Excerpts from Employee Discipline Text by Van Keating, Esq.

Introduction

This book assumes that the reader’s workplace is unionized. Grievance and arbitration provisions are standard parts of the collective bargaining agreements. Before every disciplinary action, management should review carefully not only the rule violation or other infraction provision, but also the grievance and arbitration procedures. It is a good practice to keep the contract immediately available for reference.

The organization of the material is chronological, from the concept of management rights to arbitration, but each section can stand on its own. One need not read the entire manual, but rather can focus on the most relevant portions.

The rights of management

Statutory framework

Public sector collective bargaining is codified in Ohio Revised Code Sections (RC) 4117 et seq. RC 4117.08 addresses subjects appropriate for collective bargaining. RC 4117.08(C) reads: “The employer is not required to bargain on subjects reserved to the management and discretion of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.”

RC 4117.08(C)(5) reads: It is a management right of the employer to “… suspend, discipline, demote or discharge for just cause, or lay off, transfer, assign, schedule, promote or retain employees.”

Management rights

Management rights are often referred to as “reserved rights.” Management, possessing the right to manage, reserves its right to do so unless it limits its right by some specific provision of the collective bargaining agreement. Unions may argue that the rights of management are not so broad.

The underlying principle of collective bargaining agreements is granting employees certain rights they would not otherwise have under common law. Management’s inherent right to operate its business is automatically reserved and maintained. Decisions with respect to day-to-day operations (i.e., direction of workforce, layoff, recall, etc.) may not be denied or restricted unless in clear violation of the terms of the labor contract. If an agreement is silent on a particular subject, management retains its common law rights on that subject since it has not specifically bargained such rights away.

Union’s view

The union’s view may be that the reserved rights doctrine does not apply. Instead, the union contends that management must have express contract authority to take a particular action. The union may argue that no rights are reserved under the collective bargaining agreement, but rather the agreement must specifically state management’s right to act on a particular subject. In the absence of an express provision, unions contend the management right does not exist.

Arbitrator’s view

Arbitrators almost always follow the doctrine of reserved rights. In addition, arbitrators require the union to show that a particular act was contrary to contractual limitations placed upon management. A specific contractual provision is usually necessary in order to limit management’s rights, but limitations upon management rights are not restricted to those contained in some specific provision of the agreement. There are “implied obligations” or “implied limitations” under some general provision of the agreement.

Legislative limitations

Federal and state legislation restricts management rights as well. Examples include, minimum wages, maximum hours, child labor, health and safety, workers’ compensation, and fair labor practices. Each such law, enacted in the public interest, restricts management rights.
The “duty to bargain” is imposed upon private employers by the National Labor Relations Act and the Labor-Management Relations Act. Management must bargain with duly authorized employee representatives on subjects concerning wages, hours, and other terms and conditions of employment. The Ohio Revised Code was amended to codify public sector collective bargaining in the state.

These terms and conditions include, but are not limited to:

- holiday and vacation pay,
- discipline and discharge,
- workloads and work standards,
- pensions,
- insurance benefits,
- work schedules.

Restrictions imposed through collective bargaining

Wages, hours and other terms and conditions of employment are mandatory subjects of bargaining. A tendency in negotiations is to expand the subjects of bargaining and, thereby, erode management rights. Contract negotiations, grievance procedures and strikes are mechanisms for organized workers to constrict inherent managerial rights. The collective bargaining process whittles away at management rights.

Restrictions made by collective bargaining agreements upon management rights go beyond wages, hours, and other terms and conditions of employment. Restrictions imposed through collective bargaining may include the entire scope of managerial functions. Some important and far-reaching rights often are negotiated away inadvertently.

For instance, a contractual provision requiring “mutual consent” of both management and labor before action on a certain issue decreases management’s authority. The formation of a “labor-management committee” also dilutes management’s authority. A labor-management committee clause requires that certain issues be considered by a committee consisting of representatives from both labor and management before any action.

“Seniority” provisions require that the most senior “qualified” bargaining unit employees have first opportunity for certain positions, regardless of whether they are actually the most qualified employees.

Rights lost through arbitration

Arbitration decisions also will affect management rights. A broad arbitration clause may allow arbitrators to decide questions raised by the union concerning any matter, both within and outside of the purview of the collective bargaining agreement. Management rights can be lost through ambiguous contract language subject to interpretation by an arbitrator in a manner not intended by management.

An arbitration clause expressly limiting the rights of an arbitrator to interpret the agreement during arbitration should be negotiated to prevent the unintended erosion of management rights through arbitration. The following language should be included in the collective bargaining agreement:

“The sole and only function of the arbitrator shall be to decide if there was or was not a violation of an express provision of the agreement. The arbitrator shall expressly confine himself or herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issues not so submitted. The arbitrator shall have no authority to add to, subtract from, modify, change or alter any of the provisions of the agreement, nor to add to, subtract from or modify the language therein in arriving at a determination of any issue presented.”

Management rights clauses

Management rights clauses in a collective bargaining agreement are widely favored by management as a mechanism for retaining its inherent rights. These clauses vary significantly in their form and content. Simple clauses, such as “all normal prerogatives of management shall be retained except as specifically limited or abridged by the provisions of this agreement,” are a concise statement of the doctrine of retained rights. A short management rights clause for use by school boards in their collective bargaining agreements would be as follows:

“The union recognizes the board as the locally elected body charged with the establishment of policy for public education in the local school district and as the employer of all personnel of the district. The union further recognizes that the board shall have the sole responsibility for the management and control of all the schools in the district. In addition, the union acknowledges that the board is specifically delegated with the responsibility of making the rules and regulations by which the district will be governed as provided by, but
not limited to, RC 3313.20 and 3313.47. The union further recognizes that the board has the exclusive
authority in all matters concerning supervision, evaluation, suspension, discipline, lay off, termination and
hiring of all members of the bargaining unit, except as limited by the specific provisions of this contract.”

An example of a more detailed management rights clause for use by school boards in their collective
bargaining agreements would be as follows:

“The union recognizes that the board is the legally constituted body responsible for the management,
direction and control of all the public schools of the board, and employees and other personnel employed by
the board. The union further recognizes the board is responsible for the determination of all resolutions,
policies, practices, procedures, rules and negotiations governing any and all aspects of the board’s school
district, except as restricted by this agreement.

These rights and responsibilities include, but are not limited to, the following, except as restricted by
this agreement:

- To determine all matters of managerial policy, including, but not limited to, the district’s
  functions, services, programs, available funds and budget, as well as the standards, methods,
  means and procedures to perform the functions, services and programs of the district;
- To hire, appoint, evaluate, promote, assign, reassign, schedule, reschedule, transfer, lay off,
  train, retrain, suspend, demote, discipline, remove, dismiss, retain or reinstate employees;
- To direct, supervise and manage the workforce; to determine the efficiency and effectiveness
  of the workforce; to determine the size, composition and adequacy of the workforce; and to
  select the personnel by which district operations shall be carried out;
- To maintain or increase the efficiency and/or effectiveness of district services;
- To take actions to carry out the mission of the district as a governmental unit.

Notwithstanding RC 4117.08, the board is not required to bargain on any subjects, including, but not
limited to, those enumerated above, reserved to and retained by the board under this article.”

One advantage of including a management rights clause is that arbitrators will know the limits of
management rights without recourse to common law. Second, a management rights clause such as that
outlined above may limit bargaining during the term of the agreement over certain management-directed
changes. Third, union representatives can more easily explain to its members the parties’ rights under the
collective bargaining agreement.

Principles of contract interpretation

The reserved management rights theory holds that management has the right and the responsibility for
direction of the workforce, and for control of the business, except for limitations imposed by statutes or the
courts. RC 3313.47 provides that the management and control of public schools is vested in the board of
education. RC 3319.01 provides that the superintendent has the authority to direct and assign teachers and
other employees under his or her supervision.

However, it is the board, pursuant to RC 3319.07 and .081, that has the authority to employ personnel.
In addition to the authority established by law, employers have considerable rights under the common law of
labor/management relations and of the workplace.

A collective bargaining agreement is a limitation on management rights. When management merely sits
down at the bargaining table, it is in the process of limiting or restricting its own rights. An employer’s rights
also can be limited statutorily. Both the federal and state governments have done this with wage and hour
laws, antidiscrimination laws and other laws restricting managerial rights.

The effect of RC Chapter 4117

With the enactment of RC Chapter 4117, management may have the ability to expand its rights through
the collective bargaining process. RC 4117.10(A) provides that the parties to a collective bargaining
agreement may supersede conflicting state law in a collective bargaining agreement (State ex rel. Rollins v.
Board of Educ. for Cleveland Heights-University Heights City School Dist.(1998), 40 Ohio St.3d 123).
While in Rollins, RC 4117.10(A) served as an expansion of the employer’s rights, statutory rights preserved
for management can be limited by the collective bargaining agreement (See Alexander Local School Dist. Bd.
Methods of contract interpretation

The role of past practice

Past practice can play a significant role in the interpretation of a collective bargaining agreement. Past actions taken by labor and by management can be just as binding on the parties to a collective bargaining agreement as the agreement itself. The use of past practice as a deciding factor in interpreting contract language and intent has been given great credence by the United States Supreme Court (United Steelworkers v. Warrior & Gulf Navigation Co. (1960), 363 U.S. 574).

In order to establish the existence of a past practice, a four-part test must be employed. The first element of the test is demonstration that the past practice has been clear. The party attempting to prove the existence of a past practice must show that in each instance where a past practice is claimed to have existed, a similar set of circumstances can be shown to have been in existence. If the party refuting the existence of past practice can demonstrate that this was a unique circumstance, not previously in existence, they may be able to show that the actions taken were an exception to the rule and, therefore, that no past practice exists.

The second element of the test that must be established is whether, when presented with a certain set of circumstances, actions taken have been consistent. This does not mean that in each and every situation the results must be the same. It means that in the past, when confronted with similar situations, actions have been taken in such a manner that the union and employees can reasonably expect that current actions will be similar to those that have occurred in the past.

The third element to be evaluated is the length of time that the past practice has been followed. There is no set length of time that has to be established in order to prove this part of the test. Instead, the number of times that a practice has been followed is examined. It is possible that only a few instances will suffice to establish a past practice when the circumstances arise infrequently.

The fourth and final element of the test that must be established is whether the existence of the practice has been accepted by both parties to the agreement. In order to prevail under this portion of the test, the opposing party either must have known or should have known of the existence of the practice. If knowledge of the practice can be established, then all that remains to be shown is acceptance of the practice through repeated failure to object to the actions taken.

The use of custom

The terms “custom” and “past practice” are not interchangeable. While past practice generally focuses on one location or employer, a custom often has a broader scope to the point of becoming an industry-wide or regional standard. Evidence of custom would be that other employees in the region interpret a provision of the contract in the same manner.

Often arbitrators will take judicial notice of industry customs. Judicial notice applies to circumstances where the facts are so notorious that proof of these facts is not required, according to The Law Dictionary (Anderson Publishing, 1986).

From a legal standpoint (Federal Rules of Evidence, Rule 201(b)), “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within [the region] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

Controlling maxims

Throughout history, arbitrators, attorneys, jurists and other labor relations professionals have developed various maxims, or rules, of contract interpretation. Many of these maxims originated during the early years of English common law as contracts were beginning to evolve, and disputes regarding interpretation of those contracts materialized. Today these maxims are used by arbitrators to assist them in interpreting collective bargaining agreements.

The benefit of employing maxims in contract interpretation is that they may shed some light on the intentions of the parties at the time they entered into the collective bargaining agreement. In this section, we will examine some of the more common maxims and their application to the interpretation of collective bargaining agreements.

Clear and unambiguous language controls

This is perhaps the most important maxim to be followed in the interpretation of a collective bargaining agreement. When the language is clear in its meaning, there is no reason to look further for assistance in the interpretation of that language (i.e., to search for the true intent of the parties). The language is certain and
unambiguous, and therefore, it would be inappropriate to look any further for underlying intent.

