DELEGATE PRIMER *and* GRIEVANCE GUIDE *to* EFFECTIVE REPRESENTATION

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1199SEIU
United Healthcare Workers East

QUALITY CARE AND GOOD JOBS FOR ALL

Digital Version: 1199SEIU.org/Delegates

Education & Leadership Development Department

We welcome new Delegates and applaud the continued commitment and dedication of incumbent Delegates.

The strength of our union lays in the unity, passion, dedication and leadership of our members. Delegates play a special role. They communicate the union's vision and values, educate their peers, build a movement for change at work and in their communities, and they have a special legal obligation to represent other members and to enforce the contract.

This Grievance Guide covers essential basic information about responding to grievances but conversations with Organizational staff, Officers, experienced Delegates and members as well as Delegate Training will build your ability to be effective at representing members.
The Guide also provides short summaries of key aspects of our union's history, vision and your role.

In this Grievance Guide, you will find:

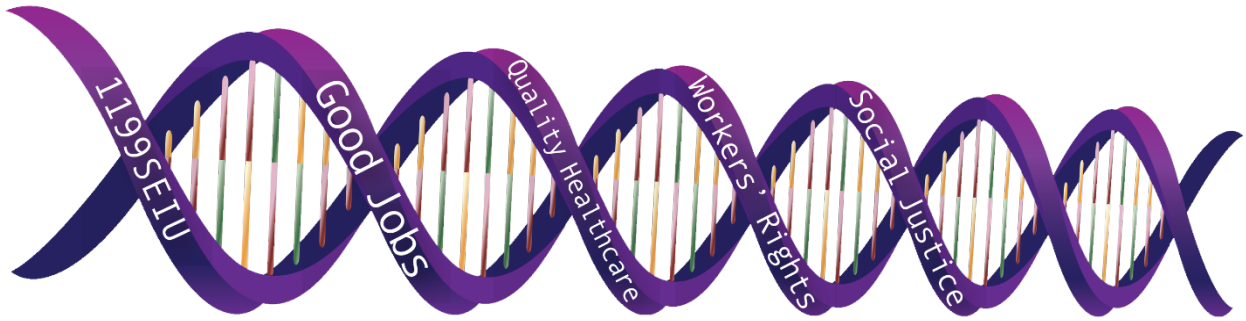
1199SEIU MISSION, HISTORY, & VISION

MISSION

We are frontline health care workers and we stand together for our patients, our families, and our communities. We have a tradition of leading the charge for social justice and equality that exemplifies our commitment to helping others. The 1199 constitution declares that, "We Nurture, Save, and Extend lives" by :

- "Advancing the economic interests of our members and all working people"
- "Growing our numbers and strengthening our organization"
- "Negotiating and enforcing our collective bargaining agreements"
- "Building our political influence to secure and defend the healthcare institutions that we serve" … and to "expand quality healthcare coverage to every person as a human right."

Fighting for quality health, good jobs & social justice is in our DNA



We link with other social movements and advocates for change who believe that access to quality, affordable healthcare is a human right and critical to achieving racial, immigrant, environmental and economic justice. Our healthcare system should always prioritize quality of care and the health of our communities over corporate bottom lines. Every person should have access to affordable, high quality healthcare and long term care services—delivered in the setting of their choice—where there are a sufficient number of well-trained workers to provide the highest standards of care.

HISTORY

We are a union of healthcare and human services workers. We were founded by Leon Davis, who worked in a Harlem, NY pharmacy in the 1920s as a stock clerk. As a union member, he transformed his small local union of pharmacy workers into a national union for hospital workers. The key to the growth of 1199 since 1932 is vision and unity, forging a collective dream shared by many.

1199 joined forces with the energy, spirit and tactics of the Civil Rights Movement of the 1950s and 1960s and we have not stopped fighting since. In the 1950s, hospital and nursing home

workers struggled with poverty, earning $32 a week for a 48-hour week with no benefits. Hospital workers went on a 46-day strike, committed civil disobedience (they lacked the legal right to join a union or strike), and many were arrested for their actions. They won the right to have 1199 be their union and they won a $100 a week minimum wage.

Many brave brothers and sisters have forged this union through thick and thin, victories and setbacks. We are now the largest health care workers local in the nation, 450,000 members strong. 1199SEIU United Healthcare Workers East headquarters is in New York City. We are a national union representing members in all of New York state, as well as Florida, New Jersey, Maryland, Massachusetts and the District of Columbia. We are affiliated with the Service Employees International Union (SEIU). Together, we are 2.2 million workers who partner with other movements for social, economic and climate justice determined to make changes that working people deserve.

VISION: TRANSFORMING OUR UNION

Our industry is changing. The technological, demographic and economic changes of the last few decades are all deeply affecting health care. To survive and thrive into the future, we must change too so we can continue to fight and win for our patients, families, and communities.

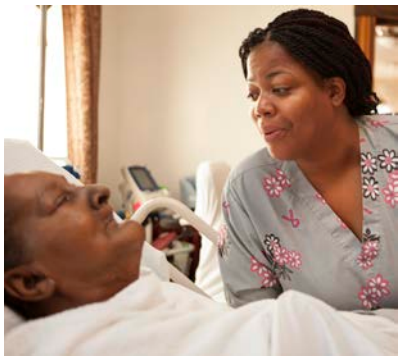
To achieve our Vision of a just and fair society for working people, we must become an even more effective, nimble, dynamic and democratic organization.

Delegates, members, officers and staff must work together to achieve the following:

1. Re-Structure the work to align with the vision and evaluate changes by their ability to help us achieve our mission.
2. Be comfortable with change -- All 1199's leaders (officers, staff and members) embrace change and lead change and be uncomfortable with the status quo and mediocrity.
3. Hold effective democratic conversations between and with officers, staff and members in order to identify and address tough issues constructively and effectively.
4. Grow our membership.
5. Be comfortable using technology to engage members and communities in order to build our capacity and effectiveness.
6. Continuously recruit, train and prepare leaders within our membership and throughout the organization.

Together we will innovate to strengthen our current methods of bargaining, representation, and organizing to meet the challenges of a transforming healthcare system and make our lives and communities better. Healthcare workers can help lead the way to creating a more just health care system where all workers are paid a living wage and racial, gender and other disparities are eliminated to create a more just healthcare system for patients and workers alike.

WHAT IS A UNION?


A union is a group of workers who form an organization to gain:

1. Respect on the job,
2. Better wages and benefits,
3. More flexibility for work and family needs,
4. A counterbalance to the unchecked power of employers, and
5. A voice in improving the quality of their products and services.

Unions have made life better for all working Americans by helping to pass laws ending child labor, establishing the eight-hour day, protecting workers' safety and health and helping create Social Security, unemployment insurance and the minimum wage, for example. Unions are continuing the fight today to improve life for all working families in America.

Unions are shrinking nationwide and represent only 7% of private sector workers and 11% of all workers. While we are still a powerful force for change, we must also educate our families and communities on how our collective work in labor and social justice organizations results in changes that help working people.

There are millions of workers who want to join unions but face obstacles to doing so. Our brothers and sisters in Florida, "a right to work state," face this struggle daily. Good employers understand that when workers form unions, their companies also benefit. But most employers fight workers' efforts to come together by intimidating, harassing and threatening them. In response, workers can only win by linking arms with each other and with our communities and other movements to make change that benefits workers. Together, we are blazing new pathways forward for members in the workplace and in the nation by winning elections and laws that strengthen all working families, including our fights for a $15 minimum wage, affordable child care, racial, gender and LGBTQ justice, immigration rights and climate change.

UNION DUES

Members pay dues to support the implementation of the Union mission, vision and agenda. These resources help us build the strongest, united and most effective voice so we can win better wages and benefits, solve problems in the workplace and beyond. All the activities involved in negotiating and enforcing our contracts as well as fighting for improved patient care and other social justice campaigns rely on resources, including union facilities, operations, services, staff, tools and equipment.

UNION BENEFITS

Benefits such as health care, salary increases, pensions, child care, college tuition credit and admission services, basic and continuing education classes, retiree services, job protections, and due process are the result of contract negotiations between the union and the employer. Dues do not pay for benefits. Dues pay for the contract fights where we win agreements from the employer to provide these benefits to every eligible member of the bargaining unit. The employer must honor the contract by paying the agreed upon terms for salaries and benefits.

POLITICAL ACTION CONTRIBUTION (PAC)

PAC contributions can only be used for electoral and political activity. Government funding (like Medicare and Medicaid), along with insurance payments, allow many hospitals, nursing homes, home care agencies and medical clinics to deliver services. Also, government regulation on safety, staffing, licensing and other issues affects how institutions operate and how our members do their jobs. In addition, the minimum wage, access to healthcare, education, affordable housing and other issues affects our members, our families and our communities and our opportunities to achieve all we can be and pursue our dreams.

ROLES AND RESPONSIBILITIES OF UNION DELEGATES

Delegates are union leaders elected by their co-workers to protect and advance the interests of healthcare workers, our families, patients and communities. Delegates make sure workers are treated fairly, solve problems on the job, and help negotiate and enforce strong contracts. They help lead the fight for justice at work, in our communities, and in this nation. In addition, Delegates have special legal duties and rights. (See the discussion of Weingarten Rights and the Grievance Guide to learn more.)

AS A DELEGATE, YOU TOOK THE FOLLOWING PLEDGE:

> "I do hereby accept the position of Delegate and member of my regional Delegate Assembly. I pledge to faithfully carry out the obligations of my office and secure for the members I represent every right and privilege of Union membership. I pledge to help build our Union and defend it from all its enemies. On this pledge, I stake my good name, my honor and my conscience." - 1199SEIU constitution, Article IV, Section 7:h

AS LEADERS BUILDING A MOVEMENT FOR JUSTICE AT WORK AND IN COMMUNITIES, DELEGATES ALSO

- ✓ Advocate for the highest quality care for our patients.
- ✓ Defend job standards by protecting and improving our contracts.
- ✓ Provide leadership, be a model of a proud union member and defend the union constitution.
- ✓ Communicate with members; educate, mobilize and empower.
- ✓ Investigate and solve workplace grievances and problems.
- ✓ Build our union by organizing non-union workers.
- ✓ Help ensure members are paying dues and political action contributions.
- ✓ Orient new members so they understand the accomplishments and mission of our union.
- ✓ Participate in Delegate meetings, assemblies, trainings and other activities.
- ✓ Develop new Delegates and build our union's committees.
- ✓ Support and participate in our union's mission for social justice and progressive causes.
- ✓ Engage members to actively participate in committees, caucuses, and campaigns

PROBLEM SOLVING

A term you may be familiar with is "Filing a Grievance." A grievance is an allegation that management has violated the terms of the contract. Not every problem is a violation of the contract, and not every problem requires a grievance. Delegate must have other ways, both formal and informal, for solving problems. The best solutions build unity and strength. They educate members that it is their participation and involvement that builds their power in the workplace. In proactively solving problems:

- Thoroughly investigate – Obtain member and management points of view
- Inform members when they don't have a winning case and identify other courses of action, such as
    - Ask management to give another chance
    - Counsel the member
    - Referral to Member Assistance Program (MAP)
    - Member can appeal to the Chapter to have their grievance heard
- Celebrate your victories collectively
- Evaluate and Learn from what went well and what will you do differently the next time to builduild the collective wisdom of the Delegate Body.

