agreement provision as having the effect of barring consideration of other Agreement provisions bearing on the basic claim of the grievance. In the opinion of the arbitrator, the grievance's "unjustly released" claim impliedly charged violation of Article X-D and Article XVIII-F-7 of the Agreement, notwithstanding the absence of specific grievance reference to those provisions.

Mrs. Validzich was a teacher employed by the Board. In part, her employment relationship with the Board rested upon her individual contract for the 1967-68 school year. But, there was more to the employment relationship than that. She had rights and obligations under the collective bargaining Agreement and as a member of the collective bargaining unit. And, she had a contingent

right to continued employment under the Tenure Act. Had the Board not acted "to terminate your [Mrs. Validzich's] services June 7, 1968 and not to offer you [Mrs. Validzich] a contract for the 1968-69 school year, on the ground that your [Mrs. Validzich's] work is not satisfactory", she would have continued in the Board's employ. By the Board's action, she was involuntarily separated from the Board's employ. It is clear to the arbitrator that, even though her termination was not effective until the end of the 1967-68 school year, she was nevertheless "discharged" within the meaning of Article XVIII-F-7 of the Agreement. Further, it is clear to the arbitrator that she was deprived of "professional advantage" and was the subject of "adverse evaluation of teacher performance asserted by the Board" within the meaning of Article X-D of the Agreement. Viewed under either or both of these Agreement provisions, the Board's action must be examined against the Agreement provided standard of just cause - unless application of such a standard here would be contrary to law (see Article XIX-E of the Agreement).

The arbitrator does not believe that application of the Agreement provided just cause standard here would be contrary to law. The Tenure Act establishes certain statutory rights and procedures for tenure teachers, which by its terms are not applicable to probationary teachers. A Board of Education has no power to extend such statutory rights and procedures to probationary teachers, nor does it have power to eliminate the statutory probationary period. However, the Tenure Act does not say that a Board of Education is without power to enter into a collective bargaining agreement providing contractual rights and procedures for probationary teachers, thereby according protection to such teachers beyond

that accorded to them by statute. The Board's position to the contrary is premised upon its view that, by the Tenure Act, "The Legislature has usurped and pre-empted this field." The arbitrator sees no such pre-emption intent in the Tenure Act. While it appears that the Legislature intended to increase job security for tenure teachers and only for tenure teachers through the vehicle of a statute, it does not appear that there was a legislative intent to prohibit boards of education from voluntarily increasing job security for nontenure teachers through the vehicle of a collective bargaining agreement.

On the question of whether there was just cause for the considered action against Mrs. Validzich, the Board must be held to have the burden of proof. This is in accordance with a principle well established in the "common law" of collective bargaining agreements. The Board has not met its just cause burden in this instance. The proof of record against Mrs. Validzich in this regard consists essentially of the testimony of the Dillon Elementary Principal, Robert Spencer, and copies of three written evaluation reports by him concerning Mrs. Validzich (dated October 10, 1967, December 4, 1967, and February 2, 1968). The arbitrator does not think that the parties' interests would be well served by a detailed description of that evidence in this Opinion. It is enough to say that, after careful study of the entire record, he finds that the concrete facts adduced fall short of establishing performance or conduct of a nature warranting termination of Mrs. Validzich, and he finds that she was unjustly discharged.

The remedy must be the one which the parties have expressly prescribed in Article XVIII-F-7 of the Agreement. The plain requirements of this provision must be respected by the arbitrator, notwithstanding the different remedy

requested in the grievance as written. He must therefore order that Mrs. Validzich be reinstated with full reimbursement of all professional compensation lost. Under all the circumstances, it seems appropriate that her reinstatement be implemented by offer of a contract to teach in the Carman School District for the 1969-70 school year, at the salary to which she would have been entitled in that school year had it not been for her June 1968 termination. As for the amount of her professional compensation lost, that cannot be determined with certainty until the end of the current school year. At the end of the current school year, she should be reimbursed for the difference between what she earned during the current school year and what she would have earned during the current school year had it not been for her June 1968 termination; Provided, that in computing her earnings for the current school year, deduction should be made at the rate of ten (10) cents per mile for such additional mileage as may be required of her for travel between her residence and her school. It is noted that, while the Board has alleged failure by Mrs. Validzich to mitigate damages, this allegation has not been supported by probative proof.

- - - - - - - - - - - - - -

Howard A. Cole
Arbitrator

January 31, 1969

Ann Arbor, Michigan

C

TECHNIQUES FOR TRAINING MANAGERS AND SUPERVISORS

Assembled by

Judy L. Meadow, Senior Personnel Analyst

for

Department of Public Works
The City of Los Angeles

CITY OF LOS ANGELES
CALIFORNIA

HARRY H. JOHNSON
PERSONNEL DIRECTOR

DEPARTMENT OF
PUBLIC WORKS
BUREAU OF PERSONNEL
100 CITY HALL
LOS ANGELES CALIF. 90012
485-5781

TOM BRADLEY
MAYOR

I.

November 1, 1974 PERSONNEL DIRECTIVE NO. 34

TO: Heads of the Bureaus and Offices
of the Department of Public Works

SUBJECT: GRIEVANCE PROCEDURES

On July 1, 1974 the first Memoranda of Understanding were signed by representatives of the City of Los Angeles and recognized employee organizations representing various employee representation units. All of the Memoranda of Understanding contain provisions for grievance procedures and grievance representation. The signing of the Memoranda of Understanding resulted in the adoption of three separate grievance procedures; one for employees who are in recognized employee representation units other than those represented by the Engineers and Architects Association; one for employees who are represented by the Engineers and Architects Association; and one for non-represented employees.

On August 30, 1974 the Board of Public Works instructed the Personnel Director Public Works to issue new grievance procedures to replace the previous step-by-step procedure adopted by the Board on February 5, 1968. These three new procedures supplement the grievance procedures in the Memoranda of Understanding in that they provide a step-by-step method of processing a grievance in the Department of Public Works. Attached are copies of each procedure and copies of forms to be used in filing grievances; Form General 162 - Grievance Initiation; Form General 163 - Grievance Response; and Form General 164 - Grievance Appeal. The following gives a brief explanation of the three procedures and grievance representation. Also, attached hereto are the complete grievance procedures in detail.

Grievance Procedure For Represented Employees

This procedure is to be used by all employees who are in units represented by a certified employee organization with the exception of those employees who are in a unit affiliated with the Engineers and Architects Association. This procedure provides for one informal discussion, three formal levels of review and binding arbitration.

(over)

Grievance Procedure For Units Affiliated With The Engineers And Architects Association

This procedure is similar to the above procedure except that after the third level of review, it provides a choice of binding arbitration or a review by the Civil Service Commission. Once the selection of arbitration or review by the Civil Service Commission is made, this selection is irrevocable. While the decision of an arbitrator is binding, the decision of the Civil Service Commission shall be advisory and must be acted upon by the Board of Public Works.

Grievance Procedure For Non-Represented Employees

The grievance procedure for non-represented employees is exactly the same as the grievance procedure for represented employees except the decision of the Board of Public Works (third level of review) shall be final.

Grievance Representation For Represented Employees

A grievant may be represented by a representative of his choice in the informal discussion of his grievance with his immediate supervisor and at all formal review levels.

The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is a member of the same unit and same Union as the grievant and is employed by the Department of Public Works within a reasonable distance from the work location.

The Union and Associations may designate a reasonable number of grievance representatives who must be members of the Unit and shall provide the Department of Public Works with a written list of employees who have been designated as employee representatives. A grievance representative, if so requested, may represent a grievant at all levels of the grievance procedure. A complete explanation of grievance representation is contained in the attached procedures.

Grievance Representation For Non-Represented Employees

A non-represented employee who files a grievance may be represented by a representative of his choice in the informal discussion with his immediate supervisor and at all formal levels. The grievant and his representative may have a reasonable amount of paid time off for this purpose. However, the representative will receive paid time off only if he is employed by the Department of Public Works and is employed within a reasonable distance of the work location of the grievant.

These grievance procedures attached hereto are designed to serve all employees in the Department of Public Works. They insure their rights and delineate their responsibilities. Each step of the grievance procedure including arbitration is defined and should provide for the proper settlement of complaints.

Harry H. Johnson

HARRY H. JOHNSON, Director
Bureau of Personnel

HHJ-SF:pg

W. A. No. 5491

Attachments

November 1, 1974
(Revised 11-25-74)

PERSONNEL DIRECTIVE NO. 34

CITY OF LOS ANGELES
DEPARTMENT OF PUBLIC WORKS
GRIEVANCE PROCEDURE

NON - REPRESENTED EMPLOYEES

The following grievance procedure is intended for use by all employees of the Department of Public Works who are not represented by recognized employee organizations having a Memoranda of Understanding with the City of Los Angeles.

I. Definitions

A grievance is defined as any dispute concerning the application of Departmental rules and regulations governing personnel practices or working conditions over which the Board of Public Works has jurisdiction.

II. Responsibilities and Rights

A. Nothing in this grievance procedure shall be construed to apply to matters for which an administrative remedy is provided before the Civil Service Commission. Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

B. No grievant shall lose his right to process his grievance because of Management-imposed limitations in scheduling meetings.

C. The grievant has the responsibility to discuss his grievance informally with his immediate supervisor. The immediate supervisor will, upon request of a grievant, discuss the grievance with him at a mutually satisfactory time. The grievant may be represented by a representative of his choice in the informal discussion with his immediate supervisor, and in all formal review levels.

D. The time limits between steps of the grievance procedure provided herein may be extended by mutual agreement, or by mutual agreement, the grievant and Management may waive one level of review from this grievance procedure.

(OVER)

Grievance Procedure
Non-Represented Employees

E. The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is employed by the Department of Public Works within a reasonable distance from the grievant's work location.

III. Procedure

The grievance procedure shall be as follows:

A. Step 1 - Informal Discussion. The grievant shall discuss his grievance with his immediate supervisor on an informal basis in an effort to resolve the grievance and if not presented to immediate supervisor within ten (10) calendar days following the day the grievable incident occurred, it shall be considered waived. The immediate supervisor shall respond within five (5) calendar days following his meeting with the grievant.

B. Step 2 - Immediate Supervisor. If the grievance is not settled at Step 1, the grievant may within seven (7) calendar days of his receipt of the oral grievance response reduce his grievance to writing and submit it to his immediate supervisor.

The supervisor, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of his receipt of the Grievance Initiation form.

C. Step 3 - Bureau Head. If the grievance is not settled at Step 2, the grievant may within seven (7) calendar days of his receipt of the written grievance response file a written appeal with the appropriate Bureau Head.

The Bureau Head or his designee, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of the Grievance Appeal form.

D. Step 4 - Board of Public Works. If the grievance is not settled at Step 3, the grievant may within seven (7) calendar days file a written appeal with the Secretary Board

Grievance Procedure
Non-Represented Employees

of Public Works. The Secretary Board of Public Works shall forward a copy of the Grievance Appeal to the Grievance Commissioner for investigation of the merits of the grievance. This investigation may include a hearing at which the Grievance Commissioner or his designee will act as Hearing Officer and receive oral and/or written arguments on the merits of the grievance.

The Hearing Officer shall then prepare a written report containing recommendations for response to the grievance for submission to the Board of Public Works. The Board, if in agreement with the recommendations, will adopt the recommendations and authorize that an appropriate response be given to the grievant. The Board shall reserve the right to modify the Hearing Officer's recommendations as it deems necessary.

The Secretary Board of Public Works shall render to the grievant and his representative, if any, a written decision of the Board within thirty (30) calendar days from the date the hearing was held. This decision shall be final and binding.

The grievance forms will be as follows:

Grievance Initiation: Form General 162

Grievance Response: Form General 163

Grievance Appeal: Form General 164

Grievances not appealed within the prescribed time limits shall be considered waived. Grievances not answered within a prescribed time may be appealed to the next step.

HHJ-MJB:pg

W. A. No. 5491

November 1, 1974 PERSONNEL DIRECTIVE NO. 34

CITY OF LOS ANGELES
DEPARTMENT OF PUBLIC WORKS
GRIEVANCE PROCEDURE

REPRESENTED EMPLOYEES

The following grievance procedure is intended for use by all employees of the Department of Public Works who are represented by recognized employee organizations having a Memorandum of Understanding with the City of Los Angeles but excluding employees represented by Engineers and Architects Association.

I. Definitions

A grievance is defined as any dispute concerning the interpretation or application of this written Memorandum of Understanding or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this Memorandum of Understanding. An impasse in meeting and conferring upon the terms of a proposed Memorandum of Understanding is not a grievance.

II. Responsibilities and Rights

A. Nothing in this grievance procedure shall be construed to apply to matters for which an administrative remedy is provided before the Civil Service Commission. Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

B. No grievant shall lose his right to process his grievance because of Management-imposed limitations in scheduling meetings.

C. The grievant has the responsibility to discuss his grievance informally with his immediate supervisor. The immediate supervisor will, upon request of a grievant, discuss the grievance with him at a mutually satisfactory time. The grievant may be represented by a representative of his choice in the informal discussion with his immediate supervisor, and in all formal review levels.

(OVER)

D. The time limits between steps of the grievance procedure provided herein may be extended by mutual agreement, or by mutual agreement, the grievant and Management may waive one level of review from this grievance procedure.

E. Management shall notify the Union of any formal grievance filed that involves the interpretation and/or application of the provisions of this Memorandum of Understanding, and a full-time Union Staff Representative shall have the right to be present at any formal grievance meeting concerning such a grievance. If the full-time Union Staff Representative elects to attend said grievance meeting, he shall inform the Departmental Employee Relations Representative or the appropriate Bureau Employee Relations Representative of his intention. The Union will be notified of the resolution of all other formal grievances.

F. The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is a member of the same unit and same Union as the grievant and is employed by the Department of Public Works within a reasonable distance from the grievant's work location.

III. Procedure

The grievance procedure shall be as follows:

A. Step 1 - Informal Discussion. The grievant shall discuss his grievance with his immediate supervisor on an informal basis in an effort to resolve the grievance within ten (10) calendar days following the day the grievable incident occurred. The immediate supervisor shall respond within five (5) calendar days following his meeting with the grievant.

B. Step 2 - Immediate Supervisor. If the grievance is not settled at Step 1, the grievant may within seven (7) calendar days of his receipt of the oral grievance response reduce his grievance to writing and submit it to his immediate supervisor.

The supervisor, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of his receipt of the Grievance Initiation form.

C. Step 3 - Bureau Head. If the grievance is not settled at Step 2, the grievant may within seven (7) calendar days of his receipt of the written grievance response file a written appeal with the appropriate Bureau Head.

The Bureau Head or his designee, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of the Grievance Appeal form.

D. Step 4 - Board of Public Works. If the grievance is not settled at Step 3, the grievant may within seven (7) calendar days file a written appeal with the Secretary Board of Public Works. The Secretary Board of Public Works shall forward a copy of the Grievance Appeal to the Grievance Commissioner for investigation of the merits of the grievance. This investigation may include a hearing at which the Grievance Commissioner or his designee will act as Hearing Officer and receive oral and/or written arguments on the merits of the grievance.

The Hearing Officer shall then prepare a written report containing recommendations for response to the grievance for submission to the Board of Public Works. The Board, if in agreement with the recommendations, will adopt the recommendations and authorize that an appropriate response be given to the grievant. The Board shall reserve the right to modify the Hearing Officer's recommendations as it deems necessary.

The Secretary Board of Public Works shall render to the grievant and his representative, if any, a written decision of the Board within thirty (30) calendar days from the date the hearing was held.

E. Step 5 - Arbitration. If the written decision at Step 4 does not settle the grievance, the grievant may within seven (7) calendar days, following the date of service of the written decision of the Board of Public Works, file a written request for arbitration.

If such written notice is served, the parties shall meet for the purpose of selecting an arbitrator from a list of seven arbitrators furnished by the Employee Relations Board within seven (7) calendar days following receipt of said list.

Grievance Procedure
Represented Employees

1. Arbitration of a grievance hereunder shall be limited to the formal grievance as originally filed by the employee to the extent that said grievance has not been satisfactorily resolved. The proceedings shall be conducted in accordance with applicable rules and procedures adopted or specified by the Employee Relations Board, unless the parties hereto agree to other rules or procedures for the conduct of such arbitration. The fees and expenses of the arbitrator shall be shared equally by the parties involved, it being mutually understood that all other expenses including, but not limited to, fees for witnesses, transcripts, and simicosts incurred by the parties during such arbitration, will be the responsibility of the individual incurring same.

2. The decision of an arbitrator resulting from any arbitration of a grievance hereunder shall be final and binding.

3. The decision of an arbitrator resulting from any arbitration of grievances hereunder shall not add to, subtract from, or otherwise modify the terms and conditions of this Memorandum of Understanding.

The grievance forms will be as follows:

Grievance Initiation: Form General 162

Grievance Response: Form General 163

Grievance Appeal: Form General 164

Grievances not appealed within the prescribed time limits shall be considered waived. Grievances not answered within a prescribed time may be appealed to the next step.

HHJ-MJB:rc

W. A. No. 5491

November 1, 1974 PERSONNEL DIRECTIVE NO. 34

CITY OF LOS ANGELES
DEPARTMENT OF PUBLIC WORKS
GRIEVANCE PROCEDURE

ENGINEERS AND ARCHITECTS ASSOCIATION (EAA)

The following grievance procedure is intended for use by all employees of the Department of Public Works who are represented by the Engineers and Architects Association in any of the following Representation Units:

1. Professional Engineer and Scientific Representation Unit;

2. Supervisory Professional Engineer and Scientific Representation Unit;

3. Supervisory Technical Representation Unit; and

4. Technical Representation Unit.

I. Definitions

A grievance is defined as any dispute concerning the interpretation or application of this written Memorandum of Understanding or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this Memorandum of Understanding. An impasse in meeting and conferring upon the terms of a proposed Memorandum of Understanding is not a grievance.

II. Responsibilities and Rights

A. Nothing in this grievance procedure shall be construed to apply to matters for which an administrative remedy is provided before the Civil Service Commission. Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.

B. No grievant shall lose his right to process his grievance because of Management-imposed limitations in scheduling meetings.

C. The grievant has the responsibility to discuss his grievance informally with his immediate supervisor. The immediate

- over -

supervisor will, upon request of a grievant, discuss the grievance with him at a mutually satisfactory time. The grievant may be represented by a representative of his choice in the informal discussion with his immediate supervisor, and in all formal review levels.

D. The time limits between steps of the grievance procedure provided herein may be extended by mutual agreement, or by mutual agreement, the grievant and Management may waive one level of review from this grievance procedure.

E. Management shall notify the Association of any formal grievance filed that involves the interpretation and/or application of the provisions of this Memorandum of Understanding, and a full-time Association Staff Representative shall have the right to be present at any formal grievance meeting concerning such a grievance. If the full-time Association Staff Representative elects to attend said grievance meeting, he shall inform the Departmental Employee Relations Representative or the appropriate Bureau Employee Relations Representative of his intention. The Association will be notified of the resolution of all other formal grievances.

F. The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is a member of the same unit and same Union as the grievant and is employed by the Department of Public Works within a reasonable distance from the grievant's work location.

III. Procedure

The grievance procedure shall be as follows:

A. Step 1 - Informal Discussion. The grievant shall discuss his grievance with his immediate supervisor on an informal basis in an effort to resolve the grievance within ten (10) calendar days following the day the grievable incident occurred. The immediate supervisor shall respond within five (5) calendar days following his meeting with the grievant.

B. Step 2 - Immediate Supervisor. If the grievance is not settled at Step 1, the grievant may within seven (7) calendar

days of his receipt of the oral grievance response reduce his grievance to writing and submit it to his immediate supervisor.

The supervisor, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of his receipt of the Grievance Initiation form.

C. Step 3 - Bureau Head. If the grievance is not settled at Step 2, the grievant may within seven (7) calendar days of his receipt of the written grievance response file a written appeal with the appropriate Bureau Head.

The Bureau Head or his designee, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of the Grievance Appeal form.

D. Step 4 - Board of Public Works. If the grievance is not settled at Step 3, the grievant may within seven (7) calendar days file a written appeal with the Secretary Board of Public Works. The Secretary Board of Public Works shall forward a copy of the Grievance Appeal to the Grievance Commissioner for investigation of the merits of the grievance. This investigation may include a hearing at which the Grievance Commissioner or his designee will act as Hearing Officer and receive oral and/or written arguments on the merits of the grievance.

The Hearing Officer shall then prepare a written report containing recommendations for response to the grievance for submission to the Board of Public Works. The Board, if in agreement with the recommendations, will adopt the recommendations and authorize that an appropriate response be given to the grievant. The Board shall reserve the right to modify the Hearing Officer's recommendations as it deems necessary.

The Secretary Board of Public Works shall render to the grievant and his representative, if any, a written decision of the Board within thirty (30) calendar days from the date the hearing was held.

E. Step 5 - Arbitration/Civil Service Commission Review. If the written decision at Step 4 does not settle the grievance,

the grievant may proceed either by requesting arbitration in accordance with Step 5.1 or in accordance with Step 5.2. The choice is binding on the grievant.

1. Arbitration

If this alternative is elected, the grievant may within seven (7) calendar days following the date of service of the written decision of the Board of Public Works, file a written request for arbitration.

If such written notice is served, the parties shall meet for the purpose of selecting an arbitrator from a list of seven arbitrators furnished by the Employee Relations Board, within seven (7) calendar days following receipt of said list.

a. Arbitration of a grievance hereunder shall be limited to the formal grievance as originally filed by the employee to the extent that said grievance has not been satisfactorily resolved. The proceedings shall be conducted in accordance with applicable rules and procedures adopted or specified by the Employee Relations Board, unless the parties hereto agree to other rules or procedures for the conduct of such arbitration. The fees and expenses of the arbitrator shall be shared equally by the parties involved, it being mutually understood that all other expenses including, but not limited to, fees for witnesses, transcripts, and similar costs incurred by the parties during such arbitration, will be the responsibility of the individual incurring same.

b. The decision of an arbitrator resulting from any arbitration of a grievance hereunder shall be final and binding.

c. The decision of an arbitrator resulting from any arbitration of grievances hereunder shall not add to, subtract from, or otherwise modify the terms and conditions of this Memorandum of Understanding.

2. Civil Service Commission Review

If this alternative is elected, the grievant may within

seven (7) calendar days following the date of service of the written decision of the Board of Public Works file a written request with the Civil Service Commission.

The Civil Service Commission, after meeting with the grievant, shall render to the grievant an advisory written decision within thirty (30) calendar days from the date said arguments are concluded. The final decision, however, will rest with the Board of Public Works.

The grievance forms will be as follows:

Grievance Initiation:	Form General 162
Grievance Response:	Form General 163
Grievance Appeal:	Form General 164

Grievances not appealed within the prescribed time limits shall be considered waived. Grievances not answered within a prescribed time may be appealed to the next step.

HHJ-MJB:mg

W. A. No. 5491

II.

CITY OF LOS ANGELES
DEPARTMENT OF PUBLIC WORKS

OUTLINE OF GRIEVANCE HANDLING TRAINING PROGRAM

I. Program Development

a. Purpose of training program: To familiarize participants with negotiated grievance procedures.

b. Distribution of handouts: Personnel Directive No. 34, Grievance Procedure Chart.

c. Discuss purpose of grievance procedure: To resolve employee problems which arise during term of Memorandum of Understanding.

II. New Role of Supervisors

a. Represent management in grievance process.

b. Dual role as represented employee in supervisory bargaining unit.

III. Role of Union Representative

a. Represent employee in presenting grievance.

b. Political role: Interested in organizing employees.

c. Expert on contents of written Memorandum of Understanding.

d. Provides input to union negotiators for future union contracts.

e. Rights provided in Memorandum of Understanding: Paid time-off to represent employee if:

1. Member of union
2. Member of grievant's bargaining unit
3. Work in same department as grievant
4. Employed within reasonable distance of grievant's work location

f. Procedure for granting paid time-off.

g. Difference between grievance representative (shop steward) and union staff representative

Grievance Handling Training Program

OUTLINE - 2

IV. Definition of Grievance

a. Must involve interpretation or application of Memorandum of Understanding or departmental rules and regulations.

b. Exclusions from grievance procedure: Waivers of alternative remedies.

V. Steps in Grievance Procedures

a. Informal/oral discussion

1. Role of immediate supervisor
2. Time limitations
3. Determination of grievability
4. Consideration of past practices and past decisions

b. Successive levels of review

1. Identifying and designating reviewers
2. Obtaining support of higher management
3. Development of consistent, uniform departmental decisions
4. Procedural considerations, i.e., grievance forms, time limits

VI. Arbitration

a. Appeal procedure

b. Who is arbitrator and how selected?

c. Authority of arbitrator:

1. Final and binding
2. Advisory
3. Civil Service Commission option

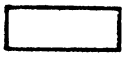
VII. Role Playing of Grievant: Discussion (Handout of Vacation Grievance Case)

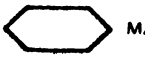
VIII. Case Study Workshop (Handout: 3 cases)

TIME ALLOTTED: Three Hours

GRIEVANCE PROCEDURE

STEPS	TIME LIMITS		EVENT
STEP 1	Within 10 calendar days from event.	GRIEVANT →	EMPLOYEE INFORMALLY MEETS AND DISCUSSES GRIEVANCE WITH SUPERVISOR
1-a	Within 5 calendar days following meeting with grievant.	IMMEDIATE SUPERVISOR →	IMMEDIATE SUPERVISOR'S ORAL RESPONSE
STEP 2	Within 7 calendar days of Supervisor's Response.	GRIEVANT →	EMPLOYEE INITIATES FORMAL WRITTEN GRIEVANCE
2-a	Within 15 calendar days from Employee's Grievance Appeal, supervisor shall meet with grievant.	→	FIRST LEVEL OF REVIEW'S WRITTEN RESPONSE
STEP 3	Within 7 calendar days from First Level of Review Response.	GRIEVANT →	EMPLOYEE APPEALS GRIEVANCE IN WRITING
3-a	Within 15 calendar days from Employee's Grievance Appeal, Bureau Head or designee shall meet with grievant.	→	SECOND LEVEL OF REVIEW'S WRITTEN RESPONSE
STEP 4	Within 7 calendar days from Second Level of Review Response.	GRIEVANT →	EMPLOYEE APPEALS GRIEVANCE IN WRITING
4-a	Within 30 calendar days from date arguments are submitted.	→	THIRD LEVEL OF REVIEW'S WRITTEN RESPONSE
STEP 5	Within 7 calendar days from Third Level of Review Response.	GRIEVANT AND UNION JOINTLY →	EMPLOYEE APPEALS GRIEVANCE IN WRITING
5-a	Within 7 calendar days from date list of arbitrators is provided by Employee Relations Board.		ARBITRATION


EMPLOYEE ACTION


MANAGEMENT ACTION

III.

THE VACATION GRIEVANCE

ROLE: SUPERVISOR KELLY SMITH

Your department's memorandum of understanding covers vacation leaves to the extent that only one employee from each work unit may be on vacation at any time due to heavy workload, and that seniority preference will be given when approving vacation requests. Further, any requests received after the department's annual deadline are to be approved on a seniority basis only if the dates requested are still available to allow an employee vacation leave.

Lee Johnson, the shop steward, has requested a meeting with you to discuss a complaint by one of your employees, Pat Rogers. Lee has indicated to you that it appears Pat was bypassed in favor of a less senior employee in vacation assignments.

Prior to your meeting with Lee and Pat, you checked with Joe, your leadman, whom you assigned the task of asking employees for their preferred vacation dates. He remembers that Pat was unsure of the exact dates when asked, but promised to contact Joe when the dates were known. Joe said that Pat never did contact him again. A further check reveals that Pat's vacation request was submitted last week, long after the department's annual deadline.

Lee and Pat are entering your office for their meeting.

THE VACATION GRIEVANCE

ROLES: SHOP STEWARD LEE JOHNSON AND EMPLOYEE PAT ROGERS

Your department's memorandum of understanding covers vacation leaves to the extent that only one employee from each work unit may be on vacation at any time due to heavy workload, and that seniority preference be given when approving vacation requests. Further, any requests received after the department's annual deadline are to be approved on a seniority basis only if the dates requested are still available to allow an employee vacation leave.

Pat Rogers, the most senior employee in Supervisor Kelly Smith's work unit, approaches you with a complaint. "I'm really upset, Lee," confides Pat, "I've been planning this vacation to Europe all along and figured I'd get my preferred vacation dates seeing how I'm the person with the most seniority in the work unit. I even put down 150 bucks deposit on a charter flight and that's not refundable. Well, anyway, I filed my vacation request last week and Kelly turns it down because someone with less seniority than me will be on vacation at that time. Now I know I'm entitled to first choice on vacation leave because of my seniority."

"Pat, do you mean to say that no one even asked you for your vacation choice?" asks Lee. Pat states that Joe, the leadman, did ask around a few months ago for Kelly, but Pat wasn't certain then. "Besides," says Pat, "Joe gave me the impression that this was only a preliminary check for Kelly and I'd have time to put in my request when I knew the the exact dates."

Lee calls Kelly, explains the situtation, and asks for an appointment for Pat, Kelly and Lee to discuss the complaint.

You are entering Kelly's office for your meeting.

IV.

SUPERVISOR'S QUESTION-GUIDE FOR THE RESOLUTION OF GRIEVANCES

1. What time limits do I have to meet in handling this complaint or grievance?
2. Am I approaching this with an open mind, making proper allowance for any personal biases I may have?
3. What is the complaint or grievance about?
4. What are the facts which gave rise to this question or grievance?
5. Is the voiced complaint the real problem, or is something deeper troubling the employee?
6. Have I heard everyone who may be able to shed light on the situation?
7. Have I investigated past practices and solutions to similar cases?
8. Have I checked the employee's records for any other background information which might be pertinent?
9. What are the laws, rules, and policies governing the situation?
10. What are the possible solutions that I might consider?
11. Do I have the authority to make this decision, to adopt any of the alternative solutions?
12. Will adoption of any of the possible solutions jeopardize any management rights?

Every group of employees - be they government or private sector - build up a number of advantageous past practises which they're not about to forego. Unions are well aware of this - and insist they be preserved in dickering for a new contract.

A City's sanitation crew had a setup peculiarly its own - a six hour day instead of the usual eight. The reason? They finished their rounds in that time and there was nothing else for them to do - so they'd wash up, change and go home about 2 PM every day.

As far as the men were concerned, this was still the deal even after the Municipal Employees Union - which represented them - signed a contract which provided:

> "The basic work week shall consist of 40 hours, five consecutive days, eight hours each, Monday to Friday inclusive. Each employee shall work a full eight-hour day."

But the first day after the pact was signed, as the sanitation men were getting ready to go home at the usual 2 PM, in popped their supervisor. "Hold it boys!" he announced, "You can't change yet. You're on duty until 4 PM."

The men clustered around him belligerently. "What do you mean? What's the reason? There's nothing else for us to do today!"

"Don't take it out on me, fellows," the supervisor pleaded, "I'm just following orders - and I was told you've got to put in eight hours, according to the union contract."

Came 4 PM and, instead of heading home, the sanitation men made a beeline for the union, where they raised holy hell. At their urging, the representative filed a grievance demanding restoration of the six-hour day:

> "The contract contains a clause which says: ALL BENEFITS ENJOYED BY CITY EMPLOYEES SHALL BE CONTAINED IN AND CONSIDERED A PART OF THIS AGREEMENT. The shortwork day for the sanitation crew is one of those benefits," the union argued.

"The contract speaks for itself," countered the City. "Eight hours work per day for everyone - with no exceptions."

Was the City RIGHT or WRONG?

Joe Sellers worked the 11 PM to 7 AM shift in the boiler room. One Friday morning, his foreman spied him relaxed in a chair behind one of the control panels. "Get off your duff, Joe," he ordered, "You know you're not supposed to be sitting down on the job."

The following morning, the foreman reported the incident to the power superintendent. "I found Joe doing this several times previously," he added, "Maybe we ought to have a talk with him - to straighten him out."

"Okay," the super agree, "Send him to me when the shift is over."

When the foreman escorted Joe to the super, the employee balked, "I don't want to talk to you people unless my shop steward is present."

"Look, Joe," the foreman reassured him, "we're not going to discipline you. We just want to have a talk with you and give you a little friendly advice. You don't need anyone from the union with you."

Joe went along and, after a brief chat, he was sent home. No disciplinary action was taken.

The employee mentioned the incident to his shop steward the next day - and the steward blew his stack. "They had no right to do that!" he shouted in a voice that almost broke the sound barrier. The union filed a protest with the company:

> "The contract states that if the employee to be disciplined is called in for questioning during an investigation he shall be accompanied by a union representative. Why did you refuse to let the shop steward accompany Sellers?"

"We had no intention to punish Sellers - only to counsel him," replied management. "There was no need for a union rep."

The union asked an arbitrator to decide if the company had violated the contract in questioning the employee without representation.

Was the union RIGHT or WRONG?

Did an employer have the right to deny shift preference to three employees because they had poor attendance records? The contract said seniors would be given shift preference with "due regard" to work needs.

THE UNION'S ARGUMENT: The grievants had a contractual right to shift preference. Contract rights may not be taken from them as a form of discipline.

THE EMPLOYER'S ARGUMENT: The grievants are trying to get on a shift where it would be very difficult to cover their absences. We have to give good service.

D

PRINCIPLES, PRACTICES, PREPARATION FOR GRIEVANCE HANDLING AND ARBITRATION

I.

Individual and Group Grievances: Principles

By

Paul Prasow

1. Objectives and Values Underlying Effective Grievance Procedures

The need for management (administration) in an organization is basic, and arises from the nature of the organization. The managers are specialists in, and responsible for, decision-making and actions with respect to efficient operations. The resulting decisions and actions may sometimes have an adverse effect on the relationship between the manager and his employees. Supervisors, being human, are at times less than perfect in dealing with subordinates; and subordinates, also being human, are at times less than perfect in interpreting and reacting to even the good-faith actions and decisions of supervisors. Furthermore, in carrying out their responsibilities, the welfare of the employee cannot always be the sole or primary concern of employees in responding to the exercise of managerial authority.

In order to meet the difficulty of balancing conflicting interests, grievance systems have been devised to permit the working out of effective and harmonious accommodations. The main function of such systems is to foster the cooperation of supervisors and subordinates in their common endeavors. As the late Professor Harry Shulman observed:

> "A grievance procedure is to the human factor what maintenance is to the machine factor. It provides the lubricant to ease friction, the advance of inspection and care to avoid breakdowns, and the repair when repair becomes necessary. It facilitates the fair ascertainment of rights and duties as between supervisor and subordinate. It functions primarily to make the necessary adjustments which must be made if efficient operations are to be maintained."

The first requirement for an effective grievance procedure is that it have full, continuing and active support from the top management (administration) of an organization, and that its basic philosophy and purposes be adequately communicated from the highest levels to all supervisors and employees.

A second requirement is the positive acceptance of the grievance procedure at all levels of supervision below top management. Supervisors must understand and accept the idea that employees have the right to present a formal or informal grievance and that such action is not per

se an unfavorable reflection on supervisory abilities. Acceptance implies a willingness by supervisors to discuss any complaint or any issue, no matter how trivial or improper it may appear, with serious concern for the employee's interest and welfare. Acceptance means that supervisors recognize the value of an effective grievance procedure as a method of achieving efficient and orderly operations with a minimum of friction or resentment on the part of subordinates. Acceptance of the grievance procedure means that supervisors understand the dynamics of the management function and its impact upon employees.

A viable grievance procedure is as important to management as it is to the employee, in that it provides a clear channel for the expression of individual or group complaints. In a situation where someone exercises authority over others, there is always the possibility that conflicts of interest may arise. Conflicts are inherent because supervisors must give orders and subordinates must accept them. Perceptions of fairness and reasonableness in both the giving and taking of orders may differ widely. Furthermore, the relationship between supervisor and subordinate is never static; it is constantly undergoing change. It is fluid, evolving, and continuously affected by subtle and myriad variations in the factors that determine the nature and quality of the relationship at any particular time.

A third requirement of an effective grievance procedure is that employees must feel free to express their complaints with no fear of discrimination. They must be protected against reprisals whenever they raise questions about supervision or working conditions. This can be accomplished only if the highest authority makes clear to all concerned that any form of punitive action will not be tolerated, and if this basic policy is implemented by supervisors.

If the grievance procedure is adequately supported by the highest officials as well as accepted, understood, and properly administed by supervisors, it can serve as an invaluable asset to the entire organization. It can help management identify and eliminate legitimate causes for dissatisfaction; it can enable supervision to deal with these complaints promptly, thereby preventing minor problems from mushrooming into major explosions; it can provide a safety valve and a temperature chart with respect to employee feelings and morale; it can provide a fair procedure for handling disputes; and it can make a vital contribution to improving morale and efficiency.

2. Scope of the Grievance Procedure

a. Contractual definition: Any controversy or difference between employer and employee or employee's representative

(1) Interpretation or application of agreement

(2) Any alleged violation of agreement
(3) Any other grievance or dispute

b. "Interests" grievances vs."rights"grievances

(1) "Interests" disputes are concerned with the negotiation or modification of the terms of a collective agreement. They are unresolved issues in contract negotiations.

(2) "Rights" disputes arise during the term of a written binding agreement and involve the interpretation and application of that agreement. The vast majority of arbitrations are over "rights" rather than "interests".

3. Purposes of Grievance Procedure

a. Explicit purpose

(1) To interpret provisions of agreement
(2) To apply agreement to new and changing aspect of day-to-day relations.
(3) To protect rights of employees
(4) To protect rights of management and employee's association/union

b. As a means of locating problem situations in the working relationship

(1) Explicit grievance not to be taken at face value
(2) Grievance seen as a symptom of some maladjustment
(3) Aim is to seek out real and submerged difficulties

c. As a channel of communication

(1) Information is channeled both ways between top and bottom levels of employer and association/union hierarchy
(2) Management and association/union representatives use grievance procedure as a means of keeping in touch with developments at the level of the individual employee
(3) Reliability as a channel of communication is generally good because grievances are subject to review at each step by higher levels within each organization, and grievance may be appealed to some form of impartial adjudication.

4. Types of Grievances

a. Some grievances involve a conflict between two or more sections of the agreement. The association/union will point to one clause, and management to another.

b. The agreement may be silent on the specific problem. The issue may clearly be within the scope of the agreement, but there is a gap on the particular issue.

c. The grievance may raise the question of the applicability of a general rule to a particular case. The general rule may be "management has the right to discipline or discharge for just cause". The particular case may involve the discharge of an employee for infraction of a specific rule. The question of due process is often involved.

d. Many grievances present no contract problem, but arise as a device to save face for one party or the other. Some grievances are political in nature, and arise because there are sharp interest differences among various groups within an employee organization that complicate the task of its leadership in contract administration. It is well known, for example, that the interests of senior personnel and junior employees are frequently in conflict

5. Basic Principles of Grievance Adjustment

a. Grievances should be adjusted promptly, preferably at the first step of the grievance procedure.

b. Grievances should be adjusted on their merits.

c. Grievance machinery should be easy to utilize, and well understood by the employee, union steward, and supervisor.

d. Grievance decisions should be followed up to see that they are implemented.

6. Steps in Grievance Handling

a. The nature of the grievance should be defined as clearly and as fully as possible.

b. All relevant facts about the issue should be gathered to explain when, how, where, to whom, and why the grievance occurred.

(1) Facts must be separated from opinion, conjecture, speculation, or assumption.
(2) Records are important, including payroll records, time cards, case load, inspection records, attendance records, performance evaluations, etc.

c. Establish tentative solutions or answers to the grievance. Tentative solutions provide the basis for gathering additional facts which may indicate the tentative solutions to be rejected, and the one to be accepted.

d. Gathering additional information to check validity of the tentative solution, to ascertain the best possible solution. This may involve checking personnel policy and contract provisions, studying how similar grievances have been settled, ascertaining past practice, determining administrative policy, and discussing problems with personnel staff.

e. Apply the solution. A definite stand must be taken one way or the other. This stand may be favorable or unfavorable to the grievant, and should be communicated to the employee and/or his representative clearly and unequivocally.

f. The matter should be followed up to determine whether it has been handled in a satisfactory manner, and the difficulty eliminated if the decision has been in favor of the employee.

