

Winning Performance Cases at Arbitration

By Charlie Estudillo

Three Ways to Win

There are three ways to win a performance case at arbitration:

1. Prove the evidence to support demotion or removal is not substantial,
2. Prove the grievant's substantive rights under the law were violated, or
3. Prove that management caused harmful procedural error in the administration of the PEP, violating the grievant's contractual rights.

The first thing to look at is the weight of the evidence to determine if it is substantial. You need to look at the numbers of cases cited as examples of unsatisfactory performance to sustain the Chapter 43 action. (See 5 U.S.C. 4303.) You also need to look closely at the types of errors cited to see if the supervisor correctly documented the case. Management may have based their demotion or removal action on literally hundreds of cases. Your first problem will be getting a handle on the masses of memos, rebuttals, case material, applications, etc.

The Chapter 43 Arbitration Case Outline is useful for creating a one-page thumbnail sketch of your case. It focuses on the Opportunity to Perform Successfully (POS) and other performance progress memos during the POS. These memos plus the "Proposal and Decision to Remove or Demote" will be the primary evidence management will use to support their adverse action.

Chapter 43 Arbitration Case Outline

Here's a way to take all that raw data from before, during and after the PEP and arrange it in outline form to give yourself a readily accessible thumbnail picture of the evidence management will be using at the arbitration hearing.

Focus on the issues that can win a case. Keeping in mind your available case law and winning arguments, you can put whatever data you think would be helpful on your outline. However, any outline should contain the following information:

1. Date of the memo. (Start with the audit that gave rise to the PAP/POS.)
2. Number of cases audited in that memo.
3. Number of cases cited as "level 0," "unacceptable," or "failing to meet the standard." (State in you outline how the cases were described or labeled.) If cases are described as "deficient," "adversely affecting," the GJT, or "containing errors," put that in your outline. If management does not use the proper language they may not be able to use those cases to sustain their demotion or removal action.
4. The level of performance alleged in the memo.

5. A note about whether level 1 and level 2 standards were quoted in the memo (See Donaldson v. Labor.), and whether a numerical standard for accuracy or timeliness was given for the GJT. If a numerical standard was stated, list it.

1. The percentage of accuracy stated for the GJT(s).
2. Any other interesting data or statements you see, such as “The standard expected of you is level 2,” “Many of the errors cited are minor in nature,” or anything else you can use. Representatives should go through all the PAP/POS memos, proposals, etc., and chart how the evidence falls. Did the employee’s accuracy improve? Were cases which were cited as

“failing to meet” in one place documented only as “adversely affecting this GJT” later on? Did the number of cases audited drop severely as the PAP/POS progressed? Outline to give you a framework to start with and use throughout the case.