POLITICAL AND UNION ACTIVISM

All Delegates should be current in dues and contribute to PAC. They should be registered to vote and volunteer on political campaigns, engage in voter registration, lobby days, and rallies and actions to pass pro-worker legislation. In addition, Delegates should be knowledgeable about their contract victories and how they were won. They should educate other members on the role of the union and the difference between dues, benefits and PAC and encourage members to become participants in the fight for fairness. Delegates should also know their contract and be able to answer basic questions about its terms. They should attend and conduct member meetings and constantly encourage other members to get involved.

WEINGARTEN RIGHTS

Weingarten rights guarantee a union member the right to Union representation during an investigatory interview. These rights, established by the Supreme Court, in 1975 in the case of J. Weingarten Inc., must be claimed by the union member who must verbally state to the employer that he/she wants a Union representative present (see sample card below). Union members cannot be disciplined for invoking this right. Union representatives (Delegates, organizer, or officers) must educate union members about this right. Your Delegate training will discuss Weingarten rights, investigatory meetings and information requests in more detail.

This is an example of what the Weingarten rights card(s) will look like:

WEINGARTEN RIGHTS

(If called to a meeting with management, say or read the following or present this card to management when the meeting begins.)

If this discussion could in any way lead to my being disciplined or terminated or have any effect on my personal working conditions, I respectfully request that my union delegate, representative or officer be present at this meeting. Without union representation, I choose not to participate in this discussion.

WHAT IS AN INVESTIGATORY INTERVIEW?

An investigatory interview is one in which a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his/her conduct. If an employee has a reasonable belief that discipline or discharge may result from what s/he says, the employee has the right to request Union representation.

Examples of such an interview are:

1. The interview is part of the employer's disciplinary procedure or is a component of the employer's procedure for determining whether discipline will be imposed.
2. The purpose of the interview is to investigate an employee's performance where discipline, demotion or other adverse consequences to the employee's job status or working conditions are a possible result.
3. The purpose of the interview is to elicit facts from the employee to support disciplinary action that is probable or that is being considered, or to obtain admissions of misconduct or other evidence to support a disciplinary decision already made.
4. The employee is required to explain his/her conduct, or defend it during the interview, or is compelled to answer questions or give evidence.

WEINGARTEN RULES

When an investigatory interview occurs, the following rules apply:

RULE 1 - The employee must make a clear request for Union representation before or during the interview. The employee can't be punished for making this request.

RULE 2 - After the employee makes the request, the supervisor has 3 options. S/he must either:

a. Grant the request and delay the interview until the Union representative arrives and has a chance to consult privately with the employee: or
b. Deny the request and end the interview immediately; or
c. Give the employee a Choice of: 1) having the interview without representation or 2) ending the interview

RULE 3 - If the supervisor denies the request and continues to ask questions, this is an unfair labor practice and the employee has a right to refuse to answer. The employee cannot be disciplined for such refusal but is required to sit there until the supervisor terminates the interview. Leaving before this happens may constitute punishable insubordination.

The employer does not have a legal obligation to notify the union member of this right. Delegates and staff have a responsibility to educate members about this right. As a union delegate, your role is to build power in the work place. When workers unite and focus, they can change the behavior of employers. Employers learn to consult with the union ***before*** they make decisions that affect members. Your role as a delegate is to understand and build a system where members create this power in the work place. When the members are strong, unified, respected and engaged, a good employer will notify a union member of their Weingarten Right to be represented. The employer involves the union at the start of the process rather than confront the union later. When the employer is powerful, they don't notify employees or they may be ignorant of this right.

UNION REPRESENTATIVE'S RIGHTS UNDER WEINGARTEN

You are not required to merely be 'silent witness'. You have the right to:

1. Be informed by the supervisor of the subject matter of the interview
2. Take the employee aside for a private conference before questioning begins
3. Speak during the interview
4. Request that the supervisor clarify a question so that what is being asked is understood
5. Give employee advice on how to answer a question
6. Provide additional information to the supervisor at the end of the questioning.

You do not have the right to tell the employee not to answer nor, obviously, to give false answers. An employee can be disciplined for refusing to answer questions.

A union member can still ask for representation at other types of meetings. Some employers will permit a representative to attend even when not legally required to.

1199 SEIU GRIEVANCE GUIDE

This Grievance Guide is designed to assist 1199 SEIU Delegates, Organizers and Officers to more effectively handle grievances. It provides details on how arbitrators have decided actual cases filed by 1199 SEIU. Since Arbitration is a costly potential last step of the grievance procedure it is very helpful to know the standards arbitrators use to decide cases. Understanding these standards helps both management and the union determine who has the stronger case or if the case is a "toss up" that could go either way in arbitration.

The Grievance Guide can be a useful tool for:

- Training Delegates and members about their rights, and how to prevent discipline.
- Identifying information to gather when investigating specific types of cases.
- Explaining the strengths and weaknesses of cases to members.
- Determining the best course of action on a case after an investigation.
- Preparing for grievance meetings—to help you focus on the most important factors.
- Pointing out to management where they have a weak case.
- Determining how to emphasize strengths and minimize weaknesses of a case.
- Evaluating possible settlements of cases.

CONTENTS

WHAT YOU WILL FIND IN THE GRIEVANCE GUIDE7

1. TIP SHEETS ON INVESTIGATING AND HANDLING GRIEVANCES

At the beginning of this Grievance Guide, you will find a series of Tip Sheets on, "Investigating and Handling Grievances". These resources are designed to help you carry out your role enforcing the collective bargaining agreement (contract).

The Tip Sheets included are:

CONTENTS *(Continued)*

Each chapter has:

- Basic information you need to help you understand, investigate and handle this kind of case.
- Specific tips on handling this kind of case.
- Questions arbitrators ask when deciding this kind of case.
- Lists of common questions arbitrators ask on a rating sheet that you can use to "score" the strengths and weakness of the case for both management and the union.
- The score serves as a guide to see the strength of the case and not a definitive determination of how the case will turn out. This is especially true if the scores for management and the union are even or close to even.
- Details on what arbitrators have ruled (including quotes) from actual cases.
- Fact Sheets on the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) are included for your reference in Chapter One: Time and Attendance.

TIP SHEETS ON INVESTIGATING AND HANDLING GRIEVANCES

TIP SHEET #1

INVESTIGATION OF GRIEVANCES

1. GET ALL THE FACTS BY USING THE FIVE "W'S" PLUS "R"

Check the Grievance Guide to find out what information is most important to get for each type of case.

Who?..... Names of everyone involved, witnesses, management

What?..... Exactly what happened, what was done, what words were said

When?..... Exact dates and times, sequence of events

Where?..... Exact location -- department, floor, building, parking lot, etc.

Why?..... The reasons

this happened, what was violated Remedy?...What will resolve the situation

2. WHERE TO GET THE FACTS

- Interview the people involved, the witnesses, management
- Collect documents, memos, letters, schedules, records, pay stubs, etc.
- Check personnel files
- Read the contract, rules, policies, laws
- Request information from management

3. IS IT A GRIEVANCE?

- Each contract defines what a grievance is.
- Usually a grievance is a violation of something:
    - the contract
    - past practice (must be a clear long standing practice)
    - rules and regulations
    - health and safety regulations
    - the law

Sometimes, a legitimate workplace problem does not involve a clear violation of one of the above. So, like the Problem Solving Flow Chart shows, we may not file a grievance, but try to solve the problem other ways.

Remember that grievances have time limits. Sometimes you may have to file a grievance to protect the right to grieve while you continue to investigate.

TIP SHEET #2

THE RIGHT TO INFORMATION

Under our contracts, the National Labor Relations Board (NLRB) and Supreme Court Rulings, Delegates have the right to request information needed to process grievances.

Delegates must make specific requests for information, you can't just say "give me everything you have" or make other broad requests.

INFORMATION REQUESTS SHOULD BE MADE IN WRITING WITH:

- The date of the day you write the request
- The name of the management person you are asking to provide the information
- Your name
- The name of the grievance related to the information request
- Specific description of the information you want

EXAMPLES OF THE KIND OF INFORMATION YOU CAN REQUEST INCLUDE:

- accident records
- attendance records
- memos and letters
- disciplinary records
- evaluations
- interview notes
- job assignment records
- job description
- payroll records
- performance reviews
- personnel files
- seniority lists
- reports and studies
- equipment specifications
- inspection records

Management may refuse to provide the information you request claiming that you don't really need the information, that it is too difficult to produce, or for other reasons.

Persist in demanding the information. Answer management's reasons the best you can, but keep insisting that you need the information and you have a right to it.

Management may refuse to provide information on the basis that it is confidential. Particularly sensitive information or patient information protected by law may be legitimately refused.

In cases where management refuses to provide information because of confidentiality you may be able to get what you want by modifying your request or getting written authorizations to see the information from the people whose information you want.

There is no specific time limit for management to provide the information. You should keep after management to provide the information in a reasonable length of time based on how difficult it is to produce the information and when you need it.

TIP SHEET #3

HOW TO INTERVIEW MEMBERS WITH A POTENTIAL GRIEVANCE

WHEN INTERVIEWING A MEMBER WITH A WORKPLACE PROBLEM:

- Find the best place to talk (private, quiet, etc.)
- Put the member at ease
- Explain why you need all the facts and that you may need to ask some challenging questions
- Ask member to explain what happened
- Listen and take notes, try not to interrupt
- Ask follow up-questions--use open-ended questions that can't be answered with just a yes or no
- Repeat back what you heard to confirm you have it right
- Ask questions to fill in gaps and get answers to management's position
- Explain next steps

TIP SHEET #4

INVESTIGATING GRIEVANCES QUESTIONS TO ASK

QUESTIONS TO ASK:

"Tell me more about what happened."

