The Hearing:
From an Arbitrator's Perspective
(Black and White Handout Version)

Michele Hoyman

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Contact Information

Michele Hoyman, Ph.D., Arbitrator

Associate Professor of Political Science
University of North Carolina – Chapel Hill

Phone: (919)962-6867
E-Mail: hoyman@unc.edu

Agenda

- I. How does an arbitrator decide a case?
- II. How do past practices come into consideration?
- III. Putting it all together – example case discussion.
- V. The “Dos and Donts” of arbitration.

I. How does an arbitrator decide on a case?

- First arbitrator establishes the facts.
  - If there is a dispute over the facts, the arbitrator must make a finding.

- Sometimes to find facts, the arbitrator has to make a credibility finding.

- What factors matter when it comes to credibility?
  - Subjective: Shifty eye movements, twitchy body language, etc.
  - Objective: Inconsistent statements, proven history of providing inaccurate information, etc.

Standards of Credibility

Elkouri & Elkouri: *How Arbitration Works*, 5th Edition

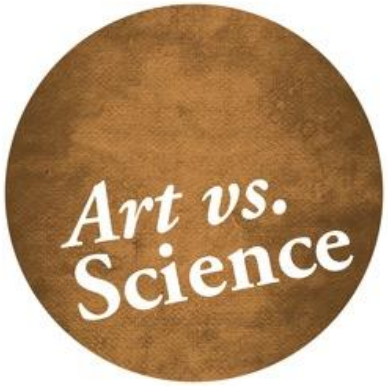
- There is a school of thought in arbitration that the grievant has an incentive to lie in discipline and discharge cases. As such, this school holds that disinterested witness testimony should be credited over that of the grievant (p. 445-446).

- However, not all arbitrators adhere to this school of thought. Most make credibility findings on a case by case basis.

- Its important to remember one on one credibility findings are difficult to make.

Remember

Art re of an art than a science.



Subjectivity is an issue in arbitration.

- If you give five different arbitrators the same case, they will render different decisions and may have different reasoning.

- In order to reach a decision, the arbitrator's background is important. Therefore, research on how they have ruled in the past on this type of case should be investigated. How have they ruled on this type of issue previously, for example on absenteeism?

Subjective Factor Example: Use of Apologies

- One type of factor arbitrators use to decide cases is whether the grievant apologized and when the apology was made during the grievance process.

- In a study involving members of the National Academy of Arbitrators, Lamont Stallworth and Michele Hoyman tested arbitrators to see about the role of apology in arbitration outcomes.

Apology Study Results Overview

- Sincere apologies have a significant impact on increasing the chance an arbitrator will sustain a grievance.
- Insincere apologies do not help grievant(s) prevail in their cases.
- The more severe the case (for example, discharge vs. discipline), the more likely an arbitrator is to consider mitigating factors like apologies.

So, what is a “sincere” apology?

- Sincere apologies are those which:
  - Contain an acknowledgement that a moral norm was violated.
  - Accept responsibility for the violation.
  - Are specific about the violation.
  - Acknowledge impact and damage of violation.
  - Express remorse at having committed the violation.
  - Offer reasonable explanations for why the violation occurred.

II. The Importance of Past Practices

- Past practices are the institutional norms that the organization engages in with regards to labor relations.

- If there is clear contract language that contradicts past practices, that will override past practices.

- However if the contract is silent or if the contract is ambiguous, past practices can obtain.

Standards Establishing Past Practices (Elkouri and Elkouri, 4th Edition)

- There are three standards that are used to establish a past practice:
  - (1) There must be strong proof of the existence of the practice; not a single shot occurrence.
  - (2) In order to amend or modify contract language, the practice must be "clearly established and based on mutual consent."
  - (3) Mutual knowledge of existence – there must be evidence the opposing party was aware of the practice.

Past Practices Usage

- Past practices can be used to interpret contractual language which is ambiguous (Elkouri and Elkouri, 4th Edition, p. 451).

- Past practices can be used to create a separate, enforceable condition of employment if the agreement is otherwise silent (Elkouri and Elkouri, 4th Edition, p. 456).

III. Example Arbitration Case

- Background Facts:
  - A city bus driver has been employed for 10 years.
  - The bus driver gets into an accident after a heavy rainstorm during “stop and go” traffic and going 30-40MPH.
  - No passengers were on the bus at the time of the accident.
  - After the accident, the driver assisted passengers in getting out of damaged vehicles.

Example Case (Continued)

- More Background Facts
  - Total damage amount was $50,000.00.
  - Police cite the grievant for “following to close” and both parties agree the accident was preventable.
  - Result of city’s review: driver discharged for speeding and following to closely.
  - The grievant expressed what seemed to be sincere remorse about the events.

Example Case: Analysis

- Should the grievance be sustained?
- On what basis?
- What does the contract require for a discharge?
  - Contract states: Any preventable accident **can** carry a penalty up to discharge, although a discharge is not necessary for every accident.

Example Case: Deciding Factors

- The city discharged the driver partially due to its finding that he was speeding, but that was not confirmed in the police reports.
  - Although "following to closely" was cited in the police reports, it is unclear whether that offense is enough for a discharge.
- Grievant had one other accident.
- This was a senior employee.
- Grievant expressed remorse.
- The contract says that preventable accidents can be punishable with up to discharge. It was unclear whether the employer had followed progressive disciplinary standards in regards to the driver's past practices.

Example Case: Conclusion

- What would you do?
  - The grievance was sustained and the driver was reinstated due to lack of progressive disciplinary action and ambiguous rule standards. The driver's record was changed to include a 9 day suspension for the incident.

Practical Guidelines for Successful Arbitration Hearings on Both Sides

THE “DOS AND DO NOTS” OF ARBITRATION

The “DO” List:

- Speak clearly and loudly enough to be heard.
- Make sure the witnesses do too.
- Convey the relevant terms of the bargaining agreement to the arbitrator up front.
- List key facts you need to establish in building your case.
- List all witnesses you need to call to establish your facts.
- Try to agree to join exhibits before the hearing.
- Keep direct examination to a minimum.

The “DO” List (Continued)

- Try to educate the arbitrator during the first witness.
- Tell a story: (A) tell them what your going to say (opening argument) (B) say it (witnesses and testimony), and (C) tell them what you said (closing argument).
- Gather and exchange information with the other party.

The “DO NOT” List:

- Do not assume the arbitrator knows the context and vocabulary of your workplace. Set the scene.
- Do not hesitate to call for a recess if things get out of control.
- Do not use outside counsel if you have local practitioners who know the contract better.
- Do not argue with the arbitrator.
- Do not object incessantly.

GOOD LUCK ON YOUR NEXT ARBITRAITON CASE!

Thanks for listening!

Some things to remember about evidence…

- These are often set out in the contract or else devised by the arbitrator.
- Lowest standard: clear and convincing.
- Substantial evidence.
- Preponderance of evidence.