

Introduction to Arbitration

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What Is Arbitration?

Arbitration is part of the system of American jurisprudence. It rests on the assumption that when opposing parties compete for a favorable ruling from the arbitrator, through the examination of witnesses and the evaluation of evidence, the truth of the matter will become evident. Arbitration is a search for the truth. The theory is that the best argument wins, just as in the judicial system. In reality, a good litigator can win a bad case, lose a good case, lose a bad case or win a good case. There are many variables: the facts, the representatives, the evidence, the witnesses, and the arbitrator. In many ways, arbitration is a crapshoot: you do not know how it will come out until you get the decision.

Preparing and arguing an arbitration case is hard, exciting, and satisfying work. It does not suit everybody. It requires focus, discipline, organization, and the ability to think on your feet. It demands skillful communication, particularly the ability to articulate an argument clearly and concisely.

Telling a Compelling Story

Arbitration is a play, a drama, and you are the director and the playwright. The witnesses are your actors and your exhibits are your props and scenery. You find out the facts, what happened, find out who the witnesses are, what documents you have, if any, to prove your case, what angle and spin to apply to the facts, research case law to find something that the arbitrator can rely on, and develop a strategy and a cohesive perspective for the case. You then write a series of questions for all witnesses. You put the questions together to tell a compelling story with the purpose of leading the arbitrator down your path, seeing the facts your way, and convincing him to decide for your grievant.

Generally, decisions in arbitration cases favor consistency. Arbitrators want to hold close to precedents from other cases in labor relations.

You need to make your case look legitimate and show how the agency's action was unreasonable and inconsistent with previous decisions. Research in case law is extremely important. You need to find a case that is like yours (or that has relevant elements in common) and present your case to make it look as close as possible to the precedent. Anchor it to existing case law. Your questions and arguments should highlight that connection, either overtly or covertly. Sometimes very experienced union representatives present evidence in a manner that misdirects management's expectations about their argument. You may want to lay out all the connections and supporting evidence and then tie it all together at the end of your brief.

Remaining Emotionally Detached

You have to remain objective and know both the strengths and the weaknesses of your case. Do not allow yourself to be fooled by the grievant or to be overcome by your role as advocate. Unless you are sure of the facts and rightness of your case you will not be able to convince the arbitrator. You have to be convincing about your belief in the facts, the

grievant, and the case. Your grievant and other witnesses must be able to testify credibly and be strong enough to withstand cross-examination. If they are not believable, cannot stick to the story, or are susceptible to suggestion and cave in to questions from the management representative, they may hurt you more than they help you. Consider not putting them on. Having a bad witness can be worse than having no witness at all.

There is another reason to remain emotionally detached: sometimes—even when you are well prepared, your grievant is in the right, and the evidence supports your case—you will lose anyway. You must not let your disappointment rob you of the energy you need to continue to fight for the people you represent.

Evidence

Arbitration is an evidentiary hearing. Evidence can be in the form of documentation or verbal testimony. The value of the evidence depends on its probative value, i.e., its authenticity, what it proves, and how what it proves helps your case. An arbitrator does not have to accept your evidence. The Arbitrator will admit your evidence if it is relevant to the case. If the agency, on direct examination or cross-examination, challenges the evidence you offer, you need to be prepared to respond to the objection.

Burden of Proof

Different types of cases have different burdens of proof. In arbitration cases, the moving party, the party whose case is presented first, has the burden of proof. In a case where the employee suffered adverse action (removal, demotion, suspension, reprimand, non-promotion, etc.) the agency is the moving party. In all other cases (performance appraisal, award issues, contract interpretation and other grievances filed by the union) the union is the moving party. If the burden of proof is not met, the moving party loses.

In a performance case, management's representative need only prove the agency's case by substantial evidence, a very low burden of proof created by the CSRA. This standard, much lower than preponderance of the evidence, is defined in 5 CFR 1201.56 as "the degree of evidence that a reasonable person, considering the evidence as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree."

