

**LERA Dispute Resolution Interest Section Presents:
Employment Arbitration in Practice**

*Making the Arbitration Process Work for You:
Common Roadblocks and Some Solutions*

Arbitrator Michele Hoyman, Ph.D.
Associate Professor of Political Science
University of North Carolina at Chapel Hill
Contact: hoyman@unc.edu
Website: www.michelehoyman.com



Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions

Presented By: Arbitrator Michele Hoyman, Ph.D.

Some Arbitration Roadblocks and Solutions

I. Roadblock: Multiple issues in a single case (this is a “who’s on first?” problem).

The arbitrator cannot go forward with hearing two cases at once. There are a few solutions:

- Discuss with the other side what is the *key* issue and exhibits you are going to bring up. Otherwise the arbitrator will render a decision on what they believe is the issue, particularly if the parties are fairly close.
- If the parties can’t decide, the arbitrator may break up the case. For example, hearing arbitrability and substance separately might look like the following:
 - Hear just the arbitrability on the scheduled case day, then adjourn and render a decision on arbitrability.
 - If the case is arbitrable, then the parties reconvene and hear the substantive case.
- The other alternative to breaking up the case is to hear both cases that day and divide the decision into half. Only rule on substance if arbitrator decides it is arbitrable. This is cheaper/more efficient.

II. Roadblock: Surprises – something comes up that one side was not prepared for.

- Prevent this from happening by trying to discuss the case with the other side before the hearing to determine what issues will be raised.
 - Are there certain facts that both sides agree are not relevant? For example a past disciplinary record, which occurred way outside the expunging date.
- Try to make the case as narrow as possible. Keep in mind the parties, particularly the union, is prohibited from raising things not raised in grievance chain (Steps I through IV).
- If it comes up at the hearing, caucus quickly with members of your side and then do a sidebar with the arbitrator and the other side.

III. Roadblock: Is your case hopeless?

- There is no such thing. Even if it is clear that the facts are not on your side or the contract language is not perfectly clear for your argument, you can win.
- For example if you are the union and it is clear that the grievant committed the alleged violation? You can still win. Try the following:
 - Argue the penalty is too severe for the infraction.
 - Bring up a procedural violations. For example, if no investigation was held.

Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions

Presented By: Arbitrator Michele Hoyman, Ph.D.

- Claim extenuating circumstances. Admit the grievant messed up but there is a reason to explain the behavior.
- Make a case for differential treatment. Call up as many witnesses as possible who claim to have done the same behavior but were punished differently/less harshly.
- Say there is a violation of well-established past practice in absence of clear contract language.
- Conversely, if you are the company, and you know it looks like the grievant was treated differently? You can still win. Try the following:
 - Show that you have consistently treated other cases with similar circumstances with the same penalty.
 - Demonstrate the violated rule is clear, reasonable, and was promulgated to employees.

IV. Roadblock: Prohibited/compromised communication before and during the hearing.

- Make sure all contact pre-hearing is joint. No ex parte contact is permissible.
- Any small talk before the hearing should not compromise the appearance of objectivity.
- Remember almost any subject - like the weather or parking - may not be “neutral” depending on whom you are talking to.
- As much we love to eat, the arbitrator should never have lunch with either party.

Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions

Presented By: Arbitrator Michele Hoyman, Ph.D.

An Arbitrator's Do and Don'ts List for Hearings

Do's

- 1) Do speak slowly, clearly, and loudly. 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. Remember the court reporter cannot record a nod, they must be able to hear a "yes."
- 3) Do make sure to cover the relevant terms of your contract. Introduce them via a witness.
- 4) Do make a list of key facts you need to establish in preparing your case.
- 5) Do explain in your opening statement what the facts are and why the contract terms apply.

Don'ts

- 1) Don't assume the arbitrator knows the vocabulary or context of your workplace. He or she is an outsider. It is the parties' job to educate the arbitrator with the jargon specific to the case.
- 2) Don't hesitate to take a break and caucus with your side if you think things are taking a turn for the worse. This is important particularly before cross-examination.
- 3) Don't rush. You can even repeat certain things for emphasis.
- 4) Don't ask a question on cross examination that you don't already know the answer to. No fishing expeditions!
- 5) Don't argue with the arbitrator. After he or she makes a ruling on an objection, move on.
- 6) 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.