

CHAPTER 1

AN INTRODUCTION TO ARBITRATION

Broadly speaking, when an employee believes that management has done or failed to do something that adversely affects the terms and conditions of employment, he has a right to present a grievance. Such grievances are processed through a number of steps up to a high level in the organization for a decision, and, in certain instances may be referred to an impartial third party for a decision, a process known as “arbitration.” Under the Federal Service Labor- Management Relations Statute (Statute), 5 U.S.C. §7101 *et seq.* the decision of the arbitrator is, by law, binding upon both parties with a limited review to the Federal Labor Relations Authority (FLRA) or the Federal Circuit Court of Appeals.

Grievance Procedure

The purpose of the grievance/arbitration process is to provide machinery through which the grievances of individuals, the Union, or the employer can be speedily and equitably settled through mutual agreement or, when this is not possible, through the intervention of an arbitrator selected by the parties. The grievance procedure can best be described as a funneling process designed to filter out and settle the relatively less contentious differences between the parties as they progress from step to step of the grievance procedure, until finally those grievances that are clearly irreconcilable proceed to arbitration.

Good labor relations that both parties act in good faith to do everything possible to settle their differences within the framework of the privacy provided by their

agreement rather than project them into the semi-public forum of arbitration with all of the publicity, delay, and expense involved. Unfortunately, however, experience shows that both sides sometimes go through the motions of the grievance procedure just to dump an unwarranted grievance in the lap of an arbitrator. For instance, the employer may oppose an employee grievance for the sole purpose of saving the face of an inept supervisor. Conversely, the Union may pursue an unjustifiable grievance to arbitration simply to pacify an aggressive member or group of members.

Also the cost of arbitration makes it incumbent upon the Union to pursue only those that are valid. To adopt any other attitude would be to condone the spending of the funds of the membership generally to support an individual member or group of members in the presentation of a frivolous complaint. This is not to say that the Union should only take to arbitration “winnable” grievances. Precedent setting grievances are difficult to predetermine as to success or failure but very important principles and future practices may hinge on the decision.

Therefore, it is important to avoid invoking arbitration frivolously or without due deliberation by carefully scrutinizing each grievance and weeding out those without merit. Before declining to process a grievance, however, it is essential to discuss the case with the employee concerned and particularly, to explain why the complaint is not a valid grievance within the meaning of the Statute or the contract. It may be advisable to further advise the employee in writing that the Union has, based upon a full review of the matter, concluded that the grievance lacks merit and that the Union is not prepared to present it. Each local should establish standards for review of grievances and organize a Grievance Committee empowered to scrutinize and reject questionable grievances. This

process can substantially reduce the Union's liability in defending against failure to represent suits.

CHAPTER 2

WHAT IS ARBITRABLE AND WHO PAYS THE COST?

Under the Statute, any negotiated collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Under the Statute at 5 U.S.C. §7121, the negotiated grievance procedures will automatically extend to all matters, except those excluded by law, that are covered by the statutory definition of grievance set forth in §7103(a)(9) of the Statute, unless parties mutually and specifically agree to exclude any of these matters from their negotiated grievance procedure. Thus, even matters for which a statutory appeal procedure exists will be subject to the negotiated grievance procedure unless the parties mutually exclude any such matter from coverage. The Statute requires that

- a. Any negotiated grievance procedure shall:
 - (1) be fair and simple,
 - (2) provide for expeditious processing, and
 - (3) include procedures that –
 - (a) assure an exclusive representative the right, on its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
 - (b) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
 - (c) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.
- b. The negotiated grievance procedure shall not apply with respect to any grievance concerning:
 - (1) any claimed violation of 5 USC §7321 (relating to prohibited political activities)

- (2) retirement, life insurance, or health insurance;
 - (3) a suspension or removal under 5 USC §7532;
 - (4) any examination, certification, or appointment; or
 - (5) the classification of any position which does not result in the reduction in grade or pay of an employee.
- c. Options between statutory appeal procedures or negotiated grievance procedures:
- (1) An aggrieved employee has an option, in appealing discrimination matters under 5 USC §2302 (race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation), to use either a statutory appeal procedure or the negotiated grievance procedure (where the negotiated grievance procedure covers such matters), but not both. Selection of the negotiated grievance procedure, however, in no way prejudices an employee's right to request the Merit Systems Protection Board or the Equal Employment Opportunity Commission, as appropriate, to review a final decision.
 - (2) Employees have an option, in appealing matters covered under 5 USC §4303 (demotions or removals for unacceptable performance) or 5 USC §7512 (removals, suspensions for more than 30 days, reductions in grade, reduction in pay of an amount exceeding one step of an employee's pay grade or 3% of the employee's pay grade or 3% of the employee's basic pay, and furlough for 30 days or less) of using the statutory appeals procedure under 5 USC §7701 or the negotiated grievance procedure, if such matters have been negotiated into coverage under the grievance procedure, but not both.
 - (3) The Statute also provides that matters similar to those listed under subparagraph (2) above which arise under other personnel systems applicable to employees covered by the Statute, may, in the discretion of the aggrieved, be raised under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedures, but not both.
 - (4) An employee will have exercised his/her options to raise a matter under an applicable appeal procedure, or under the negotiated grievance procedure, at such time as the employee timely files a notice of appeal or otherwise initiated an action under the applicable appeal procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedures, whichever event occurs first.
 - (5) In matters covered under 5 USC §4303 and 5 USC §7512 (subparagraph (2) above) that have been raised under the negotiated grievance procedure, an arbitrator must apply the same standards in deciding the case as would be applied by an administrative judge or an appeals officer if the case had been appealed under 5 USC §7701, as applicable.

- (6) In matters covered in both subparagraphs (2) and (3) above, which have been raised under a negotiated grievance procedure, 5 USC §7703 pertaining to judicial review, shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been raised under the applicable appellate procedures.
- (d) Exceptions to Arbitration Awards. Parties to an arbitration may appeal most arbitration awards to the Authority which will review the award to determine if it is deficient on one of the limited number of grounds set forth in §7121(a) of the Statute.

Many, if not most, grievances that go to arbitration relate to disciplinary action.

