

ADVANCE PREPARATION

The arbitrator will hold one, or if necessary, several hearings to get the facts of the case and the positions of the parties. Unless the parties have agreed on special formal rules, procedure at the hearing will be determined by the arbitrator (or chairperson of the arbitration board). Normally it will be quite informal.

Some of the elementary rules of preparation for the hearing are almost self-evident, but they are worth noting as a convenient checklist.

1. Reexamine the fundamental facts of the grievance. Decide which are in dispute, for these must be proven through witnesses, documents or other evidence. Check the contract clauses which may be applicable. Review the discussions and records of the case in the grievance procedure. Gather any material which should be given or shown to the arbitrator.
2. Get all the facts. Do not ignore unfavorable facts in preparing your case. By acknowledging them in advance you will be able to verify their accuracy, recognize their limitations, and evaluate their effect on the case, instead of being "surprised" and unprepared when they are suddenly raised before the arbitrator.
3. Review past practice, what happened in similar situations, what positions were presented. Check for any background information which may provide perspective for the arbitrator.
4. Working conditions -- if the case hinges on the duties of a job or the physical surroundings of a work place, examine them yourself to be personally familiar with them. Consider asking the arbitrator to visit the work place.
5. Arrange for witnesses to verify the facts at the hearing. The arbitrator is not familiar with the case and must be informed of all the details. In most cases, it is advisable to attempt to do so through the witnesses.
6. Review your reasoning -- how the union interprets the facts and their significance. Decide what you will emphasize and how you can present it most effectively to persuade the arbitrator to accept your viewpoint.
7. Prepare an outline of the evidence you will offer and the points you will stress. In addition, put into writing, for your own use, all aspects of the case. This will ensure that no significant point is neglected in the preparation or forgotten during the hearing.
8. Anticipate management's points. Allow for the employer's views so that you will be able to respond to and/or counteract them as necessary before the arbitrator. The discussions during the efforts to settle the grievance will usually indicate what the employer is likely to contend. Judge which are the weaker points in the union's presentation. Plan your reaction to criticism of the union's views, so that you will be ready not only to defend but to substantiate your position as well.

9. Check other arbitration rulings on similar grievance cases. If possible, examine also the decisions which have been made by your arbitrator in other cases. What kind of reasoning or evidence had been most persuasive to him or her in the past?
10. Consult other representatives of the union. Use the written outline noted in Point Seven above as a basis for stimulating their thoughts. Talking the case over with them will usually reveal some valuable viewpoints and recommendations on items which may have been either overlooked or inadequately covered. The cross-exchange in such consultation often provides a helpful preview of the questions which might arise in the arbitration hearing.
11. Brief any witness who is to take a major part in the presentation of the case to the arbitrator on all aspects of the case. Be sure that no one who is participating in the presentation is only half-prepared. Any indications that s/he may be unfamiliar with the basic elements of the dispute can be detrimental to the management's case.

SELECTING WITNESSES

It is common to establish many of the facts in a case through the testimony of witnesses. Where there is a choice, select your witnesses carefully and attempt to avoid using any whose manner may prejudice your case. Try to choose those who can speak from direct observation or experience so that their testimony stands as more than hearsay.

Should you use only one, a few, or several witnesses on a particular point? While it is true that, a long array of witnesses may reinforce the point, it is also likely that many witnesses may negate the value of each other's testimony. It is usually preferable to select a few, well-qualified witnesses to testify on the point(s) in dispute.

PREPARING WITNESSES

Interview your witnesses in advance. Let them become familiar with the questions they are liable to be asked. It is a good idea to jot down some summary of what they will say so that you will know just what their testimony will be.

Don't arrange the advance discussions into a formal rehearsal, however, and don't ask witnesses to memorize statements. All you ordinarily need do is review approximately whatever they have to say.

Be sure that your witnesses are not withholding from you any information which they believe may be detrimental - to the case. A sudden disclosure through cross-examination in the hearing may turn a case around. It is best that your representatives are fully prepared with knowledge of all aspects of the case, good and bad, to enable the evaluation necessary for the most advantageous result.

For those witnesses who may be apprehensive about participating in an arbitration/ put them at ease by describing what the hearing will be like. They should understand in advance that they will be subject to questioning by union representatives at the hearing.

There is nothing improper or unlawful about preparing witnesses, as long as you are preparing them to offer accurate and truthful testimony.

General Rules, Preparation for Arbitration and Hearing Procedure

by Dr. Clarence M. Updegraff

The following material by Dr. Clarence Updegraff is adapted from a bulletin published by the Bureau of Labor and Management, State University of Iowa, Iowa City, Iowa.

