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## CONTRACT GRIEVANCES

### I. Introduction

- A. NYSCOPBA, as certified bargaining agent for the Security Service Unit (SSU), has the *exclusive* right to administer and enforce the Agreement.
- B. Article 7 of the Agreement contains a comprehensive grievance procedure to address alleged violations of the Agreement.

### II. Background

- A. The Taylor Law requires public employers to negotiate with bargaining representatives regarding terms and conditions of employment, and encourages parties to agree on procedures to resolve any disputes that may arise between them.
- B. This furthers the public policy of the State which is to promote peaceful and harmonious public sector labor relations and to prevent strikes.
- C. A contract grievance procedure is part of the continuing process of collective bargaining:
  - 1. it replaces contract litigation (unlike litigation, parties to the agreement have to continue to work together);
  - 2. it is supposed to be faster, cheaper, less technical;
  - 3. it should provide a quick way to identify and resolve labor disputes to keep them from getting out of hand, damaging morale and interrupting the smooth operation of the employer's business.
- D. "Grievance" Defined
  - 1. A grievance can be any dispute between Labor and Management.
  - 2. In the context of a collective bargaining agreement, look to Article 7 Grievance and Arbitration to define what may be grieved.

E. "Grievance Procedure" Defined

1. A grievance procedure is a series of steps, defined by the contract, explaining:
  - a. who can file a grievance;
  - b. who hears and decides grievances;
  - c. any appellate steps;
  - d. time limits and other procedural requirements; and
  - e. what remedies can be awarded for violations.

F. Goals of the Contract Grievance Process:

1. To enforce the agreement.
2. To identify labor-management problems and resolve them as quickly as possible.
  - a. If a grievance procedure is working properly, most grievances should be resolved at early stages to avoid adverse consequences to morale and productivity.
  - b. This requires both union and management to pay attention to the grievance procedure by:
    - (1) adhering to time limits;
    - (2) listening to the other side's story or explanation; and
    - (3) considering reasonable offers of compromise.

G. Grievance "Ownership"

1. The contract defines who can file and process a grievance. This is known as grievance "ownership."
2. NYSCOPBA's contract, like most, allows any employee to file at Step 1. Only the union can take grievances to Step 2 and beyond.
3. This is because the union is the exclusive representative of the entire workforce. Grievance decisions at the higher steps may affect the rights of many or even all employees. Therefore, only the union can take grievances to these levels.
  - a. This ensures consistent results.

- b. It also ensures that once a matter is settled it does not have to be revisited for every other member of the unit.
4. Because the union “owns” contract grievances at Steps 2-4, it can settle or withdraw a grievance without the individual grievant's consent, so long as the decision is consistent with the duty of fair representation. [Exception: Disciplinary grievances (Article 8) are owned by the member throughout the whole process.]

### III. **Failure to follow the grievance procedure (Self- Help)**

- A. Occasionally an employee will disobey a supervisory directive, based on a claim that the directive violates a contract right (e.g., I do not have to do that job because it is out of title). This is known as “self-help.”
  1. The general rule is that an employee can be punished as insubordinate even if he or she is later found to be right.
  2. The employee generally should obey the order and file a grievance — “work now, grieve later.” The reason for this is that operations would be disrupted if supervisory directives could be disobeyed pending formal resolution of contract grievances.
  3. There are some exceptions to the work now, grieve later rule, including orders that:
    - (a) present serious safety hazards;
    - (b) require clearly illegal acts; or
    - (c) require an act which is clearly beyond supervisor's power.

### IV. **Article 7 — Grievance and Arbitration**

- A. This is the main grievance article of the current agreement for the SSU. It excludes disciplinary cases, which are covered by Article 8.
- B. “Contract” versus “Non- Contract” Grievances
  1. Article 7.1(a) defines a contract grievance as: “a dispute concerning the application and/or interpretation of this Agreement. . . .” Article 7.1(a) grievances can go to arbitration. You must grieve an article of the agreement or a preserved benefit (see Article 27).
  2. Article 7.1(b) defines “non-contract” grievances as “any other dispute or grievance concerning a term or condition of employment which may arise out of an action within the scope of authority of a department or agency head which is not covered by this Agreement. . . .” Article 7.1(b) grievances

end at alternative dispute resolution conference (also known as “triage”). They do not go to arbitration.

