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ADMINISTRATION OF UNION GRIEVANCES: LEGAL OBLIGATIONS AND PRACTICE POINTERS

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ADMINISTRATION OF UNION GRIEVANCES: LEGAL OBLIGATIONS AND PRACTICE POINTERS

INTRODUCTION

In any unionized workplace, sooner or later employers are faced with having to respond to a grievance filed under the applicable collective bargaining agreement ("CBA"). Whether based on a contractual dispute or filed as a result of a disciplinary action, it is inevitable that the employer will be required to respond to union and employee complaints within the framework of the contractual grievance procedure. This presentation will review the legal obligations of New Hampshire School Districts with respect to such procedures and provide basic practice pointers to consider when responding to union grievances.

BACKGROUND ON GRIEVANCE PROCEDURES IN NEW HAMPSHIRE

In New Hampshire, pursuant to RSA 273-A:4, "every agreement must contain workable grievance procedures." There is little guidance in case law as to what constitutes "workable" grievance procedures. In a 1991 case, the Public Employee Labor Relations Board ("PELRB") held that "lacking a final resolution under the grievance procedure, we find that the procedure is not workable as required under RSA 273-A as the school board who is involved in the process is also the body who has the ultimate power to veto any arbitrator's decision. A workable grievance procedure must include a mechanism for resolution of disputes." Association of Campton Educators/NEA-NH v. Campton School District, et al., PELRB Decision No. 1991-66 (November 27, 1991). However, it has since been determined that a contractual grievance procedure need not leave the final decision to a neutral third party in order to be "workable" under the law. In fact, as recently as 2012, the New Hampshire Supreme Court held that the final decision on a grievance may be made by the public

employer's governing body under the grievance procedure and still be considered "workable" under the statute. See In re Silverstein, 163 N.H. 192 (2012).

The grievance procedure is considered to be "negotiated language" between the public employer and the exclusive representative of the bargaining unit (union) and is therefore binding upon both parties, just as any other provision of the contract. As previously noted by the PELRB, "grievance procedures are the result of the give and take of negotiations. They are not all the same; they vary according to what the parties have decided their procedures will be. . . .The grievance procedure belongs to the parties. It is reflective of their 'deal.' Its presumed purpose is to facilitate the fair, quick and inexpensive resolution of disputes arising under the CBA." Lebanon Support Staff Association, NEA-NH v. Lebanon School District, PELRB Decision No. 1995-49 (June 22, 1995).

Note that in accordance with RSA 273-A:5, it is an unfair labor practice for either a public employer or the exclusive representative to breach a collective bargaining agreement. It follows that it is illegal for either the public employer or union to violate the provisions of a contractual grievance procedure. If a public employer fails to respond to a grievance, refuses to participate in or otherwise repudiates the grievance procedure, union representatives routinely allege that the public employer's actions (or inaction) has rendered the grievance procedure "unworkable" and committed an unfair labor practice in violation of RSA 273-A:5, I(h). In a general sense then, it behooves the public employer to follow the provisions of the negotiated grievance procedure in good faith, regardless of the degree to which the grievance may appear to lack merit.

The Public Employee Labor Relations Act was enacted "to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." Laws 1975:490:1. The New Hampshire Supreme Court has held that RSA Chapter 273-A reflects "a legislative purpose of achieving labor

peace by requiring collective bargaining between a public employer and an exclusive representative of all employees within the bargaining unit" and that "labor peace is enhanced by providing employees with a single voice when bargaining with their employer and by eliminating the burden on the employer of facing conflicting demands from various employees within a single working unit." Dillman v. Town of Hooksett, 153 N.H. 344, 347 (2006). Accordingly, the union's assignment of its right to seek review of an arbitrator's award to an individual employee in the bargaining unit was deemed to be invalid. Id.

Although RSA 273-A:11 allows individual employees to present oral grievances to the employer, without the intervention of the union, and the exclusive representative may be excluded from a hearing on the grievance until it is reduced to writing, any resolution of the grievance must be consistent with the terms of the existing collective bargaining agreement. Ultimately, the public employer's agreement is with the exclusive representative and the standing of individual employees is limited to what the exclusive representative has negotiated on their behalf. Being prepared to respond to grievances, whether filed by the union or an employee in the bargaining unit, is therefore part of maintaining good labor-management relations.

GRIEVANCE PROCEDURE POINTERS

1. Familiarize yourself with the terms of the agreement and grievance procedure. Prevention is always the best medicine. If you know your contract, you are less apt to violate it and in the event of a grievance, you are more prepared to respond.

