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Panel Handout: Best Practices in Arbitration of Higher Education Issues

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“Best Practices in Arbitration of Higher Education Issues”

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“BEST PRACTICES IN GRIEVANCE ARBITRATION”¹

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The Three Stages of the Grievance Arbitration Process

- I. Pre-Hearing Activities
- II. Arbitration Hearing
- III. Post-Hearing Actions

I PRE-HEARING STAGE

A. General Purpose of the Grievance Process:

1. The overall purpose of the pre-hearing grievance process is to afford labor and management representatives the opportunity to resolve disputes expeditiously at the lowest step of that process set forth in their CBA. Unlike litigation or employment arbitration where the parties are unlikely to meet again following the resolution of the dispute, the parties to the CBA have an ongoing relationship that should be recognized and preserved.

B. Goals of the Specific Grievance.

1. From the moment of the initial filing of a grievance, both sides should continually evaluate the purpose and goal of the grievance, and the impact on the parties' relationship as well as the individuals involved. Depending on the specific complaint and the relationship of the parties, the grievance can be used to promote a dialogue as well as to resolve a specific problem or issues raised

¹ @2016, Lobel, Ira, Mackenzie, Susan, and Townley, Rosemary, “Best Practices In Grievances Arbitration.”

by the matter grieved, or whether third party assistance should be obtained. The goals may change as the parties go through the process. Both parties should continually ask themselves about the goals, including whether their own best interest or the interest of the parties' ongoing relationship is best served by a negotiated settlement, or resort to arbitration under their CBA process. The answer to this question may change if the issue(s) involve contract interpretation or employee discipline. The rule of unintended consequences always applies.

C. Timeliness of the Grievance Filing and Processing:

1. Filing deadlines with dates certain are uniformly set forth in the CBA, with limited exceptions, to promote the goals of speed and economy. These deadlines include the date by which a grievance must be filed, whether by the individual grievant and/or the union, (for example, "within thirty (30) days of the occurrence giving rise to the dispute, or when the grievant or union first became aware of such occurrence"), or moved to the next step of the grievance procedure. If the moving party fails to file or move a grievance within the deadlines stated in the CBA, an arbitrator might find that the grievance was untimely filed or processed and therefore non-arbitrable. The party claiming that a CBA deadline has not been met should advise the opposing party in writing as soon as possible, or risk losing the "timeliness defense" at the arbitration stage.

D. Preparation for the Arbitration Hearing

1. Identify the issue to be resolved?
2. What evidence do you need to present your case (both documentary and testimonial)
3. How do you determine the relevant fact witnesses for interviewing in order to prepare for your case?

4. How do you “prep” potential witnesses?
5. Can you subpoena “reluctant” witnesses and, if so, what is the procedure?
6. Which documents will you need to present your case effectively to the arbitrator?
7. What “discovery” is allowed in labor arbitration to secure the documents not in your possession but needed to establish your case? When can these requests be made? What if the opposing party fails to cooperate and you do not believe you have sufficient evidence to present at the hearing?
8. What are the controlling statutes/rules in our region dealing with this production of documents to the opposing party?
9. Should your preparation be different if your case deals with a discipline matter, as opposed to a claim requiring an interpretation of a provision(s) of the CBA?
10. Is this a case that should be resolved? Is there any compromise you would contemplate to avoid the expense and uncertainty of a third party decision?

E. Scheduling of the Arbitration Hearing

1. Does your CBA address the period of time within which the grievance must be heard?
2. What action would you take if the arbitrator proposes a date too remote in time from the filing date of the request for arbitration?
3. Would your response to the proposed date be different if the grievance dealt with a suspension/termination vs. a contract interpretation matter?
4. Would you approach any issue dealing with the scheduling of the hearing differently if the CBA calls for arbitration pursuant to an administrative agency rules vs. directly with the arbitrator ?

5. When do you ask for the arbitrator's intervention at the pre-hearing stage, if at all? Would it be appropriate for the arbitrator to schedule a pre-hearing, administrative conference to address matters relevant to the hearing?

II THE HEARING

- A. The grievant, union representative and counsel, along with the opposing representatives, have the right to attend the hearing. How many representatives can each side bring to an arbitration hearing? When should this issue be addressed with the arbitrator: before or at the arbitration hearing?
- B. When should sequestering of witnesses be requested? Who should be sequestered?
- C. Are there circumstances where it is appropriate to shift the burden of going forward and for what reasons? Should an employer be permitted to call the grievant as its first witness in a disciplinary case?
- D. Which documents should you present at an arbitration hearing? Should documents be pre-marked? How many copies of these documents should you bring with you to the hearing?
- E. When should the parties use the services of a court reporter? If a transcript is not required under the parties' CBA and one party does not wish to pay for a transcript, may the arbitrator direct that a transcript paid by one party serve as the official record of the proceeding? Does the non-paying party have a right to a copy of the transcript?
- F. Should members of the public and/or family members of the grievant be permitted to attend an arbitration hearing if the other party objects? If the grievant has retained a private attorney, and requests that the attorney be present the case at the hearing, should that attorney be allowed to participate in the hearing?

- G. What information should be included in an opening statement? Should you ever waive your opening statement until the opposing party rests its case?
- H. What are the primary objections made at an arbitration hearing during the presentation of evidence? What is the basis of these objections?
- I. Should the arbitrator engage in the questioning of witnesses during examination by either advocate?
- J. How does the arbitrator ensure that the representatives act in a civil manner if there is an altercation between them, either verbal or physical, during the course of the hearing?
- K. Ex-parte encounters: are there any circumstances where it is appropriate for the arbitrator to engage in conversation when the opposing party is not present? How should you advise your client with respect to the manner in which to handle a potential “encounter” with the arbitrator, opposing advocate, witnesses, others involved in the case?
- L. When is oral summation at the close of a case a more effective technique than submission of a written brief? May one party close orally and the other by brief? When are reply briefs appropriate?

III POST-HEARING

- A. The Opinion and Award: A majority of CBAs set forth a time limitation by which the arbitrator must issue the opinion and award (e.g., within 30 days of the close of the hearing). If the parties do not receive an award or any explanation from the arbitrator or the administrative agency for the delay by the contractually-mandated date, what should be the next step?
- B. If the parties do not mutually understand the arbitrator’s opinion and award or how to implement the remedy awarded, what is their recourse? Should one advocate contact the arbitrator directly about any confusion? What happens if the arbitrator makes a mathematical mistake, such as misreading the contract regarding timeliness, or if a typographical error appears that substantively impacts on the award?

- C. May one party release the arbitrator's opinion and award to a newspaper/media outlet or post it to a social media site?
- D. If one party is not happy with an award and wishes to overturn it, what legal recourse does it have in the courts?
- E. If the parties are completely dissatisfied with the outcome of an opinion and award, for example, a grievant is reinstated but without back pay, is there any legal impediment to negotiating a settlement?
- F. Can you refuse to pay the arbitrator's bill if you disagree with the outcome?

QUESTION AND ANSWER SESSION