3. Article 7.1(c) emphasizes that disciplinary disputes are subject to Article 8.
4. Several contract articles are expressly precluded from arbitration:
  - a. Article 9 (Out of Title) (see 9.2(a) grievances processed under 7.1 (b)) [NOTE: There is a special form for out-of-title grievances. Back pay goes back 15 days from when the out-of-title grievance is filed.]
  - b. Article 10.6 (Counseling) (Appendix C) processed under 7.1(b));
  - c. Article 22 (Safety) (See 22.5 grievances processed under 7.1(b));
  - d. Article 24 (Seniority) (See 24.3 - job and shift assignment grievances are processed up to Step 3);
  - e. Article 25 (Labor Management) disputes growing out of implementation of MOU's can be initiated at Step 3 of the process, but the terms of an MOU cannot be arbitrated (Article 25.4);
  - f. Article 25.6 (Quality of Work Life) not subject to Article 7; and
  - g. Article 3 (Non-Discrimination) Article 3 grievances concerning discriminatory application of contract should be tied to an arbitrable section of the CBA in order to get to arbitration. One arbitrator has held that the failure to connect Article 3.1 with an “*arbitrable*” provision of the CBA defeats the arbitrability of the grievance.

#### C. Grievance Processing

1. Pre-Grievance -- Article 7.2 encourages attempts at informal resolution before a formal grievance is filed. While informal efforts to resolve a dispute are good, the time limits for filing do not stop running while you are negotiating, absent a written extension of time.
2. Key to success -- ascertain from the very beginning appropriate documentation and obtain copies.

For example, in a Workers’ Compensation medical documentation case (i.e. employee was denied contractual Workers’ Compensation benefits under Article 14.9 due to alleged non-conforming or untimely medical documentation), you should have:

- a copy of the medical document submitted;
- a receipt from your employer showing the note was submitted (or a date and time-stamped copy);
- copies of any correspondence from your employer regarding acceptance or denial of the medical note;
- copies of any Workers' Compensation decisions and C-8 forms;
- copies of any correspondence from your employer discussing your payroll status for the period covered by the medical note;
- copies of your time and attendance record for that period (in DOCCS referred to as a "1205");
- copies of the relevant form filled out by the supervisor when you called in to work (where applicable) (in DOCCS referred to as a "1202"); and
- all other relevant documentation.

For example, for the denial of overtime, get copies of:

- The voluntary overtime book;
- The charts showing who was hired;
- Local labor/management agreements regarding distribution of overtime (if any); and
- Seniority list (if seniority is used at the facility).

3. Step 1

- a. may be filed by any unit employee or the union with the facility, institution, division or regional head;
- b. must be in writing (see attached form). Fill out the form and cite all relevant articles you believe may have been violated;
- c. must be presented to facility head within **20 calendar days** of the date when employee first knew of act or omission being grieved. **Any time limit extension must be in writing:**
- d. management must meet with union/employee within ten (10) days;

- e. management must issue a written decision within ten (10) days of the meeting;
  - f. if management ignores these time limits, the union can move grievance to Step 2;
  - g. NYSCOPBA representative at Step 1 will be the sector grievance coordinator or chief sector steward. They can seek advice or assistance from the Business Agent or Vice-President, when necessary or appropriate.
- (1) Step 1 settlements are not precedential at any other facility (See Article 7.4(b)).

4. Step 2

- a. Step 2 grievances may be filed within 15 calendar days from receipt of the Step 1 decision.
- b. The Step 2 appeal should contain description of relevant facts and refer to all sections of Agreement which union claims are violated.
- c. The NYSCOPBA Business Agent or Vice President will screen and send proposed Step 2s to the NYSCOPBA grievance department for further review and filing.
- d. The Grievant, Sector Grievance Steward or Chief Sector Steward and Business Agent or Vice President should present the Step 2 grievance.
- e. The Department or Agency must meet with union/grievant within ten calendar days, and render a decision within 10 calendar days; if they fail to do so, grievances can be moved to the next step.

5. Step 3

- a. Within 60 calendar days of receipt of Step 2 decision, grievance can be processed to Step 3 by filing a grievance appeal with GOER.
- b. The NYSCOPBA grievance department files cases to Step 3 if the grievance has been considered to have merit or if the grievance was approved for appeal by the grievance/legal committee.
- c. The appeal to Step 3 includes a short written statement of the reasons for the disagreement with the Step 2 decision. A Step 3 meeting is only held if requested by the union. A Step 3 answer is

due from the State within 30 days following the written appeal (or within 30 days after the meeting, if requested by the union.).

