How to Deny a “Grievance” That Isn’t a Grievance to Avoid Losing in Arbitration
By: Kris Hopping
Senior Human Resources Specialist
Coachella Valley Water District

Introduction
It has happened to all of us at one time or another. You come into the office and find a new grievance form sitting on your desk. As you look over the form, you realize that the issue at hand is in fact not grievable. So what do you do? While it may be very tempting to simply write “not grievable” or “no merit” on the grievance form and draw a big smiley face across the page, do not do it! Denying a grievance correctly at the first step is essential to avoiding a loss in an arbitration hearing in the future. This paper will offer helpful suggestions and insights to help you deny grievances the “right” way.

When is a Grievance Really a Grievance?
In Labor Relations Academy II, The Arbitration Process, Bill Kay emphasized the need for every agency to have a very clear definition of a grievance in their Memorandum of Understanding (MOU) with each of their bargaining units. This definition will help you to determine how you need to respond to each grievance that comes across your desk. In each grievance, there is a “presumption of arbitrability.” This means that all employees have the right to take their grievances to arbitration. The only way that this rule would become invalid would be for the employer to prove that the issue is not subject to arbitration.¹

In the book Supervisor’s Guide To Contract Administration And Grievance Handling, author Joseph J. Woodford explains that any time an employer receives a grievance, that employer needs to determine if the grievance has both “substantive arbitrability” and “procedural arbitrability.” Substantive arbitrability refers to whether or not a grievance filed against an employer is covered by the grievance definition in the MOU. To determine substantive arbitrability, you will need to determine whether or not an agency has violated a “past practice” procedure or violated a procedure and/or policy contained in the MOU. The employer needs to also determine “procedural arbitrability.” Procedural arbitrability refers to whether or not all procedures regarding the grievance in question were followed correctly. Examples of procedural arbitrability are determining whether or not the grievant is an employee of the agency, determining if the grievance was filed in a timely manner, and checking to ensure that the correct forms were filed to proceed with the grievance. Presumption of arbitrability covers both substantive grievances and procedural grievances².

What Should You Do When You Receive a Grievance?

Mr. Woodford recommends that you use your agency’s grievance definition to answer the following questions when you receive a grievance:

1. Who may file a grievance?
2. May a group of employees file a grievance?
3. May the union file a grievance? If yes, under what circumstances?
4. Must the grievant be adversely affected?
5. Must the grievant claim a specific violation, misinterpretation, or misapplication of the collective bargaining agreement?
6. Are complaints other than violations of the collective bargaining agreement grievable? If yes, what?
7. Is the subject of the grievance barred from the grievance procedure by an express waiver?³

Each time you receive a new grievance form, check your agency’s definition of a grievance and answer the questions above to determine the validity of that grievance. Often you will find that the issue at hand is a valid concern and you will then take steps to resolve the situation; but what if you find that it is not a valid grievance? For example, you receive a grievance from an employee stating that he should have been paid overtime for working on the weekend despite the fact that his/her position has been classified as “exempt”. No employees at your agency that have been classified as exempt get paid overtime. The grievant claims that the work he did on the weekend does not fall within his/her usual duties, so they should receive overtime pay for the extra work they completed. After reviewing the policies and procedures in your MOU, you find that the section on salaries expressly states that exempt employees do not receive overtime pay. Upon reading that portion of the MOU, you find that the issue is not grievable because the MOU is clear on the overtime issue. You are also not aware of any past practice of paying overtime to exempt employees. Your response to the grievance could be to simply state that the grievance has no merit. Although that would be a quick way to deal with a grievance of this nature, the quick way is not the right way to handle a situation such as this.

As stated above, each grievance has a “presumption of arbitrability.” If a grievance is denied at the first step, the employee has the right to pursue the grievance through all of the steps, including ending up in an arbitration proceeding. Knowing that this grievance could eventually end up before an Arbitrator, take the time to respond to the grievance at this first level in such a way so that you do not have to worry that an Arbitrator will overrule your decision in the future. What steps should you take next to ensure that this does not happen?

Step 1 – Investigate the Grievance

When you receive a grievance, you should conduct an investigation. This is true even when you know a grievance is based on an issue that is not grievable or if the grievance is untimely. Why should you do this? It is very important for you to explain your entire position in regard to the grievance at the initial step. As stated above, if an employee is not satisfied with your decision, s/he always has the right to take his/her grievance to the next step in the process, including eventually, arbitration. By completing a thorough investigation at the beginning of the grievance process, you may uncover information that could be used to build your case, and you will save yourself a lot of headaches in the future.

Remember that you cannot introduce information and/or arguments to an arbitration hearing unless they pertain directly to the facts of the grievance. Any decision made by an Arbitrator will be made on the information provided to the employee though the internal grievance process. By including all of the relevant information from your investigation in your initial grievance response, that information can then be used to explain your decision to the Arbitrator. This will not only give you a stronger case, but if you gather enough information to persuade the Arbitrator that you are correct, you will likely win.