In all other cases the moving party must prove its case by a preponderance of the evidence. 5 CFR 1201.56 defines this standard as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

However, even if the agency meets its burden of proof (substantial or preponderance of the evidence), the union can still prevail through affirmative defenses, by proving that a preponderance of the evidence

1. Shows harmful error in the application of the agency's procedures in arriving at its decision;
2. Shows that the decision was based on any prohibited personnel practice described in 5 USC 2302 (b) [including prohibited discrimination]; or

3. Shows that the decision was not in accordance with law.

Part of your job is going to be to educate the Arbitrator, through the arbitration process, about SSA's programs, working conditions, applicable federal laws and regulations, the contract, and the legal standard to be followed. Unlike arbitrations of labor disputes in the private sector, federal arbitration cases are subject to the same regulations regarding procedures, burden of proof, etc. as cases brought before the Merit Systems Protection Board. (You can find these regulations in Title 5, Chapter II, Part 1201 of the Code of Federal Regulations.) This educational process is very important. A failure to paint a clear and convincing picture for the arbitrator can have severe adverse consequences for your case.

Organization and Preparation

The importance of organization cannot be overstated. Once the arbitration starts there is nowhere to hide. Your best offense and defense is being well prepared and organized. Make sure you nail down who management's witnesses are at least ten days in advance, in accordance with past practice from the 1977 contract (the little yellow one) Article 26 Section G. This is a carryover provision.

All your exhibits should be copied and numbered in order with post-its by the first day of hearing. At the least, before the hearing starts, you should be ready with all the questions for the witnesses you expect to question that day. If possible, before the hearing starts, you should have at least your basic questions for all your witnesses.

In writing the questions, try to imagine the hearing, posing the questions, anticipating the responses, and thinking of what responses the other side could come up with. Write your cross examination questions in the form of a decision tree: if the opposition answers "yes" to a question, have one line of questioning; if they answer "no," have another line of questioning. Most responses will be predictable, but you should expect some surprise answers. Do not be surprised if some management witnesses lie on the stand. If you are lucky, you will be able to trap management with some documentary evidence that proves they are lying. If you cannot and they lie convincingly, you may be in trouble and need to consider abandoning further questioning. Good cross-examination requires great skill. On your list of questions for witnesses, anticipate objections and write how you will respond to them. Be prepared to adjust your question in light of an objection.

Keeping track of the mass of notes, exhibits, and case law can be a daunting task. You will need not only to be organized, but also to look organized. Being organized will give you confidence and the mental freedom to concentrate on your questions and the witnesses. You want the hearing to go as smoothly as possible, and rooting around for lost exhibits or questions breaks your rhythm and can confuse you. It is a good practice to have a separate folder housing your questions and exhibits for each witness. Consider using small Post-its to label each exhibit with your numbering system (union 1, etc.). In your prepared list of questions make big notes of the exhibit numbers to remind yourself to submit your evidence.

Preparing Witnesses

The better organized you are in the writing of your questions the easier it will be to develop the rapport needed to adduce good witness testimony. No single part of your case is more important than the testimony of your witnesses; therefore nothing is more important than spending the needed amount of time preparing your witnesses. You need to work with your witnesses until they are comfortable with and trust you.

It is useful to meet with the witnesses for a couple of days and hear their story a month or so before the hearing. At the same time, let them know the theory of the case and how it all ties together. As well as writing actual questions, work with the witnesses, try to give them confidence, and develop an outline for the case based on their testimony.

Ask them questions as though you were in a hearing and have them practice testifying. If you have a problem with their answer, or if they seem to be having trouble with your question and try to answer badly, say "Let's go off the record." Then tell them where you are going, how what they said was problematic, and how you think they could say it a better way. Tell them what you are trying to achieve with the question. To avoid imprinting a wrong answer, restate the question, then give their answer, then ask the question again. Remember that you are the director and this is your play. You want the witnesses to become comfortable with questions and answers like they will experience in the hearing. This will help them not to be confused later.