7. Factors Considered by Arbitrators in Deciding Grievance Issues

a. Language of agreement or policy statement

b. Mutual intent of the parties

c. Terms of submission agreement (Statement of the grievance)

d. Practice and custom

e. General standards of contract interpretation

(1) Clear vs. ambiguous language
(2) Specific vs. general language
(3) Normal vs. technical usage of terms
(4) No consideration given to compromise offers during grievance processing

8. Arbitration of Specific Grievances

a. Discipline and Discharge

(1) Burden of proof
(2) Review of penalties imposed
(3) Factors in evaluating penalties

(a) Nature of offense: discharge vs. corrective discipline
(b) Due process considerations
(c) Post-discharge conduct or charges
(d) Grievant's past record
(e) Length of service with Company
(f) Knowledge of rules; previous warnings
(g) Lax enforcement of rules
(h) Unequal or discriminatory treatment
(i) Management responsibility

b. Seniority

(1) In promotions, transfers, layoffs, recall from layoffs
(2) Determination of fitness and ability
(3) Evidence and burden of proof
(4) Factors considered in determining fitness and ability

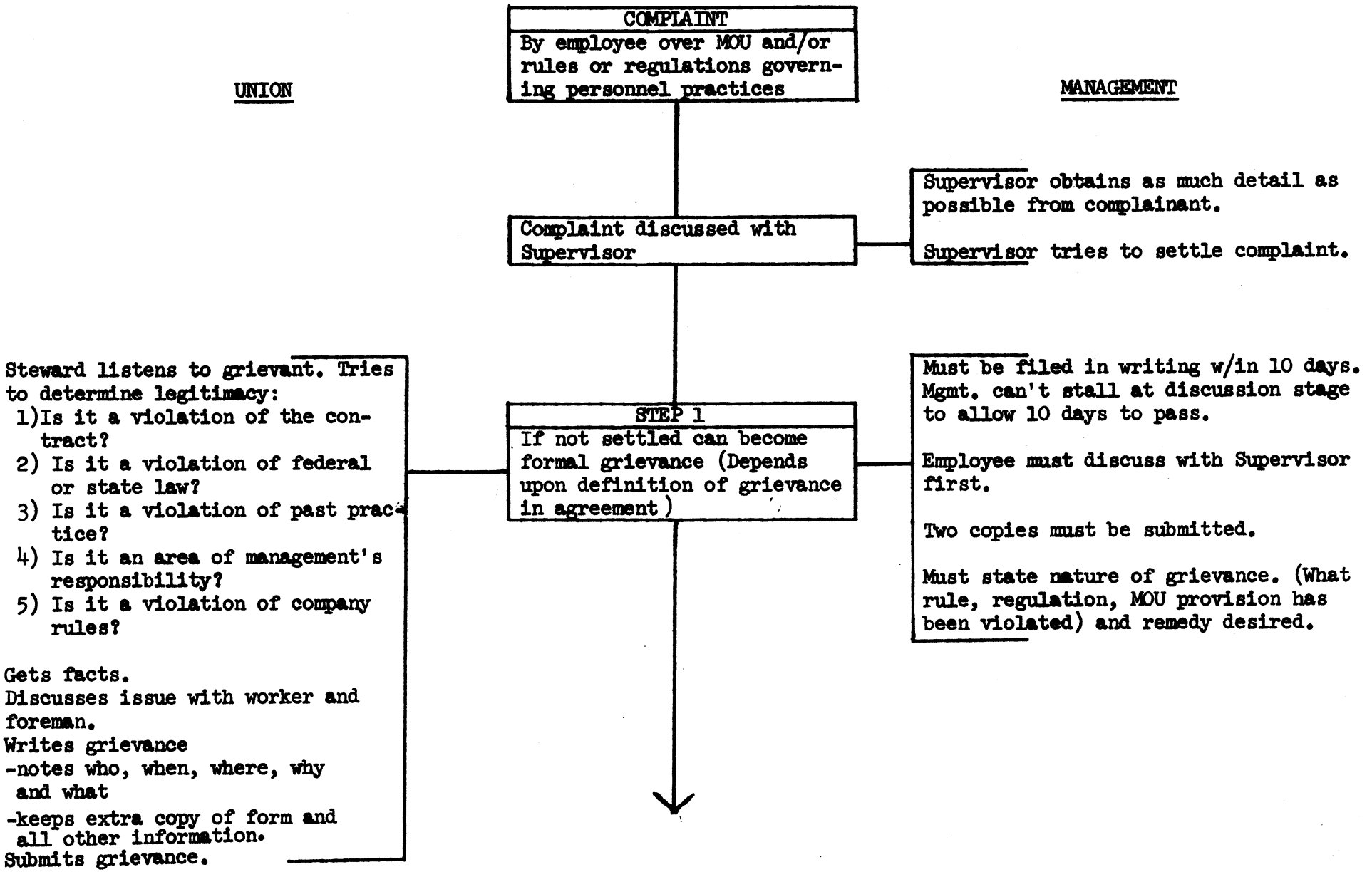
(a) Tests
(b) Experience
(c) Training
(d) Trial period
(e) Supervisor's opinion
(f) Production records
(g) Attendance records
(h) Disciplinary records
(i) Physical ability
(j) Mental stability
(k) Personal characteristics
(l) Age

c. Assignment of Duties and Tasks

(1) Establishing, eliminating, and combining jobs and classifications
(2) Inter-job and inter-classification transfer of duties
(3) Unilateral employee determination vs. use of grievance procedure
(4) Refusal to perform assigned duties; question of insubordination or safety and health

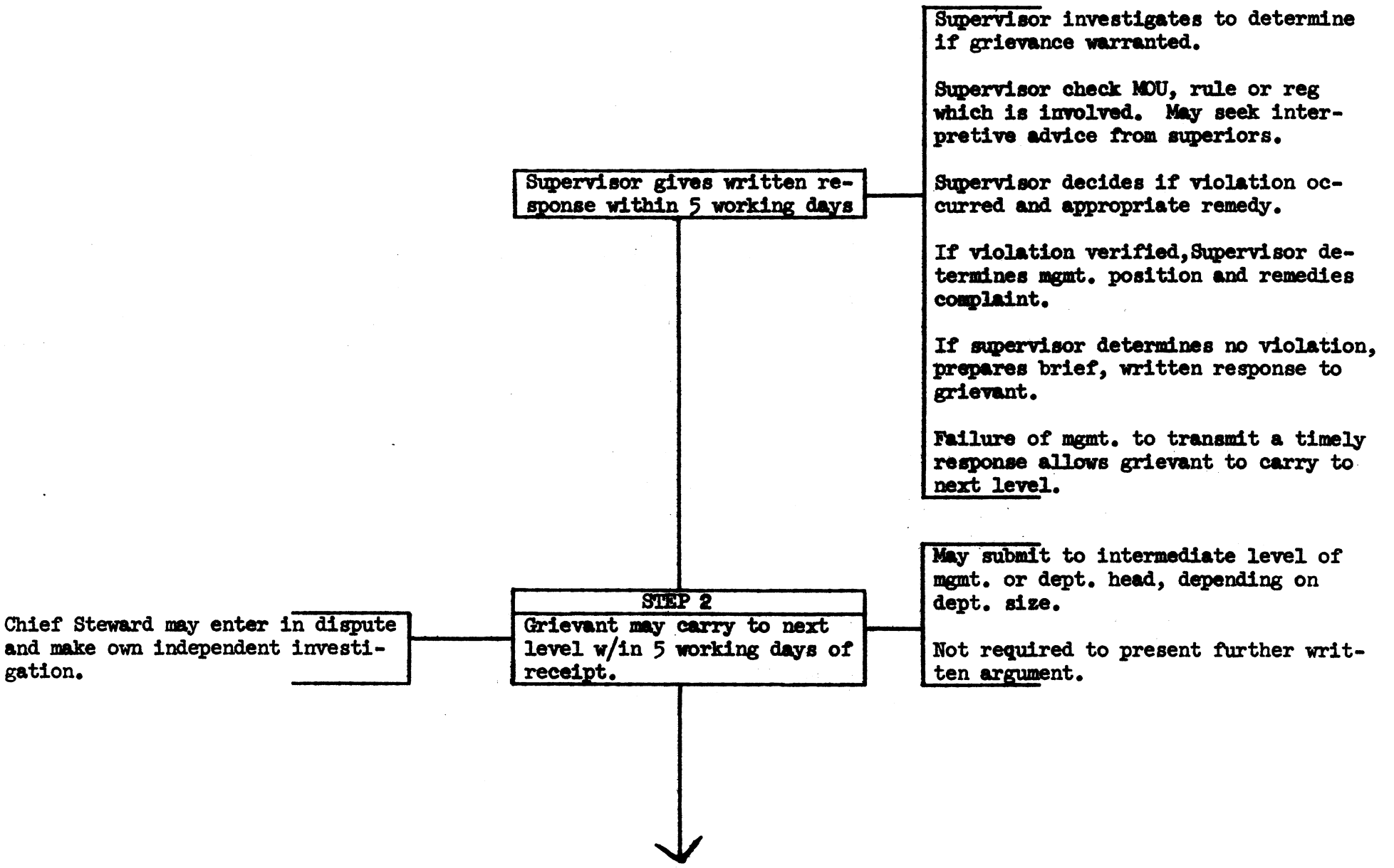
II.

OUTLINE OF TYPICAL NEGOTIATED GRIEVANCE PROCEDURE AND DUTIES OF THE PARTIES



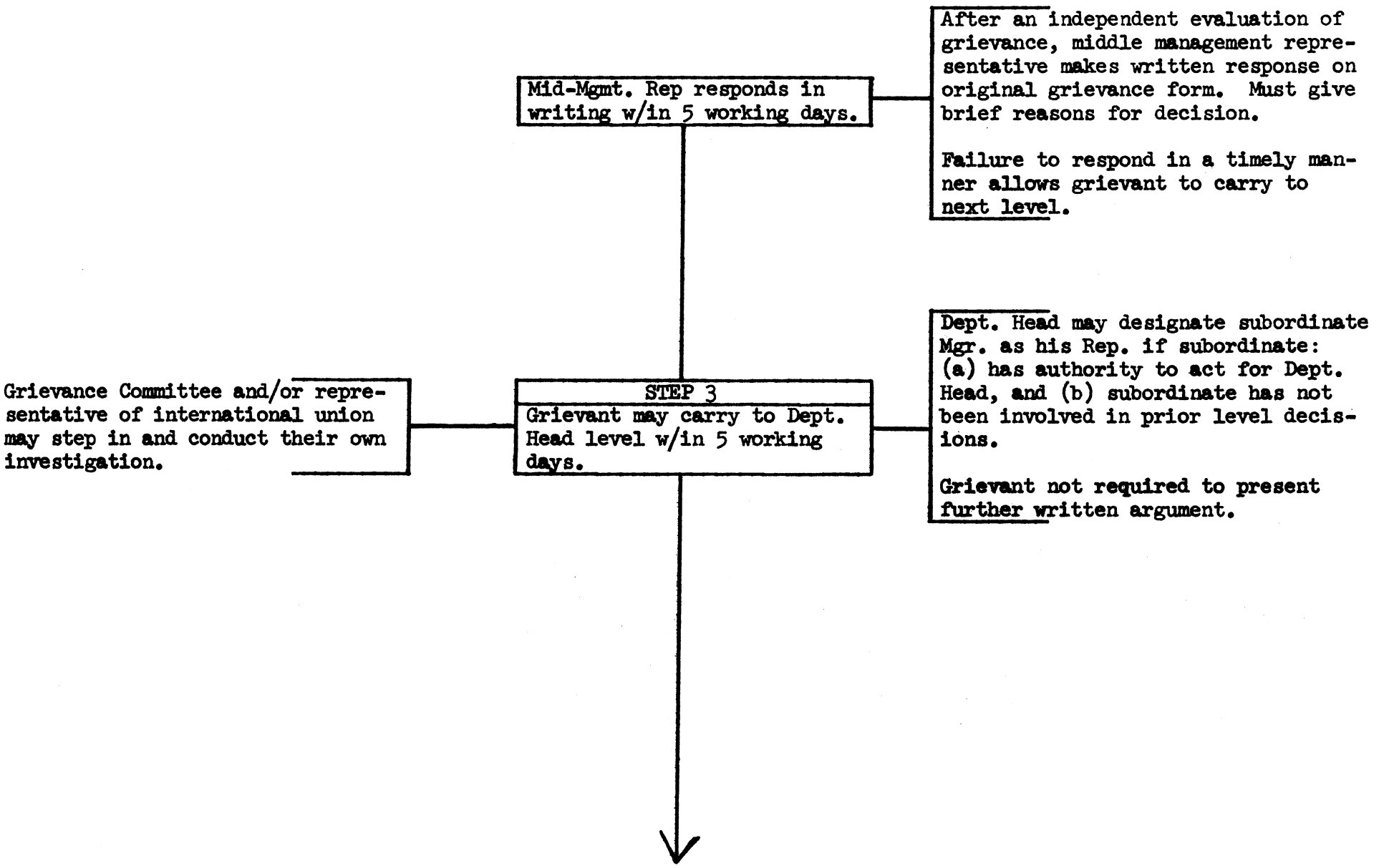
UNION

MANAGEMENT



UNION

MANAGEMENT



UNION

MANAGEMENT

Dept. Head or Rep responds w/in 10 working days

May discuss issue with grievant.

Discusses issue with subordinate supervisor.

Makes independent investigation and evaluation of allegations.

May consult w/Employee Relations Administrator representing his department.

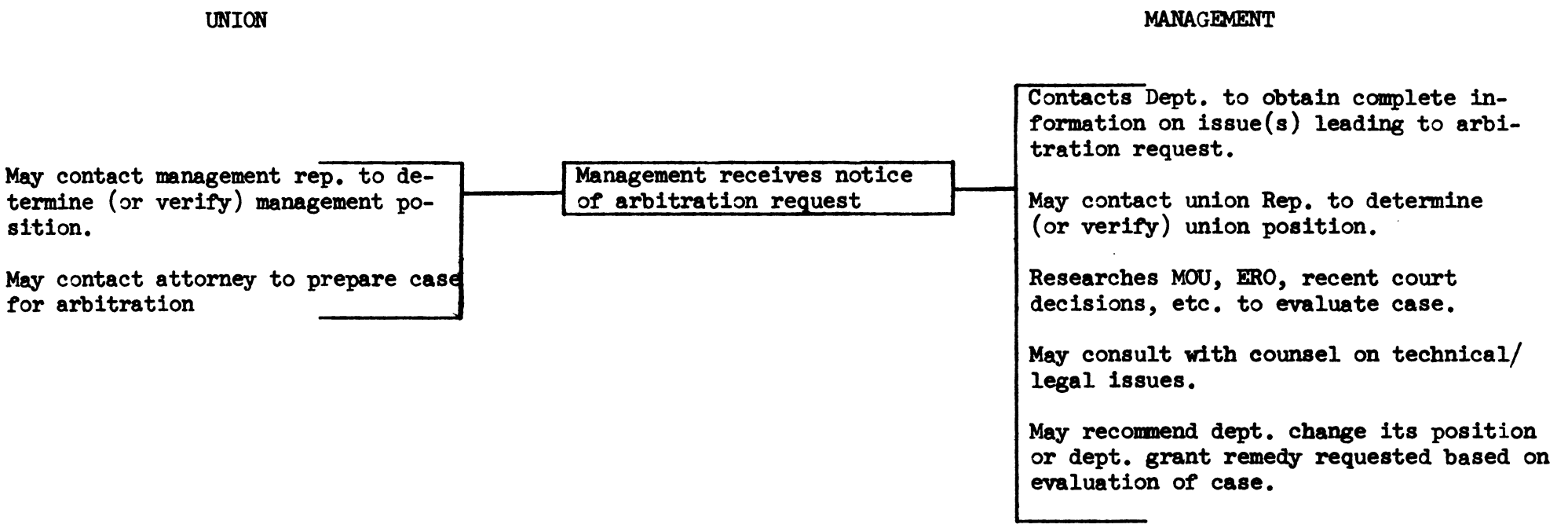
Meets w/parties and gives written decision including reasons, e.g. prior response appropriate.

Failure to respond in a timely manner grants grievant right to refer grievances involving agreement (MOU) to arbitration.

Within 10 days union (not employee) may submit matter for arbitration.

Department Head's decision is final on matters not subject to arbitration, i.e., do not involve application or interpretation of MOU.

END OF FORMAL GRIEVANCE PROCEDURE



Prepared for

The Institute of Industrial Relations, UCLA

by

John A. Spitz
Blair Levin

III.

THE MEANING OF ARBITRATION
Definition

Arbitration is third-party settlement of disputes between individuals or parties outside a court of law. Labor arbitration most commonly is used to settle disputes between parties of a labor agreement as to its application or interpretation. Since such arbitration consists of determining the rights of a party to an agreement, it is referred to as a "rights" dispute or more commonly as "grievance arbitration."

A second use of arbitration is to settle "interest" disputes. It involved the determination of the interests of the parties, as distinct from their rights under an existing agreement. It applies to a determination by an arbitrator or arbitration board of the terms and conditions of a new or renegotiated labor agreement. This type of arbitration is rarely used in labor relations in this country, although it is being used to an increasing extent in public sector situations as an alternative to the strike.

Labor arbitration is an extension of the process of collective bargaining but differs from other aspects of bargaining in one crucial respect: the parties have ceased to negotiate with each other and are trying to convince an arbitrator that their case should be upheld. In this sense, it is sometimes called a judicial proceeding since the arbitrator must "judge the case before him." Some arbitrators, however, shun the

word "judicial" as an inadequate description of the arbitrator's function. To them, the arbitrator is more than a judge, since he must occasionally fill in the cracks of the labor agreement. In this capacity he is "legislating" or setting up his own rules which he believes to be consistent with the labor agreement and personnel practices. Sometimes he constructs these rules from general industrial relations practices.

The way an arbitrator views a case depends in part on his personal philosophy of arbitration and in part on his relationship to the parties. The arbitrator who is called for a single case (ad hoc arbitrator) is inclined to be a judge in most cases. The permanent umpire who handles most or all of the cases for an agency and union is inclined to be more than a judge. But these are generalizations and should not be taken literally.

Distinction from mediation, conciliation and fact-finding

Arbitration results in a decision, which the parties have agreed in advance to accept. Mediation and conciliation are efforts by a third-party to bring the parties to an agreement on their own. The mediator or conciliator has no power to enforce a settlement, since the parties have made no prior agreement to accept his conclusions. Fact-finding is an effort to obtain and point out the key facts in a dispute. Even when a fact-finding board makes recommendations, these carry no force beyond their persuasiveness and the power of public opinion which they may generate.

Voluntary and compulsory arbitration

Almost all arbitration in this country is of a voluntary kind. This means that the parties voluntarily accept it, either as a general means of settling all disputes under an agreement or as a means of settling a particular dispute. Sometimes the term "mandatory arbitration" is used to describe the situations where the parties have agreed in advance that they will arbitrate disputes, to distinguish from agreements under which they may (or may not) do so.

Compulsory arbitration imposes the process on the parties as a matter of law or decree. Usually it is associated with interest disputes involving "essential" public services where the right to strike is curtailed by law.

General Information

1. Purposes of arbitration

   -To resolve a dispute short of a strike or job action

   -To provide a safety valve, beyond the regular grievance procedure

   -To resolve a situation that needs a decision

   -To test the meaning of the contract

   -To provide opportunities for face-saving

2. The basis of the arbitrator's decision

-Not what he thinks is fair, or right, or wrong; rather what he thinks the contract says in relation to the circumstances presented to him during the hearing and proven past practices.

-The jurisdiction of the arbitrator is usually defined in the contract; the matters on which he may rule, meaning or intent of parties, application, interpretation, and the nature of his ruling. Usually excluded are changes, additions, deletions or modifications of the contract.

3. Types of arbitrators

-Ad hoc, single: one impartial individual, hired by the parties for a particular case or series of cases.

-Permanent, single: one impartial individual selected by the parties and usually named in the contract who will hear all cases for the duration of the agreement.

-Arbitration board, ad hoc or permanent: each party appoints one or two representatives to board; board in turn selects impartial chairman; decision is by majority vote of board.

4. Selection of arbitrator

-Named in contract.

-By agreement between parties.

-Failing agreement, or by agreement, on request to the American Arbitration Association or the Federal Mediation and Conciliation Service.

5. Procedures and methods

-Formal and informal systems.

-Stipulations: preparation may help to clarify the issues or perhaps produce a solution short of arbitration, reduce the areas in dispute.

-Briefs: read at beginning of hearing, used as basis for presenting case even when not submitted.

-Opening statement: what it's all about, what you're going to show.

-Who goes first: not necessarily the party requesting arbitration--rather, the prosecution, the party which took the initiative in the dispute; as in a discharge, the management; in a request for an increase in a piece rate, the union.

-Direct presentation: by the spokesman telling things to the arbitrator, possibly introducing some exhibits. Where you have an able witness with expert or first-hand information, his testimony will usually be more effective.

-Examples of exhibits: copies of contract, grievance, transcripts of earlier meetings, pictures of the job, production records, check stubs, etc.

-Witnesses: examined (questioned) by their side, then subject to cross-examination by the other side, with the arbitrator sometimes seeking clarification. May also involve re-examination. Exhibits are often introduced through witnesses and explained by them.

-Summation: summary of major points in direct presentation through witnesses and exhibits, with counter arguments to what other side has presented. Should be relatively brief, including specific reference to decision desired from arbitrator.

-Post-hearing briefs: one side or the other may request permission to file post-hearing briefs. Should not include new material unless by mutual agreement when facts were not available at hearing. May be used to stall, delaying a decision, as deadlines for filing are extended.

6. Follow-up, after receipt of award

-Whatever the award, should be viewed as to manner in which it can be used to strengthen management.

-See that terms of award are carried out, and that situation does not arise again.

-Enforcement: if arbitrator did not exceed jurisdiction, did not engage in fraud, corruption or other misconduct, decision is enforceable in court. Will not be set aside for errors in judgment as to law and fact.

-Award should be considered in relation to application to other grievances, future changes in the contract.

7. Arbitration clauses

-Wording of clause most important: what may be arbitrated, jurisdiction of arbitrator, limitations on his power of decision, question of whether decision final and binding, questions of time limits on getting case to arbitration and on arbitrator in rendering award, importance of consistency in contract, all are factors which must be considered.

IV.

GENERAL RULES

PREPARATION FOR ARBITRATION AND HEARING PROCEDURE

By Dr. Clarence M. Updegraff

(Adapted from a bulletin published by the Bureau of Labor and Management, State University of Iowa, Iowa City, Iowa.)

1. When selecting an impartial arbitrator or chairman look for intelligence, honesty, experience and courage. The broader the arbitrator's background of knowledge, the more likely he is to understand your case fully and to decide it correctly.

2. Try to get, as early as possible, a complete understanding of the opposite party's evidence and contentions. This may lead to a settlement. It will, at least, tend to prevent your being "surprised" at the hearing.

3. Avoid being so steeped and stubborn in your own feelings about the dispute that you cannot see the possible merits of your opponent's position. You can't defeat their contentions if you refuse to understand them.

4. Remember that fixing a time and place for hearing requires commitments for numerous people. Be as considerate of the others as they should be of you in adapting other work to arrange attendance at the hearing. After the date is fixed, do not try to change it.

5. Make a searching, full examination of the testimony of your own witnesses well before the hearing. Make a brief, logical summary of their evidence and write a preliminary statement of the contentions you will make at the hearing. This will aid you to plan a full, logically organized, and persuasive presentation of your position.

6. Be sure that all of the people who will be in your group at the hearing understand who will be the principal spokesman for your side, who the witnesses will be, and what will be the main substance of their testimony. This will contribute to making the hearing orderly and efficient.

7. Try to agree with the opposing party as to wording the exact question or questions to be submitted to the arbitrator and have a written memorandum stating the same signed by both parties prior to the dates set for the hearing. Deliver a copy of this to the arbitrator as soon as it is ready, or offer it at the beginning of the hearing.

8. If there are several issues to be submitted, try to agree with all other parties in advance on the order in which they will be taken up at the hearing.

9. Prepare a brief, written pre-hearing summary of your contentions and deliver one copy of it to the arbitrator and one copy to your opponent at the beginning of the hearing or prior thereto. If possible, agree with the opposition for both parties to do this at the same time.

10. Have copies of all documents which you desire to present as evidence ready for delivery at the hearing. Have also at least one copy of each one for your opponent unless you know he has copies of same.

11. If a view of a place, a machine or an operation would seem to be helpful, have a picture, drawing or blueprint of it ready for introduction in evidence or arrange in advance that it will be available for observation and for the arbitrator to go to see it during the hearing so that as little time as possible will be required.

12. Be on time, or early if at all possible, in arriving at the place set for the hearing. Tardiness wastes the time of others, is discourteous, and creates a generally bad impression.

13. Do not shout or speak more loudly than necessary at the hearing. Never use provocative words or epithets. These actions create bad impressions of those guilty of them and in fact cloud rather than clarify issues.

14. During the hearing, do not mention nor refer to old and long-settled former frictions or acts of misconduct by your opponent unless the matters brought up are clearly relevant to the issue at present in dispute.

15. Strive for clearness and coherence in your oral presentation and as much as possible, avoid repetition; if one of your colleagues has stated facts or arguments, avoid restating the same matters.

16. Avoid mixing presentation of facts and arguments. The effect of this is confusing and may result in weakening your own case.

17. Do not interrupt statements of the opposing party or the presentation of its evidence. You will have full opportunity to cross-examine opposing witnesses. You and your witnesses will be protected from interruption. This is an arbitrational hearing, not an informal grievance committee meeting nor bargaining conference.

18. If you intend to call witnesses, have them present in the room or in an adjacent room ready for call when the hearing starts. (If they are employed near the hearing room, they may remain at work, but they should be notified in advance that they may be called and should be requested not to leave, even though their work shift may end before they are needed as witnesses.)

19. Prove your case by your own witnesses. Do not try to establish it by evidence gleaned from people put on the stand by your opponent. They are there to oppose you, not help you.

20. If you cross-examine the other party's witnesses, make it short. Do not unduly prolong cross-examination in attempts to get damaging admissions. The more questions you ask on cross-examination, the more opportunity you give a hostile witness to repeat the adverse testimony he came to give. Choose most carefully the inquiries you make of such parties. Make them as few as possible.

21. Each party has the right to ask leading questions when cross-examining hostile witnesses. Each party should save time by asking its own witnesses leading questions, excepting at points where disputed facts are involved. Testimony on controverted matters should be brought out by questions which do not suggest the answer, if possible.

22. Do not make captions, whimsical, or unnecessary objections to testimony or arguments of the other party. Such interruptions are likely to waste time and confuse issues. The arbitrator, no doubt, will realize without having the matter expressly mentioned more than once, when he is hearing weak testimony such as hearsay or immaterial and irrelevant statements.

23. If you have extraordinarily long or highly technical matters to present, or if you wish for any reason to preserve a reliable record of the hearing, make advance provision for the attendance at the hearing of an efficient public court reporter. This involves a moderate expense, which in most cases is equally divided between the parties. It will tend to insure that when the arbitrator is working on the award and reviewing the evidence, he will have it all before him and will not be hampered by the frailties of human memory.

24. If one party requests the privilege of filing a post-hearing brief, it must be granted, as part of a "fair hearing." Both parties, however, should be given equal time, which should be limited to a comparatively short period of a week or two after the hearing or after the reporter's transcript is received. If reply briefs are agreed upon, they should follow within three or four days after the delivery of the post-hearing briefs. It is customary in these situations for the parties to mail briefs to the arbitrator and to opponents at the same time.

    Many arbitrations are closed without post-hearing briefs, but they are desirable if the written statement prepared for the arbitrator prior to the hearing was not full, or if, in the light of matters which develop at the hearing, it should be for any reason supplemented.

25. After you receive it, read the entire award, not merely the result. Try to give your constituents and associates a full, correct understanding of the arbitrator's reasoning. Only in this way can you get the full value of the decision whether it was in your favor or against you. The logic of the prior decision often indicates clearly whether the next dispute should be taken to arbitration because it's distinguishable, or dropped because it is similar to the previous one.

26. If there is any question in your mind as to the expenses of arbitration, ask the arbitrator about it at the earliest possible time.

ADVANCE PREPARATION

The arbitrator will hold a hearing or several if necessary, to get the facts in the case and the views of the parties. Unless the parties have agreed on special formal rules, procedure at the hearing will be determined by the arbitrator (or chairman of the arbitration board). Normally it will be quite informal.

Some of the elementary rules of preparation for the hearing are almost self-evident, but they are worth noting as a handy checklist.

1. Reexamine the basic facts of the grievance. Decide which ones may be in dispute, for they will have to be proved through witnesses, documents or other evidence. Check the contract clauses which may be applicable. Go over the discussions and records of the case in the grievance procedure. Gather any material which will have to be given or shown to the arbitrator.

2. Get all the facts. Do not skip over unfavorable facts in preparing your case. By recognizing them in advance you will be in a sounder position to evaluate their effect on the case and to check on their accuracy and limitations instead of being surprised and unprepared when they are suddenly raised before the arbitrator.

   Review past practice, what has been done in similar situations in the past. What was the union's position then? Check on any background which may provide helpful perspective for the arbitrator.

   If the case hinges on duties of a job or the physical surroundings of a work place, examine them so that you may be personally familiar with them. Consider having the arbitrator visit the work place if necessary.

3. Arrange for witnesses to verify the facts at the hearing. The arbitrator is not familiar with the case and will have to be informed of all the details. In most cases it is best to do so with the aid of witnesses.

4. Review your reasoning -- how the union interprets the facts and their significance. Decide what you will emphasize and how you can present it most effectively to persuade the arbitrator to accept your view of the case.

5. Prepare an outline of the evidence you will offer and the points you will make. In addition, put in writing, for your own use, all aspects of the case to help get the picture straight. This will help assure that no significant point is overlooked in the preparation or forgotten during the hearing.

6. Anticipate the union's points. Allow for the views which will be advanced by the union so that you can deal with and counteract them as necessary before the arbitrator. The discussions during the efforts to settle the grievance will help show what the union is likely to contend. Judge what are likely to be the weak spots in management's presentation. Figure out how you will answer criticism of management's views, so that you be ready to defend and substantiate them.

7. Check other arbitration rulings on similar grievance cases. If possible, examine also the decisions which have been made by your arbitrator in other cases. What kind of reasoning or evidence has been most persuasive to him in the past?

8. Consult other representatives of the management. Use the written outline noted in point (5) above as a basis for getting their thoughts. Talking the case over with them will normally turn up some valuable viewpoints and suggestions on items which may have been overlooked or covered inadequately. The cross-exchange in such consultation often provides a helpful preview of the questions which will arise in the arbitration hearing.

   If another representative of the management is to take a major part in the presentation of the case to the arbitrator, be sure that he is briefed thoroughly on all aspects of the case. Make sure that no one who will participate in the presentation is only half-prepared.

   Any indications that he may be unfamiliar with basic elements of the dispute can be detrimental to the management's case.

SELECTING WITNESSES

It is common to establish many of the facts in a case through the testimony of witnesses. Where you have a choice, select your witnesses carefully and try to avoid using any whose manner may prejudice your case. Try to choose those who can speak from direct observation or experience so that their tesimony may stand as more than only hearsay.

Should you use only one or a few rather than many witnesses on a particular point? It is true that a long array of witnesses may help emphasize and reinforce the point, but it is also true that if you use many witnesses they may negate the value of each other's testimony. If you have a choice, it is usually best to keep down their number, but make sure that those you select are best qualified to testify on the point in dispute.

PREPARING WITNESSES

Interview your witnesses in advance. Let them become familiar with the questions they will be asked. It is a good idea to jot down some summary of what they will say so that you may know just what their testimony will be.

Don't make the advance discussions a formal rehearsal however, and don't try to get witnesses to memorize statements. All you ordinarily need to do is run through approximately what they have to say.

Make sure that your witnesses are not withholding from you information which they think may be detrimental to the case. A sudden disclosure through cross-examination in the hearing may turn a case upside down. It is best that your representatives be fully prepared with knowledge of all aspects of the case, good and bad, to make the evaluation necessary for the soundest result.

To help put at ease those witnesses who may not have participated in other arbitrations, tell them what the hearing will be like. They should understand in advance that they will be subject to questioning by union representatives at the hearing.

There is nothing improper or unlawful about preparing witnesses, as long as you are preparing them to give accurate and truthful testimony.

V.

CHECKLIST ON PREPARATION FOR ARBITRATION

1. STUDY THE CASE OBJECTIVELY

_____ Is the matter grievable

_____ Have all the procedures been followed

_____ Are you dealing with the party specified in the contract (e.g. business representative, employee, union committee, etc.)

_____ Identify the contract clauses that apply to each issue

_____ Check old contracts and bargaining history

- ____ How did the provision get into the contract
- ____ Who proposed the provision
- ____ Who wrote the provision
- ____ What changes were sought by either party

_____ Identify the facts that go with each issue

_____ Identify the witnesses that support the facts

_____ Look for other supportive evidence

_____ Look for other arbitrations on the same issue

_____ Estimate your chances of winning

- ____ What evidence is available to support management's position
- ____ How effective are the available witnesses
- ____ Who will present the case for the grievant
- ____ What evidence is available for the grievant
- ____ How effective are the grievance witnesses
- ____ Who has the most emotionally persuasive case
- ____ Who will the arbitrator be

_____ Is the issue important to management

- ____ What management purpose will be served by a favorable arbitrator's decision
- ____ Will a favorable decision establish a needed guideline
- ____ Will a decision settle a continuing dispute
- ____ What will be the result of an unfavorable decision
- ____ What will it cost to get a decision

_____ Consider possible settlements

11. PREPARING YOUR CASE

_____ Identify your main argument

_____ Interview each witness

____ Determine what he knows about the case

____ Make sure he understands the relationship of his testimony to your argument

____ Cross examine him to determine his testimony and to get him used to cross examination

____ Make a written summary of the important points of his testimony

____ Outline the questions you will ask him

_____ Try to talk to grievance witnesses

_____ Decide the order you will call the witnesses

_____ Decide what the weak spots in your case are and how you will plug them

_____ Organize your supportive evidence

____ Consider graphs, charts, records, pictures, video tapes, moving pictures, etc.

____ Decide which witnesses will introduce evidence

____ Make duplicate copies for arbitrator and grievant

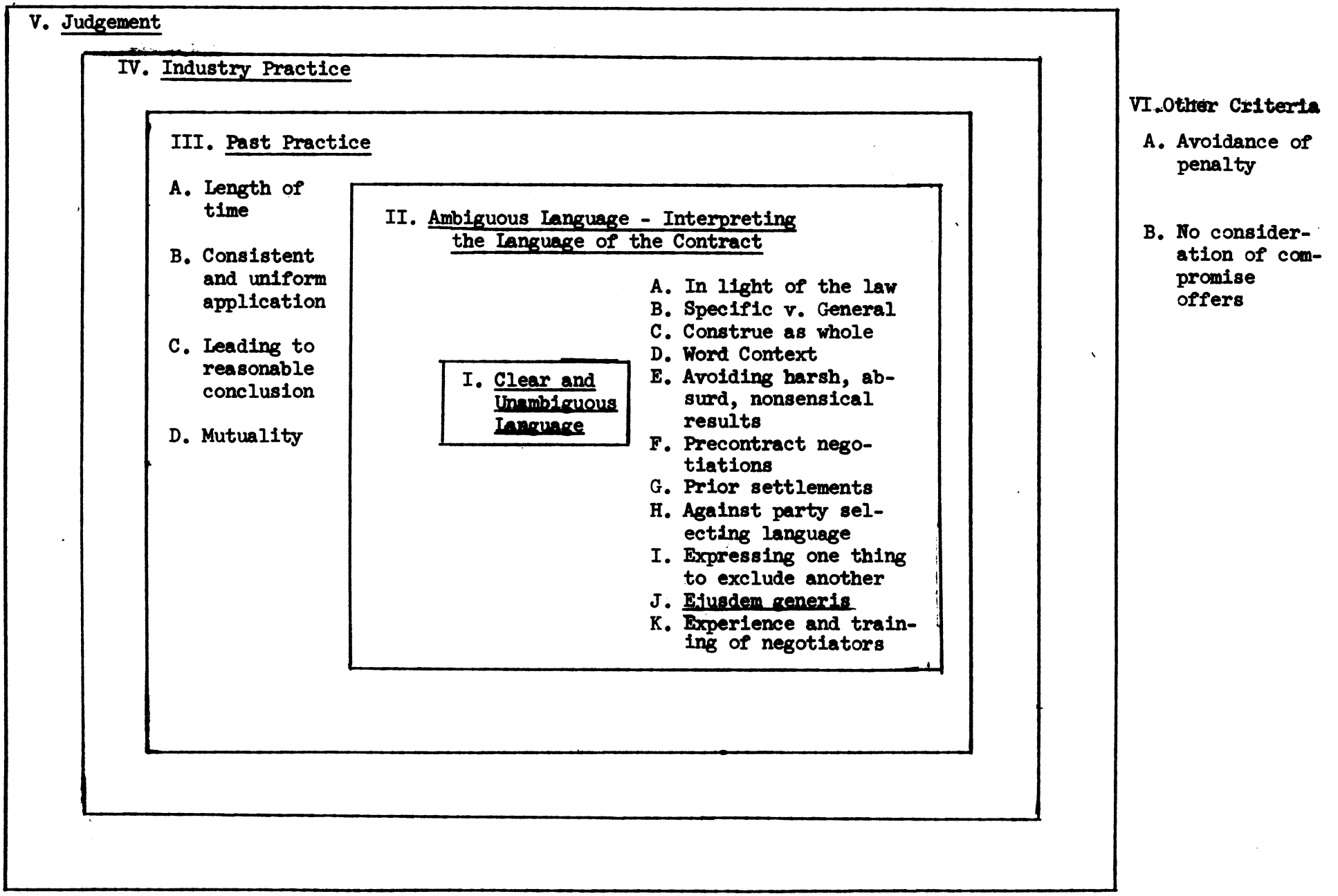
____ If other party has documents ask for them and if refused ask arbitrator to get them for you

_____ Visit the site of the grievance

____ Consider having arbitrator visit site

Prepared by the Firm of
Lee T. Patterson

DETERMINING THE MUTUAL INTENT OF THE PARTIES - ARBITRATOR CRITERIA IN INTERPRETING CONTRACT



HOW TO USE THIS CHART

This chart illustrates the criteria by which arbitrators interpret the contract. The overriding purpose of the criteria is to determine the mutual intent of the parties; that is, what the parties meant the agreement to mean when they wrote it.

The chart works outward; that is, the more important the criteria, the closer it is to the center. The arbitrator tries to determine the intent from clear and unambiguous language in the contract. If the relevant words are ambiguous, he applies the tests listed in the second box. If this does not resolve the dispute, he looks to Past Practice, Industry Practice, or simply makes a reasonable judgement.

The terms used in the chart are defined in the pages that follow.

The other criteria categories include criteria which may contribute to a decision but will not decide it.

Each arbitrator weighs criteria differently. However, this chart shows you the way an arbitrator would evaluate a case.

The chart is titled "Determining the Mutual Intent of the Parties" because that is the overriding goal of the arbitrator. No matter what criteria he employs, he is there to determine what the mutual intent of the parties was when they wrote the contract.

EXPLANATION OF TERMS

1. Clear and Unambiguous Language

-Language which does not have two or more reasonable explanations.

-Always used as the most important criterion except in unique or extenuating circumstances. If there is clear and unambiguous language in the contract relevant to the case, that clear and unambiguous language will be the basis for the award.

-Ordinary dictionary definitions are used except when stated. Trade and technical terms will be interpreted in trade or technical sense unless clearly used otherwise.

-The parties may think the language ambiguous but the arbitrator makes the final judgement.

-Language has to be read carefully in the context of the entire case. The particular language in one section of the contract may be clear but the meaning may be doubtful from a lack of harmony between all the sections of the contract.

2. Ambiguous Language Interpretation

If the language is not clear and unambiguous, the language must be interpreted by the arbitrator. He uses the following principles, in differing degrees of importance, to rule on ambiguous language.

a. Interpretation in light of the law
If two interpretations are possible, one making agreement lawful, the other making it unlawful, the lawful interpretation will be used.

b. Specific language over general language
Specific language supercedes general language.

c. Agreement to be interpreted as a whole
-Arbitrators generally determine meaning not from a single word or phrase, but from the contract as a whole. They look at a section in relationship to the entire agreement.

-All provisions of the contract are construed to have meaning. If one interpretation of a section renders another section meaningless, and a second interpretation gives the section some meaning, the second interpretation will be used.

d. Construction in light of word context
Ambiguous words can be given meaning by viewing them in light of their context in the contract.

e. Avoidance of harsh, absurd or nonsensical results
When one interpretation of an ambiguous provision leads to harsh, absurd or nonsensical results, an alternative interpretation is used.

f. Precontract negotiations
-The arbitrators may look at notes and records of negotiations to determine the mutual intent of the parties.

