

HR-101: GRIEVANCES

From Start to Finish



INLAND PERSONNEL COUNCIL

March 1, 2024

Presented By:


Brooke E. Jimenez – Partner

David E. Robinett – Senior Counsel

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**Atkinson, Andelson
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Agenda

- > **Part I**
 - > Grievances In General
- > **Part II**
 - > Avoiding Grievances
- > **Part III**
 - > Processing Grievances
- > **Part IV**
 - > Settling a Grievance
- > **Part V**
 - > Fighting a Grievance
- > **Q&A**



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Part I — Grievances in General

- What is a Grievance?
- What is NOT a Grievance?
- Who can file a Grievance?
- When is it a Grievance?
- Grievance Odds and Ends

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What is a Grievance?


- Generally: An allegation that there has been a “violation,” “misinterpretation” or “misapplication” of the “specific provisions” of the collective bargaining agreement
 - Look at your specific CBA language
- A grievance also may extend to memoranda of understanding or side letters
 - Refer on a case-by case basis
 - Make sure it has not expired

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What is a Grievance?

- What Does It Look Like
 - Look at CBA
 - Timelines
 - Levels/Steps
 - Mediation
 - Board hearing
 - Arbitration
 - Look at Forms
 - Usually in appendix



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What is NOT a Grievance?

Generally, anything for which there is a more appropriate procedure:

- Education Code and other statutes
- EERA, FEHA/EEOC, ADA, other anti-discrimination laws
- Board Policies
- Excluded language (e.g., discipline if appeal rights included, evaluations, etc.)
- Past practice - maybe

Best to avoid incorporating these into the CBA


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What is NOT a Grievance?

Tip: Pay careful attention to your collective bargaining agreements and board policies

- Sometimes a "grievance" is not a grievance
- Informal complaint resolution process?
- Uniform complaint?
- Complaints concerning district employees?



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Who can file a Grievance?

- Individual bargaining unit member
- Group of affected members
- The Association
 - On behalf of a member
 - On behalf of a group of members
 - On behalf of itself?

It is unlawful to use the negotiations process to prohibit an Association from filing a grievance


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When is it a Grievance?

- Not before ripe - a grievance cannot be filed until an act occurs that meets the definition of "grievance"
 - A grievance cannot be "anticipated"
- Not after stale - a grievance must be filed within the timelines specified in the contract
 - Familiarize yourself with these timelines, especially Informal/Step 1
 - Familiarize yourself with the definition of "day" (school, duty, calendar)

The first and most important factor to consider in responding to a grievance is whether it is timely



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When is it a Grievance—Redirecting a Non-Grievance (Hypothetical)

[CBA Example] A grievance is an allegation by a unit member or members that there has been a misinterpretation, misapplication, or violation of this Agreement. Actions to challenge or change the policies, regulations, or other matters outside of this Agreement are not within the scope of this procedure, and review must be taken under separate processes.

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When is it a Grievance—What if the Language Isn't Clear?

- If contract language is plain, unambiguous and specific, that meaning controls
- If not, you may be able to rely on any of the following to support your position:
 - Bargaining history
 - Past Practice
 - Industry Practices

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Grievance Odds and Ends

- Election of Remedies
 - Grievant gets one bite at the apple (no forum shopping)
- Separate Grievance File from Employee File
- No Reprisals for Grievance Activity (can lead to unfair practice charge)
- Release Time
 - EERA explicitly grants release time to process grievances
 - Grievant
 - Union

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Part II — Avoiding a Grievance



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Avoiding a Grievance

- Every administrator should read through the entire contract and be familiar with it - particularly those portions they deal with on a regular basis.
- Administrators should stay apprised of matters that impact the contract:
 - Side letters ("MOUs") and tentative agreements.
 - Precedent-setting arbitration decisions.
 - Precedent-setting settlement agreements.
 - Official interpretations and practices.

