

The Basics of Arbitration

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What is Arbitration?

A process of dispute resolution in which a third party neutral (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.

What can an Arbitrator do?

An Arbitrator can only resolve the issues submitted. The scope of this ability is defined by the collective bargaining agreement (CBA), and the issue as defined by the parties, and by the law.

What Arbitration is not.

- Not a court of law.
- Not an administrative forum (EEOC, MSPB).
- Does not exist outside the CBA.

Selecting an Arbitrator

- Collective Bargaining Agreement language is controlling.
- Past Practice.
- Contact the Federal Mediation and Conciliation Service (FMCS) for a panel of arbitrators at www.fmcs.gov.

Selecting an Arbitrator

- Choose arbitrator in accordance with the CBA.
- Notify the FMCS of arbitrator selection.
- Arrange hearing date with arbitrator

Pre-Hearing Conference

- Agree to Joint Exhibits.
- Prepare Joint Stipulations.
- Make sure Parties agree on the Definition of Issue.
- Review Appearance and Availability of Witnesses.

Joint Exhibits

- Joint exhibits are documents and other evidence for which the parties agree that authentication and foundation are *not* required.
- Joint exhibits may be documents that are contested in terms of weight and veracity.
- Exhibits that are not joint may be introduced separately by either party with proper authentication and foundation.

Examples of Joint Exhibits

- Collective bargaining agreement.
- Grievance package.
- Relevant agency regulations, policies and orders.
- Copies of statutory regulations.

Joint Stipulations

- Joint stipulations are facts that are agreed to by the parties.
- An arbitrator cannot deviate from jointly stipulated facts and issues.
- Parties cannot argue contrary to joint stipulations.
- Reduces the complexity of the hearing.

Examples of Joint Stipulations

- Names, dates, events.
- Past practice.
- Agency actions and underlying intent.
- Issues.

Defining the Issue

Disciplinary cases: Do the facts support the charges? If so, is the discipline appropriate? If not, what is the remedy?

Contractual cases: Did the Employer violate Article XXX of the CBA when it . . . ? If so, what is the appropriate remedy?

Regulatory/statutory cases: Did the Employer violate XXX when it? If so, what is the appropriate remedy?

Housekeeping

- When and where.
- How to set up the room.
- Scheduling requirements (official time).
- Equipment (telephone, flip chart, computer).
- Sequestering witnesses.
- Recorder/stenographer (\$\$\$).

Arbitration Hearing

- **Formal hearing. Witnesses are generally sworn in.**
- **Arbitration consists of:**
 - Opening statement
 - Stipulated facts and documents
 - Written evidence from each party
 - Witness testimony
 - Final closing (oral and/or written)
- **Party with burden of proof presents first:**
 - In personnel actions, including discipline, the Employer presents case first.
 - In other cases, the Union presents case first.

Opening Statement

- State the case in one sentence.
- Provide a roadmap for the arbitrator.
- State undisputed facts.
- State pertinent contractual or regulatory language.
- Highlight strength of your case.
- Briefly address weaknesses.
- State remedy requested.

Witnesses

A witness must be qualified, straightforward, and credible.

Direct Examination

- Have your witness give the following:
 - Name and address.
 - Employment, past and present.
 - Basis of knowledge of the grievance.
- Note: Expert witnesses must be qualified as such before testifying.
- No leading questions.

Documents

A document must
be in the record
to be considered.

Getting Documents Into the Record

- Stipulation
- Authentication
- Foundation

Evidence Standards.

1. Disciplinary and adverse actions.

Preponderance of evidence (51%):

- The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
- A standard of proof which is met when a party's evidence on a fact indicates that it is "more likely than not" that the fact is as the party alleges it to be.

(Black's Law, Fifth Edition)

Evidence Standards

2. Unsatisfactory performance actions.

Substantial evidence:

- The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.
- Such evidence that a reasonable mind might accept as adequate to support a conclusion. (Black's Law, Fifth Edition)

Arbitration Hearing

Objections to questions and answers can include:

- Hearsay;
- Goes against stipulations;
- New evidence never presented before;
- Irrelevant to case at hand.

Cross Examination Objectives

- To discredit the witness' direct testimony.
- To highlight conflicting testimony.
- To produce affirmative testimony.

Cross Examination Techniques

- Questions based on unrefuted fact and documents.
- Impeachment (challenge and discredit).
- Build on and relate back to previous testimony.
- Don't ask a question if you don't know the answer.
- Use leading questions.
- Know when to stop.

The Goals of Arbitration

- Prove your case.
- Answer your opponent's case.

Common Errors in Case Presentation

- Relying on minimum facts and maximum argument.
- Concealing facts and distorting truth.
- Delaying through legal technicalities.
- Failing to cooperate with the arbitrator.
- Disregarding decorum and courtesy.
- Being argumentative with the other party.

Closing Statement

- In lieu of a post-hearing brief.
- Review facts presented.
- Respond to points against your case.
- State how the other party's case fails to support their suggested outcome.
- Restate the issue and remedy sought.
- Argue for your outcome.
- Cite previous decisions.

Standards Applied in Contract Interpretation Cases

The Union bears the burden of proof.

Standards Based on Contract Language

- Clear and Unambiguous language.
- Specific language versus general terms.
- The agreement construed as a whole.
- Normal and technical term usage.

Standards Going Beyond the Contract

- Intent of the parties.
- Bargaining history.
- Compromise offers.
- Past practice (reasonable, uniform and recurring over a substantial period of time).
- Language construed against the drafter.

Standards Applied in Disciplinary Cases

The Employer bears the burden of
proof.

Mitigation of Penalty

- Forewarned is forearmed.
- Management investigation.
- Substantial evidence rule.
- Fair and equitable.
- Mitigating circumstances.
- Inconsistent enforcement of rules.
- Rehabilitation.
- Punishment befits the crime.
- Procedural deficiencies.

Post Decision Procedures

There are limitations on post judgment process.

Post Arbitration Procedures:

An arbitrator's decision is generally final and binding. Even in the absence of such specific language, the general understanding shared by both labor and management is that the arbitrator's award should end the dispute without further litigation.

Post Arbitration Procedures:

However, in some situations, lawsuits may be brought either in state or federal court, under Section 301 of the Labor Management Relations Act, which provides federal jurisdiction over “[s]uits for violation of contracts between an employer and a labor organization....” Courts have recognized that this statutory provision provides a sufficient jurisdictional basis for a suit to vacate or confirm an arbitrators award. Such a suit filed in state court under § 301 may be removed to federal court.

Post Arbitration Procedures:

- The grounds recognized by the courts for vacating an award are quite limited. Courts will not relitigate or second-guess the merits of an award.
- Errors in fact or even errors of law in an arbitrator's decision generally are not regarded as a sufficient basis for overturning the decision.
- An award should be enforced so long as it “draws its essence” from the collective bargaining agreement.