1. When selecting an impartial arbitrator or chairperson, look for intelligence, honesty, experience and courage. The broader the arbitrator's background of knowledge, the more likely s/he is to understand your case fully and to decide it fairly.
2. Try to get, as early as possible, a complete understanding of the opposite party's evidence and contentions. This will at least tend to prevent your being "surprised" at the hearing and may even lead to a settlement.
3. Avoid being so steeped and stubborn in your own feelings about the dispute that you cannot see the possible merits of your opponent's position. You can't defeat their contentions if you refuse to understand them.
4. Remember that fixing a time and place for a hearing requires commitments from numerous people. Be as considerate of the others as they should be of you in adapting other work to arrange attendance at the hearing. After the date is fixed, do not try to change it.
5. Make a thorough, searching examination of the testimony of your own witnesses well before the hearing. Make a brief, logical summary of their evidence and write a preliminary statement of the contentions you will make at the hearing. This will aid you in planning a complete, well organized, and persuasive presentation of your position.
6. Be sure that all of the people who will be in your group at the hearing know the principal speaker for your side, the witnesses, and the substance of their testimony. This will contribute to making the hearing more orderly and efficient.
7. Try to agree with the opposing party as to wording the exact question(s) to be submitted to the arbitrator and prepare a written memorandum stating the same signed by both parties prior to the date of the hearing. Deliver a copy to the arbitrator as soon as it is ready, or offer it at the beginning of the hearing.
8. If there are several issues to be submitted, try to agree with all other parties in advance on the order in which they will be presented at the hearing.
9. Write a brief pre-hearing summary of your contentions and deliver one copy of it to the arbitrator and one copy to your opponent either before or at the beginning of the hearing. If possible, arrange with the opposition for both parties to do this at the same time.
10. Have copies of all documents which you desire to present as evidence ready for delivery at the hearing. Include at least one copy of each for your opponent unless you know s/he has copies already.

11. If a view of a place, a machine or an operation would seem to be helpful, have a photograph, drawing or blueprint of it ready for introduction in evidence or arrange in advance that it will be available for observation and for the arbitrator to see it during the hearing so that as little time as possible will be required.
12. Be on time, or early if at all possible, in arriving at the place designated for the hearing. Tardiness is not only discourteous, but also wastes the time of others and creates a generally poor impression.
13. Do not shout or speak louder than necessary at the hearing. Never use provocative words or epithets. These actions create poor impressions of those guilty of them, and in fact cloud rather than clarify issues.
14. During the hearing, do not mention or refer to former frictions or acts of misconduct by your opponent which were settled long ago unless these matters are clearly relevant to the issue presently in dispute.
15. Strive for clarity and coherence in your oral presentation, avoid repetition as much as possible; if one of your colleagues has already stated facts or arguments, avoid restating same.
16. Avoid mixing of facts and arguments in your presentation. The effect of this is confusing and may only result in weakening your own case.
17. Do not interrupt statements of the opposing party or the presentation of its evidence. You will be given ample opportunity to cross-examine opposing witnesses. You and your witnesses will be protected from interruption. This is an arbitration hearing, not an informal grievance committee meeting or bargaining conference.
18. If you intend to call witnesses, have them present in the room or in an adjacent room ready for call when the hearing begins. (If they are employed near the hearing room, they may remain at work, but they should be notified in advance that they may be called and should be requested not to leave the area, even though their work shift may end before they are needed as witnesses.)
19. Prove your case by your own witnesses. Do not try to establish it by evidence gleaned from people put on the stand by your opponent. They are there to oppose you, not help you.
20. If you cross-examine the other party's witnesses, make it short. Do not unduly prolong cross-examination in attempts to get damaging admissions. The more questions you ask on cross-examination, the more opportunity you allow a hostile witness to repeat the adverse testimony s/he came to present. Choose most carefully the inquiries you make of such parties and make them as few as possible.
21. Each party has the right to ask leading questions when cross-examining hostile witnesses. Each party should save time by asking its own witnesses leading questions, excepting at points where disputed facts are involved. Testimony on controverted matters should be brought out by questions which do not suggest the answer, if possible.