"How do you know that?"

- "What were the exact words you (they) used?"
- "What do you think management will say happened?"
- "How do you get along with _____ in general?"
- "Can you give me an example of what you mean?"
- "What is the normal practice where you work?"
- "What time was it when that happened?" "How do you know?"
- "How many times did it happen?"
- "Why did you do that?"
- "Tell me the order that things happened."
- "Exactly where were you (and others involved) when it happened?"
- "Who saw what happened?" "Who else should I talk to?"
- "Why do you think this happened?"
- "I'm not sure I know what you mean by that, please explain."
- "What else should I know?"

TIP SHEET #5

DELEGATE INVESTIGATION WORKSHEET

Who? Names of Everyone Involved, Witnesses (Union & Management)

What? Exactly what happened? (Be Specific)

_____
_____
_____

When? Exact dates & times? (Be Specific)

_____
_____
_____

Where? Exact location – department, floor, building, parking lot (Be Specific)

_____
_____
_____

Why? Possible reasons this happened.

_____
_____
_____

Remedy: What will resolve the situation?

_____
_____
_____

Other notes

_____
_____
_____

TIP SHEET #6

PROBLEM SOLVING FLOW CHART

- **Get the** *whole* **story—5Ws**
- Clearly define the issue/problem
- **Define what you want**

- What does the information tell you?
- Look for patterns in the information
- Look for hints for possible action

- What you will do step by step
- ***Who*** will do ***what*** and by ***when***
- How to make sure everyone does their part

- Carry out your plan
- Keep people accountable
- Flexibility--Adjust as needed

- Review what was done well, what could be done better
- Learn from your experiences
- Celebrate victories

TIP SHEET #7

WRITING GRIEVANCES

- The purpose of a written grievance is to give the employer official notification of the grievance.
- A written grievance should not be long or complicated.
- Because the written grievance only provides a written notification, you should not argue your case in writing.

A good written grievance should contain three parts:

1. STATEMENT OF THE GRIEVANCE.

What happened or failed to happen? (This includes the grievant's name, when, and where the grievance took place.) It can and should be one sentence.

2. WHAT WAS VIOLATED?

Mention all sections of the contract that might possibly be violated. Add other violations, which might apply.

Cover all your bases by using the phrase "and all other relevant sections of the contract." Example: "This action violates Section, Article 3, and all other relevant sections of the contract."

3. THE REMEDY.

How do you want the Employer to correct the situation? Ask for all the benefits that the worker would have had if the violation had never occurred.

Again, cover your bases by using the inclusive phrases. "shall be made whole for any and all losses" or "and any and all other benefits to which the grievant is entitled."

Tip Sheet #8

RIGHTS OF DELEGATES

When you are representing the union as a Delegate, your contract and the law say you must be treated as an equal at meetings with management.

THIS MEANS YOU CAN, FOR EXAMPLE:

- Raise your voice
- Use “salty” language (curses/swears)
- Challenge management’s truthfulness
- Threaten legal action
- Talk about possible group actions
- Address the boss the same way he/she addresses you

There are limits--the law doesn’t protect “Outrageous” or “Indefensible” conduct.

You are only protected by this “Equity” rule when you are representing the union, no when you are talking to management as an individual worker.

TIP SHEET #9

PLANNING TO MEET WITH MANAGEMENT ON DISCIPLINE WORKSHEET

- What do you expect management's case to be? How will you deal with it?

  _____
  _____
  _____

- What is your plan for the meeting? (Force management to prove their case, appeal to the Director's nice side? What is your plan "B" if your first plan doesn't work?)

  _____
  _____
  _____

- What role will the Delegate and the member play? (How/when will member talk? What should member say and not say? How to call a caucus? etc.)

  _____
  _____
  _____

- What are the strongest points the Union wants to make: (Check Grievance Guide to get information on where management's case is weak and the union's case is strong)?

  _____
  _____
  _____

- What is your opening statement to start the meeting, define the issue: (With discipline cases this may simply be to demand that management prove its case)?

  _____
  _____
  _____

- What is the remedy you will ask for? What would you settle for?

  _____
  _____
  _____

- How will you end the meeting? What will you tell management will happen next? (Confirm agreement in writing, file a group grievance, group actions, etc.)

  _____
  _____
  _____

TIP SHEET #10

MEETING WITH MANAGEMENT

Don't Talk to Management Alone

- It can drive a wedge between member(s) and Delegate.

Prepare member(s)

- Explain what will happen in the meeting.

Prepare your case

- Written outline, facts, documents, etc.

Determine roles at the meeting

- For both Delegates and member(s).

Know the manager

- Find out the hot buttons, style, history, etc. of the manager.

If it is a discipline case management must go first

- They have the burden of proof.
- Listen to management's case (take a caucus if desired) then respond by showing where management's case is weak.

If it is a contractual grievance the union goes first

- We have the burden of proof.
- Make a clear statement of your case and what you want.

Listen to management's response

- Take notes if you need to.

Call a caucus if necessary: Respond, ask questions, explore settlements and consider settlements carefully

- Discuss with member(s) involved and consider precedents.

End the meeting by summarizing

- What was accomplished and what will happen next.

After the meeting, debrief

- What happened with the union team?

DON'T TALK TOO MUCH—LISTEN INSTEAD! DON'T GET SIDETRACKED. DON'T LOSE YOUR TEMPER.

TIP SHEET #11

USING STRENGTHS & MINIMIZING WEAKNESS OF A CASE

WAYS TO USE STRENGTHS OF A CASE:

- Ask questions (that you know the answer to) which highlight your strengths
- Ask questions (that you know the answer to) which highlight their weaknesses
- Repeat your strong points-- have more than one person say it
- Put some emotion into your presentation of your strengths
- Point out the factors arbitrators consider and how they have ruled on similar cases (use the Grievance Guide)

WAYS TO MINIMIZE WEAKNESSES OF A CASE:

- Shift discussion to your strengths
- Don't dwell on weakness, don't ask questions that highlight weaknesses
- Minimize the negative effect of what worker was disciplined for if possible (no one got hurt, really a minor incident, etc.)
- Acknowledge management's concern, but show how it wasn't a problem in this case ("We understand you want to protect your authority, but it wasn't challenged here.")
- Look for technicalities not fulfilled, ("You didn't do a good investigation, you didn't send proper notice, etc.)
- Emphasize unpredictability of arbitration ("You may think you have a strong case, but you never know how an arbitrator might decide")

TIP SHEET #12

GETTING SETTLEMENTS

WHEN AGREEING UPON A SETTLEMENT:

- Determine the needs of all concerned.
- Make sure everyone has the same reliable information.
- Consider multiple options for settlement.
- Discuss possible settlements with members.
- See if you can reach agreement on a general approach, then work on the details.
- Don't make it personal.
- Address whatever blocks a settlement — face saving, dispute over facts, etc.
- Put settlement agreement in writing.
- Look for settlements that resolve the problem for the future if possible.
  (Note: Sometimes the best you can do is to settle a case and agree with management that it only applies to that case.
- Check with other Delegates and your Organizer before making any settlements that might set a precedent.
- Get approval from members before accepting settlement.

CHAPTER 1

TIME AND ATTENDANCE

IN TIME AND ATTENDANCE CASES DELEGATES SHOULD...

KNOW:

- Arbitrators balance the right of the employee to use sick leave, when they are sick, with management's right to expect a reasonable record of attendance.
- Even if a worker has unused sick leave, discipline is possible.
- Arbitrators consider lateness and absenteeism as part of the same problem.
- You can expect management to give workers many chances to improve before dismissing them.

INVESTIGATE:

- Check schedules, time cards, and other personnel records, to verify the attendance history of the disciplined member and to ensure that all workers are being treated equally.
- Did management use progressive discipline?
- Does management enforce the rule consistently?

BE ALERT:

- If management launches a new policy or changes an existing one, contact your organizer immediately to assess the need for a grievance or other action.

PREVENT DISCIPLINE:

- Talk to members about absenteeism and lateness when problems begin.
- See if there is a problem (e.g. substance abuse, family problems) that you can help with by referring the worker to the Member Assistance Program (MAP).
- If a member has a personal illness or family issues, they may be eligible for time off under the Family Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA). [See pages 29 and 30 of this chapter]
- Explain to members if they continue to miss a large number of workdays plus come to work late, especially in a pattern (e.g. before and/or after holidays or weekends), discipline is likely and it will be difficult to defend the member.

HELPFUL TIPS ON HANDLING ATTENDANCE DISCIPLINE GRIEVANCES...

INVESTIGATING

Delegates have the right to review attendance and lateness records of the disciplined worker and others in the same unit or department, particularly when investigating charges of disparate treatment.

TECHNICALITIES

Always check to see if management fulfilled their contractual obligations. However, when there is a clear record of absenteeism, minor procedural missteps by management are not likely to result in overturned discipline.

CRACKDOWNS & ARBITRARY ENFORCEMENT

If management is using the time and attendance policy unfairly or in a "crack down" on many workers, you should consider mobilizing the members to take action, and/or filing class- action grievances.

SETTLEMENT ADVICE

Sometimes you may find that it is easier to negotiate than confront, especially when the grievant has been given many chances to improve.

FMLA & ADA

The Family Medical Leave Act (FMLA) and The Americans with Disabilities Act (ADA) may be helpful to you in representing members with absenteeism related to family member illness, personal long-term illness and disability. (See pages 29 and 30)

HOW ARBITRATORS DECIDE ABSENTEEISM CASES

IN DECIDING CASES WHERE WORKERS ARE FIRED OR SUSPENDED FOR ABSENTEEISM, ARBITRATORS ASK THE FOLLOWING QUESTIONS.

10 KEY ARBITRATOR QUESTIONS:

1. Does the Employer have a clear and established time and attendance policy that is well-defined, and known to all employees?

2. Has the grievant had other similar, or unrelated, discipline problems?

3. What is the length of the grievant's employment, and the length of their poor attendance/lateness record?

4. What is the attendance/lateness record of other employees relative to the grievant?

5. Did the employer use progressive discipline?

6. Did the grievant have the opportunity and a willingness to improve?

7. Is the policy enforced consistently with respect to all employees?

8. Did the grievant have legitimate reasons for the absences/lateness's, or is there some pattern of abuse?

9. Did management perform a full and fair investigation?

10. What is the nature and importance of the grievant's job?

You can see how the key questions above affect the strength of an individual case by using the chart on the next page.