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Avoiding a Grievance

- Know your collective bargaining agreements
 - Sometimes better to "seek permission" than "ask forgiveness"
 - "Permission" comes from the contract!
 - Bargaining history
- Before changing to a different practice or implementing a new policy
 - Check to see if it is something that must be negotiated and get advice (remember "scope of representation" - *Anaheim*)
 - Exception (sort of): clear language (*Marysville*)

If unsure, ask someone who knows. Avoid setting off alarms

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Avoiding a Grievance


- Understand Past Practice
 - Will play a major role if grievance goes to arbitration and contract language is unclear
- Clarify Ambiguous Language in Negotiations
 - Arbitrator rule of contract interpretation: clear language trumps past practice
 - Do not need to wait until contract is open (memoranda of understanding, side letters)
- Administrators should actively identify problems in the contract
 - Collect information about problematic language (e.g., unduly burdensome or vague)
 - Notify the District's representative before bargaining

Where possible, resolve the matter before it becomes a grievance!

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Part III — Processing Grievances



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Grievance Steps - Typical

- Informal Level
 - Within 5 days of the act/occurrence, or the date the Grievant should reasonably have known. Informal conference with immediate supervisor or designee.
- Level I – Immediate Supervisor
 - Within 15 days of act, in writing to immediate supervisor. Clear concise statement, identify specific Articles and remedy.
- Level II – Superintendent or Designee
 - Typically the Chief Personnel Administrator. May request a conference.
- Level III – Mediation
 - Association or District submits request for a mediator to SMCS.
- Level IV – Binding Arbitration
 - Strike names from panel of seven from SMCS. Fees paid by losing party.

Is there a Board of Education step in your grievance procedure?

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Responding to Grievances—Managing the Process

- Develop specific forms for grievances.
- Require grievants to specify:
 - Who are the grievant(s);
 - What sections of the contract are being grieved;
 - Why or how the contract was violated;
 - What date(s) the contract was violated; and
 - What is the remedy requested

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Responding to Grievances—Redirecting a Non-Grievance (Hypothetical)

[CBA Example] No grievance shall be processed through the Grievance Procedure by any grievant who pursues any other available legal remedy with an agency or judicial body that accepts jurisdiction, unless agreed to by the District.

If such agency or judicial body does not accept jurisdiction, the time limit for filing the grievance begins on the date of receipt of notification of rejected jurisdiction.

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Responding to Grievances—Intake and Investigation

- Don't Shortchange the Informal Resolution Stage
 - Make the employee identify specific sections of the contract
 - Listen to grievant tell his/her story (informal level, usually)
 - Take notes
 - Ask questions if you are unclear
 - Get names, dates, times and chronology
 - Keep the discussion focused on the grievance (and, if appropriate, redirect non-grievance issues to the appropriate procedure)

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Responding to Grievances—Intake and Investigation

- Evaluate and Understand What the Grievance is About – It May Not Really Say So
 - Sometimes a problem appears much smaller than it seems (early resolution)
 - Sometimes a problem is much bigger than it appears (consider settlement)
 - Multiple/joint grievances can be consolidated, or separated, as appropriate
- Check the Procedural Boxes
 - Use proper forms
 - Make sure responses are timely made at each step
 - Draconian results can come from minor deviations (cuts both ways)
- Earnestly Investigate the Grievance
 - When first analyzing, treat every allegation as true
 - Be discreet about written materials and/or notes, as they may have to be turned over to the union

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Responding to Grievances—Multiple Grievances (Hypothetical)

[CBA Example] The parties shall make a good faith effort to process group grievances jointly, provided however, that the District reserves the right to separate grievances which are in its judgment based upon different facts or contractual considerations.

[CBA Example] The District and the Association may agree to consolidate grievances at Level III and beyond.

