How Arbitrators Decide

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How Arbitrators Decide

This paper is a brief review of the factors that come into play in an attempt at grievance adjudication and the possibility of final resolution employing the procedures encountered during an arbitration hearing. It will touch on some of the factors that should guide the advocate for both the employer and the employee. It will also point out some of the criteria that should be employed to make the process more effective. It is by no means exhaustive in attempting to address the many complexities that come into play during grievance processing and the intricacies employed in the arbitration hearing. Hopefully it will give the reader a glimpse at how arbitrators think and rule.

Contract Enforcement

Contract enforcement is the responsibility of all who are a party to the negotiated agreement. The parties should have an understanding of the agreement in force and the rights and privileges afforded as the result of the agreement.

Grievance Procedure

Collective Bargaining Agreements should have, whether a matter of law or policy, a well thought-out grievance procedure. The procedure should be short with as few steps as necessary and short timelines between the steps, to effectively resolve issues in dispute. There is no benefit to dragging out the resolution of the issue or issues in dispute.

The filing of grievances is an important part of the overall collective bargaining process. Issues that repeatedly come up as grievances may represent a red flag.
identifying items in the current agreement that most likely needs to be addressed in subsequent negotiations for a successor agreement. While the filing of grievances should not be done in a frivolous manner, they do play an important part in the enforcement of the collective agreement.

It is important for the representatives to view each grievance as a potential arbitration, with the thought of resolving the dispute before it reaches that level. The aim should be to resolve the issue at the earliest possible step so only those issues that cannot be resolved moved to arbitration. The arbitration process should not be used as a threat by either party; it is the final step in the grievance adjudication process. As has been mentioned, it is advisable to keep the number of steps to a minimum and the timelines between steps as short as possible. This will facilitate the resolution of the grievance and eliminate some of the animosity that may build up in anticipation of the grievance resolution. The one caution that needs mentioning is the necessity to abide by the timelines as spelled out in the agreement. A failure to follow timelines may be cause for an arbitrator to rule a grievance as untimely filed and dismiss the charges without hearing.

A typical grievance process consists of four steps. The initial step of a grievance procedure is usually referred to as the informal step, the informal aspect being that it is generally an unwritten effort to resolve the dispute without a formal hearing and the need for the accompanying paperwork and record. Remember, it is the interest of all parties to resolve disputes as early as possible. The first formal step is generally addressed to the grievant's immediate supervisor. This step requires the formal filing of grievance papers and necessitates a written response from the supervisor. The supervisor’s response needs to be filed within
the time frame established in the negotiated process. The second formal stage, or third step, involves the immediate supervisor’s superior, if one exists, and as in the previous step requires a written response. It must be filed in a timely manner and the formal written response needs to be afforded within the specified time frame. Finally, if no resolution is reached, the parties may submit the grievance to arbitration. The fourth and final step is arbitration. While we have described a generalized grievance procedure, the actual procedure may vary in order to address local needs and conditions.

Arbitration awards may be final or advisory, depending on the language of the agreement. Arbitrators must base their decision on what is contained in the Collective Bargaining Agreement. Some issues may rely on past practice or other such issues brought forward to the arbitrator during the arbitration hearing. But the arbitrator may not expand the authority of the negotiated agreement which is the controlling document.

The Arbitrator

The dictionary, in part, defines arbitration as a process by which parties in dispute submit their arguments to an impartial person, the arbitrator, for a judgment and resolution that will generally be binding on the parties to the dispute. Most labor contracts have binding arbitration as the final step in the grievance process, while a few have an advisory award that the parties may or may not wish to follow. Even fewer Collective Bargaining Agreements end the grievance machinery without any form of arbitration at all. Regardless of the type of arbitration in the agreement, arbitrators, no matter how impartial they may be,
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will reach a decision swayed by a variety of factors. Once the parties agree to submit the dispute to arbitration, an arbitrator must be selected. While the procedure may vary slightly depending on the agency that is responsible for overseeing the arbitration process, the parties proceed to select a mutually acceptable individual who will function as the arbitrator. The list of names or panel of arbitrators is distributed to the parties, and by process of elimination an acceptable arbitrator is selected.

