

AN INSTRUCTIONAL UNIT FOR
STATE, PROVINCIAL AND LOCAL
AFFILIATES AS A GUIDE TO
ESTABLISH EFFECTIVE
GRIEVANCE ARBITRATION.







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Today's issues that require arbitration procedures as they affect fire fighters, fall into one of two categories — interest arbitration or grievance arbitration.

Interest arbitration is the arbitration of issues at an impasse in contract negotiations. It is referred to as interest arbitration because the arbitrator is being asked to determine the “interests” of the parties as they should be incorporated into a new labor agreement. Each party selects a panel member and these individuals then select an impartial chairperson. In the majority of cases the decision of this board is final and binding upon the parties in dispute.

Grievance arbitration on the other hand is referred to as “rights” arbitration because the arbitrator makes a decision concerning the “rights” of the parties under an existing labor agreement. Those issues that fall into the category of grievance arbitration involve a determination by an impartial third party of a disputed work-related issue, including disciplinary action.

In most grievance procedures, arbitration is the last

step and a step that should rarely be taken if your grievance procedure has been effective. It is desirable for the opposing parties to reach an agreement that disposes of the grievance during the grievance procedure.

Simply stated, grievance arbitration is a proceeding that is voluntarily chosen by two parties that want a dispute determined by an impartial judge. This judge is chosen of their own mutual selection¹ and who's decision they agree in advance to accept as final and binding. The function of grievance arbitration is to resolve a given controversy and one way or another, to end grievances arising out of that controversy. How to effectively arbitrate a grievance is the subject of this manual.

¹ In some instances, if the parties are unable to agree upon the selection of a judge either party may request that an arbitrator be appointed.



CHAPTER 1: GRIEVANCE PROCESSING AND PROCEDURES

The purpose of your local's grievance procedure is to provide a speedy, equitable and just resolution of disputes between your fellow fire fighters and their employers. An ideal resolution of any grievance, whether it be a contract interpretation or disciplinary action, is to resolve the dispute without resorting to a final and binding arbitration through an independent and mutually acceptable third party arbitrator.

Generally it is in both parties' interests to perform the grievance procedure as informally and expeditiously as possible. Your grievance procedure is the heart of your contract. The enforcement of your union's agreement as well as the labor relationship within your fire department depends upon your knowledge of how to file and follow through a grievance.

For your local's grievance procedure to be an effective process, it should meet several specific standards. First, it should provide a reasonable opportunity for a mutual resolution before arbitration. In any grievance procedure arbitration is the last and final step.

Furthermore, your grievance procedure should be uncomplicated with well-defined steps. For the majority of grievance procedures it is unnecessary to have more than a few separate steps, beginning with the station steward and when necessary, ending in arbitration.

Your grievance procedure should also have reasonable time periods for each of its steps. Enough time should be afforded to properly resolve an issue, however, this does not mean these time periods should be excessively lengthy. An ideal grievance procedure has a penalty or forfeiture clause for failing to comply with any time requirements. If your grievance procedure does not have this requirement, then it should at least have a clause that provides for the grievance to continue to the next step if your employer does not respond in the established amount of time. (Appendix A provides an example of an arbitration clause.)

One of the more important factors of your grievance procedure should be an agreement, between your local and employer, that your union be solely

responsible for the processing of all grievances. This is generally understood under most collective bargaining agreements where the union is the sole and exclusive bargaining agent and should always be the rule in any type of case involving IAFF members.

Your local should also establish a grievance committee. This committee should consist of three to five members and be given the sole responsibility of reviewing grievances or complaints. After reviewing a complaint, the committee should decide if a grievance exists and if so, how it will be processed. This committee should also be responsible for pulling down a grievance or reaching a reasonable resolution during the grievance process.

Because of the important responsibility placed on your local's grievance committee, the selection of its members should not be taken lightly. Members should be selected who display a genuine interest in their local, their working conditions, and the welfare of their fellow fire fighters. Each member who is chosen should be willing to learn, work, and devote their time to the

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duties and responsibilities of their position.

Some final notes concerning grievance arbitration: your local should make sure its grievance procedure clearly defines the jurisdiction and authority of the arbitrator; specifically states that a fire fighter can only be discharged or disciplined for a just cause; and has a standard grievance form. (Appendix B provides an example of a grievance form.)



Arbitrators are impartial third parties who are assumed to have no self-interest in the resolution of any dispute they are selected to hear and decide, and whose primary consideration is to carry out the intent of the parties in dispute. It is up to the arbitrator to determine what the contract language of your agreement means to those who use it while realizing that reducing your agreement to writing may introduce a distortion or change in its original intention. The arbitrator is also the person who runs the hearing and concerning procedures at the hearing, he² is the one who decides how these procedures are to be followed and has great discretion in what will be done.

The fact that the arbitrator is the person in charge greatly simplifies your situation. This allows you to focus your attention on one individual when presenting your case. Your job is to persuade this one person as to the merit of your local's position and

² *Whenever a male gender is used in this manual it shall be construed to include both women and men.*

since your purpose is to persuade the arbitrator, it is not necessary for you to address other officials in any way. The arbitrator is the individual to whom all your remarks should be made.

LEGAL AUTHORITY OF AN ARBITRATOR

An arbitrator's legal authority depends on the particular state, provincial and/or federal statute under which he operates but for the most part on the authority and jurisdiction given him through the mutual agreement of the parties under the terms of the labor agreement. Under the Uniform Arbitration Code, which is usually controlling, an arbitrator can swear witnesses, issue subpoenas, conduct *ex parte* (one-sided) hearings, and most importantly, make final and binding decisions when it is called for in the contract.