**Specific language takes precedence over a general clause**

The underlying concept of this maxim is that the choice of words used by the negotiators in drafting the agreement (i.e., specific versus general) must be considered in determining intent. This maxim might be more easily understood by reviewing the following example:

- **General clause.** “In the filling of overtime assignments, the work shall be offered to the unit members with the greatest seniority.”
- **Specific language.** “Overtime assignments in the maintenance department shall be offered to the most senior employee who possesses the skills necessary to accomplish the required tasks.”

The first clause establishes a general rule for the assignment of overtime in a bargaining unit, with no consideration given to the specific skills that a job may require, and no consideration given to the fact that a bargaining unit is likely to contain a multitude of employee classifications without transferable skills. The second clause, on the other hand, focuses on a specific department and considers the relative skills and abilities that may be attributed to a particular unit member.

The application of a rule that gives preference to specific language over general clauses can prevent unintended results. If the bargaining unit contains maintenance workers and custodians, the work that a custodian performs may not require the skills of a maintenance worker. Thus, the first clause standing alone could result in the assignment of a custodian to the repair of a boiler, while the first clause, when read in conjunction with the second, provides that only an employee with the requisite skills will be assigned the work. Accordingly, the use of specific language ensures that the contract is interpreted properly.

**Words will be judged by their context**

The objective of this maxim is to give consideration to the language surrounding the contractual provision in dispute, and to use that language as an aid to determine the intent of the parties when the contractual language in question was drafted. The essential element of the maxim is that by considering the impact of the language in question on other sections of the contract, the true meaning of the language may come to light.

**The contract is to be read as a whole**

When an individual is attempting to determine the meaning of a collective bargaining agreement, it is necessary to consider the relationship of each section of the document to the entire document. The application of this maxim should protect against one section of the contract invalidating another section, or taking that other section out of context.

**To express one thing is to exclude another**

This maxim, otherwise known by the Latin phrase expression *unius est exclusio alterius*, generally is applied to contractual provisions that include a list of exceptions to a rule. In these cases, arbitrators are likely to conclude that there are no other allowable exceptions to the rule since only those exceptions listed must have been intended, according to *How Arbitration Works* (Elkouri and Elkouri).

**Ejusdem generis**

*Ejusdem generis* is another long established maxim of statutory or contractual construction. Where general words follow an enumeration of specified items, the general words will be limited in definition by the specific items. Here again, this maxim can be more easily understood with an example:

“Personal leave can be granted for any of the following reasons:
- attendance at a funeral,
- graduation,
- mortgage closings,
- other important matters that cannot be handled after the school day.”

Through the application of the maxim of *ejusdem generis*, the phrase “other important matters that cannot be handled after the school day” can be more readily understood. If the reason for using personal leave does not correspond with one of these four reasons, such use would be impermissible. In other words, attending a wedding may be permitted while attending a basketball tournament may not.
The parole evidence rule

The essence of the parole evidence rule is the supremacy of the negotiated agreement. In other words, it holds that “[a] written contract consummating previous oral and written negotiations is deemed, under the rule, to embrace the entire agreement, and, if the writing is clear and unambiguous, parole evidence [e.g., evidence of the negotiations leading up to the contract] will not be allowed to vary the contract,” according to How Arbitration Works. However, the parole evidence rule does have some exceptions. It will not be applied to preclude the evidence of collateral and contemporaneous agreements, and also will not be used if the parole evidence is being offered to show fraud or mutual mistake.

Each of these maxims of contract interpretation can be considered or ignored at the discretion of the arbitrator. They will not provide clarity to the meaning of the collective bargaining agreement in every situation. At best, these maxims act as guidelines that the parties can use to help them determine the true meaning of disputed contractual language.

The impact of waiver

The waiver of a right can occur in a number of ways, depending on the type of right involved. Management can waive inherent rights, while unions can waive contractual or statutory rights. Whenever attempting to interpret the effect of a contract on a past practice, it is beneficial to review whether any kind of waiver has occurred.

A union’s waiver of rights can occur in two different ways. One is an express waiver of rights by the use of a “waiver of negotiations,” or “zipper” clause. The other occurs when the union fails to exercise a right for such an extended period of time that a conclusion can be reached that, as a result, they have waived their right to exercise that right.

For instance, it has been held by the State Employment Relations Board (SERB), as well as the National Labor Relations Board (NLRB), that a union has a right to bargain over “mandatory” subjects of bargaining during the term of the collective bargaining agreement. This right can, however, be waived through the use of an effective zipper clause under which the union waives its right to bargain during the term of the agreement.

Just as the principle of waiver can be applied to the union, it can equally be applied to management. Here again, the concept is one of acquiescence — the repeated failure of management to exercise a right of which they have full knowledge. If, for example, the superintendent has the right to deny personal leave whenever more than 10% of a building requests it, but repeatedly fails to exercise this right, the superintendent may, by his or her inaction, waive his or her right to deny future leave requests when similar circumstances exist. The basis for this principle is that a party is justified in relying upon established past practice.

The role of mistake

One of the most long-established rules of law focuses on the impact that a mistake, made by one or both of the parties to a contract, may have on the enforceability of that contract or a specific portion of it.

Generally speaking, there are two types of mistakes that can occur. One is a unilateral mistake; the other is a mutual, or bilateral mistake. In most circumstances, arbitrators will only grant relief when a mutual mistake has occurred. The principle underlying this rule is that the language of an agreement in which a mutual mistake was made does not reflect the true intent of the parties. Arbitrators will, however, consider the impact of a mistake made by one party (i.e., a unilateral mistake) if it is discovered that one party was aware that the other party was making a mistake and used that knowledge to its advantage.

Workplace discipline

Progressive discipline

Workplace discipline is composed of management actions to enforce employee compliance with work rules and standards. The forms of discipline can include warnings or more tangible consequences, including discharge. The severity of punishment typically matches the degree of the offense and the frequency of violation by a particular employee. Some offenses are so severe that immediate dismissal is justified. Other infractions may be dealt with using lesser forms of corrective action.

Progressive discipline consists of steps of ever-increasing punishment for subsequent violations of a rule. Termination can be the final step if an employee demonstrates that he or she repeatedly refuses to adhere
to workplace standards. Progressive discipline gives the employee a chance to correct misconduct before suspension or termination.

When there is no clause in the contract regarding disciplinary action, the district must defer to state law. Discipline is a mandatory subject of bargaining, because it affects “… terms and conditions of employment…” RC 4117.08(C). Therefore, the union representative must be notified and the union given the opportunity to negotiate the implementation of any disciplinary policy.

Purpose
The purpose for progressive discipline is to give the employee an opportunity to improve performance or behavior before more serious discipline is administered. Typically, progressive discipline allows for a verbal, then a written, warning. In receiving a disciplinary warning first, the employee should be able to correct the behavior before being suspended from employment. Progressive discipline gives the employee several chances to correct behavior.

 Arbitrators are more likely to uphold a disciplinary action if the employee was given ample opportunity to conform. Proper use of step discipline can avoid findings that the discipline was arbitrary and capricious. The employer’s investment in a trained and experienced employee may also be preserved.

Format
Progressive discipline for most offenses is usually a four-step process:

● First offense — verbal counseling/warning, with a post-conference memorandum;
● Second offense — written warning, with employee acknowledging receipt in writing and a copy placed in the personnel file;
● Third offense — suspension without pay, with the length of a suspension depending upon the severity of the offense; a final warning should be given in writing and acknowledged by the employee;
● Fourth offense — termination.

More serious offenses justify immediate suspension or discharge. These offenses should be spelled out as part of the rule, with a general statement of “other serious offense” to cover unanticipated serious infractions.

Expunging offenses from a personnel record violates the Ohio Public Records Law. While including an expungement clause eases the union’s fears, such a clause is unenforceable in Ohio.

Precautions
Employees must know the rules or regulations and what discipline will result from violations. Progressive disciplinary procedures must be followed. The warnings given by school administrators must be clear and specific as to what conduct is prohibited and what penalty will result from future violations. A finding by an arbitrator that the employee was given improper notice could result in a disciplinary action being set aside or reduced.

Each employee should sign an acknowledgement that they received a copy of the rules and regulations. Supervisors or principals should hold meetings with employees to review the rules, regulations and standards. Standardized forms should be used to document offenses and disciplinary actions. Warnings or other actions should be based upon the facts recorded.

It is important to ensure that administrators apply discipline in a uniform manner for similar offenses. The board should also be cautious of disciplinary actions involving protected classes of persons and activities, such as race, gender and union activity.

Investigation of complaints
In discipline cases, the board bears the burden to show sufficient cause for acting as it did. A thorough investigation is required to provide the basis for the disciplinary action. The investigation should be timely, explore all sides of the matter, and gather all relevant documentary and physical evidence. A procedure for investigation includes recording and investigating the complaint against the employee, preserving evidence, and applying standards of fairness and confidentiality during the conduct of the investigation.

The administrator first obtains information to develop a comprehensive and accurate picture of the incident related to the complaint. A complaint should be reduced to writing and signed by the person making the allegations, but even an anonymous complaint, when sufficiently serious, must be investigated. If a
principal is the one bringing the complaint, it is advisable to have another administrator investigate, to avoid the appearance of bias.

The person bringing the complaint and any others involved in the incident are questioned about what they know. Topics of investigation include who was involved, when and where the incident occurred, and how the incident happened. A written statement should be prepared by the investigator and reviewed and signed by the person providing the information. As an alternative, the interviewee can write a statement.

An interview with the employee against whom the complaint is lodged is usually a later step in the course of obtaining testimony and information about the incident. The subject of the complaint is afforded an opportunity to have representation during the interview.

It is imperative during a disciplinary procedure that the board allows the employee and the employee’s representative to address the facts presented and to offer a defense. While arbitrators do not require the same due process protections given to individuals in judicial proceedings and under the Constitution, they do follow basic standards of fairness known as “industrial civil rights.”

These rights include:

● The employee’s right to be informed of the charge(s) against him or her.
● The right to answer charges and present a defense. The U.S. Supreme Court has held that prior to termination, an employee is entitled to “oral or written notice of the charges against him/her, an explanation of the employer’s evidence and an opportunity to present his or her side of the story” (Cleveland Bd. of Education v. Loudermill (1985), 470 US 532).
● The right to counsel. The U.S. Supreme Court has held that an employee has the right to refuse to meet with management at an investigatory interview unless a union representative is present, where the employee “reasonably believes the investigation will result in disciplinary action” and where he or she requests representation (Weingarten v. NLRB (1975), 420 U.S. 251).

For most other types of interviews, discussions and evaluations, work orders and instructions, counseling and correction, union representation is not required.

Preliminary decision

After fact-finding, a preliminary determination is made on the action to be taken, if any. A meeting is held to notify the employee and the representative of the outcome of the investigation. A memorandum detailing the results of the investigation, the outcome of the conference, and what steps or procedures will be forthcoming as a result of the preliminary determination is then prepared.

Please note that an investigation alone does not constitute the due process of law required for a pretermination hearing. Evidence obtained during the investigation may be presented at the hearing, however.

Documentation

Documents relevant to discipline may include local school board policies, the contract of employment, the collective bargaining agreement, notices to the employee, work record, personnel file, records of the employee’s performance, photographs, e-mails or other electronic records, letters, memoranda, notes and recorded testimony. Good documentation is essential to winning the arbitration or administrative hearing involving employee discipline. Remember to date all documents related to employee performance or discipline.

In cases involving job performance issues, a memorandum should identify performance deficiencies, inform the employee of those deficiencies and provide specific directives to correct deficiencies. First, the memorandum must be job related, emphasizing facts and specifying employee performance through specific incident descriptions. Second, the memorandum must avoid vague judgments, inflammatory words or statements that are unfair, arbitrary or biased. Third, directives or recommendations must be reasonably related to the identified deficiencies and specific in order to provide guidance to the employee. Finally, when a memorandum is intended to document a meeting or conference with the employee, the memorandum should be provided to the employee as soon after the face-to-face conference as reasonably possible. The employee should be given an opportunity to address any alleged errors of fact or to submit a rebuttal statement if he or she disagrees with the content of the memorandum.

Grounds for discipline
Disciplining employees can be hard for school boards because of all the red tape involved. Grievances, statutory concerns and fear of lawsuits are roadblocks to effective discipline.