GRIEVANCE ASSESSMENT GUIDE - ABSENTEEISM

GRIEVANT/CASE:_____

MANAGEMENT POINTS		**UNION POINTS**	
1. Add 1 point if no clear precedent or policy has been violated.	+_____	1. Add 1 point if an established, reasonable attendance policy has been violated.	+_____
2. Add 1 point if the absences are from an injury or illness that is over and won't cause any additional absenteeism.	+_____	2. Add 1 point for each written warning for absenteeism.	+_____
3. Add 1 point if the grievant has a good past attendance record.	+_____	3. Add 1 point if grievant has a record of other discipline, unrelated to absenteeism..	+_____
4. Add 1 point for 3+ years of service; and add 1 more point for 10+ years.	+_____	4. Add 1 point if the grievant is on probation for past poor attendance.	+_____
5. Add 1 point if the grievant's attendance is above average.	+_____	5. Add 1 point if the grievant's attendance is significantly below average.	+_____
6. Add 1 point if the grievant has made legitimate efforts to improve.	+_____	6. Add 1 point if management used progressive discipline.	+_____
7. Add 1 point if discipline is inconsistent or discriminatory.	+_____	7. Add 1 point if discipline is consistent with how others have been treated.	+_____
8. Add 1 point if the penalty was too severe for the violation.	+_____	8. Add 1 point if the penalty fits the violation.	+_____
9. Add 1 point if grievant's performance evaluations are good to excellent.	+_____	9. Add 1 point if the employee's job is critical and must be filled when they are absent.	+_____
10. Add 1 point if management did not do a full investigation.	+_____	10. Add 1 point if management did a complete investigation.	+_____
11. Add 1 point if the union can prove that the absence was caused by actual illness or injury.	+_____	11. Add 1 point if management has evidence the grievant wasn't really sick or injured when absent.	+_____
Total Points (MANAGEMENT)	+_____	Total Points (UNION)	+_____

THE SIDE WITH MORE POINTS IS MORE LIKELY TO WIN.

ARBITRATORS' VIEWS: TIME AND ATTENDANCE

1. ATTENDANCE AND PUNCTUALITY ARE BASIC RESPONSIBILITIES

Excessive absenteeism or lateness due to illness can be a problem...

- Even a worker who is really sick can be disciplined for being absent and late so much that they cannot do the job.

The more important your job…

- Workers with more critical jobs may be expected to have better than average attendance and punctuality records.

You don't have to use all your sick leave...

- Even if you do not use all your sick leave, you can still be disciplined for excessive and/or pattern absenteeism.

ARBITRATORS SAY...

Employers do not have to put up with excessive absenteeism:

- "It is beyond question that employee absenteeism is not a misconduct which permits summary dismissal for a first or second infraction. It is recognized that everyone, from time to time, will be fallen by personal or family problems necessitating their absence from work. [However], employers do not have to tolerate excessive absenteeism or disrespect for their operational needs."

For more sensitive jobs, time and attendance are even more important:

- "[Grievant] has duties that include the care of elderly people in a nursing home. Her job is one that carries with it significant responsibilities. There was unrebutted testimony that patients respond poorly to being treated by people with whom they are unfamiliar." (Case: 13 300 00176 96)

On the same subject another arbitrator wrote:

- "Obviously, attendance and punctuality are requirements for any job. When the position is that of a Counselor, the need for those performance attributes is heightened, for counseling cannot be done at home; presence on the job is essential." (Case: 13 300 00087 97)

It is extremely difficult to defend pattern absenteeism:

- "It has long been held that long-term absences, such as lengthy illnesses, that are 'excused' may mitigate a charge of excessive absenteeism, but that numerous short term or one day absences are not [excusable]... After a careful review of the evidence, the [arbitrator] is persuaded that [the grievant] was excessively absent from 1991-1995 and that her absences also represented a pattern of pre- and post-day off absences." (Case: 13 300 00176 96)

2. MANAGEMENT MUST FAIRLY ENFORCE TIME AND ATTENDANCE POLICIES

Management cannot be random or arbitrary...

- All time and attendance policies must be applied fairly and equally in order to avoid Inconsistent or 'disparate' treatment.

There must be proper documentation...

- Management must show proof of the number of absences and times late, and their efforts to help the worker to improve.

It's difficult to overturn an entire policy...

- It is easier to prove arbitrary policy enforcement than it is to have an arbitrator overturn a policy.

WHEN IT COMES TO POLICY…

Arbitrators have consistently upheld the legitimacy of no-fault time and attendance policies, especially when they are combined with clear and consistently applied progressive discipline:

- "...Acknowledgment that 'excessive absenteeism' can be based upon absences for which the employee had good reason, e.g. bona fide illness, a disciplinary action will be considered as for just cause when it is consistent with the established policy and progressive disciplinary system." (Case: 13 300 020330 96)

Discipline may be overturned when it is not consistent:

- "There can be no question but that [grievant] has had an attendance record, which required response and progressive discipline from the employer. However, the employer failed to treat other employees with attendance records, which deserved severe response. A comparison supports the unions claim of 'disparate treatment'." (Case: 13 300 01185 92)

Arbitrators always resist union pleas to 'loosen' strict attendance policies:

- "...It would appear that the relief sought by the union [to strike down management's time and attendance policy] is really a matter for contract negotiations where the force of its contentions can be presented at the bargaining table." (Case: 13 300 020330 96)

3. PROGRESSIVE DISCIPLINE IS REQUIRED

Employees should be given the opportunity to improve...

- Management must attempt to rehabilitate before workers they can move to terminate them.

Warnings should come before actual discipline...

- Except in extreme cases, management must warn employees about what will happen if attendance and lateness problems continue.

Abuse weakens the grievant's case...

- When management can prove abuse of sick leave (patterns, faking sickness) they can take disciplinary action quicker, and possibly, without prior warning.

THE STORY WITH PROGRESSIVE DISCIPLINE…

Why do arbitrators place such a high burden on employers to show proof of progressive discipline?

- "...Employers are expected to use progressive discipline. The premise is that employees should be given the opportunity to correct deficiencies in their employment. The goal is to avoid employees being terminated before being given the chance to rehabilitate themselves." (Case: 13 300 00176 96)

Another arbitrator wrote:

- "Progressive discipline must be imposed on the transgressing employee before a conclusion can be reached that the employee is beyond remediation."

In upholding discharge, one arbitrator wrote that a last warning, preceded by progressive discipline, means just that:

- "Here, [grievant] received progressive discipline to the fullest extent. Two suspensions followed by a final verbal warning, all relating to the same misconduct: failure to notify of absence, constituted sufficient notice to [grievant] that he was in serious danger of being dismissed. That he repeated this misconduct on the very heels of the final warning afforded the employer just cause to discharge him."

4. DUTY TO CONTACT YOUR EMPLOYER

Excessive absenteeism or lateness due to illness can be a problem...

- You can be disciplined for failing to contact your Employer regarding any absence, especially if you do not even try.

The longer you are out of touch, the weaker your case gets...

- The longer you are absent without leave (AWOL), the stronger management's discipline against you can be (up to, and including, termination)

ONE CALL CAN MAKE THE DIFFERENCE...

Informing the employer of absence, wrote one arbitrator, is one of an employee's fundamental duties:

- "No call, no show is a grave infraction on any job — indeed in any aspect of human behavior, it's sure to wear a relationship thin. But on the job it is arguably the most basic of responsibilities for an employee, an imperative even more fundamental than showing up for work. The reason is because an absent employee can be replaced by a substitute or his job covered that day by a co-worker, but when the employer doesn't know whether the employee is coming or not, a bit of chaos is inevitable." (Case: 13 300 01546 97)

For the disciplined employee, proof of effort to contact the employer can help reduce punishment:

- "While grievant was less than acceptably diligent, as a long term employee, in notifying her employer of her work situation and physical condition, she made enough of an effort to make the ultimate penalty of discharge excessive [unjustified] on the facts of this case...The hospital lacked just cause to discharge grievant because of the efforts she did make." (Case: 13 300 0553 92)

For employees who have 'rotating' work schedules, the employer, has the burden of proving that you did not come to work when you knew you had to:

- "...The hospital has failed to meet its disciplinary burden of proof, i.e. that it is more likely than not that the grievant knew or had reason to know that she was scheduled [to work]. [I] will therefore order that the suspension be rescinded and [grievant] paid for three days." (Case: 13 300 01159 97)

5. CREDIBILITY AND EVIDENCE

Impartiality is one thing...

- While arbitrators are supposed to be without bias when hearing cases, they are not stupid and do not tolerate flimsy and weak stories.

Management is required to prove its case...

- Management has a duty to ensure that they have their facts and their evidence together.

YOU CANNOT JUST SAY IT...

It is possible for a grievant to undermine the legitimacy of their entire case if they are not believable:

- "Although the union has mounted a truly commendable effort to save grievant's job, a number of aspects of the case, not the least of which is the grievant's own testimony, render its task daunting indeed. Take her explanation as to why she needed more time off, testimony which strains the limits of one's capacity to suspend disbelief..." (Case: 13 300 00504 97)

Management must also be credible:

- "This conclusion [to overturn discipline] results from credibility determinations made regarding the conflicting testimony, and from my assessment regarding manner in which [the] supervisor handled the situation." (Flushing Hospital Medical Center v 1199)

In another case the arbitrator wrote:

- "...The employer has failed to submit clear and convincing proof of dishonesty or other just cause sufficient to discharge the grievant." (Case: 13 300 01232 92) If you offer arguments that serve to weaken management's case, you cannot overturn discipline unless you have proof: "The union has offered two arguments which if supported by the evidence, might serve as mitigation. The first —- and most easily demonstrated — is that other employees with attendance records as bad or worse than, that of grievant were not discharged. But no records of other employees were presented. There is thus no way of verifying this claim." (Case: 13 30371 97)

6. MITIGATING FACTORS

These are factors that weaken management's case, and allow arbitrators to "cut some slack" to the grievant by reversing or reducing discipline related to attendance violations.

Efforts to Improve...

- Arbitrators have consistently ruled that a worker's efforts to improve their attendance, helps their case.

Overall Employee Performance...

- Even though it does not always help overturn discipline for absenteeism, excellent employee job performance can help strengthen a grievant's case.

PERFORMANCE AND ATTITUDE CAN BE CRUCIAL....