2. Be aware of the union's duty of fair representation. School district officials often complain about having to respond to frivolous grievances. While oftentimes grievances do lack merit, this perception fails to recognize the duty of the union to represent all members of the bargaining unit and its legal exposure if it fails to fulfill this duty, known as the "duty of fair representation." It is well-settled that it is the obligation of the union, as the certified representative, to provide representation "without hostile discrimination, fairly, impartially, and in good faith." The Committee For Fairness In Negotiations v. Somersworth Association of Educators, NEA-NH, et al., PELRB Decision No. 86-54 (citations omitted). The PELRB has stated that an aggrieved employee's proper recourse against a union for wrongfully refusing to proceed with a bona fide grievance, is to pursue a duty of fair representation unfair labor practice. Town of Seabrook v. Seabrook Permanent Firefighters Association, Local 2847, IAFF, PELRB Decision No. 1999-116 (October 27, 1999). The New Hampshire Supreme Court has itself declared that "an exclusive representative certified under RSA 273-A:8 . . . has a duty to represent all employees within the bargaining unit fairly without regard to whether any employee is a union member." Nashua Teachers Union, et al. v. Nashua School District, et al., 142 N.H. 683, 688 (1998). If a union refuses to pursue a grievance on behalf of a bargaining unit member, dues paying or not, it can result in a claim being brought against the union by the aggrieved employee that it has failed in its duty to represent the employee in good faith under the law. Many unions have very low thresholds in terms of determining the relative merits of a

bargaining unit member's grievance out of concern for this exposure. They frankly would rather prosecute a grievance than have to defend a DFR claim, and this can be the driving force for why a particular grievance is being pursued.

3. Train lower level administrators in the grievance process and how to best respond to grievances. The decisions of a deciding official have a binding effect. In the case of Appeal of Town of Pelham, an employee was ordered to be reinstated who had been previously terminated by the Board of Selectmen, but whose union grievance contesting the discharge was later sustained by the Police Chief. Appeal of Town of Pelham, 124 N.H. 131 (1983).

4. When a grievance is received, first determine whether it has been filed in accordance with the terms of the grievance procedure. Is the grievance filed in a timely fashion, with the appropriate individual, and does it comport with the information requirements set forth in the grievance procedure? In regards to timeliness, if a grievance is going to be denied on procedural grounds, it most often occurs for this reason. If the grievance procedure does not establish a firm deadline for when a grievance must be filed, it should be addressed in the next round of contract negotiations. It is preferable for the wording to include the phrase "when the grievant knew, or should have known," in order to avoid grievances being considered "timely" despite being filed six months after the triggering event because the union official or employee didn't learn about it until then.

5. Neither party has the authority to unilaterally amend provisions of the grievance procedure. Oftentimes unions will file a grievance at a higher step in the procedure than is otherwise provided, thereby bypassing lower steps, and administrators. Unless the contract expressly allows this to occur, the grievance may be deemed defective and denied on this basis. Alternatively, an agreement can be reached allowing the bypass on a non-precedent setting basis.

6. Check for whether the grievance procedure contains a definition of what constitutes a "grievance." A common definition is "a claim by an employee or a group of employees covered by the agreement that there has been a violation or misapplication of one or more provisions of this agreement." If a grievance is filed that cites no specific violation of the agreement but relates to unrelated matters outside the agreement, it should be denied on that basis. Further, check to see whether the issue being raised in the grievance has been expressly deemed not grievable under the procedure. It is an unfair labor practice for the union to file a grievance over an issue that it has previously waived any right to dispute. As discussed above, the union's failure to follow the established grievance procedures constitutes an unfair labor practice, specifically a violation of RSA 273-A:5, II(f), and is actionable in a complaint to the PELRB.

7. Always consider whether the grievance can be resolved at the lowest possible level. This may be accomplished through a mere phone call, or at other times through execution of a formal document. While it may be that a lower level administrator does not have authority to resolve the issue, the procedure can still be followed until it reaches a level at which the deciding official (or governing body) has such authority. If a contractual issue is able to be resolved, oftentimes it should be memorialized in a side letter or memorandum of understanding so that the parties' current agreement is clearly understood pending negotiation of a successor agreement. (See Samples at Attachments 1 and 2). During the next round of negotiations, the issue addressed in the side letter or memorandum of understanding normally should be incorporated into the CBA. In the event a unique issue arises that has contractual implications, yet is unlikely to occur in the future, consider whether a simple agreement indicating that a particular resolution would establish no precedent or practice between the parties would be appropriate under the circumstances.