By and large, this term embraces the whole range of sanctions that an employer has available to impose upon an employee for misconduct or unacceptable performance. Discipline can range from a warning to discharge. An arbitrator can hear the grievance to determine whether the sanction imposed on the employee falls within the broad meaning of the term “just and sufficient cause.”

In the case of a suspension, the Statute contemplates that an employee can be suspended for a specific period as a punishment or be suspended indefinitely when there is reason to believe that the employee has committed a crime for which a sentence of imprisonment could be imposed. 5 U.S.C. §7513. Although every suspension is grievable, suspensions of more than 14 days and discharge may, at the option of the employee, be challenged through the grievance procedure or appealed to the Merit Systems Protection Board (MSPB) under the procedure provided for in 5 USC §7701.

When an employee is indefinitely suspended pending the outcome of an investigation, the Union may want to withhold a grievance until the investigation is completed. But if that is the case, *always* get a commitment from management that the grievance against the suspension will be accepted when the investigation is completed

even though the stipulated time limits may well have expired. Unless management is prepared to make this commitment, in writing, the grievant would be wise to grieve every suspension within the same limit stipulated in the applicable grievance procedure.

Who Pays For Arbitration?

The arbitration clause of the collective bargaining agreement should provide for payment of the arbitrator. In many contracts, the arbitrator's fee is borne equally by the parties (the Union and the employer). When there is a national exclusive recognition, the Constitution for the Council should spell out who pays for arbitration. Usually, an arbitration that has only local impact is paid by the Local. Issues that have wide application are arbitrated and paid by the Council. Check your Council's Constitution.

CHAPTER 3

WHO REPRESENTS THE GRIEVANT?

Before considering how to go about preparing or presenting a case at arbitration, consider who is responsible under the Statute for the processing of grievances. The Statute provides that only the Union or a person specifically designated by the Union may represent an employee under the negotiated grievance procedure. An employee may present a grievance without representation with the understanding that the exclusive representative (Union) has the right during the grievance procedure to be present and make its views known. However, *only* the parties to the contract- Union or management- may invoke the arbitration procedures.

Union officers are authorized to process grievances at all levels through procedures established by a Local or Council. The Local should make every effort to

make bargaining unit employees aware of these procedures. When the Union rejects a grievance, it should be for valid reasons. Following are guidelines for such a procedure:

- (1) If a steward or other recognized officer withholds authorization to process a grievance at the first level, the grievant shall have the right to refer directly to the Grievance Committee. A form will be provided for this purpose with the original going to the Grievance Committee and a copy to the Local President. Space will be provided on the form for the steward or other specified officer to state the reasons for withholding authorization.
- (2) Upon receipt of the copy of a referral, Local or Council Officer shall consult with officers of the Grievance Committee and, with Union representatives who participated in the negotiation of the agreement the “intent” of contractual provision is in question. With the concurrence of the Local or Council, the Grievance Committee shall authorize the presentation of the grievance at Step 1 of the grievance process and return the grievance forms, duly signed, directly to the grievant for presentation to his/her immediate supervisor or local steward. In the event that course of action is not agreed on, the question shall be decided by a majority vote of the Grievance Committee.
- (3) The steward or officer who withheld the original authorization will be informed by the Grievance Committee of the decision to authorize the presentation of the grievance at the reasons for this decision. A copy of which shall be forwarded to the Grievance Committee.
- (4) If the referral is not sustained, both the grievant and the steward or officer concerned will be informed by the Grievance Committee, together with the reasons thereof.
- (5) All grievances settled at any level in the grievance process shall be reported to the Grievance Committee and the Local or Council for record and future reference purposes.
- (6) Where a grievance against the agreement is processed at the final level of the grievance process, an officer of the Local or Council may advise and/or assist the Grievance Committee in its presentation.
- (7) No grievance filed by the union arising out of the interpretation or application of the agreement shall proceed to arbitration without the specific authorization of the Local or Council President, as appropriate. The Local or Council, as appropriate, or its designee, will present the grievance at arbitration.
- (8) Where a grievance is not against an agreement, that is, it is either a disciplinary grievance or one arising out of terms and conditions of employment not covered by an agreement, the Local will normally represent the grievant at all steps in the grievance procedure, including arbitration, if the grievance goes that far. However, at the specific request of the Local, a Council may be involved at the final level or at arbitration or both in an advisory capacity to the Local. If specifically requested by the Local, the Council will represent the grievant at arbitration.

Again, a grievance arising out of a collective agreement can proceed to arbitration only with the specific authorization of the Union. This means that a request for arbitration must be signed by a Union officer/representative. Where the Local does handle such cases, remember that the arbitrator's decision, while perhaps directly affecting a member or group of members of only one Local or possibly one bargaining unit, may nevertheless establish a precedent with a continuing impact on all members of the Council. That is why it is important that in all such cases, the Local should bring the Council fully into the picture before proceeding to arbitration.

Whenever a Local wishes to have the assistance of the Council at an arbitration hearing, the Council should be brought into the picture at an early stage of the grievance. Otherwise, the Council representative will be handicapped by arbitrating a grievance that is totally unfamiliar and one which he or she has had no hand in preparing at any of the levels of the grievance process prior to arbitration.

District officers and National Representatives encounter the same problem if they are not brought into the picture at an early enough stage in the presentation and processing of the grievance. It is strongly urged, therefore, that the Local bring the District Office into the grievance picture at the earliest possible moment, preferably even before the grievance is formally lodged with the employer, if there is any chance that the grievance may go to arbitration. Naturally, Locals must rely in a very large measure on the abilities of their stewards and officers to launch the grievance properly and this certainly points to the vital need for having knowledgeable and trained stewards and officers.

It cannot be overemphasized how vitally important it is for the Union representative handling the arbitration to be present when the grievance is argued at the final level of the grievance procedure. Nor can there be too great an emphasis on the necessity for the Council or District Office to be brought into an arbitrable grievance at the earliest possible moment.