Good or excellent performance evaluations can help the grievant save their job:

- "The union's argument that the employer may have overlooked grievant's job evaluations and perhaps rushed to judgment a bit in terminating him strikes a valid chord...Indeed, in his final appraisal in April 1997 he met or exceeded job expectations in every area." (Case: 13 300 00204 99)

If you are given opportunities to improve, but you do not, it will definitely count against you in arbitration:

- "Upon thorough consideration of the record, the arbitrator finds that the grievant had numerous opportunities to improve his time and attendance record at work. He failed to do so. Accordingly, the arbitrator finds that there was just cause to terminate [the grievant]." (Case: 13 300 00141 96)

Attitude can be an important determinant of a grievant's case:

- "...The arbitrator finds that the grievant extended his approved leave though he did not have authorization to do so. The arbitrator is persuaded that the grievant's actions demonstrate a cavalier attitude toward his employment. Though he had received counseling and a written warning, the grievant failed to appreciate that his excessive absences were a problem at work." (Case: 13 300 00141 96)

THE FAMILY & MEDICAL LEAVE ACT (FMLA)*

The Family & Medical Leave Act (FMLA) allows "eligible" workers to take off up to 12 work weeks in any 12-month period for the birth or adoption of a child, to care for a family member, or if the workers themselves have a serious health condition.

An "eligible" worker is a worker who has been employed by the employer for at least 12 months and has worked at least 1,250 hours. The 12 months do not need to be consecutive. FMLA can be taken on an intermittent basis allowing the worker to work on a less than full-time schedule or taking leave in separate blocks of time.

The worker is entitled to have their benefits maintained, but they must continue to pay their portion during the leave. The worker also has the right to return to the same or equivalent position, pay, and benefits at the conclusion of their leave.

The eligible worker must provide 30-day advance notice for foreseeable events or as soon as practicable if not foreseeable. The employer is allowed to ask the worker to obtain a certification from a medical provider testifying to the need for the worker to take the leave for themselves, or the family member.

Upon completion of the leave the employer can require the worker to obtain a certification of fitness to return to work when the leave was due to the worker's own health concerns. The employer can delay the start of FMLA for 30 days if the worker does not provide advance notice, and/or until the worker can provide certification from a medical provider.

If a worker and spouse both work for the same employer, they cannot each take 12 weeks off for the birth of a child, when adopting a child, or to care for a parent with a serious health condition.

Once a worker requests a leave, the employer is required to provide the worker with written notice, with-in two business days, informing the worker if he/she is eligible or not.

An employer can require an employee to substitute paid vacation or personal time for FMLA for the birth and care of a child, the placement of the child for the adoption or foster care or to care for an immediate family member with a serious health condition. An employer can require an employee to substitute vacation, personal time and/or medical or sick days for FMLA to take care of an immediate family member with a serious health condition, if the employer's policy allows the use of sick time to care for a family member, and to take care of the employee's own serious health condition. The employer must give 2 business days' notice that the accrued leave will be designated as FMLA leave.

HOWEVER, the employer is not allowed to require the employee to substitute vacation for FMLA leave in any situation where the employer's policy would not normally allow the substitution of accrued vacation time.

For intermittent leaves, the employee must give notice once, but the employee must notify the employer as soon as practicable if the intermittent leave schedule is changed or was previously unknown. However, the employer can require recertification every 30 days unless the doctor gives duration of a treatment for a specific time until there is a need for reevaluation. At the time of reevaluation, then the employer can ask for recertification. If you need more information about the FMLA and how it relates to contractual provisions, or if you have difficulty getting a leave for yourself or a worker, contact your organizer.

An employee may also take up to 26 work weeks of leave during a “Single 12-month period” to care or a covered military service member with a serious injury or illness, when the employee or the spouse, son, daughter, parent or a next of kin of the service member. There are some specific details about this FMLA provision. Please check with your organizer.

** Please note that many 1199 contracts have certain leave provisions that are better than the FMLA.*

THE AMERICANS WITH DISABILITIES ACT (ADA)

Under the Americans with Disabilities Act (ADA), an employer must provide an effective and reasonable accommodation when a qualified individual with a disability requests that accommodation. A disability under the ADA is defined as a physical or mental impairment that substantially limits a major life activity.

If a worker you are representing has an attendance problem caused by a disability, it might be possible to use the ADA to get management to make an accommodation that would help the worker with his/her attendance problem, even if the accommodation is not consistent with the contract. For example, it might be possible to get a change of schedule or a different assignment for a worker with cancer who must receive chemotherapy regularly.

An accommodation is considered reasonable if it does not cause an undue hardship to the employer and the worker can still perform the essential functions of the job. Undue hardship, which means that the accommodation would be a significant difficulty or expense, does take into account the financial realities of an employer.

The term “reasonable accommodation” is determined on a case by case basis, so it is up to you and the worker to convince management that the accommodation you are requesting is in fact reasonable.

If you need more information on the ADA or if you are having difficulty negotiating with management to get a reasonable accommodation for a worker, contact your organizer.

CHAPTER 2

INSUBORDINATION

INSUBORDINATION CASES, DELEGATES SHOULD...

Know:

- Arbitrators uphold management's right to manage and direct workers, therefore, refusing to follow orders a very serious workplace offense.
- While, arbitrators require progressive discipline, some cases of insubordination may justify immediate dismissal.
- Arbitrators expect workers to follow the principle "obey now and grieve later."
- Arbitrators will accept a worker's refusal to follow orders if the worker has a "good faith fear" that the order would jeopardize his/her health or safety or if the order was clearly illegal, like being asked to falsify records or give injections when you are not licensed to do so.
- However, arbitrators have not accepted a refusal to work because an RN or other licensed worker believes understaffing prevents them from giving the level of care required by their license.

Investigate:

- Did management give clear, understandable, safe and legal orders, related to business operations? What were management's exact words?
- Was there a clear refusal to follow orders? What were the worker's exact words?
- Was the worker aware of the consequences of not obeying the order?
- Was discipline progressive and applied consistently and non-discriminatorily?

Be Alert:

- Management may try to instigate insubordination by "pressing a worker's button."
- If management tries to provoke workers or use "fear of insubordination" to intimidate them, consider group "actions" with your co-workers and organizer.

Prevent Discipline:

- Tell members they should comply with orders and grieve later, unless they have a "good faith fear" that compliance would endanger their health or safety.
- Tell members that if they want to question an order, they must do so without hostility, and without actually refusing the order.

- Warn members that using words or body language to intimidate, ridicule, embarrass or degrade a supervisor, especially if other workers are present, can be considered insubordination.
- Explain to members that if they continue to miss a large number of workdays plus come to work late, especially in a pattern (e.g. before and/or after holidays or week-ends), discipline is likely and it will be difficult to defend them.

HELPFUL TIPS ON HANDLING INSUBORDINATION GRIEVANCES

Investigate: Get the exact words
Find out exactly what management said in giving the order and what the worker said in response. If no clear order was given or there was no clear refusal, then there was no insubordination.

Gray Areas (unsettled disputes)
In cases where there is a pending dispute about the legitimacy of an order, the worker is still obligated to comply and grieve later, until the dispute is fully settled.

Crackdowns & Arbitrary Enforcement
If management is using insubordination to crackdown on workers or is picking on some workers, don't wait for each new case, get your co-workers together and, with your organizer, plan a group response.

Creative Solutions
If there is a clear and persistent "personality clash" between a worker and a supervisor, try to get the worker moved to an area where they do not have to interact with the offensive Supervisor.

Settlement Advice
If the facts are not in the worker's favor try showing that the incident was a misunderstanding, not insubordination. Also, try to convince management that there was no attempt to undermine their authority and that their authority has not been damaged.

Refusing to work because of low staffing is very risky
Arbitrators feel issues of staffing should be dealt with at the bargaining table or through legislation, not by refusing to work. This is even if an RN or other licensed worker sincerely believe that working with such short staffing prevents them from giving the level of care demanded by their license. Arbitrators say that while the worker may be correct about the level of care, refusing to work only makes the level of care worse and what constitutes appropriate care is open to interpretation.

HOW ARBITRATORS DECIDE INSUBORDINATION CASES

IN DECIDING CASES WHERE WORKERS ARE FIRED OR SUSPENDED FOR INSUBORDINATION, ARBITRATORS ASK THE FOLLOWING QUESTIONS.

Key Arbitrator Questions

1. Was the order clearly expressed to the worker?

2. Was there a clear refusal to comply with the order?

3. Was the employee made aware of the consequences of non-compliance with the order?

4. Did the worker refuse to perform the task out of a "good faith fear" for his/her health or safety?

5. If abuse is alleged, did the employee intend to inflict bodily harm on, or insult, a supervisor in front of other workers?

6. Did the worker's actions actually undermine a supervisor's authority and ability to manage?

7. Was the insubordination so serious that it justified immediate dismissal, not progressive discipline?

8. Are the rules and penalties for insubordination consistently applied to all employees?

9. Did management perform a full and fair investigation?

You can see how the key questions above affect the strength of an individual case by using the chart on the next page.

GRIEVANCE ASSESSMENT GUIDE - INSUBORDINATION

GRIEVANT/CASE:_____

MANAGEMENT POINTS		**UNION POINTS**	
1. Add 1 point if the order given was clear and reasonable.	+_____	1. Add 1 point if the order given was not clear and reasonable.	+_____
2. Add 1 point if a clear and reasonable order was obeyed.	+_____	2. Add 1 point if a clear and reasonable order was not obeyed.	+_____
3. Add 1 point if the worker was warned of the consequences of non-compliance.	+_____	3. Add 1 point if the worker did not know the consequences of non-compliance.	+_____
4. Add 1 point if the order was consistent with established policy.	+_____	4. Add 1 point if the worker can show a "good faith fear" for their health or safety.	+_____
5. Add 1 point for each written warning for insubordination.	+_____	5. Add 1 point for each 3 year period of good work performance.	+_____
6. Add 1 point if grievant has a record of other discipline, unrelated to insubordination.	+_____	6. Add 1 point if the penalty is too severe for the violation.	+_____
7. Add 1 point if the worker threatened/abused a manager in front of other workers.	+_____	7. Add 1 point if a member of management provoked the incident.	+_____
8. Add 1 point if management can show that the worker undermined their authority.	+_____	8. Add one point if no damage to management's authority was done.	+_____
9. Add 1 point if management used progressive discipline.	+_____	9. Add 1 point if discipline is inconsistent or discriminatory.	+_____
10. Add 1 point if management did a complete investigation.	+_____	10. Add 1 point if management did not do a full investigation.	+_____
Total Points (MANAGEMENT)	+_____	Total Points (UNION)	+_____

THE SIDE WITH MORE POINTS IS MORE LIKELY TO WIN.

