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ADVANCED ARBITRATION OVERVIEW

I. What Does an Arbitrator Do?

1) First job is to decide the issue of the case. Arbitrator only does that if both sides disagree. Each side asserts what is the issue in the case just before the opening statement or before.
   a) Example: The issue in a discharge case might be "Did employer have just cause to discharge Jane Smith on Feb. 25, 2001 for bad attendance?"

2) Next, the arbitrator establishes the facts.
   a) What is a fact? The sky is blue. That is a fact, correct? Not in arbitration. The sky is blue only if a credible witness (someone whom the arbitrator determines can be believed) testifies to it and no one refutes it.
   b) How do facts get into the record? Through testimony in an adversarial, judicial-like hearing (like a court proceeding) by asking direct interrogatories.
   c) What about contradictions in testimony? In that case the arbitrator makes a credibility finding. In doing so, the arbitrator will credits the testimony of one person over another. One on one credibility findings are the most difficult to make.
   d) What about relevance? There are relevant facts and irrelevant facts: Arbitrator decides relevance.

3) Then, the arbitrator applies the terms of the contract to the case facts.
   a) This sounds simple, but it isn't in practice.
   b) What if contract language is silent? The arbitrator may rely on past practices if both parties agree on what they are.
   c) What if contract language is not clear? The arbitrator may rely on parties' interpretation or a past practice.
      i) There are three requirements of past practice needed to override clear contract language.
         (1) Uniformity or consistency. The past practices must be regularly occurring – not off and on.
         (2) Occurs over a substantial period of time.
         (3) Openly accepted (by the other party) implicitly or explicitly.
   d) What if parties differ on their interpretation of language?
      i) Look at bargaining history and intent.
   e) What if two clauses of contract apparently conflict?
      i) Example: One clause says "Company seniority should be used for the basis of all lay-offs." and another clause says "Management has right to consider department staffing needs and to lay-off according to that."
      ii) Arbitrator will have to decide which clause's language takes precedence and therefore whether the employer's action violated the agreement when it used department seniority and laid off a more senior person (measured in company-wide seniority).

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II. Arbitration Process Overview

Contract and Evidence Standards

1) Contractual standards.
    a. These are set out in the contract.
2) Standard of evidence.
    a. The evidence standard is "clear and convincing," not "preponderance of the evidence" or "beyond a reasonable doubt."

Order of Events in a Hearing

1) List of appearances.
    a. All advocates and witnesses should sign in and identify their role and position. Their role would be witness, advocate or technical assistant.
2) Motion to sequester witnesses.
    a. In cases hinging on credibility (usually involving discharge or discipline), parties will often make this potion at the beginning of a hearing so that witnesses will not be "tainted" by hearing the testimony of other witnesses.
3) Agreement to which exhibits can go in as Joint Exhibits. Usually Jt Ex. #1 is collective bargaining agreement and Jt. Ex. #2 is the grievance or the grievance package.

4) Statement of the issue.
    a. The parties will present a statement of the issue, sometimes this is done jointly (meaning both sides agree on the issue).
5) Opening statements.
    a. Employer goes first, then the union.
    b. Opening statements should include a preview of all argument you are going to make.
    c. You should include a clear statement of what happened with key dates (examples: date the grievance was filed, relevant information about the grievant, anything about the context of the situation that is important).
    d. You should also mention a list of any contract clauses that you allege were violated. Any spin you want to be put on the alleged violation should be done by emphasis or repetition, and not by editorial comments.
6) Witness testimony.
    a. The employer presents all their witnesses first, then the union.
    b. Each witnesses testimony has two components – direct and then cross examination.
    c. All information form witnesses must be obtained during direct and cross examination.
    d. Interrogatories should be neutral on direct examination, you can lead a bit more on cross examination.
7) Closing arguments.
    a. The employer may elect to make a closing statement after presenting all their witnesses, or may decide to wait until the union has presented its case.
    b. The union always ends with their closing argument.

