

School District Grievance Procedure Provisions to Immediately Review

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Following publication of our recent Legal Update discussing the statewide surge of workplace safety grievances, we have received many questions regarding which grievance procedure provisions deserve immediate attention to best prepare for a potential grievance. While each district's grievance procedure may contain procedures or provisions unique to itself, there are a few core provisions that should be included within all grievance procedures for purposes of providing a fair, effective, and efficient grievance process.

The first grievance procedure section deserving of immediate attention is the definitions section. It is critical to clearly define the individuals eligible to invoke the procedure, limiting use of the grievance procedure to only individual employees, as opposed to a class of grievants or a union representative. While the procedure should permit the employer to combine grievances that are similar in nature, the combining of grievances should be solely reserved to the employer and not be interpreted as allowing a group of employees to file a "class action" grievance.

It is also important to clearly define the scope of what constitutes grievable discipline, termination, and workplace safety violations. For example, a grievance procedure should explicitly identify which types of employment actions constitute grievable discipline and which employment actions do not (*e.g.*, counseling sessions and performance improvement plans are non-disciplinary actions that should not be subject to the grievance procedure). Terminations should be defined to exclude actions such as layoffs. Likewise, the applicable safety standards for evaluating a workplace safety violation should also be clearly defined within the procedure (*e.g.*, any violation of the district's safety and health program developed under Wis. Admin. Code. SPS § 332.203). These clear definitions will allow the district, employees, and an impartial hearing officer ("IHO") to clearly understand what is and is not within the jurisdiction of the grievance procedure.

Another grievance procedure section that should be immediately reviewed is the scope of the IHO's authority. School districts should consider the following in how they want an IHO to preside over a hearing:

- the IHO's ability to dismiss untimely or otherwise procedurally defective grievances
- the standard of review the IHO shall apply to workplace safety or discipline grievances
- whether the rules of evidence are to be strictly followed during a hearing
- whether a hearing must occur or whether written submissions could be accepted in lieu of a hearing
- whether the hearing must be closed or open to the public
- whether the direct testimony of students will be permitted
- other similar considerations

Districts should also identify within the procedure who selects the IHO and when that selection is to occur. Implementing these guidelines will provide a cleaner and easier process for all involved; however, districts must ensure that the guidelines are workable within the construct of a grievance procedure. For example, districts should avoid implementing a "just cause" standard for a workplace safety grievance, because that standard is incompatible with the facts and circumstances giving rise to safety grievances and may cause a grievance procedure to become ineffectual.

In addition, Wis. Stat. § 66.0509(1m) requires that the school board is the last level of appeal and indicates the board's decision should be the final decision under the procedure. The review by the school board should be limited to the record established before the IHO, should not involve a hearing, and should be held in closed session.

Finally, districts may wish to consider inserting a cost-sharing requirement into grievance procedures, such as requiring the employee and employer to each pay fifty-percent of the cost of an IHO should an employee appeal a grievance to that step of the process. Cost-sharing provisions can be helpful in minimizing the number of grievants who appeal their grievance all the way through the grievance procedure, as many grievants may not feel strongly enough to appeal their respective grievance to an IHO if they have to share in the costs of doing so. These provisions also assist with offsetting a district's costs, especially if workplace safety grievances have been filed by numerous employees.

We encourage school districts to proactively address these and other provisions within their grievance procedures, both internally and with counsel, to ensure their district is best positioned to limit its grievance procedure to only legitimate grievances and to address those legitimate grievances in an effective and efficient manner.

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