Your questions and the way you phrase them will likely change throughout the witness preparation, and you need to let the witness know that you have rephrased the question. If witnesses are having trouble testifying in practice, continue to repeat the answer before you ask the question until they are able to say what you want them to say. Go through the entire testimony, introduce the exhibits and ask question about them just as you will at the hearing until everyone goes through the entire testimony strongly, clearly, and without mistakes. You may have to rewrite questions based on the witnesses' answer to strengthen your mutual communication and understanding. Once you have phrased your questions correctly and the witnesses understand what you want, do not change the questions. Nothing is more confusing or damaging to the confidence of your witnesses than thinking they know the question and the answer and then having you change the question: Always have your grievant present and aware of what the witness is going to say.

Be sure to anticipate some questions management might ask on cross. If you think that the answer to a question might damage your case, prepare your witness ahead of time. State the troublesome question and tell the witness how you would answer it. Ask if the witness is comfortable with that answer. Ask how the witness might answer. Practice this until the person can consistently answer properly. Try not to give a witness too much freedom to think about answers to questions that may be asked in cross-examination. It is better if the witness does not start thinking about other possible replies if you a particular answer to avoid hurting the case. If the witness is not comfortable giving your answer, ask how he or she could answer honestly without hurting the case. Give some suggestions, find an answer you both like, and practice it until the witness gets it right.

Advise your witnesses to look at and respond to the person asking the questions, whether that person is you, management, or the arbitrator. Tell witnesses not to get too defensive under cross-examination. They should answer "yes" and "no" to the extent

possible. They should not offer to add anything unless you have practiced and you know and approve of what they are going to say. Tell them not to answer a question when an objection has been made, until the Arbitrator has ruled, and then to answer it only if the question is approved.

When preparing your witnesses, try to steer them away from using SSA jargon. We may understand it, but the arbitrator will not. You will use up more time, have to stop the arbitration to have the witness explain, and damage the smoothness of your case if you have to continually respond to the arbitrator's request for explanation. If you have to use jargon, either introduce the term to the witness in advance of them using it ("What is a 'redet' or 'RZ'?") or bring up the jargon in a short question followed up immediately with the question asking them what a PERC is. It would be helpful to the arbitrator if you prepared a glossary of terms and acronyms that will be used by your witnesses.

The Technical Assistant

You will find it useful to have a union technical assistant at every hearing. The TA, perhaps someone with technical expertise you lack, can help by finding POMS references, or other technical material. The TA also keeps the arbitration material organized, copies exhibits, gets materials, and helps to keep you free to concentrate on the case. At the hearing the TA should keep track of all the exhibits and their numbering. He or she should keep three lists of the exhibits in the numerical order assigned by the arbitrator:

1. Joint Exhibits,
2. Union Exhibits, and
3. Management Exhibits.

By keeping them in order, the TA helps the representative avoid fumbling around during the hearing.

The Arbitration Hearing

Preliminary Matters

The arbitrator will ask if the case is rightly before him or her, if he or she is empowered to grant the remedy sought, and how long the parties want the hearing to last. He or she will ask the parties to frame the issue and to provide lists of witnesses, joint exhibits, names, addresses and telephone numbers of the parties, If possible have a list of the witnesses prepared in advance.

In most cases the parties will agree on the framing of the issue, something like "Was the suspension of Mr. Z in accordance with law, rule, regulation, and the National Agreement? If not, what shall the remedy be?"

In the preliminary stage of the arbitration proceeding, before the opening statements are made, an arbitrator will often encourage the parties to save time by making stipulations. These are agreements about the facts of the case, usually in writing and signed.

Both parties have the opportunity to make an opening statement. The moving party makes the first opening statement. In a case where the employee has suffered an adverse

action (removal, demotion, suspension, reprimand, non-promotion, etc.) the agency is the moving party. In all other cases (performance appraisal, award issues, contract interpretation and other grievances filed by the union) the union is the moving party.

Testimony and Other Evidence

The actual hearing is a series of questions posed by the representatives to the witnesses and their responses. Witnesses must have a reason to testify, that they either saw, heard, did, or know something that directly bears on the case. The questions you ask them and their responses should be designed to prove your case. The arbitrator may also question the witnesses and the representatives. The parties will agree to swear in witnesses under an oath administered by the Arbitrator.

After making opening statements, you and management's representative will question your own witnesses to elicit testimony to support your case. This procedure, known as *direct examination*.