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Responding to Grievances—Intake and Investigation

- Interview all witnesses and take notes.
- Maintain a file.
 - Collect all relevant documentation.
 - Make a record of the district position, arguments, witnesses, evidence, and participants in discussions.
- Find out how other administrators have handled similar grievances.

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Responding to Grievances—Written Response

- Prepare a Decision
 - Always respond in writing
 - Usually a procedural requirement
 - Writing makes a better record than an oral history
 - Spend some time giving your rationale
 - Always preserve defenses, even if not evident
 - Timeliness
 - Jurisdiction/arbitrability (failure to allege contract violation)
 - Estoppel/waiver
 - Check procedural requirements for who prepares the response and who response must be presented to

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Responding to Grievances—Implementing Decision

- The burden is on the grievant to establish the contract was violated by producing some evidence.
- If you deny the grievance:
 - Outline all reasons for denial.
 - Cite to the specific contract language or other authority in support of denial.
 - Do not get bogged down in unnecessary detail – you do not have to rebut every allegation.

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Responding to Grievances—Implementing Decision

- **Implement Decision**
 - If you are in the wrong, own it. Willingness to correct errors wins employee/union respect and confidence.
 - Resolve the error at the lowest level possible; the further along a mistake is corrected, the more it looks like a mistake.
 - Appeals to the next Level
 - Timelines are critical. Typical results:
 - If Grievant misses deadline, further appeal is barred
 - If District misses deadline, grievant may advance to next level
 - In some CBA's, the grievance is automatically granted

It is better to make the sequence work for you than allow it to be used against you! Know in advance at what step you want the grievance to be resolved

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Part IV – Settling Grievances

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Settling Grievances

- **Pros**
 - Early resolution means less time and money spent
 - Grievant (employee and/or union) satisfied
 - Establishes precedent to clarify ambiguous language
- **Cons**
 - Establishes precedent (unless disclaimed)
 - May lead to perception of weakness
 - May encourage others to file grievances on same topic

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Settling Grievances

- If you are going to settle a grievance, have an airtight settlement agreement
 - Explicit recitation of facts
 - No admission of wrongdoing (don't "grant" the grievance)
 - Agreement that settlement does not create precedent or establish past practice (unless you want it to – careful)
 - Full releases/waivers (protect against forum shopping)
 - If grievant is individual employee, have union as party to settlement
 - Consult counsel

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Part V — Fighting Grievances



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Fighting Grievances

- Involve legal counsel as early as possible - litigation
- Some grievances must be fought to the end
 - Infringing on management rights
 - Untenable/unworkable results
 - Board priorities
 - Large monetary losses
 - Very clear management-friendly past practice
 - Remember: better to resolve clear employee-friendly past practice
- Do not take "losers" to arbitration. The negative effects could be severe
- Costs must be considered

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Fighting Grievances – Arbitration

- Usually Binding
 - Even if not binding, decision can (and will) be used to establish precedent
- Neutral Arbitrator
 - Mutually-selected by the parties
 - Costs are usually split
- Formal Litigation – Involve legal counsel
 - Court reporter
 - Examination/cross-examination under oath
 - Objections
 - Burden of proof is on grievant (compare to discipline case)

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Fighting Grievances – Arbitration

- Arbitrator has limited jurisdiction/power
 - Cannot hear cases that are untimely or do not allege a contract violation (arbitrability)
 - Cannot add to, subtract from, or otherwise modify contract
 - Sometimes prohibited from granting certain remedies
- Arbitrator does not know the parties or the case
 - Does not know the case prior to hearing
 - Entire understanding of matter is limited to the hearing
- Written decision/award
 - Binding?
 - Collateral estoppel/res judicata

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Fighting Grievances – Arbitration

- Contract interpretation principles
 - Plain meaning
 - Parole (external) evidence
 - Bargaining history/notes
 - Other evidence of "Meeting of the Minds"
 - Past practice
 - Gap filling ("*Expressio unius est exclusio alterius*")
 - Harmonization, industry standard
- If you do not like your contract language, fix it!
 - Hard to change after arbitration (winner will not agree)
- If you have a past practice that you like, incorporate it!

