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Inside Pandora's Box — Essential Elements of Effective Dispute Resolution in the Workplace

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The purpose of this article is to identify and briefly describe the elements and processes of effective dispute resolution in the workplace. While there are many parallels, and some significant departures, between unionized and non-union settings, the major setting will be assumed here to be non-unionized and specific comment will address the differences where appropriate. In either context, it is the author's firm conviction that the major distinction in this area is not between union or non-union but in the distinction between the resolution of disputes within the workplace and in society-at-large.

In society-at-large, two parties might literally "meet by accident," have their "day in court" to resolve the facts of what happened, who is responsible, and what the remedy shall be; and then, ultimately go on with their lives. In the workplace however, there is not such a neat beginning, middle and end. Unlike civil litigation in today's large and frequently anonymous society, workplace disputes are more akin to those within a small community where what may have happened long before a particular event will effect the participants' perceptions, and what happens throughout the resolution process will become woven into the fabric of relationships within that community continuing its effect well past the time of its formal conclusion. A biased, overbearing, evasive or dictatorial style by a manager, a tendency to "play fast and loose" or to cut corners by an employee, or the temptation of either to succumb to stretching the truth up to outright falsification in the interest of a short-term "win" will have long-term effects on reputations, relationships and the ability of the workplace community to function. The first essential element of a workplace dispute resolution process therefore is to remember that you are in a small community with a long institutional memory from which there is no going back and the only revision occurs over the natural passage of time.

In non-union settings, the dispute resolution process is typically included in the employer's personnel policies that identify the terms and conditions of the workplace, benefits and other expectations including provisions for termination of employment or other disciplinary actions. The employing entity or individual department managers retain the right, whether specified or not, to implement additional rules and processes necessary to the functioning of their specific areas of responsibility. In unionized settings, the collective bargaining agreement will reflect this retained right through a "management rights" clause which is moderated in its implementation by the specific stages of an established grievance procedure with fixed time limits for each step.

The issues that might be the basis of a complaint or grievance are the same, for the most part, in unionized and non-union settings. These include as examples: promotions; performance evaluation; calculation or payment of wages; health or safety conditions of equipment; scheduling of work; seniority rights; vacation accrual and scheduling; insurance coverage; attendance; job transfer; rest or break periods; personal or sick days; training or continued education; discrimination in application of policies; discipline or termination of benefits.

The starting point in both settings for a dispute resolution process

is the employer's personnel policies, and the union contract where applicable, with particular attention to the time limits where they are specified. In a unionized setting the collective bargaining agreement controls the procedure and prevails over any contradictory terms in the policies. If the union contract is silent, or in the absence of a union contract, the policies control both the substantive terms of employment and the procedure for resolution of any disputes over their interpretation or application.

The actual steps of a grievance or dispute resolution procedure have become so consistent over the years that these procedures have

become standard in both non-union personnel policies and collective bargaining agreements. The first step, with a focus on local resolution at the lowest level, is almost universally a verbal notification by the employee to his or her immediate supervisor of a grievance or, in any other words, a disagreement over the interpretation or application of policy. In the interest of promptness in the resolution of outstanding issues, and to preserve the freshness of the parties' recollection, there is usually a very brief time limit of five to seven days in which to verbally initiate a grievance or dispute resolution process.

In any effective dispute resolution process, the time limits are always identified at each step and further defined as either calendar days or working days. As in civil litigation, time limits are critical in the initiation of the process by an employee, in the processing of workplace disputes and in the investigation and response by a manager. While a "default" based on the technicality of a time limit does not serve the purpose of disclosure and settlement of the underlying issue, the general view is that a higher goal of workplace functionality is served by not letting disputes fester while memories fade.

After the first verbal notification of a dispute, within a specified time limit, and the immediate supervisor's response, also within a specified time limit, to either compromise and adjust the grievance or to deny it, there follows a series of steps designed for progressively further investigation, at progressively higher levels and greater incentive for resolution of the issue. These steps may be identified in a variety of ways; numerically as Step 2, Step 3, Step 4 etc., or by level of participation of Department Head, Director, Human Resources, Vice-President etc. The purpose and the participants at each step will be described in detail in the personnel policy; time limits for each meeting and response will be specified; and, time limits for appealing or moving the issue on to the next higher level in the process will also be specified.

Popular myth has it that in unionized work settings, employees cannot even speak to managers without a union representative present. This is wrong. Whether the "myth" is put forward by an overly controlling union representative or by an overly anxious manager, the National Labor Relations Act has not superseded the First Amendment of the United States Constitution.¹

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Any member of a union-represented bargaining unit does have the right under Federal labor law to present and settle their individual grievance with or without a union representative present; but the resolution may not alter the terms of the collective bargaining agreement between the employer and the union without the union's participation and agreement.² Collective bargaining agreements also typically require that the union, through its grievance committee or "shop-steward" be present and participate in the processing of a grievance after the initial verbal level.³

In both the union and non-union setting, after the initial verbal communication of a dispute, all correspondence is, by policy or by contract, in writing; and these written complaints or grievances and responses at each step serve as the formal documentation of the process.

