

ARBITRATION: PUTTING IT ALL TOGETHER

Courtesy of

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A. Start Preparing Early.

Start early. As the Union's advocate, you'll be on the spot from start to finish. You need to know and understand the case as well as possible, and better than anyone does when its first assigned to you. You'll also need to prepare the grievant and your other witnesses. There are several time-consuming, interdependent steps. And unexpected twists, turns and delays are the norm.

You should also start early because in preparing it, you will also further investigate and scrutinize the case. You might discover that the decision to arbitrate was made on a mistaken premise, and should be reconsidered. The earlier that this kind of revelation comes to light, the better. Among other considerations, cancelling a hearing on short notice can cost thousands of dollars. Arbitrators' policies vary widely, but they commonly require at least 30 days notice to cancel or postpone a hearing without a fee, and many require more than 30 days.

B. Discipline Or Contract Case?

In discipline cases, the employer is the moving party, presents its case first, and bears the burden of proof. After the union presents its case, the employer also gets a chance to present evidence rebutting the union's case.

In all *other* cases – where we're claiming that something other than discipline violated the contract – the roles are reversed. The union is considered the moving party, the union goes first, and the union has the burden of proof. And after the employer presents its case, the union gets the rebuttal opportunity.

C. Flash Forward Checklist

Assume the hearing is tomorrow. Aside from knowing the case well and knowing who is going first, what do you need to be ready?

1. A viable, road-tested "theory of the case";
2. A grievant who is prepared to testify, who knows and understands the case theory, and has hopefully bought into it;
3. The other union witnesses you need to prove the union's case; who also need to be available and prepared to testify;
4. A minimum of 4 union exhibits notebooks, each containing full sets of the exhibits you plan to present at the outset of the hearing (one set for the arbitrator, one for the employer representative, one for you; and one for use by witnesses);
5. A personal hearing notebook for your use during the hearing, organized to give

you ready access to any of the following that apply, and any other papers you want to have access to during the hearing

- a. A list of the things you want to raise at the outset of the hearing, such as a proposed issue statement; notes on employer exhibits you intend to object to and why; fact stipulations you might want to propose; moving to sequester witnesses, etc.
- b. For the grievant and each of the other union witnesses, a written outline of the testimony you plan to elicit from them;
- c. Your opening statement;
- d. A list of admissions you plan to elicit from management witnesses on cross examination, to refer to when you are crossing or preparing to; and
- e. Sets of your *possible* union exhibits – exhibits that you don't plan to present at the outset and are not sure you will use, but want to have ready in case the need arises – at least four copies of each one.

D. Theory of the Case

The theory of the case is a brief, cohesive statement of why you should win based on applying relevant contract principles to the facts of the case.

A theory may be suggested when you first get the case. The steward may firmly believe, for example, that it was disparate treatment for the employer to fire grievant for violating the XYZ policy, because other employees who violated the policy were only reprimanded.

Or in a contract case, the organizer may believe the employer violated the contract by stopping the grievant's vacation accrual during her leave of absence because there's nothing in the contract that says it can do that.

But any theory that's suggested up front is just a starting point. You have to keep an open mind. Developing a viable theory of the case requires you to carefully scrutinize and evaluate facts of the case and consider alternatives.

You should be considering, testing, evaluating and refining your case theory – and alternatives to it – all along as you prepare.

E. Focus On Evidence

Also throughout your preparation, you need to focus on evidence: witness testimony, recordings or documents that establish or reflect relevant facts.

In evaluating case theories, ask yourself what facts have been, can be, or might be established through witness testimony and/or recordings or other reliable documents?

Consider what evidence you might be able to gather that would establish or bolster the likelihood of facts that are consistent with your case theory? or undermine the employer's case?

Hearsay evidence is admissible in arbitration, but is less convincing than direct evidence. Thus, if you plan to have a witness testify about the terms of another union contract – a contract other than the one under which the case arose – you'll want to present a copy of it as an exhibit. The testimony will be stronger with the exhibit supporting and confirming it.