CHAPTER 4

THE PRELIMINARY MOVES

The purpose in representing a member in the grievance/arbitration process is simple and clear-cut: to obtain an equitable settlement of the grievant's complaint with as little fuss and furor as possible. You should not be interested in emerging as heroes or be consumed with making management look bad. On the contrary, if management can be persuaded to rectify an injustice of its own accord, then be quick to applaud its cooperation and willingness to modify its position and to correct it.

To achieve this aim, always approach the problem on the basis of "what" is right and never "who" is right. By seeking the right and fair solution in the particular circumstances of the case, you can avoid the litigious wrangling and legal posturing that can overwhelm you as well as defeat the purpose of a negotiated settlement process.

Once you establish that the grievance is well-founded, do everything you can to convince management to rectify the injustice complained of without the necessity of airing all the gory details in the semi-public forum of arbitration. Prepare just as meticulously for the final step of the grievance procedure as you do for arbitration because, from every viewpoint, it is preferable to settle a complaint successfully during the grievance process than to score a victory at arbitration. Certainly winning a case at

arbitration will focus attention on you and vindicate the Union's position, but it will probably take months to get a decision, be expensive, take up a good deal of your time that would otherwise have been devoted to other of your many duties to the benefit of the membership generally.

But cost and time are only two of the many reasons why you should avoid this kind of contest. Among other things, the mere fact that you have had to seek the intercession of a third party is an admission of failure by both parties—an admission that there is something wrong in the existing employee-employer relationship. More important still, a decision gained through arbitration, particularly where the decision was based on a technicality, can often stir up hostility which lingers long after the decision itself has been accepted and forgotten. You cannot afford this adverse effect on your continuing relationship with the agency.

Fortunately, you will find that most arbitrators are anxious to be fair and will go to great lengths to avoid issuing a decision based on a technicality that the losing party may find infuriating. The fact is, however, that arbitrators are human and, as such, unpredictable. For this reason, if for no other, you should strive to your utmost to reach an acceptable settlement with management officials rather than gamble on an arbitration hearing where anything may happen—and frequently does. Even in supposedly “open and shut” cases, it is difficult to predict the outcome. Facts that seemed rock solid can evaporate in the heat of arbitration. Witnesses who seemed to be towers of strength will dissolve or become tongue-tied and confused under cross-examination. Points that seemed vital may be dismissed as irrelevant by the arbitrator. So don't take a chance. Clear the problem up within the framework of the grievance procedure if you possibly

can. Resort to arbitration only when it cannot possibly be avoided. But always prepare and process each grievance as if it might go to arbitration.

Preparing the Grievance

The first step in preparing the grievance is to interview the grievant personally – if this is possible – preferably in private to avoid the influence of others who may want to embellish the story. Ask the grievant for a complete description of the events leading to the grievance and listen to the whole story without interruption or prompting. When the grievant has finished, ask if you have been told everything that might remotely bear on the grievance. You will often find that, while not telling you anything untrue, the grievant may neglect to mention possibly unflattering or unfavorable, but nonetheless relevant, facts. You must listen with a critical ear and look for loopholes in the story, much as a detective does when attempting to establish the facts of a case.

Once you are satisfied that you have heard the whole story, get the grievant to repeat it in chronological order because more likely than not, in the original telling, the grievant will have jumped back and forth in time while recalling incidents that seemed to be important. During this review, take careful notes of the grievant's story, placing the events in chronological order and pay very close attention to dates and times even where it is not immediately apparent that such times and dates are material to the grievance itself. It is also a good practice to have the grievant write out the story in his own handwriting. This serves a two-fold purpose. First, the effort required to chronicle the events will help to trigger the grievant's memory and to establish all relevant details in proper order. Second, you will have the grievant's own rendition of the facts on file so that if the story does not stand up either at the grievance hearing or at arbitration, you cannot be accused of losing the case by misinterpreting what the grievant told you.

Take a day or two to digest the grievant's story. After that, you should re-interview the grievant, this time with your notes and the employee's statement in front of you. You must carefully cross-examine the grievant on the points that appear doubtful or that might be challenged by management. You will probably find the grievant resentful of having the story dissected in this manner and possibly belligerent in asking whether you are on the employee or employer's side. Don't be deterred by this response. Simply explain that if the story cannot stand up to your scrutiny, the flaws will certainly be exposed by management. This is the time to detect flaws and to correct errors and inaccuracies that could ruin your case if they were exposed through management cross-examination.

After interviewing the grievant, conduct a similar examination of all of your witnesses and any management witness to whom you can gain access. Interview each witness separately and privately to be sure that your witnesses will corroborate the grievant and each other and will not tell conflicting stories that will damage the credibility of your case. At this point, a word of caution: never assume that the grievant has accurately described the testimony that another witness will give. Regardless of the time factor involved, do not forego the examination of a witness on the assumption that you know what he or she will say when called upon. Such assumptions will almost always let you down at the crucial moment.

Once you have all the facts, you should include them in a working outline that will be invaluable in helping you to guide the grievance through the process. It will also serve two other purposes. First, merely preparing it will make you organize your thoughts properly and plan your attack. Second, if the grievance does go to arbitration,

the outline will provide the framework on which to build your case and will form the basis of your final brief for presentation to the arbitrator and to the employer's representative. Your working outline should always contain the following:

- (a) a statement of the grievance;
- (b) a summary of the grievance up to the point where you became involved, including any admission by management and any overtures made to settle the complaint;
- (c) the grievant's written statement;
- (d) the written statement of each witness you intend to call;
- (e) a summary of your own investigations and opinions;
- (f) a summary of the strong points in management's favor;
- (g) a summary of the points favoring the grievant;
- (h) a plan of presentation.

Remember, there is no substitute for preparation. The better prepared you are, the more persuasive case you can present and the less able management will be to deny the justice of your complaint. Grievances are won on the basis of the facts, not by emotional presentation. At all steps in the grievance process, you or another union representative should keep accurate notes that will give you a preview of management's defenses, admissions of facts, and the documents that management may produce to support its views.

CHAPTER 5

PREPARING YOUR CASE

When you have exhausted the steps in the grievance procedure, and after it has been decided that the Local or Council will support and represent the grievant in arbitration, you must be careful to follow the procedures set down in your contract, particularly with regard to time limits. Failure to comply with time limits will usually prove fatal to your cause, although the arbitrator may extend time limits if necessary to avert a hardship. But don't take a chance; do things on time.