-If a party tried to get a particular clause in the contract but didn't succeed, the sense of the clause will not be used in overall interpretation.

g. Prior settlements as aid to interpretations
The arbitrator may utilize prior settlements involving the ambiguous provisions as precedents in determining the award.

h. Interpretation against party selecting the language
The drafter of the contract should have been able to prevent doubt about meaning. If both parties agree that language is ambiguous, the drafting party, if there is one, will probably lose.

i. Expressing one thing to exclude another
To mention one item of a group or class of items, and not to mention the others, is construed to mean that other(s) item(s) were intentionally excluded.

j. Doctrine of ejusdem generis
Where general words follow a list of specific terms, the general words will be interpreted to include or cover only things of the same general nature or class as the specific terms unless it is proven that the parties intended a wider definition.

Example: a clause providing that seniority shall govern all cases of layoffs, transfer, "or other adjustment of personnel" should not be interpreted to require that overtime be allocated on the basis of seniority.

k. Experience and training of negotiators
Strictness of interpretation of an ambiguous agreement may depend on the experience and training of the negotiators. If they were very skilled, the arbitrator will apply a strict interpretation. If less skilled, he will be more liberal.

3. Past Practice
-Refers to practice which is reasonable uniform response to a recurring situation over a substantial length of time, which both parties recognize as proper.

-Past practice may be used in deciding arbitrations when the following statements are true:
a) the practice has been around a substantial length of time
b) the practice has been consistently and uniformly applied
c) the use of the practice would lead to a reasonable and logical conclusion
d) the practice has been mutually accepted:
mutuality can be established by a direct agreement by both parties, by implication of sufficient generality and duration, or by silence - that is, no objection by either party.
e) arbitrators disagree on how to weigh each of the variables

-The burden of proof is generally with the union to show that in fact, the practice does exist.

-If the practice is conflicting or unclear, the arbitrator will probably not give it much weight.

4. Industry Practice
If the language and past practice is unclear, the arbitrator may consider how others have handled the problem. He may look to:
-other units of same employer under same clause
-other agreements by one employer with several unions
-other agreements by several employers with one union

5. If nothing else is relevant, arbitrator will base his ruling on what is reasonable, equitable, and not harsh, absurd, or nonsensical.

6. Other Criteria

a. Avoidance of forfeiture or penalty
If an agreement can be interpreted in two ways, one which would result in one party paying a penalty, and one which would not, the arbitrator will tend to use the latter interpretation.

b. No consideration to compromise offers
"No consideration" will be compromise offers or concessions offered by one party and rejected by the other during negotiations preceding arbitration.

Prepared for

The Institute of Industrial Relations, UCLA

by

John A. Spitz
Blair Levin

VII.

CODE OF PROFESSIONAL RESPONSIBILITY

for

ARBITRATORS OF LABOR-MANAGEMENT DISPUTES

**As approved April 28, 1975,
at the Annual Meeting of the National Academy of Arbitrators,
Dorado Beach, Puerto Rico. The Code also was approved by the
American Arbitration Association and
Federal Mediation and Conciliation Service who are parties.**

FOREWORD

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" is intended to supersede the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

Revision of the 1951 Code was initiated officially by the same three groups in October, 1972. The Joint Steering Committee named below was designated to draft a proposal.

Reasons for Code revision should be noted briefly. Ethical considerations and procedural standards are sufficiently intertwined to warrant combining the subject matter of Parts I and II of the 1951 Code under the caption of "Professional Responsibility." It has seemed advisable to eliminate admonitions to the parties (Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators. Substantial growth of third party participation in dispute resolution in the public sector requires consideration. It appears that arbitration of new contract terms may become more significant. Finally, during the interval of more than two decades, new problems have emerged as private sector grievance arbitration has matured and has become more diversified.

JOINT STEERING COMMITTEE

Chairman
William E. Simkin

Representing American Arbitration Association
Frederick H. Bullen
Donald B. Straus

Representing Federal Mediation and Conciliation Service
Lawrence B. Babcock, Jr.
L. Lawrence Schultz

Representing National Academy of Arbitrators
Sylvester Garrett
Ralph T. Seward

PREAMBLE

Background

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chairman, Chairman of Arbitration Board, etc.) may suggest typical approaches but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

Some arbitration and related procedures, however, are not the product of voluntary agreement. These procedures, primarily but not exclusively applicable in the public sector, sometimes utilize other third party titles (Fact Finder, Impasse Panel, Board of Inquiry, etc.). These procedures range all the way from arbitration prescribed by statute to arrangements substantially indistinguishable from voluntary procedures.

The standards of professional responsibility set forth in this Code are designed to guide the impartial third party serving in these diverse labor-management relationships.

Scope of Code

This Code is a privately developed set of standards of professional behavior. It applies to voluntary arbitration of labor-management grievance disputes and of disputes concerning new or revised contract terms. Both "ad hoc" and "permanent" varieties of voluntary arbitration, private and public sector, are included. To the extent relevant in any specific case, it also applies to advisory arbitration, impasse resolution panels, arbitration prescribed by statutes, fact-finding, and other special procedures.

The word "arbitrator," as used hereafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a labor-management disputes procedure in which there is conferred authority to decide issues or to make formal recommendations.

The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations. It does not apply to partisan representatives on tripartite boards. It does not apply to commercial arbitration or to other uses of arbitration outside the labor-management dispute area.

Format of Code

Bold Face type, sometimes including explanatory material, is used to set forth general principles. Italics are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

Application of Code

Faithful adherence by an arbitrator to this Code is basic to professional responsibility.

The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its Committee on Ethics and Grievances, to advise its members as to the Code's interpretation. The American Arbitration Association and the Federal Mediation and Conciliation Service will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures. Other arbitrators and administrative agencies may, of course, voluntarily adopt the Code and be governed by it.

In interpreting the Code and applying it to charges of professional misconduct, under existing or revised procedures of the National Academy of Arbitrators and of the administrative agencies, it should be recognized that while some of its standards express ethical principles basic to the arbitration profession, others rest less on ethics than on considerations of good practice. Experience has shown the difficulty of drawing rigid lines of distinction between ethics and good practice and this Code does not attempt to do so. Rather, it leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case.

I. ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators.

2. An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.

B. Qualifications for Special Cases

1. An arbitrator must decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence.

a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.

b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

C. Responsibilities to the Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

a. To this end, an arbitrator should keep current with principles, practices and developments that are relevent to his or her own field of arbitration practice.

2. An experienced arbitrator should cooperate in the training of new arbitrators.

3. An arbitrator must not advertise or solicit arbitration assignments.

a. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" of similar notation on letterheads, cards, or announcements. *It is inappropriate, however, to include memberships or offices held in professional societies or listings on rosters of administrative agencies.*

b. *Information provided for published biographical sketches, as well as that supplied to administrative agencies, must be accurate.* Such information may include membership in professional organizations (including reference to significant offices held), and listings on rosters of administrative agencies.

II. RESPONSIBILITIES TO THE PARTIES

A. Recognition of diversity in Arbitration Arrangements

1. An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which he or she serves.

a. Recognition of special features of a particular arbitration arrangement can be essential with respect to

procedural matters and may influence other aspects of the arbitration process.

2. Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.

B. Required Disclosures

1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.

a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, he or she must disclose such activities before accepting appointment as an arbitrator.

An arbitrator must disclose such activities to an administrative agency if he or she is on that agency's active roster or seeks placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

b. *An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.*

c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless he or she is certain that both parties to the case are fully aware of such activities.

3. An arbitrator must not permit personal relationships to affect decision-making.

Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.

a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

C. Privacy of Arbitration

1. All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.

a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits. Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by a grievant.

b. *Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.*

A commonly recognized exception is discussion of a problem in a case with a fellow arbitrator. *Any such discussion does not relieve the arbitrator who is acting in the case from sole responsibility for the decision and the discussion must be considered as confidential.*

Discussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality.

c. *It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.*

An arbitrator may request but must not press the parties for consent to publish an opinion. Such a request should normally not be made until after the award has been issued to the parties.

d. It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all the parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available.

e. *Applicable laws, regulations, or practices of the parties may permit or even require exceptions to the above noted principles of privacy.*

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a. *Only an "arm's length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.*

b. *In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.*

E. Jurisdiction

1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves.

2. A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as relieving him or her of further jurisdiction over such issues.

F. Mediation by an Arbitrator

1. When the parties wish at the outset to give an arbitrator authority both to mediate and to decide or submit recommendations regarding re-

sidual issues, if any, they should so advise the arbitrator prior to appointment. If the appointment is accepted, the arbitrator must perform a mediation role consistent with the circumstances of the case.

a. Direct appointments, also, may require a dual role as mediator and arbitrator of residual issues. This is most likely to occur in some public sector cases.

2. When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role.

a. *Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.*

b. *If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.*

c. *An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.*

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. An arbitrator must assume full personal responsibility for the decision in each case decided.

a. *The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.*

b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full personal responsibility for the award.

H. *Use of Assistants*

1. An arbitrator must not delegate any decision-making function to another person without consent of the parties.

a. *Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator which does not involve the delegation of any decision-making function.*

b. *If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.*

I. *Consent Awards*

1. Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.

a. *Before complying with such a request, an arbitrator must be certain that he or she understands the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.*

J. Avoidance of Delay

1. It is a basic professional responsibility of an arbitrator to plan his or her work schedule so that present and future commitments will be fulfilled in a timely manner.

a. *When planning is upset for reasons beyond the control of the arbitrator, he or she, nevertheless, should exert every reasonable effort to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.*

2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.

a. *An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that he or she can foresee.*

b. *Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees arrangements should be made by agreement that the arbitrator confidently expects to fulfill.*

c. *An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.*

3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed.

a. *If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.*

b. *If the parties have agreed upon abnormally short time limits for an award after a case is closed, the arbitrator should be so advised by the parties or by the administrative agency involved, prior to acceptance of appointment.*

K. *Fees and Expenses*

1. An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of his or her work.

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

a. *Services Not Primarily Chargeable on a Per Diem Basis*

By agreement with the parties, the financial aspects of many "permanent" arbitration assignments, of some interest disputes, and of some "ad hoc" grievance assignments do not include a per diem fee for services as a primary part of the total understanding. *In such situations, the arbitrator must adhere faithfully to all agreed upon arrangements governing fees and expenses.*

b. *Per Diem Basis for Charges for Services*

(1) *When an arbitrator's charges for services are determined primarily by a stipulated per diem fee, the arbitrator should establish in advance his or her bases for application of such per diem fee and for determination of reimbursable expenses.*

Practices established by an arbitrator should include the basis for charges, if any, for:

(a) hearing time, including the arbitration of the stipulated basic per diem hearing fee to hearing days of varying lengths;

(b) study time;

(c) necessary travel time when not included in charges for hearing time;

(d) postponement or cancellation of hearings by the parties and the circumstances in which such charges

will normally be assessed or waived;

(e) office overhead expenses (secretarial, telephone, postage, etc.);

(f) the work of paid assistants or associates.

(2) *Each arbitrator should be guided by the following general principles:*

(a) *Per diem charges for a hearing should not be in excess of actual time spent or allocated for the hearing.*

(b) *Per diem charges for study time should not be in excess of actual time spent.*

(c) *Any fixed ratio of study days to hearing days, not agreed to specifically by the parties, is inconsistent with the per diem method of charges for services.*

(d) *Charges for expenses must not be in excess of actual expenses normally reimbursable and incurred in connection with the case or cases involved.*

(e) *When time or expense are involved for two or more sets of parties on the same day or trip, such time or expense charges should be approximately prorated.*

(f) *An arbitrator may stipulate in advance a minimum charge for a hearing without violation of (a) or (e) above.*

(3) *An arbitrator on the active roster of an administrative agency must file with the agency his or her individual bases for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.*

Such filing may be in the form of answers to a questionnaire devised by an agency or by any other method adopted by or approved by an agency.

Having supplied an administrative agency with the information noted above, an arbitrator's professional responsibility of disclosure under this Code with respect to fees and expenses has been satisfied for cases referred by that agency.

(4) *If an administrative agency promulgates specific standards with respect to any of these matters which are in addition to or more restrictive than an individual arbitrator's standards, an arbitrator on its active roster must observe the agency standards for cases handled under the auspices of that agency or decline to serve.*

(5) *When an arbitrator is contacted directly by the parties for a case or cases, the arbitrator has a professional responsibility to respond to questions by submitting his or her bases for charges for fees and expenses.*

(6) *When it is known to the arbitrator that one or both of the parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.*

(7) *If an arbitrator concludes that the total of charges derived from his or her normal basis of calculation is not compatible with the case decided, it is consistent with professional responsibility to charge lesser amounts to both parties.*

2. An arbitrator must maintain adequate records to support charges for services and expenses and must make an accounting to the parties or to an involved administrative agency on request.

III. RESPONSIBILITIES TO ADMINISTRATIVE AGENCIES

A. General Responsibilities

1. An arbitrator must be candid, accurate, and fully responsive to an administrative agency concerning his or her qualifications, availability, and all other pertinent matters.

2. An arbitrator must observe policies and rules of an administrative agency in cases referred by that agency.

3. An arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel.

a. It is not improper for a person seeking placement on a roster to request references from individuals having knowledge of the applicant's experience and qualifications.

b. Arbitrators should recognize that the primary responsibility of an administrative agency is to serve the parties.

IV. PREHEARING CONDUCT

1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.

a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

b. *Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.*

V. HEARING CONDUCT

A. General Principles

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.

a. *Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.*

b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or certify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

c. *An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.*

B. Transcripts or Recordings

1. Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator.

a. *A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.*

b. An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. *However, if an arbitrator intends to make his or her appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.*

c. If the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator may also make appropriate arrangements under which the other party may have access to a copy if a copy is provided to the arbitrator.

d. Without prior approval, an arbitrator may seek to use his or her own tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

C. Ex Parte Hearings

1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.

2. An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate

notice of the time, place, and purposes of the hearing.

D. *Plant Visits*

1. An arbitrator should comply with a request of any party that he or she visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request.

a. *Procedures for such visits should be agreed to by the parties in consultation with the arbitrator.*

E. *Bench Decisions or Expedited Awards*

1. When an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.

a. *If notice of the parties' desire for a bench decision is not given prior to the arbitrator's acceptance of the case, issuance of such a bench decision is discretionary.*

b. *When only one party makes the request and the other objects, the arbitrator should not render a bench decision except under most unusual circumstances.*

2. When an arbitrator understands, prior to acceptance of appointment, that a concise written award is expected within a stated time period after the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.

VI. POST HEARING CONDUCT

A. *Post Hearing Briefs and Submissions*

1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.

a. An arbitrator, in his or her discretion, may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.

B. *Disclosure of Terms of Award*

1. An arbitrator must not disclose a prospective award to either party prior to its simultaneous issuance to both parties or explore possible alternative awards unilaterally with one party, unless both parties so agree.

a. Partisan members of tripartite boards may know prospective terms of an award in advance of its issuance. Similar situations may exist in other less formal arrangements mutually agreed to by the parties. In any such situation, the arbitrator should determine and observe the mutually desired degree of confidentiality.

C. *Awards and Opinions*

1. The award should be definite, certain, and as concise as possible.

a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

D. *Clarification or Interpretation of Awards*

1. No clarification or interpretation of an award is permissible without the consent of both parties.

2. Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard.

E. *Enforcement of Award*

1. The arbitrator's responsibility does not extend to the enforcement of an award.

2. In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings.

-- End of Section E --

E

UNDERSTANDING GRIEVANCE ARBITRATION IN THE PUBLIC SECTOR

by

Arnold Zack

Arbitrator
Boston, Massachusetts

This article was first published as a report contracted by the Division of Public Employee Labor Relations, Office of Labor-Management Relations Services, U.S. Department of Labor.

I.

INTRODUCTION

The expansion of collective bargaining in the public sector has brought with it a more structured relationship between the employer and the employee organizations. This, in turn, has stimulated the development of procedures to resolve disputes arising between the parties in the formulation of their new agreements as well as disputes arising during the life of those agreements over their interpretation and application.

We are concerned in this volume with the latter and, more particularly, with "rights" or grievance arbitration, i.e., the resolution of disputes over rights guaranteed by the parties in their current collective bargaining agreement. The widespread voluntary use of this procedure in the private sector has led to its expanding adoption in the public sector.

In this volume we offer a guide to the proper and most effective use of this quasi-judicial process for those in the public sector who are not familiar with the format, language and procedures involved in arbitration. Our objective is to inform the spokesmen for the public employer and the employee organization, lawyer and non-lawyer as well as those individuals mutually agreed upon by the parties to serve as their decision-makers, as to how the arbitration process is carried out. .

Because of the vast scope of the subject of grievance resolution, we are limiting our consideration to the final step which is arbitration. Other than occasional references to those portions of the grievance procedure which have bearing on the jurisdiction of the arbitrator, little attention is paid herein to the handling of the dispute through the preliminary steps of the grievance procedure. Admittedly, advice on the structure and use of the grievance procedure might be of greater and more immediate value to the parties than advice on how to deal with the last step of the process. However, there are adequate materials available on labor relations and grievance processing to which the reader is referred for background information. Furthermore, those earlier steps do not involve the arbitrator, who is the focus of this volume.

A. The Grievance Procedure

Once the collective bargaining agreement is signed by the parties, many assume that conflict is put to rest. They have worked out a document defining their relationship which presumably will minimize or eliminate further controversy. It is also anticipated that the parties' conduct, though perhaps reluctant will conform to the terms of the agreement they have signed. In essence then, the collective bargaining agreement is assumed to be a form of private ' treaty" outlining the extent of the rights and duties of each party in its dealings with the other, for the duration of the contract.

It would, of course, be ideal for all concerned, including the public, if in the negotiation of the agreement both parties were able to draft a comprehensive document capable of foreseeing and forestalling all potential disputes which might arise during its life.

Unfortunately, such crystal-ball vision is usually lacking, particularly when the parties are pressured to obtain agreement in a period of negotiation tensions and time deadlines. It is not humanly possible, particularly in a new collective bargaining relationship, to draft such a perfect document.

Therefore it is inevitable that questions will arise concerning the interpretation and application of the document drafted in the haste and pressure of contract negotiations. What is the meaning of a particular clause of the agreement? How does it apply, if at all, to a set of facts which occurred after the agreement was signed? These questions are not at all uncommon in any contractual relationship. They arise in the lease of a house or in a contract for the purchase of an automobile. In such "one shot" transactions the relationship between the parties, if unsatisfactory, can be concluded by moving or by purchasing one's next car elsewhere. And the party who is convinced that the other had not complied with the agreement has access to relief in the courts.

But the employment contract is not a "one shot" deal. It would be virtually impossible to move the work force to a different location or for the employer to hire an entirely new work force. It is equally impractical as well as expensive and time consuming to run to the courts for relief every time one party believes its rights under the collective bargaining agreement have been infringed upon.

The employees might exert economic pressure by withholding their services (striking) until the employer gives in on a complaint, or the employer might "lock out" his striking employees until they are willing to return to work on his terms. Indeed, at one time such economic confrontation was the rule. More recently the parties have come to accept that they are, in a sense, "married" to each other. The parties have opted for the grievance procedure culminating in arbitration as the *quid pro quo* for the jungle warfare of the strike and the lockout.

What is required therefore, is a sort of "marriage counseling" provided by an individual who recognizes and is committed to preserving the nature of the parties' ongoing relationship and who is well versed in law and the practice of labor relations. He must be readily accessible as the overburdened and delay-ridden courts are not and should be someone in whom the parties have sufficient faith to refer their problems for a final and binding determination.

In the United States, companies and unions in the private sector traditionally include provisions for a dispute settlement procedure of their own creation in their collective bargaining agreements. These private dispute resolution systems usually prescribe a number of appeal steps designed to stimulate resolution of disputes at the lowest levels – closest to the shop. At the same time they provide for a mutually agreed upon route of appeal to permit reference of disputes to joint meetings at the higher levels of management and the union. There the likelihood of resolution is greater because of removal from the vested positions and firmed interests of the individuals immediately concerned with the controversy.

In anticipation of the parties' inability to resolve their pending dispute even at the higher levels of the grievance procedure, provision is then made for appeal to a mutually selected outsider. He is to hear the facts and views of the parties and make a decision on the matter. Such decision, by agreement of the parties, will be final and binding upon them.

B. The Growth of Arbitration

Arbitration is a procedure by which the parties submit their conflict to a neutral for a determination which is usually final and binding. It may be compulsory if legislation requires the disputant parties to utilize such a procedure, or it may be voluntary in that the

parties have agreed to be bound by the decision of a mutually designated arbitrator.

Although arbitration has been available as a means of conflict resolution since the Biblical days of Solomon, it has until recently been viewed with suspicion and jealousy by courts of law as usurping their legal authority to resolve conflicts. As a consequence, the courts had been reluctant to recognize the binding nature of arbitration awards or to use their authority to enforce them. It was not until the early years of this century that arbitration agreements, initially in commercial disputes, came to be viewed as valid and enforceable by the courts. More recently state and federal legislation has affirmed the integrity of voluntary arbitration as an acceptable means of resolving disputes.

C. The Legal Status of Arbitration

The most active governmental role in the field of private sector arbitration has been played by the judiciary. There has been a considerable change in the attitude of the courts from rejection of arbitration as an improper means of dispute settlement and an illegal invasion of the exclusive jurisdiction of the courts in dispute settlement. The growth of arbitration itself, as well as the passage of "modern" arbitration statutes on the state and federal levels making arbitration agreements valid and enforceable, has tended to bring a more tolerant attitude on the part of the courts toward private sector arbitration. The original jealousy of the courts has been replaced by a recognition of the preferability of a mutually developed and self-policing voluntary procedure for dispute settlement. The courts have also come to accept the desirability of the parties agreeing on their own choice of decision-maker.

The culmination of the movement toward respect for arbitration is demonstrated by a series of three U.S. Supreme Court decisions, referred to as the "Steelworkers' Trilogy": USWA vs. American Manufacturing Company, 363 US 564; USWA vs. Warrior and Gulf Navigation Company, 363 US 574; and USWA vs. Enterprise Wheel and Car Corporation, 363 US 593. The courts' new role is limited to intervention in situations where they are called upon to stay arbitration, to enforce the parties' agreement to arbitrate, or to enforce an award resulting from an arbitration. Such problems arise infrequently and generally result in enforcement of the awards unless there is proof of fraud, misconduct, gross mistake, substantial breach of common law rule, or capricious conduct on the part of the arbitrator.

Although arbitration in the private sector has been given a seal of approval by the government, similar endorsement has not been forthcoming for arbitration in the public sector. Here, the jurisdictional autonomy and claim of inherent authority on the part of local, state and federal governments has resulted in variations in the extent to which binding grievance arbitration has been encouraged, accepted or even tolerated. Some jurisdictions continue to adhere to the view which traditionally prevailed before unionization in the public sector that the employer, as a structure of government, is prohibited from delegating to any outsider the right to make a determination which is binding on it. This position is premised on the theory that arbitration constitutes an improper usurpation of governmental authority which is more properly vested in and reserved to the executive and legislative branches of the government. This school of thought has been eroding as more and more state and local courts, corporate counsel, and Attorneys General opinions are ruling that the delegation of such authority is permitted as a voluntary ceding of managerial prerogatives. The arbitrator is seen merely as interpreting or applying those rights to which the employer has originally agreed in the collective bargaining agreement. Such delegation is therefore viewed as within the authority of the executive, and the resulting arbitration awards are, accordingly, deemed enforceable. In some jurisdictions the problem has been resolved by specific legislative authorization of arbitration for the resolution of questions of contract interpretation and application. In the federal sector,

Executive Order 11491 has granted authority for the inclusion of grievance arbitration in collective bargaining agreements between federal agencies and organizations representing their employees.

It is apparent that the role of government in the American experience with grievance arbitration has differed in the private and public sectors. In the private sector the role has been to respect it as a process and forum to be developed by the parties themselves in situations where they believe it will assist in administering and enforcing their agreement and in restricting the incidence and escalation of conflict during its life. The role of government has been restricted largely to one of recognizing and respecting the privacy and voluntary nature of such agreements. It has refrained from forcing the parties to adopt any specific machinery, recognizing that arbitration's effectiveness comes from the voluntary nature of its adoption by the parties themselves. The success of such voluntary procedures in the private sector is attested to by the fact that some 95 per cent of the estimated 130,000 collective bargaining agreements currently in effect provide for grievance arbitration. It is underscored by the willingness of the judiciary to endorse almost universally the awards emanating from such procedures.

Whether similar, widespread acceptance and endorsement of the procedure will evolve in the public sector remains to be seen. The evidence to date is that acceptance of the concept of arbitration and the growth of its use will continue. But in the public sector there has been no clear consolidation of issues – these are now in the process of change.

D. The Benefits of Arbitration

In the private sector grievance arbitration has become the standard mechanism for resolving disputes which arise during the life of the parties' agreement. As noted earlier, it is viewed as a *quid pro quo* for the surrender of the right of the union to strike and the right of the employer to lock out during the contract term. This same tradeoff is not available in the public sector because of the widespread legal prohibition of the strike, but it must nonetheless be considered as a practical reality since strikes do in fact occur even in the public sector. There are several other pertinent reasons for the acceptance of grievance arbitration as the preferable method of conflict resolution during the life of the parties' agreement.

First, arbitration is much more expeditious than resort to the courts. Cases are processed more efficiently through such tribunals than they would be through the use of the courts. An even greater backlog of cases than now exists in the courts would be created should collective bargaining contract interpretation be submitted to that forum for resolution. The average span of time from the filing of a demand for arbitration to the rendering of the arbitrator's award may be as short as one or two months and should seldom exceed six months, even in the most complex of cases.

Second, arbitration is less expensive than resort to the courts. There are several reasons for this. Generally, cases may be handled by the parties' negotiators without the need for hiring legal counsel. The built-in delays of the courtroom procedure, with its resulting expense in legal fees, are excluded. Also the procedures are less formal and can be tailored to meet the needs of the parties rather than becoming bogged down by excessive legal maneuvering. Depending on the wishes of the parties and of the arbitrator, the arbitration hearing may be conducted as a "shirt sleeves" working session or round table "discussion," with representatives of the parties participating freely or answering pertinent questions put to them directly by the other side and the arbitrator. This informal procedure thus makes it feasible to dispense with the services of legal counsel if the parties so desire.

Third, experience has shown that arbitration by experts in the field results in more

equitable resolution of disputes than decisions by judges who work in diverse areas of law and are not especially familiar with labor-management relations. Parties to a labor contract are in a continuing relationship with neither party capable of bailing out should they become unhappy with certain events or certain provisions of the contract. Arbitration has been developed as a means of resolving disputes while protecting and continuing an amenable relationship between the parties. Without the continuing availability of neutrals to resolve disputes which the parties cannot settle between themselves, there would undoubtedly be even greater chaos and even more frequent strikes, seriously jeopardizing the stability of labor-management relations.

Fourth, in contrast to the traditional availability of appeals to Civil Service Commissions and State Boards of Education, arbitration provides for final decisions by individuals designated by the joint action of the parties, rather than decisions made solely by the employer or its designees. Since the parties presumably choose the experts for the dispute in question there is greater likelihood of the neutral's determination being acceptable to them than would be a decision handed down by an agency or appointee of the government.

At the same time, the belief by the parties that the arbitrator's decision has been reasonable and has given adequate recognition to their arguments, tends to maintain the arbitrator's acceptability and increase the likelihood of his future designation by the parties. This in turn expands the neutral's experience and expertise on the problems of these parties, increasing his effectiveness in dealing with their problems in the future. In the sense that arbitration is really of the parties' own making, it comes closer to achieving their expectations and acceptance than would reliance on the courts or on administrative appeals agencies.

Fifth, arbitration permits the continuation of work by employees during normal processing of the dispute. It therefore deters the explosive potential of some disputes while the dispute settlement machinery does its work.

E. The Disadvantages of Arbitration

Although arbitration has become the most widely used forum for labor-management contractual dispute settlement, it still possesses a number of limitations. Many of these are noted below in our consideration of the details of the procedure, but some should be pointed out at the outset.

First, despite its informality and speed even arbitration can become costly. The concept of both parties sharing equally in the cost of the neutral, including his fees and expenses, while no doubt equitable, is a burden not faced in appeal to the courts or to the applicable administrative agencies. Smaller units of government and small employee organizations find this burden even greater and even perhaps a deterrent to having their "day in court." The cost problem may be exacerbated by the scarcity of experienced neutrals in many of the less industrialized areas of the country. The importation of arbitrators from those areas of the country having a concentration of industry and commerce will intensify the cost problem.

Second, arbitration can be abused by the unscrupulous use of power. When used as a tool of harrassment by either a wealthy employer or a powerful employee organization, it can impose intolerable pressure on the other side to capitulate on grievances rather than be "arbitrated to death" in terms of cost or time expenditures.

Third, there has been a tendency toward excessive legalism to the detriment of the informality and speed of private sector arbitration; this may be an even greater handicap in the public sector where the pre-collective bargaining atmosphere is geared toward heavy reliance on procedure and may lead to routine use of lawyers, transcripts and post-hearing briefs. This inevitably means a slower, less effective and more expensive procedure of dispute resolution.

Fourth, arbitration is a private proceeding with little opportunity for public employers or employees to exercise political leverage. Therefore, it lacks the prospect of effective use of political pressures which may, on occasion, bring more favorable rulings in administrative agencies or on appeal to the local legislature or courts. Arbitration tends to treat the strong and the weak alike.

F. Unique Aspects of Arbitration

In addition to this list of advantages and disadvantages it should be pointed out that arbitration is unique in its impact for other conceptual reasons. It provides an opportunity for balancing equities between the parties, for solving vexing problems between the parties which were not foreseen or dealt with in contract negotiations. In many cases it permits the grievants as well as the parties the cathartic value of having their "day in court" and the opportunity to "save face."

It also constitutes an acquiescence by the individual to be bound by an award because it is binding on his employee organization. Although there are continual legal questions which arise over the extent to which the grievant surrenders his right to use other forums such as the National Labor Relations Board, the Equal Employment Opportunities Commission, or similar state agencies, or the courts, it is generally accepted that the individual is bound by the workings of the procedure agreed to by the parties to the collective bargaining agreement.

Finally, the procedure is unique in its precedent setting characteristics. Arbitration decisions are important not only for the resolution of the dipsute at hand, but as a guide for the parties to the future interpretation and application of their contract, and to arbitrators of future disputes arising from the same or successor contracts.

II.
GOING TO ARBITRATION

The decision to go to arbitration, usually the union's but also management's, triggers the intervention of an arbitrator. Although the impact of his decision may be widespread, his authority is usually very limited. The arbitrator has only such authority as others delegate to him. Therefore his authority to intervene in a dispute must be prescribed in some form of delegating instrument.

A. Compulsory or Voluntary Grievance Arbitration

In some countries the government requires that disputes involving interpretation or application of employment contracts be routinely handled through government-created and government-staffed labor courts. This requirement of the use of such facilities has been described as compulsory arbitration of rights disputes. It falls short of the voluntarism associated with mutual development of dispute settlement machinery which we in the U.S. consider the hallmark of voluntary arbitration. In this country we have avoided the concept of government labor courts as a means of protecting the contractual rights of employees, although we do have a form of labor court in the National Labor Relations Board to protect the right of employers and employees in their organizational relations.

In our private sector experience the development and use of grievance arbitration has been voluntary. It is not mandated by law; neither is its form prescribed. The parties voluntarily agree to establish the procedure. After its creation, the parties are bound to its use if either of them chooses to appeal a decision of the lower levels of the grievance machinery to arbitration. It might thus be considered as compulsory by the party being grieved against. The fact remains that such "compulsion" was voluntarily built into the system by the parties themselves. Thus grievance arbitration is voluntary in that the parties

agree to arbitrate. It is compulsory in that, once agreed upon as the final and binding step in the grievance procedure, there is no alternative method between the parties for resolving their unsettled grievance. As a consequence, we have tens of thousands of companies and unions which have contracted to submit disputes of contract rights to arbitration procedures which they themselves have developed and agreed to be bound by. The government has remained aloof from the development of such procedures in this country.

Once the agreement to arbitrate is clear it is incumbent upon the parties to spell out exactly what they wish to handle in the arbitration step. As noted above, the provision dealing with arbitration should therefore cover the scope of the arbitrator's jurisdiction, procedures for the selection of a single arbitrator or multiple arbitrators, the timing of the procedure, the form of the award, and the weight to be attached thereto, etc.

B. Employee and/or Organization Instituted Appeals to Arbitration

As important as is the determination of the scope of arbitration disputes is the issue of the standing of the parties to initiate such appeals. Most collective bargaining agreements specify that grievances are to be initiated by the aggrieved or the "employee." Occasionally one also finds language granting the employer the right to grieve as well. A sizeable number of contracts also extend jurisdiction to the employee organization to commence an action in the grievance procedure. This is particularly important if the issue involves organizational rights such as failure to transmit deducted dues to the union or where contractual deprivation to the individual employee might be rather tenuous. The same rationale for organizational initiation of grievances may exist if there is a situation involving repeated contractual violations which the aggrieved employees are unwilling or afraid to grieve. Under such circumstances, the organization may feel obligated to file a grievance in order to avoid the establishment of an adverse past practice in which the employer is able to show employee condonation of a particular course of conduct.

A determination that either party may file a grievance, although directly related to the issue of which cases come before the arbitrator, does not necessarily imply that the grievants have a parallel right to appeal to the arbitration step. That is a separate issue which is also properly subject to negotiations between the parties. Most agreements grant to the employees' organization, rather than to the individual grievant, the right to decide whether to take an appeal to arbitration in employee-initiated grievances. To leave to the grievant himself the right to invoke the arbitration step after the earlier grievance steps are exhausted, might lead to excessive appeals. This would inundate the arbitration step and deplete the organization's treasury.

Leaving the right of appeal to the grievant alone would tend to propel to arbitration a large number of cases which the organization otherwise finds lacking in merit. The prevailing practice of having the organization, rather than the grievant, determine which cases are to be appealed to arbitration places heavier political responsibility on the organization's officials in requiring them to deny grievants with weak cases the opportunity of appeal to arbitration. At the same time it provides a realistic means by which to eliminate the weaker cases and to minimize costs. The organization may not be able to avoid the arbitration of some political cases, but at least the number of appeals will be significantly reduced, with consequent economic saving to the organization. On this aspect, as on the determination of who or what party may initiate a grievance, the parties' agreement in contract negotiations governs. If clearly specified by the parties, as indeed such understanding should be, there should be no procedural question of arbitrability on this issue to be decided by the arbitrator. But if there is uncertainty or lack of clarity as to whether the grievance was filed by the proper party or appealed to arbitration by the proper party, then an issue might be raised for resolution by the arbitrator before the merits of the case are heard.

C. Tripartite Panel Vs. Single Arbitrator

Some collective bargaining agreements specify the use of a tripartite panel rather than a single arbitrator. When such a requirement exists, the parties usually each appoint one member of the panel. These two partisan members then select the third, who serves as the chairman and neutral member of the panel. As in the situation where the parties are unable to agree on a single arbitrator, this arrangement may also provide for referral of the choice of chairman to a designating agency. Under a few agreements the parties specify the use of three neutrals for a panel, but this entails a triple cost factor. Although three heads may be better than one, the ultimate outcome of the case may still depend on the "vote" of just one of the three arbitrators. In general practice the parties each designate a representative to sit with the neutral arbitrator during the hearing(s) and ask questions of the witnesses. They subsequently meet in executive session with the chariman of the panel to discuss the forthcoming award. The award is then prepared by the chairman who usually again discusses it with the partisan members of the panel prior to its issuance. The award is signed by all three panel members. There may be a notation of dissent or concurrence following the signature. It is also possible that there may be a full concurring and/or dissenting opinion prepared by the partisan members and added to the award.

The use of a tripartite panel has a great advantage to the parties. It gives them an extra bite at the apple. Not only do they have the usual opportunity to persuade the neutral at the hearing, or through post hearing briefs, but they also have "their" arbitrators who attend the executive session and have an additional opportunity to "persuade" the neutral arbitrator to their way of thinking.

The tripartite panel may also be helpful to the arbitrator in several ways. First, in unusual cases involving technical complexity the two partisan "experts" may aid the chairman in explaining and expanding his comprehension of the facts. Second, it may obviate the need for calling a second hearing to clarify certain confusing matters. Third, the tripartite panel provides a unique opportunity to resolve disputes to the mutual satisfaction of the parties because the three arbitrators are in a confidential situation where the representatives of the parties may be willing to work out a compromise settlement of a grievance rather than run the risk of a total victory or loss through an arbitration award. A settlement or unanimous award would undoubtedly be more acceptable to the parties than a two-to-one decision.

But these advantages may be offset by several obstacles inherent in the tripartite panel system. First, the requirement of one or more executive sessions adds to the cost in man-hours as well as in dollars. Second, trying to arrange hearings around the schedules of three arbitrators rather than just one tends to delay the issuance of the award. Third, the necessity of the neutral securing a concurrance from one of the partisan arbitrators may result in his having to compromise his own position and issue an award which might differ from that which he would have issued had he been serving as a single arbitrator. A fourth disadvantage arises in the hearings themselves. There is a temptation for the partisan members of the panel to use their positions for excessive questioning of certain witnesses, particularly those on the opposing side. Although they seldom cast themselves in the role of outright impartials, partisan panel members should avoid the posture of being spokesmen for their respective sides.

In general then, the tripartite panel procedure may create as many problems as it solves. As a consequence, parties with such provisions in their agreement frequently waive their right to its invocation. They tend to reserve that format for more complex cases. Since the ultimate authority rests with the neutral, the parties should consider whether the benefits they might gain in utilizing the tripartite panel approach in each case, justifies the establishment of such an elaborate, time-consuming, and costly procedure.

D. Relationship to Other Statutory Appeals, Rights or Procedures

When the parties agree to the establishment of an arbitration procedure, one would expect that the forum would provide for the final resolution of all disputes submitted to it. Lamentably, this is not so.

In the private sector, the courts as well as the National Labor Relations Board have vested in the arbitrator the authority to dispose of disputes which might otherwise come to them. This has foreclosed substantial numbers of appeals from, or challenges to, the decisions of the arbitrator. Despite this there are still cases appealed to court. A few of these are challenges to the actions and/or decisions of the arbitrator on the grounds that he acted arbitrarily, capriciously, or otherwise exceeded his authority. A growing number are appeals to regulatory agencies which, unlike the NLRB, have not accepted the arbitration step as terminal for disputes in which they believe they have jurisdiction. Thus grievances alleging race or sex discrimination, or violation of health or safety regulations may not reach their final resolution at the grievance step if the grievant is dissatisfied and wishes to exercise his statutory right to bring action in another forum. In many cases the statutory appeal is well founded, since the aribtrator, the creature of the parties' creation, may take the position that his authority is limited to the interpretation of the contract rather than the application of the law.

These problems of appeal from arbitration in the private sector are multiplied in the public sector. In the federal sector, for example, arbitration decisions based on interpretations or applications of existing agreements may be appealed to the Federal Labor Relations Council. Even when an employer and his employee organization are willing to adhere to the arbitrator's determination, either of them may be compelled to challenge the ruling for its violation of superior legal authority.

Many of these problems will be resolved in the future as the private sector model of NLRB and judicial respect for arbitration awards gains credence in the public sector and spreads to other government agencies. Hopefully it may even be expected to have the individual grievant willing to abide by the neutral's ruling and, even more importantly, to be bound by his own organization's decision as to which cases should be appealed to arbitration and which should be dropped.

E. The Agreement to Arbitrate

The arbitrator must be cognizant of the limitations placed on his authority by the laws of the land, but the parties' agreement to arbitrate is pivotal to his function. That is the document which establishes his responsibility and limits the range of his authority. The agreement to arbitrate may be limited to the resolution of one particular or immediate dispute between the parties or may be broad enough to encompass all disputes which arise between them. The former *ad hoc* arrangement usually comes into being when the parties have no contractual agreement to refer all disputes to arbitration, but instead decide on arbitration procedures for each dispute.

The more prevalent arrangement is that which is incorporated into the parties' collective bargaining agreement during contract negotiations, specifying arbitration as the final step in resolving certain specified classes of disputes arising between them during the life of the agreement. In both cases, the agreement to refer either a single dispute or all disputes to arbitration is incorporated into a contract signed by the parties, identifying the existing or anticipated types of disputes, naming the arbitrator or the procedure for his selection, and setting forth any other prerequisite such as time limits for submission, jurisdiction of the arbitrator, form of the award, etc.