Might there be relevant medical records you could get? Emails? Memos or other correspondence? Security videos? Payroll records? News media reports available on the internet? Aerial photography from Google Earth?

Note, however, that “character evidence” – witness testimony about what a nice person the grievant is, for example – is generally *not* going to be helpful.

Note also that rulings on unemployment eligibility are deemed inadmissible as evidence by statute, and thus are not properly admitted as evidence in arbitration, either.

F. Nuts And Bolts Prep Tasks

1. Obtain A Panel of Arbitrators

Request a panel from the agency specified in your contract's grievance procedure (the FMCS, ERB, or the AAA). The forms are available on line, and the requests can be submitted online to the FMCS, by email to ERB and the AAA, or by fax to any of the three. Panels can be requested unilaterally; however, choosing some of the options offered by the FMCS and ERB require that the parties have agreed to them.

2. Thoroughly Review And Analyze the Documents

Immerse yourself in the file. It is the written historical record of the case to date. One approach is to create a chronological (“chron”) memo:

- a. Take the file apart or have it copied, so that you start with have a pile of separate *1-sided* documents;
- b. Identify the date of each document, and put them in chronological order with the oldest documents on top, and the most recent at the bottom;

- c. Review each document and write short chron entry on each consisting of the document's date, what it is, and a summary of its content. For example:

12-13-11 [Memo to FM from CD:] Need meeting with you re: performance issue that "may result in Level 4 or more serious corrective action, including termination"; propose 12-19, 12-20 or 12-21-11 @ 3:00 p.m. at plant office.

- d. Make notes in the chronology about the questions that occur to you that you want to ask the grievant, the steward, and/or the employer; about documents you want to request from any of them, and other follow up issues.
- e. Review the chronology and consider whether the facts that they reflect seem consistent with the theories of the case you are considering, and what other kinds of evidence might be available to support or refute them.

3. Call or Meet With Grievant

- a. Introduce yourself, discuss case status and process;
- b. Get grievant's basic story and answers to your questions;
- c. Ask grievant for documents, records releases, and proposed witnesses;
- d. Establish rapport and confidence;
- e. Hearing date limitations;
- f. Discuss candor, full disclosure, need for responsiveness and follow-through;
- g. Unemployment status;
- h. Talking among witnesses;
- I. Document set.

4. Information Request To Employer

- a. Grievant's personnel file;

- b. Ask for everything, but be reasonable;
- c. Investigative reports, witness statements, policies;
- d. Avoid duplication;
- e. Offer to discuss objections;
- f. Confidentiality issues?
- g. Propose a reasonable deadline (and calendar it);
- h. Note that you'll likely need to make further requests.

5. Select Arbitrator From Panel

- a. Rank the arbitrators and write list in "striking order;"
- b. Coin-toss: loser goes first (winner makes final choice);
- c. Notify arbitrator and request dates

6. Further Investigate, Gather Documents

- a. Follow up with grievant on information and documents;
- b. Call, interview, and evaluate proposed witnesses;
- c. Union data;
- d. The internet (Weather? Google Earth?)

7. Meet with Grievant

- a. Hard questions;
- b. Case theory, strengths and weaknesses;
- c. Discrimination, whistleblowing, retaliation issues;
- d. Prior discipline;
- e. The Hearing Process

- (1) Step-by-Step;
 - (2) The technical and *other* issues;
 - (3) Direct examination - open ended questions;
 - (4) Cross examination - leading questions;
 - (5) Admissions;
 - (6) Listening, waiting, responsiveness;
 - (7) Demeanor, eye contact.
- f. Range of outcomes;
 - g. Finality.
 - h. Acceptance of responsibility, remorse/contrition;
 - I. Talking among witnesses.

