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Arbitrability and Framing the Issue

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ARBITRABILITY AND FRAMING THE ISSUE



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What is “arbitrability?”

- Can the matter be submitted to an arbitrator for decision under the terms of the arbitration clause in the contract?

What is “arbitrability?”

Procedural

- Some condition has not been met:
 - Timeliness
 - Did not follow the pre-grievance process
 - Exhaustion of the grievance process

Substantive

- A/K/A “subject matter”
- Does not meet the contractual definition of what can be arbitrated.

Who decides arbitrability?

- General default position is that substantive arbitration is left to the courts and procedural to the arbitrator unless the contract makes it clear otherwise so.

What does the contract say?

Can arbitrability be waived?

Procedural

- Yes, if party asserting it fails to raise it.
- Question of whether there's a waiver if party failed to raise earlier in the grievance process.

Substantive

- No. Generally, if an arbitrator had no contractual authority to hear the case, the asserting party's participation in the proceeding will not be a waiver.

The real question:

What has happened between
these parties previously?

When do you frame the issue?

How do you frame the issue?

What has been the issue in the earlier grievance steps?

- Adding to the claims at the arbitration stage may be violative of the contract.
- Has the grievance been resolved in part?
- Have the facts been resolved in whole or in part?

What do you want?

- Can the parties agree to the issues beforehand?
- Is there a usual way that these parties have submitted their issues?

Remember, your
evidence may be
limited to the issue
you frame or agree
to!

Ideas for Framing

- Use neutral language (“when the District did not...” instead of “when the District in bad faith failed to...”)
- Identify dates (“when on October 1, 2012, it did not...”)
- Identify the contract provisions you are asking to be reviewed (not “the contract as a whole”)
- Ask for the arbitrator to issue a remedy
 - But know what his/her authority is regarding the remedy.
- Agreeing to the issue will prevent the arbitrator from coming up with his/her own issue or accepting your adversary’s issue.
Very perilous!



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