6. Step 4

- a. Within 60 calendar days after the union receives Step 3 decision, the union can file for arbitration by serving demand on GOER and Master Arbitrator.
- b. Following this demand, NYSCOPBA and GOER meet with the Master Arbitrator for a resolution conference to settle or narrow issues and stipulate to facts. This conference is often referred to as “triage”. The grievant may be asked to participate by telephone in triage. Prior to triage, the grievant will be contacted by NYSCOPBA’s counsel to discuss the case.
- c. If the case is not resolved, either party can seek expedited arbitration — a one day hearing, without briefs (flexible). The arbitrator renders decision within seven days — such decisions are non-precedential unless the parties agree otherwise. The arbitration is handled by NYSCOPBA’s counsel.
- d. Full (traditional) arbitration
  - (1) At the resolution conference, if parties mutually agree, the case can be submitted to full arbitration for a precedential decision. If they cannot agree, the Master Arbitrator decides whether the case should go to the full arbitration.
  - (2) A decision is *generally* rendered within 30 days of completion of hearing and brief. This is not a strict deadline for the arbitrator.
  - (3) All arbitrations are handled by NYSCOPBA counsel.

7. Miscellaneous

- a. Article 7.3(a) requires the employer to release union representatives from normal duties for grievance investigation and processing during the employee's normal work hours. There should be no loss of pay or accruals for such investigation and processing of grievances (does not provide for overtime - see 7.4(d)).
- b. The employer, on written request of the union at least 48 hours in advance, should schedule shift assignments so grievance meetings fall within union representatives' regular working hours.

- c. A new provision in the recent collective bargaining agreement allows the union to place a grievance on “hold” to pursue an informal resolution to the grievance. If there is financial liability at issue in the grievance on hold, the State is not financially liable for any period the grievance is on hold longer than 30 days.

## V. Duty of Fair Representation

1. A union’s duty of fair representation to its members changed significantly in 2018.
2. Previously, a union’s duty of fair representation applied to all members of the bargaining unit – whether they were dues paying members of the union or not. This was because any employee in a title covered by the bargaining unit was represented by the union, even if they were not members of the union. As such, if an employee in the bargaining unit chose not to be a member of the union, they still paid dues, but the dues they paid were reduced by the amount of money the union spent (pre-rata share) on any political activities. These individuals were called Agency Fee payers.
3. The US Supreme Court decision in *Janus v. AFSCME* changed the law significantly. The decision in *Janus* provides that an employee in the bargaining unit who does not want to be a part of the union, does not have to pay any dues. What this created is commonly referred to as the “free rider” problem. The *Taylor Law* previously provided that all members of the bargaining unit must be represented by the union and treated the same with respect to representation. That meant the union would have had to represent individuals who “opt out” of the union and who now, based on the decision in *Janus*, pay no dues.
4. In order to address the free rider problem, NYSCOPBA, along with a coalition of other unions, proposed to the NYS legislature a revision to the *Taylor Law* with respect to the duty of fair representation. The revisions were included in the budget bills and became law in 2018. Based on these revisions to the *Taylor Law* – a union does not owe the same duty of fair representation to members and non-members. Below is a list of the types of representation that NYSCOPBA owes to members vs. non-members based upon the change in the law.
5. The revisions to the Taylor Law make clear that NYSCOPBA is not required to provide non-members with the following services or representation:
  - Representation (union or legal) during questioning by the employer
  - Representation (union or legal) in disciplinary grievance processing and arbitration



- Representation (union or legal) in proceedings brought by the NYS Justice Center for the Protection of People with Special Needs
- Legal Defense Fund
- Rainy Day Fund
- Insurance (non-contractual) funded by members' dues
- Representation (union or legal) “. . . in statutory or administrative proceedings or to enforce statutory or regulatory rights . . . ”, which includes:
  - o Representation before PERB (including filing Improper Practice charges)
  - o Representation in Article 78 proceedings to challenge administrative decisions
  - o Representation in Article 75 proceedings to confirm/modify/etc. arbitration awards
  - o Representation in Civil Service Law Section 71 proceedings (re: discharge after 1- or 2-year leave of absence due to work-related injury)
  - o Representation in Civil Service Law Section 72 proceedings (re: involuntary leave due to non-work-related injury)
  - o Representation in Civil Service Law Section 73 proceedings (re: discharge after 1-year voluntary or involuntary leave as a result of non-work-related injury)
  - o Representation in Disability Retirement proceedings under Retirement and Social Security Law §§ 507-a and 507-b
  - o Representation with respect to military benefits under the Civil Service Law and Military Law
  - o Representation in “exit interviews” for probationary employees pursuant to Part 4.5 of the Civil Service Rules

6. What must NYSCOPBA provide to non-members?

- a. The new law states in part that “[A]n employee organization’s duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the

negotiation or enforcement of the terms of an agreement with the public employer.”