8. Look to the express provisions of the grievance procedure in determining what level of process is required in considering and answering the grievance. If the procedure calls for a meeting, hold a meeting. If the language allows a meeting or hearing to take place at the discretion of the deciding official, then that individual can determine whether to meet on a case-by-case basis. Consider the facts and make a good faith determination on whether the contract has been violated. How should you respond? If the grievance should be granted or sustained, address the underlying issue and perhaps a formal answer is unnecessary. Conversely, in the event the grievance is without merit, a simple denial will usually suffice. (See Samples at Attachment 3). Include reasoning if that is what is required under the terms of the procedure. (See Sample at Attachment 4). Answer within the time frame established under the provisions of the grievance procedure.

9. Except for the arbitration stage, grievance hearings are generally informal and there is no technical "due process" right. They are a creature of contract. As a result, the formal requirements of "due process," such as the right to confront and cross-examine witnesses and the prohibition of *ex parte* communications do not apply. When a superintendent represents the administration in the grievance hearing before the school board, he or she is technically not prohibited from being present during the school board's deliberation on the grievance even though the union is not present as well. An exception to this would be in the event of a disciplinary proceeding in which an employee's statutory and constitutional rights are implicated and formal due process procedures must be followed.

10. Be aware of the special considerations relating to teacher nonrenewals. Oftentimes, in the event of a teacher nonrenewal, the association will file a grievance alleging a violation of the CBA in conjunction with requesting a school board hearing under the provisions of RSA 189:14-b. The school board hearing will then be conducted as both a grievance hearing and a statutory hearing, and the formal requirements of Ed 204.02 are followed. However, in the event the school board accepts

the recommendation of the superintendent and the teacher is nonrenewed, the teacher must decide whether to appeal the action to the State Board of Education or to an arbitrator under the provisions of the contractual grievance procedure. In accordance with RSA 273-A:4, the teacher cannot do both.

11. Don't feel compelled to inquire as to the status of a grievance if it is not appealed after it has been denied. The issue may in fact be abandoned by the union or the union may have "dropped the ball," in forgetting to appeal to the next step. Always consider the matter closed until you hear otherwise.

12. Be cognizant of the fact that as a grievance proceeds through the various levels of the grievance procedure, a record is being created that may end up as exhibits in arbitration. Therefore, strive for factual accuracy and professionalism in all written communications.

ATTACHMENT 1

SAMPLE SIDE LETTER

Date

UniServ Director
NEA-New Hampshire

Re: CBA Side Letter - Article 5, Section C

Dear _____:

This letter serves to confirm the parties' agreement regarding the application of Article 5 (Compensation), Section C.1(b). Specifically, rather than having the option of being paid in twenty-one (21) equal installments, as is currently provided, employees will henceforth have the option of being paid in twenty-two (22) equal installments. This also serves to confirm the parties' agreement that this letter shall be attached to the parties' CBA for future reference with respect to the application and enforcement of Article 5, Section C, 1(b).

Kindly indicate the Association's assent to the foregoing by signing in the space indicated below and return your original signature on a copy of this letter to me.

Thank you for your cooperation in this matter.

Sincerely,

Peter C. Phillips
E-mail: phillips@soulefirm.com

PCP:sds
cc: _____, Superintendent

I acknowledge that the foregoing accurately reflects the parties' agreement.

Dated:_____ _____
UniServe Director

ATTACHMENT 2

SAMPLE - MEMORANDUM OF UNDERSTANDING

ANYTOWN SCHOOL SUPPORT STAFF ASSOCIATION

and the

ANYTOWN SCHOOL BOARD

Memorandum of Understanding

Vacation Time for Part-Time Employees

This memorandum of understanding ("MOU") is entered into between the Anytown School Board ("the Board") and the Anytown School Support Staff Association ("the Union").

Whereas, the Union is the certified and exclusive representative for "all regular full-time and regular part-time secretaries and custodians" employed by the Anytown School District ("the District") for purposes collective negotiations over the terms and conditions of employment; and

Whereas, following the parties' negotiation of their current (2015-2018) collective bargaining agreement ("CBA") and as of the 2016-2017 school year, the District established a custodian position that has a regular schedule of 25 hours per week for 52 weeks per year; and

Whereas, in the past regularly scheduled part-time/full year bargaining unit positions were afforded vacation time on a pro-rated basis but the current CBA is silent as to what, if any, vacation benefit is offered to part-time employees, and

Whereas, the part-time custodian requested vacation time and was denied use of such time, thereby resulting in a written grievance,

Now therefore,in full settlement of such grievance, the parties hereby agree to amend Article VI, A. 1 of the CBA, effective as of the 2016-2017 school year, by adding the following sentence (and footnote) thereto:

"bargaining unit employees who have a regular work schedule of at least 25 hours per week for 52 weeks per year shall earn vacation time on a pro-rated basis.[1]"

The parties may modify this MOU in writing by mutual agreement.

