

TO ARBITRATE OR NOT TO ARBITRATE

Not all cases that are unresolved will go to arbitration. The Council 5 Arbitration Review Team evaluates all such cases and decides whether or not to proceed to arbitration. A local union can appeal the Arb Team's decision not to proceed. There are many factors considered when the Council 5 Arbitration Review Team makes its decision. Be aware of these factors and apply them to the grievances you forward to Council 5.

Some of the factors are:

What was the reason that the grievance was filed?

There are many reasons for filing grievances. Perhaps to bring an unfair, but not contractually wrong situation to the Employer's attention. Perhaps to try and reach a mutual understanding on ambiguous language. Perhaps to make the Union "felt" in the workplace. You should be aware though, that only those grievances, which were filled due to a clear contract violation or to clarify unclear language, are likely to proceed.

What are the chances of winning in arbitration?

The chances of winning relate to a number of factors including the relationship of the particular facts to the language, past practice, management's rights, the authority of the Arbitrator, the strength of our evidence (including the credibility of our witnesses), the record of the particular Arbitrator(s) we use, prior arbitration awards and feasibility of the remedy.

What are the consequences of winning and of losing the case?

Sometimes the consequences of winning would be more negative than dropping the grievance. We may not want the Employer to enforce the language, but want to create a pressure to change language, which neither party likes. Proceeding as though we want to arbitrate may sometimes create a situation where the Employer will agree to modifications.

What can the Arbitrator give you? What can he/she take away from you? Is there effective relief available from the Arbitrator?

The Arbitrator is limited by the contract in what he/she can address in an award. The Arbitrator can only address the issues identified by the parties, and cannot add to or subtract from the Agreement. In many issues, the most remedy an Arbitrator can assess will be to say, "Yes, the Employer violated the Agreement - naughty, naughty, don't do it again." Punitive damages are unlikely and may be outside of the Arbitrator's authority. Sometimes, we may risk a negative interpretation that could work to our disadvantage by pursuing a weak case. Some Arbitrators have an unfortunate tendency to "write new language" for us by interpreting the contract in ways neither party intended. So, an important element in evaluation is exactly how this case and its facts fit in with the Arbitrator's authority.

What is the effect of winning or losing the grievance in the entire bargaining unit or seniority unit?

The effect of winning or losing with a particular Appointing Authority or in a particular bargaining unit should be carefully evaluated. For example, pursuing a weak case and losing may result in a total loss of language, or escalation of discipline, or new policies on bidding and promoting. This could affect not just your own Local Union, but could have broader impact in the Employer's application of the Agreement. Winning most often has positive effects but could have negative repercussions in other units where the Employer has been more liberal than the Arbitrator's award.

SOME FACTORS UNIQUE TO DISCIPLINE:

- There are a number of factors to consider in discipline cases, which are somewhat unique.
- Is the discipline in keeping with the grievant's work record and discipline record?
- The ideal of "just cause" in discipline brings in length of service, quality of service, past disciplinary record, etc. Thus, a discipline case is very "individual" to the person involved. An action of situation, which may warrant a one-day suspension for a one-year Employee with a written reprimand, could only warrant an oral reprimand for a 20-year Employee with a spotless record.
- Is the discipline in keeping with treatment of other Employees with similar offenses?
- Given the fact that individual circumstances will warrant different penalties, there still should be consistency in treatment. For example, while degree of discipline may differ, if an action warrants discipline for one Employee, it should warrant discipline for any other Employee. Similar offenses should have similar penalties for the same number of offenses.
- What is the credibility of the evidence and proof?
- More than any other kinds of cases, discipline will depend on witness testimony. Especially in dispute of fact, the Arbitrator may have to decide which party presents witnesses with greater credibility and believability.

The Arbitration Hearing

Arbitration is a hearing aimed at getting factual information from both sides. The Arbitrator usually determines the degree or level of formality. At the beginning of the hearing and usually before going "on the record", the Arbitrator holds a discussion with the Representative of each side. This is the time that either side may raise questions of Arbitrability or Timeliness. The Arbitrator will ask if the parties have agreed to the "framing" of the issue, and if not, will hear both sides. A discussion of exhibits occurs and numbering of joint exhibits. Then "for the record" the information is repeated.

The parties make **opening statements**, basically telling the story, outlining the facts and introducing the key points of their case. In discipline cases the Employer is the moving party, carries the burden of proof and proceeds first. In language or contract interpretation grievances the Union is the moving party, carries the burden of proof, and proceeds first. The moving party makes the first opening statement. The other party may make their statement immediately after or reserve the right to make their statement before presenting their case.