- b. Accordingly, NYSCOPBA is required to provide the following services to non-members.
  - Contract negotiations: NYSCOPBA must continue to negotiate on behalf of the entire bargaining unit (which means non-members must receive the same contractual benefits as members).
  - Contract grievance processing in a manner consistent with the processing of grievances for members
    - o The inclusion of contract enforcement in the new statute allows NYSCOPBA to retain control over contract grievances. Maintaining this control will prevent non-members from pursuing grievances that might be detrimental to the other members of the bargaining unit.
    - o Where a union owns contract grievances, as NYSCOPBA does at Step 2 and beyond, the Taylor Law gives unions broad authority to advance grievances (or not) based on the likelihood of success or other factors. Unions are not obligated to advance every grievance to arbitration even if those are the grievant’s wishes.
    - o Generally, a non-member’s grievance should be handled in the same way as would a member’s grievance.

7. Union Liability for Breach

- a. The union can be sued by a unit member for breach of duty of fair representation, and can be liable for damages and other relief.

8. Personal Liability For Breach

- a. Individual union representatives and officials are not personally liable for damages for a breach of the duty of fair representation. The duty of fair representation, rather, is held by the union. (*See Duane Reade Inc. v. Local 338 Retail, Wholesale, Department Store Union, UFCW, AFL-CIO, et al.*, 6 Misc. 3d 790 (New York County 2004).)
- b. No causes of action against individual union officers are sustainable where their acts occurred within the scope of their activities as union representatives because union officers and employees are not individually liable to third parties for acts

performed as representatives of the union. (*Butler v. McCarty*, 35 PERB 7506 (2002) *citing*, *Covello v. Depository Trust Co. Local 153*, 88 F.Supp.2d 59, 61 (E.D.N.Y. 2000).

### **Grievance Handling Golden Rules**

- A. Communicate: Make sure the grievant, the sector grievance steward or chief sector steward, the Vice-President or Business Agent, and NYSCOPBA grievance coordinator knows what is going on with a grievance. This is essential to ensure that the union's contract enforcement efforts are consistent and coordinated. Promptly return all phone calls.
- B. Investigate: Make sure grievances are based on good facts. If several members are involved, talk to all of them, even if some are hostile or against the grievance. Obtain any relevant documents. It will be hard to make your case without facts, and you will look foolish to management if you have your facts wrong. Keep the NYSCOPBA Vice President or Business Agent involved in the investigation process — and ask for help if you need it.
- C. Shoot Straight: Tell the members the truth. They have a right to know what the union is doing with their grievance and why. Deal with management representatives with the same level of honesty and respect as you expect in return. You will be dealing with them on a regular basis.
- D. Watch Time Limits: A missed time limit can kill a member's grievance. Time that you spend trying to resolve a grievance does not stop or pause the time for filing. If you are trying to resolve the grievance amicably, just give management a warning that you are filing to preserve time limits but are still looking to resolve it amicably.
- E. Decide Who's On First: When you present a grievance to management, make sure:
  - 1. you and the grievant agree on the union's position and the facts;
  - 2. decide who will speak to management on what issue;
  - 3. discuss potential settlements beforehand;
  - 4. if problems come up, ask — caucus — don't let management divide and conquer at the grievance presentation.
- F. Don't Just Say No: Sometimes a member will have a legitimate gripe and will want to file a grievance, even though the grievance is a loser.

1. Sometimes you'll decide to file if there is no other good option — but be honest about the prospects of success.
2. It is usually better to explain why a grievance is not the best way to go.
3. You should consider alternative ways to deal with legitimate gripes that cannot be grieved, such as:
  - (a) legal (Taylor Law, civil service appeal, lawsuit);
  - (b) public relations — internal press, external press;
  - (c) labor/management;
  - (d) legislative agenda; or
  - (e) negotiations.