Whenever possible, avoid making leading questions to your own witnesses. Although you may lead your witness when facts are not in dispute, leading questions detract from the value of the testimony. If your witnesses cannot testify freely, authoritatively, and credibly without your having to lead them, you are in trouble. Leading your own witness will often draw an objection.

Direct evidence, testimony by a witness who saw, heard, or otherwise observed a relevant fact, has far more weight than other evidence because it is first-hand knowledge. Hearsay evidence, testimony about facts that are not based on the witness' personal observation, has less credibility. The arbitrator will probably choose not to allow it.

A representative has the right to question a prospective technical witness by asking the Arbitrator to "voir dire" in order to determine if the witness has the credentials, authority, competence, or expertise purported by the other party.

The rules of evidence are a system of rules and standards by which the admission of evidence or proof submitted at arbitration is regulated. It is entirely up to the arbitrator to admit or dismiss evidence. Generally, evidence that may have some value is allowed, although it may be given little if any weight.

Your technical assistant should prepare five copies of each exhibit you plan to use as evidence, one each for you, the arbitrator, the TA, management's representative, and the witness. As the first joint exhibit, the contract is usually marked "J1."

You enter exhibits offered in evidence during the opening statement or in conjunction with a witness's testimony by saying: "The union offers Union Exhibit 1." The arbitrator will accept the exhibit subject to an objection by the other party. If there is no objection to an exhibit offered or if an objection is overruled, the arbitrator will accept the exhibit into evidence. Even if the other representative objects to an exhibit, rather than exclude it the arbitrator will likely accept the evidence "for what its worth" and determine the value or weight the exhibit later. At this point the evidence is as an exhibit accepted in evidence and part of the hearing record.

After management puts on their case-in-chief, you have the opportunity to cross-examine their witness and introduce evidence. You should lead management witnesses whenever possible to keep them on a short leash.

Either party may object to a question posed by the other party to any witness and to the response of a hostile witness if the witness' answer is not responsive to the question. Objections are usually made because a question

1. Is irrelevant,
2. Is speculative, confusing or ambiguous,
3. Calls for a conclusion,
4. Is a compound question,
5. Solicits hearsay,
6. Has been asked and answered already,
7. Is argumentative, or
8. Assumes a fact that is untrue or is not in evidence.

The arbitrator may ask you to defend or explain any objection you make and will also ask the other representative to address the objection. The arbitrator will either sustain or overrule the objection. You will have to learn to read the arbitrator. If the arbitrator does not like objections, allows hearsay evidence, or allows management to lead their witnesses, stop objecting.

You can ask the arbitrator to direct a hostile witness or one who has repeatedly been evasive to answer your question.

After direct examination and cross examination, the representative will have the opportunity to question their witness again on redirect. This is an opportunity to rehabilitate any damage done to your witness' testimony on cross exam.

After redirect, a representative is offered the opportunity to further cross-examine the hostile witness. After recross, you can have re-re-direct, re-re-cross, and so on until all questions are exhausted.

Rebuttal is the opportunity for to call your witness back to testify to address or rebut statements made by management witnesses that hurt your case. Always dismiss your witness subject to recall for rebuttal. Think carefully before recalling witnesses for rebuttal, as you expose them to additional cross-examination which could damage their testimony.

When you have asked your last question to the opposition's witness during direct, cross, redirect, recross, rebuttal, etc., say "No further questions." If the witness is your own, say "No further questions subject to recall for rebuttal."

After you have finished questioning your last witness and you have completed your case-in-chief, declare to the arbitrator, "The union rests."

The End of the Arbitration Hearing

The arbitrator will ask the parties if they wish to submit post-hearing briefs. Although often the parties feel the need for briefs, they often do not submit them in expedited arbitrations. If you do not submit briefs, be sure to submit any case law you need to support your case. The arbitrator will close the record and decide the arbitration on the testimony and evidence submitted.

Often an arbitrator will announce the arbitration decision on the spot. Sometimes you will have to wait for the written ruling. Either way, the arbitrator will send both parties a written formal, binding determination by mail. Then, if you are lucky, your TA will provide one last, satisfying service—telling everyone how brilliant you were.