When referring the grievance to arbitration, you should attach a statement of the grievance and copies of the replies made at each level. Refrain from appending any other papers to the grievance. Attaching additional documents cannot possibly do any good at this stage and may, in fact, contain information which, on reflection, you would have preferred not to bring to the attention of the arbitrator.

Having requested arbitration, it now becomes essential that you have some idea of what you can and cannot do and say at the hearing before you begin to prepare your case. The following are the basic concepts of evidence that are relevant to arbitration.

Burden of Proof – This phrase refers to the relative responsibilities of the parties involved with respect to the initial production of evidence and the ultimate burden of persuasion. With an important exception, the party filing a grievance will normally be required to bear the burden of proof by going first in presenting evidence to support its case against which the other party must defend itself. Since the Union more often than not is the party filing the grievance, it will be your job to open the hearing by producing

sufficiently weighty evidence as will overcome the position taken by the employer and defended at the various levels of the grievance procedures.

The important exception to the general rule that the grieving party bears the burden of proof is a case involving a disciplinary action. In that instance, the burden of proof falls squarely on the employer's shoulders who must therefore open the hearing by producing sufficient evidence to justify the discipline. In misconduct cases, the employer must support the disciplinary action by a preponderance of the evidence, that is, the degree of proof that makes the thing sought to be proved more probable than not. However, the employer needs only substantial evidence to prevail in an unacceptable performance case. Substantial evidence is such evidence that a reasonable person might accept as adequate to support a conclusion.

Best Evidence Rule – This rule requires the presentation of the best available evidence of a disputed fact. For example, if you want to demonstrate what an individual said, call that person to testify as to his or her statements – don't call another person who overheard the statements in question. However, if both parties to the conversation refuse to give evidence, as they have every right to do, then it becomes acceptable to call a third party who overheard the conversation, as this is the best evidence that can be produced.

It is, however, secondary evidence. You must, therefore, be prepared to explain why you have violated the basic rule of best evidence by not producing the person whose remarks are in dispute. In the absence of a valid explanation, the use of secondary evidence might raise doubts as to its credibility. In other words, always use first-hand information rather than second-hand information if you possible can.

Similarly, if you wish to enter a document into evidence, always produce the original document and have it introduced by a witness who can testify as to its authenticity. In all probability, the arbitrator, upon examination of the original document, will be satisfied as to its authenticity and allow you to submit copies for the evidentiary record. Copies of original writings are secondary evidence and if you produce only copies, you must be prepared to explain why you are unable to produce the original document.

The Hearsay Rule – Hearsay evidence is not usually admissible in court to prove the truth of the statement. In arbitration hearings, however, hearsay evidence is sometimes allowed into the record. One reason for this is that neither the parties nor the arbitrator have any statutory power to compel the attendance of witnesses or to gather evidence by deposition or statutory declaration. For this reason, the record of some arbitrations may consist of little other than hearsay evidence. *****

Having accepted the hearsay, however, the arbitrator, being aware of its deficiencies, will give it such weight as he feels it deserves in arriving at his decision. Hearsay evidence leaves much to be desired and should be relied upon only when all efforts to produce more reliable evidence have been exhausted.

Testimony – A witness will normally be required to confine his testimony to facts of which he has personal knowledge. His testimony should include any first-hand information concerning those facts. But the witness should be instructed ahead of time to avoid giving any opinion as to the relevance of the facts that are the subject of the testimony.

From time to time, however, you may need to present expert testimony on scientific or medical matters. In such cases, it is permissible for a witness who qualifies as an expert to offer opinions and impressions drawn from knowledge of the facts of the case and his professional experience. The arbitrator is, of course, free to give such weight to these opinions as he considers warranted. You will need to demonstrate at the outset of the testimony that the matter on which the expert intends to address is one that requires special knowledge or training and that the expert possesses the necessary professional competence to make the testimony credible on the issue.

It is also important to remember that any statements or testimony, whether tendered by an expert or an ordinary witness, must bear upon the issue in dispute and must tend to prove or disprove something in relation to it.

So don't let your witness wander. Through your questions, be sure that you contain the testimony to the issue at hand. If you fail to do this, even the most broad-minded arbitrator will call a halt to the testimony being offered on the simple and logical grounds that it contributes nothing to the hearing and is, therefore, a waste of time.

Confessions – Often in disciplinary cases, the employer will attempt to introduce evidence, either verbal or in writing, to the effect that the grievant has confessed. To be admissible into evidence, a confession must have been freely, voluntarily, and willingly given. Therefore, confessions will be accepted only if they have been made voluntarily and without improper inducements. For example, a confession obtained in response to management's promise of leniency would be highly suspect as the grievant may well have confessed to something he didn't do just to save his job. Likewise, confessions obtained by threats, pressure or third degree methods are unacceptable in evidence. You

must thoroughly examine the circumstances leading up to any alleged confessions before conceding the right of the arbitrator to consider them.

You must also guard against any attempt by the employer to introduce into evidence an unsupported document alleged to be a confession. This may occur when a management representative has conducted an investigation of the circumstances giving rise to the grievance. Often such an investigator will produce a “confession” claimed to be freely given and signed by the grievant. Unless the witness presenting this confession can prove, through other witnesses, that the alleged confession was indeed freely given by the grievant, and that the signature on the document is, to their certain knowledge, that of the grievant, such a document is of little value. You must be quick to remind the arbitrator, with all due respect, that in a contest between the employer and an unhappy employee, an unsupported document introduced by the agency representative is inherently unreliable and should therefore be rejected.

You must also be very careful to ensure that the grievant does not make any admission of guilt in the cover letter which accompanies your notice of referral. This is not at all to suggest that you do anything dishonest, but rather that it is not your responsibility to bring into focus any matters that would prejudice the grievant’s case. Don’t help the employer by any rash or ill-considered action and above all, make sure the grievant admits nothing. Confession may be good for the soul but it plays havoc with your case at arbitration.