22. Do not make captious, whimsical, or unnecessary objections to testimony or arguments of the other party. Such interruptions are likely to waste time and confuse issues. The arbitrator will no doubt realize without having the matter expressly mentioned more than once, when s/he is hearing weak testimony such as hearsay or immaterial and irrelevant statements.
23. If you have extraordinarily lengthy or extremely technical matters to present, or if you wish for any reason to preserve a reliable record of the hearing, make advance provision for the attendance at the hearing of an efficient public court reporter. This involves a moderate expense, which in most cases is equally divided between the parties. It will tend to insure that when the arbitrator is working on the award and reviewing the evidence, s/he will have it all before him or her and will not be hampered by the limitations of the human memory.
24. If one party requests the privilege of filing a post-hearing brief, it must be granted, as part of a "fair hearing." Both parties, however, should be given equal time, which should be limited to a comparatively short period of a week or two after the hearing or after the reporter's transcript is received. If reply briefs are agreed upon, they should follow within three or four days after the delivery of the post-hearing briefs. It is customary in these situations for the parties to mail briefs to the arbitrator and to opponents at the same time. Many arbitrations are closed without post-hearing briefs, but they are desirable if the written statement prepared for the arbitrator prior to the hearing was incomplete, or if, in the light of matters which develop at the hearing, it should be for any reason supplemented.
25. After you receive it, read the entire award, not merely the result. Try to give your constituents and associates an accurate, comprehensive understanding of the arbitrator's reasoning. Only in this way can you get the full value of the decision whether it was in your favor or against you. The logic of the prior decision often indicates clearly whether the next dispute should be taken to arbitration because it is distinguishable, or dropped because it is similar to the previous case.
26. If there is any question in your mind as to the expenses of arbitration, ask the arbitrator about it at the earliest possible time.

Maintaining the Right Tone.

The atmosphere of the hearing often reflects the relationship between the parties. While the chief purpose of the arbitration hearing is the determination of the particular grievance, a collateral purpose of improving that relationship may also be achieved by skillful and friendly conduct of the parties. Thus, a better general understanding between the parties may be a by-product of the arbitration. To this end, the parties should enter the hearing room with the intention of conducting themselves in an objective and dignified manner. The arbitration hearing should be informal enough for effective communication, but without loss of that basic sense of order that is essential in every forum of adjudication.

The hearing is no place for emotional outbursts, long speeches with only vague relevancy to the issue, for bitter, caustic remarks, or personal invective. Apart from their long-run adverse effect on the basic relationship between the parties, such immoderate tactics are unlikely to impress or persuade an arbitrator. Similarly, over-technical and over-legalistic

approaches are not helpful.

A party has every right to object to evidence he considers irrelevant, as the arbitrator should not be burdened with a mass of material that has little or no bearing on the issue. But objections made merely for the sake of objecting often have an adverse effect, and they may give the arbitrator the impression that one simply fears to have the other side heard.

SELECTING AN ARBITRATOR

[adapted From "Arbitration: Last Stop on the Grievance Route" by Tim Bornstein, Associate Prof. Univ of Mass.]

When parties are new to arbitration, they often have excessive fears of the process. If they are careful to choose an experienced, fair-minded arbitrator, they can be secure in the knowledge that his decision will be fair.

How can the qualifications of arbitrators be compared? What criteria are important in making the selection? How can reliable information about arbitrators be secured?

Referral Agencies

Most collective agreements provide that an arbitrator will be selected jointly by the parties from a panel of arbitrators submitted by either of the major arbitration referral agencies, the American Arbitration Association, the Federal Mediation and Conciliation Service, or the Hawai'i Labor Relations Board. Under such provisions, the union normally initiates arbitration by writing to one of these referral agencies and requesting that a panel of arbitrators be supplied. The agency will respond by submitting a list of seven arbitrators. Each party is entitled to strike the names of unacceptable arbitrators and to rank the remaining names in the order of preference. Based on the parties' responses, the referral agency will designate one arbitrator who has been identified by both parties as acceptable and who has been ranked highest in preference.

With the panels submitted to the parties, the referral agency will attach a brief biographical sketch of each arbitrator. These sketches usually include only the barest facts about the arbitrator: his age, education, profession, experience, and per diem charges. This information is insufficient as the basis for making a well informed choice. Accordingly, experienced parties will seek out other sources of information about arbitrators: The opinion of parties who have dealt with them in the past; their published works; their published and unpublished arbitration decisions; and evaluations of their work and reputation by firms which specialize in selling such evaluations to employers. At best the selection process is notoriously haphazard and unscientific. For example, when one consults others who have dealt with a particular arbitrator, one should beware of extravagant praise of an arbitrator who has ruled in a party's favor in only one case and extravagant condemnation of an arbitrator who has ruled against a party in a single case.

Selection Criteria

It is usually wise to choose an experienced over an inexperienced arbitrator for significant cases on the assumption trial experience tests, refines and improves an arbitrator's judgement. Moreover, experience in public sector arbitration may help assure that the arbitrator will have realistic grasp of the unique characteristics of public employment issues.

Impartiality is of course an essential qualification in an arbitrator. Impartiality, like virtue, is not to be taken on faith but is earned through one's actions. Thus, the only sensible way to determine an arbitrator's impartiality is to seek out his reputation among those who are familiar with it.