At the first meeting or step after the verbal notification and continuing through the final internal step of the process, the purpose is discovery of the facts, putting those facts into the context of the workplace policy or contract provision, identifying each parties' role or stake in the circumstance and attempting to work a resolution of the initial complaint or grievance. Some of the basic investigatory steps for all parties involved include: identification of parties and witnesses; names, job titles, work records, personnel files; time, day and date of any "incidents" or conversations and all pertinent events, prior to and subsequent to the particular dispute. Pay particular attention to whether it was weekend, holiday, shift time, etc. Pay even greater attention to the established time limits for the process based on these times; locations of events, floors, departments or other means of identifying and describing an incident in perspective of the overall workplace (e.g. did a conversation take place in a private office, or at the circulation desk?); what is the basis of the grievance in either the policy or the contract provision; what remedy is available to address the dispute.

In the course of processing a dispute and creating the documentary record through the investigatory stages, and recognizing that a resolution is possible and preferable at each stage, utilize planning techniques. They will help you do a better job and to maintain focus on the issues, remedies and strategies.

- Keep documentation out of the grievance form or response. Have the documentation available for use in meetings and have copies to share as appropriate but do not construct long, elaborate "he said ... she said ..." statements of the case. Characterize the case, the events and the response in brief, general terms with specific reference to the sections of the policies or contract that support the characterization. State what remedy is desired or that such a remedy is not appropriate and leave the justification for the face-to-face meetings and/or the next step of the process.
- Use short, positive statements to write the grievance or the response. Long sentences are hard to read, irritating and confusing at the next higher level of review. Stick to short, clear, declarative statements.
- Use simple, descriptive words — not "legalese". Let the research, preparation and logic of your position convince the reader.
- Be objective and use proper names or the third person (i.e. he, she, him, her) rather than inflammatory characterizations or personal pronouns (i.e. you, me, I).

In both union and non-union settings, grievances or disputes will present one of two types of issue — either an interpretation of policy or contract, or a disciplinary issue. The policy or contract should be consulted first as to the responsibility of each party in presenting their documentation for each type of issue. In the absence of any specific provision to the contrary, in a contract or policy interpretation dispute, it is the responsibility of the employee to go forward with the documentation, proof and justification for his or her grievance or complaint and remedy. In the case of discipline, again unless there is specific contract language or policy to the contrary, it is the employer's responsibility to go forward and carry the burden of proof to justify their action.

Following are some basic principles of contract or policy interpretation⁴:

- The meaning of clear and unambiguous language should not be altered.
- Ordinary and normal meaning of words should be applied.
- Language should be interpreted in the context of the entire agreement or policy.
- Harsh, absurd or nonsensical results should be avoided.
- If one or more of a class is expressed, the presumption is that others are to be excluded.
- Where general words follow a listing of specific terms, the general words will be interpreted to include or cover only things of the same nature or class as those listed.
- Where there is a conflict between general and specific language, the specific will prevail.
- If an agreement or policy can be construed in two ways, one which will result in a forfeiture of some sort, and one which will not, the one which will not is preferred.
- Custom and past practice is relevant to the extent that it can be shown to be known by all parties and acquiesced to either directly or indirectly through non-action to disclaim it.
- Ambiguous language should be interpreted in a way that is fair and reasonable to both parties rather than to grant one party an unfair or unreasonable advantage.

Most personnel policies, and all union contracts, will in some manner address discipline and/or discharge. The traditional standard is that disciplinary action must be supported by "just cause" and that it is the employer's responsibility to meet that burden of proof. Some behaviors, such as theft, fighting and substance abuse on the job, are often listed as basis for immediate discharge. Otherwise, "just cause" is rarely defined leaving it almost a circumstantial or case-by-case judgment.

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While the absence of an established definition of "just cause" provides flexibility for specific circumstances, discharge or other disciplinary cases frequently present very emotional conflict in the perception of underlying facts which, combined with the risk of economic loss to both parties, makes them the hardest cases to resolve. In a unionized setting, by law and almost universally by contract, there is the right to have a representative present, upon request, with a grievant throughout the investigatory phases of the process which might reasonably result in the imposition of discipline. This is known as the Weingarten rights after a decision of the Supreme Court in the case of the same name.⁵ This right does not automatically extend to non-union settings though, but is frequently incorporated into the language of personnel policies.

Following are some questions to assess the "just cause" of a disciplinary action.⁶

- Was the employee given advance warning of the probable consequences of his or her conduct?
- Was the rule, policy or order reasonably related to efficient and safe operations?
- Was the alleged violation of the rule, policy or order fully investigated before discipline?
- Was the investigation fair and objective?
- Did the investigation disclose substantial proof of guilt?
- Was the employer's treatment even-handed and non-discriminatory?
- Was the disciplinary action reasonably related to the employee's record and to the gravity of the offense?