ARBITRATORS' VIEWS: INSUBORDINATION

1. "WORK NOW AND GRIEVE LATER"

Arbitrators expect clear and legitimate orders to be followed...

- Even if a worker feels that an order is improper, they must obey the order and grieve it afterward.

Expressing a gripe is one thing...

- If a worker disputes an order, they must comply with the order, but they can still express their displeasure, as long as they are not too argumentative or confrontational.

Safety concerns are an excuse for refusing to follow orders...

- The only acceptable reason for refusing an assignment is if a worker has a "good faith fear" for his/her health or safety.

INSUBORDINATION IS A VERY SERIOUS OFFENCE…

In upholding a disciplinary action, one arbitrator said that reasonable and clearly understood orders must be followed:

- "Grievant conceded that [the supervisor] told him to stay and finish the job or be disciplined...the fact that this exchange occurred between 1 and 2 AM can hardly mean that Grievant misunderstood what [the supervisor] was saying..." (Case: 13 300 00002 98)

With the exception of special circumstances, there are very few substitutes for this advice obey now and grieve later:

- "...By failing to observe the time-honored maxim of "work now, grieve later," the grievant rendered herself vulnerable to the imposition of substantial discipline." (Case: 19390 00323 97)

It is best not to argue with supervisors —arbitrators think workers should rely on delegates and the grievance procedure:

- "In short, [grievant] continued to violate one of the best-settled rules of industrial relations. He engaged in oppositional conduct and attitude when he should have complied with the work orders and resorted exclusively to the grievance procedure and his union representation for redress." (Case: 13 300 00759 95)

To arbitrator's health care facilities and other workplaces are not debating societies:

- "Patients and treatment procedures have top priority. Professionalism must be maintained. Loud arguments between staff and supervision; delays in transporting patients; and challenges to work orders are incompatible with professionalism and the carrying out of the hospital's mission." (Case: 13 300 00759 95)

2. ABUSIVE LANGUAGE AND BEHAVIOR

Refusing orders is not the only insubordination...

- Abusive behavior toward managers which, undercuts their authority is insubordination, and can result in discipline.

It's not just what you say, but how you say it...

- Workers' use of obscene language does not automatically warrant discipline, unless the language was intended to insult or intimidate a supervisor.

Do not expect supervisors to 'talk to the hand'...

- Expressing a lack of respect for supervisors can be considered insubordination.

Intimidation is also insubordination...

- Threats of violence against management, especially in the presence of others, virtually guarantees discipline.

MANAGERS DON'T HAVE TO TOLERATE VERBAL ABUSE…

Even if you do not refuse an order, if you try to cut a manager "down to size" you can be disciplined:

- "It is [well-established] that before a finding of insubordination may be made, the evidence must be convincing that a refusal took place or that, even absent an articulated refusal, a supervisor was so verbally abused in front of other employees that the undermining of authority — the essence of the refusal — took place." (1199 and Morningside House)

The workplace is not the proper arena to pump up the volume:

- "There are elements of grievant's conduct, notably her angry and boisterous outbursts in patient areas...[which] justify the imposition of discipline." (Case: 19 390 00323 97)

It is wise not to use words or phrases that have double meanings, because arbitrators will uncover veiled threats:

- "One would be hard pressed to explain [what] justifies telling a supervisor when asked to change tasks, "I don't have to take this shit!" That invective, springing from the same root of malice grievant manifested in [an earlier] meeting that afternoon with [two supervisors], renders dubious his claim about merely referring to legal remedies [NLRB, EEOC, etc...] when he said he would take [his dispute] outside." (Case: 13 300 00700 94)

3. PROGRESSIVE DISCIPLINE VS. GROSS INSUBORDINATION

Typically, discipline for insubordination must be progressive...

- Except in extreme cases, management must warn workers about what will happen if problems persist, and they must give the worker a chance to improve.

To arbitrators some refusals warrant immediate dismissal...

- If, in refusing an assignment, you use crude or profane language, it is considered gross insubordination, which can lead to immediate termination.

It's difficult to overturn an entire policy...

- It is easier to prove arbitrary policy enforcement than it is to have an arbitrator overturn a policy.

ARBITRATORS LOOK FOR PROGRESSIVE DISCIPLINE...

As with other workplace problems, past offenses can paint a bad picture:

- "Grievant's prior record of numerous counseling's and warnings -many of which also related to failure to follow directives or a lack of diligence in performance of her duties - evidenced a pattern of disregard that cannot be sanctioned." (Case: 13 300 00033 97)

Progressive discipline should be corrective, not punitive:

- "Prior to his discharge, he was not only progressively disciplined but expressly warned about any continuation of his unacceptable conduct. His failure to heed these proper warnings and admonitions not only justifies his termination, but makes him willfully responsible for his own dismissal." (Case: 13 300 00759 95)

If a refusal to follow orders is coupled with crude or vulgar language, it could be gross insubordination:

- "The governing labor relations rule in this case is well settled. An employee who refused to follow his supervisor's directive is guilty of insubordination. When the refusal is coupled with invective, profanity or other manifestation of disrespect, the conduct is labeled gross insubordination. The overwhelming majority of arbitrators have held that an employer has the right to summarily dismiss an employee for this type of misconduct, unless less harsh discipline has been historically imposed for the same misconduct." (1199 v Morningside House)

In explaining why insubordination is such a serious workplace offense, one arbitrator had this to say:

- "The reason why insubordination is grouped with the infractions known as egregious is because it strikes at the heart of an employer's operation - the right to direct and ontrol the workforce." (1199 v Morningside House)

4. MITIGATING FACTORS - Factors that weaken management's case, and allow arbitrators to reverse/reduce discipline.

Unclear Orders

- Management has the duty to ensure that its orders are understood.

Management Provocation

- A supervisor trying to 'trigger' insubordination by creating a "charged atmosphere" is engaged in inappropriate behavior.

Overall Employee Performance

- A long record of good job performance may help reduce discipline.

Inconsistent Treatment

- Similar infractions, by different workers, must be treated similarly.
-

Management has an obligation to clear up misunderstandings:

- "Thus, having been told she would not receive paid leave for the days in question, she decided to take unpaid leave and so informed [her supervisor]. It then became his obligation to tell her she could not do so. Since he did not, [grievant's] absence from work did not subject herself to discipline, I find." (Case: 13 300 1841 99)

Arbitrators don't allow management to provoke workers:

- "The arbitrator is troubled by the evidence that [a manager] had been, to use the vernacular, "on Grievant's case" earlier that day and that, against that backdrop, the assignment in question had never been done before by Grievant or other workers in his title. It is fundamental that in exercising authority over subordinates a supervisor must do so evenly and without harassment. Likewise, insubordination must never be preceded by a supervisor's desire to foster it." (1199 v Morningside House)

One arbitrator said this about reducing a termination:

- "My view is that discipline, imposed over a vast period of time...cannot automatically be accumulated and made a basis for discharge...During this period, grievant was at various times commended for his work...Therefore, [after] a complete review of the findings relative to the seriousness of the incident, and the grievant's past work record, I find that the degree of discipline imposed was not reasonably related to the offense committed and the past record." (Case: 13 300 00836 94)

Employers must give all workers comparable penalties for comparable infractions:

- "...An arbitrator may not disturb the penalty selected by the employer once misconduct has been shown unless the Union convincingly proves that it is excessive under all the circumstances, such as might be shown when the suspension was not proceeded by any prior discipline or where a shorter suspension was utilized by the employer in a [similar case]." (Case: 13 300 00804 91)

CHAPTER 3

PATIENT ABUSE

1199 will defend any member who has been falsely accused, or unfairly treated because of allegations of patient abuse. However, this does not mean that the union, in any way ever condones patient abuse.

PATIENT ABUSE CASES, DELEGATES SHOULD...

Know:

- Arbitrators say that management must have full trust that workers will competently and respectfully care for patients.
- While, arbitrators generally require progressive discipline, some incidents of patient abuse can result in immediate dismissal.
- Patient abuse includes: physical or sexual assault/mishandling, mental or emotional mistreatment, neglect and intimidation.
- Specifically, patient neglect is the failure to provide timely, consistent, safe, adequate and appropriate services, treatment and/or care.

Investigate:

- Was discipline applied consistently and non-discriminatorily?
- Check the incident reports: What is the nature of the injury/abuse? How was the abuser identified? What is the sequence of important events? Are there other relevant reports that may contain important clues?
- Was the alleged neglect due to scheduling problems or under-staffing?
- Are there other explanations for injuries? Are there medications that might make patients more injury-prone?
- Does the patient have a history of self-injury or familial abuse?

Be Alert:

- Even if a worker is 'cleared' of charges by a state investigation arbitrator might still uphold employer discipline.
- If management "fosters" patient abuse through low staffing, weak procedures for handling difficult patients, or inadequate supplies consider group actions, filing appropriate reports, and filing grievances on safety concerns.

Prevent Discipline:

- Arbitrators rarely allow workers to substitute their judgement for established policy. For example, 1:1 patient observation means the worker should never leave the patient unattended, even when acting in the patient's best interests.
- Encourage workers protect themselves by reporting on all problems with a client when the problems occur.

HELPFUL TIPS ON HANDLING PATIENT ABUSE GRIEVANCES...

The Investigation

- Employers must conduct a full investigation of all the underlying facts and circumstances to insure sufficient proof of the alleged misconduct. A Delegate investigation should include copies of reports, photos of injuries, and interviews of witnesses and, if possible, the patient.

The Victim (as witness)

- According to the contract a patient's non-appearance as a witness, at arbitration, does not hurt management's case.

Patient Rights

- You have the right to interview the alleged victim, but they do have rights that arbitrators expect to be preserved. (e.g. a patient advocate must be present)

Act Against Poor Conditions Prior to Abuse

- If low staffing levels, poor procedures or inadequate equipment are leading to charges of neglect/abuse, don't wait for each new case, get your co-workers together and, with your Organizer, plan a group response.

Good Past Performance

- If a worker has a record of good performance, you may be able to get them transferred to another patient to avoid additional problems.

Settlement Advice

- If a patient investigation is on-going, it is a good idea to try to get a worker back on the job as soon as possible by getting them assigned to another floor or an area that doesn't perform patient care.

HOW ARBITRATORS DECIDE PATIENTABUSE CASES

In deciding cases of discipline for patient abuse, arbitrators ask the following questions.

