

Update

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Grievance Procedures in Higher Education Contracts

Introduction

This summary analysis is based on approximately 300 grievance procedure provisions found in current contracts on file in the NEA Higher Education Contract Analysis System (HECAS). It examines various components of grievance procedures and identifies the extent and varying language of these key elements: scope of grievance procedure, informal resolution of grievances, initial time limitations for formal filing, and arbitration or final step, including authority of the arbitrator.

Scope of Grievance Procedure

The definition of a grievance usually sets forth the scope of the grievance procedure and outlines the type of complaints that may be processed. For the purpose of this analysis, grievance definitions in agreements are classified as unrestrictive or restrictive.

The unrestrictive type of definition is the most comprehensive. It expresses or implies

Table 1

SCOPE OF GRIEVANCE PROCEDURES

| Item | Number of Provisions | Percent |
|---|----------------------|------------|
| Contract only | 196 | 70 |
| Contract/administrative rules | 21 | 7 |
| Contract/practice | 15 | 6 |
| Contract/administrative rules/practice | 18 | 6 |
| Contract/administrative rules/personnel policy | 20 | 7 |
| Contract/administrative rules/practice/personnel policy | 11 | 4 |
| Total provisions analyzed | 281 | 100 |

that any complaint—violations of contract, administrative rules, past practice, or disputes relating to personnel policies—can be processed as a grievance. The unrestrictive definition is unusual. Table 1 shows that 70 percent of the higher education contracts reviewed define grievance from the basis of a contract violation only. An example of the unrestrictive type of grievance definition follows:

A grievance is an allegation or complaint that there has been a violation, misinterpretation or misapplication of the terms and conditions of this Agreement or

any complaint alleging improper, arbitrary, capricious or discriminatory enforcement or application of Employer policy, rules, regulations, practices and/or procedures affecting bargaining unit members (Northwest Technical College, Iowa).

The restrictive definition found in most of the analyzed agreements limits disputes to specific misinterpretation, violation, or misapplication of a specific contract provision or to one or more, but not all, of the items listed under the unrestrictive definition. For example, although the grievance procedure for an institution

might be considered unrestricted in nature, that is, it may include violations of policy, rules, regulations, practices and/or procedures, it limits this seemingly expansive definition by disallowing violations elsewhere in the contract. For example, one contract excludes from the grievance procedure the “*addition of new positions, retrenchment or decisions relating to promotions,*” thus making it more restrictive (Broome Community College, New York).

Informal Resolution of Grievances

The majority of grievance procedures reviewed incorporate an informal stage which operates before a particular grievance procedure is reduced to writing and presented at a Level I step. This stage usually consists of a meeting with the aggrieved employee and the immediate supervisor to air the grievant’s complaint and to attempt to reach a settlement.

Some agreements recognize the initial presentation of the grievance at an “informal” meeting as part of the formal grievance procedure. Others, however, consider the first step as outside the formal procedure. A criterion for determining whether or not the first step is considered part of the formal procedure—regardless of the terminology for the “informal” stage—is the mention of time limitations. For example, the faculty/academic professional contract for Napa Valley Community College, California, states under its

Level 1 – Informal Resolution clause that any unit member can file a grievance orally with an immediate supervisor but must do so “*within ten (10) days after the grievant knew, or reasonably should have known, of the circumstances which form the basis for the grievance.*” In contrast, the grievance procedure for Danville (IL) Area Community College’s Step 1 (Informal Step) emphasizes the desirability of informal communications in resolving grievances and allows Association representation at this stage with no mention of time limits.

Nearly 70 percent (54) of the seventy-eight agreements having a grievance procedure with an informal resolution clause show no specific time limits during this stage. However, it should be noted that, despite the absence of a stated time limit during the informal stage, if an overall time limit for filing a formal grievance is specified elsewhere in the agreement that limit governs.

Initial Time Limitations for Formal Filing

The initial time limit for the formal stage of filing a grievance presents a varied picture. A few contracts require that a grievance be filed within a reasonable time but do not indicate how long “reasonable” might be. This leaves the decision regarding a dispute up to an arbitrator’s discretion. Some union advocates prefer a “reasonable time limit” to a specified number of days because it permits greater flexibility. Nearly 20 percent of the

contracts reviewed allow over 25 days for the initial filing, while 16 percent of the contracts require action within 5 days of the alleged action or failure to act that gave rise to the grievance. Only six of the grievance procedures studied have no time limit indication. One contract had different initial time limits for new employees and employees who had been on board for several weeks (Mid-State Technical College, Michigan).

Among the grievance procedures reviewed, 15 to 20 days was the most common time limitation range for a grievant to appeal management’s final decision.

Arbitration/Final Step

Binding arbitration is designated as the terminal point in the majority of agreements reviewed; that is, very few grievance procedure provisions culminate in a management decision or non-binding arbitration. In addition, the definition of what is grievable and arbitrable is the same in nearly all of the contracts. The scope of arbitration is more likely to be the same as the grievance definition if the latter is characterized by the unrestricted type of definition outlined earlier.