8. Interview Possible Witnesses

- a. Candor, full disclosure;
- b. Get grievant's basic story and answers to your questions;
- c. Ask grievant for documents, records releases, and proposed witnesses;
- d. Willingness to testify;
- e. Hearing date limitations;
- e. Process
 - (1) Subpoena;
 - (2) Direct examination - open ended questions;
 - (3) Cross examination - leading questions;
 - (4) Admissions;

- (5) Listening, waiting, responsiveness;
- (6) Demeanor, eye contact.

9. Scheduling Hearing

- a. Check grievant and witness availability;
- b. Plan for final pre-hearing preparation time;
- c. Calendar postponement, cancellation dates;
- d. Subpoena or otherwise schedule witnesses as necessary.

10. Hearing Location /Logistics

- a. Adequate conference room and break out rooms;
- b. Water, coffee, refreshments;

11. Employer Fails or Refuses to Provide Information

- a. Phone call and confirming email reminder;
 - (1) New deadline;
 - (2) Intent to ask for ruling by the arbitrator.
- b. Letter to arbitrator asking for phone conference;
 - (1) Outline problem;
 - (2) Forward prior correspondence;
 - (3) Request order requiring production.
- c. Phone conference.

12. Analyze everything

- a. Closely review and analyze the additional information and documents you've gathered and update your chron;

- b. Adjust or change case theory as needed;
- c. Identify and reconcile inconsistencies;
- d. Outline testimony needed from grievant and each of the other witnesses to support case theory and rebut employer's case;
- e. Identify the documents needed as exhibits;
- f. Identify admissions to elicit from employer management witnesses;
- g. Identify the admissions grievant and/or witnesses must make.

13. Prepare Exhibits

- a. Identify your "for sure" exhibits, (those that need to be in, either because they are central to the story or your case);
- b. Identify any "possible" exhibits that you *may* want to introduce at hearing, such as potential impeachment exhibits;
- c. Coordinate and/or stipulate with employer representative re: numbering of common "for sure" exhibits to avoid duplication, if possible;
- d. Assemble notebooks of non-duplicative "for sure" Union exhibits;
 - (1) 3-ring binders with number tabs;
 - (2) Full sets for arbitrator, witness chair, employer representative, and you;
 - (3) Footers with exhibit and page numbers;
 - (4) Exhibit lists.
- e. Prepare sets of un-numbered *possible* exhibits.
- f. Master Exhibit List

14. Prepare Outline of Grievant Testimony

- a. Going first?;
- b. Facts needed, open-ended questions;

- c. Exhibit testimony needed;
- d. Acceptance of responsibility;
- e. Remorse/contrition;
- f. Objectives;
- g. Anticipated cross questions, hazards.

15. Prepare Outlines of Other Witnesses' Testimony

- a. Going first?;
- b. Facts needed, open-ended questions;
- c. Exhibit testimony needed;
- d. Anticipated cross questions, hazards.

16. Prepare Grievant to Testify

- a. Case theory
- b. Review outline, exhibits, process issues
- c. Practice

17. Prepare Other Witnesses to Testify

- a. Case theory
- b. Review outline, exhibits, process issues
- c. Practice

18. Preliminary Matters List

- a. Issue Statement;
- b. Exhibit objections;
- c. Sequestering witnesses;
- d. Arbitrability;

- e. Retention of remedy jurisdiction;
- f. Fact stipulations
- g. Logistical issues

19. Cross Exam Admissions list

20. Opening Statement

21. Closing argument

G. The Hearing

1. Off-record discussion of preliminary matters;
2. Review employer exhibits;
3. On-record: Get preliminary matters rulings and stipulations *in*;
4. Moving party Opening Statement;
5. Non-moving party Opening Statement? (Pros and Cons);
6. Moving party witness #1 direct;
7. Note-taking in prep for cross;
8. Introduction of Exhibits
9. Prep for cross;
10. Referring to Exhibits;
11. Moving party rests;
12. Non-Moving party case;
13. Moving party rebuttal?
14. Moving party rebuttal?
15. Closing Argument and Briefing Options

16. Post-hearing debriefing notes