KEY ARBITRATOR QUESTIONS

1. Was actual harm done to the patient, and what was the extent of that harm?

2. Was the worker sufficiently trained regarding policies related to patient abuse?

3. Did the worker have recourse to reasonable, alternative behavior?

4. What is the length of the grievant's employment?

5. Does the grievant have a history of discipline, specifically for neglect or patient abuse?

6. Was the alleged patient abuse so serious that it justified immediate dismissal instead of progressive discipline?

7. Does management have credible eyewitnesses, including the resident, who observed the alleged abuse?

8. What is the mental and physical capacity of the resident, and are they able to tesitify?

9. Did the grievant or any other worker ever report that there was a problem with the client prior to discipline?

10. Did management perform a full and fair investigation?

11. Are the rules and penalties for patient abuse consistently applied to all employees?

You can see how the key questions above affect the strength of an individual case by using the chart on the next page.

GRIEVANCE ASSESSMENT GUIDE – PATIENT ABUSE

GRIEVANT/CASE:_____

MANAGEMENT POINTS		**UNION POINTS**	
1. Add 1 point if management has physical evidence of harm done to a patient.	+_____	1. Add 1 point if the patient takes medication that makes them bruise easily.	+_____
2. Add 1 point if the patient says they were mentally abused or intimidated by the grievant.	+_____	2. Add 1 point if the patient's ID of the grievant was weak or if the patient is not reliable.	+_____
3. Add 1 point if the worker violated a well-established policy regarding patient neglect or abuse.	+_____	3. Add 1 point if the worker can show that they used personal judgement where there was no applicable policy.	+_____
4. Add 1 point if the worker did not follow the patient's care plan.	+_____	4. Add 1 point if the worker did follow the patient's care plan.	+_____
5. Add 1 point for each written warning regarding patient care.	+_____	5. Add 1 point for each 3 year period of good work performance..	+_____
6. Add 1 point if grievant has a record of other discipline, unrelated to patient abuse.	+_____	6. Add 1 point if the penalty is too severe for the alleged violation.	+_____
7. Add 1 point if there are credible witnesses to the worker's alleged abuse of a patient.	+_____	7. Add 1 point if management's case is based only on circumstantial evidence.	+_____
8. Add one point if the worker has never reported problems with the patient.	+_____	8. Add one point if the worker has reported problems with the patient.	+_____
9. Add 1 point if management used progressive discipline.	+_____	9. Add 1 point if discipline is inconsistent or discriminatory.	+_____
10. Add 1 point if management did a complete investigation.	+_____	10. Add 1 point if management did not do a full investigation.	+_____
Total Points (MANAGEMENT)	+_____	Total Points (UNION)	+_____

THE SIDE WITH MORE POINTS IS MORE LIKELY TO WIN.

ARBITRATORS' VIEWS: PATIENT ABUSE

1. WHAT IS PATIENT ABUSE?

To arbitrator's patient abuse is an act of bad faith...

- Because workers are entrusted with the health and safety of defenseless patients, abuse is a serious infraction.

Abuse can take both physical and mental forms...

- Whether a worker touches a patient or not, their actions may still constitute patient abuse.

Despite legal concerns employers must show just cause...

- Despite the seriousness of a charge, there must be just cause for discipline.

PATIENT ABUSE IS A SERIOUS WORKPLACE OFFENSE...

Arbitrators say that patient abuse is in direct conflict with the mission of the facility and the worker's basic job responsibilities:

- "Some conduct [slapping, punching patients] is violate of one of the missions of a long-term care nursing facility, which has been entrusted by the public to provide safe and supportive care to its residents. When the evidence shows that an employee seriously breaches such a trust by physically abusing a helpless resident, the only just remedy is termination of employment..." (Case: 13 300 01403 96)

One arbitrator wrote said there was no abuse when a worker inadvertently shook a patient, since the patient did not act threatened:

- "The facts that [grievant] had worked for ten years with no prior allegations of roughness or abuse, that she worked with [the client] for five years with no allegations of roughness or abuse, that [client] reacts strongly when he feels threatened or mishandled and did not do so in this instance, that [management] described [grievant's] movement as reflexive and brief and that [management] did not allege that [grievant] raised her voice at all -- all these lead me to conclude that [grievant] did not deliberately shake [client] while adjusting his coat and that [client] did not feel abused or threatened." (Case: 13 300 00510 99)

While employers may have serious and legitimate legal concerns regarding patient abuse, just cause for discipline is still required:

- "Understanding that...lawsuits and potential liability may well impel an employer to be scrupulous in its hiring practices and vigilant in policing its work force to prevent patient abuse, these factors do not abrogate the time-honored principles of just cause. That is, an employee should not be [disciplined] for misconduct that he did not commit simply because the allegation of the misconduct is serious." (Case: 13 300 01555 95)

2. PROGRESSIVE DISCIPLINE

Discipline for patient abuse may, or may not, be progressive...

- The seriousness of the alleged patient abuse is important in determining whether progressive discipline is required.

Some forms of patient abuse warrant immediate dismissal...

- There are some instances, which require the Employer to deal swiftly and decisively with allegations of patient abuse.

No progressive disciple for serious abuse...

- Arbitrators agree that progressive discipline is typically required, but that determination is made on a case-by-case basis: "Progressive discipline is an essential requirement in most disciplinary cases. But it is not a requirement in all cases, and weather it is or is not required depends on the nature of the conduct that prompted an employer to terminate an employee." (Case: 13 300 01526 95)

In upholding a suspension, one arbitrator wrote that a pattern of minor infractions, can lead to progressively stronger discipline:

- "In sum, it appears that the Grievant's conduct may have resulted from her apparent frustration or overreaction to the need to yet again go outside to retrieve a roving patient. And this type of conduct, unfortunately, mirrors prior occurrences noted in her employment history. She acted in a wholly inappropriate manner and must now suffer the consequences." (Case: 13 300 00242 99)

In explaining why progressive discipline is not always required, one arbitrator wrote the following:

- "In this case, the Employer correctly argued that no progressive discipline was required because it was a case of patient abuse. A hospital must be able to trust its employees as they care for patients. Nurses and aides routinely have private interactions with patients and a hospital must be able to have confidence that the employees it sends to care for its patients will care for them competently and respectfully." (Case: 13 300 01526 95)

There are no excuses for brutal and severe cases of abuse:

- "Grievant may have a record of satisfactory evaluations in his personnel folder, and the Employer did not prove that he had a history of roughing up residents in light of his ratings history and the absence of such reports or warnings in his record. [Still], it is well established that a single act of physical assault upon a patient [can provide] grounds for summary discharge, especially when the act is so brutal and severe as that depicted in the photographs." (Case: 13 300 01403 96)

3. MITIGATING FACTORS

These factors weaken management's case, and allow arbitrators to "give relief" to the grievant by reversing or reducing discipline related to insubordination.

Lack of Malice

- If the action that preceded abuse is not motivated by hostility or other ill-will arbitrators may reduce penalties.

Reporting Past Problems

- If a worker reported problems with a particular patient in the past, that fact could help reduce discipline for abuse.

Overall Employee Performance

- Though it does not always help, a long record free of incidents or allegations of abuse can help reduce discipline.

Worker Discretion When There Is No Policy

- Arbitrators know that sometimes workers must make independent decisions in the absence of supervision or defined policy, so they forgive some missteps.

Arbitrators are quite concerned with the worker's intentions:

- "Given [grievant's] long service, lack of prior discipline and the lack of malice in the incident in question, the suspension should be reduced to two weeks." (Case: 13 300 00510 99)

Arbitrators say performance should affect discipline:

- "[Grievant], it seems clear, was not known for violent conduct towards residents and her record of eight years was unblemished. True, one incident can, in some circumstances, be sufficient to warrant discharge, but a prior history of good conduct is relevant when trying to determine what may have happened on August 20, 1997." (Case: 13300 1736 97)

Arbitrators can distinguish between a lapse of judgement and egregious misdeeds and istakes:

- "[Grievant] acted reasonably under unexpected circumstances --with no forewarning regarding [client's] behavior, no instructions and no professional clue as to how to best handle a client with a history that was well-known or should have been well-known to the Employer. Perhaps one could argue that there was a better way for the grievant to have dealt with LG, thus allowing her to stay in the home or to call in from there. To second-guess the grievant, however, and penalize her for a lapse in judgement is quite different from summarily dismissing her for egregious misconduct." (Case: 13 300 01858 97)

CHAPTER 4

PAST PRACTICE

This Chapter is written with the purpose of assisting 1199 Delegates who are attempting to understand, establish or preserve a past practice that is of benefit to workers. It is important, before a Delegate takes on a past practice grievance, that they verify the requirement of the contract and whether the practice has already been settled in a "stipulation" or amendment to the contract.

IN PAST PRACTICE CASES DELEGATES SHOULD...

Know:

- Arbitrators always look to the contract before considering past practice. In the League Contract the past practice must have been reduced to writing and incorporated into stipulation ___ of the contract. If past practice has not been put into writing, then there would be NO viable grievance to pursue because the past practice was not retained. For other contracts, like the Greater NY Nursing Home contract, that do not require past practices to be reduced to writing, the following information can be considered.
- Arbitrators uphold past practices, because they understand that not all agreements are written, and not all benefits are included in the contract.
- In order to be valid, past practices must be clear and well defined.
- Arbitrators expect past practice to be well known to both union and management representatives, and be commonly used at the workplace.

Investigate:

- You must be able to prove that the past practice was mutually agreed upon and consistently applied over a reasonable amount of time, or a substantial number of 'events.'

Be Alert:

- When a past practice conflicts with clear contract language, an arbitrator is obligated to give the contract priority over the past practice unless the union can prove that the parties intended to modify the written agreement.
- If the circumstances, which originally gave rise to a past practice are eliminated an arbitrator is likely to allow the employer to unilaterally discontinue the practice.
- Don't expect an arbitrator to uphold a past practice that violates the law, or encourages unsafe working conditions.

Prevent Discipline:

- A Delegate has the obligation to challenge any break from established past practice immediately, because a failure to object to changes could be viewed as acceptance of those changes
- If the past practice can be shown to provide a benefit of value to workers, it is likely that an arbitrator will preserve the practice, even if the employer claims undue financial hardship.

HELPFUL TIPS ON HANDLING PAST PRACTICE GRIEVANCES...

Stipulations

- A "stipulation" is a letter of agreement on specific past practices outside the contract or annexed to the contract, which the parties wish to continue. It essentially relieves the parties of having to prove that the practices exist. However, this does not mean that management can unilaterally eliminate past practices, which are not listed as "stipulations," unless the contract requires the past practices to be in writing.