While most agreements contain language such as: “No employee shall be disciplined or discharged except for just cause,” few, if any, define the phrase. Arbitrators most often use the definition for “just cause” as set forth in *Enterprise Wire Co.* (Daugherty, 1966) 46 LA 359, consisting of a series of questions requiring all affirmative answers to find just cause.

These questions are:

- **Notice** — Did the district give the employee forewarning or prior knowledge of the possible or probable disciplinary consequences of the employee’s conduct?
- **Reasonable rule or order** — Is the policy or rule that was violated within the appropriate policymaking authority of the school board, i.e., does it reasonably relate to the orderly, efficient and safe operation of the school district and the performance that the school board may properly expect of the employee? (An exception is allowed where compliance with a policy or rule would jeopardize the employee’s health, safety or integrity.)
- **Investigation** — Did the district, before administering discipline to an employee, make an effort to discover whether the employee had, in fact, violated a policy or rule?
- **Fair investigation** — Was the factual investigation conducted objectively and fairly, and was it complete?
- **Proof** — Did the investigation results provide substantial evidence that the employee committed the acts for which he or she was disciplined?
- **Equal treatment** — Has the board applied its rules, orders and disciplinary penalties evenhandedly, and without discrimination?
- **Penalty** — Was the degree of discipline administered in a particular case reasonably related to the seriousness of the employee’s proven offense and the employee’s work record?

A “no” answer to any of these questions will result in a finding that just cause was not followed in disciplining the employee, or that some arbitrary, capricious or discriminatory element was present.

**Notice**

“Did the district give the employee forewarning or prior knowledge of the possible or probable disciplinary consequences of the employee’s conduct?”

The employee must receive notice of both what constitutes misconduct and what the consequences are. Notice is imputed to employees where the board has written rules and regulations, either posted or in an employee handbook.

**Forms of notice**

Notice may be either actual or constructive. Actual notice is proven by showing that an employee read or was told about the rule or regulation at issue in a particular case. A signed acknowledgement is preferred, since the employee may deny a verbal notice occurred.

Constructive notice is shown when an employee should have been aware that his or her conduct was a violation of workplace rules or norms. For example, if rules and regulations are posted on a prominent bulletin board in the employees’ lounge, notice will be inferred. Reports of other employees being disciplined for the same action can be constructive notice.

**Exceptions**

No formal notice is required where the misconduct in and of itself is wrongful (i.e., assault, continuous insubordination, theft). The behavior must be such that it is obvious to the average person that it will lead to discharge. Specific notice may not be required when the employee’s conduct is against the law or contrary to societal or professional norms. The formal steps of investigation and a conference should still be followed, but step discipline may be neither appropriate nor necessary.

**Conduct wrongful per se**

There are some kinds of activities that every employee should know will not be tolerated on the job. For misconduct of this kind, “forewarning or foreknowledge” is assumed by common sense, rather than by any
specific written rule or explicit verbal direction.

Socially disapproved activities — actions that society as a whole prohibits or disapproves, including:
- misconduct involving property (theft, willful destruction of property, arson);
- misconduct directed against persons (threats of bodily harm, unprovoked assaults), carrying of firearms on board premises, rape or sexual harassment;
- other illegal or socially unacceptable misconduct, such as selling prescribed drugs, gambling and so on.

Professionally disapproved activities — actions that violate fundamental principles of the board-employee relationship, including:
- insubordination;
- neglecting one’s duties (e.g., by sleeping, leaving one’s work station in order to avoid work, being absent too frequently, getting drunk during work hours, leaving work early without permission);
- poor work performance;
- dishonesty in any form.

Published rules and regulations are not necessary to inform an employee that conduct of the nature above-described may subject him or her to discharge from the board’s employ. Every employee is presumed to know that the school cannot operate without a reasonable measure of discipline and without a reasonable attitude of respect from the employees for the authority of the board.

Keep in mind that within the last twenty years, state laws dealing with public school employees have evolved from generally defining good moral character to specifically identifying conduct that is unacceptable, resulting in immediate termination. For example, school bus drivers are now subject to federal controls on drug and alcohol abuse. Once charged, a driver is disqualified from operating a bus until the matter is resolved in court. Additionally, laws now require frequent monitoring of arrest records, which can also result in forcing the school district to take the employee out of service.

Ohio, like many other states, has also adopted a professional code of conduct for teachers. Any possible violation must be reported to the Department of Education, which then conducts its own independent investigation and hearings. Depending on the violation, ODE may ultimately suspend or revoke a teacher’s certificate or license, which results in the teacher being unable to perform his or her job in any school district. Ohio has also expanded its list of disqualifying offenses that make any person unemployable by a school district, in any capacity. As mentioned, more frequent monitoring of legal records has resulted in increased numbers of school employees being terminated for conduct that violates state law as opposed to local district rules or regulations.

Similar offenses

A specific notice that a particular action is prohibited may not be needed if that action is so similar in character to misconduct that has been prohibited that notice is implied.

Management cannot anticipate every conceivable act by an employee that justifies discipline. Further, if the rules are too specific, the union may claim that if the board had intended to prohibit a particular kind of conduct, it would have said so. Phrases like “and similar offenses” are designed to put employees on notice that they may be held liable for misconduct that is not spelled out, but that common sense dictates is “similar” to actions that are subject to penalty.

Reasonable rule or order

Was the policy or rule that was violated within the appropriate policymaking authority of the school board; i.e., does it reasonably relate to the orderly, efficient and safe operation of the school district and the performance that the school board may properly expect of the employee?

It is easier to define reasonable rules or orders by defining what rules and orders are unreasonable.

There are five categories of unreasonable rules:
- rules or orders that are inconsistent with the contract,
- rules that conflict with an established past practice,
- rules or orders not related to job performance or workplace safety,
- rules or orders affecting employees’ lives off the job,
- reasonable rules unreasonably applied.

Rules or orders that are inconsistent with the contract

The management rights principle typically allows the board residual and discretionary power over
matters not specifically covered by the contract. It does not, however, permit management to exercise its rule-making power in any way that is inconsistent with the contract.

Care must be exercised when the employer adopts special policies or procedures to implement provisions of the contract to ensure that there are no inconsistencies with the collective bargaining agreement. Sometimes managers want to add to or change rules because business needs arise or become more acute after the contract has been negotiated. This too can lead to disputes.

**Rules that conflict with an established past practice**

Management’s right to make reasonable rules is limited not only by written contract terms. Whether it is a question of a new rule or a change or clarification of an existing rule, the board’s action may be successfully challenged by the union if it conflicts with a past practice.

The Ohio Supreme Court articulated the three-prong standard for “past practice” in *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. Of Fire Fighters v. Cleveland* (2003), Ohio St.3d 476. To be binding on the parties, a past practice must be:

- unequivocal,
- clearly enunciated,
- followed for a reasonable period of time as a fixed and established practice accepted by both parties.

What constitutes a “reasonable time” is not specified. The Ohio Supreme Court declared in the Local 93 case that a practice that existed for 30 years was not a past practice because the union tried to negotiate the practice out of existence starting in 1992 and did not file a grievance until 1999. The majority of the court focused on the “accepted by both parties” part of the third prong. The minority pointed out that the practice existed for 15 years after the first collective bargaining agreement without objection from the union.

The board’s rights to make or change rules that are inconsistent with existing practices are restricted. A contract provision may expressly call for negotiation before the employer can change a past practice or general contract language may provide for maintenance of benefits and working conditions not specifically dealt with elsewhere in the agreement. Even where none of the foregoing factors are present, past practice has been widely held to limit the board’s freedom of action with respect to new work rules.

**Six exceptions to past practice**

Past practice will not always prevent the board from making or changing a rule in the face of a longstanding past practice, but one or more of the following conditions must be present.

- Changed conditions — it must be stated that once the conditions upon which the past practice has been based are changed or eliminated, the practice may no longer be given effect;
- Abuse of a benefit — inherent in every practice is the principle that it is not to be abused and that, if it is, reasonable corrective action may be taken;
- Past practice not proved — the standard criteria for building past practice is that the practice has gone on for a long time, that it be a continuous and repeated activity, and that it be known to the administration;
- Prior acceptance of new rules by the union — union acquiescence in the past when the board issued new rules that changed longstanding practices, may preclude the union from challenging a rule that is not to its liking on the grounds that it was unilaterally adopted and therefore unreasonable;
- Failure of the union to lodge a timely complaint — once the union is on notice that the board intends to change a rule, it must question the matter and file a timely complaint;

**Rules or orders affecting job performance or workplace safety**

Many kinds of employee conduct are related to legitimate management objectives and may therefore be regulated by board rules. Whatever an employee may do — or not do — that affects any of the following factors is conduct in which the board has a rightful interest:

- the employee’s ability to perform his or her own job with reasonable efficiency and safety,
- the personal security of the students and other employees,
- the security of board property.
Absenteeism, tardiness, sleeping on the job, negligence, intoxication, insubordination and similar misconduct fall within the foregoing criteria.

**Rules or orders affecting employees’ lives off the job**

Employees have privacy rights regarding their personal lives and generally, off-duty conduct cannot be regulated. When an employee violates a criminal law, the board may become uneasy about an employee’s reliability, feeling that an individual who breaks the law cannot be relied upon to perform his or her job. Illegal activity, however, cannot be a cause of discipline unless that activity has a direct connection to the board-employee relationship.

**Reasonable rules unreasonably applied**

A rule, though reasonable, may be applied or administered unreasonably. The key question is whether the purpose or intent of the rule is reasonably fulfilled in the particular context in which the board seeks to apply it.

Six unreasonable applications of reasonable rules are:

- when application of the rule to an employee or group of employees does not serve the rule’s purpose,
- when the rule is applied to employees in a discriminatory manner,
- when the rule is applied in an arbitrarily restrictive manner,
- when discipline is imposed under a rule that has nothing to do with discipline,
- when it is impossible to comply with the rule,
- when the employee is “off-the-clock.”

**Investigation**

“Did the board, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule?”

A timely, thorough investigation of suspected misconduct is important to the board for two reasons:

- Fair play — Due process requires that an employee be informed promptly, in reasonable detail, of the alleged offense and given the chance to tell his or her side of the story.
- Sufficient proof — A thorough investigation will provide sufficient proof for use during the grievance and arbitration phase. Avoid reliance on hearsay evidence by going to the actual source of the evidence. Remember, later-discovered evidence cannot be the basis for discipline. Get all the facts prior to acting.

Due process requires that an employee is entitled, during the investigation of alleged misconduct, to answer the charges, and has the right to confront his or her accusers, and to present evidence in his or her defense. An employee also has a right to refuse to cooperate with an investigation. An employee has the right to have union representation at all disciplinary meetings.

**Fair investigation**

“Was the board’s investigation conducted fairly?”

An investigation must be objective from the perspective of a disinterested third party. For an impartial evaluation to be conducted, an administrator other than the supervisor who imposed the discipline is generally required.

Arbitrators commonly cite two different kinds of management failure in the area of fair investigation:

- The foregone conclusion — Where a single administrator has the authority to function as witness, prosecutor and final judge, the outcome is often a foregone conclusion.
- Half measures — Was it a rubber stamp investigation or was the employee allowed to present some form of rebuttal evidence? The supervisor who brought the charges must supply all the relevant information available, including exculpatory material.

**Proof**

“Did the investigation results provide substantial evidence that the employee committed the acts for which he or she was disciplined?”

Without sufficient proof, the arbitrator will not support the discipline. If the employer cannot prove the infraction, then no penalty is just.
The requirement that the board must prove that an employee has committed the alleged misconduct:
● protects the employee from arbitrary, capricious or discriminatory discipline;
● prevents discipline based solely upon personal grudges against an employee;
● ensures due process.

There must be a proper charge that was clear and specific and made known to the employee before discipline was imposed. There must be proof of the specific charge, not something else. To be relevant at the arbitration hearing, the evidence must have been known to management when the employee was disciplined.

The nature of the misconduct must be explicitly identified, and the charge must be made known to the employee before discipline is imposed.

Equal treatment
“Has the board applied its rules, orders and disciplinary penalties evenhandedly and without discrimination?”

While the board must prove a bona fide, work-related reason for the discipline, the presumption is that there was no bias or discrimination. However, the employee may assert that others were treated differently for the same or similar behavior. Discrimination is not permitted based on gender, age, race, national origin, pregnancy, disability, union activity, workers’ compensation claims, service in the National Guard or other military reserves, or any other unlawful factor.