Damaging Admissions – This sounds almost like another way of referring to a confession, but it is more complex than that. These are statements made by one of the parties that amounts to a prior acknowledgement that one of the material facts relevant to

the issue is not as he now claims. These include any previous statements made by the grievant that would tend to disprove the contentions that you are now attempting to establish. These statements may be written or oral, but are subject to the requirement that the entire statement must be considered, including portions both favorable or unfavorable to the party offering the evidence.

This rule also applies to admissions against interest made by the grievant's representative with his actual or apparent consent. Such admissions are equally binding upon the grievant. Naturally, the same holds true of statements made by management representatives within their area of authority.

Fortunately, however, this rule does not apply to offers of settlement made at the grievance hearings, even though such offers to settle could logically be considered as implying an admission against interest. This view is sustained on the basis that both parties to the grievance are encouraged to do everything possible to negotiate a settlement within the framework of the grievance procedure. If tentative offers of settlement were to be accepted as evidence against the party making them, the grievance hearings would soon become unrealistic.

Having touched upon who will open the hearing, the type of evidence that is acceptable, and the kind of testimony that witnesses can give, it is time to address the very important subject of preparation and planning for the arbitration hearing. Preparing and planning for the hearing are very bit as important as the proper conduct of the hearing itself. Remember—far more grievances are won or lost in the preparation stage than at the hearing. So don't cut corners. Do your research thoroughly. Take nothing for granted.

In preparing your case, you must first carefully define the issues at stake so there is no doubt in your mind as to exactly what you are setting out to prove. This is not to suggest that you cannot have more than one string to your bow. For example, if you are representing a grievant who has been discharged for a particular offense, there is nothing wrong with trying to prove him innocent of the offense while at the same time submitting that even if he were guilty, the punishment of discharge should be set aside in favor of some lesser sanction. But be careful about arguing too many alternative defenses, like the new lawyer who, in defending a client against a charge of causing damage to a car borrowed from a lot for a trial run, asserted that:

- (a) his client did not borrow the automobile;
- (b) he returned the car undamaged;
- (c) the fenders were crushed when he borrowed it.

Next, you must critically examine the strengths and weaknesses of your own position and assess the weapons – in this case the facts – which you have at your command. Similarly, and of equal importance, you must assess the strengths and weaknesses of management's case as you develop your own. Finally, you cannot afford to overlook the dramatic values of the situation and you must call your witnesses in the order and at the point in the hearing which will achieve the most effective climax possible.

So now make a list of the things that must be proved to support the grievance. Then list any references to acts, regulations, agency, contract provisions, or departmental directives that will support your case. Note also any precedents or established practices that you can cite in your favor. Then list the witnesses whom you will call to prove your

case. In the first list, include everything that, at first glance, seems even slightly relevant. Then, go over the list again to eliminate an unnecessary duplication of proof and to weed out the non-essentials that will only clutter up your presentation.

Next meet again with the grievant and the witnesses to go over their statements with them and make sure that they will be able to prove the facts that must be proved for the grievance to succeed. Make sure that you know exactly what each witness has to contribute but do not overcoach him or suggest changes in his testimony. Remember that the arbitrator wants to hear his story, not your version of the facts through his mouth. Always instruct the witnesses to tell the plain, simple, unvarnished truth as they understand it. Then you need never fear that their testimony will dissolve on cross-examination.

**** Just a final word on the assembling of witnesses. As we mentioned earlier, there is no statutory authority under which witnesses can be compelled to give testimony at an arbitration. This does not mean that officers of the department cannot be requested to appear as witnesses if the grievant or you feel that their testimony would help to clarify the situation or circumstances that gave rise to the grievance. Always request the cooperative attendance of such witnesses in writing. Courtesy alone requires that such letters be answered and if the officials concerned decline to attend and to assist in clarifying the issues at stake, this refusal itself could be a valuable weapon in your arsenal.

If the employer refused to make a witness or document available for the arbitration, enter in to the record what you believe the testimony of the witness or

document would shown. Many arbitrators will accept as evidence what you say. And the employer will have the burden of disproving your version.

You have now arrived at the point where you can prepare the formal pre-hearing brief or opening statement that you will use to argue you case at the arbitration hearing.

This brief should contain:

- (a) a statement of the grievance,
- (b) the facts,
- (c) the issues,
- (d) the conclusion – the relief requested by the grievant.

The Statement of Grievance – should say, very simply, what it is that the grievant is unhappy about.

The Facts - If you list something as a fact, be sure that it is either a fact that will be accepted by the other party or one that you are prepared to prove. Keep in mind that the content of your brief concerning the facts of the case is itself hearsay, inasmuch as it represents only what other people have told you. It is for this reason that you must always be prepared to adduce evidence through your witnesses to corroborate any facts alleged in your brief that are challenged by the employer.

In assembling the facts, keep in mind that the arbitrator must have the complete story. Tell him the background and mention the times, dates, places, and people involved. Show him what happened through a simple story related in the chronological

order of events. But stick to the facts. Don't drag in any "red-herrings" and don't confuse facts with opinion.

The Issues – Leave no doubt as to what the issues are. State each issue simply and separately so that there can be no possibility of confusion.

The Arguments – Here you must examine separately each of the issues involved. Let the arbitrator know what you intend to prove. Then dissect management's position and attack each point raised during the processing of the grievance. Show where, how, and why management has drawn a wrong conclusion or inference from the facts.

The Conclusion – State exactly what relief or redress you want in order to rectify completely the injustice done to the grievant.

In essence, then your brief should acquaint the arbitrator with the facts of the case and let him or her know what you intend to prove. It will not reveal in advance the strategy that you will use to prove your points. The pre-hearing brief or opening statement should serve as a road map for the arbitrator for the course your presentation will take.

Normally, both parties, by mutual agreement, will forward a copy of their brief to the arbitrator and to the other party a week or so before the hearing. This gives the arbitrator an overview of the case and ensures that neither party will be surprised by the position adopted by the other party and be unprepared to offer an adequate defense. When that happens, a lengthy postponement might be the only solution.