Authority to arbitrate

Arbitrators have a great deal of leeway when it comes to fashioning an award. However, their authority is limited by that vested in them by the controlling documents, usually the Collective Bargaining Agreement between the parties in dispute. The format currently used in the practice of arbitration was largely established by what is referred to as the Steelworkers Trilogy, a series of three cases in 1960 that changed the way arbitration is dealt with in this country and is the basis courts use to determine questions of arbitrability. The Steelworkers Trilogy cases aided in the establishment of the body of rules that maintains the necessity of arbitrator’s need to be neutral and impartial in making their deliberations. The arbitrator’s role is to be determinative, not to find compromise. If compromise is part of the settlement then the parties will arrive at it independently, perhaps with the arbitrator serving as mediator. Arbitrators cannot impose their feelings of what is fair or reasonable; once the issue goes to hearing, the decision must be driven by the testimony presented during that hearing.
Challenges to arbitrability

Public sector arbitrability may be challenged on three grounds: Legal Arbitrability, Substantive Arbitrability and Procedural Arbitrability. In the public sector, the legal challenges are resolved within the scope of negotiations laws for the various states. It is generally the role of the commission that oversees the Collective Bargaining law to make the determination on the legality of arbitration on a case-by-case basis. However, even when the Bargaining Statute allows for an issue to be arbitrable, the Collective Bargaining agreement can limit the issues that may go to arbitration. Contractual limitations are a valid argument for challenging arbitrability. A Substantive Arbitrability challenge essentially alleges that the grievance filed is not within the scope of the definition as agreed to by the parties in the collective bargaining agreement. Procedural Arbitrability challenges allege that the grievance was not timely filed or processed. The arbitrator has the authority to rule on issues of procedure. Often, the threshold question of arbitrability results in a bifurcated hearing, where the parties need to argue the procedural question prior to addressing the substantive issue.

Private sector challenges to substantive arbitration are generally resolved in the courts using a variety of precedent-setting cases, namely the Steel Worker Trilogy previously mentioned. The Federal Courts and the United States Supreme Court decisions have created a strong presumption in favor of arbitration. It would need to be an extremely persuasive argument for the courts to even hear the issue. Generally the courts support the arbitrator’s decision in making the determination of arbitrability.
Issues that impact the Arbitrator

The Advocate

Framing the Issue

The arbitrator needs to understand the whole question of what is in dispute to answer it correctly. The question should be presented as briefly as possible. If there are multiple issues to be decided, the format should state only one question at a time. Compound sentences create complexity and can become confusing to all involved.

Be prepared.

Do not attempt to wing the hearing. Insufficient preparation often results in a minimum of facts and a maximum of argument--and argument is not evidence. Witnesses should be fully prepared, but not coached, as to the relevance and importance of their testimony.

Be ready to stipulate.

The more documents that may be stipulated and submitted as joint exhibits, the lesser the need for testimony. This will result in not only a time saved but also prove to be less costly in the end. The greater the amount of information that is stipulated the shorter the ensuing hearing.

Harassment

Arbitration and arbitration costs should not be a harassing technique. One should not go into an arbitration using it as a weapon to beat the opponent over
the head. Arbitration filings that are frivolous and filed to punish the opponent are often losers. The use of arbitration as a harassment technique, including arbitrating grievances that can’t be won, will turn off the arbitrator.

**Obfuscation**

Don’t conceal the essentials of the case: they will come out eventually and place the advocate in a poor light! There is a need to be forthright and honest. In the long run you will fare better than if you hold out or concoct questionable testimony. Once revealed as less than honest, it is difficult to recoup even if it was only a single inconsequential issue. Don’t conceal essential facts or distort the truth!