Penalty
“Was the degree of discipline administered in a particular case reasonably related to the seriousness of the employee’s proven offense and the employee’s work record?”

A penalty imposed by the board must be fair and proportional to the offense and record of the employee. Frequent warnings, reprimands and suspensions eventually justify termination because the employer has gone as far as can reasonably be expected. An employee’s continuous misconduct is the reason for disciplining. Good, consistent documentation is required.

Rehabilitation is a large part of school disciplinary action. The penalties in step discipline are meant to be corrective in nature, not punitive. Since the employee, at least in the short term, will remain an employee, the system must be perceived as fair. In addition, whatever penalty is assessed in one case will set a precedent for future cases.

Grievances
The grievance procedure
The grievance procedure is the formal mechanism to adjust employee complaints and to clarify disputes over the rights and obligations of the employer. Disputes are addressed in a formal, prearranged way by the union or management to define and narrow the alleged violation. Grievance meetings between union and management at any level may result in a settlement.

Purposes
The purposes of the grievance procedures are to:
● settle disputes arising during the life of the agreement,
● establish an orderly method for handling disputes,
● provide for the union’s role in processing grievances,
● permit either side to appeal the results of a grievance,
● promote a healthy management-labor relationship,
● permit employees to express dissatisfaction and obtain adjustments in a fair and impartial setting.

The union may propose that the purpose of the grievance procedure be defined in the collective bargaining agreement as one of the following:
● to assure that a complaint is considered fairly, with all due speed and without prejudice;
● to encourage expression regarding conditions that affect the employees;
● to appraise policy effectiveness.
Any type of philosophy or ideological statement not completely germane to labor law or contract negotiations should be deleted in its entirety from a negotiated grievance procedure. Grievances could be based on allegations that the board did not meet the high idealistic standards as prescribed in these “purpose” statements of the grievance procedure.

Statutory provisions

RC 4117.03(A)(5) states:

“Public employees have the right to: …[p]resent grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.”

RC 4117.08(C) in the final sentence reads:

“A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement.”

Definitions

The most important element of the grievance procedure is the definition of a “grievance.” Under Ohio law, the board of education is the statutory authority responsible, in cooperation with the superintendent, for operating the schools. While some rules and regulations may arise from collective bargaining, those relating directly to the development of “public policy” must remain solely the responsibility of the board.

The grievance definition should be confined to the written provisions of the collective bargaining agreement. For example, a preferred management definition would state:

“A grievance is a complaint involving the alleged violation, misinterpretation or misapplication of a written provision of the negotiated agreement between the association and the board of education.”

The board also may try to negotiate the exclusion of specific contractual matters from the grievance procedure (i.e., discipline, merits of an evaluation, contract action, etc.).

As important as restricting by definition what can constitute a grievance is limiting who can file a grievance. The definition of a “grievant” should specifically state that either an individual or a group of individuals may file a grievance. The union or association should not possess a separate right to file. Failure to properly restrict the definition of a grievant could result in arbitration when the individual grievant is satisfied at a lower-level disposition, but the union is not.

A management definition of a “grievant” could be:

“A grievant is a professional staff member or group of professional staff members, in the bargaining unit, alleging a violation, misinterpretation or misapplication of the written provision of the negotiated agreement. A grievance alleged by a group shall have arisen out of identical circumstances affecting each member of said group.”

The term “day” also must be defined, because of the time limits in the grievance procedure. A day for the purposes of grievances only could be “school day.” The term “day” as it relates to other provisions in the contract should be separately defined.

Sources of grievances

All administrators should become familiar with the causes of grievances. Although grievances arise from a variety of sources, most fall within one of the following categories:

● Misunderstandings — Misunderstanding is the most frequent source of disputes, especially misinterpretation of the negotiated agreement by either party due to ambiguous language or conflicting provisions. It can also be the result of ignorance or ineptitude in the administration of the contract.

● Intentional violations — Any deliberate disregard of the terms and conditions set forth in the contract or any action about which the contract is silent may lead the union to file a grievance to avoid waiver of future contractual rights.

● Symptomatic grievances — Employee frustration or dissatisfaction may lead to grievances. The union may employ grievances as a tactic just prior to negotiations.

● Conflicting relationships — Tension can erupt due to opposing personalities, past work stoppages and unresolved issues from previous negotiations.

Processing grievances
The objective in processing a grievance is to reach an amicable solution at the earliest possible opportunity. Success will promote cooperation, as well as amicable relations, between labor and management.

To be prepared for the grievance, consider the following basics of grievance processing for administrators:

- understand the jobs and know the people being supervised;
- develop good rapport with building representatives and elected employee leaders;
- thoroughly understand the negotiated agreement;
- understand the board’s and superintendent’s positions on contract issues;
- develop an understanding of your own level of authority, when to act and when to seek assistance at some other administrative level.

Procedural steps

Most procedures will consist of three to five steps. Each step should be clearly defined, including requirements, time limitations upon both parties and who will be involved in the decision-making process.

The goal for the board is to resolve the grievance at the earliest possible opportunity. This places considerable emphasis on the informal step. Building-level administration should take full advantage of this opportunity to resolve problems prior to a formal grievance being filed. A review by the board of education should be the final step of the grievance process prior to arbitration. In addition, language should be included to prevent any grievance from bypassing the initial steps and proceeding directly to the final step.

In order to resolve grievances in an orderly and efficient manner, time requirements are imposed from one step to the next. Sufficient time should be allotted for the four key elements:

- awareness of the alleged incident giving rise to the grievance,
- investigation of facts surrounding the alleged incident,
- discussion between the grievant and management for informal resolution of the grievance,
- formal processing of the grievance through all the steps.

Management should insist upon and enforce the time limitations set forth in the procedure, and never accept untimely grievances.

The union may propose to include language in the grievance procedure that “failure of the administration to act within the appropriate time line will result in the grievance being resolved by the remedy requested by the grievant.” This places a burden upon the board to meet all time lines, while placing no time restrictions upon the association.

It would be better for management to incorporate language that entitles the grievant to move to the next step of the procedure if the board misses a deadline, but renders the grievance null and void (i.e., the grievance is waived) if the grievant misses a deadline.

Finally, the grievance procedure should not be conducted on school time. The matter should be grieved outside instructional hours. A board should not pay the cost of substitutes. The children should not be deprived of their rightful instruction.

Informally addressing issues

One objective of the grievance procedure is to achieve a prompt, equitable resolution on an informal basis. The grieving employee can discuss his or her concerns with management before a formal written complaint is issued. The administrator listens to the employee’s side of the story and investigates the complaint with other workers before determining if there are grounds for a grievance. The administrator’s decision is recorded, along with any other information obtained in the investigation.

If settlement cannot be reached at the informal level, the grieving party initiates the formal process. All formal grievances must be in writing on the district’s grievance form. The following information is required:

- date on which the alleged grievance arose,
- date of filing and date of receipt by the administration,
- persons involved in the aggrieved situation,
- section of the grievance definition covering the situation,
- contract clause allegedly violated,
- specific facts giving rise to the alleged violation,
- remedy sought,
- signature of the aggrieved employee (or by the union, if permitted by the contract).
First step

The first step of the formal process is either at the building level or directly with the superintendent, as defined by the collective bargaining agreement. The administrator should be prepared by gathering information before the grievance is heard and decided.

Facts

Find out as much about the case as possible, including the “five Ws and an H.”

Who was involved in the alleged incident? Be sure you can properly identify not only who was involved, but also any witnesses to the incident. Talk to all about their version of events. Who is responsible for what occurred?

When did it happen? Identify the time and date of the alleged incident as specifically as possible.

Where did it happen? Locate the area as specifically as possible. If equipment is involved, identify it by serial number. This is especially important in the case of health and safety grievances.

What happened that makes the alleged incident a grievance? What are the circumstances surrounding the incident? What action did the administration take at the time? What is the remedy sought by the grievant?

Why does the alleged incident constitute a grievance? Has a provision(s) of the contract been violated?

If so, how was the provision(s) allegedly violated?

How did it happen? How did the alleged incident become a grievance?

Contract language

Grievances should be confined to an alleged violation of the collective bargaining agreement. Make certain you know the provision(s) of the contract that the employee or union is claiming the district has violated. You should also be able to point to other sections of the contract that support management’s position.

Statutes

Federal or state law may affect the case (e.g., nonrenewals). Make sure you research the law and know which statutes may be relevant to the grievance.

Past practice

Find out if similar situations have occurred in the past and, if so, how they were handled. It is important to interpret and apply contract language consistently.

The written response

After the hearing, the employer has a specified time period within which to provide a written response to the alleged violation. Before a formal reply is issued, management should thoroughly review the grievance, as well as the hearing notes, to fully understand the allegations. Survey all relevant contract language and other official records.

The grievant’s story and supporting documentation should be investigated. Review the grievant’s personnel file. Also, consult with other members of the management staff to see how they have dealt with similar grievances.

Follow the grievance procedure “to the letter,” including strict adherence to the time limitations. Require the grievant to adhere to these restrictions as well, and do not accept expired grievances.

Management should take as much of the time permitted in the grievance procedure as needed to prepare its written response. Never rush making a decision. On the other hand, do not delay the decision unnecessarily.

Remember that the burden of proof is on the grievant. Management has the right to take an action it deems necessary (unless restricted by the contract) until the union proves that the action violates employees’ rights.

The formal written response in most cases should be concise and to the point. For example, “grievance denied.” Narrative explanations may assist the union in crafting its argument if the grievance is appealed. In more complex or technical cases, a complete explanation may be appropriate so that management’s position cannot be misconstrued or misunderstood by the union or arbitrator.

Once a decision is made, stick with it to ensure management’s credibility. Compromises or splitting the difference in a dispute might be interpreted as management’s uncertainty or admission that the grievance had merit.
Record keeping

Maintaining accurate, detailed grievance records will lead to consistent strategies and approaches to processing grievances, as well as effective contract administration. Records provide a reference source that administrators can use to avoid duplication of effort and repetition of mistakes. Good records are a means to share information and reach agreement on common solutions to similar problems.

Good grievance records help management identify problem areas and propose solutions to contract disputes. The number of grievances that have arisen from the same problem, the final outcome of grievances and the cost of the change can identify needed actions. Grievance records can also assist in preparation for future negotiations. Compilation of grievance statistics will help management anticipate union proposals and aid in the development of board proposals with supporting documentation.

Effective grievance records should consist of the following information:

- a copy of the grievance on the appropriate form;
- management’s response at each step;
- union’s response at each step;
- all investigatory notes;
- notes on conversations with the grievant, union representative, witnesses, coworkers and other management personnel;
- other information acquired during the investigation stage by each administrator involved with the grievance;
- other documentation relating to the grievance;
- relevant items, such as a doctor’s release notes, time cards and witness statements;
- conversation notes;
- all other relevant material;
- arbitrator’s decision and award.

This information should be kept in a separate filing system, called the grievance documentation file. A separate filing system will safeguard meeting notes or other confidential personal information inadvertently being released to the public. Furthermore, a grievance could be viewed as a negative item in a personnel file. A separate filing system helps protect the grievant from reprisals.

A parallel grievance tracking system could include the following information:

- subjects of grievances;
- employee/unit/classifications of grievances;
- types of grievances settled at the administration level;
- types of grievances appealed to the board of education;
- if applicable, types of grievances submitted to arbitration.

Roles in the grievance process

The major roles of the key participants in the grievance process are:

Administrator/building principal

- enforce management rights at the building level,
- limit the union’s and employees’ rights to those specified in the contract,
- fully understand contractual limitations,
- apply a literal interpretation to the meaning of the collective bargaining agreement,
- distinguish an alleged violation either as a complaint or a grievance,
- participate at the informal level,
- participate at the formal level (first step),
- provide a written response,
- report management’s response to the superintendent.

Superintendent

- assist building administrator at the informal level,
- participate at the formal level (second step),
• thoroughly investigate the original grievance,
• review pertinent contractual language allegedly violated,
• know the remedy requested by the grievant,
• review the answer provided by the administrator at the building level,
• personally examine/investigate the case,
• search for any inconsistencies,
• attempt to discover additional information/facts,
• review the entire contract for additional language relevant to the grievance,
• review past practices,
• review contradicting statutes/regulations,
• consider the impact of a pro/con decision by an arbitrator on labor/management relations,
• provide a written response.