It is feasible for the parties to make a separate agreement to arbitrate, called a submission, on an *ad hoc* basis each time a dispute arises, although such a repetitive approach

is quite cumbersome. Its use also raises the likelihood of additional conflict between the parties in seeking agreement to arbitrate when a dispute is already pending. The parties' negotiators may draft a submission agreement most favorable to their respective positions on the pending issue. It is thus more desirable and expeditious for the parties to make arbitration available for all disputes which may arise in the future. With such a prospective arrangement they work out their differences as to what, when, by whom, where and how mutually agreed upon types of disputes may be arbitrated. The path to the arbitration step is thus made secure and binding upon both parties. This approach also minimizes the likelihood of any additional dispute or hostility between the parties over procedures to be followed in a particular conflict.

Arbitration is generally agreed upon as the routine last step in the grievance procedure. While, as noted earlier, the format of the preliminary steps of the grievance procedure is beyond the scope of this volume, a few generalized comments on the preliminary procedure are in order at this point.

There should be a sufficient number of appeal steps to remove the dispute from the individuals who were directly involved in it. This permits appealing the dispute to a level where a more detached appraisal of the dispute and its consequences will be likely to stimulate voluntary resolution without resort to arbitration. The number of appeal steps should be sufficient to weed out and reduce the number of appeals to arbitration. But the steps should not be so numerous as to result in repeated rubber-stamping of lower level decisions until the appeal reaches the level of those with authority to settle. The procedure should not be viewed as an obstacle course on the road to the ultimate arbitration step, but rather it should be considered as a series of forums, each providing an opportunity for independent review of the problem, with resolution as the main objective. The earlier such conflicts are resolved the better will be the parties' relationship and the more useful will be the arbitration step in resolving the most troublesome of the parties' disputes. Arbitration should be viewed as a fail-safe procedure rather than as a dumping ground for the parties' internal political problems. It is a forum for the resolution of those insoluble conflicts which cannot be worked out by the parties at the earlier steps of the grievance procedure, or where neutral and final determination is required to provide guidance in the conduct of the parties' future relations.

III.
JURISDICTION OF THE ARBITRATOR

Since an arbitrator has only such authority as the parties delegate to him in their agreement, the parties must consider the question of the scope of that authority as well as the right of the employer and/or the union or, even the individual employee, to appeal to arbitration when they draft their arbitration provision. A standard for handling disputes over arbitrability should also be considered at that time.

A. Establishing the Scope of the Arbitrator's Authority

The range of alternatives on the scope of authority is limitless. In some cases it may be confined to the stated terms and conditions of the agreement, or to contractual questions other than matters having economic impact, or merely to disciplinary matters. Such clauses might read: "Only questions of discipline may be arbitrated." or "Matters involving the payment of monies may *not* be arbitrated." At the other extreme, the scope may be broad enough to encompass not only the terms and conditions of employment, but also any alleged violations of the employer's rules and regulations or by-laws or even pertinent statutes and ordinances. Some clauses even go so far as to permit the arbitration of any and all matters in disagreement, or controversies of whatever character as may arise between the employer and the employees, regardless of whether related to their agreement. Such

authority would be found in the following clause: "Any dispute between the parties, whether or not founded in the agreement, may be submitted to arbitration."

If the scope of authority is too narrow, it forecloses resort to the procedure in the many cases where the neutral's determination may be important for resolution of a divisive conflict between the parties. The deprivation of this escape valve can lead to frustration and escalation of the hostility between the parties. In the private sector it is often reasoned that the exclusion of a subject from the arbitrator's jurisdiction relieves the grieving party of the obligation to resolve disputes through peaceful means and thus opens the door to the strike and/or lockout. Withholding services or ceasing operations may then force settlement of the excluded dispute. In the public sector, however, the right to strike or lock out is legally unavailable in most jurisdictions. Yet there is little question that the denial of access to arbitration for certain types of disputes and the resulting ill will and frustration may even at times result in legal or illegal job action to show sufficient strength to achieve favorable resolution of the dispute.

On the other hand, if the scope of authority is too broad, the arbitration forum may become the dumping ground for all types of complaints. These may arise from personality clashes, imagined manifestations of ill will, or even disputes involving rules, regulations, statutes and by-laws over which the neutral has no jurisdiction and which might be unilaterally changed by the employer or some governmental unit to directly frustrate the forthcoming award. With this excessively broad scope of authority, therefore, the parties risk too many cases coming to the arbitrator. And these cases may concern alleged rights for which the arbitrator cannot provide an effective remedy.

In some contracts the parties have compromised the problem of excessive resort to arbitration with the desirability of providing the fullest possible use of the grievance procedure as a means of letting off steam. They do this by providing that all disputes may be grieved and appealed up to the next-to-last step, while at the same time limiting the range of disputes that may be appealed from that step to arbitration.

The most common device for limiting the number of grievances going to arbitration is a "scope" clause which confines arbitrable disputes to those arising out of the collective bargaining agreement as administered by the parties in the employment relationship. In such situations the extra-contractual relationship of the parties, generally referred to as prior practice, might be relevant as it relates to the terms and conditions set forth in the parties' agreement, particularly in showing the way in which the parties themselves had traditionally interpreted the language of the contract.

The language for such a clause would thus refer to disputes arising out of the interpretation and/or application of the parties' agreement. This would leave the relevance of past practice, if any, to the consideration of the arbitrator.

The parties frequently seek to protect themselves from the potential excesses of the arbitrator by providing language which prohibits him from "adding to, detracting from, or otherwise modifying the terms of the parties' agreement." Presumably, the conscientious arbitrator will recognize the limits to his authority without such language, yet it is found in a great many contracts.

B. Questions of Arbitrability

The foregoing limitations on the arbitrator's jurisdiction, together with other procedural restrictions built into the several steps of the grievance procedure, may nonetheless provide a breeding ground for the development of further disputes. At times the filing of a grievance or its handling at the various steps of the grievance procedure may raise questions as to whether the case should be properly appealed to arbitration in light of the grievance procedure and arbitration language agreed to in the contract. Frequently

the parties will agree to overlook these jurisdictional or procedural questions in the belief that resolution of the substantive issue involved is more important than the procedural issue and should therefore be decided by arbitration. This often avoids the frustration that results when a grievant feels he has been denied his "day in court." At other times the animosity between the parties over the substantive issue produces added tensions in the processing of the claim and leads to the raising of procedural questions that might otherwise have been waived or ignored. These objections are often raised in the hope that a ruling that the dipsute is not properly before the arbitrator would preclude his ruling on the substantive issue.

These ancillary issues of whether or not the arbitrator has jurisdiction to hear and decide a particular case are called issues of arbitrability. They are, in and of themselves, disputes between the parties which require resolution. Historically the courts have been called upon to decide such issues. Sometimes such court actions would be filed to secure a stay or injunction against proceeding with the arbitration *ex parte* when one party refused to go forward. The courts are still requested on occasion to compel a recalcitrant party to proceed to arbitration when the issue of arbitrability is raised as a defense. More recently the courts have deferred their jurisdiction in most such private sector cases to the arbitrator himself in the first instance for a preliminary proceeding to determine whether or not he has jurisdiction to decide the case before him on the merits.

The theory for granting the arbitrator jurisdiction over the question of arbitrability is that this issue is itself a dispute between the parties to be resolved through the procedure voluntarily established by them. It could be argued that the arbitrator will always decide that a case is arbitrable in order to ensure that he gets to hear the case on its merits. This is a possibility and could be foreclosed if the parties were to specify that the jurisdictional challenges be heard and determined by a separate arbitrator. The fact remains that the requirement of a written explanation as to why an arbitrator has or lacks jurisdiction over the substantive issue requires cogent and convincing reasoning if the neutral is to preserve his acceptability for any subsequent disputes.

It is the practice of some arbitrators to avoid the challenge of "hogging" jurisdiction by offering to excuse themselves from hearing the merits of the case in the event that they overrule the challenge to arbitrability, even if not required to do so by the parties' agreement.

However, the parties are usually willing to avoid the expenditure of additional time and money as well as the burden of selecting and familiarizing another arbitrator with their problem, by agreeing to proceed to the merits with the same arbitrator. He has, presumably, already gained some exposure to the problem and knowledge of some of the facts of the dispute.

The potential challenges to jurisdiction fall into two categories: substantive and procedural. The substantive challenges to arbitrability are found on the theory that under the agreement a particular matter is exempted from the arbitrator's authority. Thus, a grievance alleging that the discharge of an employee was improper would be beyond the arbitrator's jurisdiction if the parties' agreement specified that "the right of discharge is reserved to the employer and may not be appealed to arbitration," or if the grievance protested a negotiated wage rate and the agreement excluded wage rate questions from arbitration.

In the realm of procedural challenges to arbitration are protests that the procedural prerequisites for handling grievances up to and including arbitration have not been complied with. The argument is that the failure to adhere to such procedures is fatal to the grievant's right to have his claim heard on its merits in arbitration. Among the frequent procedural challenges are: the grievance was filed too long after the incident giving raise to it; the grievance does not specify all relevant contract provisions as required by the

agreement; the limits on appeal were exceeded by one day on a particular step of the grievance procedure; or the grievant had, in fact, accepted an offer of settlement in one of the lower steps of the grievance procedure, thus disposing of the claim.

The usual practice of arbitrators is to hear the challenges to arbitrability at the outset of the proceedings. Sometimes a bench opinion is offered by the arbitrator as to his jurisdiction over the case. More often, however, he will reserve judgment until he has had opportunity to review and examine his notes of the testimony, the evidence, and any arguments made by the parties either orally or in writing. Some arbitrators refuse to hear any evidence on the merits until they have issued their decision on arbitrability. But others, to avoid excessive delay and added cost occasioned by convening a second hearing after a written ruling sustaining the arbitrability of a dispute, prefer to also hear the merits at the first hearing. They state to the parties, after hearing the arbitrability issue, that they will reserve judgment thereon and that since they and the parties are all present with time remaining in the work day, they will proceed to hear the case on its merits to avoid the necessity of arranging for and holding a second day of hearing.

By following this practice the arbitrator will be provided with that measure of extra information not brought to light in the jurisdictional proceeding and will be able to move on to a decision on the merits if he should find the case to be arbitrable. This avoids postponement of finality until after a second hearing is held on the merits, perhaps weeks or even months later, should arbitrability be sustained.

There arises a question of whether participation in any aspect of the arbitration proceeding by a party – even to argue against the arbitrator's authority – constitutes acceptance of the jurisdiction of the arbitrator. As in the court system it is possible for the party challenging the jurisdiction of the forum to make a "special appearance." In so doing, the party appears for the limited purpose of presenting its viewpoint on jurisdiction without such appearance being considered a waiver of the right to challenge that jurisdiction.

A similar device may be invoked by a party challenging arbitrability, while at the same time taking part in the proceeding on the merits. By expressly stating that its participation does not constitute a waiver of any legal right it might have to protest the arbitrator's hearing of the case, such a reservation of rights may empower the protesting party to later have the award vitiated or denied enforcement on grounds that the arbitrator assumed excessive authority.

C. Advisory or Binding Awards

A final element of the arbitrator's jurisdiction which must be agreed upon by the parties in their negotiations is whether the arbitrator's award is to be advisory or binding. Strictly speaking advisory arbitration is a misnomer, since the term arbitration presumes an agreement to be bound by the neutral's determination. In the private sector, binding arbitration is nearly universal. In the public sector the arbitration system has often commenced as advisory due to actual or assumed statutory prohibitions on binding arbitration and to the reluctance of many formerly omnipotent employers to share their decision-making authority. Increasingly, however, new contracts contain provisions for binding arbitration. The arbitrator's authority focuses on interpretation and application of the parties' agreement, rather than on regulations, bylaws or statutes which are beyond his or even the parties' control. In practice even if the arbitration is advisory, it behooves the employer to accept the arbitrator's recommendation if it seeks to avoid acceptance of binding arbitration. Failure to accept the advisory award will certainly strengthen the voice and perhaps the cause of the organization in its demand for binding arbitration in the next negotiations.

As for the arbitrator, whether the award is advisory or binding makes little difference in his handling of the case. Presumably, a written award detailing his reasoning and justifying his decision must be rendered in either case. The only difference in approach might be the increased interest of the arbitrator in attempting to mediate a dispute which in its ultimate resolution is dependent on a mutually acceptable solution. The arbitrator might feel that this acceptability would be more readily attainable through mediation than by direct negotiation between the parties after the issuance of an award which might have frozen the victor's position to deter direct settlement.

Mediation of grievances will be considered in greater detail later in this volume.

IV.
DECISION TO ARBITRATE

Arbitration does not occur automatically. It comes as the result of a conscious decision by both parties.

After a grievance has been processed up the grievance procedure ladder comes a moment of truth for both sides. For the employer it is whether to grant the grievance in whole or in part or whether to reject it and propel the employee organization to move to arbitration. For the organization the question is whether to live with the employer's rejection of the claim, seek salvage of some portion of its demand through a settlement, or take the bull by the horns and proceed to arbitration. Generally the burden of moving to arbitration is on the employee organization. It must consider many factors before making the decision. Is the instant grievance strong enough to achieve the goal sought? Does the organization have credible evidence in support of its position? Is the financial cost of proceeding to arbitration worth the economic and political gains sought? Will a victory in this case help to resolve other problems or merely stimulate new grievances by other employees? Will a victory deter the employer from similar adverse actions in the future?

A. Procedural Judgments

In addition, the moving party must answer to its own satisfaction other essential questions.

Does the agreement provide for arbitration of the issue in dispute? It is futile, if not extravagant, to bring to arbitration a dispute which is beyond the scope of the arbitrator's authority. It takes up the time of the people involved. It wastes the financial resources of the employee organization. It diminishes the status of the organization in the eyes of its members. And it raises doubts in the mind of the employer as to the capability of the organization and its capacity to control internal political struggles. An arbitrator will certainly handle the question of substantive challenges to his jurisdiction under the contract if it is presented to him, but it is the ultimate disadvantage of the parties and the system to make him the scapegoat for their failure to admit that a case is not arbitrable. In those cases where the employer is reluctant to recognize an issue as arbitrable when, in fact, it is, having the issue of arbitrability decided by the arbitrator is an unnecessary hurdle to overcome before proceeding to the merits of the grievance.

Have the procedural requirements for appeal been fulfilled? It is essential that the moving party carefully examine the procedural requirements set forth in the contract's grievance procedure to be sure that they have been complied with. Is the grievance phrased in conformity with the requirements of the contract? Is it properly signed by the appropriate individuals or officers? Were the time limits adhered to on appeal from the various steps? It is necessary to verify the answers to these and other questions, whether or not the other party has raised procedural questions, to be prepared in the event it does.

It is quite possible that procedural irregularities will not be discovered or raised until

the last step of the procedure or when outside counsel come in to take over presentation of the case. When such irregularities are raised at the hearing as a procedural challenge to arbitration, they may be dismissed as having been waived by the failure to raise the challenge theretofore in the grievance procedure. Or, on the other hand, the arbitrator may find the procedural flaw to be fatal and dismiss the grievance. For this reason, it is essential that the moving party be adequately prepared on procedural grounds to refute any challenges which might be raised by the other side.

What if the moving party discovers a procedural flaw on its own during this review? It may seek to amend the grievance to comply with the agreement. It may seek a side agreement or stipulation with the other party to ignore possible procedural defects. It may gather evidence showing that the other party was aware of the defect but overlooked it or waived it by proceeding with discusions on the merits. It may re-examine its posture and perhaps settle or withdraw the grievance without prejudice in order to save its day in court for a procedurally stronger claim which will better ensure consideration of the essential issue on its merits. Above all, upon discovering such a flaw the moving party must establish safeguards to assure that such a failing does not recur in processing subsequent grievances. Here, as in the case of substantive challenges to arbitrability, it is unwise to run the risk of taking a procedurally defective case to arbitration unless there is a conviction that the procedural defect will not preclude the basic grievance from being heard and determined on its merits.

B. Substantive Judgments

In addition to the procedural judgments which must be made on the question of whether to proceed to arbitration, there is another question that must be answered. However some cases may still be appealed even if that question is answered negatively.

Is there a reasonable chance of winning the case? This is perhaps the most important question to be answered in determining whether or not to appeal to arbitration. It might seem simplistic to even raise this question, since every grievance is presumably filed in the expectation of winning, but the decision to file a grievance is quite different from the decision to file for arbitration. The stakes are much higher in the latter. Indeed, it may be preferable to leave vague contract language unchallenged than to make that challenge and have it resolved adversely. That might create a binding precedent with negative impact upon the moving party for the remainder of the life of the agreement.

Additionally, it is important to each party to have a favorable record of victories in arbitration cases. This increases its credibility and tends to stimulate more favorable settlements in the processing of future grievances. Conversely, if the moving party has a record of always losing its arbitrations, the other side might find reduced incentive to offer a settlement if prior experience indicates that it will win in arbitration.

Despite the importance of winning in arbitration, both sides will acknowledge that there are certain cases brought to arbitration with the expectation of losing. These are usually "political" cases. Ideally they should not arise. Each party should attempt to resolve its internal problems before letting a case escalate to the arbitration step. Arbitration should not become a dumping ground for those cases in which the parties are incapable of policing their own organizations. Arbitration should not be a face saver for the loser. Realistically speaking, however, this does occur and at times even serves a valuable purpose in disposing of cases arising from uncomfortable personality problems and in restoring a harmonious relationship between the parties. Among the cases in this category are those involving the over-reacting supervisor who, on impulse, discharges a highly competent, long service employee for a minor offense which really justifies only a warning or a one day suspension. The employer may not be willing to overrule the supervisor for

fear of destroying his morale or his authority in the work place. Another example is the case of the grievance filed by the leader of an opposition group within the bargaining unit who had, indeed, been insubordinate or excessively tardy, or who had violated a provision in the agreement, but whose case the organization cannot abandon for fear of the resulting internal strife or leadership upset.

Other cases in this category include those brought by the union because it seeks to show management that it has the militancy and resources to take a case to arbitration to counter management statements or the impression that the union is weak, divided or unable financially to afford such appeals. Or, a case may be appealed to show organization firmness in its original position in filing and processing the case through the several steps of the grievance procedure.

Similar attitudes on the part of the employer may lead it to permit appeals of questionable cases to arbitration to make the same showings of firmness, solidarity, strength of resources and even militancy.

There are, of course, a large number of cases which are taken to arbitration without the certainty of winning and without the intention of saving face. These are the cases in which either or both of the parties seek resolution of a genuine difference of opinion to end unrest, uncertainty and tension. Sometimes, too, the decision to arbitrate is made with one eye on forthcoming negotiations over contract renewal, to strengthen one's case or to seek to deprive the other side of some of the strength of its position on a certain matter.

C. Who Makes the Decision

In most collective bargaining agreements the right of appeal to arbitration is restricted to the parties themselves. Nonetheless the contractual grant of authority to appeal does not necessarily reflect the realities of the political structure of management or the employee organization. Within the employee organization there is often a committee of officers which makes the decision on appeal. This committee may be subject to various pressures, and these may be reflected in its judgments as to whether or not the case has merit, as well as its decision to appeal.

On the management side, too, the decision to settle or to appeal may be fraught with political overtones. Here, though, the ultimate decision may rest in the hands of the highest administrative officer whose exposure to the daily labor management relations and to the role of arbitration may be limited. Management must also consider the impact of such determination on its other bargaining units and on its future negotiations.

V.
SELECTION OF THE ARBITRATOR

The essence of the arbitration process is the resolution of a dispute by a mutually acceptable neutral. It is important therefore that the parties include in their collective bargaining agreement detailed language to assure the selection of a competent and acceptable arbitrator. There are several ways in which arbitrators may be chosen: directly, either ad hoc or through selection of a permanent umpire; through a rotating panel; through direct selection of an individual arbitrator for each case to be heard; or indirectly by resort to the facilities of the American Arbitration Association, the Federal Mediation and Conciliation Service, or one of the various state designating agencies.

A. Permanent Arbitrator

Under the permanent umpire system the parties in their negotiations agree upon a permanent neutral whose name is written into the agreement. He becomes the parties' automatic

choice for arbitrator in all cases reaching the arbitration step for the life of the agreement or until he is relieved of his responsibilities. The designee may be employed on a full-time basis, devoting his time exclusively to these two parties if their case load warrants. He may, as is more often the case, be employed on a part-time basis, subject to call when needed. The same arrangement can be made utilizing a number of permanent umpires on a rotating basis. Any individual on this permanent panel who is called upon to arbitrate for the parties serves the same function as the single permanent umpire.

The method of his removal is also a matter of negotiations. The parties may agree that he is to be employed for the full term of the agreement, that he may be removed at the request of one party, or that he may be removed only if both parties agree.

Among the benefits of the permanent umpire method is the elimination of the time-consuming and often hostile discussions as to which arbitrator should be selected for a particular case. Since most arbitrators usually give priority to cases arising out of their umpireships, it is also possible to get earlier scheduling of hearing dates. A rotating panel can be particularly helpful in reducing delays if it is so structured as to allow the bypassing of the next arbitrator in instances where his schedule precludes a prompt hearing. Use of a permanent umpire also assists the parties by permitting them to work with a person who is familiar with them and their problems and whose style of conducting a hearing and seeking out necessary information is known to them. A single umpire also provides a greater continuity in decision-rendering. To know or anticipate an arbitrator's views on a particular subject matter may forestall the filing of weaker grievances. With an umpire, decision-rendering tends to be more consistent and to provide the parties with one neutral's attitudes. This provides a measure of guidance in handling later disputes throughout the grievance procedure. This arrangement also assures that the arbitrator has the necessary familiarity with the enterprise as well as understanding of the details of its operations. Perhaps most importantly, the umpire, unlike the *ad hoc* arbitrator, develops a comprehensive and detailed understanding of the parties' relationship from his repeated role in solving their problems. This, in turn, shortens the length of time spent in hearings on background information. The umpireship arrangement is of particular value in a multi-location operation. There the use of the same arbitrator in a number of different locations helps to insure uniformity of personnel practices and contract interpretations among the diverse operations.

But the umpireship also has its drawbacks. For the parties, the use of a single neutral binds them to the thinking process of one man. This reduces or eliminates the opportunity to seek out other arbitrators with a different philosophy or viewpoint in dealing with related issues. There is much less likelihood of an arbitrator reversing himself than there is that another arbitrator will decide like facts in a different way. The umpireship system also tends to foster the forwarding of more cases to arbitration than might otherwise occur, particularly if the arbitrator is on a retainer fee arrangement where the cost per hearing might be less than if an ad hoc arbitrator were used.

For the neutral, too, the umpireship has its drawbacks. If the umpire is too readily available he may come to feel over-used. Although the assurance of handling all the parties' work is gratifying, particularly if a retainer fee is negotiated, there may be an uncomfortable feeling that the parties are pressuring him or that they are upset if they each don't win their "fair share" of the arbitration cases. This is obvious in the umpireship arrangement because of the repeated contact with the spokesmen for the parties and the arbitrator's exposure to expressions of dissatisfaction with his performance in a particular case. This is not noticed in *ad hoc* arbitrations where the losing party may simply refrain from using the arbitrator again; the arbitrator's ignorance is his bliss.

B. Ad Hoc Arbitrators

Although the permanent umpireship arrangement has been employed in a number of situations in the public sector, the more common method of designation is on a case-by-case basis. This may be done by direct designation or through the facilities of various designating agencies. Here, too, the controlling arrangement is that worked out by the parties in negotiations and incorporated into their agreement. Generally, the pertinent contract language specifies that arbitration shall be used as the final step of the grievance procedure; that the parties are to meet to agree upon an arbitrator; and that if they are unable to agree on a mutually acceptable neutral, the matter of selection will be referred to one of the designating agencies.

Occasionally the language agreed to by the parties will limit the arbitrator to hearing only one case, but generally the parties agree that in the interest of speed and economy a number of grievances should be heard by one arbitrator and at one sitting if possible.

Efficient utilization of the *ad hoc* arrangement requires that the parties be fully familiar with the available neutrals and their prior awards. They must have sufficient faith in the process and in the integrity of the other party to overcome the prospect of a complete veto of names suggested by the opposite side. Use of the *ad hoc* arbitrator, as distinguished from the umpire, permits trying an arbitrator and later abandoning him if either party chooses not to use him in a subsequent case, or keeping him on for successive cases, just as long as the parties are satisfied and want to continue to utilize his services. The *ad hoc* arrangement probably makes more sense for those parties with a limited number of arbitration cases. It also permits the employment of an arbitrator with specialized expertise should the nature of a particular grievance so require.

It is essential in drafting the procedure for the designation of the *ad hoc* arbitrator that the parties provide language which will guarantee the selection of an arbitrator even if they are unable to agree upon one. For this reason, it is recommended that the parties set a time limit for the direct selection of a mutually acceptable arbitrator. After that, if they have not reached agreement, they should refer the selection of an arbitrator to a specified individual or agency pursuant to its own rules.

C. Designating Agencies

There is no restriction as to who or what agency may be named as the body or individual to select an arbitrator in the absence of agreement between the parties. They may agree upon a judge, a clergyman, or any other mutually selected individual to make the appointment. Far more common, however, is the practice of choosing one of the established designating agencies which maintain rosters of experienced neutrals. Among the most well known of these agencies and the ones with the largest rosters are the American Arbitration Association (which is a private, non-profit organization), and the Federal Mediation and Conciliation Service. A number of state agencies also maintain rosters although they tend to be smaller and more localized in their membership.

Under the procedures of the American Arbitration Association, which has 24 regional offices in the United States, the party appealing to arbitration will contact the AAA for a list of arbitrators. Such list will be tailored to any contractual requirements of the parties' agreement such as a specific provision for a list of five names, with each party striking alternative names until one remains. Absent such specific procedure, the usual practice of the AAA is to send out a list of nine names to each party. Each party marks its list by striking out the names of objectionable arbitrators, and listing in numerical order the remaining names according to preference. The lists are then returned to the AAA regional office which issued them. There the lists are compared and the highest mutual choice of the parties is designated as the arbitrator. In the event of non-agreement, new lists may be provided or a direct administrative appointment made by the AAA.

The AAA panel of labor-management arbitrators is composed of nearly 2,000 names of persons experienced in arbitration with a number of cases to their credit. All are required to have endorsement from employers and employee organizations in their geographic areas.

Adherence to the AAA rules not only assures the designation of a competent arbitrator but also that certain procedures will be complied with, such as the issuance of an award within thirty days after the close of hearings. The AAA staff arranges the time and location of the hearings, exchanges briefs, and distributes the award and arbitrator's bill to the parties. A nominal fee is charged for these administrative services and is equally divided between the parties.

The Federal Mediation and Conciliation Service operates its list in much the same manner. It has recently undertaken to speed up the designating process by having the listing and correspondence functions performed by computer. This agency is also authorized to make administrative appointments if the parties are unsuccessful in their use of the lists. The involvement of the FMCS, however, terminates with the designation of the arbitrator. The staff does not become involved in any further administration of the case. The arbitrator is responsible for scheduling the hearing, exchanging briefs and distributing his award and bills to the parties. There is no charge to the parties for the FMCS' service in designating the arbitrator. The same is true for state agencies which only carry out the designating function.

D. Qualifications of the Arbitrator

Theoretically anyone may serve as an arbitrator provided both parties agree to be bound by his decision. There are no formal certifications or qualifications necessary to serve in this capacity or to hold one's self out as an arbitrator. In practice, however, the parties are willing to delegate final authority only to an individual with experience in the field and whose judgment they feel confident in relying upon. As a consequence, parties tend to confine their selection to those individuals who have expertise in the employment relations field and whose judgment is respected by other employers or employee organizations who have used their services. In general, the parties seek out as arbitrators those who have an understanding of industrial relations problems and skill and experience in the interpretation of collective bargaining agreements. They also look for those who have a familiarity with personnel policies, industrial discipline and human relations. Certainly the parties would each prefer to have as the arbitrator of their dispute one who has previously ruled in their favor on the same or a similar issue between two other parties. Sometimes such rulings may be gleaned from other employers or employee organizations on how the arbitrator "leans" in the disputed area. But such search is usually fruitless, since each case depends on the specific language of the governing agreement and on the evidence presented. The parties may be led into a false sense of security because of a favorable phrase or expression of viewpoint by the arbitrator in another case. In any event, even if an arbitrator with favorable inclinations is found it is unlikely that he will be agreed upon by both parties. If one party has discovered from its investigations that a particular arbitrator is favorably inclined on the issue, it is just as likely that the other party is also aware of that "inclination" and will reject the arbitrator for that reason. Thus, seeking out the arbitrator who is a "sure thing" on a particular issue is dangerous and unrealistic. The best hope for the parties is to agree upon an individual with knowledge in the field who is in a non-partisan, professional position with a sense of integrity and impartiality and a commitment to maintaining the continuity of the employer-employee relationship.

Impartiality is difficult to quantify since the arbitrator must be "partial" to one side or the other on each individual case. Perhaps the best guideline is that the arbitrator be free from underlying commitment to, or prejudice in favor of, one side or the other. Integrity likewise is difficult to pinpoint. But the arbitrator, to be acceptable over the long run, must have demonstrated his sound reasoning ability in the language of his written awards and his independence from influence and pressure on his practice. Impartiality and integrity are best protected by the mutuality of the selection process where each party has an equal say in the designation of the

neutral. Each must be satisfied as to the arbitrator's qualifications and independence. Examination of the arbitrator's prior awards, either in publications by reporting services or in contact with other parties who have used him, should provide ample opportunity to determine his prejudices and attitudes. Determination of underlying employer or organization prejudice is futile if made in terms of the number of available awards rendered for each side. Only a small portion of any arbitrator's awards are published or even available to the parties. Indeed, evidence of an arbitrator evenly dividing his decisions between parties does not confirm impartiality or neutrality. To the contrary, such careful balancing of awards between contending parties might only prove that the neutral lacks the integrity or conviction to decide each case on its merits without regard to his overall "batting average." The neutral who sets as his goal alternate satisfying of opposing parties, or splitting the difference, is in for a short career. The parties know their strengths and weaknesses in the preparation and/or presentation of each case. They know intrinsically which cases they "ought" to win or lose. For a neutral to hand down a decision that is contrary to the parties' expectations, with a poorly reasoned award, would be a necessary corollary to maintaining that .500 batting average for each side. The party which receives a favorable decision when it has a weak case which it expected to lose, can well suspect that the next case will go to the other side, regardless of its merits. For the parties as well as the arbitrator himself, a sound ruling is often more important than the outcome of a particular case.

Reliance on the balance sheet approach by the arbitrator *or* the parties, destroys not only the arbitrator but the arbitration process itself. Fear or suspicion that the arbitrator follows such a practice would only stimulate the processing of more inconsequential cases in the hope that when the balance is struck, it could result in favorable opinions in the more important cases. Such an approach can only be self defeating for all concerned. As noted by the late Harry Shulman in a 1945 opinion, "There seems to be a feeling on the part of some that a party can win a greater number of cases if it presents a greater number for decision, the assumption being that some purposeful percentage is maintained. There are many reasons why this point of view is wholly unsound. No umpire should be retained in office if he is really believed to be making decisions on such a basis. An umpire should be employed only so long as he renders decisions on the basis of his best and honest judgment on the merits of the controversies presented, and only so long as both parties believe that he does so. If he is believed to be making his decisions on a percentage basis, the remedy is to put him out of office rather than to give him more cases for arbitrary decision." IALAA Par. 67, 264-67,620, 1945.

It is understandable that arbitrators, particularly those newer ones or those with limited experience in the public sector, will not have encyclopedic knowledge on the subject matter of all disputes coming before them. To some extent the parties can remedy this problem by agreeing on an arbitrator who has demonstrated knowledge in a particular area such as job evaluation, time study, civil service rules, tenure or police-fire parity. But frequently arbitrators with such specific skills are not immediately available or are not acceptable to both parties. If such is the case, it is the responsibility of the parties to inform the selected arbitrator of the nuances of their particular problem. By this process, he can gain the requisite background to make an intelligent and helpful determination.

It is often believed that legal training is a prerequisite for success as an arbitrator. This is based on the belief that legal contract interpretation is generally involved in a dispute. Since the parties frequently employ lawyers to present their cases, this intensifies the trend toward arbitration becoming increasingly "legalistic." But nearly half of the busiest arbitrators are not lawyers. Yet they have established themselves as masters of contract interpretation and the rules of arbitration proceedings. In fact, they may be less likely to get bogged down in the technicalities of rules of evidence, thus retaining a more objective view of the merits of the case before them.

E. Availability of Arbitrators

A serious problem related to the qualification of arbitrators is the matter of their availability. There has been much discussion over the "shortage" of arbitrators. At present a relatively small corps of a few hundred individuals do most of the arbitration work in the United States. They, in turn, are concentrated in the industrialized areas of the country. This is a result of the way in which arbitration has evolved since World War II.

The rapid expansion of labor arbitration in the U.S. has come as a result of a voluntary effort to resolve industrial disputes using the staff of the War Labor Board. This group proved so acceptable that, after the War, many of its members hung out their shingles as arbitrators and went into private practice. Until recently, these War Labor Board alumni were deciding the great bulk of the arbitration cases because of their established expertise and acceptability.

This concentration of arbitration work among this relatively small cadre provided limited opportunity for the larger number of newer arbitrators to gain experience in the field. But things are now changing. The advancing age of the War Labor Board alumni and their preference for reduced work schedules and/or retirement is now increasing the demand for other arbitrators. This demand is particularly noticeable in the public sector with its burgeoning dispute settlement activity. The older, more established arbitrators continue to have sufficiently heavy work schedules to keep them busy. This precludes their extensive absorption of additional work. Additionally, many of the "old school" have been reluctant to undertake the mediation and fact finding which is often the threshold work in the public sector. This is due to their lack of familiarity with the mediation process, dislike for long, drawn-out hours of meeting, and unwillingness to travel to out-of-the-way locations where much of this work is available. As a consequence, much of the public sector work has fallen to the newer arbitrators who are qualified but somewhat less experienced. This in turn augments their experience, broadens their exposure and increases their acceptability much more quickly than if their only opportunities were in the private sector. Thus there is a rapidly expanding cadre of neutrals with experience and expertise in the specialized field of public employment. This is of inestimable value in the expanding field of public sector grievance arbitration. It is bound to have its long term impact in providing more experienced arbitrators for private sector work as well.

As public sector arbitration clauses are negotiated, and more grievances are appealed to arbitration, it appears quite likely that even the existing supply of qualified arbitrators will be inadequate. Extensive training activity for the role of arbitrator with the active participation of the parties will do more to lure into the field a greater number of neutrals with qualifications that make them acceptable to the parties. Many argue convincingly that this is needed even now in those states which already have public sector collective bargaining. The spread of such bargaining to less industrialized states where the availability of neutrals is even more limited is certain to exacerbate the problem and intensify the need for recruiting and training local individuals for service as arbitrators.

F. Compensation

Most arbitration of commercial, construction, accident claims and community disputes is done by uncompensated volunteer arbitrators, unless special arrangements are made for compensation. But the growth of labor-management arbitration as a specialized service in the U.S. has led to its becoming a compensated profession. This is due to the great demand it places on a limited number of available neutrals. Fewer than one hundred individuals are deemed sufficiently acceptable to devote 100 per cent of their time to arbitration. The other few hundred who spend a sizable amount of their time in the practice of arbitration, reduce their availability for other economic pursuits. Thus arbitration, whether carried out on a full or part time basis, has become a means of livelihood for those engaged in it. It requires the maintenance of an office and the absorption of telephone, reproduction, secretarial and other overhead expenses.

These costs are not usually passed on directly by the arbitrator to the parties. Rather, they are built into his fee as absorbed overhead. Arbitrators set their fees on a daily rate which at the present time ranges from $150 to $300, not including expenses. In a few jurisdictions where state agencies designate the arbitrators, a statutory rate is set as the daily fee. Where this set fee is too far below a busy arbitrator's regular fee, he tends to remove himself from the rosters of these designating agencies. Those on the roster are deemed to be qualified by the agency, their personal situations and availability enabling them to work at a lower fee.

The daily rate arrangement runs for each day of hearing, each day of executive session in the case of tripartite panels, and each day spent in study and preparation of the award. Arbitrators rarely charge by the hour, but many do charge for a half day of service when applicable. A daily rate for hearings has become standard due to the arbitrator's setting aside a full day out of his schedule for the parties. This deprives him of other work opportunities for that day, particularly when travel time to and from the hearing location is taken into account. Thus the arbitrator is likely to charge the same daily hearing rate whether the actual hearing runs for three hours or eight. It is also possible that the arbitrator may charge for hearings held during the evening or hearings which run beyond the regular work day.

Some arbitrators also charge for travel time and for belated cancellations or postponements of hearings. These charges vary and may be ascertained by the parties in communication with the individual arbitrator or the designating agencies. All fees and travel expenses charged by the arbitrator are paid by the parties pursuant to the terms of the parties' Agreement. In nearly all cases the arbitrator's services are borne equally by the parties. In a few cases, the agreement stipulates that the arbitrator is to assess costs on the basis of "guild," i.e., to the losing party. This might appear to be the more equitable approach but the fact remains that the grievance and arbitration procedures are developed for the mutual benefit of the parties, regardless of who is at fault in a particular case. Additionally, many arbitration decisions, especially in discipline cases, are not a win or loss for either party. For the arbitrator to apportion responsibility in cases of reduced penalty, for instance, may require additional inquiry and/or additional hearings. This may spawn further hostility between the parties and set the stage for the filing of additional cases.

VI.
PREPARATION FOR THE HEARING

Once the grievance is filed, it is often a long and arduous route to the arbitration award with many steps to be taken and work to be expended by both parties. But no single element is of greater importance to either party than the decision to proceed to arbitration.

A. Agreement on Subject Matter

When a determination is made to appeal a grievance to arbitration it is important that the parties reach an understanding on the subject matter to be arbitrated.

An accord on the subject of the dispute is important for three reasons. Sometimes when there are a number of cases awaiting arbitration there may be error by one or the other party in preparing for the issue they think is to be arbitrated. Sometimes the parties also have different viewpoints as to what is the point of contention in a particular grievance. The latter may create the possibility of an apparent hostility even though none in fact exists. If the parties were to get together to discuss the subject matter of the dispute they might reach the conclusion that there is no real conflict and that the grievance was easily resolvable. This often happens when the parties bring in outside counsel or advisors who are removed from personal involvement and are thus likely to be more objective. They may advise their clients that it would be preferable to settle rather than carry the case into arbitration.

It is most desirable for all concerned if the parties also agree on the specific issue to be submitted to the arbitrator; this should be done well in advance of the hearing. This would provide

not only an additional opportunity for settlement efforts between the parties but would also help to remove extraneous matters from the purview of the arbitrator. As a result the parties could focus on the crucial issue in their preparation of the case and eliminate costly delays which would result from seeking agreement at the outset of the hearing. If such a pre-hearing meeting is not held, or if it is unsuccessful, then the problem of framing the issue must be dealt with at the hearing before the arbitrator.

B. Data Collection

Even in the presence of an early agreement between the parties as to the wording of the submission, it is essential that the parties undertake to collect all the evidence they can to support their views of the issue. In some instances the essence of the parties' conflict is over the proper interpretation of certain contract language. When such is the case there is often little disagreement over the facts of the situation and the parties may even stipulate to the facts. More often there is some disagreement as to exactly what took place. In any event it is essential that the arbitrator be provided with a clear and documented recitation of what occurred and sufficient evidence to refute the other side's version of the situation.

Ideally, such data collection is carried out immediately after the incident leading to the grievance when the recollection of events is fresh in the minds of witnesses and the relevant exhibits readily available. Any such evidence which was found to justify the filing of the grievance should be retained as evidence for the arbitration hearing. The observations of witnesses should be put in writing with full detail and be signed and dated. The passage of time between the incident and the hearing frequently leads to inaccurate recollections or even unavailability of witnesses due to illness or death. Such written statements may become the only available data as to what transpired. Too frequently, such foresight is not exercised, and the need for detailed data is not realized until the preparation of the case for the arbitration step. Collecting accurate accounts of events that transpired several months earlier is difficult. Recollections become hazy. They become "confused" by intervening events, by prejudices, by personal motives and by statements made by other witnesses in the early steps of the grievance procedure. Nonetheless is it important to have all available witnesses present their respective versions of the facts and for the arbitrator to distill therefrom the version which appears to be the most credible. It is also wise to anticipate the other party's version of the incident so that convincing refutation is available. It is risky but often necessary to attempt to elicit the recollections of witnesses on the other side at the hearing. In questioning to find material to support the cross-examining party's case, there is always the risk that a refutation will come forth. It may be worthwhile to secure the testimony of individuals outside the employment relationship such as physicians, police officials, neighbors of the grievant and the like. They may help to strengthen one's case and to prepare against surprises in the other side's presentation. Sworn affidavits from such individuals may be presented if the persons are unable or unwilling to attend the hearing. If such "experts" are unable to be present, their affidavits may be accepted into evidence by the arbitrator.