**Legal Technicalities**

Don’t play Perry Mason. The arbitration hearing is less formal than a court procedure and is designed to be so. Muddying the procedure with legal technicalities does not impress, and may in fact confuse the issue. Objecting when not necessary or relevant can slow down the procedure and antagonize the opposition, as well as put doubts in the mind of the arbitrator. Legitimate objections should be raised only when necessary and relevant.

**Maintain rules of courtesy and decorum**

Civility should reign. The arbitration hearing is not a time to exhibit animosity. It is a procedure that should be streamlined and exhibit the greatest effort toward getting the issue on the table and presenting relevant data and testimony! Maintain your cool, don’t lose your temper. You do not have to like the opposing counsel, but losing your temper will undoubtedly hurt your case.
Relevance:

We have often heard the objection, “it is irrelevant, immaterial and incompetent.” However, this catch-all phrase of three objections is not really an acceptable objection. In arbitration it is important to establish the proper foundation. While we are not bound by the same rules of evidence that a court trial would suggest, it is important to use those rules as a guideline. Arbitrators will employ a commonsense approach to evidentiary issues in reaching their decisions.

Manner of speech

It is imperative that the advocate talk **to** the arbitrator, not **at** the arbitrator. By no means exhibit hostility toward the arbitrator. The arbitrator does not have a personal interest in the case, and will do everything to treat both advocates equally and fairly.

Consistency

It is a generally accepted principle that what you say you will prove in the opening statement you should prove via testimony. If you were not able to prove these things during the testimony, do not state in your closing statement or summary brief that you did in fact do so.

The strength of the argument is the ability to state what you are going to prove in the opening statement, prove it via testimony and restate what you proved in the closing or summary brief.

Documents
Be sure to make sufficient copies of documents: at least one for the arbitrator, your adversary, the witness and yourself. Those should be prepared in advance and offered prior to the onset of the hearing, or offered one at a time as the testimony warrants. The documents will be marked and numbered for identification by the arbitrator.

Witnesses

Personal Appearance

It is important for the grievant and the witness to dress conservatively and groomed in accordance with local custom. One does not have to dress to the nines, but whatever is worn should be consistent with local customs and in line with the order of the day.

Credibility

Witnesses should testify to firsthand knowledge: direct observation of that which they are testifying to, rather than hearsay based on third-party or similar stories. The witness must be able to establish a basis for what they remember. The witness must be truthful and consistent in testimony. The witness should not memorize their testimony, as rehearsed testimony often sounds false!

Preparedness

There is a distinction between a weak witness and weak testimony. Honesty is the best policy. A lie will generally be found out and severely damage the case. Testimony that was clearly memorized casts suspicion and doubt, and the veracity of the witness could be questioned.
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Testimony

A good witness establishes the facts—not opinion—regarding a specific issue or argument. Testimony is not a time for creative fiction. It is important that the witness say “I don’t know” if that be the case. Avoid the use of hedge words and phrases as they will only weaken the overall veracity of the witness and the validity of what is being stated.

Self-control

It is imperative that witnesses maintain the proper demeanor while testifying. There is no place at the hearing for a person that exhibits a chip on the shoulder. A calm and determinative demeanor will be more conducive to establishing the position being brought forth than an attitude that is belligerent, vacillating, flippant, and/or antagonistic to the arbitrator or the opposition. A witness or an advocate that sees the other side as the enemy may cause an arbitrator to discount some of the testimony.

The Arbitrator

How decisions are made

The Collective bargaining Agreement

Arbitrators are limited in what they may rule on. For the most part, the Collective Bargaining Agreement sets the limits, and arbitration is generally confined to the four corners of the contract. Some portions of the Agreement may be excluded by consensus and therefore be placed outside of the scope of the arbitrator’s jurisdiction. Arbitrators do not grant punitive damages unless there is specific language to allow the arbitrator to do so; very few contracts grant
that permission. Basically, punitive damages are left for the courts to decide if the case so warrants.