Board of education
• promote sound, consistent personnel practices;
• participate at the formal level (third step);
• be fully informed by school administration about the grievance;
• conduct hearing in executive session, as per the Sunshine Law;
• deal with disagreements among board members in private;
• take full advantage of the time allotted by the grievance procedure to render a decision;
• provide a written response.

Union representative
• process the grievance on behalf of individual, group or union;
• participate at the formal level (each step);
• vigorously represent the employee in cases seen by union as valid;
• may assist in resolution of the grievance by explaining to the grievant that the case has no merit;
• may process grievance, regardless of its value, to satisfy the bargaining unit.

Arbitration

There are two types of arbitration — advisory or binding. Advisory arbitration may be more palatable to management, because the board retains the authority to accept or reject the arbitrator’s opinion. In binding arbitration, however, management must obey the arbitrator’s decision.

Limitations on the arbitrator’s authority should be provided by adding the following to the contract:
• prohibit the arbitrator to add to, subtract from or alter the contract;
• limit the arbitrator to the issues submitted to arbitration;
• prohibit the arbitrator from interfering with management prerogatives, powers and duties.

Boards should consider the concept of “loser pays” arbitration. The issue is whether a board should pay a 50% share of an arbitrator’s bill just to prove it acted properly. “Loser pays” may prevent unions from taking frivolous grievances to arbitration if they know that the party that loses will pay the full cost of the arbitration.

Arbitrator’s remedy options
“Penalty” and “remedy” as used in arbitration have the following meanings. The penalty is the punishment imposed by the employer. The remedy is the relief given by the arbitrator when he or she decides the issue of the penalty. The arbitrator can sustain, overrule or modify the employer’s penalty.

If the arbitrator overrules or modifies a discharge, the standard options are:
• Full back pay — the relief the union almost always seeks (even when it does not expect to get it) is that the grievant be “made whole” for all wages and other benefits he or she lost as a result of unjust discharge. Reinstatement with full back pay is normally awarded only when it is clearly established that the grievant engaged in absolutely no misconduct.
No back pay — typically no back pay is awarded when the grievant’s misconduct is serious, but strong mitigating circumstances, discriminatory application of penalty or procedural violations by the board bar discharge. Also, no back pay may be awarded when the grievant contributed to his or her difficulties by, for example, refusing to comply with a reasonable investigation by management.

Some back pay — A partial back-pay award may result where the grievant engaged in misconduct that was deserving of a disciplinary suspension, but not discharge, or when other mitigating circumstances are present.

Where the disputed penalty is something less than discharge, the arbitrator has several options. If the penalty was disciplinary suspension, the arbitrator may rescind, reduce or convert to a warning. If the penalty was a warning, the arbitrator may remove the warning from the grievant’s personnel file, or, if the penalty was a written warning, convert it into an oral warning.

Other modified remedies include:

- conditional,
- last chance,
- demotion,
- transfer,
- back pay without reinstatement.

A conditional remedy would be one that requires the grievant to make certain efforts in order to return to work (i.e., attending a rehabilitation program).

A last-chance remedy gives the grievant a last chance to change his or her behavior, or he or she can be discharged.

Demotions and transfers may be imposed only if the collective bargaining agreement permits demotions and transfers. Transfers are made when the employee is having trouble getting along with others.

Back pay without reinstatement may be used where the discharge was found to have violated just cause, but where the employer-employee relationship has deteriorated to the point where reinstatement would do no good. Back pay will be granted, but the termination will stand.

Just cause

Even when a district has work rules and regulations regarding the penalties for misconduct, courts have determined that just cause must be established. In Midwest Coca-Cola Bottling Co. v. International Brotherhood of Teamsters, Local 792 (C.A.8, 1986), 89 F.3d 152, the U.S. Court of Appeals for the Eighth Circuit ruled that the arbitrator’s award was consistent with the collective bargaining agreement.

The agreement recognized the rights of Coca-Cola to make work rules, except as limited, modified or restricted by the collective bargaining agreement. The arbitrator ruled that under the contract between the parties, he was permitted to decide if just cause existed to discharge a worker and to order reinstatement. The court held, “[a]s the agreement nowhere defines just cause, the arbitrator must interpret and decide the meaning of the agreement with respect to its discharge provisions.” The arbitrator ruled that the employee should be reinstated on the strength of his 17-year work record.

Drug and alcohol abuse cases

Even in clear-cut cases of drug or alcohol abuse on the job, arbitrators are more likely to reinstate the employee with a requirement for rehabilitation than they are to uphold terminations. Arbitrators often hesitate to uphold discharges of employees based on drug and/or alcohol use, viewing drug and alcohol abuse as a disease.

The three models for dealing with these cases are:

- the traditional corrective discipline model,
- the therapeutic model,
- a modified corrective discipline model.

The traditional corrective discipline model views the process as a parental, or “tough love,” approach. The therapeutic model views alcohol/chemical dependency as an illness to be treated, and the employee is given an opportunity to recover. This model may include leaves of absence and rehabilitation. If the employee is again disciplined for alcohol/drug abuse, it is further cause for treatment, not discharge.

The modified corrective discipline approach is the median between the two: the traditional corrective discipline and the therapeutic model. Arbitrators who follow this approach view alcohol and/or chemical dependency as an illness, and allow one second chance after there has been rehabilitation. However, after the
second chance, subsequent misbehavior will cause the employee to be fully accountable.

The Americans with Disabilities Act and Section 504 of the Rehabilitation Act may be relevant if the conduct alleged is chronic, but controlled, alcoholism or drug addiction. Past remedied conduct clearly is protected.

In Crewe v. Office of Personnel Management, (C.A.8, 1987), 834 F.2d 140, the court held that for federal employment purposes, the office of personnel management must decide on the eligibility of a person who has a history of alcohol abuse. The court held that many factors regarding whether the person is a good employment risk must be considered. However, the length of time since they last used alcohol is less important than the steps taken by the person to get treatment for their illness.

Conclusion

Study the particular arbitrator’s past decisions on the theory that the arbitrator will rule the same way in your case.

The administration must be extremely careful in disciplining and discharging employees. The best case against an employee is made when it is well documented, and when the employee has been given every possible chance to correct his or her behavior.

Jurisdictional issues

In 1983, the Ohio General Assembly passed Senate Bill (SB) 130, codified at RC Chapter 4117, which established a legal framework within which collective bargaining could take place. It defined the terms and conditions of employment.

Labor relations in Ohio’s school districts should be a cooperative effort between labor and management. Conflict is an integral part of labor relations. Unresolved conflict can be detrimental, causing bad employer-employee relations that disrupt a school district’s educational program.

In Ohio’s public labor sector, disputes between employers and employees can be settled in the courts, regulatory agencies such as SERB or the grievance procedure established in the collective bargaining agreement. Each has different powers and authority to resolve employer and employee disputes and, therefore, has different jurisdictions.

The term jurisdiction means “who will decide.” Whether the courts, SERB, other regulatory agencies or the grievance procedure contained in the contract have jurisdiction is the initial question that must be answered before a dispute can be settled. Making the question even more complicated is the fact that some of these forums share jurisdiction.

The most common way to resolve disputes pertaining to the collective bargaining agreement is through the grievance procedure. The grievance procedure is used to settle disputes arising under the agreement that are referred to as “contractual” disputes. Disputes where the courts, SERB or another regulatory agency has jurisdiction are generally referred to as “legal” disputes.

Collective bargaining agreements govern wages, hours, terms and conditions of employment, and are negotiated between the employer’s and the employees’ exclusive bargaining representatives. Generally, disputes over these matters can be resolved through the grievance procedure. In the absence of a collective bargaining agreement, these matters are determined by federal and state statutes, administrative rules and regulations, and the employer’s policies enforced through the courts and other regulatory agencies.

RC 4117.10 provides that wages, hours, terms and conditions of employment contained in a collective bargaining agreement can supersede those governed by state and local laws and ordinances, but not federal law. However, the agreement can supersede these items only if the contract provision conflicts with the law. If a contract is silent on the matter, the law will control.

As to employees covered by civil service law, matters that are subject to final and binding arbitration in the collective bargaining agreement, especially disciplinary actions, are not subject to the jurisdiction of the civil service commissions and the State Personnel Board of Review.

Certain laws cannot be superseded by the collective bargaining agreement. These laws, considered to be “prohibitive” subjects of negotiations, include:

- civil rights,
- affirmative action,
- unemployment compensation,
● retirement,
● residency requirements,
● minimal education requirements.

Under Ohio’s Collective Bargaining Law, every contract must include a grievance procedure. Grievance procedures are negotiated by the parties and can take many forms. The most common form is a “step” grievance procedure.

A difference between final and binding, and advisory arbitration is how the two different types of arbitration affect the jurisdiction of the courts in enforcing collective bargaining agreements. Under RC Chapter 4117, either party can enforce an agreement through the courts. Without final and binding arbitration in the final step of the grievance procedure, the courts have jurisdiction to decide the grievance upon its merits, thereby interpreting and enforcing the agreement. In addition, the courts maintain jurisdiction over the contract’s enforcement and interpretation. Only final and binding arbitration can prevent the courts from taking jurisdiction over grievances. However, with advisory arbitration, the court continues to maintain jurisdiction over the contract’s enforcement and interpretation.

The courts

Federal law

In 1960 the U.S. Supreme Court handed down three decisions involving the United Steelworkers of America: United Steelworkers v. American Manufacturing Co. (1960), 80 S.Ct. 1343; United Steelworkers v. Warrior & Gulf Navigation Co. (1960), 80 S.Ct. 1347; and United Steelworkers v. Enterprise Wheel & Car Corp. (1960), 80 S.Ct. 1358. These decisions are commonly referred to as the “Steelworkers Trilogy.”

Prior to the trilogy, the courts and private arbitration were in conflict. Arbitrators viewed courts as interfering in the arbitration process, and the courts viewed arbitration as competition. This conflict manifested itself in two areas:
● determining whether a grievance can be arbitrated,
● the rights of the courts in reviewing arbitration awards.

Many employers sought a safe haven in the courts from arbitration and the arbitrator’s award, frustrating both arbitrators and unions. When faced with a demand by the union for arbitration, many employers went to court asking the judge to decide whether the grievance could be arbitrated. Frequently, the courts agreed with the employer and sustained the employer’s position on the grievance. However, arbitrators believed that deciding the question of arbitrability was exclusively within their jurisdiction.

On other occasions, after an arbitrator had issued an award, the losing party would appeal the award to the courts. Oftentimes, the court would review the merits of the grievance and overturn the arbitrator’s award. This review by the courts short-circuited the “final and binding” nature of arbitration.

The trilogy established arbitration as the national labor relations policy and resolved the conflict between the courts and private arbitration. It established the roles that both the arbitrators and courts would play in future arbitrations. The trilogy held that the determination of arbitrability rests with the courts, unless the contract expressly provides that the question of arbitrability is to be determined by an arbitrator.

If the court has any doubt over arbitrability, it should be resolved in favor of arbitration, as long as the claim on its face is governed by the contract. Therefore, if the contract does not state that the arbitrator has the authority to rule on the arbitrability of a grievance, one of the parties can ask the courts to determine arbitrability and order arbitration. In order to avoid involving the courts, many contracts specifically provide that the arbitrator will decide all questions of arbitrability.

As to the review of an arbitration award by the courts, the trilogy gave much deference to the arbitrator. It limited the authority of the courts to review the arbitrator’s award to certain specific grounds. While it granted the courts the authority to enforce awards, it held that the courts do not have the authority to review the merits of the case.

State law

Prior to the trilogy decisions, many state legislatures delineated the roles of arbitrators and the courts by passing arbitration statutes. In 1953, the Ohio General Assembly enacted Ohio’s arbitration statute, codified at RC Chapter 2711. It provides for the powers, duties and authority of the arbitrator. One of the most important powers of the arbitrator that is often overlooked is the arbitrator’s authority to issue subpoenas, enforceable by county courts of common pleas, for witnesses and other evidence.

