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How do you decide when to file a grievance?

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EDITOR'S NOTE: We are departing from our usual format this issue toreprint an article by Judith McCormack, the former chair of the Ontario Labour RelationsBoard, and a lawyer with Sack Goldblatt Mitchell in Toronto.

Within the HSA membership a great many grievances arise out ofreorganizational initiatives taken by the employer or the RHB or CHCs, or out of improperapplication of the classification system. While these types of grievances are not asadversarial as those against discipline or discharge, or even selection disputes,nonetheless the filing of any grievance places an employee in a situation where they arechallenging relations of power in the workplace. It is entirely understandable that anemployee contemplating any form of grievance may find it difficult to decide whether toinitiate the process. These concerns are shared with union members in all industries. Thefollowing article considers these issues from the perspective of union legal counsel.

by JUDITH McCORMACK

When should my steward file a grievance on my behalf? How does she decide which issues to grieve? What are the consequences of not filing a grievance?

To grieve or not to grieve - that is the question union reps face almost daily. Sometimes the answer is simple. A members rights have clearly been violated, and she is enthusiastic about grieving.
In other cases, the situation is more complicated. A worker may be reluctant to file a grievance for a whole host of reasons. He may be worried that the employer will be angry, or he may not be used to standing up for himself.
Then there are cases where no worker has been affected, even though a clause in the collective agreement has been breached. So what is the problem? Surely not filing a grievance is one of the safer things to do.
Unfortunately, arbitrators have found in a number of cases that not filing grievances where a collective agreement has been breached can have serious consequences.
Lets take an example where an employer doesnt post several jobs, contrary to the agreement. However, the jobs are low-level and no one wants them, and so no grievance is filed. Along comes a job that everyone wants, one that has fascinating work, good hours and an intelligent supervisor. The employer doesnt post this job either. A grievance is filed and it goes to arbitration.
At the arbitration, the employer is likely to argue two things. First, even if the job should have been posted, the union is estopped from relying on its legal rights. -Estopped" is the kind of archaic legal word lawyers adore. It means that the union cannot rely or insist on its strict legal rights. Why not? Well, because by doing nothing when the first few jobs werent posted, the union led the employer to believe that postings wouldnt be required. As a result, the argument goes, the union shouldnt be able to insist on this particular job being posted.
Or the employer might argue that the agreement is unclear, and that the arbitrator should look at past practice to figure out what it means. -Past practice" is what the union and employer have done in similar situations.
The unions failure to grieve in the past might be used to interpret the agreement against the union.
Of course, there are a number of limitations on when these arguments can be successful. But they illustrate the dangers of not grieving.
What can you do? If its not possible to file a grievance, at least make it clear in writing to the employer that this is -without prejudice" to the unions rights. This is a handy phrase that means -you cant hold it against us later." Its not foolproof, but its better than doing nothing. If you let sleeping dogs lie, they sometimes wake up and bite you.
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