Some may contend that such an open exchange of briefs can only serve to blunt the weapons with which you hope to mortally wound the adversary at arbitration. But the fact remains that grievances are won and lost on the basis of who has the better facts

more skillfully presented; seldom are they sustained on the basis of trickery, technicalities, or the exploitation of legislative loopholes. Arbitrators dislike being forced to make decisions based on such methods.

Remember – arbitrators are not interested merely in administering the law – they are there to see justice done and they will go to great lengths to ensure that their award is fair as well as legal.

Although there is no requirement to prepare and present a brief, it can be a vivid reminder to the arbitrator, days or weeks after the hearing, of your position and of the evidence and arguments in your favor. In addition, preparation of the brief requires you to marshal your thoughts, force a clear analysis of the issues, and often, point the way to obvious conclusions and solutions.

CHAPTER 6

THE ARBITRATION

Representing a grievant at arbitration for the first time can be a nerve-shattering experience for a layman untrained in the law, inexperienced as an advocate, and unfamiliar with the tricks of a skilled lawyer. A certain degree of nervousness and stage fright is natural and to be expected but there it should end. You will find that just knowing you are thoroughly prepared for the hearing will go a long way toward settling the “butterflies.” It also helps if you drop over the day before and familiarize yourself with the lay of the room in which the hearing will be held. Then at least you will feel a little less like the stranger within the gates – about to be taken in!

Normally, arbitrations are heard in a board room or conference room in an atmosphere of ease and reasonable informality; an atmosphere encouraged by the

arbitrator and enhanced by a few minutes of friendly and casual conversation before opening statements are presented.

You will probably find that the arbitrator will sit at a table at the front of and facing the room. Off to the right will be a table for the witness who is testifying. You and the employer's representatives will sit at separate tables, separated by a few feet, facing the arbitrator. Witnesses and any interested or curious spectators will sit at the back of the room. However, where there will be questions of credibility on witness testimony, the witnesses should be sequestered.

But informal or not, don't be lulled into underestimating your adversary, for he is almost certain to be a skilled lawyer, often supported by a junior counsel and experienced in labor relations. Opposing counsel's knowledge of the technicalities of the law will be of little value to him in an arbitration hearing. But what is invaluable is the ability that he has gained, through years of legal training and practice, to search out, prepare, and present the facts in such a manner and with such force and persuasiveness as to convince the arbitrator of the merits of the employer's case.

Don't worry too much about your lack of technical legal knowledge; the arbitrator will protect the interests of the grievant in this area. Knowing that you are inexperienced and facing a skilled lawyer, the arbitrator will probably make an effort to even the contest, short of showing any bias. This might include suggestions as to the need to present particular kinds of evidence bearing on the disputed issue. But the arbitrator cannot assume the burden of discovering that evidence – that is your job. Unfortunately, the side with right on its side does not always win. The arbitrator must make his award on the basis of the facts placed in evidence before him. If your preparation and

presentation are so inadequate that you overlook facts vital to your case, you cannot hope to succeed against a competent opponent. So once again, do your homework thoroughly – more cases are lost in preparation than in presentation.

To start the proceedings, the arbitrator will ask whether either party questions arbitral jurisdiction. Unless objections are made at this time, the arbitrator will presume to have jurisdiction to entertain the grievance on its merits. Since in nearly every case, the hearing is being held at the request of the grievant, you will seldom, if ever, be in a position of challenging the arbitrator's jurisdiction. The employer may raise a question of arbitrability on a variety of the grounds, such as by contending that no clause of the collective agreement has been violated or that no disciplinary action is involved or perhaps that the hearing is premature because the grievance procedure has not yet been exhausted. In such an event, the arbitrator, before hearing the grievance on its merits, may first have to determine the question of arbitrability. To assist that effort, both parties may be asked to submit arguments pro and con on the arbitrability point involved. In keeping with the burden of proof principle that was previously explained, the party raising the objection would present its arguments first. The other party would then offer a rebuttal; and, finally, the party raising the objection would have an opportunity to reply to any arguments raised by the opposing party. Having heard the views of both parties, the arbitrator may decide to adjourn the hearing to decide the jurisdictional question. Under certain circumstances, the arbitrator may reserve that question and proceed to hear the case on its merits.

Once the preliminaries have been cleared away, either party may request that the witnesses be excluded until called to give evidence. Even though the other party may

object to this, there is little doubt that the arbitrator will exclude witnesses if asked to do so. Before making such a request, you must weigh carefully the pros and cons to the witnesses present throughout the hearing. It will certainly be helpful if each of your witnesses is present when the other witnesses are being examined. On the other hand, if you know that the employer will be calling a number of witnesses, you may see an advantage in excluding witnesses so that they will not be aware of the testimony of the other witnesses and will therefore be more vulnerable under cross-examination.

And so at last the moment has arrived when your case will face the acid test.

Assuming that this is not a disciplinary action, the arbitrator will request that you open the case for the grievant. In your opening statement, you should refresh the arbitrator's memory on the nature of the grievance. You must carefully state the issues involved and provide insight into the evidence that you will produce to establish your case so as to alert the arbitrator to the important points in your presentation and the facts to watch for in the evidence. Be very careful that you do not exaggerate those facts that you may have difficulty in establishing, as this will certainly weaken your position in the final analysis. As part of your opening statement, you should also sketch in the background, so that the arbitrator has the complete framework of the case which you will establish and solidify through the presentation of evidence. Having heard the arguments presented by the employer during the grievance process, you should also prepare your opening statement in such a manner as to anticipate and negate as many of the employer's arguments as possible before your opposition even has a chance to speak. Always remember - the best defense is a good offense so seize this opportunity to destroy your opponent's case even before it is presented.

After opening statements, the arbitrator will direct you to call your witnesses. The cardinal rule here is never to ask a question unless you are sure of what the answer will be. Your own witnesses should by this time have been so thoroughly instructed and briefed that you will be in absolutely no doubt as to the testimony which they will offer. The rule also applies on cross-examination. The time for investigating is over – do not be fooled into thinking that you can discover additional information by asking open-ended questions on cross-examination.