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Common Problems With Grievance Cases

- 1 Inconsistent application (or regular misapplication) of the collective bargaining agreement
- 2 Bad documentation of each step in the grievance process
- 3 Waiver of defenses
- 4 Inconsistent past practice – the union has the institutional memory
- 5 Unknown arbitrators may produce some "off the wall" decisions
- 6 Bad contract language leads to bad precedent

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HR-101 Quiz (Grievances Recap #1)

You are the principal.

A teacher has filed a grievance claiming she was discriminated against on the basis of race and gender because she was denied a promotion. She believes district management is responsible for this decision.

At the informal conference, the grievant is venting about how the HR Director, has had it out for her for years, and has denied her promotions that should have rightfully been hers ever since the two of them divorced four years ago. You should:

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HR-101 Quiz (Grievances Recap #1)

Multiple Choice:

- a. Thoroughly investigate her allegations about discrimination by the HR Director.
- b. Ask her to submit her grievance form at a higher level.
- c. Determine whether her allegation falls under the grievance procedure.
- d. Determine whether her allegation falls under the grievance procedure **and** notify HR about the allegations.

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HR-101 Quiz (Grievances Recap #2)

You are the HR Director (in a different district from Recap #1).

A teacher has grieved a letter of reprimand that was placed in his file. He claims that the timelines for investigating the matter alleged were not followed, and the placement of the letter in his personnel file did not comply with contractual requirements.

At Level II, you should:

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HR-101 Quiz (Grievances Recap #2)

Multiple Choice:

- a. Simply deny the grievance at Level II, since it was already denied (with a reasonable-sounding explanation) at Level I.
- b. Review the findings at Level I, and confirm them yourself (**subject to whether legal counsel is involved*).
- c. Determine whether each allegation falls under the grievance procedure, and consolidate/separate as necessary.
- d. Re-investigate the alleged misconduct and make your own determinations as to whether the reprimand was warranted (exercising your administrative authority over the site administrator).

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HR-101 Quiz (Grievances Recap #3)

It is December, and several teachers at your site have grieved that their class sizes exceed contractual maximums since the beginning of the semester. They demand \$110.00 a day for each day any one of their classes exceeded the maximum..

You, the principal in charge, should:

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HR-101 Quiz (Grievances Recap #3)

Multiple Choice:

- a. Calculate the potential remedy under the union's formula, then offer them half of what they want, and draw up a written agreement so you can show that this dispute was resolved at the lowest possible level.
- b. Calculate the potential remedy under the union's formula, decide that this is too much money, and in the Level I response state simply and concisely: "After a full investigation, the grievance is hereby denied."
- c. Figure out whether the grievance is timely, what the potential remed(ies) could be, and discuss potential damages with the HR Director.
- d. Decide that it is not appropriate for you to deal with this grievance at Level I and decline to investigate or issue a decision, sliding it under the Superintendent's door when she's not looking.

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**Questions, Answers
& Discussion**

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Thank You!

Questions or comments? Please contact:

Brooke E. Jimenez
BJimenez@aalrr.com

David E. Robinett
DRobinett@aalrr.com

(951) 683-1122

aa/rr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

aa/rr

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Brooke E. Jimenez

Partner
951-683-1122
bjimenez@aalrr.com



Brooke Jimenez represents California public school and community college districts and county offices of education in the areas of education law, employee discipline, harassment and discrimination complaints, and contract administration. She also handles general litigation matters, including discovery, depositions, mediations, and appeals.

Ms. Jimenez has provided legal assistance to several outreach organizations, including the UCLA Law Low Wage Worker's Clinic, Children's Law Center of Los Angeles, and Western Law Center for Disability Rights, Learning Rights Project.