**Past Practice**

The issue of past practice is difficult to define in brief and simple terms. It usually relates to an issue that was developed between employees and employers over a period of time. To be valid, the practice must be of a long-standing nature. Its practice must be clear and applied in the same fashion every time the same situation arises. It must have been recognized by both parties and accepted as practice without reservation. If Contract language is unclear, ambiguous or broadly written, the arbitrator may look to past practice as a means of resolving the issue in dispute. While past practices may be binding on issues of employee benefits, they are rarely binding when the issue is one of management rights. However, if the issue was addressed at the bargaining table and not reduced to writing, it is no longer considered to have the force and effect of past practice. The basic test for past practice is therefore: frequency, consistency, longevity and circumstances. If the issue comes down to contract language versus past practice, clear and precise contract language wins out.

**Precedence**

Other arbitration decisions may have an influence on the deliberations of the instant grievance. However, the ruling of one arbitrator is not binding on the decision made by another arbitrator. Sure winners can be losers, and quite the reverse as well.
Equity

A basic tenet that needs to be considered is that of fairness. Employees need to be treated on an equal basis. Unequal treatment is often sufficient to establish the award in favor of the employee.

Basic Labor Conventions

There are a number of basic labor conventions that are used by arbitrators to aid them in making their decisions. This is not meant to be an exclusive list, but simply an example of the kinds of information arbitrators view as important is the decision-making process.

Just Cause

A basic tenet in disciplinary proceedings is that management must have “just cause” for imposing discipline. That standard is often written into Collective Bargaining Agreements; but even in the absence of precise language, this is a guiding principle used by arbitrators in making their determinations. The question arbitrators will ask themselves is: did the employer act fairly in imposing the discipline? The answer is found in what is known as the seven tests of just cause:

- Was there adequate notice; did the employees know of the rule; and was it adequately disseminated?
- Was it a reasonable rule?
- Was there significant investigation leading up to the finalization of the charges?
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Was that investigation fair and conducted with objectivity?
Did the evidence produce sufficient proof that the charges were valid?
Was the discipline even-handed and consistent with the way others charged with similar violations were dealt with?
Did the crime justify the penalty?

An answer of 'no' to any one of the above questions is often sufficient to establish that just cause was not afforded.

**Weingarten Rights**

Employees have the right to when a meeting is called that could adversely affect their terms and conditions of employment to request representation at that meeting. These rights are guaranteed by the United State Supreme Court, but the employee must request representation. If the employee is refused the requested representation, the employee can refuse to answer further questions without fear of repercussion. Denial of these rights may be legitimate grounds for reversal of certain discipline.

**Progressive discipline**

Progressive discipline is a procedure that requires employers to discipline employees in a fair and equitable manner. This helps to maintain the principle that the punishment should fit the crime. The steps in progressive discipline vary from Agreement to Agreement, but the process generally initializes with a verbal reprimand, a written warning, a period of suspension, and finally, if the behavior
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has not improved, termination. Many variations exist, but the essence is to improve employee behavior while giving the employee an opportunity to correct the way in which they behave. The procedure may be truncated for serious offenses with termination being immediate. However, this is an area where the arbitrator needs to review the record to determine the severity level to which the offense rose and if the punishment was appropriate.

Other Issues

Other basic principles and regulations, such as those established by the Fair Labor Standards Act, are also useful in making the final determination. Many factors, some complex and detailed, go into the issuance of an award, whether it be to the favor of the employee or the employer.

To Arbitrate or not to Arbitrate

Finally, the question of whether to take a case to arbitration should always be a consideration. A number of issues should be reviewed before deciding to move to arbitration. As previously stated, the question of whether all other options have been addressed needs to be considered. Is the issue to be arbitrated addressed in the current Collective Bargaining Agreement? Is it realistically possible to win the argument? Does the case essentially have merit? Does the budget allow for the expenditure that will be incurred by going to arbitration? While a negative response to any of the considerations may not be reason enough to not proceed to arbitration, it should be sufficient cause for the representative to step back before making the final determination to proceed.