In the example above, your investigation would most likely involve researching past MOUs looking for any variation from the current contract language of “no overtime pay shall be granted to exempt employees.” If you have staff that prepares your payroll in-house, you may want to speak with the employee with the longest service record in the section to see if there had ever been a variation from the policy of not paying overtime to exempt employees. As a final measure, you should speak with the employee’s supervisor to ensure that they did not tell the employee that they would be receiving overtime pay for his/her work on the weekend. By gathering all of the facts regarding the grievance, you will now be able to determine if the grievance is valid.

Step 2 – Determine the Validity of the Grievance

Once you have completed your internal investigation, you now need to determine if the grievance is valid or if it has no merit. As stated in the previous section, it is very important for you to gather all of the necessary facts prior to preparing your grievance response. A thorough investigation will ensure that you make the correct determination as to the validity of the grievance and will also show the employee that you are taking his/her concerns seriously. Be sure to compare your findings with the grievance definition and all of the policies and procedures written in your MOU. If you find during your investigation that the grievance is indeed valid, take actions to correct the situation. If you find that the grievance has no merit, you now need to list the reasons why you reached that conclusion.
For instance, while you were researching the overtime pay example, you discovered that the language in past MOUs has consistently stated that there will be no overtime paid to exempt employees. You spoke with an employee in the payroll department who told you that overtime has never been paid to exempt employees during his entire 32-year career at your agency. Finally, when you spoke with the supervisor of the grievant, you were told that the employee had been told by his/her supervisor that they would not be paid overtime for his/her work on the weekend. After looking at all of your research, it is your determination that the MOU has not been violated and there has been no past practice violation as the agency has never paid overtime to exempt employees. So, you have done your research and made your determination. Now it is time to draft your response.

Step 3 – Respond to the Grievance

Once you have done your research and made your determination, you now need to respond to the employee. As stated above, you need to include all of your reasons for denying the grievance in your initial response. Remember that an Arbitrator will not consider new information at the time of the hearing. A well written response could mean the difference between a win and a loss in an arbitration hearing.

In the overtime example, your response should include the following facts:

1. The MOU expressly states that there will be no overtime paid to exempt employees.
2. No “past practice” existed in regards to paying overtime to exempt employees as no exempt employees have been paid overtime in the past.
3. The employee had been informed by his/her supervisor prior to working on the weekend that they would not be paid overtime for his/her work on the weekend.

After stating all of the reasons for denying the grievance in writing, you can then present your findings to the employee. It is best to do this in a face-to-face meeting. Such a meeting will allow you to explain the reasons for the denial and answer the employee’s questions. It is also likely to improve the probability of gaining the employee’s buy-in as to your findings. If the employee is still unsatisfied, this meeting will also give you a chance to explain the grievance process to the employee and clear up any misconceptions he/she has regarding the next steps in the grievance procedure.4

---

Case Study – Why Didn’t I Get Promoted?

In our agency, we recently had a grievance filed by an employee that directly relates to this topic. The employee had been employed at the Coachella Valley Water District for approximately 2 years. He was classified as a Domestic Water Serviceworker Trainee when he was hired. This position required him to obtain a Water Distribution Grade I Certification from the American Water Works Association within 2 years of appointment. Upon receiving this certification and completing his training period, the employee would then be considered for promotion to the Domestic Water Serviceworker I classification. Shortly after he was hired, the State of California changed the certification requirements for this position. The State of California Department of Health Services began to issue the Water Distribution Certifications and reclassified the Domestic Water Serviceworker I position so that it now required a Grade II certification. The District met with representatives from the union for our general employee unit, Service Employees International Union (SEIU) to discuss the new certification requirements. The result of this meeting was the creation of a new position titled Domestic Water Serviceworker Trainee II which required a Grade I from the Department of Health Services. The employee who filed this grievance obtained a Water Distribution Grade I certificate from the California Department of Health Services. He felt that he should be promoted to the Domestic Water Serviceworker I level due to the fact that that position required a Grade I certification at the time he was hired. The grievance form contained a complaint that the employee had been “denied a promotion upon receiving his Water Distribution Grade I Certification.” Upon receiving his grievance, we followed the steps outlined above to determine our response.