RC Chapter 2711 granted almost exactly the same arbitration rights to the state courts as the trilogy granted to federal courts. The state courts have the right to enforce, vacate, modify and undertake a limited
review of arbitrator’s awards. Therefore, any court actions pertaining to arbitration must be pursued through the state courts, beginning with the court of common pleas.

Before 1975, arbitration in Ohio’s public sector had not been sanctioned by the state courts or the Ohio General Assembly. Ohio’s lack of a source of authority for arbitration in the public sector allowed some public employers to repudiate contractually agreed-to arbitration.

Ohio’s legal authority on public sector arbitration was established in 1975 when the Ohio Supreme Court decided *Dayton Teachers Association v. Dayton Board of Education* (1975), 41 Ohio St. 2d 127. In that case, after contractually agreeing with the teachers association to resolve grievances through final and binding arbitration, the board of education refused to arbitrate grievances. The board claimed that the contract, and therefore the obligation to arbitrate, was null and void, arguing that it could not abdicate its statutory responsibility through a collective bargaining agreement.

The court ruled that the contract was valid and that the contract’s requirement to arbitrate grievances was equally valid and enforceable, establishing a legal authority in Ohio’s public sector for contractually agreed-to arbitration that is governed by the state’s arbitration statute. This decision can be viewed as the Ohio public sector trilogy. It legally authorized arbitration in the public sector, stating the court’s policy of favoring and encouraging arbitration.

Until the passage of Ohio’s Collective Bargaining Law, statutory authorization for public sector arbitration had been absent. According to RC 4117.09(B)(1), a grievance procedure can culminate with final and binding arbitration and the court can enforce arbitrator’s awards. This provision of Ohio’s law and the *Dayton Teachers* decision have given an unequivocal legal and legislative endorsement to arbitration in Ohio’s public sector.

**State Employment Relations Board**

SERB is an administrative agency of the state of Ohio with jurisdiction to decide legal disputes concerning Ohio’s Collective Bargaining Law. Generally, these legal disputes are presented to SERB in the form of unfair labor practices. SERB has jurisdiction only over legal issues, and is not empowered to resolve contractual disputes. Sometimes an unfair labor practice can be resolved through the use of a contract’s final and binding arbitration provision.

Occasionally, SERB may find it necessary to resolve a contractual issue before it can determine an unfair labor practice. If the parties have final and binding arbitration in their grievance procedure, SERB can “defer” the issue to arbitration. SERB first established their deferral policy in *Miamisburg*, SERB 86-001 (1-15-86), a decision that gave SERB six options, ranging from retaining jurisdiction and making a limited review of the arbitrator award to dismissing the unfair labor practice and allowing the parties to treat the dispute as a contractual dispute. Those options were reduced to three in a subsequent decision, *SERB v. Upper Arlington City Board of Education*, SERB 92-010 (6-30-92).

Many times an employee will file both a grievance and an unfair labor practice over the same dispute. In this situation, it is a good strategy to ask SERB to dismiss the unfair labor practice and defer to final and binding arbitration, arguing that the dispute is contractual in nature and best resolved through arbitration. SERB may dismiss the unfair labor practice and let the parties settle their differences through arbitration.

**Arbitrability**

It must be determined whether or not the arbitrator has the authority to render a decision in the case that will be presented.

One of the first questions an arbitrator will ask the management and union representatives at an arbitration hearing is “Do the parties agree that this grievance is properly in front of the arbitrator?” or “Do the parties agree that I have jurisdiction?” At this juncture, either party can raise the issue of arbitrability. If both parties agree that jurisdiction is proper, the arbitrator will continue the hearing and decide the grievance upon its merits, thereby rendering any future question of arbitrability waived. If one party disagrees, the arbitrator will hear the arguments of both parties on the issue of arbitrability.

Once the parties have presented their arguments on the issue of arbitrability, the arbitrator may give an immediate “bench” decision, postpone the hearing and ask the parties for briefs on the issue, or defer the decision and continue to hear the merits of the grievance.

The question of arbitrability can be raised based upon two separate and distinct grounds: “substantive” arbitrability, and “procedural” arbitrability. Substantive arbitrability is whether the subject matter of the dispute is arbitrable. An arbitrator’s right to hear a grievance is dependent upon whether the parties agreed in
the contract to arbitrate the subject matter of the grievance. If the parties did not agree through contract language that a particular dispute is subject to arbitration, the arbitrator will rule against arbitration.

To determine the question of substantive arbitrability, arbitrators will look at two provisions of the contract: the arbitration clause that gives the arbitrator authority to hear a grievance and the grievance definition clause that defines what disputes can be grieved. Many arbitration clauses exclude arbitration of grievances on certain subjects. For example, if an arbitration clause excludes written reprimands from being arbitrated, the union does not have a substantive right to arbitrate a grievance on a written reprimand. Therefore, the grievance is not arbitrable.

Under the Collective Bargaining Law, the union has the right to seek relief through the courts. A dispute not covered by the arbitration clause can be appealed to courts, thereby providing the union with an alternative method of enforcing a contract provision if it does not have a remedy under the terms of the contract.

Also, the arbitrator will look at the grievance definition clause to determine the arbitrator's jurisdiction. The grievance definition clause determines which disputes are grievable. If the dispute is outside of the scope of the grievance definition, the grievance normally is not arbitrable. Additionally, any disputes that are not controlled by the contract and are strictly under the control of management are non-arbitrable.

For example, if an employee files a grievance claiming a contract violation for not being promoted to a non-bargaining unit position, the grievance is not arbitrable. A non-bargaining unit position is not covered by the terms of the contract, but is determined by management.

Besides "substantive" arbitrability, the employer can raise the question of "procedural" arbitrability. A grievance procedure normally requires the parties to process a grievance in a certain prescribed manner. A grievance procedure may require that a grievance be filed within a certain period of time after the alleged violation has occurred, or that a grievance must be appealed to the next level of the grievance procedure within so many days after management renders its decision at the previous step of the grievance procedure.

Another possible violation of the procedure occurs when the grievance is not appealed through all the steps of the procedure prior to arbitration. Ordinarily, if the party filing the grievance does not process it as prescribed, the question of procedural arbitrability can be raised in front of the arbitrator. The arbitrator may declare that the grievance is not arbitrable because the grievance process violated the contract when it failed to comply with the procedural aspects of the grievance procedure.

Unlike substantive arbitrability, the issue of procedural arbitrability cannot be appealed to court. It is strictly within the arbitrator's purview to determine all questions of procedural arbitrability. In the trilogy, the U.S. Supreme Court ruled in John Wiley & Sons, Inc. v. Livingston (1964), 84 S.Ct. 909, that questions of procedural arbitrability are for arbitrators to decide, not the courts. When the court has determined that the subject matter is arbitrable because of substantive arbitrability, the arbitrator is to decide all procedural matters as well.

Unfortunately, some arbitrators ignore this distinction and misapply the trilogy. Arbitrators have justified ignoring procedural violations by claiming that the violation is minor and that the trilogy compels them to arbitrate. Arbitrators should be reminded that the trilogy does not apply to questions of procedural arbitrability but, instead, that John Wiley & Sons, Inc. is the controlling Supreme Court decision on that issue.

There is another difference between substantive and procedural arbitrability that is very important — when and how to raise the issue. Any question of arbitrability must be submitted to the arbitrator before the merits of the grievance are heard. Many arbitrators believe that questions of substantive arbitrability can be raised at any time in the grievance procedure, including at the time of the hearing.

Some arbitrators view raising issues of procedural arbitrability differently. Arbitrators have ruled in the past that if a question of procedural arbitrability is not raised during the grievance procedure, the employer is precluded from raising it at the hearing. Management should determine if there is an issue of arbitrability early in the grievance procedure and raise that issue throughout the grievance procedure.

Besides substantive and procedural questions that have a bearing on arbitrability, there are other questions that affect arbitrability. If the union attempts to arbitrate the same grievance or the same question of contract interpretation a second time, management can challenge the arbitrability of the matter under the res judicata doctrine.

The arbitrator is not required to abide by the awards of other arbitrators. The weight that the arbitrator will afford other arbitration awards is solely within the discretion of the arbitrator.

Management must show that the facts and issues are the same in both grievances and that the contract language to be interpreted has not changed. In grievances involving contract application (i.e., discipline),
arbitrators will not normally apply the doctrine of *res judicata*, since the facts underlying the grievances can be quite different. However, in grievances involving contract interpretation, arbitrators are unwilling to interpret a contract clause that was previously interpreted by another arbitrator, especially if the contract language has not changed.

Another way to challenge arbitrability of a grievance is on the grounds that the grievance is moot (i.e., that the grievance has been resolved). If the grievant has been given the remedy sought and an interpretation question remains, some arbitrators will decide that the grievance is not arbitrable. Mootness also can occur when the grievance has been settled but, for one reason or another, the union insists on arbitration or the grievant refiles the same grievance.

**Review, enforcement and validity**

Another impact of the trilogy on arbitration and the courts is that it defined the courts’ power and rights in reviewing arbitrators’ decisions. The U.S. Supreme Court gave courts limited powers to review arbitration awards. The courts are not permitted to review the merits of the awards and, therefore, a court cannot substitute its judgment for that of the arbitrator.

While the arbitrator has the authority to decide the merits of a grievance, the courts alone are empowered to enforce arbitration awards. After an arbitrator issues an award, the arbitrator’s job is generally done. If, for example, the employer refuses to implement the award, the arbitrator has no power to enforce it. The power of enforcement lies solely with the courts. If the award is unclear or ambiguous the arbitrator may, with the mutual consent of both parties, clarify the award. However, he or she is not legally required to do so.

The courts can overturn an arbitrator’s award only for reasons prescribed by the appropriate arbitration statute. For example, one of the parties can ask the courts to vacate the award. Vacating an award means that the court is being asked to set the award aside, making it null and void.

Under RC 2711.10, an award can be vacated by petitioning the common pleas court in the petitioner’s county. An award can only be vacated on certain specified grounds:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality or corruption on the part of the arbitrator(s);
- the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown; in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the right of any party has been prejudiced;
- the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The grounds for vacating an award under the Ohio statute are almost identical to those stated in the U.S. Arbitration Act, enacted in 1947. Since the grounds for vacating an award are so similar, Ohio’s courts will look at U.S. court decisions for guidance in vacating an award.

The first two grounds for vacating an arbitrator’s award under Ohio’s statute — fraud or corruption, and partiality — were designed to maintain the integrity of arbitration. In reviewing a request to vacate an award, the courts presume that awards are made honestly and without fraud. However, if an award is procured by fraud or corruption, the courts will always vacate such an award.

The courts’ view of vacating awards due to the partiality or bias of the arbitrator is not so absolute. Generally, the courts believe that in order to vacate an award for bias, the bias must be blatant. In one Supreme Court case, however, the court vacated an award not because of blatant bias, but to protect a party from even a “risk of partiality.”

The courts have also vacated awards when the arbitrator did not disclose the arbitrator’s previous business relationship with one of the parties to the arbitration. In one case, where the arbitrator did not disclose that he had represented the union only six months before the hearing, the court vacated the award. However in another case, where the arbitrator did not disclose that he had represented one of the parties several years earlier, the court did not vacate the award.

The conduct of the arbitrator in the hearing can be another reason to invalidate an award. According to the statute, an award can be vacated if the arbitrator refuses to postpone the hearing upon one of the parties showing sufficient cause. In one case, an arbitrator’s award was vacated when the arbitrator refused to postpone and continued the hearing after the employer’s representative became ill and was rushed to the hospital. In another case, however, an arbitrator’s award was not set aside when the arbitrator refused the employer’s request for a continuance so that a criminal charge could be resolved before the discharge hearing.

If the arbitrator did not allow pertinent and material evidence to be presented and one of the party’s
rights were prejudiced, the courts may vacate the award. This is one of the reasons why arbitrators do not require the parties to follow the strict rules of evidence in a hearing.

By far the most common ground upon which an arbitrator’s award is vacated is that the arbitrator exceeded his or her authority. The authority of the arbitrator arises out of the contract between the parties and the issue submitted to the arbitrator. The contractual language and the issue submitted fashion the arbitrator’s jurisdiction. If the award exceeds the jurisdiction of the arbitrator, it may be invalidated by the courts.