Examination of the Witnesses – You will have the opportunity to examine your witness first to bring out such facts as you want recorded in evidence. After you have finished your examination, the witness will be subject to cross-examination by counsel for the employer, after which you will have an opportunity to again question the witness and repair any damage caused on cross-examination. Normally, this will conclude the questioning of the witness. However, the arbitrator may permit redirect and recross if it appears that the facts could be clarified by additional questioning. Remember, the arbitrator is anxious to ensure that both parties are satisfied that all of the facts have been gathered without regard to the normal rules of court procedure.

In examining your witnesses, do not ask leading questions. These are questions that either suggest the answer or assume something which has not been proven as fact. For example, you cannot say “at this point in the conversation did the director call you an incompetent idiot.” Nor can you say “after the director called you an incompetent idiot in front of your staff” unless the witness has already testified that the director did, in fact, make such a statement. Both of these are leading questions in as much as one question

suggests the answer and the other assumes a fact about which the witness has not testified.

However, there is generally no objection to asking leading questions designed to stimulate the witness's memory or to direct his attention to a particular subject. For example, it is quite proper to say "Do you remember an afternoon in mid-May when a section of the library shelving collapsed." You can also help to recall the proper time frame by asking "Was it before or after lunch" or "was it later than New Year's but before Easter." Once a witness has referred to a particular person or document, it is also quite permissible to point to the person and say "Is this the man you are talking about" or to show him the document and ask "Is this the document you are referring to?" All of these are leading questions but all of them are permissible as they do not put words in the witness's mouth. Finally do not waste time by asking a witness who he is, where he lives, what his job is, what department he works for. Come quickly to the point by say, "I understand that you are ...etc; is this true?" A leading question? Yes. But necessary if you are to get on with the job.

Start your examination with simple questions that locate the witness, establish the time if necessary, and clarify any other minor points that have a bearing on the witness's later testimony. Then establish the facts you wish to bring out by asking short, incisive questions that do not omit the scope of the answer. If you feel that a worthwhile purpose would be established, let the witness tell his story in his own words after you have asked your preliminary questions. If you do this, ask only the minimum number of questions necessary to bring out any important details which the witness may have overlooked. If you ask too many questions, it may create the impression that you are not satisfied with

the evidence and you are trying to shore it up. Never repeat an earlier question to the same witness -- you may get an inconsistent answer that your opponent will seize upon and expand. If you wish to emphasize an important point, say, "I am sorry but I missed your answer. Would you repeat it please?"

And just a special word about the grievant as a witness. The grievant cannot be compelled to give evidence. However, if you decide that he should testify and he agrees, he is subject to cross-examination the same as other witnesses and is, therefore, fair game for your opposition. In all probability, you will want the grievant to tell his story. If you do, make sure he tells the whole story. Similarly, if you refer to the grievant's record to establish the fact that he has been a good employee over the years, be sure that you also bring to light any unfavorable parts of his record. By bringing these unfavorable points into the open and "pooh-poohing" them as trivial, you can take much of the sting out of your opponent's cross-examination. You can be sure that any adverse points in the grievant's background that you try to evade will be seized upon and exploited by your opponent. Such unpleasant facts always sound much worse when they are adduced through cross-examination than they do if they are frankly and openly admitted and then minimized through carefully phrased questions designed to illustrate their unimportance. If you do not disclose them, you can also be sure that your opponent will argue that the grievant has deliberately misled the arbitrator and that these facts were brought to light only by judicious questioning on the cross-examination.

Once you have made your case, the employer will begin its presentation. All of management witnesses are, of course, subject to cross examination.

Cross Examination – Unless the testimony of the witness has been damaging, leave him alone. This cannot be emphasized too strongly. Cross-examination should be limited to those matters that you are confident you can call into question by additional testimony. If you ask questions that elicit answers that do not undermine the witness's direct testimony, all you do is give the opponent an additional opportunity of impressing upon the arbitrator the truth of facts that you wish had never been introduced in the first place.

Cross-examination has two purposes. As mentioned above, skillful and limited cross-examination may identify loop-holes in the witness's testimony, thereby destroying its value. Through cross-examination, you may also attack and expose defects in the witness's character, thereby destroying his credibility as a witness. In such cross-examination, you are not limited by any of the rules of evidence that apply to direct examination. You are at liberty to destroy the credibility of a witness by asking questions concerning past criminal records, for example. If the witness has a bad reputation, you can attack this. You are at liberty to ask leading and suggestive questions to show bias. You can question the witness's motives in appearing at all, and you should do this if there is any suggestion of hostility toward the grievant.

Do not, however, abuse a witness. These people have volunteered to come forward and help to clear up the circumstances surrounding the grievance. Always remember that the basic purpose of cross-examination is to bring out the true facts. Never cross-examine more than is absolutely necessary because if you don't break the witness, the witness breaks you by impressing the arbitrator with the unassailability of the direct testimony. You will also find that the arbitrator resents an average witness being

handled roughly and may tend to sympathize with his cause. On the other hand, everyone secretly enjoys seeing the arrogant, overconfident witness taken down a peg. So don't hesitate to cut the ground out from under the feet of such witnesses whenever you get the chance.

Generally speaking, it is a mistake to antagonize a witness, for he will then go to extremes to avoid admitting anything that will further your case. Be polite and soft spoken. Let the witness know that you appreciate his volunteering to appear. Ask the really important questions only after gaining the witness's confidence. Lead him up the garden path in your questioning and when he has gone too far to retreat- lower the boom.

When the employer has finished presenting its case, you have a final opportunity call evidence in reply in order to rebut evidence adduced by the employer in its case in chief. At this point, you may recall any of your witnesses, provided you confine your questions to matters touching upon the evidence brought forward by the employer. In other words, you cannot use this opportunity to again parade your entire case. You may, however, if you choose, call a witness who has not previously testified, provided all the testimony offered by such a witness is in rebuttal to the employer's evidence. The effect of a witness appearing for the first time in the reply stage with evidence that completely negates the employer's evidence is most dramatic indeed. So think about this when you are preparing your case.