The majority of contracts whose grievance procedures end with a final and binding decision also define the scope of the arbitrator and the limits of the decision. The language used usually limits the arbitrator to an interpretation of the

particular language in dispute without adding to or altering contract language. The language also usually specifies the arbitrator's remedial powers and/or excludes management policies or management decisions that do not affect terms and conditions of employment or the negotiated agreement as a whole. Other language that represents arbitral limitations constrains the arbitrator from substituting his/her judgment for that of the college regarding the reasonableness of any practice, policy, or rule established by the college.

The analysis found several examples of contract language regarding limiting an arbitrator's scope and authority. One category of restriction involves the area of "academic judgement." Restricting decisions on "academic judgement" means that an arbitrator cannot overrule an administrative decision concerning appointment, reappointment, promotion, or tenure. In some cases where there has been procedural error the arbitrator can remand the decision back to the campus to be redone, but the arbitrator cannot award tenure or a promotion. Specific examples of language surrounding such limitations state that the "arbitrator shall not have the authority to grant a continuing or permanent appointment" (SUNY, New York) and that "the arbitrator shall not render an opinion as to whether a bargaining unit member should or should not be appointed, reappointed, terminated, laid off, or be granted tenure or promotion..." (Western Michigan University).

Other examples include: ***An arbitrator's decision awarding employment beyond the sixth year shall not entitle the employee to tenure. In such cases the employee shall serve during the seventh year without further right to notice that the employee will not be offered employment thereafter. If notice that further employment will not be offered is not given on time, the arbitrator may direct the university to renew the appointment only upon a finding that the notice was given so late that the employee was deprived of a reasonable opportunity to seek other employment, or the employee actually rejected an offer of comparable employment which the employee otherwise would have accepted*** (Florida State University System).

The contract for the California State University states: ***In cases involving appointment, reappointment, promotion, or tenure, the arbitrator shall recognize the importance of the decision not only to the individual in terms of his/her livelihood, but also the importance of the decision to the institution involved.***

The arbitrator shall not find that an error in procedure will overturn an appointment, reappointment, promotion, or tenure decision on the basis that proper procedure has not been followed unless:

- 1. there is clear and convincing evidence of a procedural error; and***
- 2. that such error was prejudicial to the decision with respect to the grievant. The normal rem-***

edy for such a procedural error will be to remand the case to the decision level where the error occurred for reevaluation, with the arbitrator having authority in his/her judgment to retain jurisdiction.

An arbitrator shall not grant appointment, reappointment, promotion or tenure except in extreme cases where it is found that:

- 1. the final campus decision was not based on reasoned judgment;***
- 2. but for that, it can be stated with certainty that appointment, reappointment, promotion, or tenure would have been granted; and***
- 3. no other alternative except that remedy has been demonstrated by the evidence as a practicable remedy available to resolve the issue.***

The arbitrator shall make specific findings in his/her decision as to the foregoing (California State University).

Two contracts have an option of referring the dispute over a tenure or promotion grievance to a faculty review committee. In the contract for the California State University, the peer review panel reviews the case and makes a recommendation to the president which is not binding. The contract for Michigan states:

If a grievance concerning the denial of tenure remains unresolved at Step Two and there has been no election for binding arbitration, the grievance may be referred by the ASSOCIATION to the Faculty Review

Committee. The Faculty Review Committee shall have full power to settle the grievance, including the authority to award tenure. Its decision shall be final and binding on all parties (Central Michigan University).

Another example of restricted language pertains to limits on an arbitrator's authority to grant monetary awards.

The power of the arbitrator shall be limited, prospective in nature, and shall not extend to the revision of salary schedules, rates of pay, workloads, or work assignments. In cases involving discharge and/or suspension without pay, the arbitrator's power in such cases shall be limited to reinstatement and/or the amount of back pay due, if any. If the arbitrator's award includes back pay, special earnings from other sources shall be deducted from the award. (Edison Community College, Florida).

Other monetary awards may be granted in accordance with the

principle of arbitration to make the injured party whole. If a monetary award, other than salary for services rendered, is made in excess of \$2,500, the Board of Trustees shall review the arbitrator's decision and render a final decision as to the amount of the award to be granted (Los Angeles Community College System, California).

Limitations on the arbitrator with respect to monetary awards were uncommon among the grievance procedures reviewed. Most of the language in these provisions focused on restrictions concerning retroactivity of the award or on limitations on the number of days covering an award.

Summary/Conclusions

The most significant trend in this review suggests that higher education members are steadily moving through negotiations from unilateral grievance resolution, to advisory arbitration, and then to final and binding arbitration—where the majority of grievance procedures terminate. In addition, the review indicates a general climate of restriction on the role of the arbitrator.

Overall, it should be noted that while the grievance procedures reflect a range of variation among the critical elements reviewed, any analysis must be considered in conjunction with forces outside of the labor agreement—state laws and government regulations—that affect job security for our higher education members.



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