The primary source of an arbitrator’s authority is the arbitration clause. Many contracts limit the arbitrator’s powers in the arbitration clause. Many arbitration clauses will state that the arbitrator cannot add to, subtract from or modify any provisions of the contract. This type of language prevents the arbitrator from changing contract language through the award. If the award changes the contract language, the arbitrator has exceeded his or her authority, invalidating the award.

Often courts have stated that an award should not be upset if it “draws its essence from the labor agreement” and if the arbitrator was not exercising his or her “own brand of industrial justice.” This standard has been applied by the courts to awards that modify discipline, as well as other contractual disputes.

Some contracts specify that an employee will be terminated for certain infractions. When this type of contractual provision is present, courts have set aside awards where the arbitrator found “just cause,” but modified the termination to a suspension, believing that the discipline was too harsh. In this situation, the courts generally hold that the arbitrator’s award did not draw its “essence” from the contract, and that the arbitrator was exacting his or her own form of “industrial justice.”

At an arbitration hearing, the parties usually will inform the arbitrator as to what issue(s) the arbitrator must decide. This is frequently done through a submission agreement. The arbitrator is constrained to decide only the issue presented. If the award goes beyond the scope of the submission, the courts will either vacate or modify the award or remand the case to the arbitrator, instructing him or her to rule only on the submitted issue.

The arbitration hearing

By the time a matter reaches the arbitration stage, both parties have undoubtedly spent a significant amount of time discussing the grievance. They have become familiar with all the facts and arguments surrounding the grievance by taking part in the various steps of the grievance procedure, and by conducting their own investigation and analysis.

Arbitration can be seen as advantageous to both sides because a neutral arbitrator, usually an individual familiar with the general subject matter and legal issues involved in the grievance, will decide the case and finally put the matter to rest. Arbitration can also be seen as a disadvantage because both parties must communicate their side of the story to the arbitrator, who usually knows nothing about the dispute until the hearing begins.

Selecting an arbitrator

The selection of an arbitrator is very important. The methods for selecting an arbitrator vary from contract to contract. Many contracts contain a reference to the Labor Arbitration Rules of the American Arbitration Association (AAA).

Most labor arbitration provisions give the parties to the contract the right to participate in the selection of an arbitrator. The facts and circumstances of the case and full information about available arbitrators must be carefully considered by the parties before the selection is made.

AAA will provide the parties with names of arbitrators who have had experience in the specific issue that is the subject of their grievance and pending arbitration. This system relies heavily upon the judgment of the tribunal administrators of the AAA regional offices. Because AAA has gained a solid reputation for absolute impartiality of its conduct throughout the arbitration process, it is commonly designated in collective bargaining agreements as the method for selecting an arbitrator.

AAA’s reputation is based in large part upon the informed judgment of its regional directors and their staff, who keep informed of labor arbitrator activities in their own area. They know the availability of arbitrators, and the kinds of cases each are best suited to handle. Armed with that information, they then compile a list of arbitrators that they feel can best handle the case at issue. This list is submitted to the parties, and an arbitrator is selected from that list.

The following procedure is used by AAA for the selection of an arbitrator:

● Upon receiving a demand for arbitration, AAA sends a copy of a specially prepared list of
potential arbitrators to each of the parties. General information about each arbitrator is attached to the list.

- The parties cross off unacceptable names and indicate their preference as to those remaining.
- After the lists are returned by the parties, AAA determines which of the arbitrators is most acceptable. That arbitrator is then contacted and asked for available dates.
- If none of the arbitrators on the list is found to be mutually acceptable by both parties, a second list can be requested. If the parties cannot agree on a name from the second list, AAA has the authority to appoint an arbitrator so long as that arbitrator’s name was not crossed off by either party as unacceptable.

**Preparation for the hearing**

Effective presentation of the facts and arguments must begin with thorough preparation. This includes the following eight steps:

- Review the original statement of the grievance and its history through every step of the grievance procedure.
- Read the entire collective bargaining agreement, giving particular attention to the provision(s) of the agreement upon which the grievance is based. Determine additional provisions that may be relevant to the grievance.
- Gather all documents and other evidence that may be needed for the hearing. Make copies for the arbitrator and the other party of all relevant documents that are expected to be introduced as evidence. If any of the documents intended to be introduced are in the possession of the other party, request that they bring them to the hearing. If necessary, the arbitrator can subpoena documents and witnesses if they are not voluntarily made available.
- Interview all witnesses and make sure they are familiar with the case and the arguments upon which it will be based. Engage in mock testimony, including cross-examination, so that they can become comfortable with the testimony they will be asked to give at the hearing.
- Prepare a witness statement or testimony summary for each witness expected to be called. This will ensure that no testimony is inadvertently omitted at the hearing, and that all points are covered.
- Understand the arguments that the other side will likely make and be prepared to counter those arguments.
- Review the case with other members of management to get new perspectives on the issues involved. This may also help to reveal arguments or ways to approach the case that may not have yet been considered.
- Locate and review published opinions on the issues involved to determine what the prevailing school of thought is on such issues, and to find other arguments that may be relevant. AAA has published summaries of thousands of labor arbitration awards in its monthly publications. These can be used to become educated on the issues and possibly bolster the case.

**The arbitration hearing**

After consulting with the parties and the arbitrator, the date of the hearing is set and the parties are officially notified by AAA. The order of the proceedings then normally is as follows:

- opening statement by the party who filed the grievance, followed by a similar statement by the other side;
- presentation of witnesses by the party who filed the grievance, with cross-examination by the other side;
- presentation of witnesses by the responding party, with cross-examination by the other side;
- summation or closing statements by both parties, usually following the same order as in the opening statements.

In termination-type hearings, management will have the burden of proof and must present its case as if it were the grieving party.

**Opening statement**

If there are facts about the circumstances that gave rise to the grievance that are undisputed, the parties may stipulate to those facts. This saves time and money for everyone involved by eliminating the need to establish facts that both parties agree exist.
The opening statement sets forth the foundation of the testimony that the witnesses will give and assists the arbitrator in understanding the relevance of the evidence. The opening statement should identify the issues to be decided, indicate what is to be proved and specify the relief sought. It should also refer the arbitrator to relevant contract provisions and any other language that the arbitrator should consider. The request for relief should be specific and the arbitrator’s authority to grant the requested relief under the contract should be clearly defined.

Because of the importance of the opening statement, it may be presented in writing with a copy for the other side. It also is presented orally in order to emphasize the issues and arguments before the arbitrator.

**Document presentation**

Documentary evidence may be an essential part of the case. The collective bargaining agreement, or relevant sections of it, should be submitted. Other documentary evidence may include personnel records, medical reports, wage information and pertinent correspondence. Each piece of documentary evidence should be submitted, its authenticity established and its relevance explained. Copies should be submitted to both the arbitrator and the other party.

**Witness examination**

Generally, the facts at issue are presented through direct examination. Each witness is identified, qualified as to the facts about which he or she will testify and permitted to give testimony. Although leading questions (i.e., questions that suggest the answer sought by the examiner) are not allowed in a court of law, they are allowed in an arbitration. Leading questions are not as persuasive, however. Questions are also helpful in emphasizing important points or getting the witness back on track as to the testimony at issue.

**Cross-examination of witnesses**

In addition to direct testimony, each witness is subject to cross-examination. Cross-examination serves many important functions, including disclosure of facts the witness may not have stated under direct examination, correction of misstatements, placement of facts in context, reconciliation of contradictory statements and attacks on the credibility of other witnesses.

**Closing argument**

After all evidence has been submitted and testimony given, both sides will have the opportunity to present a closing statement or summation. The purpose of the closing statement is to summarize the facts, issues and evidence presented, and to state why the arbitrator should rule in favor of the presenting party.

The closing argument can be especially critical if the arbitrator does not allow arguments to be presented in the opening statement. Some arbitrators only allow presentation of the issues and the facts in the opening statement, reserving presentation of argument for the closing statement. In that case, the closing statement can take on enormous importance as the only vehicle for setting forth the party’s arguments and contentions as to why it believes its position is correct.

**Post-hearing procedure**

After both sides have had the opportunity to present their evidence and arguments, the arbitrator will declare the hearing closed. Under AAA rules, the arbitrator has 30 days to render the award, unless the collective bargaining agreement contains some other time limit.

Some arbitrators require post-hearing briefs to be filed. Even if such briefs are not required, the parties may request the opportunity to file them as a final attempt to present their evidence and arguments to the arbitrator. If post-hearing briefs are to be filed or additional documentation requested, the arbitrator can set appropriate time limits. In that case, the hearing technically remains open until all such documents are received.

Post-hearing material is transmitted through the AAA regional office. The parties should not unilaterally communicate with the arbitrator after the close of the hearing. Communication can be made with the arbitrator only when both parties are present. AAA will see that the post-hearing briefs and any additional documentation are forwarded to the arbitrator for consideration before making a decision.

**The arbitration award**

The decision of the arbitrator on the issues presented to him or her under the arbitration provision of the collective bargaining agreement is referred to as the arbitration award. If the arbitration is binding in nature
(as opposed to merely advisory), the award will dispose of the controversy finally and conclusively. The parties must recognize and adhere to the arbitrator’s decision.

The arbitration award should be limited to the issues presented to the arbitrator, and should provide a final resolution to each issue. The award is generally accompanied by an opinion that reviews the evidence submitted and the arbitrator’s reasoning in making the award.

The arbitrator’s power and authority ends with the rendering of the award. Once it is made, the award may not be changed by the arbitrator unless the parties mutually agree to reopen the case. The case may be reopened if the award is ambiguous and needs interpretation or clarification. In that case, the parties must agree in writing to the reopener, specify the precise matter questioned and file the agreement to reopen with AAA.

Sample policy and contract provisions

Sample contract language #1

**Noncertified**

The board and the association understand and agree that RC 3319.081 pertains to the classified employees of the school district.

Newly hired regular classified employees, including hourly rate and per diem employees, shall enter into written contracts for their employment that shall be for a period of not more than one (1) year.

If such employees are rehired after the one- (1) year contract, their subsequent contract shall be for a period of two (2) years.

If after the completion of the two- (2) year contract provided in B of this Article, the contract of such school employee is renewed, the contract shall be for a continuing period of time.

Employee contracts may be terminated by a majority vote of the board of Education only for violation of written rules and regulations as set forth by the board of education or for incompetence, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance or nonfeasance, or the employee may terminate his or her contract by serving notice to the treasurer of the board thirty (30) days prior to the effective date of the termination.

Any disciplinary action affecting an employee, other than nonrenewal or termination, shall be administered with the intention of improving the employee’s performance. The board agrees that, whenever possible, a disciplinary problem shall initially be resolved between the employee and his or her immediate supervisor.

All disciplinary action, conferences or verbal reprimands affecting bargaining unit members shall be administered in private.

The employee may be represented by a representative of the employee’s choice at any disciplinary interview, meeting or hearing contemplated by this article.

Said suspension or termination shall occur only after the employee has been verbally warned on the first occurrence and warned in writing on the second such occurrence, unless the act is deemed by the superintendent and board of education to be severe enough to warrant immediate suspension or termination. Prior to suspension or termination, the superintendent will give the reasons for suspension or termination to the unit member in writing and will afford him or her an opportunity to reply. Discipline is subject to the grievance procedure only for suspensions and terminations.

Employees or their representative shall have access to any information permitted by statute that is contained in the employee’s personnel file.

Sample contract language #2

**Both certificated and noncertificated**

Employees shall not be suspended and/or disciplined without compliance with the progressive discipline procedure set forth below:

Based upon the severity of the situation, disciplinary action may warrant deviation from the below procedural orders:

- oral reprimand — noted in personnel file,
● written reprimand,
● five-day suspension without pay,
● termination.

Any written record of disciplinary action will be kept in the employee’s active personnel file. After three (3) years, the employee may request removal of disciplinary records from their file if no intervening disciplinary action has occurred.

No employee shall be subject to discipline except for just cause, commencing with Section B (written reprimand) in the above procedure.

Sample contract language #3

**Both certificated and noncertificated**

In the event of job performance deficiencies or unacceptable behavior, the supervisor shall hold a private conference with the employee for the purpose of correcting whatever problems exist.