Reasonable Expectation

- The Rule of Reasonable Expectations means that if a practice is such that the union has a "reasonable expectation" that it will continue the practice will likely be considered binding. Thus, the rule gives contractually binding status to employee benefits such as meals, breaks and discounts.

Mobilization

- Encourage many workers to sign the grievance, or circulate a petition supporting the grievance. Encourage other employees to file grievances on the same matter. Also communicate with workers regarding the grievance during breaks or after work. Mobilization may show management how important the issue is to workers.

Act Immediately

- If a Delegate observes management attempting to either disregard or apply past practices inconsistently, the Delegate must attempt to clarify and/or correct the situation immediately. Failure to do so could be viewed as acceptance of the change.

HOW ARBITRATORS DECIDE PAST PRACTICE CASES

Where a contract does not require past practices to be reduced to writing:

In deciding cases where the issue is whether or not a past practice exists, arbitrators ask the following questions.

KEY ARBITRATOR QUESTIONS

1. Is there language in the contract, which addresses the practice, or is the contract 'silent' on the issue?

2. Is the language in the contract, which deals with the issue or practice "clear-cut" or vague?

3. Has the practice been clear and unmistakable?

4. Is the practice obvious and has it been commonly used, where applicable, with all covered workers throughout the workplace?

5. Has the past practice been consistently applied and clearly understood by both management and the union?

6. If management attempted to unilaterally implement the practice, did union representatives file a timely grievance on the matter?

7. Was the past practice arrived at through a mutual agreement between the union and management?

8. Does the practice involve something that could be considered a "benefit" of value to workers?

9. Does the practice encourage illegal or unsafe working conditions?

10. Has the practice already been settled by a 'stipulation' or amendment to the collective bargaining agreement?

You can see how the key questions above affect the strength of an individual caseby using the chart on the next page.

GRIEVANCE ASSESSMENT GUIDE: PAST PRACTICE

Where a contract does not require past practices to be reduced to writing:

GRIEVANT/CASE:_____

MANAGEMENT POINTS		**UNION POINTS**	
1. Add 1 point if the past practice is not clear and well defined.	+_____	1. Add 1 point if the past practice is clear and well-defined.	+_____
2. Add 1 point if the practice has been in effect for less than three years.	+_____	2. Add 1 point if the practice has been in effect for more than three years.	+_____
3. Add 1 point if the past practice is not always used when it is appropriate.	+_____	3. Add 1 point if the past practice is always used when it is appropriate.	+_____
4. Add 2 points if the past practice has not been consistent when used.	+_____	4. Add 2 points if the past practice has been consistent when used.	+_____
5. Add 1 point if the past practice is not widely known to the workers it covers.	+_____	5. Add 1 point if the past practice is widely known to the workers it covers.	+_____
6. Add 1 point if the past practice was imposed on workers by management.	+_____	6. Add 1 point if the practice was jointly determined by the union and management.	+_____
7. Add 1 point if there has been no mutual acceptance of the past practice.	+_____	7. Add 2 points if there has been mutual acceptance of the past practice.	+_____
8. Add 2 points if the practice restricts management's ability to direct workers.	+_____	8. Add 1 point if the past practice does not restrict management ability to direct workers.	+_____
9. Add 1 point if the practice provides no benefit to workers.	+_____	9. Add 2 points if the past practice provides a benefit to workers.	+_____
10. Add 2 points if the past practice is in conflict with the contract.	+_____	10. Add 1 point if the past practice addresses an issue on which the contract is silent.	+_____
Total Points (MANAGEMENT)	+_____	Total Points (UNION)	+_____

THE SIDE WITH MORE POINTS IS MORE LIKELY TO WIN

ARBITRATORS' VIEWS: PAST PRACTICE

1. UNDERSTANDING PAST PRACTICE

Some practices can shed light on 'fuzzy' contract language…

- When the contract does not specifically "speak to" an issue, past practices can help to establish the practical meaning of the contract language.

Past practices can allow "test driving"…

- Some past practices can help both sides to jointly outline and define an issue without including it in the contract.

Don't expect an arbitrator to rewrite your contract…

- Arbitrators will never propose changes to a contract even if a past practice conflicts with the contract, unless the practice serves to modify the contract.

The contract is an arbitrator's top concern…

Agreeing that a past practice helped to clarify the contract, one arbitrator listed the key components of legitimate past practices:

- "[I]t demonstrates all of the qualities normally associated with [past practice]. The past practice was clear. It was consistently applied. It was long-standing, it was regularly repeated. In short, it reflected the parties' mutual acceptance of the way in which Article XI, Section 6 should be applied." (Case: 17 300 0178 90)

Evaluating a confusing contract clause that provided workers a mileage reimbursement, an arbitrator said that past practices can help "give meaning" to unclear language:

- "It must be said at the outset that I do not find Article XXVI to be the model of clarity the parties suggest. Nevertheless, its meaning and the intent of its contractual coverage can, in my judgment, be ascertained if its wording is examined in historical context." (Case: 13 300 01448 96)

Arbitrators realize that past practices can demonstrate the parties' intentions when there is no relevant contract language:

- "When the contract is silent, it is necessary to look at the past practices of the parties and the bargaining history, if any, to determine the intent of the parties." (Case: 13 300 01027 93)

In a case involving overtime payments, an arbitrator wrote that a clear contract has priority over practices, that are inconsistent with that language:

- "It is fundamental that [when looking at the difference] between clear language and an inconsistent practice that the language must prevail. After all, clear language reflects the parties' mutual intent at the highest level of union and employer involvement." (Case: 17 300 0070 87)

2. ESTABLISHING PAST PRACTICE

A one-time exception is not a past practice…

- A past practice must be well established by being repeated over a significant amount of time.

Only consistently used methods, qualify as past practices…

- A past practice must be consistent and well known to the union, management and the workers it applies to.

There is no such thing as a "top-down" past practice…

- To be a past practice the custom must be mutually accepted, regardless of who initiated it.

Both sides must be on the same page…

- Saying that a past practice regarding overtime pay existed one arbitrator wrote: "First, it is undisputed that a long standing past practice exists with respect to the disputed issue. This practice was clear and consistent. It was uniformly applied to those individuals who worked a "6 and 4" schedule. It provided for the addition of a benefit day at the overtime rate. Such a practice, applied uniformly, consistently without deviation for approximately eight years becomes a term and condition of employment." (Case: 17 300 0070 87)

Ruling that management could eliminate a mileage reimbursement plan an arbitrator wrote that policies, not consistently applied, cannot be considered past practices:

- "Given the [lack] of testimony at this point, it cannot be said that the Union has met its burden of establishing that both parties accepted [the practice] as part of the normal routine. At best there was a mixed practice. As such, it cannot be said to have given meaning to contractual language or to have reached the point of becoming a [binding obligation]." (Case: 13 300 01448 96)

The same arbitrator also wrote:

- "I realize the importance of [the practice] to the Center's employ-ees. However, it's my opinion that the contract did not require [the practice] and that the evidence does not support a claim that such [practice] was required by a uniform and consistent practice reflecting the mutual intent and understanding of the contractual parties." (Case: 13 300 01448 96)

An arbitrator wrote that when mutual agreement was settled upon for a vacation carry-over policy, the only way to change the practice would be through mutual agreement:

- "The parties, by their own course of conduct, have given the provisions of Article XVII (8) a particular meaning, one which both they and the arbitrator are bound to follow. Regardless of whether or not the Agreement also contains a past practices clause, the parties mutual [acceptance of] the manner in which the language in question has been applied over the last 11 years gives [the] article a meaning which the employer may not unilaterally change." (Case: 1330 0083 89)

3. PRESERVING PAST PRACTICE

Past practices can take on the force of contract language...

- When practices are mutually agreed upon, they become implied agreements, which become part of the contract.

Just because the load gets heavy…

- If a past practice provides a benefit to workers, management cannot change the practice unilaterally, simply because it becomes a financial burden.

Past practices are not written in stone…

- If the underlying reason for using the past practice goes away, an employer can discontinue the practice.

Past practices as legitimate as the contract… Though mostly unwritten, legitimately established past practices become an "official" part of the contract:

- "Arbitrators regularly recognize that established past practices become integral parts of the Agreement. They have as much force and effect as any of its written provisions. For the parties mutually accepted the past practice as a binding condition of employment. Ordinarily, therefore, past practices may not be changed without mutual consent." (Case: 17300 0178 90)

Management cannot just end a practice of providing free meals, because they claim they cannot afford it:

- "Management…behaved as if free meals were a right of dietary employees at the facility. It is not for Management, to now claim because of budgetary restraints, that it has the unilateral right to eliminate these meals. By its behavior over the years, Management has…given bonafide past practice status to the granting of free meals at [the center]. This practice cannot now be eliminated unilaterally." (Case: 1330 0345 85)

Saying that an established check cashing policy had outlived its usefulness an arbitrator wrote that past practices must change with the times:

- "[N]o past practice exists in a vacuum. Every established past practice necessarily rests upon a foundation. That is, the factual circumstances out of which the past practice arose. A past practice, therefore, must be viewed in the light of the conditions at the time it came into being. When those conditions change, when the foundation upon which the practice rests is shifted, then the practice itself may be subject to change. The point is that no past practice is broader than the circumstances out of which it has arisen." (Case: 17 300 0178 90)

1199SEIU
United Healthcare Workers East

GRIEVANCE FORM

DATE:_____ CASE:_____

Name of Grievant(s)_____
Address:_____ City: _____
Telephone Number _____ Facility: _____
Job Classification:_____ Shift:_____

Nature of Grievance_____

Articles & Sections Violated:_____

Remedy Desired:_____

Grievant(s) Signature (s):_____

Union Delegate Signature:_____ Date Presented to Union:_____

Date given to Management:_____ Received by (signature):_____
Date of 1st Step Meeting:_____ Response:_____

Date given to Management:_____ Received by (signature):_____
Date of 2nd Step Meeting:_____ Response:_____

Date given to Management:_____ Received by (signature):_____
Date of 3rd Step Meeting:_____ Response:_____
Further disposition of grievance:_____

I hereby withdraw this grievance which has been satisfied to my satisfaction by the Union:

X:_____ Witness: _____

Notes:

Notes:

Notes:

ACKNOWLEDGEMENTS

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The concept for this Grievance Guide and the topics for the chapters came from the 1199 SEIU Education Committee.

Damone Richardson and Ken Margolies from Cornell University's, School of Industrial and Labor Relations, Division of Extension in NYC wrote and edited this Grievance Guide based on actual 1199 SEIU arbitration cases.

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QUALITY CARE AND GOOD JOBS FOR ALL

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