Anytown School Support Staff Association ***Anytown School Board***

_____ _____

[1] Example: A regularly scheduled part-time employee who works 25 hours per week for 52 weeks works 1300 hours per year. Pro-rated from a full time employee who works 1950 hours per year (37.5 hours per week x 52 weeks) and is in the 1-5 year category would earn 66% of 15 days for 9.99 days per year rounded to 10 days. The same pro-ration approach would be applied to the 6-10 and 11-20+ year categories.

ATTACHMENT 3

SAMPLE GRIEVANCE ANSWER

Dear _____:

I am writing to inform you of my decision regarding your formal grievance dated [insert date], which I received on [insert date]. You have alleged violations of the Master Agreement under Articles _____ and _____. We met on [insert weekday, date and time] to review your formal grievance. _____ and _____ were also present.

I find that there has been no violation, misinterpretation or inequitable application of the Master Agreement. Therefore, I am denying your grievance.

Sincerely,

ATTACHMENT 3

SAMPLE SCHOOL BOARD DECISION
(DISCIPLINARY GRIEVANCE)

DRAFT OF BOARD DECISION TO [redacted] (TO BE PLACED ON LETTERHEAD)

Dear Mr. [redacted]:

I am writing on behalf of [redacted] Board to inform you of the Board's decision on your grievance. You received a written warning from [redacted], dated December 16, 2016, for failure to properly maintain equipment and work space. You subsequently grieved the written warning through the grievance procedure in the Board's collective bargaining agreement with the American Federation of State, County and Municipal Employees. The grievance was denied by the administration, and you appealed the grievance to the Board. The Board held a hearing on April 2, 2016, with you, your union representative, the administration and its attorney. At that hearing, the parties agreed that the issue to be decided by the Board is whether there was just cause for the written warning.

After considering all of the evidence submitted at the hearing, the Board concluded that there was just cause for the written warning. The Board found that you failed to properly maintain equipment and the work space, and found that the written warning was an appropriate level of discipline. Accordingly, the Board decided to deny your grievance.

Sincerely,

[redacted], Chairperson
[redacted] Board

Cc: [redacted].

ATTACHMENT 4

SAMPLE GRIEVANCE ANSWER

February 2, 2017

_____President
Anytown Teachers' Association
24 Chipmunk Lane
Anytown, NH

Re: Step 2 Answer
Teacher Step Placement Grievance

Dear_____:

This letter serves as my Step 2 answer to the Association's grievance dated January 21, 2017 seeking retroactive step increases for six teachers.

First of all, please be advised that the grievance is untimely, as it violates the time limit for filing under Article XV – Grievance Procedure. Specifically, Section 15.3.5, provides that "in order to encourage and allow resolution of grievances on an informal basis, the grievant(s) will be allowed ten (10) days following the condition or act which is the basis of the complaint, to present the grievance at Step 1." (Emphasis added). As you know, teacher step placements for the current collective bargaining agreement (2016-2019) were negotiated by the parties in 2015 and specifically memorialized in Appendix A as follows:

> "…a person on Steps 3 – 14 in 2015–2016 will move to Step X – 2 in 2016-2017, where X is the employee's 2015-2016 step. A person on Step 15 in 2015-2016 will move to Step 12 in 2016-2017. A person on Step X in the 16-17 school year will move to Step X + 1, and X + 2 in the respective years of this Agreement on the appropriate salary schedule." (Emphasis added).

Therefore, since current teacher step placements were negotiated and determined as of the effective date of the current agreement, specifically the first contract day of the 2016-2017 school year, the Association has long since waived any right to grieve such placements now.

I further note that I denied similar requests for step adjustments on July 20, 2016 and December 29, 2016, both of which you were notified. Thereafter, in both instances, no grievance was ever filed by the Association within the contractual ten (10) day period.

While reserving all rights to assert that the grievance is untimely, please be advised that it is also without merit. Teacher step placements for the term of this Agreement (2016-2019) were agreed upon by the parties and memorialized in Appendix A, as referenced above. Indeed, based upon two negotiated "step compressions" (most recently in 2016), the parties have agreed that there is no correlation between a teacher's step placement and his/her years of service. If the Association believes that the step placement for certain teachers should be adjusted, I suggest that it propose such changes during the next round of contract negotiations.

The Association's reference to Section 10.5 in the grievance is inapplicable to the instant matter because this provision concerns the salaries of teachers who are entering the District.

Based upon the foregoing, the grievance is denied.

Sincerely,

_____,
Superintendent of Schools