If the employee’s job performance deficiencies are not corrected or if the unacceptable behavior does not cease, the supervisor shall give the employee a written reprimand that the employee must sign. If the employee refuses to sign, it shall be so noted. The employee may request that this reprimand be removed from his or her file after two years following the incident if no further incidents occur.

If the employee’s job deficiencies are not corrected or if the unacceptable behavior does not cease, the employee will be referred to the assistant superintendent or his or her designee to determine if the problem is serious enough to warrant termination or suspension. The employee shall be allowed to have the representation of a fellow employee at this meeting.

Nothing contained herein shall limit the Administration from taking appropriate disciplinary steps necessary if it is determined that the employee’s unacceptable behavior could result in harm to students or others.

No employee shall be reprimanded or otherwise disciplined in the presence of other employees or in public. Any and all events related hereto shall be conducted in private and shall remain confidential.

Sample contract language #4

The board of education sets forth the following progressive disciplinary procedure in order to ensure the fair, timely and equitable treatment of its employees in disciplinary action. Each employee may have their chapter representative present at all levels of this procedure, and shall be subject to the grievance procedure.

Each employee, in the event that the board seeks to take disciplinary action against them, shall be treated through the following procedure:

● First occurrence — Informal counseling with employee by the supervisor. This session will cover only the issue that necessitated this session.
● Second occurrence — Verbal reprimand by the employee’s supervisor. This verbal reprimand will be recorded; yet, if no further infraction occurs, the record will not be placed in the employee’s personnel file.
● Third occurrence — Disciplinary notice sent to the employee by the supervisor. A copy of this notice will be dated and sent through the school system mail to the affected employee.
● Fourth occurrence — Five-day suspension. Each employee that continues the undesired behaviors necessitating the use of this policy after the third occurrence shall be suspended for five work days without pay. Upon the employee’s return from suspension, a meeting will be held with the employee and the employee’s representative and supervisor to discuss the problem and to design a specific course of correction for the affected employee. The business manager as the board’s designee shall be responsible for suspending the employee.

Each employee that continues to violate school board policy after a meeting has been held after the fourth occurrence shall face further appropriate disciplinary action up to and including termination.

The employee’s immediate supervisor, at his or her option, may use a lesser degree of discipline that is not specified in this procedure for non-related infractions or greater degrees of discipline for gross misconduct by the employee (intoxication on the job; theft of school, employee or other property; intimacy with students; destruction or threat of destruction of property).

Glossary
A

**Adjudication** — Sitting in judgment; distinguished from the mediation function; settlement of a dispute by the imposition of terms that result from taking of testimony and findings of fact. Adjudicatory functions include determinations in representation, scope of bargaining and unfair labor practice cases. Adjudication is legal in nature; dispute resolution is compromise oriented and based on voluntarism.

**Advisory arbitration** — The terms of settlement rendered by the arbitrator are in the nature of recommendations that the parties are not obliged to accept.

**Arbitration** — Dispute resolution in which neutral third party renders a decision on an issue submitted by the parties.

**Binding arbitration** — The parties are compelled to accept and abide by the terms of the arbitrator’s award that is enforceable in the courts.

**Compulsory arbitration** — Mandated by statute for the resolution of impasses. This is distinguished from voluntary arbitration that is invoked by the parties themselves through their negotiated or jointly formulated agreement to arbitrate.

**Final-offer arbitration** — A form of interest arbitration in which a neutral third party (arbitrator) selects one side or the other’s last proposal(s) as a means of imposing the terms of settlement.

**Grievance arbitration** — Settlement of grievances by submission of a dispute, usually involving interpretation and application of a collective bargaining agreement, to a neutral third party.

**Interest arbitration** — Procedure for the resolution of disputes over the terms of new contracts; distinguished from grievance (or rights) arbitration. A neutral third party is chosen by the parties or appointed by an administrative agency as in other forms of arbitration.

B

**Bargaining unit, collective bargaining unit** — A group of employees organized by a union or other association for the purpose of negotiating with the employer. It is voluntarily recognized by the employer and/or certified by an administrative agency.

**Binding arbitration** — See arbitration.

C

**Cease and desist order** — An order prohibiting continuation of an act (e.g., one that constitutes an unfair labor practice). Such an order is made as a remedy.

**Collective bargaining (collective negotiations)** — The process in which representatives of labor and management meet to establish terms and conditions of employment for employees in a bargaining unit. Collective bargaining is defined under the National Labor Relations Act (NLRA), Section 8(d) as “[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment ... and the execution of a written contract ... but such obligation does not compel either party to agree to any proposal or require the making of a concession.”

**Collective bargaining agreement** — The document incorporating the results of the negotiations between the parties; a written instrument setting forth the terms and conditions of employment, dispute resolution procedures and any other accords resulting from collective bargaining. Also known as the contract or agreement.
Compulsory arbitration — See arbitration.

Conciliation — A process through which impasses are resolved by a neutral third party; distinguished by some from mediation and characterized as less actively intervening than mediation. See mediation.

Constitutional rights — Rights belonging to every United States citizen and employee under the Constitution.

Contract administration — Living under, interpreting and applying the collective bargaining agreement.

D
Deferral policies — Administrative rationale for allowing or requiring parties to exhaust other procedures or avenues prior to proceeding before the agency. For instance, an unfair labor practice charge may also be the subject of grievance arbitration under the parties’ collective bargaining agreement.

Demand (for arbitration) — The notice one party serves on another or on the administrative agency expressing its intent to carry a dispute to arbitration.

Discharge — Termination of an employee’s job status by an employer.

Due process — The procedural protections that are enjoyed by all people, including government employees, in their relationships with their various governments. These are substantive protections that constitutions and statutes afford public employees.

Duty of fair representation — Applies to a union’s duty to represent all members of a bargaining unit that the organization has been designated to represent.

Duty to bargain — See unfair labor practice.

E
Employee handbook — Set of rules, regulations, and policies established by the employer to be followed by each employee.

Employee organization — See labor organization.

Exclusive representation — Distinguished from members-only or proportional representation by more than one labor organization. The benefits of bargaining are equally applied to all employees in the unit. Not only is no other union permitted to represent the employees, but the individual employee is not free to negotiate his or her own contract with his or her employer.

F
Fact-finding — An impasse resolution tool. Typically, the fact-finder is expected to analyze the issues between the parties in order to provide them with a factual statement of issues, supporting information and recommended terms of settlement. Fact-finding has been compared to advisory arbitration.

Final-offer arbitration — See arbitration.

Fair representation — Each employee included in a bargaining unit, whether or not a member of the representative union, has a right to be fairly represented by the union’s agent(s) during grievance and arbitration proceedings.

Form letter — Employer standardized letter created for different employee notification purposes (e.g.,
discipline, discharge, etc.).

G

**Grievance** — A complaint by an employee or a union, sometimes by the employer or employer association, arising out of interpretation or application of the collective bargaining agreement; covers any aspect of the employment relationship. Many collective bargaining agreements limit those issues that may be termed grievances by defining the term with some precision.

**Grievance arbitration** — See arbitration.

**Grievance procedure** — The mechanism outlined in the contract, including grievance definition, the steps to be followed, personnel levels and parties to be involved, as well as any of the other details the parties specify for the orderly resolution of grievances.

I

**Impasse** — Stalemate or deadlock in collective bargaining between management and labor representatives. This is a point at which either or both parties to negotiations determine that no further progress toward settlement can be made. In some statutory schemes, impasse is technically declared at the point in time by which the parties should have reached agreement.

**Interest arbitration** — See arbitration.

**Investigation** — A process of discovering facts and circumstances behind alleged violations of rules or regulations of management.

**Insubordination** — A willful or intentional disregard of the lawful and reasonable instructions of the employer.

J

**Jurisdiction** — The extent or range of authority; usually arises in connection with an agency’s or neutral’s authority to act.

**Just cause** — This standard has come to denote a variety of “due process” safeguards to assure that there is good and sufficient reason for imposition of discipline in any given case. Burden of proof of the offense falls on the employer.

L

**Labor organization** — NLRA (at 29 U.S.C. Section 152(5)) defines a labor organization as “any organization of any kind, or any agency or employee representative, committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.”

**Limited right to strike** — Under a limited-right-to-strike provision, unions must first exhaust the impasse-resolving mechanisms of mediation and fact-finding, and a strike may be enjoined by the courts if it would jeopardize the community’s health, safety or welfare.

M

**Make whole remedy** — Undoing a wrong so as to restore the employee to his or her status before the objectionable or erroneous action was taken. Back-pay awards are seen as making an employee whole for lost wages.
Management prerogative — Areas in which employers are held to have the right to make unilateral determinations. These are generally concerned with the operation of the business in terms of technology and product, production schedules, etc. This is distinguished from terms and conditions of employment in the context of scope of bargaining determinations.

Management rights clause — A contract provision spelling out areas where the employer reserves discretion or expressing areas over which the employer retains control.

Managerial employees — Defined under NLRA as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.

Mandatory or required subjects for bargaining — See also scope of bargaining. Those areas held by the administrative agency or the courts to be subjects over which the employer must agree to bargain if the union raises them. This is distinguished from permissive subjects for bargaining.

Mediation — Involvement in a labor dispute by a neutral third party who attempts to assist parties in resolving their dispute by suggesting possible areas of compromise, bringing a different point of view, clarifying issues and other techniques designed to bring the parties closer together and narrow the disagreement. The function of mediation is to assist the parties by being creative and innovative in finding areas of agreement and compromise to reach final resolution of the impasse.

Preventive mediation — Using the techniques of mediation before disputes arise. This includes such devices as labor-management committees, informal pre-negotiations discussions, use of the mediator as a consultant and training programs for contract administrators.

Med-arb — A combination of mediation and arbitration in which a neutral party works to bring the parties together, but retains the power to impose terms of settlement. When a mediator selected by the parties is unable to effect a joint resolution, he or she issues a binding award on the issues remaining in dispute.

N

Actual notice — Can be express or implied. Express includes all knowledge to a degree above that that depends upon outside inference, or which imposes upon the employee the further duty of inquiry. Implied notice imputes knowledge to the party because he or she is shown to be conscious of having the means of knowledge.

Constructive notice — Information or knowledge of a fact imputed by law to a person because he or she could have discovered the fact by proper diligence, and the situation was such as to cast upon him or her the duty of inquiring into it.

P

Penalty — Punishment imposed upon the violation of a rule, regulation or policy of the employer.

Permissive or optional subjects for bargaining — Subjects about which the parties may bargain if they choose; distinguished from mandatory subjects for bargaining.

Preventive mediation — See mediation.

Probationary employee — An employee whose employment status is not yet permanent. The probationary period is a trial period.

Progressive discipline — A method of imposing progressively more severe penalties on employees each time any given offense is repeated.
Reasonableness — Standard used to determine the accepted behavior, rule or regulation. It is typically judged by what similarly situated people in the locality do under the same or similar circumstances.

Remedy, remedial order — An order of an administrative agency, court or arbitrator to correct a defect; relief or cure.

Scope of bargaining — The range of subjects dealt with by union and management and covered in the collective bargaining agreement. Subjects within the scope of bargaining may be mandatorily or permissively negotiable. Illegal subjects of bargaining are outside the scope of bargaining.

Stipulation — Specification of points on which there is agreement.

Subjects for bargaining — See scope of bargaining and mandatory, illegal and permissive bargaining.

Tenure — Status in a job; permanent status conveying certain job rights. An employee may not be removed from a tenured position without due process.

Terms and conditions of employment — Generally speaking, this term includes wages, hours, working conditions and fringe benefits. An issue may be a term or condition of employment if it has a substantial impact upon an employee’s wages, hours, or working conditions.

Time lines — Within specified time limits; within a certain period.

Unfair labor practice; unfair practice — Defined as various offenses under different statutes that may be committed by either management or unions. Both employers and employee organizations are prohibited from engaging in certain practices by RC Chapter 4117.

Endnotes

1. Discipline and Procedures, James Redecker.
4. Id.
5. Id.
6. Id.
8. Id.
10. Supra, note 7.
11. Id.
12. Id.
15. Id.
18. Id.
21. Id.