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Utilizing Objections

1) Either side can object during the hearing. Indicate your objection by stating "Objection, Ms. Arbitrator."
2) The arbitrator will ask the basis for your objection.
3) There are three reasons for an objection: relevance, hearsay, or leading the witness.
    a. Relevance – Something came up that is not pertinent to the case.
    b. Hearsay – A witnesses is giving testimony about something they did not directly experience.
    c. Leading the Witness – The other side is phrasing their questions in such a way as to suggest an answer to the witness.

Establishing Just Cause (Discipline and Discharge Cases)

1) Did the grievant commit the violation they were charged with?
2) Was there a rule?
3) Was it a reasonable rule?
4) Was it a clear rule?
5) Was the rule appropriately promulgated (did everyone know or should have known about it)?
    a. You can show evidence of this by, for example: producing signed personnel orientation statements, showing notices put in pay stubs, or pictures of public bulletin boards with announcements.
6) Was the rule properly enforced?
7) Was the grievant allowed the opportunity to tell their side of the story in the pre-disciplinary investigation?
8) Is the discipline proportionate to the offense (does the punishment match the crime)?
9) Were there any mitigating circumstances?
10) Was there differential treatment?

How to Win Arbitration

1) Have the facts on your side (strong case).
2) If you can, try to discuss the case with the other side before the hearing to determine what issues they are going to raise.
3) Show the arbitrator that the contract language is on your side.
4) Show the arbitrator that there has been a contract violation or a violation of a well-established past practice.
5) Successfully refute the key arguments and facts presented by the other side. You have the opportunity to do this when cross-examining the other side's witnesses and in your closing statement.
6) Is it clear the grievant committed the alleged violation? You can still win. Try the following:

a. Argue that the penalty is too severe for the infraction.
b. Bring up a procedural violation.
    i. For example, if a pre-disciplinary investigation is required under the discipline cause of the contract, and the employer did not carry out an investigation, use credible witnesses to establish that fact.
c. Claim extenuating circumstances. Admit the grievant messed up but there is a reason to explain the behavior.
d. Throw yourself at the mercy of the arbitrator.
e. Make a case for differential treatment.
    i. This is a powerful tool in the union's toolkit. You can often win even when it is very obvious that the grievant has broken a rule. You admit the rule violation but then call up as many witnesses as possible who claim to have done the same behavior but were not punished/punished differently. Beware this is a complex strategy, but it does work.

III. Arbitration Do's and Don't's

Do's

1) Do speak slowly, clearly, and loudly.
    a. If the arbitrator can't hear you, she can't rule in your favor.
2) Do make sure all the witnesses speak loudly enough to be heard. If not, repeat the question and ask them to speak up.
3) Do make sure to convey to the arbitrator the relevant terms of your contract.
4) Do make a list of key facts you need to establish in building your case.
    a. What is a fact? The sky is blue is a fact, right? No. A fact in arbitration is something which a credible witness testifies to which is not refuted by a more credible witness.
5) Do figure out the order of witnesses you want to call after establishing key facts.
6) Do explain in your opening or closing statement what the facts are and why the contract terms apply as you allege.

Don't's

1) Don't assume the arbitrator knows the context of the workplace and the vocabulary of your workplace.
    a) It is your job to familiarize the arbitrator with the jargon specific to the case. This is often done through the first witnesses called for either the management or labor. This witness, often a shop steward, should set the scene for the arbitrator.
    b) Remember the arbitrator is the outsider. The union or employer has to educate the arbitrator by explaining all the relevant insider terms that she cannot understand.
    c) Example jargon terms that need to be defined include things like AWOL, buck slip, swing shift, etc.
2) Don't hesitate to take a break and caucus with your side if you think things are taking a turn for the worse. Re-grouping is always an option.

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3) Don't rush. Use all the time allocated to explain your case.
4) Don't give up. There are ways to win even cases that seem hopeless.
5) Don't argue with the arbitrator. This applies in particular to objections – after a ruling is made, move on.