While in law school, Ms. Jimenez was the Executive Editor for the *Chicano Latino Law Review* and Comments Editor for the *Indigenous Peoples' Journal of Law, Culture & Resistance*.

Honors & Recognitions

Ms. Jimenez was named a "Southern California Rising Star" in 2014, 2015, and 2017. Rising Stars are exceptional Southern California attorneys who are 40 years old or younger or who have practiced law for ten years or less. They are selected based on peer evaluations and independent research regarding the attorneys' professional achievements. Only 2.5 percent of attorneys are recognized as Rising Stars.

Ms. Jimenez was also named one of the "Top Women Attorneys in Southern California" by Super Lawyers, a national rating service of exceptional lawyers which polls selected Southern California lawyers.

OFFICE

3880 Lemon Street
Suite 350
Riverside, CA 92501

EDUCATION

J.D., University of California, Los Angeles School of Law
B.A., University of California, Riverside

ADMISSIONS

2007, California
U.S. District Court, Central District of California

PRACTICE AREAS

Education
Investigations
Labor & Employment Law
Litigation
Student Discipline

Brooke E. Jimenez

Firm News

AALRR Announces 2020 Equity and Non-Equity Partners
01.15.2020

AALRR Hosts 2nd Annual Civil Rights Conference
09.20.2019

Super Lawyers Recognizes Seven AALRR Attorneys as Rising Stars
06.06.2017

Atkinson, Andelson, Loya, Ruud & Romo Holds Student Enrichment Day for High School Students
12.08.2016

HEMET: Students visit law firm
The Press Enterprise, 09.24.2015

Five AALRR Attorneys Recognized as Rising Stars by Super Lawyers National Rating Service
06.08.2015

AALRR to Sponsor Welcome Reception During Women in School Leadership Forum
09.23.2014

Nine AALRR Attorneys Recognized as Rising Stars by Super Lawyers National Rating Service
06.06.2014

Alerts & Articles

Governor Signs AB 438 Announcing Sweeping Changes to the Classified Layoff Process for School Districts;
AALRR Webinar Planned
10.12.2021

Community & Professional

- Latina Lawyers Bar Association, Member
- Los Angeles County Bar Association, Member

David E. Robinett

Senior Counsel
951-683-1122
drobinett@aalrr.com



David Robinett represents school and community college districts and county offices of education in personnel and employment law, special education law, facilities, and collective bargaining matters. Mr. Robinett has successfully represented clients in civil litigation at both the superior court and appellate levels. He also has experience representing clients at administrative hearings in the areas of special education, employee discipline, and layoffs.

Firm News

Alternatives to Student Suspension
Association of California School Administrators - Leadership Magazine,
08.31.2012

Events & Speaking Engagements

Mr. Robinett has conducted training sessions and workshops on a wide range of topics, including sexual harassment, school district tort liability, and the role of education foundations.

Employee Absenteeism: Managing Attendance Issues (K-12)
At Your Desk (Via Zoom), 11.21.2024

Making the Interactive Process a Success (Part 2): Leaves of Absence,
Telework and Other Reasonable Accommodations (K-12)
At Your Desk (Via Zoom), 10.17.2024

OFFICE

3880 Lemon Street
Suite 350
Riverside, CA 92501

EDUCATION

J.D., Pepperdine University School
of Law
B.A., Texas A&M

ADMISSIONS

2002, California

PRACTICE AREAS

Contract Enforcement &
Collective Bargaining
Litigation

David E. Robinett

Making the Interactive Process a Success (Part 1): Tips for Effective Communication and Problem Solving
When Employees Request Accommodation (K-12)
At Your Desk (Via Zoom), 09.19.2024

2024 Leaves Boot Camp K12
At Your Desk (Via Zoom), 08.15.2024

Managing and Understanding Leaves (K-12)
At Your Desk (Via Zoom), 08.15.2024

Publications

Mr. Robinett contributes to the firm's education law publications.