If, after all of the foregoing steps, investigations, meetings, documentation and analysis there is still an unresolved dispute, the matter must then move on to whatever is defined by contract or policy as the final stage. Here is perhaps the single, most significant distinction between a union contract and the typical personnel policy for resolution of disputes.

In a non-union setting, the final stage of the dispute resolution process is usually at a relatively high level of management such as Vice-President of Labor Relations, Director of Human Resources or the Executive Director of the organization. The role of this person is to undertake a review of all documents, to ascertain relevant facts and to render their final interpretation of the personnel policies and decision on the grievance or complaint. Non-union personnel policies generally conclude their grievance or complaint procedure by characterizing this stage as the final and binding conclusion. In academic institutions, there are frequently provisions for a hearing of certain types of unresolved grievances before a panel drawn from the collective body of the faculty often called the Faculty Senate. And, in some industries, for some types of grievances, usually termination or discharge, some employers have recently added a provision for outside review of those limited cases. The distinguishing characteristic of this level however is that for the vast majority of grievances it remains internal to the organization.

In a union setting one of the bedrock principles on which the grievance procedure is based is that after all of the internal steps have been completed there remains the option of external review of unresolved grievances by an arbitrator, chosen by mutual agreement of the employer and the union, and whose decision will be final and binding. Arbitrators are frequently professors of labor relations or attorneys who, in the course of their careers, have represented both unions and employers and are believed to be familiar with context and interests of both sides and able to remain neutral in their observation of the witnesses and determination of the facts.

The arbitration process is similar to a hearing before an administrative agency. There are usually lawyers for both the employer and the union, but not necessarily. And, there are witnesses, but the formal rules of evidence are relaxed in favor of the broader purposes of get-

ting all of the information out "on the table" and letting the parties debate its significance. At the end of the process, either immediately or after written summaries by the parties, the arbitrator issues his or her decision. By contract, and by law, the arbitrator's decision is considered final and binding and may only be overturned by a court under very stringent conditions.⁷ Arbitration decisions and other resolved or unresolved grievances frequently become the subjects of bargaining at the expiration of a union contract to address and clarify the contract in those areas where there have been disputes during the term of the prior agreement. And then, the process begins anew.

Conclusion

Effective resolution of disputes in the workplace requires the technical skills and analysis summarized here; but more than that alone, to return to the introduction of this article, is the ability and the willingness to listen to the other person's story and to recognize the possibility of another point of view beyond the technicalities of the policies or the contract. Any practitioner of labor law, any human resources manager and especially any labor arbitrator can confirm the large number of grievances that have proceeded needlessly to lengthy and expensive hearings for lack of a simple "I'm sorry" by one party or the unwillingness of the other to accept such a human touch without it being an admission of error, vulnerability or liability.

Remember, the purpose is to resolve disputes, not to "win" them. And, remember also that regardless of where you work, it is a small community.

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Endnotes

¹ A more cynical view is that this "myth" is intentionally fostered to discourage the exercise of rights under the National Labor Relations Act, 29 U.S.C. 151 et seq.

² "... any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievance adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect ...". 29 U.S.C. 159(a).

³ It is a common practice for a manager of Human Resources and International Representative of a union to meet periodically with all of the parties, who are then at the third or fourth step of the grievance procedure in order to settle out as many of them as possible. This process might include dozens or more grievances being worked through at one time. One union, the UAW (United Automobile Workers) refers to these day-long grievance review sessions as "shake-out meetings." The individual grievants and the managers are usually involved, and in any event are always notified. The view from both sides is that a large backlog of grievances is undesirable for everyone.

⁴ For further reading on this subject see Elkouri, Frank and Edna Asper Elkouri. *How Arbitration Works* 4th ed. Washington D.C., Bureau of National Affairs, 1985 and Fairweather, Owen. *Practice and Procedure in Labor Arbitration*, 2nd ed., Washington D.C., Bureau of National Affairs, 1983.

⁵ *NLRB v. Weingarten Inc.*, 420 U.S. 251 (1975).

⁶ See: *Worthington Corp.*, 24 L.A. 1 (1955); *Riley Stoker* 7 L.A. 767 (1947); *Enterprise Wire Co.*, 46 L.A. 359 (1966).

⁷ In a series of Supreme Court decisions known as "The Steelworkers Trilogy" in 1960 it was established that interpretation of labor agreements are for arbitrators and the courts have no business delving into the merits of grievances or overturning arbitration decisions solely because the court might have decided the case differently. The parties bargained for the arbitrator's decision and the decision is legitimate so long as it "draws its essence" from the collective bargaining agreement. A court should refuse to overturn a labor arbitration unless it is clear that the arbitrator exceeded his/her authority. *United Steelworkers v. American Manufacturing*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).