Step 1 – Our Investigation

Our first step was to look at the definition of a grievance in our MOU. At the Coachella Valley Water District, our grievance definition is:

A. “A grievance is defined as an allegation by an employee or a group of employees that the District has failed to provide a condition of employment that is established by this Memorandum, or by a District or departmental policy or procedure. This grievance procedure shall not apply to matters:

1. Covered by the Labor Relations Ordinance, or
2. Concerning Performance Evaluations, except that evaluations may be grieved to the level of the Human Resource Director, or
3. Concerning non-disciplinary oral and written counseling and retraining, or
4. Concerning any discipline or termination covered by the Skelly procedures in Discipline and Termination, or
5. Concerning any other subjects, unless the subject is covered by the expressed terms of this Memorandum or any portion of a District or departmental policy or procedures that relates specifically to wages, hours, and other terms and conditions of employment”.^5

When comparing the employee’s grievance form to our grievance definition, we determined that this was not a grievable issue because no discipline was involved. At this point, we began our investigation into the grievance and its possible merits prior to drawing any conclusions.

**Step 2 – How We Determined the Validity of the Grievance**

We first looked into the certification requirements that the State of California had imposed for this position. The state did not allow anyone to be “grandfathered in” at this level of certification. Therefore, all employees were required to obtain the higher level of certification before they would be considered for promotion. When the new certification requirements were imposed, we met with SEIU to discuss the requirements. SEIU and the District came to an agreement regarding the new requirements and a new position was created that required a Grade I certification. Once the agreement was reached, we held a meeting to discuss the new position and the new certification requirements with the employees. We looked into our grievance records and found that this employee had filed a grievance previously on this issue. That grievance was denied; however the employee had pursued the grievance through all of the levels of the process including the last step in our internal process, a grievance meeting with the General Manager. At all steps in the process, his grievance had been denied. After looking over the grievance form, we determined that this new grievance did not contain any additional information that would require us to begin the grievance process all over again. Once the investigation had been completed, we prepared our response to the employee.

**Step 3 – Our Response to the Grievance**

In drafting our response, we wanted to ensure that we were very thorough and that we included all of the relevant information to present to the employee and his SEIU representative. After reviewing all of the information, we wrote the following list of our responses to his concerns:

1. You have not been denied any compensation or promotional opportunities. The State of California and the United States Federal Government issued mandates as to which levels of responsibility require which level of certification. To meet these mandates, we had to alter requirements for the Domestic Water Serviceworker I and Domestic Water Serviceworker II positions. The Coachella Valley Water District must comply with State and Federal mandates.

2. We have addressed this problem in the 2003-2004 budget and we created a classification for a Domestic Water Serviceworker Trainee II at a SRN 16. This position will be available for Domestic Serviceworker Trainee I's who received Distribution Grade I from the State of California and have met the requirements for promotion into another position. This new classification was presented to and approved by SEIU.
3. You have already discussed this issue with the Human Resources Director, your SEIU representative, the General Manager, and myself. On May 24, 2003, you brought up the issue during a meeting with your supervisors, the Human Resources Director, and your SEIU representative. You also spoke to the General Manager about this issue in a meeting with him at the beginning of June 2003. He wrote a response to you dated June 10, 2003. This issue was not specifically addressed in the response, but the other concerns you had were responded to in the memo. As it has already been discussed with your SEIU representative, and the General Manager, we will not allow the grievance to start over again with Human Resources.

4. Past practice states that promotions are not automatic nor are they guaranteed when an employee receives higher certifications, but are awarded based upon supervisor recommendation and approval by the General Manager. The supervisor recommendation is based on certifications and the performance of the individual.

5. Grievances are to be filed within 15 days of the alleged offense. I received this grievance 2 months after you and I talked about this issue and over 1 month after your conversation with the General Manager.

6. District Ordinance section 07-03-01, states: “A grievance is defined as an allegation by an employee or group of employees that the District has failed to provide a condition of employment which is established by this Agreement or by a District policy or procedure.” Not receiving a promotion is not a condition of employment and therefore does not fall into this definition.

After describing our determinations regarding this grievance, we gave these conclusions: No pay or benefits have been taken from you. The State of California and the United States Federal Government have mandated these changes. SEIU knew about the new certification requirements and the new job classification being created to help resolve this issue. You have already discussed this issue with Human Resources and the General Manager. Finally, we received this grievance beyond the required period for filing had expired and long after the alleged incidents occurred. Because of the reasons listed above, we are denying this grievance.

After preparing this response to the employee we held a meeting with him and his SEIU representative to review our findings. Although the employee was not pleased, he understood that we took his complaint seriously and that our determination was based on facts rather than assumptions. After our meeting, neither the employee nor his SEIU representative pursued the grievance.
Conclusion

It is very important to investigate each grievance completely prior to responding in writing or in person to the grievant. Although a one-sentence response to a grievance stating that it is denied would be a quick but wrong way to handle the situation. If you want to avoid losing in arbitration, remember to investigate each grievance to determine its validity and draft a complete response to the employee. The extra time and effort will pay off when you find that you won your arbitration hearing.

Kris Hopping
Senior Human Resources Specialist
Coachella Valley Water District
P.O. Box 1058
(760) 398-2661, extension 2489
khopping@cvwd.org

June 2005
References