Even in cases where there is little conflicting evidence regarding the crucial issue, the parties must still collect all relevant information for presentation to the arbitrator. Who is the grievant? (List his name, address, job classification, job description, rate of pay, date of hire, past positions.) What is his prior disciplinary record? What has been his job performance and demonstrated work capabilities? Who else is affected by this grievance? Does the grievance accurately reflect the demand of the grievant? Does it raise an underlying on ancillary issue which the other party may be planning to emphasize in the presentation of its case?

The parties' collective bargaining agreement should be read in its entirety to ascertain if there are any other provisions other than those cited by the grievant which are relevant or even controlling. Reliance on the index or table of contents is not sufficient. Many a relevant provision which is sure to be discovered by the other party lies buried in a seemingly irrelevant

article. It is also important to check all the contract provisions relating to the grievance procedure to verify that all procedural prerequisites have been met.

A thorough preparation of the case includes the collection of all possible evidentiary records. Minutes of the parties' prior meetings, the current agreement, prior agreements if relevant, personnel records, disciplinary documents, the employer's work rules, posted notices, memoranda of understanding, plans and/or photographs of the work area, charts, maps, medical and police records, copies of prescriptions and telephone bills, copies of by-laws, municipal ordinances, statutes and court decisions all may have bearing on a case. In any event they will certainly be requested by the arbitrator if relied upon by either party. There is no question that a well-prepared case has greater appeal and credibility than one which is shoddily prepared and has inadequate documentary support.

Other arbitration decisions rendered by the same or other arbitrators, particularly if between the same parties, should be searched out and examined. Even decisions involving a like issue but between different parties are of value in ascertaining an understanding of an arbitrator's reasoning process which might be crucial to the instant case.

In some cases, it is worthwhile to seek out prior decisions of the arbitrator who is to hear the case. While it is unlikely that an identical fact situation would have arisen in an earlier case, it is possible through such investigation to learn the arbitrator 's general approach to the subject matter and his treatment of the subject as far as remedy is concerned. It is also possible that a study of his awards will give some clue as to what type of documents he prefers or the order in which the case might be presented. It should be re-emphasized that only a portion of all awards are published by the various reporting services. Any additional decisions must be obtained from the parties involved, never from the arbitrator himself, unless with the consent of said parties.

C. Case Preparation

Once all the relevant facts and supporting data are collected it becomes much easier for the parties to prepare their cases for presentation. This must be done in a logical, informative manner. It is most useful for assuring that the arbitrator, who knows nothing of the case prior to the hearing, is rapidly tuned in to a dispute with which the parties have lived for months. Generally this is best done by the preparation of an opening statement setting forth the facts which each of the parties expects to bring forth from the testimony and the exhibits. It is generally more helpful for the arbitrator if the parties present such opening statements at the outset of the hearing. However, for greater impact or for surprise purposes, either or both of the parties might elect to bypass or minimize the opening statement to avoid revealing their case to the other side.

The arbitrator should have as much background information as possible, preferably by stipulation between the parties or through interrogation of the first witnesses. It is also desirable that the parties get together before the hearing to stipulate the facts for submission as a joint exhibit if possible to facilitate the progress of the hearing.

The statements of all witnesses should be studied and only those with the best recollection or the most persuasive presentation should be selected to give testimony. It is preferable to avoid redundant witnesses. They are time-consuming, add nothing to the hearing, and increase the risk of conflict with the testimony of other witnesses. They also provide more fodder for cross-examination and impeachment by the other side.

The selection of good witnesses who fully understand the thrust of the party's case is essential not only to lay a good foundation but also to permit withstanding extensive cross-examination. Thus an administration or organization official could be used as a witness to introduce prior agreements, prior arbitration awards involving the same parties, minutes of earlier negotiations, disciplinary records and the like.

Probably the most important aspect of case preparation is in the development of the argument. As noted above, there must be careful scrutiny of all testimony and documents to come forth with a convincing analysis thereof, leading to a favorable award. In developing this analysis, it is important to limit provisions of the agreement and exhibits to those which are most relevant. Trivia which may be misleading to the arbitrator as well as challenged by the other side should be excluded. In addition to those arguments based upon the agreement itself, there should be an exploration of human interest or common sense arguments which might excuse or justify certain conduct, support the reasonableness of the employer's or the employee's action, or mitigate the penalty to be imposed. Such arguments may be of particular importance where the agreement is ambiguous or where there is a conflict between the contract and past practice.

Finally, attention should be paid to preparing arguments on the remedy. Even for the employer, it is desirable to deal separately with the remedy question. Such argument is without prejudice to the main contention on the merits in the event the grievance is sustained and is directed, in the alternative, to the proposition that the remedy requested by the organization is excessive, unwarranted, or violative of the agreement or past practice.

It is important throughout the preparation of the case to keep in mind the other side's presentation and to prepare adequate refutation even if this involves having additional witnesses and documents on hand.

D. Composition of the Team

An arbitration hearing is an event of consequence for many on both sides of the table. It presents an opportunity to vary one's usual routine while watching a spectacle of sorts. Despite the willing audience, it is desirable that representation on both sides be kept to a minimum. A large attendance costs money in terms of lost work days and accentuates the circus atmosphere. A smaller group is best suited to encourage the informality which is essential to the proceedings.

It is difficult to prescribe who should be on each team. Obviously this varies with the parties and the nature of the case. Undoubtedly, each team will have as a resource an individual who is familiar with the facts of the incident or transaction, such as the grievant or the shop steward (or on the management side the foreman or supervisor), and a ranking representative of the organization and the administration. In addition, each side will have such witnesses as they deem necessary for the presentation of their case and for rebuttal.

The spokesman for each team need not be the ranking official of that party. He should be selected because of his ability to present the case in a concise and persuasive manner. He should be thoroughly acquainted with the facts and arguments of the case as well as with arbitration procedures. In addition, he should have some familiarity with the rules of evidence. It is possible that the parties will rely on the same individuals who processed the grievance through the early steps of the grievance procedure.

In view of these suggested prerequisites, the question arises as to whether the parties should use a lawyer as their spokesman. Certainly the public employer has access to counsel through their city solicitor, town counsel, district or state attorney's offices. Also available are the attorneys used or available to arrange bond issues and the like. The employee organizations likewise have access to staff attorneys or attorneys in private practice in the community. The increasing complexity of collective bargaining agreements, the growing reliance on arbitration and on legal precedents, the overlapping jurisdiction of state and federal labor relations and equal employment agencies, the expanding reliance on post-hearing briefs and legalisms within the process, all seem to point to a need for lawyers as spokesmen. This seems particularly important when the other party is known to have hired legal counsel for the hearing.

Despite the foregoing argument, it must be remembered that arbitration gained its credibility and effectiveness as a forum for non-lawyers. The bulk of arbitration cases are still handled

by the same non-lawyers who processed the grievance through the several steps of the grievance procedure. Reliance on attorneys tends to accentuate legalisms in arbitration. It also tends to postpone the resolution of cases by delays in scheduling hearings to fit the convenience of busy lawyers and in waiting weeks for the delivery of transcripts and post-hearing briefs and perhaps even reply briefs. This all results in increasing the cost of the process to the parties, perhaps to the extent of pricing arbitration beyond the means of the small employer and small employee organization.

Although there are certainly cases with complex legal issues which do justify the use of an attorney, there are many more that can be handled efficiently and with less cost by experienced staff employees for both parties. For those few cases which cry out for the services of an expert spokesman, the parties are well advised to seek out the services of an individual in the labor-management field regardless of whether an attorney, rather than to rely on attorneys whose strength lies in other areas of the law. The added financial expenditure for labor relations experts in such cases will probably be justified by the more favorable results. But in most cases, it should be emphasized that the parties themselves can effectively present their cases.

E. Testing the Strength of the Case

After the factual data and relevant arguments are bonded together into a coherent statement of the party's case, it is generally profitable and informative to submit it to a final scrutiny. Do the data and arguments express the party's strongest position? Does the outline developed for the hearing cover all the relevant materials? Is there adequate data and testimony to respond to the challenges of the other party? Are the witnesses sufficiently conversant with all aspects of their roles in the case to withstand forceful cross-examination? Does the party have the best evidence and the best available witnesses? Have arrangements been made for the release from work and presence of all witnesses? Has the opposing party's case been carefully anticipated and responses thereto developed?

Once the case if fully prepared, it is often worthwhile to submit it to a dry run. By designating a member of the team to act as devil's advocate or in the mock role of the opposing spokesman, it is possible to submit the witnesses and the case itself to a cross-examination. Such an exercise, if carried out effectively, may highlight the weaknesses of the case and areas where additional witnesses or supporting data may be desired. It subjects the entire case to careful scrutiny under the stress of simulated opposition. It also exposes inexperienced witnesses to the type of questioning they may expect from opposing counsel at the hearing. This exercise may lead to a reassessment and/or strengthening of the case. If fatal flaws are found, it might be wise to drop the appeal to arbitration or endeavor to obtain a settlement from the other side. Even if such realization is reached at the eleventh hour, it can serve to avoid the cost of arbitration and the risk of losing the entire case.

VII.
SETTING UP THE HEARING

After the arbitrator has been chosen and the parties have prepared their respective cases, the next step is to inform the arbitrator of his selection and arrange a time and place for the hearing.

A. Notice

The method of notifying the arbitrator of his selection to hear a particular grievance depends on whether he is a permanent umpire, an *ad hoc* appointee of the parties, or the designee of an appointing agency. In the majority of cases, except perhaps for umpireships, the arbitrator has no advance notice of the dispute to be resolved. Generally he is informed only that he has been selected to arbitrate a case between two parties. He is provided with the names of the parties and sometimes with a one- or two-line statement of the subject matter. Special no-

tice is taken of discipline cases involving termination in order to encourage an earlier hearing date. This tends to minimize accumulation of back pay in the event the grievance is sustained and permits the employee to seek new employment if it is not.

In cases arising out of a permanent umpireship it is likely that the arbitrator will be notified informally and asked to schedule a hearing date. If the operation is multi-locational he will be advised of the location of the grievance.

In the case of direct appointments where the parties themselves have selected the arbitrator, the same format will be used. However, it is more likely that a formal letter will be sent to the arbitrator introducing the parties and the grievance to be determined and perhaps even suggesting a time and place for the hearing.

In appointments made through the facilities of a designating agency, the agency makes the final selection of the arbitrator. This is done either by the tabulation of the preference lists returned to it by the parties or by direct appointment if so authorized. In either case the agency notifies the parties as well as the arbitrator of the appointment.

The arbitrator responds to notification of his selection by accepting the appointment. In some jurisdictions the arbitrator is required to sign an affirmation of his acceptance. Once the appointment is made, it is time to establish the time and place for the hearing. In cases of direct appointment, umpireships and some state designating agencies, this is handled by the arbitrator himself. In cases handled by the AAA the time and place are set by them after consultation with the parties and the arbitrator. In *ex parte* hearings an extra effort is made to assure that the non-cooperating party has been given actual notice of the date and the location set for the proceedings.

B. Location

The location of the hearing is determined by the site and facilities of the work place and, above all, the wishes of the parties. In some cases the facilities may be in a relatively inaccessible area or have inadequate provision for a meeting room. This may dictate a hearing in a more convenient, albeit distant location. But, in most cases if the parties are agreeable, a hearing is arranged at the employer's facility. Such an arrangement is cheaper, usually more convenient for the parties and their witnesses and is near the work area should the arbitrator desire to examine such area.

Sometimes one of the parties may be unwilling to meet in the employer's facilities. In this case an agreement must be reached on an alternative location - either at a government office, the office of one of the attorneys, or the office of the arbitrator. Use of hotel facilities which is common in private sector arbitration will entail additional cost. When the parties cannot agree on a location, this issue, too, is referred to the arbitrator. Wherever the hearing is held, the location should afford an opportunity, if necessary, to visit the work site to examine job conditions, lighting, or whatever the dispute involves. By and large the arbitrator will not interfere in the selection of the site, but will go where the parties request, unless he has advised them in advance of his reluctance to travel.

The hearing room itself should be reserved far in advance of the date of hearing. It should be large, properly lighted, and airy enough to accommodate the number of persons who will be attending. Since arbitration hearings are not open to the public and often are restricted as to employer and employee participation, the number in attendance is usually limited. As attendance increases and the procedure becomes increasingly formal, the spokesmen tend to address the audience rather than the issue.

The usual format is to have a rectangular or U-shaped table, with the parties aligned on opposite sides and the arbitrator, or panel, at one end. Usually the spokesmen sit at the end nearest the arbitrator(s). The stenographer, if one is used, also sits near the arbitrator, and a

witness chair may also be placed there, though witnesses often participate from wherever they are sitting at the table. Efforts should be made to reduce or eliminate interruptions, particularly those caused by telephone calls and the like.

C. Time

Arranging the location of the hearing is far less complex than arranging the time. This generally requires the dovetailing of schedules on the part of the arbitrator and the parties. It is further complicated when busy lawyers, or a highly popular arbitrator are employed by the parties or when the parties have many arbitrations scheduled.

The greatest problem is likely to be the arbitrator's schedule. Full-time arbitrators often schedule their hearing dates three or four months ahead, and part-time arbitrators have other commitments such as teaching, business, or law practices which limit their availability. Arbitrators try to give preference to those cases arising out of their permanent umpireships or to cases involving discharge. However, there are frequent last-minute postponements and cancellations of other hearings which make dates available if the parties are able to mobilize their forces swiftly enough to be prepared for a hearing within a week or two.

Even if the arbitrator and counsel are available, it is possible that witnesses or representatives of the parties might not be available due to vacation schedules, conventions, or even other arbitration hearings.

The general practice is for the arbitrator to contact the parties directly or through a designating agency to inform them of his earliest free dates. Each party checks out these dates among its own people then notifies the arbitrator, designating their preference. The mutually acceptable date is then set for the hearing. Most hearings are scheduled for 10:00 a.m. This gives the arbitrator time to travel from his home to the hearing that morning and allows the parties time for a last minute caucus. In public education cases there is a tendency for the parties to request a hearing after school hours to make personnel readily available without the cost of providing substitutes. This often means a shorter hearing than if a full day were available. It often means that the parties have already done a full days' work and may not be at their best standard of performance. On the other hand, the late starting time often increases the availability of arbitrators who may be occupied with other activities during the day. But it reduces the accessability to those busiest arbitrators who are not inclined to make themselves available for a second shift of "night" work. This practice may constitute a false economy for the employer who is unwilling to release staff from their duties or to provide substitutes. The money saved by that practice can be far exceeded by the extra charges made by the arbitrator for meeting late into the night or the cost of his overnight accommodations.

D. Costs

In addition to the arbitrator's compensation for the hearing day, preparation time and travel expenses, all of which are usually divided equally by the parties, there are other costs. Each party bears the expenses of the preparation and presentation of their own case. This includes the fees and expenses of outside consultants and/or attorneys, travel expenses of witnesses, reproduction of exhibits, photographs, maps, charts and the like. The organization, by contractual provision, may also have to bear some or all of the costs of released time or substitutes for witnesses. Additional costs, such as the hearing room charge and stenographer's services are traditionally shared equally by the parties if jointly agreed upon.

Transcripts are generally not requested by the arbitrator, who usually takes his own notes of the hearing. However, there are a few arbitrators who will not accept a case unless there is assurance of a stenographer being present. There are some cases where the verbatim testimony of certain witnesses is valuable to the arbitrator, as in the case of contradictory testimony or credibility contests. In such cases the arbitrator may welcome the opportunity to be freed from note-

taking in order to observe the demeanor of the witnesses. Transcripts may also be valuable when the dispute involves extensive detailed data. But, by and large, arbitrators are able to handle the receipt of testimony through their own notes. Transcripts are more often of importance to the parties in providing a detailed record of the proceedings and as an aid in preparing post-hearing briefs.

When transcripts are ordered by only one party, that party usually bears the full cost. Many arbitrators refuse to receive a copy of the transcript unless it is being made available to the other side. When this occurs, the parties generally share the cost of the transcript.

The presence of a stenographer can also inhibit the arbitrator as well as the parties in undertaking any efforts toward settlement during the hearing and may lead to a more formal and longer hearing as the spokesmen direct their remarks to the record for posterity. Finally, transcribing of the notes into a typed transcript adds at least ten days to two weeks to the processing of the case cost to the parties which might even exceed the fees of the arbitrator.

E. Pre-Hearing Contacts

From the time of the designation of the arbitrator to the date of the actual hearing, several weeks or months may elapse. During this period, the only contact that the parties are likely to have with the arbitrator is in establishing the time and place of the hearing. If a designating agency is involved, even this contact may not occur. Throughout this period it is accepted practice that neither party will discuss the content of the case with the arbitrator, even if the spokesmen for the parties have frequent contact with him on other cases or perhaps socially. So well respected is this tradition that the parties will often arrange to have one of their number pick up the arbitrator at the airport or at his hotel and deliver him to the hearing without any question of propriety being raised. This is also true with post-hearing contacts of the same nature, prior to issuance of the award. An arbitrator, likewise will not discuss the content of a case prior to hearing unless the parties jointly request that he do so. Occasionally the parties arrange between themselves to supply the arbitrator and the other side with submissions, or "pre-hearing briefs," setting forth their versions of the incident and their supporting arguments. This is usually welcomed by the arbitrator as a means of expediting the proceeding by enabling him to become familiarized with the case prior to the hearing. Such submission must never be provided unilaterally but only by agreement of the parties. Absent such agreement, the arbitrator may nonetheless request a copy of the grievance together with the answers provided at each step of the grievance procedure and a copy of the parties' agreement. These documents also provide the arbitrator with some insight into the case to be heard.

VIII.
CONDUCT OF THE HEARING

Once all arrangements have been made and the parties proceed to the designated place at the designated time, the actual arbitration hearing commences.

A. Opening the Hearing

Generally the parties arrive independently of one another at the appointed location. The arbitrator should introduce himself to all present if he has not dealt with them before. The parties generally take positions on opposite sides of the table. If it appears that one or both parties are unfamiliar with the process, the arbitrator might indicate the sequence to be followed: agreement on the issue, opening statements, examination and cross examination of witnesses, and closing arguments. A sheet of paper may be passed around on which participants record their appearances listing names and titles. All of this should be done in a way that establishes a tone of informality for the hearing to follow. Sometimes the relationship between the parties may dictate a somewhat more formal approach.

Multiple grievances. Usually the parties are in agreement on the issue or issues to be arbitrated. Sometimes, however, the union seeks to arbitrate a number of grievances at the same hearing, while the employer wishes to arbitrate only one issue before each arbitrator. The underlying reason for such position appears to be the fear that the arbitrator, with jurisdiction over a number of grievances, will split his awards between the parties.

The language in the parties' agreement may deal specifically with this problem, specifying one case per arbitrator. More often the parties' agreement is silent on this point. As a consequence, a conflict arises which must be resolved by the arbitrator. This, it is argued, is consistent with the parties' invocation of arbitration for the purpose of speed, economy and justice in the resolution of their disputes. Absent restrictive language, the weight of arbitration awards is in favor of hearing multiple cases before one arbitrator. The establishment of multiple hearings before separate arbitrators requries complex and delayed scheduling at greater expense and extensive delays in the issuance of awards.

Some arbitrators, while ruling in such disputes that the parties' agreement does not bar one arbitrator from hearing multiple grievances, will limit their own jurisdiction in that particular series to only one substantive grievance unless requested by the parties jointly to hear all grievances.

B. Agreement on the Issue

To fulfill his function the arbitrator must be given a specific issue to decide. His authority under the agreement is limited to hearing and disposing of those issues which the parties have been unable to resolve in repeated meetings in the lower steps of the grievance procedure. As noted earlier, agreement on the issue is desirable for several reasons. First, the grievance as drafted by the individual employee may not be an accurate reflection of the issue to be resolved. In filing the grievance the employee may not have consulted the representatives of the organization and, as a result, may have phrased his grievance in such a way as to obscure the real issue. For example, an employee who felt he was improperly denied a promotion due him on the basis of seniority and qualification might have worded his grievance in terms of having been personally discriminated against when the position was filled by a junior employee. This inaccurate reference to discrimination may well bring into focus entirely irrelevant contract provisions even though the parties limited their discussion to the issue of promotions in the processing of the grievance.

Second, the grievance may not contain an adequate statement of the claim sought. An employee who filed a grievance claiming unjust discharge five days after the date of his termination might seek as his remedy one week of back pay. If the case is brought to arbitration three months later and the employee is found to be innocent, the arbitrator might be precluded by the wording of the grievance from granting the employee the three months' back pay to which he is entitled. Or, even more dramatically, the grievance might omit any reference to remedy, merely claiming that the discharge was improper or that the employer promoted the wrong individual. Here too, the employer might argue successfully that the arbitrator would be exceeding his authority to award a remedy when none was requested in the original grievance.

Third, it is to the mutual advantage of the parties to ensure that the arbitrator decides the issue which has been the subject of discussion during the processing of the grievance. A grievance which protests unjust discipline for excessive absenteeism may, during its processing through the grievance procedure, have evolved into a dispute over the employer's right to unilaterally promulgate rules on tardiness and attendance. Failure of the parties to agree upon an issue which focuses on this problem might deprive the employer of the opportunity to confirm its right to "direct the work forces," etc. Instead it might lead to an award which ignores the underlying problem and focuses on the narrow issue of whether the grievant's tardiness on a particular day was or was not justified. To resolve only the narrow issue would deprive both parties of the constructive role intended for the arbitration process.

If the parties are unable to work out agreement on the issue to be arbitrated, prior to the start of the hearing the arbitrator can often assist the parties in framing an issue which is as narrow as possible but nonetheless broad enough to encompass all the arguments to be relied on by each party in proving its case. In this respect the arbitrator serves a type of mediatory function, helping the parties to reach agreement on the issue to be arbitrated.

Generally this effort is successful without much time being consumed, such as in disciplinary cases where the issue can be equitably stated as, "Was the discipline of X for just cause? What shall be the remedy, if any?"

At other times the development of a mutually acceptable statement of the issue may take several hours without agreement being reached. In such cases each party has its own convictions as to what the issue should be and is unwilling to embrace the other's view. This may be due to each party's adherence to specific contract citation, while refusing to acknowledge that other provisions may be equally relevant in deciding the issue. The arbitrator may resolve such impasse by suggesting the inclusion of all cited provisions. Or he may suggest reference to the agreement as a whole, omitting mention of specific clauses.

In the event that conflict over the submission threatens to take too much time away from the hearing, the problem may be resolved by incorporating the pending grievance itself into the issue. The form might be: "What shall be the disposition of grievance No. X ...?" Even though the grievance itself may be poorly worded or inaccurately reflect the true issue between the parties, this format at least gives recognition to the dispute in the form in which it was filed and appealed and permits expeditious opening of the hearing.

Although it is preferable to have a specific issue upon which the parties have agreed, for the arbitrator to answer in his decision, insoluble conflict between the parties over the submission may be handled by permitting the arbitrator to phrase the issue as he sees it, after hearing all testimony.

An integral part of framing the issue is anticipating the possibility of a remedy should the grieving party win. Some courts have held that the arbitrator is powerless to grant a remedy without specific authority in the submission granting that authority. The parties may thus be confined to a determination of whether or not there has been a contract violation without the possibility of restitution for the wrong done. This problem arises infrequently and is usually due to oversight by the parties in their framing of the issue. But it is essential to the arbitrator that he assures himself that he has the power to deal with remedy if it becomes pertinent. If he is not provided with that authority, the losing party might well have strong legal grounds to prohibit the enforcement of the award on the theory that the arbitrator exceeded his authority. Such authority can be extended to the arbitrator by agreement on the simple clause, "What shall be the remedy, if any?"

Arbitrability. The parties do not always agree that a case is arbitrable. Their grievance procedure may grant to one or either of the parties the right to appeal to arbitration. Very few cases would be appealed if joint agreement of the parties were necessary. In those cases which are appealed, however, the objection to arbitration may not be only because of the potential of losing on the merits. It may be based upon a legitimate belief that the dispute should not be before the arbitrator. As noted earlier, the issue of arbitrability is usually ceded to the neutral. This is done by the parties themselves or at the behest of the courts.

It is assumed that the parties' dispute is arbitrable unless either of them raises a challenge thereto. The challenging party must meet the burden of proving that a particular grievance is not arbitrable. The arbitrator takes evidence and hears argument on this threshold question prior to hearing the main case. It is desirable to obtain agreement on the arbitrability issue as well as on the main issue since the arbitrability challenge is, in fact, an issue itself. Thus the two issues can be joined, the main issue being coupled with the preliminary arbitrability issue. The actual phrasing might be: "Is grievance No. ... arbitrable? If so ... ?," and, proceeding to

the stipulation of the submission on the merits or adding a stipulated issue on the merits the acknowledgement that, "The employer challenges the arbitrability of the foregoing issue." Or, "The parties agree that the foregoing issue will be decided only if the arbitrator overrules the employer's challenge to arbitrability."

Once there is agreement on the issue or issues to be decided, or at least an understanding that the arbitrator will formulate the issue, it is time to move on to the introduction of evidence.

C. Joint Exhibits and Stipulations

In most cases both parties intend to base their presentations at least in part, upon certain records or documents which are in the possession of both parties. Accordingly, it facilitates the hearing and eliminates the need for time-consuming testimony of numerous witnesses to agree upon the introduction of exhibits which both parties accept without challenge. Traditionally, the applicable collective bargaining agreement is introduced in this manner and marked as Joint Exhibit No. 1. So, too, is the grievance itself, including the answers thereto which may be found on the same, or attached pages. Prior agreements, joint minutes of negotiating sessions, correspondence between the parties, prior arbitration awards between the parties, may all be handled in this fashion. How far the parties are willing to go in the initial submission of exhibits, depends upon their prior experience in dealing with each other and their intention to withhold exhibits until later in the proceeding for their surprise value. There may also be a preference for having the exhibits marked on the basis of the party introducing them, i.e., Employer's Exhibit No. 1 and Union's Exhibit No. 1, etc. It is most common that the bulk of the exhibits will be introduced during the examination and cross-examination of witnesses.

Following the introduction of agreed-upon exhibits, it might be possible to get agreement on the factual elements of the case. This is most likely to occur in those disputes where the issue hinges on a question of contract interpretation, rather than fact. By achieving such agreement, called a stipulation of facts, it may be possible to forego extended testimony by witnesses. Sometimes all the facts can be so agreed upon, while at other times the agreement may be limited to the grievant's work record, prior disciplinary record or the genesis of a past practice. Quite frequently the relationship between the parties precludes achieving any stipulation. In such cases efforts to obtain a stipulation may take more time than the testimony of witnesses.

D. Order of Proceedings

The question of the order in which the case is to be presented by the parties may be disputed. Although arbitration proceedings are not as strict as court proceedings in matters of burden of proof, it is customary for the moving party (the side which took the initial action resulting in arbitration) to begin the presentation. Thus, in most cases involving contract interpretation, it is the employee organization which goes first, since they are the "moving party" challenging the status quo. In cases of challenge to disciplinary action, it is customary for the employer to go first even though the case may have arisen from a grievance filed by the organization. This is done on the theory that the employer took the precipitating action of imposing the discipline. Also, the employer is likely to have greater command of the facts as well as records dealing with the employee's background. Once the determination is made of who goes first with the opening statement, this order carries through to the commencement of evidence. The order is generally reversed in the presentation of closing arguments on the theory that the party who opens the hearing should have the last word, i.e., the right to close it.

Sometimes the parties get into vigorous arguments as to who should proceed first, each urging the other a la Alphonse and Gaston. The wise arbitrator stays out of such disputes except to point out that both sides will have equal opportunity to put into evidence anything they wish, or to point out what is the general practice on order of proceeding.

E. Opening Statements

It is helpful to the arbitrator to gain an overview of the issue as early as possible in the proceedings. In this way he can respond more intelligently to the evidence as it is introduced throughout the hearing. For this reason, opening statements, either oral or written, are of particular value to the arbitrator who, it must be remembered, has no prior knowledge of the conflict between the parties. In it they provide him with their theories of the case and call his attention to the items which they intend to prove in their presentation. It is accepted practice that the opening statement be presented without interruption or objection from the other side.

Despite its value to the arbitrator, the provision of an opening statement may be objectionable to either of the parties if it reveals prematurely their plan of attack. For this reason one or both of the parties may not be willing to present an opening statement and the case will proceed without such openings.

F. Presentation of Evidence

The thrust of each party's case is made through the testimony of witnesses. These are the individuals who report each side's version of a disputed event, what was said in negotiations or meetings, what has been the accepted way of doing things over the years, and so on.

Oath. When the first witness is called, a preliminary issue arises concerning the swearing in of witnesses to testify under oath. This practice, common in court proceedings, is often waived in the less formal arbitration proceedings. Yet it may have particular value where the conflict between the parties centers on the credibility of certain witnesses. Whether or not witnesses are to be sworn is usually decided by the parties, since the arbitrator will generally proceed with whatever determination they have made. If there is a conflict over the swearing of witnesses, the arbitrator generally rules that the testimony will be given under oath and he will swear the witness. The oath generally used is, "Do you swear (or affirm) to tell the truth, the whole truth and nothing but the truth, so help you God?"

Witnesses. The party which made the first opening statement presents the first witness. Hopefully, the first witness called will be the one to present the background facts of the case or to commence the chronology of events. This witness, like others to follow will first be asked his name, position or title, years of employment, etc. The witness is examined by the spokesman for the side calling him to the stand on whatever matters the spokesman feels he is competent to testify. This is the direct examination. The questions should be phrased in such a way as to avoid leading the witness. Questions which merely require a "yes" or "no" response leave little opportunity for meaningful cross-examination by the other side. Spokesmen should ask the questions in such a way as to permit the witness to testify from his own recollection of what transpired. When the direct examination has elicited all the pertinent information which the spokesman wishes to introduce, the party examining the witness rests. This concludes the direct examination and opens the witness to cross-examination by the spokesman for the other side.

The cross-examination may be aimed at further clarification or may be intended to discredit or impeach the direct testimony of the witness. The other party, in cross-examination, seeks to have the witness add to his earlier testimony such information as might detract from his earlier statements or otherwise weaken his opponent's case. In cross-examination greater leeway is allowed in leading the witness to the desired testimony, but cross-examination is generally confined to the subject matter dealt with by the witness in his answers to the direct examination. After the opposing party has exhausted his questioning of the witness, he, in turn, rests, and the right to question is passed back to the original party's spokesman for re-direct questioning. This provides a chance to rehabilitate the witness' testimony or perhaps to expand on views which had not adequately been explored earlier. Re-direct examination

and re-cross examination continue in this manner until the opposing counsel both feel that the witness has nothing further to contribute on the items in dispute. The moving party proceeds with its remaining witnesses until it has called them all to the witness chair. The same procedure is followed for the testimony of each witness.

When the roster of witnesses for one side is exhausted, the opposing party commences the presentation of its case. If it waived its right to an opening statement at the commencement of the hearing, it might make such a statement at this time. Otherwise, it begins with its witnesses, following the same procedure as did the moving party, with direct examination followed by cross-examination, then re-direct and re-cross, etc. This is done for all of the opposition's witnesses until their testimony is fully introduced. The arbitrator usually asks any questions he may have at the conclusion of the examination of a witness, although he may interrupt earlier for clarification.

In some cases, particularly those involving discipline or discharge, there may be such contradictory testimony anticipated that one of the parties may request sequestering of the witnesses. If the other party agrees on which witnesses should be sequestered, arrangements are made to place them in a different room until it is their turn to testify. They are then brought into the hearing room and later returned to isolation or permitted to stay in the hearing room. In such cases it is common practice to permit the accused employee to remain in the hearing room throughout the proceeding for the purpose of "confronting his accusers." The arbitrator may be called upon to rule on a number of questions concerning the arrangement, such as whether witnesses from both sides should be kept together, whether a witness should return to the witness room after testifying, etc.

Exhibits. Unless the parties agreed to the joint submission of exhibits at the start of the hearing, it is likely that records, correspondence, charts and other data will be offered for admission through the various witnesses whose testimony is related to such data. The exhibit to be introduced is marked for identification by the arbitrator as an employer or employee exhibit used for questioning the witness and, if there is no objection by the other party, received by the arbitrator as an exhibit. Frequently there are objections to the introduction of an exhibit on grounds of immateriality, irrelevance, inaccuracy or the like, as will be discussed below. It is up to the arbitrator to rule on whether or not the exhibit will be received. Sufficient copies of exhibits should be made available to supply all parties. The arbitrator numbers the exhibits in the order of their introduction into evidence, and retains a set for his subsequent use in preparing his decision.

Postponements. Sometimes the presentation of testimony results in the introduction of new evidence which catches the opposing party by surprise. In such situations there may be a request by the other side for a postponement in order to research the new development, study it, and prepare a response. If the arbitrator is convinced that the newly introduced evidence does in fact constitute surprise, and is of sufficient importance to the case, he will usually grant the requested postponement. Postponements may also be granted if a crucial witness is unable to be present on the scheduled day of the hearing.

Visits to the work place. In some cases the factual presentation involves complex descriptions of the work area layout, the flow of work, or the details of a particular job. In such circumstances it is not uncommon for one or both parties, or even the arbitrator himself, to request that a visit be made to the location concerned. Such a visit can be made prior to the testimony, but it is likely to be more meaningful if made after presentation of the testimony. Generally, one or two representatives from each side will accompany the arbitrator to explain the details of what is being viewed and to answer any questions he might have.

G. Argument by the Parties

Once the factual material has been introduced by oral testimony and exhibits, it is time to proceed to the arguments. These are the parties' interpretations of the presented evidence in support of their respective positions. The parties should decide between themselves whether they wish to make their arguments orally as part of the hearing or subsequently in post-hearing, written briefs. Oral argument is much more expeditious, avoids a delay of several weeks while briefs are being prepared, and is more likely to provide a clear focus on the issues.

On the other hand, oral argument requires a ready facility in absorbing all the material that has been introduced and arranging it in a logical and convincing fashion for integration into the closing argument before the arbitrator. Most arbitrators leave the choice to the parties. They will permit briefs from both parties if one party wishes to file one. Some arbitrators prefer a short oral agrument at the close of the hearing, even if this is in addition to briefs, so that they might have an opportunity to see if they fully comprehend the arguments of both parties. This will also provide an opportunity to raise any questions that the arbitrator may have on the arguments, an opportunity which will not exist after the briefs are filed. In most cases the parties are content to rely on oral arguments.

The parties generally reverse the order of presentation for closing arguments, with the moving party going last. The parties highlight what they believe to have been the important elements of the testimony, significant exhibits, relevant portions of their contract, previous arbitration awards, and other documents which are felt to have a bearing on the case, and tie them into their argument. The spokesmen usually respect each other's right to complete their argument without interruption and save any contradictory statements or rebuttal until later. Here, too, the arbitrator will permit the parties to continue their presentations until they are satisfied that everything has been covered. Once the argument is concluded, unless there is a provision for filing post-hearing briefs, the proceedings are closed.

H. Post-Hearing Briefs

Post-hearing briefs are often filed by the parties to set forth their interpretation of the facts and their arguments in support of their case. If they are to be filed, it is necessary to agree on a deadline for their submission. This is usually set for two or three weeks after the receipt of the transcript if one is taken. At such time the briefs are sent to the arbitrator while the parties exchange copies between themselves. The American Arbitration Association handles the exchange of briefs in cases handled by them. The preparation of briefs permits a more careful examination of the testimony and the exhibits than the making of oral arguments. As a result, the brief tends to be more thorough, detailed, and sometimes repetitive.

The parties are free to make any arrangement they wish for the filing of briefs, but they should refrain from the endless exchange which results from filing replies to each other's briefs. They are well advised to agree on a single simultaneous filing, rather than permit any rebuttals. These added steps only delay the final decision while adding relatively little to the information available to the arbitrator for preparing his decision.

It is understood that the brief is to be based solely upon the materials presented at the hearing and that no new factual material not exposed to direct and cross-examination will be included. When the briefs are filed, the case is closed. No further statements, evidence, or argument will be received unless by agreement of the parties or by order of the arbitrator. The closing of the case begins the running of the time for the arbitrator to prepare his award, which under some state laws and pursuant to the rules of the AAA, must be rendered within thirty days from the close of the proceedings. Some agreements call for a much shorter period, but those are infrequent and unrealistic and usually necessitate a waiver to permit the arbitrator adequate time for preparation of the award.

IX.
ROLE OF THE ARBITRATOR

It would seem from the foregoing description that the arbitrator merely sits and observes while the spokesmen for the parties partake in all the action. So it may appear. The arbitrator really has two primary responsibilities during a hearing: to receive the evidence and to monitor the hearing.

The first responsibility involves listening to the presentation and absorbing as much as is offered so that the arbitrator completely comprehends the offerings of the parties. That understanding is the basis for exercising his intellectual judgment in the process of decision making.

The ideal way of performing this function is to sit and listen and take some notes for future recollection, as testimony and exhibits come forth from the witnesses. Sometimes the parties are sufficiently competent to provide all the arbitrator needs to know, or feels he needs to know. At other times, somewhat less is forthcoming and the arbitrator may feel that certain items need clarification or amplification. Then he will ask questions.

In a few cases, the presentation of one or both parties is sufficiently inadequate that the arbitrator needs to ask many questions in fulfillment of his responsibility. Yet in these instances, the arbitrator must be careful not to appear as counsel for the party who is less well prepared. The parties are responsible for the selection of their own spokesmen and the case can rise or fall on this selection depending on the competence of their choice. If they have chosen a poor representative, it is not for the arbitrator to bail them out. He should avoid raising new lines of inquiry not considered by the spokesmen. Ignoring obvious questions may not indicate ineptitude on the part of the spokesmen; they may have side agreements to avoid opening certain hornets' nests. The aribtrator should also avoid initiating requests for witnesses to be presented. The parties may have good reason to bypass some whom it would seem should have been called; they may be poor witnesses, they may be prejudiced, or they may raise issues which the parties have agreed to avoid. Above all, the arbitrator should not usurp a witness by asking him questions before the spokesmen have had a chance. Rather, he should wait until the conclusion of the questioning of a witness, or even until after all the witnesses have testified, to ask questions. The arbitrator should ask such questions as he deems essential to fulfill his mandate of fully understanding the presentations of the parties. But he should be wary about substituting himself for the spokesman for either party and about raising questions other than what the parties have determined to submit to him.

The second responsibility of the arbitrator is to expedite the hearing. He is the designated neutral and is in an ideal position to assure that the hearing flows smoothly with a minimum of hostility and tension. It is therefore an essential element of his role to make rulings on conflicts that are bound to arise when adversaries are dealing with each other. He decides on the admissability of evidence; he prevents intimidation or harassment of witnesses; he insures that the hearing proceeds on course and doesn't get "off the track" into irrelevant side issues. This role is a necessary one at the hearing. If the arbitrator were not present as the listening decision maker, the parties would have to invent him as the moderator.

A. Contacts Between the Arbitrator and the Parties

The same aloofness from the parties that characterizes the arbitrator's conduct from the time of his appointment to the close of the hearings should continue until after the award is rendered. The parties are free to contact the arbitrator if it is understood that there is to be no reference to the pending case. The extent to which any contact is desirable or possible under these circumstances depends on the relationship between the parties. If they are mature and sophisticated, there is little fear of much contact since it is assumed that the parties will not raise sensitive issues and that they will be reprimanded by the arbitrator if they should start to do so. If either party is new to this game, there is bound to be suspicion, resentment or out-

right distrust at the discovery of any fraternization by the other side. The arbitrator must bear this in mind and be independent in his contact with the parties. The safest course of conduct for the arbitrator is to go it alone, get himself to and from the hearing, plan to eat meals in solitude, and avoid even casual conversation in a hallway. Even the possibility of any distrust arising is not worth it to the arbitrator or the parties. All have a duty to preserve respect for the process.

B. Prospect of Settlement During Arbitration

In some cases the arbitrator may feel that the issue in dispute is better resolved by the parties themselves with or without his participation, rather than through arbitration. The issue may be one of *de minimis* importance, or one that might be destructive of an otherwise good relationship, or one in which the arbitrator's decision may serve as a troublesome precedent or create greater problems than currently exist. He may feel that the parties made insufficient effort at settlement of the dispute prior to arbitration, that the arrival on the scene of outside counsel with greater objectivity might overcome hostility toward a settlement, that the time elapsed since the grievance arose has mellowed the parties, or that a little push might induce them to settle. To urge direct settlement might deprive the arbitrator of compensation he would earn for time spent in the preparation of his decision but could at the same time increase his acceptability in terms of being chosen to arbitrate future grievances.