The parties proceed to present their cases through witnesses and documents. **Witnesses** are sworn in before providing testimony. The advocate for the moving party questions their witness in direct examination, followed by cross-examination questions from the opposing advocate. There may be additional re-direct and re-cross examination. The Arbitrator may also ask questions.

Documents are identified and introduced through a witness. The witness testifies regarding its content, purpose, and or relevance to this case. The other side may challenge the document, or during cross-examination, raise questions about the document.

After both parties have presented their case they either make oral **closing arguments** or submit a **brief**. A brief is a written summarized statement of the case and is sent to the Arbitrator after the hearing. The method is determined by the preference of the parties and of the Arbitrator.



Appeals to Arbitration

Approving a Case for Arbitration

1.) Grievance (processed by Staff through appropriate steps to point of arbitration, assume legitimate grievance or that contract mediation has reached impasse or is about to reach impasse) Local Executive Board or Membership may have a position either recommending or not recommending that a grievance proceed to arbitration.

Then as soon as possible

2.) Written Staff Review
(form filled out)

2.) Local Recommendation
(form filled out - optional)

2.) Grievant
(form filled out - optional)

(Union Staff, Grievant, Local recommendations received by the Arbitration Review Team at this point)

3.) Arbitration Review Team

Then

4) If No, Local Union, will have 35 days to Appeal in writing to the Council Executive Board.

4) If Yes, Director assigns arbitration
(Council pays the cost of the arbitration)

5) Arbitration Appeals Committee (A Committee appointed by the Council 5 Executive Board) will meet and make a final decision regarding arbitration.

6) If No, Local has exhausted appeals.
There will be no arbitration of grievance

6) If Yes, Director assigns arbitration.
(Council pays the cost of the arbitration)

Grievance Procedures

AFSCME Council 5

1. **Union presents last step before arbitration (2nd or 3rd step, depending on contract).**
2. **Steward gives Union Staff grievance file.**
The Steward is responsible for including all required information including the Local Recommendation.
3. **The Union Staff assigns a number to the grievance by entering it into the Grievance Management System (GMS).**
The number 04M-16-3142-12000 indicates the following:
 - 04M indicates contract and year (State Master agreement 04)
 - 16 indicates article number
 - 3142 indicates local number
 - 12000 indicates number assigned by Council 5 (grievances submitted for review are assigned in numerical order)
4. **Council 5 notifies the Employer of our intent to arbitrate.**
This is done to protect the timelines specified in the contract. Usually this appeal is sent out before the Union has completed its review and made a decision whether or not to proceed to arbitration.
5. **The Union Staff reviews case and sends to Council 5 Staff Review Committee, (Arbitration Review Team).**
The Review Committee decides, based on the merits of the case, whether or not a grievance will proceed to arbitration.
6. **If recommendation is to proceed, the Employer is notified and an Arbitrator's list is ordered from the BMS.**
The Employer Representative and the Union Staff strike names and schedule the arbitration. The Council will pay the cost of the arbitration.
7. **File an appeal with the Council 5 Executive Board.**
The Local Union has 30 days to appeal to the Council 5 Executive Board. The Board's decision is final. The Local does not have the option of proceeding and paying the cost.



**GRIEVANCE POLICY/PROCEDURES AND
ARBITRATION REVIEW AND APPEAL PROCESS**
AFSCME MINNESOTA COUNCIL 5, AFL-CIO

DISCIPLINE GRIEVANCES

Oral and written reprimands: Council 5 local unions have discretion to determine whether or not just cause provisions have been violated and thus, whether a grievance should be filed in cases of oral and written reprimands. As an example, if the Employer has a "no fault" policy regarding attendance and the first no call/no show automatically results in a written reprimand, the local may determine that there is no violation of just cause and a grievance need not be filed.

In the case of oral and written reprimands, local unions also may determine that no further appeal is appropriate following the Employer's last response at any step in the process. If the local withdraws or settles the grievance, no review by the Arbitration Review Team is required.

Local unions who utilize this discretion should have a consistent procedure in place to ensure that decisions to withdraw or settle are consistent and rational. This may be through a committee discussion such as a stewards committee, local union chair officers, local union executive board, local union meeting, or such other mechanism. Consultation with the Council 5 Field Representative is encouraged and appropriate.

Oral and written reprimands which are not resolved or withdrawn by the local union following the final step before arbitration will be submitted by the Council 5 Field Representative to the Arbitration Review Team for analysis and determination regarding arbitration.

Suspensions & Terminations: Suspensions and terminations should be grieved by the local union if the employee requests a grievance be filed. If the grievance is not resolved, it should be appealed through the final step prior to arbitration. If it is still not resolved following the final step before arbitration, the grievance will be submitted by the Council 5 Field Representative to the Arbitration Review Team for analysis and determination regarding arbitration.