Final Argument - This is the time to highlight and emphasize the vital facts of your case and to outline the main points of the evidence on which you rely. You may also cite the law or decisions that favor your position. No doubt you will also want to disparage the employers' case. You can either do this directly by focusing on the

weaknesses in the basic elements of the case, or by concentrating upon the weaknesses of the opposition's evidence on matters of slight importance so as to distract the arbitrator from the strength of the evidence on the important issues. With luck, you might even lull the opposing counsel into dwelling on these unimportant points in his own closing arguments. Remember that this is your last chance to emphasize the salient points of your case. Do that; don't clutter up your final arguments by rehashing a wealth of minor points. If you do, your summary loses its impact.

Finally, of course, you will end by requesting the arbitrator to allow the grievance.

Post-Hearing Brief

A post-arbitration brief is a short compilation of the Union's arguments augmented by citations of evidence and exhibits arranged in a logical format to lead the arbitrator to view the facts from your vantage so he will draw the same conclusions that you recommend and grant the remedy you request. When post-hearing briefs are to be submitted, a transcript of the hearing will usually be generated and made available to the parties. Preparation of the transcript and the submission of briefs always delays the arbitrator's decisions.

Remember, a brief is not evidence, but rather a summary of the case made at the arbitration. Just as the opening or preliminary statement in the brief in substance says where you're going, the final summary should set out where you've been. But a good brief is achieved by good preparation.

When writing the brief, it is best to use short, simple declarative sentences where possible. It generally consists of a preliminary statement indicating the nature of the case, including the issue, followed by quotations from or at least citations to those

portions of the contract that bear on that issue. This is followed in turn by your argument and your response to the arguments of the other side. As far as your argument is concerned, this is often accomplished by listing a small number of “points” each followed by a summary of the important evidence or contract clauses and detailed argument supporting each point. In a short brief, it isn’t necessary to put in the headings and subheadings, but the brief should be written as if they were there. The brief ends with a conclusion setting out the relief.

A FEW DO’S AND DON’Ts AS TO THE CONTENT OF A BRIEF

1. Do tailor the brief not only to the subject but to the particular arbitrator hearing the case.
2. Don’t forget that a brief generally consists of claimed facts, conclusions from those facts and (sometimes) arbitration “law.” Don’t confuse the facts with conclusions from those facts; facts are *facts*, while conclusions constitute *argument*.
3. Do head for the jugular. This is part of the process of keeping your eye on the ball.
4. Don’t overload the brief with too much detail.
5. Do stick to the evidence put in at the hearing. A brief is no place for new “evidence.”
6. Do follow a logical outline in the brief.
7. Do spell out technical facts or terms clearly. Don’t expect the arbitrator to be as familiar with the agency, and its terms, as you are, even if, in fact, he may be.
8. Do cite other decisions, but be sure they fit your case as closely as possible. Always read the decisions that you cite. Don’t rely solely on the headnotes.

CHAPTER 7

THE AFTERMATH

Now all you can do is wait for the decision. You can never predict with certainty the outcome of an arbitration. Even when you have case law directly on point and in your favor, you will be making a mistake to sit back secure in the knowledge that the awaited decision must also favor the grievant. Don't count your chickens before they are hatched.

It is important that you clearly understand that an arbitrator is bound by no such doctrine and is not bound by earlier decisions and is under no obligation to make the decision conform to previous decisions in similar cases. There is no doubt, however, that an arbitrator will consider very carefully any decisions quoted to him, particularly if those decisions resulted from arbitration hearings on the same point between the same parties. In that circumstance, the arbitrator will almost certainly support the original decision. Were it otherwise, the parties would be faced with two opposing decisions in two identical cases. One can easily see the confusion that would arise and appreciate the effect such confusion would have on the future administration of the collective agreement. At the same time, the arbitrator has the power to view previous decisions with a critical eye and is under no obligation to preserve bad decisions merely for the sake of consistency. Also, seemingly small differences in the circumstances of your case and the case you are quoting may lead to a considerable difference in the decision awarded, for the arbitrator may well conclude that the differences that you considered minor are, in fact, points of such importance as to distinguish one case from the other entirely.

When you receive the arbitrator's award, study it carefully. It may well establish a precedent with which you will want to be familiar. Win or lose, there are valuable lessons to be learned from each decision. What if you are not satisfied with the decision? What can you do about it?

The Federal Labor Relations Statute provides that

1. Either party to arbitration may file with the Federal Labor Relations Authority an exception to any arbitrator's award (unless the award relates to a removal or demotion for unacceptable performance under 5 USC Section 4303 or serious adverse action under 5 USC section 7512, or the matters similar to these that arise under other personnel systems.) If upon review, the Authority finds that the award is deficient because it (1) contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by federal courts in private sector labor-management relations cases, the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.
2. If no exception to an arbitrator's award is filed during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award, which award may include the payment of backpay (as provided in 5 USC Section 5596).

3. An award relating to a removal or demotion for unacceptable performance under 5 USC Section 4303 or serious adverse action under 5 USC section 7512, or the matters similar to these that arise under other personnel systems is appealable only to the Federal Circuit Court of Appeals in Washington, D.C.

The FLRA's rules and regulations at 5 CFR Part 2425 should be consulted prior to any filing to ensure proper format and contents. The Federal Labor Relations Authority has established very narrow criteria on which arbitration awards may be reviewed. It will grant an appeal when one or more of these criteria has been clearly violated. These criteria are:

1. That the award is contrary to law, rules or regulation;
 2. That the arbitrator exceeded his authority;
 3. That the award did not draw its essence from the collective bargaining agreement;
 4. That the award was incomplete, ambiguous or contradictory to the point that the award could not be implemented;
 5. That the award was based on a non-fact;
 6. That the arbitrator was biased or partial;
 7. That the grievant did not receive a fair and impartial hearing; and
 - 8.
4. That the arbitrator refused to hear pertinent and material evidence.

It must be remembered that the FLRA does not review the merits of an arbitration award during review of an exception to an award. If a question is asked of an arbitrator, he will rule on it and there will be no reversing the ruling unless it meets the list of the seven criteria listed above. For this reason, it is very important to frame the issue in a grievance very carefully at the initial step.