Many arbitrators disagree that an arbitrator should encourage settlement at a hearing. They feel that the parties had every opportunity to settle their differences prior to arbitration, that they were called in to arbitrate because the parties could not resolve their differences, and that they have the responsibility to proceed to an award. Indeed, this is what is expected by the parties in most cases. Yet there are situations where the parties imply that mediation would be welcome – maybe through a remark that they "almost settled out in the hall before the hearing," or that "this really should have been settled by us." When such a signal is raised, the arbitrator may respond by asking to speak to the spokesmen outside the hearing room and asking them if they have fully explored the possibility of settlement. This might spark further direct discussions between the spokesmen. The arbitrator must keep in mind that his main responsibility is to arbitrate, and that he must not be influenced by any confidences or prejudices gained from the parties during a mediation effort. Indeed, it is preferable that the parties work out any settlement between themselves without the presence of the arbitrator. If one or both request his involvement, he should point out the danger mentioned above and agree to become involved only if both so request. If he does become involved in mediation, he should offer to step down from his role as arbitrator if mediation fails.

C. Informed Award

On some occasions, regardless of whether or not the arbitrator urged the parties to settle, they may approach him during or at the close of the hearing with a joint request for a specific award. Sometimes one party will acknowledge that it was in error and that the case should be decided against it. Or, the parties may jointly approach the arbitrator with a proposed settlement which they would like to have him adopt as his award without attribution. Even though the arbitrator is the creature of the parties and owes any authority he may possess to them, he has the sole authority to decide. His decision must be the one he believes is correct in light of the language of the parties' agreement. This obligation cannot be compromised to accommodate a settlement which the spokesmen think appropriate. It is one thing for the spokesmen to enter into a binding settlement on behalf of their clients. It is quite another to make the arbitrator their scapegoat by having him issue their settlement as an "award." If the arbitrator believes their settlement is inappropriate, he should decline their offer and proceed to render his own decision or offer to render their proposed award with a specific statement that it is the product

of the parties' efforts rather than his own. This could be done by stating, for instance, that "the parties have agreed to a resolution of this grievance as follows: ... ."

D. Executive Sessions

In cases where a tripartite panel performs the arbitration function it is the usual practice for the panel to meet and discuss the award to determine how it will rule. Generally the neutral member of the panel will prepare a draft, setting forth the facts and the contentions of the parties. Most neutrals prefer to discuss the case with the other members of the panel before writing the actual decision. In some instances where the designees of the parties feel free to divorce themselves from the positions taken by their respective parties, it is possible to utilize the executive session as a mediating session to work out a unanimous award. In those cases where a unanimous award is not forthcoming, the executive session provides an opportunity for the neutral arbitrator to clarify his understanding of complicated issues or, at best, to test his theory of the case with representatives of the parties. In such a session the arbitrator seeks to convince at least one other panel member to subscribe to his view and join him in the award. If this is not possible, he may have to alter his award in such a manner that it will attract a supporting vote from one of the other arbitrators.

Once the executive session is held, the neutral will proceed to prepare the award on behalf of the panel and then send it to them or meet with them again to obtain signatures together with any statements of concurrance or dissent.

E. Ex Parte Hearings

A word should be added about *ex parte* hearings – those rare cases where only one party appears to present its case. This occurs most frequently when one party refuses to accept the arbitrator's jurisdiction to hear the matter and therefore fails to appear. It is essential in such cases that the reclacitrant party be given ample notice so that it has sufficient time to prepare for the hearing. If, despite the notice, the party does not appear at the hearing, the arbitrator is faced with the problem of deciding whether to provide that party with a final opportunity to participate by postponing the hearing or whether to proceed forthwith. If the latter determination is made, the arbitrator holds the hearing with only one party present, depriving himself of the opportunity to hear cross-examination of witnesses or to hear the other side of the dispute.

Under such circumstances he is within his rights in abandoning the traditional self-restraint and assuming a more active role in the questioning of witnesses and evidence. This playing of the "devil's advocate" role should not be considered an endorsement of the absent party's position. Rather, it is probably the only practical way to elicit a more objective view of the issue in dispute.

X.
EVIDENTIARY QUESTIONS

In his role as facilitator and expeditor of the hearing, the arbitrator is often confronted with evidentiary and procedural problems which may bring the proceedings to a standstill as one party objects to the material being introduced by the other. It is the responsibility of the arbitrator to hear both parties on these matters and to make a decision which will enable the proceedings to continue. In addition to actual rulings, the arbitrator must impose certain standards upon himself in weighing the evidence presented at the hearing and in the preparation of his decision. These evidentiary questions are comparable to those dealt with traditionally in courts of law.

However, in arbitration, as contrasted with the courts, there is less need for protecting the finders-of-fact from evidence of questionable validity or authenticity. The parties have specifi-

cally invoked a procedure of their own creation and have designated a finder-of-fact whose judgment and competence they presumably respect. Generally he has had enough exposure to the employment relations field to understand its unique traits and enough exposure to the judicial and/or arbitration process to recognize what information is relevant and germane and what is extraneous to his job of rendering a decision based upon the facts. Presumably, like anyone experienced in dealing with adversaries, he can distinguish between who is telling the truth and who is not.

This informal approach and its exemption from judicial rules of evidence is also warranted for other reasons. Arbitration is a voluntary, not a compulsory forum. The parties' relationship is an ongoing one and not a "one shot deal" where the parties' distaste for their relationship precludes them from further dealings with one another.

The arbitrator who enters into this previously existing relationship must recognize the manner in which the parties have worked together and adjust his method of proceeding accordingly. If their relationship has been more formal than the norm, they will be more comfortable with a formal proceeding and vice versa.

Although the practices governing admissability and evaluation of evidence tend to be less strict than those utilized in formal judicial proceedings, they are sufficiently strong to enable the arbitrator to maintain control of the proceedings, to confine the hearing to relevant materials, and to protect the parties from excessive repetition of offered evidence.

As noted in Rule 28 of the Labor Arbitration Rules of the American Arbitration Association: "The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." This is in line with established procedure. The arbitrator may listen to nearly any evidence, information, or testimony which he deems to be pertinent to the case and which he believes will help him to understand and resolve the problem before him.

A. Hearsay

In the recounting of the facts giving rise to a grievance, or what transpired in negotiations or at a meeting, the witnesses will often attempt to testify secondhand as to what they were told had happened. As in a court of law, it would not be uncommon or improper for the opposing party to object to the introduction of such testimony on grounds that it is hearsay. Certainly arbitrators would prefer to hear such testimony from the original source. The general practice in arbitration is to admit hearsay testimony, noting the objection of the other party, and with the understanding that the arbitrator will accord it its proper weight, if any, in making his decision.

Dealing with an arbitrator, rather than a jury as in some judicial proceedings, it is expected that the experience and good judgment of the arbitrator will enable him to separate the truth from the untruth.

Even when hearsay is accepted into evidence it may be accorded little weight unless it is corroborated by other testimony or supported by stronger or direct evidence. Mere assertions or allegations are not proof, and unless substantiated by credible evidence, are not likely to sway the arbitrator.

B. Credibility

When faced with contradictory testimony, one of the most troublesome problems of the arbitrator is to decide whom to believe. The question of credibility is at the core of many arbitration disputes, as it is in many other types of conflicts. Arbitrators are chosen in part because of their sensitivity to such situations and their ability to ferret out the truth. The ability to succeed in this area is developed with experience. In part it is dependent upon the observa-

tion of witnesses while testifying and particularly while under cross-examination. This can provide a valuable insight into a person's character and his veracity. Such observations by an arbitrator in numerous cases develops his capability to determine credibility. Certainly he may err or be "taken" at times: arbitrators are not infallible. If any procedure is calculated to expose the untruthful witness, it is the informality of the arbitration hearing. The arbitrator may also in his questioning seek evidence as to an individual's background, experience, motivation and interest, and, above all, the probability of his testimony being true under the prevailing circumstances.

Failure to testify. A different aspect of credibility arises in the failure of a grievant to testify. In Anglo-Saxon courts of law the right of protection against self-incrimination is often invoked to justify the failure of a defendant to testify. While arbitrators might respect a refusal on these grounds if a criminal action were pending against the grievant, the same right of protection against self-incrimination which may be present in a court does not usually apply in an arbitration case. Arbitration is a private proceeding with none of the deprivations of personal liberty that are at stake in legal proceedings. The failure of the grievant to testify is likely to raise serious questions in the mind of the arbitrator. It might be that he refrains out of fear that he might appear as a confused or inadequate witness, but the arbitrator may feel that the refusal to testify arises out of more substantial fears. If the arbitrator feels that the failure of the grievant to testify leaves a crucial gap in the case, his feelings may have decisional consequences.

C. Burden of Proof

"Fair preponderance of the evidence," "Proof beyond the shadow of doubt," "Shifting burden" are all phrases used frequently in courts of law. While it is essential for the parties to prove their cases in arbitration, the legal requirements of burden of proof are not as strictly applied. These are not cases involving criminal prosecution or capital punishment. If there is any standard of proof in the arbitration field, it is "Convince the arbitrator." Either side may run the risk of non-persuasion irrespective of the absence of rigid formulas.

Despite the vagueness suggested by this concept, there are some standards carried over to arbitration from the common law which are accepted and provide guidelines for proceeding through the hearing. Thus the grieving party is assumed to have the burden except in disciplinary cases where the employer has the burden of proof. The party who challenges arbitrability has the burden as does the party seeking to establish a past practice in violation of the stated terms of the agreement. These burdens are many and may, indeed, shift, but the subject matter involved, rather than who currently carries the burden, is most likely to determine the outcome of the case.

D. Irrelevance and Immateriality

In presenting their cases the parties are eager to put into evidence anything that they anticipate will contribute to a favorable outcome. Sometimes what one side believes is essential is deemed by the other side to be of no material value in resolving the dispute. Thus, as in courts of law, counsel are likely to object to the admissability of testimony or exhibits as being irrelevant and immaterial. The arbitrator must decide whether to accept or exclude certain evidence. Often more evidence is supplied by the parties than is necessary for him to resolve the dispute. But it is difficult to exclude material until it is heard and the arbitrator can distinguish whether or not it is relevant. Additionally, since arbitration involves parties who are in a continuing relationship, it is of value to that relationship that they "get things off their chests." The cathartic value of testifying or submitting an exhibit which the party believes to be important, may do more to restore tranquillity than the exclusion of such material. It is important to avoid the exclusion of something considered important by a party, particularly if that party

loses the arbitration. Each individual must feel that he has been given his "day in court." Part of the arbitrator's function is to listen to such evidence although he may not attach any great significance to it.

Thus arbitrators are likely to receive into evidence more challenged material than would judges dealing with juries despite objections of immateriality or irrelevance. Once the arbitrator is into his study of the matter, he can sort out what is pertinent from what is unrelated. Arbitrator Shulman has pointed out: "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant." Reason Contract and Law in Labor Relations, 68 HAR LR 999 at 1017 (1955).

The difficulty for the arbitrator in determining what is relevant at the outset of the case makes it unlikely that less, if any, effort will be made by him to exclude material on that ground early in the proceeding. To exclude evidence which at first appears irrelevant might be substantially detrimental to the party's presentation and to the arbitrator's comprehension of the case. Under U.S. and some state arbitration statutes, the refusal of the arbitrator to hear all relevant evidence may be ground for vacating an award. But as the case proceeds and the arbitrator becomes more familiar with the thrust of the presentation, he may then more likely discourage the continued introduction of irrelevant materials either through a plea to the offering party or by sustaining objections made by the other party.

E. Admissability of Events Transpiring in Earlier Processing of the Case

By the time a case reaches arbitration, it has progressed through several steps where, presumably, there have been some efforts to settle the dispute. If one party has acknowledged its willingness to resolve the case on less favorable grounds than it is endeavoring to achieve in arbitration, it is a temptation for the other side to bring that offer into evidence. Arbitrators bar the introduction of such offers on the theory that their admission in arbitration would frustrate offers of settlement in future cases and destroy, rather than bolster, the sanctity of the grievance procedure as the preferred locus of dispute resolution. Furthermore, even if introduced, it is difficult to ascertain whether the offer is truly an acknowledgement of weakness or wrong position since the effort to settle might have been unrelated to the merits of the case or involve exchanges of other benefits that are unknown to the arbitrator.

Statements made in grievance meetings. Related to offers of compromise is the question of whether statements made by witnesses in the earlier processing of the grievance should be admitted into evidence at the arbitration hearing. Here again the arbitrator is faced with a dilemma: the clearest possible view of the facts as enlightened by all possible relevant evidence, versus preservation of the privacy and privilege of the grievance procedure to encourage the earliest possible settlement of grievances. Although most arbitrators tend to exclude statements made in prior meetings when objected to, they are unlikely to raise an objection on admissability themselves.

An exception to the rule of exclusion is likely to be made in discipline cases. Arbitrators will often admit statements made by the grievant in a grievance meeting or a statement made in his presence without his contradiction.

Most parties keep records of grievance meetings. These records are often admitted into evidence without objection from the other side. But when an objection is raised, the arbitrator will generally exclude such minutes. He will admit them when prepared jointly or if prepared by one side and then distributed to and commented on by the other party.

F. Parole Evidence

Many collective bargaining agreements specifically prohibit the arbitrator from adding to, detracting from, or otherwise modifying the terms of the parties' agreement. Yet there are

numerous grievances arising out of questions of the meaning of a provision. One party says that the language is clear, while the other contends that a contrary meaning was intended when the contract was drawn. The party relying on the contract as written may object to the introduction of any background data on the ground that the parole evidence rule bars such testimony on what happened at the time of negotiations. Arbitrators are not likely to rely heavily on the parole evidence rule to exclude evidence or testimony. This is because the collective bargaining agreement is accepted as a flexible and living document subject to constant use, application and even modification by the parties. It may often change in use and may very well differ in application from its original intent and the prevailing circumstances at the time the contract was signed. It is adapted to the needs of the parties throughout the term of the agreement.

Thus evidence of past practice or negotiating history may be of importance to an arbitrator who is to interpret specific contract language. For example, one party claims that the language was inserted to put an end to a contrary past practice, while the other party claims that the language was intended merely to clarify a particular aspect of a traditional ongoing practice. Certainly the arbitrator must have all available information as to what the parties intended in agreeing upon certain language, so that he may adequately fulfill his responsibilities.

G. Circumstantial Evidence

As in courts of law, so too in arbitration proceedings, greater weight is generally accredited to direct evidence than to evidence which is merely circumstantial. Although direct evidence is, of course, preferred, there is less reluctance in arbitration than in the courts to rely on circumstantial evidence. Arbitration decisions do not carry the consequences of court judgments. Quite frequently, circumstantial evidence is offered with the intent of convincing an arbitrator that a certain event did take place, although witnesses are lacking. For example, testimony that material produced in the plant was found in the grievant's automobile in the plant parking lot, would be circumstantial on the issue of theft. Such testimony would raise the inference of theft, although there might have been no witnesses to the actual removal of the material from the plant by the grievant. It might be sufficient to sustain a discharge in arbitration even though it might not be sufficient to justify conviction of the crime of larceny in a court of law. Generally, the arbitrator will admit such evidence as being of probative value although the weight given it will probably be less than that given to direct testimony.

H. Remanding for Procedural Inadequacy

By the time a case comes to arbitration, it has usually survived a careful scrutiny of both parties in the various steps of the grievance procedure. Sometimes, however, the parties try to take short cuts to bring a pressing case to arbitration more promptly. This may occur to expedite a discharge grievance or to double up cases when a hearing date has already been scheduled. It might mean that the contractual prerequisites for appeal to arbitration have not been fully met. In most cases such by-passing of a step occurs by mutual agreement. In other cases, however, an objection might be raised that there was no such waiver and that the provisions of the grievance procedure were not fully complied with. In such circumstances the arbitrator will have to determine whether to remand the case back to the grievance procedure. In cases where the error was one of form, such as the failure to get a written rather than oral reply at one step, the arbitrator is likely to decide that the rule of *de minimis* applies and that nothing will be gained, except delay, by remanding. But in cases where the error was more substantive, such as failure to receive the results of an employer's investigation, or by-passing of a step, he might be inclined to return the matter to the parties and defer hearing the case. In general, such remand would be ordered only where there is hope that further discussion between the parties will be fruitful either in resolving the dispute or narrowing the issues.

Surprise. Related to the remand issue is the question of what to do when new material is

offered at the arbitration hearing which was previously unknown to one of the parties. The arbitrator is anxious to have all pertinent testimony available prior to preparing his decision. The failure of one of the parties to present important evidence during the earlier steps of the grievance procedure may raise questions of good faith on the part of the offering party. Generally such evidence is admitted if relevant and important and if there is valid justification for its belated presentation. If the surprise is genuine and concerns crucial evidence, the arbitrator might refer the case back to the parties for further negotiation in the hope of achieving a settlement. He might recess the proceedings for such time as he deems necessary for the party claiming surprise to investigate the matter and prepare evidence in response thereto.

The same result would be less likely to occur when the element of surprise is raised in response to a new argument being offered by one of the parties in closing oral argument. The arbitrator might not agree with the practice of withholding "good" arguments from discussion in grievance meetings, particularly where he feels the party raising such argument deliberately withheld it in order to lure the other party into appealing to, and then losing at, arbitration. But it is unlikely that he would remand such a case to the parties, since nothing is gained by so doing. More likely he would provide the objecting party an opportunity to develop a response thereto through submission of a post-hearing brief. If such surprise argument were raised by one party in its post-hearing brief, when only one such brief per party was arranged, it is unlikely that he would permit a reply brief to be filed unless both agreed upon such.

New evidence. If new evidence comes to light after the hearings have been closed but before the award is rendered, the arbitrator might grant a request that the hearings be reopened if he feels the evidence is sufficiently material, if it is not cumulative beyond what is already received, or if it could not have been timely located with reasonable diligence. Such reopening might be held to require the joint agreement of the parties. If the new evidence comes to light after the arbitrator issues his award, he is *functus officio* and powerless to reopen the case without the agreement of the parties.

I. Subpoena Power

In some cases it will be impossible for one of the parties to convince the other party to produce a particular witness or specific evidence. In such cases a request will be made of the arbitrator for a subpoena. The subpoena power of the arbitrator depends upon the state in which he is functioning. In some states, an attorney for either party, as an officer of the court, has the power to issue a subpoena. In practice it is not usually necessary for an arbitrator to issue a subpoena since his warning of a possible adverse inference concerning the non-production of witnesses or evidence is usually sufficient to produce them. But where a subpoena is necessary, it is up to the party contending for the issuance of the subpoena to convince the arbitrator of the need for the testimony or the evidence sought, his authority to demand it, and of the authority of the arbitrator to issue this process.

XI.
THE AWARD

The culmination of the arbitration process and, indeed, the culmination of the entire grievance procedure comes with the issuance of the award. The award is the arbitrator's judgment as to the merits of the controversy. It marks the close of the case and the termination of his jurisdiction over the matter in dispute.

A. Oral vs. Written Awards

There is no fixed requirement that the arbitrator's award be in writing, although this has come to be an established practice in the U.S. It is conceivable but unlikely that the parties would, in some cases, prefer an oral award, perhaps even without an explanation as to the rea-

soning behind it. There are situations in which the parties are most anxious for the issuance of the award, as when there is pending back pay. In such cases the arbitrator might provide the parties with an oral statement of his decision, reserving his rationale for a written opinion to be issued at a later date. Arbitrators are generally loathe to issue decisions immediately upon the close of the hearing even when so requested by the parties. They need the opportunity of privacy and quiet to review the evidence and to consider decisional possibilities. Such oral decisions leave an unsavory impression of hasty judgment with the loser. Furthermore there are cases where the initial impression of which side should win is reversed upon careful reading of the agreement and exhibits. For those reasons, resort to a telegraphed or telephoned decision within hours or a few days of the close of the hearing is generally the most expedited manner of transmitting the decision while providing the arbitrator some time for reflection.

The usual practice is for the arbitrator to examine the submitted evidence and the parties' arguments and then issue his decision together with his supporting opinion and/or reasoning. The rationale for preparing written opinions is the desirability of explaining in detail how the particular result was reached. This is done so that the parties will understand the result and use the opinion for guidance in their future relations. Written opinions serve the additional purpose of reducing arbitrariness, impulsive action or prejudice on the part of the arbitrator, and of inspiring confidence in the process on the part of the parties and the public. Such awards become a part of the recorded relationship between the parties. They are considered as a sort of addendum to the parties' collective bargaining agreement and an aid to future administration of the contract. In some cases the parties actually request the arbitrator to set forth procedures for handling a particular problem in the future to avoid recurrances of the same problem that is then before the arbitrator. When requested, the arbitrator usually complies, suggesting procedures for dealing with progressive discipline, repeated absenteeism, etc. The written opinion then has a value beyond merely serving as an appendage to the decision, even though it is the decision which binds the parties and solves the immediate problem. The opinion provides the parties with an insight into the arbitrator's reasoning, which might be persuasive even to the losing party, and might also help them to determine whether that arbitrator should be called upon in the future for other cases. Finally, it raises a red flag for one or both of the parties, highlighting an agreement provision which is high on the priority list for change in next negotiations.

B. Analyzing the Evidence

When the arbitrator has amassed all the exhibits, his notes, and any transcript and/or briefs that have been supplied, he is ready to begin the preparation of the award. This material is studied in the light of the parties' agreement, their past practice, arbitration awards, pertinent laws and regulations, and the like. The arbitrator functions alone unless he is a member of a tripartite panel, consulting no one for advice or further information unless specifically authorized to do so by the parties.

Impact of the testimony. The notes which have been laboriously taken by the arbitrator from the beginning of the hearing when he had little understanding of the ultimate impact of the evidence as it was offered, now take on a new meaning in relation to the full presentation of the case. Careful note-taking has its rewards when certain testimony, not appearing vital at the time uttered, becomes a key to his decision. This is particularly true in matters involving disputed facts, sequences of events, or contradictory statements made by several witnesses. The problem may be lessened somewhat for the arbitrator who does not take copious notes, by the availability of a transcript with specific quotations as to what the witness said. Total reliance on the availability of a transcript may have its drawbacks, however, since without an index it may be difficult to find a particular statement in a voluminous proceeding, and since there are times when an inexperienced stenographer does not provide an accurate transcription of what was said.

When faced with contradictory testimony, the arbitrator must weigh the testimony in light of his recollection of the demeanor of the witnesses and their veracity on other items testified to. He must determine the weight, if any, to be attached to hearsay or gossip, to circumstantial evidence and ultimately determine whether the moving party has met the burden of convincing the arbitrator of the merits of his case. Throughout his considerations he must continue to bear in mind the motives of the witnesses, their personal stake in the outcome, and the plausibility of their contentions in the light of the surrounding circumstances, the testimony of others and of their intrinsic credibility. Being the grievant or otherwise having a stake in the outcome of the case does not and should not disqualify a witness or discredit his testimony, but it does subject it to greater scrutiny. The failure of an important potential witness to testify at a hearing is bound to have some impact on the arbitrator's deliberation. The arbitrator may not be cynical by nature, but continued exposure to contradictory yet convincing statements of what took place from opposing witnesses is bound to elicit some cynicism in weighing such claims.

In disciplinary cases the arbitrator must also be concerned with the evidence of the parties' past enforcement practices for similar acts, the relevance and weight of the grievant's past record, and whether his conduct and attitude are such as to make him susceptible to rehabilitation. Such evidence introduced by the parties is re-examined by the arbitrator more calmly and thoroughly away from the pressure of the ongoing proceeding.

Impact of the Contract. The arbitrator draws his authority from the contract and must determine whether the facts as he sees them constitute a breach of the parties' agreement, or whether they are consonant with that document. The specifically cited provisions of the parties' agreement must be examined in their own context, in relationship with each other, and in the light of the parties' intent at the time of their negotiations. Evidence of language unchanged over a number of agreements, evidence of proposals for new language, of modifications from prior languages, of rejected proposals, evidence of comparable sections of agreements between the same employer and other bargaining units, practices in administration of the agreement which appear at variance with the language of the contract, relative weight to be attached to specific or general language, must all be considered by the arbitrator in ascertaining the application of the parties' agreement to the particular facts of the case.

In addition, he must determine the relevance of ancillary or supplementary agreements, certificates, letters of understanding, and the like.

Ambiguity. It is the uncertainty of the contract language which gives rise to many grievances, and it is that uncertainty which the arbitrator, in the last analysis, must resolve. Clear language is generally applied as written, but often, apparently "clear" language is subject to conflicting interpretations. In cases of ambiguity the arbitrator must endeavor to discover what the parties intended and then make his award in conformity with that intent. Sometimes when there was no meeting of the minds the arbitrator may so interpret the language as to be in accord with other provisions of the agreement or with what he believes to be the most practical interpretation of the disputed language. Nonetheless, despite the latitude which the arbitrator might have in ascribing realistic meaning to the ambiguous language of the parties' agreement, he may not alter it. That is a matter for the parties themselves in negotiating their agreement and may not be usurped by the arbitrator.

In shedding light on ambiguous language the arbitrator may rely upon certain well-established legal concepts. Thus the tradition of "*inclusio unius est exclusio alterius*" is generally relied upon to exclude unspecified items when a number of similar or comparable items are listed. Likewise specific contract language is held to prevail over more general language, and subsequently adopted language is held to prevail over earlier language. Words are given their normal usage and efforts are made to construe the agreement as a whole, avoiding harsh, absurd or nonsensical results.

Thus, testimony as to what transpired in the parties' contract negotiations often helps to resolve ambiguities. It may be demonstrated by minutes of negotiating sessions, exhibits listing contract demands, or oral testimony. Unsuccessful efforts to include certain language in an agreement will almost uniformly preclude the arbitrator from reading that same language into the contract.

The parties' own practices as well as that prevailing among comparable employers, may be germane in resolving ambiguities in contract language. Prior settlement of disputes over similar issues may also enlighten the arbitrator in this respect.

Arbitration precedents. Unlike judges in courts of law, arbitrators have very limited opportunity for relying on precedent in the making of their decisions. As a practical matter the only binding precedents in the analogous sense are the arbitration awards rendered in disputes between these same parties, under the same agreement. And, of course, such decisions are distinguishable in many instances and need not be followed if the arbitrator in the later case disagrees with the views of the earlier arbitrator. It is desirable for the continuity of the parties' relationship and to deter the taking of spurious or repetitive claims for arbitrators to maintain consistency with one another But there is neither contractual nor legal requirement that they do so. There is also some concern that strict adherence to procedure will increase the legalistic restraints already creeping into arbitration.

Arbitrators are often referred to other cases between the parties which arose under prior collective bargaining agreements. The extent to which the arbitrator in the current case may feel bound by decisions under prior agreements depends on what has transpired in the meantime. If the contract language interpreted by the prior arbitrator has remained unchanged, the prior award would be more persuasive than where a change had been negotiated in the disputed language during the intervening period. Even under such circumstances, it is possible that the earlier decision contained references to unchanged language or set forth dicta that have provided the basis for the parties' conduct in the intervening period.

Very often arbitrators are referred to cases decided by other arbitrators in disputes between the employer and other employee organizations, the organization and other employers, or between two totally different parties. These decisions are not binding on the arbitrator - unless perhaps one of them were his, in which case personal consistency would be of importance. They are not usually intorduced for purposes of binding the arbitrator, but rather to persuade him that the reasoning and decisions adopted by his brethren under similar circumstances should be followed in the instant case. At times, an arbitrator will research the published cases independently to learn how others have treated similar problems. In this respect the published awards have become a sort of substantive law of employee relations. Although the bulk of cases reported deal with the private sector, there are specialized publications dealing with public sector awards exclusively, such as those published by the American Arbitration Association and the Government Employees Relations Report.

Legal constraints. Arbitration in the private sector is a private matter resulting from a conflict between the parties concerning their contract. As such, it rarely gives rise to legal issues other than those associated with judicial concern for contract enforcement. In the public sector however, the arbitrator enters a relationship which is of a public character, defined by and subject to government rules and regulations. The precedents are more likely to be the products of administrative regulation than of contract law. Laws, by-laws, rules, regulations and the like have existed in this realm for years without anticipation of the advent of public sector collective bargaining. As a result, the arbitrator is likely to be circumscribed in his actions in the public sector. Certainly he still has the primary responsibility for the interpretation of the parties' agreement, but his decisions in the public sector are more likely to be hedged in by external, legal authority. Sometimes contractual language frees a party from compliance with the award

if it is contrary to rules or regulations of other authorities. The arbitrator is often up against governmental authorities who resent his intrusion into their traditionally sacrosanct field of civil service administration regardless of how the case comes out.

Certainly it is incumbent upon the parties to see to it that the arbitrator is made aware of these constraints upon his authority. It then becomes his responsibility to render an award in compliance with that authority, while at the same time abiding by any restraints thereon which might be imposed by the governmental unit involved in the proceeding or by a higher governmental authority. Frequently the result is a standoff. The arbitrator may find on the one hand that a termination by the employer was in direct violation of the parties' collective bargaining agreement, while on the other hand, the employer has retained all authority granted by law which might include the right to dismiss employees. These dilemmas must be resolved by the parties in collective bargaining if the arbitrator is to perform the same function of bringing finality as he does in the private sector. Until such conflicts in authority are resolved, arbitrators will have to weigh the prevailing arguments and attempt to come forth with decisions which hopefully will be regarded as final and successful efforts to resolve troublesome disputes between the parties.

An arbitrator should not knowingly issue an order which would require one or both of the parties to violate the law, even though his contractual authority may permit him to do so. Courts, when asked to enforce arbitration awards, will obviously examine the case carefully to see if violations of law will occur from ordering compliance with the award. The courts would thus be likely to hold an award illegal if its implementation would require breaking the law.

Past practice. The employee-employer relationship does not operate in a strictly legalistic format. Rather, it is an outgrowth of a combination of the written word and the actions of the parties under the aegis of the agreement. The practice of the parties may be as much a part of their agreement as is the written word.

Arbitrators recognize past practice as an essential component of the parties' relationship and attach varying weight to it when attempting to ascertain the true intent of the contract or the manner in which the parties have adapted the contract to the practicalities of the working place. The evidence of past practice which has not been circumscribed or limited by the language of subsequent agreements is bound to carry great weight in determining the intent of the parties. Past practice unchanged by contract negotiations is carried forward as one of the terms of employment and becomes in a sense a part of the contract.

In some cases of consistent practice in contradiction of the written agreement, the practice will be viewed by the arbitrator as a reshaping or amendment of the contract by mutual consent. Thus a clear and ongoing, consistent practice of the parties, in direct violation of the contract may, in effect, constitute a rewriting of the contract by the parties themselves. The value of such contract language vis-a-vis past practice may be crucial to the arbitrator's decision. In the public sector this problem is made very real by language protecting the employees' prior working conditions. These "maintenance of standards" clauses bring the prior practices into the current agreement very vividly. Some employers seek to offset this language by substituting wording at the other extreme, limiting grievances to the "specified terms and conditions of the parties' agreement." The arbitrator often may have to weigh the competing language against past practice to determine which prevails.

C. Remedy

The arbitrator, bound by the terms of the parties' submission, may only provide a remedy when he is empowered by the parties to do so. In providing a remedy he must often come to a decision as to the appropriate measure of damages under the circumstances. In fashioning a remedy in arbitration, the arbitrator is also limited in authority by the remedy sought by the

grievant. If the grievant has been totally wronged, the arbitrator seeks to make him whole for the loss occasioned by the other party's violation of the parties' agreement. He is not to award a punitive remedy or extra damages unless the agreement so provides. In making the aggrieved party whole, the arbitrator has a choice of approaches depending upon the circumstances of the case. In the situation where an employee has been improperly terminated, he might order the employee's reinstatement with reimbursement for all earnings lost. If the effort to make the employee whole is fully complied with, this might entitle the employee to compensation for the overtime work he reasonably would have performed had it not been for his improper suspension. If interest on the back pay was requested by the grievant, the arbitrator would have to determine whether it is an appropriate component of being made whole . The award reimbursing the employee for earnings lost would undoubtedly require him to deduct any interim earnings received as a consequence of his suspension, although earnings from a second job held by the grievant prior to the termination would probably not be used as an offset to back pay. Likewise the award of back pay would entitle the unemployment compensation board of the state to recover any and all amounts paid out to the grievant during the interim where pertinent.

In cases of improper distribution of overtime, the appropriate remedy might consist of payment of the monies the grievant(s) would have received had he (they) been given the overtime work in compliance with the contract terms. If an equalizing deadline for overtime distribution has not yet arrived, e.g., the end of the year, a priority opportunity for the next available overtime work might be awarded as the remedy.

There are some cases where the grievant may win, yet the arbitrator has no basis on which to prescribe a remedy. This situation might areise where the agreement precludes the requested remedy or where the employer continued to comply with an existing practice while processing a grievance which protested its right to change that practice.

In some cases the arbitrator will find that a disciplinary penalty was appropriate, but that the particular penalty imposed was excessive. Under such circumstances, if the remedy question is properly phrased, the arbitrator would have the authority to reduce the penalty without totally eliminating it, with compensation being paid for the difference between the original penalty and the ordered penalty. Thus, the reduction of a termination to a three-day suspension for a first offense of a minor infraction would enable the arbitrator to reinstate the grievant with reimbursement for all earnings lost beyond a three-day period.

D. Writing the Award

Once the arbitrator has thought out his decision and the supporting reasoning therefor, he turns to the actual preparation of the award.

The award is prepared primarily for the parties involved in the particular dispute but it has impact beyond those individuals for the life of the parties' agreement and beyond. The award and its reasoning may also have some value to other parties embroiled in a similar dispute. Although the award is the property of the parties involved, it is not unusual for such awards to be made available to others through publication by the reporting services or through direct contact. Thus the award, to serve its educational purpose, must be a complete account with full exposition of all that has occurred in the case. It is the arbitrator's responsibility to include all material relevant to his decision in writing in the award.

The award generally begins with a statement listing the parties to the dispute, the authority of the arbitrator, and the statement of the issue.

Thereafter, the arbitrator sets forth a statement of the facts as he sifts through the maze of offered testimony, including statements of conflicting facts if they are present in the case. The facts are frequently recited in chronological order, terminating with the filing and processing of the instant grievance.

The relevant contract citations are then set forth for the reference of those reading the award and are followed by a statement of the reasoning used by the arbitrator in reaching his decision. This discussion is the core of the award, for here the arbitrator states why he reached the conclusion he did. It provides an explanation of the arbitrator's course of conduct in disposing of the grievance either through the ordered remedy or the dismissal of the grievance. The explanation might also contain recommendations for the parties' future conduct to avoid similar confrontation in the future.

The arbitrator begins by focusing attention on the main issues - perhaps pointing out the irrelevancy or inconsequentiality of other issues, giving the reasons for his conclusions and responding to the arguments raised by the losing party. Once these issues are disposed of, the case is resolved. The arbitrator must be clear in his use of language so that there is no misunderstanding of the content of the award. Yet it is also desirable that the award be brief and succinct in order that it might be easily read and understood by its readers.

The conclusion of the award is the arbitrator's formal answer to the question submitted to him by the parties. If he fails to answer the precise question submitted to him, the award is in jeopardy. It may be unenforceable in the courts. More importantly, the parties may be denied the guidance and findings which they requested of the arbitrator. Thus a carefully written decision answering the question submitted by the parties is acutely important.

E. Issuing the Award

The deadline for issuance of the award may be established by the arbitrator, the parties, the designating agency, the law, or some governmental authority. In general, the arbitrator endeavors to issue awards as soon as his schedule will permit in order to provide the parties with the award they seek and to close out his files. As noted above, in some contracts the parties have set forth a deadline for the issuance of the award by which the arbitrator is bound unless he obtains agreement on an extension of the time for making the award.

In cases which emanate from designating agencies, the parties subscribe to the rules of such organization. These rules usually require, as in the case of the American Arbitration Association, the issuance of awards within thirty days of whichever occurs the latest: (1) conclusion of the hearing, (2) receipt of the transcript, or (3) receipt of post-hearing briefs.

The award is signed by the arbitrator, or the three-man panel if appropriate, and includes the date of its issuance. In some jurisdictions it must also be notarized.

XII.
THE AFTERMATH

A. Functus Officio

Once the arbitrator has issued his award, his function is terminated. His jurisdiction over the matter is ended, and he is as a stranger to the case. This prohibits his receiving subsequent arguments, reopening the hearings, or amending his award. Any further involvement by the arbitrator, such as responding to a request for clarification, requires the agreement of the parties to re-cloak him with responsibility for the case for the limited purpose intended by the parties.

B. Rejection-Acceptance

Arbitration is generally assumed to be final and binding on the parties so that any findings of the arbitrator are conclusive and the directions for compliance set forth in his award must be followed by the parties.

But there are portions of the award which may be made in the form of recommendations by the arbitrator, either in the decision portion or as dicta in the arbitrator's discussion. These recommendations are obviously subject to acceptance or rejection by the parties as they see fit.

As noted earlier, there are situations in which arbitration is only advisory, particularly in new collective bargaining relationships in the public sector. The recommendations in such situations are merely that and are not binding on the employer or the employee organization. As a practical matter, for the employer to ward off the progression to arbitration, compliance with the recommendations of the arbitrator is essential. For the employee organization, compliance is the only practical way to prevent the employer from retrenching from agreement to even advisory arbitration.

Regardless of whether the award is advisory or binding, there is no question that some arbitrators' decisions leave the parties dissatisfied. They are, of course, free to meet and discuss the results thereof to make them more mutually palatable. Failure to reach such accommodation on a variance would require the implementation of the award as rendered.

C. Conclusion

Arbitration is the parties' own procedure for resolving conflicts under collective bargaining agreements. It is non-technical and flexible, devoted to ascertaining the facts based upon the parties' agreement, declaring the rights of the parties, providing the parties with a detailed explanation as to whether their mutually-designated neutral believes there had been a breach of their agreement, and a clear statement of how that breach can be rectified, if appropriate. It is a logical procedure for terminating conflict between the parties who benefit from the continuance of their relationship in the most compatible framework for the benefit of all. Arbitration is only what the parties want it to be with variations developed to suit their needs.

The foregoing reflects the experience of one writer, since each arbitrator's experience is unique. What counts is the experience of the parties. Arbitration can be molded to meet their objectives with resulting benefit to all concerned.

F

WHERE TO GO FROM HERE

Supplementary Materials on
Grievance Handling and Arbitration

WHERE TO GO FROM HERE

I.

FILMS

"Case of the Last Fringe Benefit: Re-enactment of an Arbitration Hearing in Public Employment" - 27 min., 16mm. American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

"Trouble in the Firehouse" - 23 min. 16mm., color/sound $50 rental; $37.50 for AAA contributing members. Publications Department, American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

Explores conflict between mayor and fire department on filling of manpower needs according to their respective interpretation of the collective agreement.

"Arbitration in Action" - 58 min. $25 rental Education Department, American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

A truck driver with a generally negative work and absenteeism record is discharged for taking allegedly excessive time in the completion of a trip.

"Seniority vs. Ability" - 35 min. $20 rental Education Department, American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

The union supports the contract rights of a senior employee who has been denied a promotion due to a poor attendance record.

"Discharge for Absenteeism" - 30 min. $15 rental Education Department, American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

Grievant who suffers from such a severe drinking problem that he has been suspended with a final warning on his absenteeism, has a justifiable absence which is then questioned as cause for discharge.

"Subcontracting" - 30 min. $15 rental Education Department, American Arbitration Association 140 W. 51st St., New York, N.Y. 10020 (212) 582-6620

Union charges violation of contract clause barring action that would cause unemployment when employer subcontracts item previously built by bargaining unit employees.

"Arbitration: the Truth of the Matter" - 48 min. 16mm. Management Development Presentations 3460 Wilshire Blvd., Suite 804, Los Angeles, Calif. 90010 (213) 380-0604

Procedures in an actual arbitration hearing.

"How-To" Gellerman Films: "Managing in a Crisis" (30 min.); "Working with Troubled Employees" (30 min.); "Controlling Absenteeism" (30 min.). Management Development Presentations, 3460 Wilshire Blvd., Suite 804, Los Angeles, Calif. 90010 (213) 380-0604

WHERE TO GO FROM HERE

II.

BIBLIOGRAPHY

Amundson, Norman: "Negotiated Grievance Procedures in California Public Employment: Controversy and Confusion" California Public Employee Relations (CPER). Institute of Industrial Relations, University of California, Berkeley, August 1970

Blockhaus, Arthur P.: "Grievance Arbitration Case Studies" Boston: Cahners Books, 1974

Materials herein may be used to illustrate a grievance training objective.