LANGUAGE GRIEVANCES

A grievance regarding an interpretation of contract language need not be filed or appealed if the local union determines that there is no contractual violation. Locals do need to consult their Council 5 Field Representative if there is any question or doubt about whether or not there is a violation. This is particularly important in cases where the contract covers a number of different bargaining units or local unions.

In cases where a grievance regarding an interpretation of contract language has been filed and is not resolved following the final step before arbitration, the grievance will be submitted by the Council 5 Field Representative to the Arbitration Review Team for analysis and determination regarding arbitration.

TERMINATION OR NON-CERTIFICATION DURING THE PROBATIONARY PERIOD

This is meant to apply to those cases where an employee is terminated prior to having obtained permanent status and does not have the right to arbitrate the Employer's decision. In these cases, if the employee has a limited right to grieve (many times through the lower steps of the process), and the employee wants to grieve, the local union should file the grievance through the available steps. As arbitration is not an option, no review by the Arbitration Review Team is necessary.

In the event the termination or non-certification is determined to be grievable through the arbitration step, then the process described above for suspension and termination should be followed.

ARBITRATION REVIEW TEAM

As soon as possible following receipt of a completed file, including the Employer's final response in the final step before arbitration, unresolved, arbitrable grievances shall be submitted to the Arbitration Review Team for analysis and review. The field representative who was present at the final step before arbitration shall include a written review of the case. The local union and/or the grievant may also submit their recommendation regarding arbitration by submission of a form, to be received by the field representative, no later than thirty (30) days following the date of the Employer's last response.

Upon completion of review by the Arbitration Review Team, the decision to arbitrate or not will be sent to the local union. This decision will also be copied to the grievant. The rationale for the decision will be provided to the field representative who can then discuss the rationale with the local union. If the decision is to proceed to arbitration, the field representative will begin to move the case forward.

If the decision is not to arbitrate, the grievance will not be officially closed until the local union's right to appeal, as defined below, is exhausted.

RIGHT TO APPEAL THE ARBITRATION REVIEW TEAM DECISION TO THE ARBITRATION APPEAL COMMITTEE

The local union may appeal a decision to not arbitrate by submitting an appeal form to the Council within ~~thirty-five (35)~~ sixty (60) days' notice of the Arbitration Review Team's decision. The Council Executive Board or a sub-committee of the Board (the *Arbitration Appeal Committee*) would then consider the local union appeal and make a final decision regarding arbitration.

A local union appealing a decision of the Arbitration Review Team to dismiss a grievance from arbitration shall be provided the opportunity to make a presentation to the Appeal Committee by way of phone hook-up, in addition to their written submission.

The Arbitration Appeal Committee shall remain the final authority regarding decisions to arbitrate.

Per action of the Council 5 Executive Board on 10/24/2008, the above Policy and Procedures shall be reviewed on an as needed basis.

These policies and procedures were adopted by the AFSCME MN Council 5 Executive Board on 6/16/05. It applies to all grievances filed on or after 8/1/05. The policy was reviewed by a Committee of the Executive Board on 10/17/06, whose recommendations were adopted by the Executive Board on 11/16/06. The policy was reviewed by a Committee of the Executive Board on 10/24/2008 whose recommendations were adopted by the Executive Board on 10/24/2008. The policy was reviewed for purposes of clarification and recommendations were adopted by the Executive Board on 3/19/2009.

Amendments to Policy:

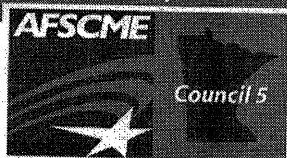
11/16/06 – Add phone hook-up opportunity to locals appealing to Arb Appeal Committee.

10/24/08 – Change annual review to an as needed basis.

3/19/2009 – Clarify how the Arb Review Team rationale is provided to the Local.

3/24/2009-jmk

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ARBITRATION RECOMMENDATION FORM

(This form is optional and may be submitted by the grievant and/or local union. To be considered the recommendation must be received by the Field Representative within 30 days following the date of the employer's last grievance response.)

Date: _____ **Subject:** **Arbitration Review**
To: **Arbitration Team** **Grievant:** _____
From: **grievant** **Local Union:** _____
 local union **Employer:** _____
Issue: _____

Local union officer:



A. What are the relevant facts in this case that would cause an arbitrator to decide the contract was violated?

What evidence do we have to prove these facts?

- over -



B. Has new information become available since the last step of the grievance process?

If so, How does it affect this case?

C. Could the arbitration award positively or negatively affect employees other than the grievant?

If so, how?

D. Could the arbitration award change the current interpretation of the contract Language?

E. Other relevant information.

F. Do you recommend the grievance be arbitrated?

Why or why not?