Bureau of National Affairs. "Grievance Guide for Unions." Washington, D.C., 1972

A digest of arbitration awards from BNA's Union Labor Report.

California Public Employee Relations Report, Institute of Industrial Relations, Berkeley, No. 26, September 1975. Special issue on "Understanding Grievance Arbitration in the Public Sector".

Recent trends in local government agreements and log of neutrals' actions.

"Grievance Principles and Problems. Instructor's Manual" Chicago: University of Chicago, 1949

An early manual. Useful for developing grievance training techniques.

Sinicropi, Anthony V and Gilroy, Thomas P.: "Dispute Settlement in Public Employment. An Annotated Bibliography" (Reprint) Institute of Industrial Relations, University of California Los Angeles, 1972.

Reviews literature on grievance arbitration procedure from 1968-July 1971.

Tracy, Estelle R., Editor: "Cases in Public Employment" American Arbitration Association, New York, 1969

Summarizes facts and prints the text of arbitrators' opinions and awards in 39 cases pertaining to the public sector.

Ullman, Joseph and Begin, James: "The Structure and Scope of Appeals Procedures for Public Employees" Industrial and Labor Relations Review, Vol. 23 1970

Survey of published literature on grievance arbitration procedures in the public sector through 1968.

WHERE TO GO FROM HERE

III.

ABSTRACTS

Begin, James P.; "The Private Grievance Model in the Public Sector" Industrial Relations Vol. 10 #1, Feb. 1971, pp. 21-35

Examines environmental features peculiar to the public sector that may affect public grievance arbitration through case studies of negotiated grievance procedures in similar government agencies of five mid-western cities. Concludes implications for management and unions are: 1) there is exaggerated concern over special needs of public sector, 2) unions should train local officials in principles of contract negotiation and administration, 3) the effect of grievance procedures on employees not directly measured, but it was found that in several instances employees benefited from experience.

Bornstein, Tim "Arbitration: Last Stop on the Grievance Route" Labor-Management Relations Service of U. S. Conference of Mayors; National League of Cities, January 1973

Presents in clear language and well organized format the nature and legal aspects of contract administration and grievance procedure; presents a detailed description of arbitration process with special reference to municipal labor relations.

Cohen, David M. "Grievance Arbitration in the United States Postal Service" Arbitration Journal, December 1973 p. 258

Discusses the advent of grievance arbitration in the Postal Service, the types of cases and the possible future.

Kagel, John "Grievance Arbitration in the Federal Service: How Final and Binding?" Government Employee Relations Report, Reference File (1972) pp. 61:601-61:606

Kagel argues that grievance arbitration in the federal service will not be effective in resolving disputes, lessening tensions or building stable labor relations until the arbitrators' awards are enforceable by statute and the Comptroller General stops interfering with the process. Agency regulations and multi-level authority also hinder the arbitrators' work. Kagel urges that the private sector model be followed of allowing the arbitrators decide the critical question of arbitrability.

Kagel, Sam and Kagel, John: "Using Two New Arbitration Techniques" Monthly Labor Review, November 1972 pp. 11-14

Argues that facts essential to settle a grievance are not obtained until there is an arbitration hearing. Outlines fact-finding procedure the authors feel would drastically reduce time required to settle grievances, by requiring labor and management view employee complaints as a mutual problem to be resolved.

Kershen, Harry: "How Impartial is Impartial Arbitration When It Involves Public School Teachers?" Journal of Collective Negotiations, Vol. 4 No. 2 1975, pp. 217-223

Examines awards rendered by arbitrators in grievance disputes with public school teachers to determine if a significant number of awards were weighted in favor of either labor or management.

Kilberg, William J.; Angelo, Thomas; and Lorber, Lawrence: "Development of Grievance Arbitration in the Federal Service" Government Employee Relations Report, Reference File (1972) pp. 61:611-61:618

Traces the development of grievance arbitration in the public sector from 1962 through 1971. Kilberg, Angelo and Lorber identify the common definition of grievances, the utilization of time limits, the common number of steps in the procedure and the way most arbitrators are chosen. Discusses the problems of unfair labor practices, access to records and identical grievances. Discusses issues mostly in terms of Executive Orders.

Krinsky, Edward: "Municipal Grievance Arbitration in Wisconsin" Arbitration Journal, March 1973, p.50

Analyzes all municipal arbitration cases submitted to Wisconsin Employment Relations between 1963 and 1970. Discusses issues and procedures. Concludes that great similarities to private sector exist.

Krislow, Joseph and Peters, Robert: "Grievance Arbitration in State and Local Government: A Survey" Arbitration Journal, September 1970

Surveys the growing use of grievance arbitration in the public sector, its characteristics, and its impact on labor-management relations and the Civil Service Appeal Systems.

Masters, W. Frank: "The Arbitrability Issue in Michigan Public School Disputes" Arbitration Journal, June 1973 , p.119

Discusses the problem of the Arbitrability Issue, whether a specific situation should go to arbitration, in Michigan Public School Districts.

Mittenthal, Richard: "Past Practice and the Administration of Collective Bargaining Agreements" Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, Santa Monica, 1961, pp. 30-57

Explores the functions of past practice as an aid in resolving grievance disputes. Describes principle characteristics of a past practice.

Ullman, Joseph C. and Begin, James P.: "Negotiated Grievance Procedures in Public Employment" Public Employees Relations Library No. 25; Chicago: Public Personnel Assn., 1970

Examines the grievance procedure in terms of its formality, the character of union and management representation, regulation of union activity and the scope of arbitration. Compares and discusses public and private sector practices. Recommends how each subject should be dealt with in contract.

IV.

GLOSSARY FOR ARBITRATION

Adverse Action	In the Federal Government, removals; suspensions for more than 30 days; reduction in grade, rank or compensation; or furlough without pay for misconduct, nonperformance, or incompetence. Lesser disciplinary actions, such as short-term suspensions or reprimands, are not technically considered adverse actions. Under Civil Service Commission regulations and nearly all collective bargaining agreements, adverse and disciplinary action appeals procedures are separate from grievance procedures.
AFL-CIO	Name of the federation created by merger in 1955 of the American Federation of Labor and the Congress of Industrial Organizations.
Agency Shop	A union security arrangment to eliminate "free riders" without requiring all employees in a bargaining unit to become members of the union as a condition of employment. Employees in the unit must either join the union or pay a service charge (usually equivalent to union dues) to collective bargaining agent. Modified agency shop: a variant (rare) devised to meet objections of employees on a public (or private) payroll to being forced to pay fees to a union. Rather than a service fee to the bargaining agent, the employee pays the sum to a designated charitable organization. See "free riders".
American Arbitration Association (AAA)	Private nonprofit organization established to aid professional arbitrators in their work through legal and technical services, and to promote arbitration and factfinding with and without recommendations as a means of settling commercial and labor disputes. Provides lists of arbitrators for a fee upon request.

Arbitration	A method of settling disputes through recourse to an impartial third party whose decision is usually final and binding. Arbitration is often used in the interpretation of existing contract language, but it is seldom used in settling disputes arising from negotiations of provisions of a new contract.
Arbitration, advisory	An attempt in the public sector to employ the arbitration process to resolve disputes while still recognizing the sovereignty of the government. The arbitrator's award need not be accepted as where the employer decides the award is contrary to overriding public interest. See "fact-finding".
Arbitration, compulsory	Third party dispute settlement required by law or government regulation.
Arbitration, interest.	The determination by an arbitrator of new agreement provisions; the arbitration of the terms of the new collective bargaining agreement as distinguished from arbitration involving the interpretation and the application of the current agreement (or grievance arbitration.) Sometimes referred to as disputes involving interests in new terms and conditions of an agreement rather than rights under the terms of the existing agreement.
Arbitration, grievance (rights)	A voluntary means of settling grievances which arise from the interpretation or application of an existing agreement. The arbitrator clarifies the meaning of agreement provisions and renders a decision when disagreements cannot be settled at the lower levels of the grievance procedure. Sometimes referred to as arbitration over the rights of the parties under the negotiated agreement.

Arbitrator (Impartial Chairman)	An impartial third party to whom disputing parties submit their differences for decision (award). An ad hoc arbitrator is one selected to act in a specific case or a limited group of cases. A permanent arbitrator is one selected to serve for the life of the agreement or a stipulated term, hearing all disputes that arise during this period.
Arbitration, voluntary	Third party settlement where labor and management jointly request that an issue be submitted to arbitration. This may be done on an ad hoc basis or may be pursuant to a collective bargaining agreement making arbitration the terminal point of the negotiated grievance procedure.
Association	An independent organization of employees generally not under the direct jurisdiction of the AFL-CIO. Major examples include the California State Employees Association and the National Education Association.
Bargaining Agent Bargaining Representative	Union designated by an appropriate government agency, such as the National Labor Relations Board, or recognized voluntarily by the employer as the exclusive representative of all employees in the bargaining unit for purposes of collective bargaining.
Bargaining Unit	Shortened form of "Unit Appropriate for Collective Bargaining". Group of employees in a craft, department, plant, form, occupation or industry recognized by the employer or group of employers, or designated by an authorization agency such as the National Labor Relations Board as appropriate for representation by a union for purposes of collective bargaining.

Boycott	Effort by an employee organization, usually in collaboration with other organizations, to discourage the purchase, handling, or use of products of an employer with whom the organization is in dispute. When such action is extended to another employer doing business with the employer involved in the dispute, it is termed a secondary boycott.
Business Agent (Union Representative)	Generally a full-time paid employee or official of a local union whose duties include day-to-day dealing with employers and workers, adjustment of grievances, enforcement of agreements, and similar activities.
Check-off	Arrangement whereby an employer deducts from the pay of union members in a bargaining unit membership dues and assessments and turns these monies over to the union. In some jurisdictions the public employee union is required to pay a fee for this service.
Closed shop	A provision in a collective bargaining agreement under which the employer may hire only union members and retain only union members in good standing. The closed shop is illegal under federal law for industries and business engaged in interstate commerce. (See Union Shop)
Collective Bargaining Agreement	Written contract between an employer (or employers) and an employee organization, usually for a definite term, defining the conditions of employment (wages, hours, vacations, holidays, overtime payments, etc.), the rights of the employees and the employee organization, and the procedures to be followed in settling disputes or handling issues that arise during the life of the contract.

Collective Bargaining in Good Faith (Taft-Hartley Act)	To meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
Collective Bargaining Negotiation	Generic term for process of negotiating terms and conditions of employment to be incorporated in written contract. See "Meet and confer negotiations".
Conciliation	See "Mediation".
Confidential Employee	One whose responsibilities or knowledge in connection with the labor-management issues involved in collective bargaining, grievance handling, or the content of union-management discussions would make his membership in the union incompatible with his official duties. Such individuals usually are staff employees reporting to and accountable to those in management responsible for the conduct of union-management discussions, especially those relating to wages, hours, and/or working conditions of union-represented employees.
Consultation	An obligation on the part of employers to consult the employee organization on particular issues before taking action on them. In general, the process of consultation lies between notification to the employee organization, which may amount simply to providing information, and negotiation, which implies agreement on the part of the organization before the action can be taken.

COPE	Council of Political Education (AFL-CIO)
Craft Union	A labor organization which limits membership to workers having a particular craft or skill or working at closely related trades. In practice, many so-called craft unions also enroll members outside the craft field, and some come to resemble industrial unions in all major respects. The traditional distinction between craft and industrial unions has been substantially blurred.
Employee (Taft-Hartley)	The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
Employee Organization	Any organization which includes employees and which has as one of its primary purposes representation of its members in employer-employee relations.
Employee Rights	Rights reserved to the employees under the provisions of the contract and all applicable statutes.

Employer	The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
Exclusive Bargaining Rights	The right and obligation of an employee organization designated as majority representative to negotiate collectively for all employees, including nonmembers, in the negotiating unit.
Exclusive Recognition	When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit.
Exclusive Representative	The employee organization which is recognized by the employer as the only organization to represent all the employees in negotiations.
Executive order 11491	Presidential order governing labor-management relations in the federal public service. Closely parallels the Taft-Hartley Act for private sector employees except that federal unions only bargain over working conditions. Federal salaries and fringe benefits are set by Congress.

Fact-finding	A process whereby an independent third party or panel is asked to conduct hearings, either public or private, make investigations and issue a report. If the report makes a determination of data and economic information, the process is called fact-finding without recommendations. If the panel suggests settlement terms for the parties, the process is called advisory arbitration, board of review or fact-finding with recommendations. If the report is binding on both parties the process is called arbitration.
Grievance	A dispute over the wages, hours and/or working conditions of an employee or employees which requests modification of a decision to conform to a higher rule, law, policy or requirement. Also the complaint filed by an employee under a grievance procedure.
Grievance Procedure	Typically a formal plan, specified in a collective agreement, which provides for the adjustment of grievances through discussions at progressively higher levels of authority in management and the employee organization, usually culminating in arbitration if necessary. Formal plans may also be found in companies and public agencies in which there is no organization to represent employees.
Impasse	That point in the negotiations at which either party has determined that no further progress in reaching agreement can be made. Technical impasse refers to that point at which agreement is supposed to be reached and has not, but the parties are continuing to bargain in good faith. In public employment, impasses are often resolved by the intervention of a neutral third party, such as a mediator or fact-finder.

Industrial Union	A union admitting to membership all persons in a "plant" or industry, unskilled, semi-skilled and skilled, regardless of work performed. Industrial unions sometimes are referred to as vertical unions.
Internal Disputes Plan	AFL-CIO's in-family procedure for resolving disputes between and among affiliated unions. Plan, set forth in Articl XX (formerly XXI) of federations constitution, provides for submission of disputes to impartial umpires with right of appeal to AFL-CIO executive council. Its purpose is to protect established relationships - not paper jurisdiction - of affiliates.
International Union	The self-identification used by most unions in the United States which have affiliated locals in other countries, usually Canada.
Labor Management Relations Act 1947 (Taft-Hartley Act)	Federal law amending the National Labor Relations Act (Wagner Act), 1935, which, among other changes, defined and made illegal a number of unfair labor practices by unions. It preserved the guarantee of the right of workers to organize and bargain collectively with their employers, or to refrain from such activities, and retained the definition of unfair labor practices as applied to employers. The act does not apply to employees in a business or industry where a labor dispute would not affect interstate commerce. Other major exclusions are: employees subject to Railway Labor Act, agricultural workers, government employees, nonprofit hospitals, domestic servants and supervisors.

Labor Organization (Taft Hartley)	Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employement, or conditions of work.
Local	Group of organizaed workers in a specific geographic area which holds a charter from a national or international union.
Lodge	Term used in some labor organizations as the equivalent of local. See "local".
Maintenance of Membership	A form of union security whereby employees who are union members on a specified date and those who elect to become union members after that date are required to remain members in good standing as a condition of employment during the term of the union's contract.
Management Prerogatives	Rights reserved to management, which may be expressly noted as such in a collective agreement. Management prerogatives usually include the right to schedule work, to maintain order and efficiency, to hire, etc.
Management Rights	Rights reserved to the management under the provisions of the contract and all applicable statutes.
Mediation	An attempt by a third party to help in negotiations or in the settlement of a dispute between employer and union through suggestion, advice, or other ways of stimulating agreement, short of dictating its provisions (a characteristic of arbitration). Conciliation is synonomous with mediation; the term is granted validity in the name of the Federal Mediation and Conciliation Service and the California Conciliation Service.

Memorandum of Understanding	A written non-binding agreement between the representative of a public agency and a public employee organization setting forth terms and conditions of employment.
Meet and Confer Negotiations	Term for process of negotiating terms and conditions of employment intended to emphasize the differences between public and private employment conditions. Negotiations under "meet and confer" laws usually imply discussions leading to unilateral adoption of policy by legislative body rather than written contract and take place with multiple employee representatives rather than an exclusive bargaining agent.
National Labor Relations Act, 1935 (Wagner Act)	Basic federal act guaranteeing private sector workers the right to organize and bargain collectively through representatives of their own choosing.
National Labor Relations Board (NLRB)	Five man board created by the National Labor Relations Act whose functions are to define appropriate bargaining units, to hold elections to determine whether a majority of workers want to be represented by a specific union or no union, to certify unions to represent employees, to interpret and apply the act's provisions prohibiting certain employer and union unfair practices, and otherwise to administer the provisions of the act.
Negotiation	To communicate or confer with another so as to arrive at the settlement of some matter; meet with another so as to arrive through discussion at some kind of agreement or compromise about something. (Webster's Dictionary)
Past Practice Clause	Existing practices sanctioned by use and acceptance, that are not specifically included in the collective bargaining agreement, except, perhaps, by reference to their continuance.

Professional Negotiations	Term used originally by National Education Association to describe alternative to collective bargaining, and to prevent split in profession's ranks beween teachers and school administrators. The distinction between "professional negotiations" and "collective bargaining" has faded over the years.
Recognition	Formal acknowledgment by an employer that a particular organization has the right to represent employees. Exclusive recognition, where permitted, is accorded an organization supported by a majority of employees in an appropriate bargaining unit and carries with it the sole right to represent all unit employees, members and nonmembers, in dealing with management.
Right-to-Work Laws	State laws which designate as unlawful agreements that require membership or non-membership in an employee organization as a condition of obtaining or retaining employment.
Strike	Any concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.
Superseniority	Seniority granted by contract to certain classes of employees in excess of that which length of service would justify. It most frequently is used to protect union stewards and other officers from transfer or layoff to insure that a union representative is available on the job.
Supervisor (Taft-Hartley)	Any individual having authority, in the interest of the employer to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances,

Supervisor - (Cont'd.) (Taft-Hartley)	or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.
Taft-Hartley Act	Same as Labor Management Relations Act, 1947.
Union Security	Protection of union status by provisions in a collective bargaining agreement establishing closed shop, union shop, agency shop, or preferential hiring and maintenance of membership.
Union Shop	Provision in a collective bargaining agreement that requires all employees to become members of the union within a specified time after hiring or after the provision is negotiated, and to remain members of the union as a condition of employment. The union shop is permitted by federal law and is prohibited in states with "right-to-work" laws.
Unit	Shortened form of "unit appropriate for collective bargaining". An appropriate unit includes all employees sharing a community of interests which can be served through collective bargaining.
Wagner Act	See "National Labor Relations Act".
Wildcat Strike	A work stoppage, usually spontaneous, by a group of organized employees without the authorization or approval of the employee organization.

G

AFL-CIO MANUAL FOR SHOP STEWARDS

American Federation of Labor and Congress of Industrial Organizations

George Meany, President

Lane Kirkland, Secretary-Treasurer

Walter G. Davis, Director, Department of Education

Adapted with kind permission of AFL-CIO, Department of Publications

CONTENTS

To Stewards and Committeemen:

Good stewards learn something new about the steward's job every day.

They learn primarily by handling grievances, by studying the contract, by getting accurate facts from the members and by taking part in many union activities.

There is a lot of good advice in the AFL-CIO Stewards Manual. Take it in small doses.

It is going to take a while to learn all the things the AFL-CIO Stewards Manual says you ought to know. You won't find all the answers right away. By studying the manual and using common sense in applying it to your union situation, you can do your job better.

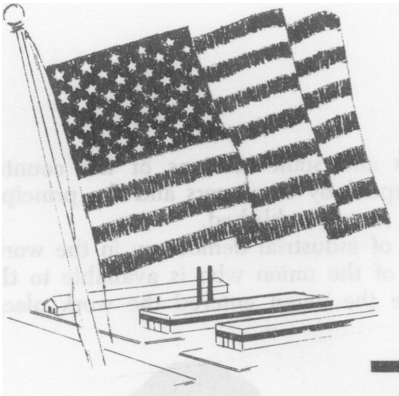
It is a good idea to read this manual once—then re-read it several months later. You will find new ideas in the manual which you hadn't noticed the first time.

Remember, if you do your steward's job well, you are doing the most important single thing to strengthen the American labor movement.

A Word to the Ladies

Women trade unionists make up a large part of the labor movement. Many of the most effective and most militant shop stewards and local union officers are women.

But more of them are men, so the pronoun "he" is used in this pamphlet to refer to the steward. We hope the ladies will forgive us, and regard the word as applying to all stewards.



COLLECTIVE BARGAINING

Unions in the United States have concentrated on collective bargaining as a means of raising the standard of living of their members. The simple phrase, collective bargaining, covers a wide variety of subjects and involves hundreds of thousands of union members in the process. What does the term mean?

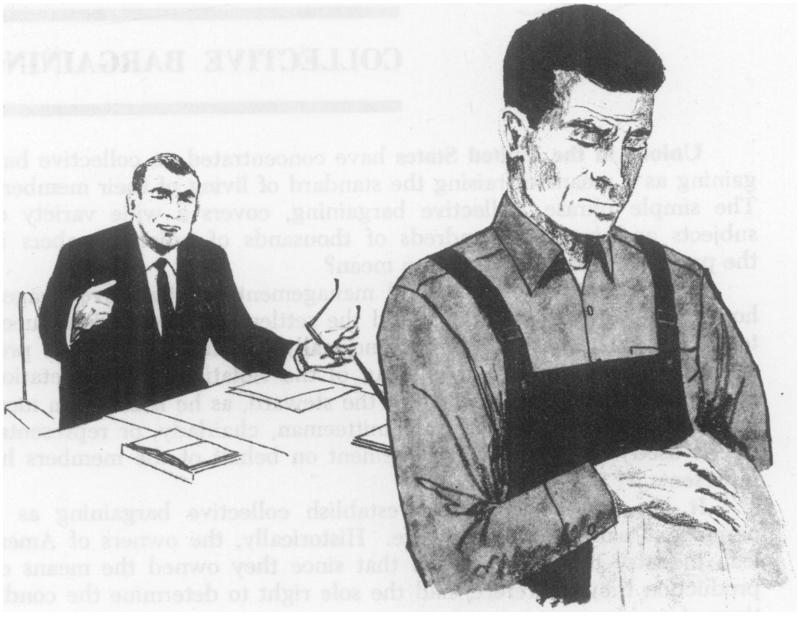
Representatives of labor and management negotiate over wages, hours and working conditions, and the settlement reached is reduced to writing. The written contract normally contains a grievance procedure to settle disputes arising out of the violation or interpretation of the agreement. It is the job of the steward, as he is called in most unions (sometimes the term committeeman, chairlady, or representative is used) to enforce the agreement on behalf of the members he represents.

It has not been easy to establish collective bargaining as a permanent part of American life. Historically, the owners of American industry took the position that since they owned the means of production they, therefore, had the sole right to determine the conditions of employment.

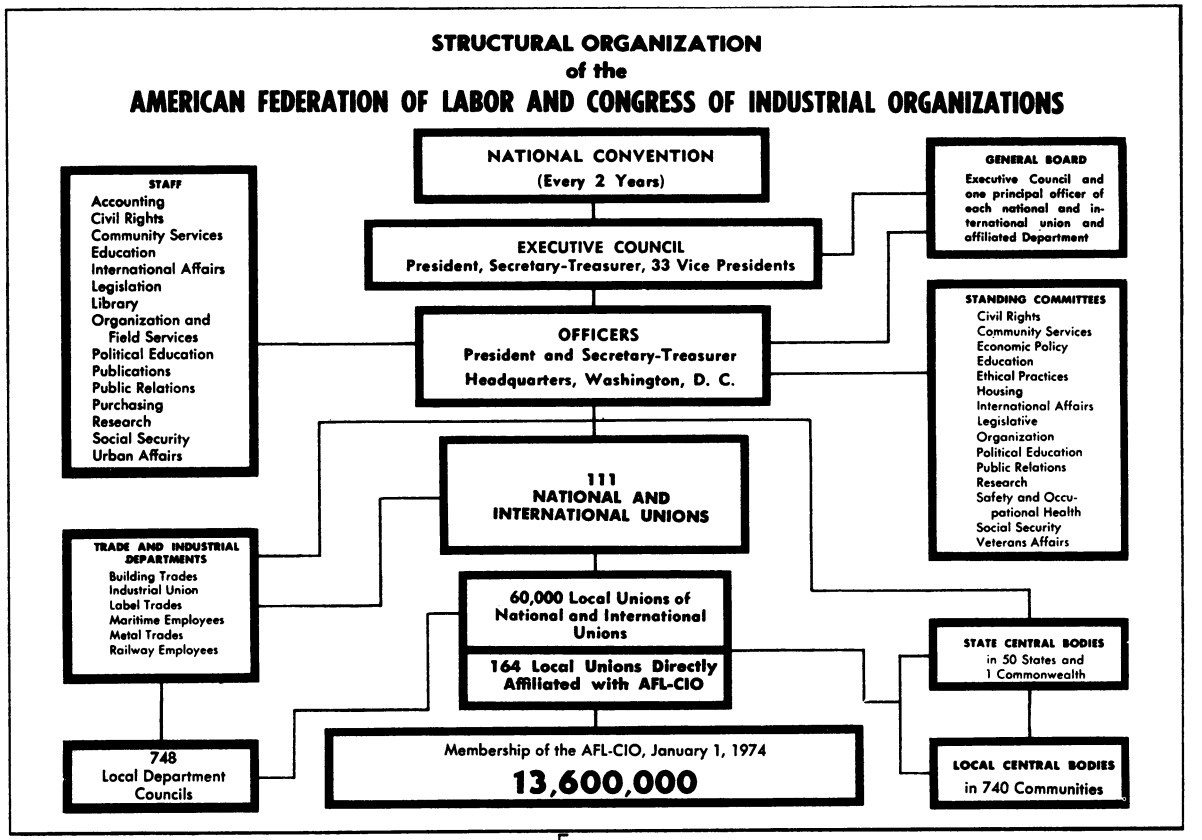
Workers formed unions so that they could have some say over wages, hours, working conditions, and the many other problems that arise in the relationship between a worker and his employer. The unions' efforts to gain recognition are a little known but very important part of American history, involving great sacrifice and bitter struggle before the principle of collective bargaining was accepted in major sections of the American economy.

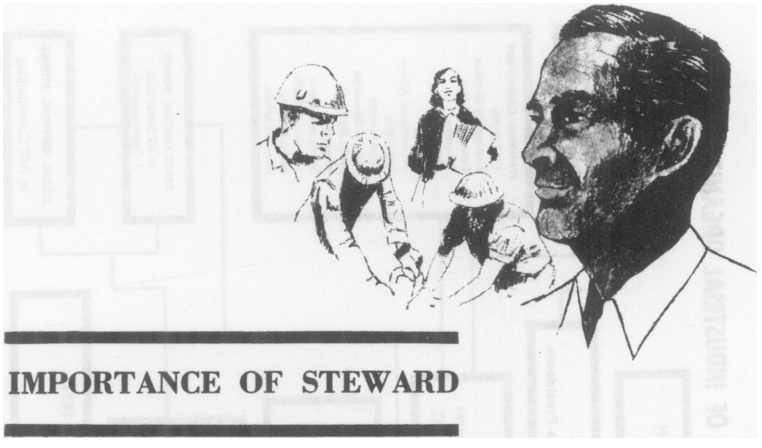
There are some industries and some sections of the country where unionism is still not accepted by employers and the principle of industrial democracy has not been established.

The steward is the symbol of industrial democracy in the workshop. He is the representative of the union who is available to the worker with a problem. Before the union entered the work place,



the "open door" policy of management often existed. Workers were encouraged to bring their problems directly to the boss' office. Those who were foolhardy enough to trust the procedure usually went out —not only the same door, but, the plant as well. The establishment of an effective steward system means the individual worker has the right to talk back through his organization if he feels he has been treated unfairly.


STRUCTURAL ORGANIZATION
of the
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
NATIONAL CONVENTION
(Every 2 Years)
GENERAL BOARD
Executive Council and one principal officer of each national and international union and affiliated Department
EXECUTIVE COUNCIL
President, Secretary-Treasurer, 33 Vice Presidents
STAFF
Accounting
Civil Rights
Community Services
Education
International Affairs
Legislation
Library
Organization and Field Services
Political Education
Publications
Public Relations
Purchasing
Research
Social Security
Urban Affairs
OFFICERS
President and Secretary-Treasurer
Headquarters, Washington, D. C.
STANDING COMMITTEES
Civil Rights
Community Services
Economic Policy
Education
Ethical Practices
Housing
International Affairs
Legislative
Organization
Political Education
Public Relations
Research
Safety and Occupational Health
Social Security
Veterans Affairs
111
NATIONAL AND INTERNATIONAL UNIONS
TRADE AND INDUSTRIAL DEPARTMENTS
Building Trades
Industrial Union
Label Trades
Maritime Employees
Metal Trades
Railway Employees
60,000 Local Unions of National and International Unions
164 Local Unions Directly Affiliated with AFL-CIO
STATE CENTRAL BODIES
in 50 States and 1 Commonwealth
748
Local Department Councils
Membership of the AFL-CIO, January 1, 1974
13,600,000
LOCAL CENTRAL BODIES
in 740 Communities



IMPORTANCE OF STEWARD

The steward has a special relationship to the workers he represents. Research studies have shown that the average worker's image of his local union, his international union, and the labor movement, in general, evolves out of his attitude toward his own steward. The average union member does not personally know the president of his international union. Nor is it likely, in a large local union, that he knows his own union president since he may not attend local union meetings regularly. The steward is the one person in the union structure with whom the member is in contact. He probably participated in the steward's selection and sees him on the job daily. If the union member considers the steward to be intelligent, aggressive, fair-minded and well informed, he will generally feel the same way about his union and unions in general.

A steward may also exert leadership in other areas than those directly associated with collective bargaining. Since he is looked upon as a leader in the department, his views on such matters as politics, civil rights, and community problems will influence the people around him.

Because we live in a changing world, a steward must constantly participate in a process of continuing education. Last year's answers will not necessarily meet this year's problems. Although being a steward is both hard work and time consuming, it can be rewarding to feel one is helping others.

Being a steward is the best training possible for other positions of responsibility in the union. For the future union leader there is no substitute for the kind of experience acquired as a steward.

JOBS OF THE STEWARD

The steward is responsible for many jobs. His most important one is the handling of grievances. Among the others are: Organizing and helping make better union members of the workers in his department, informing the workers of union meetings and urging them to attend, acting as a "transmission belt" between union officers and the membership, supporting the political education work of his union, supporting labor's community activities and knowing labor legislation.

Organize and Unionize

Over 75 percent of all union members are presently covered by union shop agreements. However, merely because a worker is a dues-payer, does not necessarily mean he understands or actively participates in the affairs of his organization. Therefore, one of the steward's basic jobs is to get acquainted with the new worker when he starts work, and to inform him about the union and its activities. A union whose stewards make it a practice to contact a new worker as soon as he appears on the job creates the impression of being "on the ball" as well as being interested in the individual.

What should a steward do when a new worker shows up? He should introduce himself and explain that he is available if the worker has any questions concerning his rights. If the new worker has not received a copy of the contract the steward should give him one, explaining that the agreement represents benefits negotiated by the union. If the new worker has previously received a copy of the contract from the employer, the steward should explain how the benefits were obtained. This is important because it is unlikely that management, when it handed out the contract, explained that the benefits which it contains resulted from union demands. In addition, the steward should know why the union was originally organized so he can convey to the new worker an understanding of the problems faced at that time and what the union did about them. Today, all too often, unions are taken for granted with little understanding of why they are formed.

The steward should also be prepared to give the new worker some sense of what the union has accomplished over the years. The education committee of the union can draw up a leaflet describing current working conditions as contrasted to those at the time the union was organized, or those of a number of years ago. Look at the sample on pages 12 and 13. Any such leaflet should represent the conditions prevailing under a specific contract.

It is not enough, however, only to be concerned with the struggles of the past. The new member wants to know what the union's program is for today and tomorrow—not just what it did yesterday. The union paper or magazine indicates those subjects the union considers to be the most important items to be dealt with in the immediate future. This is the kind of information a steward needs to illustrate the functions of a union to the new members.

There are still many contracts, including those in the so-called "right-to-work" states, which do not require union membership as a condition of employment. Here the steward must be an organizer if the union is to remain strong. The suggestions in the previous paragraphs are useful for newly hired workers. But a steward should never give up looking for ways to bring in to the union those old timers who may resist joining. It is important for him to exchange experiences with others to make sure that he does the best possible organizing job.

Act as a "Transmission Belt"

Historically, the local union meeting was the place where officers and members met and got to understand each other. As organizations grew in size, the process of keeping in touch became more complicated. The movement of workers from the city to the suburbs has made it difficult for many members to attend meetings. Unions, like other organizations, find that the average member is not much interested in going to routine business meetings. As a rule, only important business draws a big turnout. Different things represent important business to different local unions. Among those topics tending to attract large attendance are: union elections, strike votes, contract ratification, and proposals for increasing union dues. It is impossible to schedule this type of business for every meeting; therefore, it is essential that the steward inform the people in his department of the policies and decisions of the organization.

SAMPLE LEAFLET FOR NEW MEMBERS

Welcome to Local 100 of the _____ International Union, We want you to know what your union has accomplished since it was organized in 1950. Be an active member, attend the local union meetings and take part in all our activities. Help to make the organization a better one. Because of the support of the membership, here is what your union has won since 1950.

WAGES	1950	1966
Average Hourly Earnings	$1.44	$2.66
Escalator Clause	0	Wages go up automatically when prices increase

FRINGE BENEFITS		
Pension	0	$4.25 per month for each year of service plus Social Security
Hospitalization	0	Blue Cross-Blue Shield (paid by company)
Paid Holidays	6	8 (Pay for holidays worked—2½ times straight time rate)
Vacation with Pay	1 week after 3 years 2 weeks after 5 years	1 week after 1 year 2 weeks after 3 years 3 weeks after 10 years 4 weeks after 20 years

JOB SECURITY

Grievance System	0	Time limitations and compulsory arbitration
Seniority	0	Seniority applies to layoff, recall, overtime, shift work
Promotion	Based on ability with company sole judge	Based on seniority if worker has sufficient ability to perform job

WORKING CONDITIONS

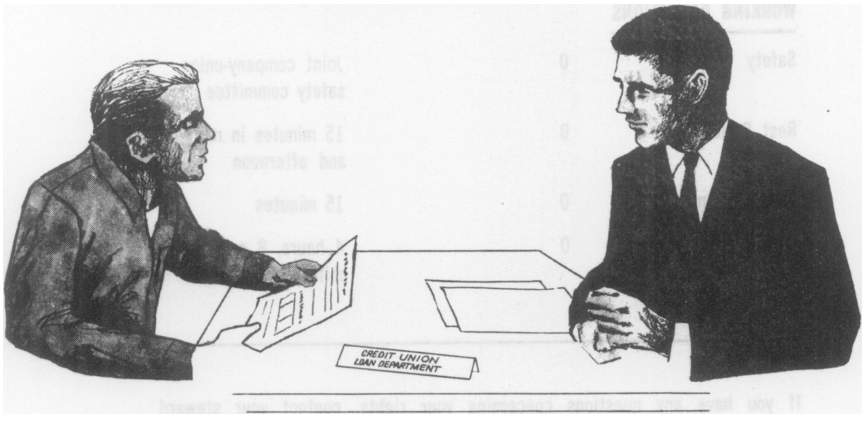
Safety	0	Joint company-union safety committee
Rest Periods	0	15 minutes in morning and afternoon
Wash-up Time	0	15 minutes
Call-in Time	0	4 hours, 8 on third shift

If you have any questions concerning your rights, contact your steward _____. Help build a better union. Attend your membership meeting at the Union Hall, _____ Street. Fourth Monday of every month at 8:00 p.m.

Experts say that the best way to transmit information is for "one man to aim his mouth at another man's ear." Sometimes a steward may be tempted to "teach the member a lesson" by refusing to report back what happened at the last local union meeting. This policy can only be self-defeating. An uninformed union member cannot be an interested union member.

These same experts say that the more the union member knows and understands about his organization the more active he becomes. If the steward makes union activity sound exciting the union will get more help from more members.

The steward, in addition to reporting to his membership, has a responsibility to communicate the views of those he represents to the officers and executive board. As a representative of his department he is expected to act as spokesman for his constituents. Obviously, a steward who does not attend the local union meeting is in no position to keep his membership informed or to express their views to the rest of the organization. Attending all local union meetings should have top priority for every steward.



Help Your Members

The steward can help his members and strengthen the union too, if he lets them know what services the union offers outside the plant. Perhaps the local has a credit union, or a blood bank, or children's activities. Members would like to know about these.

The union can help with many out-of-plant problems. A member's claim for unemployment compensation has been denied. A mother needs a day nursery that has a place for her child. These are real problems, even though the contract can't help solve them.

The AFL-CIO Community Services program trains "union counsellors" to help workers with these out-of-plant problems. They know where to send members for help. If there are union counsellors in the plant the steward should refer members to them. If no such program exists he may want to help set one up.

Support COPE

Just as collective bargaining protects the worker on the job, labor political action gives workers a voice in determining governmental policies in the community, state and nation. Unions, as organizations of workers, are concerned about the kinds of schools in a community, the kinds of taxes that are levied, as well as a whole host of laws that are of direct concern to workers when they are injured, unemployed, too old to work or forced to work in substandard industries. Workers have learned that the collective bargaining strength of the unions can be hurt by the passage of anti-labor legislation.

The AFL-CIO organization for effective political action is the Committee on Political Education, COPE. There are national, local and state COPE organizations. Through them unions work together to educate about political issues, encourage members and their families to register, endorse and support candidates whose records show they will work for the good of all the people, and get out the vote on election day.

COPE makes no attempt to tell union members how to vote, but it does hope that union members, understanding political issues, will vote in their own best interest.

Because political education is an important part of unionism, every steward needs to be informed about political issues which concern workers, and how COPE operates. Union members look to the steward, as the man they trust in the department, to keep them informed. The union leadership expects the steward to carry forward the total union program, including effective political action. And the steward is the key man in the COPE dollar drive to raise the funds which are necessary for effective political campaigns.

Union newspapers and the special material issued by national unions and the AFL-CIO keep stewards informed about political and legislative issues. Information gained from them should be passed on to the members. The steward should be a key figure in raising funds, getting members and their families registered, and seeing that they vote on election day.

Advertise the Union Label

The union label and shop card are proof that a product has been made under fair working conditions or that a service is performed by union members. They are also a guarantee of quality and good workmanship.

Support of the union label is an important way to strengthen unionism. A worker who values his own union should insist on the union label when he buys.

A steward should educate union members on the importance of the label and urge them to pass the word on to their wives who do most of the family shopping. The Union Label and Service Trades Department, at AFL-CIO headquarters, is glad to supply advice on union label promotion.

Handle Grievances

In order to successfully handle grievances a steward must be familiar with a wide variety of information. First and foremost, he must know his union contract. The contract represents the laws of the work place agreed to by labor and management. Merely reading the agreement is not enough. The steward must also know how it has been interpreted.

Most union contracts call for the use of an arbitrator to render a final and binding decision in the last step of the grievance procedure. When labor and management disagree, the arbitrator is often charged with determining what a particular clause in the contract actually means. In either case, his decisions remain in effect until overruled by a future arbitrator, or until both parties mutually decide on an alternative method. Therefore, in order to understand the contract, the steward must also know the rulings made by arbitrators. Often a new steward can better understand the contract by discussing his problems with more experienced stewards or the chief steward.

The seniority list, next to the contract, is probably the single most important document with which the steward should be acquainted. It may be needed to determine the validity of layoffs, promotions, length of vacations, eligibility for pensions, and a number of other items. Usually the contract spells out the details as to how and when seniority lists are made available to the unions.

A steward must also be familiar with the work of those he represents. He should know their jobs, how they get paid, and the production expected from them. Part of this can be obtained by watching the work flow in the department. He will probably have to spend some time talking to the people he represents, asking about their jobs and their problems, before he has a full picture.

One of the steward's toughest jobs is getting to know and understand the people around him. This comes only after long experience. Yet it is important that this skill be developed rapidly. A good steward needs to know which worker is shy and retiring and supplies answers only to questions asked or which worker tends to exaggerate the problem. Another worker may be the "moody" type and on certain days may come up with all sorts of problems that bother him. Management makes every effort to know its employees; it is important that the steward does, too.

WHAT IS A GRIEVANCE?

A grievance is a violation of a worker's rights on the job. It is important that a steward be able to distinguish between a complaint and a bona fide grievance. This can be done best by following the same procedure a good auto mechanic follows in attempting to discover why a car won't run. He approaches the problem on a systematic basis by running through a check list. Among the things he looks for are: 1) is the battery dead, 2) is the gas tank empty, 3) is the starter switch broken, 4) are the plugs fouled up, etc. A steward should have a similar check list to determine whether a grievance exists. The following points should be checked:

1) *Is it a violation of the contract?*
2) *Is it a violation of federal or state law?*
3) *Is it a violation of a past practice?*
4) *Is it an area of management's responsibility?*
5) *Is it a violation of company rules?*

Contract Violation

Because most of the rules governing the relation of a worker to his job are contained in the contract, this is the first place the steward

should look to see if the worker's complaint is a legitimate grievance. Some grievances are clear-cut violations of the contract and are easy to prove. Grievances concerning the interpretation of a contract are not as easy to determine. For example: suppose the contract reads, "an employee shall receive holiday pay consisting of eight hours straight time earnings providing he works the scheduled work day before and after the holiday." The contract is silent as to what happens if the worker is sick, or if he had an accident. In this situation, a legitimate difference of interpretation could take place as to whether an absent worker who was sick was entitled to holiday pay.

Violation of a Past Practice

A past practice can be the basis for a grievance, particularly in areas where the contract is silent or unclear. However, grievances in this area can be quite complicated and are governed by some of the following rules: 1) A practice, in order to be considered valid, must be repeated over an extended time period. 2) A practice must be accepted explicitly or implicitly by both parties. In the first case, the union and management have formally agreed to the procedure either orally or in writing. Implicit acceptance exists if neither party formally objected to the procedure over a period of time. 3) If a practice violates the contract, either side can demand that the agreement be enforced. 4) If a practice is bad or unsafe, an arbitrator may throw it out on the grounds that it should never have been established in the first place. 5) Past practice grievances arise out of problems such as subcontracting, job descriptions, and work practices like "wash-up time." Because the area of past practices is complex and since a grievance in this area may have implications for an entire plant or company, the international union representative or business agent should be consulted on such matters.

Management Responsibilities

Grievances charging a violation in areas in which management has a responsibility occur most often over problems involving working conditions and health and safety issues. For example: There is nothing in the union contract stating that the work place must be

lighted by a specific number of watts of electricity or that the room temperature must be kept at a particular level. Yet the union will argue that management's responsibility includes the maintenance of proper heat, light, ventilation, etc. Likewise the employer is expected to maintain the machinery in proper condition as well as to provide safe vehicles to drive.

Violation of Company Rules

Company rules may be established by consultation or unilateral action. Even where management has established them on its own initiative, it cannot violate them without being guilty of a grievance. For example: A grievance would exist if the rules state that a worker shall be discharged for three garnishments but is fired after receiving the second. If company rules conflict with the contract, the union will, of course, argue that the contract has priority.

WHEN A COMPLAINT BECOMES A GRIEVANCE

Not all complaints are legitimate grievances. The steward must investigate the story the worker tells him. He must check the facts —whether they are accurate. Then, he must determine if the worker's rights were violated and must look for the source of the violation. In brief, the steward must check the five points listed on page 18.

If the steward's check indicates that the worker's complaint may be justified, the worker has a legitimate grievance.

But, if after investigation the steward finds that the worker has misunderstood the contract or misrepresented the facts or that the complaint cannot be regarded as a labor-management dispute—the worker's complaint is not a legitimate grievance (it is a "bum beef").

Sometimes the steward even after investigation will not know if the worker's complaint is a legitimate grievance or not. Such a case is a borderline grievance.

Borderline Grievances

A worker is laid off for three days as a disciplinary measure. A holiday occurs on the second day of layoff. However, the contract provides that in order to receive holiday pay the worker must work the scheduled workday before and after the holiday. The worker does not fulfill the contract requirements. He is denied his holiday pay. Yet, his failure to work was not through any fault of his own. Does he get paid? His is the first case like this.

In this kind of situation, where there is no clear answer to the problem, the steward should give the benefit of the doubt to the

worker and process the complaint as a grievance. The role of the steward is to act as the attorney for the people he represents rather than as an impartial judge. If in doubt about a given case, he should check with the chief steward or grievance committee, but even they may have no clearcut answers. If doubt still remains, the grievance should be filed with the expectation that the case may become clearer as more information is made available in the higher steps of the grievance procedure.

"Bum Beef"

The contract reads that a man is entitled to two weeks vacation after two years. The worker argues that although he has been on the payroll only 21 months he should get two weeks vacation because he has worked a considerable amount of overtime during this period.

It is important that the steward carefully explain why the worker has no grievance, in order that the complaint be voluntarily withdrawn if possible. If the worker is dissatisfied with the explanation, the steward should point out where, within the union, the complaint can be appealed. In some unions the appeal is to the grievance committee, in others to the executive board, and in some cases to the local union meeting. By pointing out the appeal procedures the steward protects himself from charges of arbitrary action.

There is a basic danger involved in processing "bum beefs." Management may lose respect for the steward if it feels that he does not have the knowhow or authority to distinguish between a legitimate and non-existent grievance. The result may be that the company will stiffen its resistance on a legitimate grievance under the theory that perhaps the steward doesn't know when he has a good case. Or management may seek to settle grievances directly with their employees by by-passing the steward.

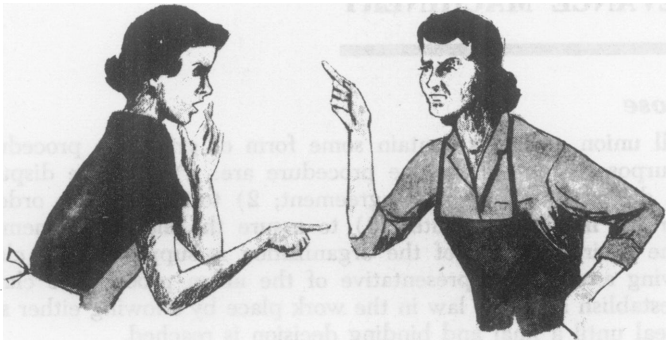
The workers, too, may lose respect for the steward if they think he will process everything brought to him. Therefore, he may be snowed under with "bum beefs." It will become doubly hard to say "no" at this stage of the game. Likewise, a steward with a long list of lost grievances to his credit will not have the confidence of the workers he represents. The net result of the steward taking up "bum beefs" can only be to reduce his effectiveness as a union representative.

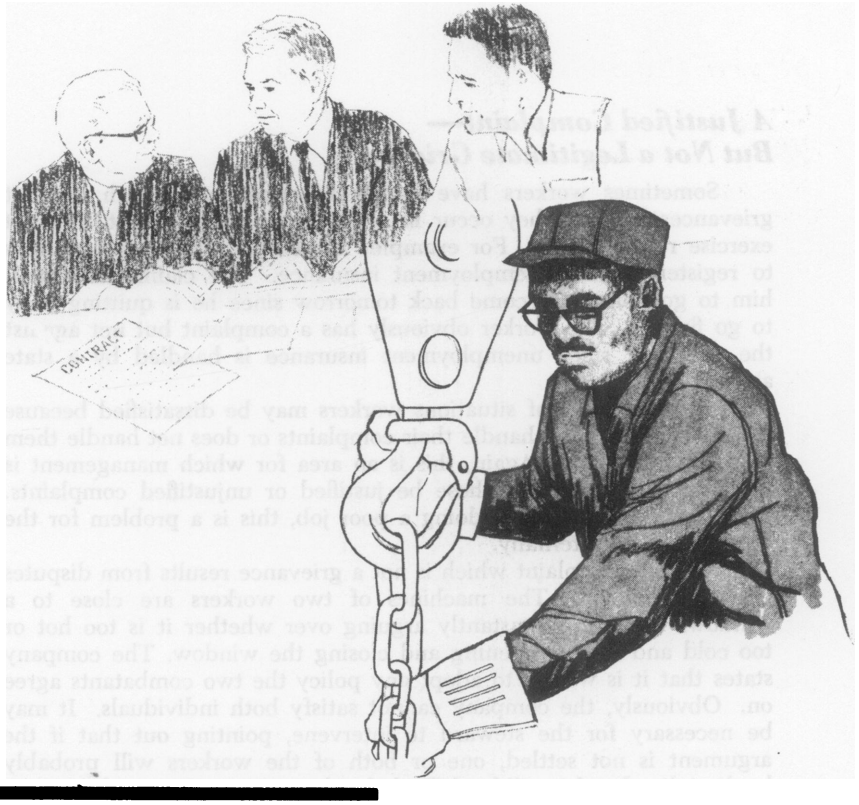
A Justified Complaint— But Not a Legitimate Grievance

Sometimes workers have legitimate complaints which are not grievances because they occur in areas where management does not exercise responsibility. For example: A member who is laid off goes to register for his unemployment insurance. The claims taker tells him to go home and come back tomorrow since he is quitting early to go fishing. The worker obviously has a complaint but not against the company since unemployment insurance is handled by a state agency.

In other kinds of situations workers may be dissatisfied because the steward does not handle their complaints or does not handle them to their satisfaction. Again, this is an area for which management is not responsible whether these be justified or unjustified complaints. If, in fact, the steward is doing a poor job, this is a problem for the union to settle internally.

Another complaint which is not a grievance results from disputes between workers. The machines of two workers are close to a window. They are constantly arguing over whether it is too hot or too cold and always opening and closing the window. The company states that it is willing to adopt any policy the two combatants agree on. Obviously, the company cannot satisfy both individuals. It may be necessary for the steward to intervene, pointing out that if the argument is not settled, one or both of the workers will probably be disciplined and it will be difficult for the union to reverse the action.





GRIEVANCE MACHINERY

Purpose

All union contracts contain some form of grievance procedure. The purposes of the grievance procedure are: 1) to settle disputes arising during the life of the agreement; 2) to establish an orderly manner for handling disputes; 3) to assure the individual member that the entire strength of the organization is supporting his claim by having an official representative of the union process the claim; 4) to establish a rule of law in the work place by allowing either side to appeal until a final and binding decision is reached.

Steps in Procedure

Underlying the grievance procedure is the belief that those closest to the dispute, both on behalf of the union and of management, should first try to reach a settlement. If they are unsuccessful, then representatives with more authority from both sides are brought into the picture. A typical procedure usually has four or five steps:

	Union Representative	Company Representative	Time limit on Management for Decision	Time Limit on Union for Appeal
Step 1:	The worker & steward	The foreman	3 days	3 days
Step 2:	The chief steward	Department or plant superintendent	5 days	5 days
Step 3:	Grievance committee	Personnel director	5 days	5 days
Step 4:	Grievance committee and International Union Rep.	Top management	10 days	10 days
Step 5:	Arbitration			

Time Limitations

There are often a number of time limitations associated with the grievance procedure with which the steward must be familiar. In some cases there is a time limitation on the life expectancy of a grievance. The contract may read: "In order to be eligible under grievance procedure a grievance must be filed within 30 days of the time when the incident *occurred.*"

Or the contract may read: "In order to be eligible for the grievance procedure a grievance must be filed within 30 *working* days of the time the employee first *became aware* of the incident."

Although different formulas are used in these two cases, a steward must observe the limitations or automatically lose the case.

Likewise, there may be time limitations on each step of the grievance procedure. Management has a stated period of time within which it must give a reply to the union; the union must also announce its intention to appeal the grievance within a specified time period.

There may be additional special limitations in filing grievances relating to discharge and back pay awards. Often the time limitations can be extended by mutual agreement. If this is not the case and management does not render its decision within the time limitation specified in the agreement, the union can automatically appeal to the higher step. Consequently, if the union fails to appeal the management decision to the higher step within the prescribed time limitation, management can assume that the case has been dropped.

Arbitration

Today, most grievance procedures call for the use of an arbitrator in the last step. This is typical of industrial unions. Some construction union contracts also provide for arbitration as do an increasing number in public employment. When no agreement can be reached by the top representatives of the union and the company, an impartial, objective third party is brought in to render a decision that is final and binding on both parties. The arbitration clause usually provides that the union and management are to mutually select an agreed upon party. If they cannot voluntarily reach agreement, arbitrators are usually obtained from one of these sources: 1) the American Arbitration Association, a private organization which in effect licenses people who have special qualifications to act as arbitrators, or 2) the Federal Mediation and Conciliation Service of the United States Government.

These organizations provide lists of potential arbitrators to the parties of a dispute, and have established machinery to assure that the person chosen is agreeable to both sides. Normally the arbitrator's fee and expenses are divided equally between the union and management.

In some industries where arbitration is used, the union and the company have agreed to except certain grievances, such as those over production standards and health and safety disputes. Unsettled disputes over these issues may be resolved through the use of the strike.

In 1960, the Supreme Court ruled that an arbitrator's decision is enforceable in the courts and will not be overturned unless fraud

was involved or the arbitrator exceeded his jurisdiction.

If company-wide or industry-wide bargaining is in effect an "umpire" may be selected by both parties. He acts as an arbitrator on all grievances arising anywhere within the company or industry and serves for the duration of the contract. This is in contrast to the more common policy utilized in single plant bargaining of selecting a new arbitrator for each grievance or group of grievances which may arise.

Although the steward may not play a direct role in the arbitration process, his initial actions may affect the outcome of a case. His ability to collect all the important information provides much of the ammunition to be used in other steps of the procedure. Furthermore, an arbitrator may sometimes rule that as part of a settlement he will not grant anything more than was asked for at the time the grievance was filed. This means a steward must be sure to ask for everything to which the worker is entitled.

PROCESSING GRIEVANCES

Steward and Worker

Most unions endorse the policy of the worker and steward processing a grievance together. There are several good reasons for this. The steward is the trained union representative and, therefore, best qualified to present the case to management. In addition, if the worker is present when the grievance is discussed with his foreman, he knows exactly what transpired and cannot argue later that, "if I had been there I wouldn't have been sold down the river." The steward and worker operating as a team also provide an additional witness for the union who may come in handy in a later step in the grievance procedure. Most important of all, this policy builds the collective strength of the union. It shows the company that the members understand the importance of protecting the contract through official procedure. It also demonstrates to the company that the steward has the support and confidence of the people he represents.

If the steward and worker find themselves with differing views in the presence of management, they should recess their meeting and reconcile their differences.

Steward Alone

In a few unions the steward may take up the grievance without the presence of the worker. This is usually done in those industries where the work force is scattered and it is difficult to easily and quickly bring together the steward and worker. This method suffers

from the fact that the worker does not directly participate in the discussion and, therefore, may not fully understand what has taken place.

In certain exceptional cases where strong feelings exist between the worker and his foreman it may be necessary for the steward to handle the grievance alone. Otherwise, the worker and foreman may engage in a "shouting match" that produces heat but little light.

There may be rare cases when a worker is so frightened of the foreman that he refuses to go with the steward to take up the grievance. Having the worker along is a way to overcome his fear, but sometimes this cannot be done, and the steward goes by himself.

Worker Alone

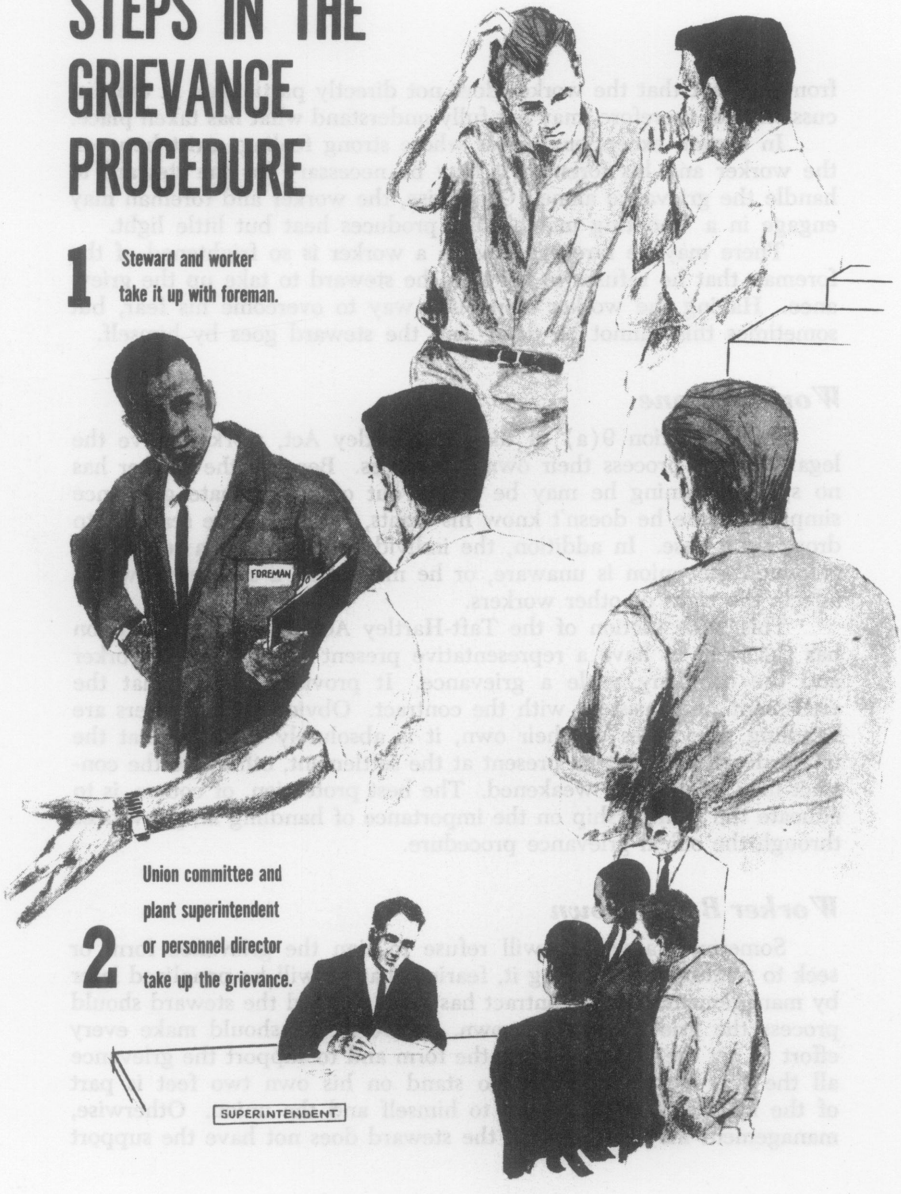
Under Section 9(a) of the Taft-Hartley Act, workers have the legal right to process their own grievances. Because the worker has no special training he may be talked out of a legitimate grievance simply because he doesn't know his rights, or he may be scared into dropping a case. In addition, the individual may make a settlement of which the union is unaware, or he may make a settlement which affects the right of other workers.

This same section of the Taft-Hartley Act states that the union has the right to have a representative present at any time a worker and the company settle a grievance. It provides further that the settlement be consistent with the contract. Obviously, if workers are handling grievances on their own, it is absolutely essential that the union demand that it be present at the settlement, otherwise the contract may be severely weakened. The best protection, of course, is to educate the membership on the importance of handling all grievances through the offical grievance procedure.

Worker Backs Down

Sometimes a worker will refuse to sign the grievance form or seek to withdraw after filing it, fearing that he will be penalized later by management. If the contract has been violated the steward should process the grievance on his own. However, he should make every effort to get the worker to sign the form and to support the grievance all the way—explaining that to stand on his own two feet is part of the member's responsibility to himself and the union. Otherwise, management may assume that the steward does not have the support

STEPS IN THE GRIEVANCE PROCEDURE

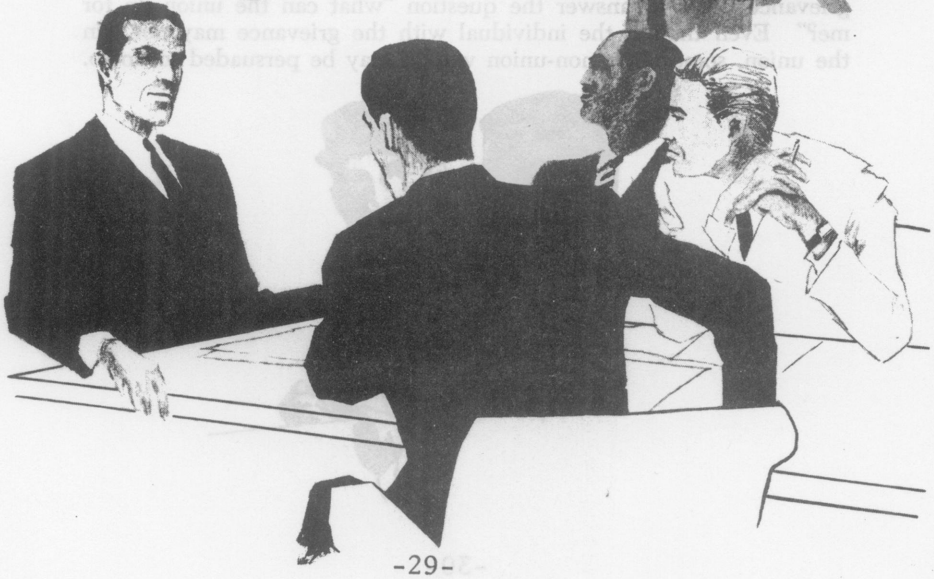


1 Steward and worker take it up with foreman.

2 Union committee and plant superintendent or personnel director take up the grievance.

3 A representative of the international union is called in to aid the union. Top company officials represent management.

4 Arbitration



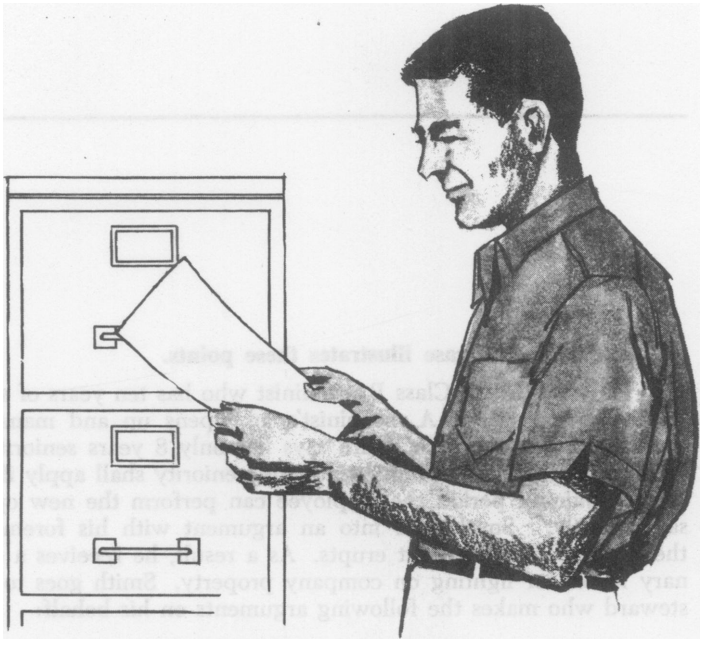
and respect of the people he represents. Consequently, the company may get tougher to deal with on matters brought to its attenion.

The exact nature of a case of this kind will determine how hard and how far a steward will push the grievance. For example: if an improper layoff occurs because seniority was violated, the facts can be determined by checking the seniority list and the worker's testimony is not essential for winning the grievance. On the other hand, a grievance concerning the suspension of a worker involved in a fight with a foreman to which there were no witnesses, would be decided primarily on the testimony of the two participants. If the worker refused to testify on his own behalf, the steward would be helpless.

Grievances of Non-Members

The National Labor Relations Board has ruled that under the Taft-Hartley Act when a union has obtained exclusive recognition, it must handle the grievance of members and non-members alike. As a matter of self-preservation all grievances should be pushed hard. A violation of a contract in regard to a non-union member may serve as a precedent to be used against a union member in the future.

Many unions use the successful prosecution of non-member's grievances as a basic organizing tool. The successful handling of a grievance helps to answer the question "what can the union do for me?" Even though the individual with the grievance may not join the union, some other non-union worker may be persuaded to do so.



HOW TO INVESTIGATE A GRIEVANCE

Whether a grievance is won or lost is often determined by how carefully the steward investigates the problem. Therefore, the steward must be prepared to do the following:

1. *Conduct an interview. Listen carefully to the worker's statement, writing down such things as dates and production records.*
2. *Ask questions for clarification or additional information.*
3. *Examine company records.*
4. *Distinguish between a fact and an opinion.*
5. *Determine which facts are relevant to the matter under discussion.*

The following case illustrates these points.

John Smith is a Class B machinist who has ten years of seniority on the job. A Class A machinist's job opens up and management gives it to Ben Blu who Smith says has only 8 years seniority. The contract reads: "In making promotions, seniority shall apply if after a 15-day training period the employee can perform the new operation satisfactorily." Smith gets into an argument with his foreman over the promotion and a fight erupts. As a result, he receives a disciplinary layoff for fighting on company property. Smith goes to see his steward who makes the following arguments on his behalf:

1. *Smith's wife has just had a fifth child. Smith is finding it difficult to support them on his present pay and has been nervous and on edge because of this.*
2. *The company violated the promotion clause because Smith, who had top seniority, did not receive the training period.*
3. *Because Smith did not receive the original trial period he should be immediately promoted without having to serve it.*
4. *All the other machinists say that the foreman was asking for it. They agree that if they had been involved, they'd have done the same thing.*
5. *The only eye witnesses say that the foreman struck the first blow.*
6. *John Smith, like everyone else in the department, thinks that the foreman is obnoxious and can't be trusted.*

Analyzing the Steward's Arguments

Argument #1 It is a fact that Smith's wife has had a fifth child but this is not relevant to the promotion issue. It may partially explain the reason for the fight between Smith and the foreman but if the company is paying the agreed upon rate for the job it is not responsible for the fact that Smith can't support himself.

Argument #2 If after checking the company's seniority list the steward finds that Blu has only 8 years on the job, this becomes Smith's best argument in favor of getting the 15 day training period.

Argument #3 Although Smith was unfairly treated originally, there is no justification for asking the company to violate the contract by waiving the training period and granting an immediate promotion to Smth.

Argument #4 The statement of the other machinists represent an opinion rather than a fact. It has little bearing either on the issue of promotion or the reinstatement.

Argument #5 The testimony of eye witnesses would have an important bearing on the reinstatement question.

Argument #6 Smith's view of the foreman is an opinion and has little bearing either on the promotion or the reinstatement matter.

RELATIONSHIP WITH MANAGEMENT

Steward and Foreman

It is important that the steward understand his relationship with management. Although the foreman exercises certain authority over him in his role as a worker in the department, when they meet to discuss grievances the steward acts as an official representative of the union and, therefore, has equal status. He has every right to be expected to be treated as an equal as well as the right to express himself fully on the problem under discussion.

Generally, every effort should be made to settle a grievance as close to the source of the dispute as possible. The representatives of both groups have to live with any settlement reached. If they can arrive at one, rather than having it imposed on them from above, both parties will be better off. In addition, the further the grievance travels up the procedure the more difficult it becomes to settle, because it becomes a matter of pride or prestige. Therefore, both sides tend to back up their subordinates even when they feel they may have been wrong originally.

It is absolutely essential that the steward talk to the foreman after getting the worker's story. He can properly evaluate the complaint only after hearing both sides. The foreman may provide certain facts that were not available to the worker or the steward.

Authority of Foreman

The degree to which grievances are successfully handled at the first step is dependent largely on the authority granted the foreman. In some companies he is only a messenger boy for the management representative in the next step of the grievance procedure. If this situation exists, few settlements will take place at this level. How much authority the foreman has is determined by what he can do about some of the following problems:

1. *Can he reinstate a discharged employee?*
2. *Can he make a rate adjustment?*
3. *Can he shift assignments among different employees?*
4. *Can he promote an employee to a higher paying job?*

It is important to observe the steps in the grievance procedure even if the foreman has limited authority. Leapfrogging to a higher step may have undesirable effects. The lower level of management will resent this and will be more difficult to deal with the next time, or the company may seek to get the grievance thrown out because the proper steps were not followed.

The contract may list some exceptions to the principle that a grievance should be initiated at the first step of the procedure. Discharge cases and disputes over production standards are often begun at a higher step because they are matters which usually require decisions by higher levels of labor and management.

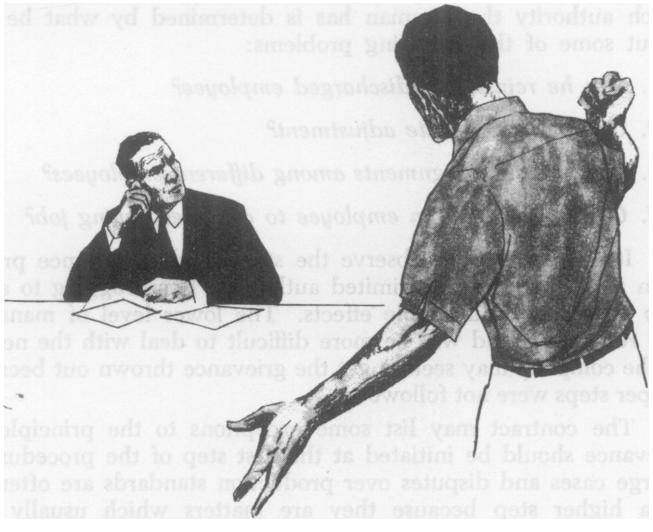
Even the best of stewards will, from time to time, have trouble in settling grievances because of various tactics adopted by the foreman.

Stalling

If the foreman stalls in giving an answer on a grievance, the steward should not hesitate to invoke the time limitations in the contract. If there are no time limitations, he may have to systematically nag the foreman until he gets an answer. If there is still no response he may have to file a grievance charging the foreman with stalling or otherwise move directly to the next step in the procedure.

Horsetrading

Sometimes the foreman may offer to split the grievances—the union wins half and loses half. This may prove to be a temptation, but it is important to remember that each worker is entitled to fair treatment. If the worker feels that his grievance has been traded to help someone else this destroys his confidence in the union. It is important to treat each grievance on its own merits.



Losing Your Temper

Sometimes management will deliberately provoke a steward hoping he will lose his temper and make rash promises or threats which he is unable to carry out. Such actions result in the steward losing the respect of both management and the people he represents. Most people do not think straight when they are angry. Anger does not help make effective arguments.

Discussing Side Issues

Often management will try to sidetrack the steward by discussing matters not related to the grievance under consideration. If it is of

concern to the organization, the steward should ask that it be discussed after the grievance is resolved. If the subject is completely irrelevant, the foreman should be reminded of the purpose of the meeting. But the foreman should not be cut off so sharply that he takes offense.

Know When to Stop Talking

It's usually better to say too little rather than too much. By listening to the other side it is often possible to get a better understanding of management's argument and, therefore, be in a better position to combat it. If management has conceded the grievance, the steward should end the discussion and not rehash it. Otherwise, the foreman may think of some additional reasons why the company's position is correct, and it may be necessary to reargue the entire case. If the worker is not present at the time of settlement, he should be notified immediately of the outcome of his case.

Failure to Reach Agreement

If the steward is unable to obtain a settlement he should tell the foreman that the grievance will be appealed, and he should inform the worker of what has happened. In addition, he should brief the union representative who is involved in the next step of the grievance procedure as to the main line of argument taken by the foreman.

The steward should be careful never to guarantee the worker a successful settlement of his problem. What appears to be an airtight case is sometimes completely destroyed upon further investigation. It may then be difficult to convince the worker why the case was lost.

The steward should be prepared to process vigorously the grievances of all the workers he represents regardless of his personal feelings about them. This should be done both as a matter of justice and as a way of insuring that dangerous precedents involving contract violations are not established.

Since the worker wants his grievance settled today, or tomorrow at the latest, it is important that he be kept informed on the progress of his case. Sometimes it may take months before a grievance is completely processed. Therefore, a worker should be informed of the various time limitations in the procedure which make more rapid settlement impossible.

WRITING GRIEVANCES

The Five W's

Under most grievance procedures a complaint formally enters the grievance procedure when it is first presented in writing. The steward, who usually has the responsibility for writing the grievance, should do so only after talking to the foreman and evaluating his side of the story. He should check carefully to make sure he has covered the Five W's—the Who, When, Where, Why and What of the grievance form. These points can be explained best by examining their location on the typical grievance form found on page 42.

WHO: Refers to that part of the form that clearly identifies the worker with the grievance. On this form is included: 1) employee's name, 2) clock number, 3) department, 4) shift, 5) classification.

WHEN: Refers to the time element. Often information regarding more than one date is needed to properly complete the form: 1) the date on which the grievance is officially written, 2) the time and date on which the grievance actually happened, 3) the date on which the grievance was filed in the first step with the foreman and 4) the date on which the foreman gave his de-

cision. It is particularly important in matters involving back pay that all dates be clearly stated.

WHERE: Refers to the exact place where the grievance took place—the department, aisle, or machine.

WHY: Refers to the reasons why the complaint is considered a grievance. This is the heart of the grievance and should be written under the section headed "Nature of Grievance." It is important to remember that it's possible to have a legitimate grievance without being able to point to a violation of a specific clause of the contract. (Reread, "What is a Grievance?" pages 18-20.)

WHAT: Refers to what should be done about the grievance—the settlement desired. Many grievance forms do not have a separate section headed, "Settlement Desired." In those cases, it is customary for the steward to list his settlement request at the end of the section "Nature of Grievance." It is extremely important that this be done since an arbitrator will often base his award solely on the original request.

The same steward who can effectively present a grievance orally sometimes experiences trouble in reducing the problem to writing. He can overcome this difficulty if he follows several simple rules:

1. *Write the grievance as concisely as possible.*
2. *Keep a written record of important details.*
3. *Say it first, then write it down.*
4. *Write legibly.*

Write the Grievance as Concisely as Possible

A grievance should be written as simply and concisely as possible. The exact nature of the grievance as well as the settlement desired should be included. The inclusion of too many details may allow the company to sidetrack the union when the issue is discussed.

TYPICAL GRIEVANCE FORM

Make original and three copies to be distributed to:
1) management 2) steward 3) chief steward 4) aggrieved worker

Employee _____ Clock No. _____

Job Title _____ Dept. _____ Shift _____

Seniority _____ Supervisor _____

Nature of Grievance _____

_____

_____

_____

_____

(Use additional sheets of paper if necessary)

Adjustment Desired _____

_____

_____

_____

_____

Date _____ _____ _____

Signature of Employee Signature of Steward

Here are the facts on a case:

Jack Pickard works on a truck cab assembly line. His operation requires that his arm come in contact with the inner metal of the cab door after it has come out of the paint dryer. One day a cab is taken out of sequence and Douglas, the foreman, tells Pickard this is a rush job and that he should immediately work on it. Pickard refuses on the grounds that the cab is still too hot and that he has received previous burns doing similar work. The foreman orders Pickard to go home 15 minutes before the end of the shift and as a further disciplinary measure, on the following day, transfers him to a job paying 3¢ an hour less.

The facts, when reduced to the grievance form, would look like this:

Nature of Grievance:

Jack Pickard was sent home early on 5/25 and lost 15 minutes pay. Jack Pickard was improperly transferred on 5/26 to a job paying 3¢ an hour less.

Settlement Desired:

Jack Pickard should receive 15 minutes pay for lost time when sent home early on 5/25. He should be reinstated to his old job with back pay retroactive from the time of transfer. All disciplinary records relating to the above problems should be removed from his personnel file.

Keep a Written Record of Important Details

The steward should keep his own written record containing additional factual information he will need when arguing the case. The company disciplined Pickard because they said he refused to accept a work assignment. Pickard says that the work assignment would have subjected him to the danger of being burned and that he had been burned on the operation before. The steward will want to have a record of the dates of any previous burns suffered by Pickard as well as the names of any witnesses who could testify as to the dangerous nature of the work assignment. It is important

that these facts be gathered immediately since most people have short memories.

Say it First and Then Write It

Writing is the equivalent of speaking with a pencil. Therefore, some stewards find it helpful, before reducing the grievance to writing to first assume they are explaining the grievance to the foreman and then to write down the same language they would have used orally.

Write Legibly

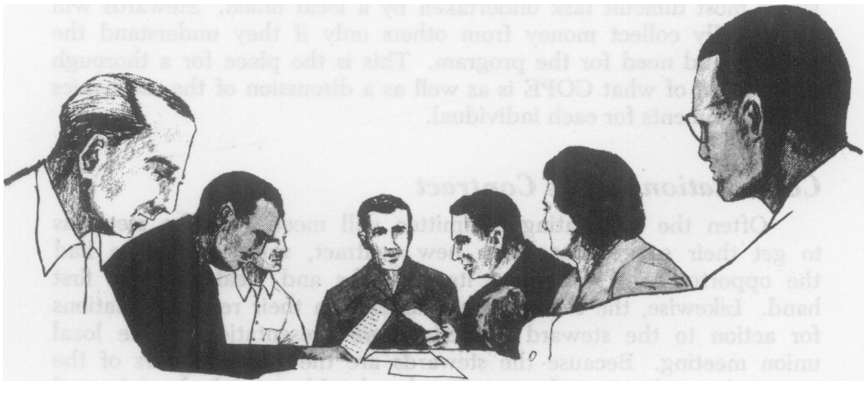
The physical process of writing grievances can be made easier. The steward should have a sharp pencil. In addition, it helps to attach the grievance pad to a clip board that can be obtained for about 50¢ from most book stores. This ensures that the forms will not get separated and that the carbon copies will be readable.

Distribution of Grievance Form

Grievance forms are usually made out with an original and three or four copies which are distributed to the following parties: 1) management, 2) steward, 3) chief steward or grievance committee, 4) worker.

The Grievance File

The lost grievance may serve a useful function. Before the contract is reopened, the steward should examine his lost grievance file to see if he feels the workers in his department are being treated unfairly because of weak contract language. If so, he should be prepared to recommend changes to the negotiating committe.



STEWARD COUNCIL MEETINGS

Purpose

A union with a number of stewards will often hold a regular steward council meeting. In a sense, this meeting may be as important as that of the local union. It is primarily at the steward council meeting that the steward will receive the information he needs to act as a transmission belt with the membership. The steward council meeting is the place where a new steward can get answers to his questions. It is also a place where interpretations of the contract should be discussed.

A steward with a tough problem may call a meeting of his own department to get the views of the workers he represents. Not only may the steward get useful suggestions but the people in the department will have a sense of participation in union policy making.

Union Policy

The steward council meeting is also a place to discuss and formulate union policy. The COPE dollar drive is probably the single most difficult task undertaken by a local union. Stewards will successfully collect money from others only if they understand the purpose and need for the program. This is the place for a thorough explanation of what COPE is as well as a discussion of the mechanics and assignments for each individual.

Consultation on the Contract

Often the negotiating committee will meet with the stewards to get their suggestions for a new contract, since they have had the opportunity of observing its strengths and weaknesses at first hand. Likewise, the executive boards explain their recommendations for action to the steward council before presentation to the local union meeting. Because the stewards are the active leaders of the organization, they are the people who should not only be informed but also consulted.

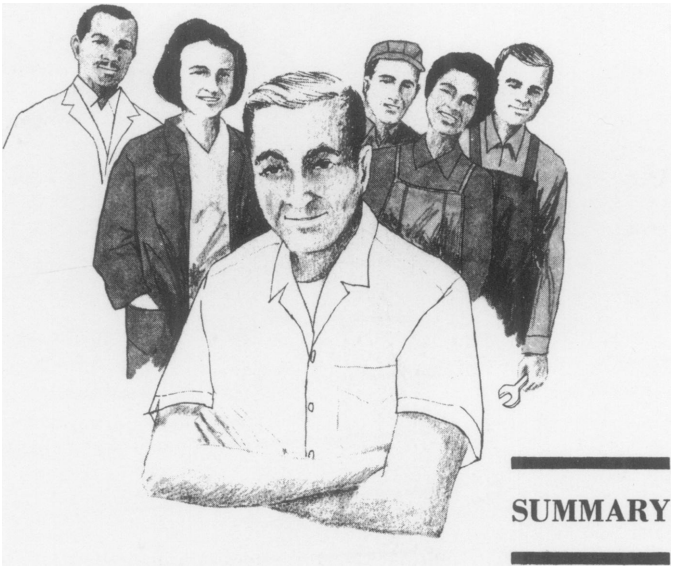
The grievance committee should make regular progress reports to the steward council so each steward knows what's happening to the grievances of the workers he represents.

Development of Skills

The steward council meeting should be a place where new skills are developed. Role playing of grievances might take place where one steward takes the part of the foreman and another the union representative. The rest of the members can offer constructive criticism of how the union can best handle the case.

Education

The steward council meeting is also a place to acquire new information. Almost every year the courts or appeal boards give new interpretations of basic labor legislation such as workmen's compensation and unemployment insurance. A representative of those agencies is usually available to appear at a meeting of stewards to explain these changes.



Paying attention to the following details will help in the winning of grievances:

1. *Don't short circuit the grievance procedure.*
2. *Stick to the facts.*
3. *Don't lose your temper.*
4. *Listen carefully to what others say.*
5. *Don't bluff or threaten.*
6. *Don't permit stalling.*
7. *Don't horsetrade.*
8. *Attempt to settle grievances at the lowest step.*
9. *Don't argue with the worker in front of management.*
10. *Keep the worker informed about the progress of his grievance.*