Most arbitrators have no problem swearing in witnesses, issuing subpoenas or writing binding decisions. However, the majority of arbitrators will attempt to avoid conducting *ex parte* hearings. Arbitrators tend to view labor arbitration as a

process of mutual consent. Since they are selected by both parties they are generally unwilling to alienate one party by conducting hearings without the other party's cooperation.

SELECTING AN ARBITRATOR

Chances are your labor agreement stipulates the process in which an arbitrator is to be chosen. In most instances, an arbitrator is selected (or appointed by the appropriate body under Provincial legislation) from a list of arbitrators supplied by the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), or a state board. These lists usually consist of seven names, of which both parties alternately strike out a name until only one name is left. This person becomes the arbitrator for the case. The AAA does charge a modest fee for this service, but will also take care of all your scheduling details. The FMCS, on the other hand, simply appoints the selected arbitrator and leaves it to him and the parties involved to find a commonly acceptable date, time, and place for the hearing.

FINDING OUT ABOUT AN ARBITRATOR

When selecting an arbitrator, you will want to find out as much as you can about the individuals from whom you have to choose. Your first inclination may be to locate and read a number of decisions of the persons you are considering. While this is possible, it is not always the most sound way of making a judgment. There are several reasons for this:

1. Not all of an arbitrator's decisions are published.

Often, arbitrators are not permitted by one or both parties to submit their decisions for publication. In other instances, an arbitrator may simply choose not to have a decision published.

2. Decisions published by an arbitrator represent only a narrow portion of his output.

They also constitute what he considers most beneficial to his reputation.

3. The way in which an arbitrator makes a decision in one case does not necessarily mean he will reach a similar conclusion in yours.

If an arbitrator achieves a reputation for always

favoring one side, he would lose the opportunity to be an arbitrator because either your employer or your local union would not want him.

4. Some past decisions may represent negotiated settlements of a dispute.

Most negotiated settlements represent a compromise satisfactory to the parties instead of the actual viewpoint of the arbitrator.

Generally, it is more important for you to base your selection on the arbitrator's background. You will want to determine if he has had any opportunities to learn something about labor and labor-management relations. You will also want to find out if he has ever worked as an artisan or in a factory. Also, if he is an attorney, you will want to consider what type of law he practices.

It is also important to consider the arbitrator's understanding of the matter being arbitrated. However, do not trick yourself into thinking an expert on your subject matter is the best person for the job. Often, a fair and intelligent person, who has no knowledge of a subject, will be a better arbitrator than a person

who has opinions that might be too strong.

You may also want to consider examining the arbitrator's knowledge on the profession of fire fighting. Because arbitrators with this type of experience are often hard to find, the arbitrator you select will probably know very little about your occupation. Consequently, some information about fire fighting may have to be included in your presentation of testimony.

The experience of an arbitrator in certain areas as they affect your particular issue is another important consideration. However, just because you choose an experienced arbitrator who may have been more favorable towards your local in the past does not mean you have a guarantee he will be as favorable in future hearings.

In some instances it may simply not be possible for you to obtain an experienced arbitrator. As such you may be forced to accept an arbitrator with less experience than you had hoped. However this does not mean you will not receive a fair and just hearing. In fact, in those cases that are not too complicated or don't have the potential of setting a dangerous precedent, it is advisable to select a less

experienced or unknown arbitrator so you may learn more about him for future reference.

When selecting your arbitrator, you should never allow politics to play a role in your final decision. On occasion your local may be tempted to choose an arbitrator based on a "tip" that he will be favorable to your side because of a personal, fraternal, or political association. Just remember, a person who is open to undue influence from one side is also open to similar influence from the other side.

To assist you in your selection process you can obtain useful information on arbitrators by contacting other IAFF locals in your area that have dealt with a particular arbitrator. Usually a simple phone call can prove beneficial if the local has had considerable experience with the arbitrator and is willing to level with you.

In general, both the AAA and FMCS assign arbitrator lists by areas or zones. Therefore it is recommended you assist in the setting up of a network or regular exchange of arbitration information (within your particular area or zone) with IAFF locals and other labor groups.

Without becoming bogged down in a large amount of unnecessary information you must be sure all of your evidence, arguments, testimony, and exhibits are directed at establishing two crucial facts:

- (1) your employer has violated one or more provisions of your contract, and
- (2) your local and/or individual fire fighter is entitled to a remedy.

For you to establish these two facts, your case preparation needs to begin with a thorough study of your contract language, followed by an examination of those issues that go beyond your contract. In some instances, your case preparation may also include looking for any possible existence of past practice.

KNOW YOUR CONTRACT LANGUAGE

Your case preparation must begin with a close inspection of your contract's language because your contract is the basis on which the arbitrator has the authority to make his rulings.

When studying your contract, you will want to look for:

1. Language that is clear and unambiguous —

The arbitrator, as well as any neutral reader, will view your contract language as relatively clear and unambiguous, even though your local and employer may attempt to place forced interpretations on a given provision.

2. General versus specific language —

An arbitrator will give more consideration to your specific contract language than your contract's general provisions. In most instances, when specific and detailed language is negotiated, the arbitrator will presume your local and employer has examined the matter more closely. Consequently, he will assume you have defined your more general intentions by that specific language.

3. Specifically "included" or "excluded" items —

To specifically include one item or class of items and not to mention any others may be interpreted by the arbitrator to mean the others were intentionally

excluded. Remember, "To express one thing is to exclude another."

4. Enumeration —

Enumeration limits any of your general language to the category of the enumerated items. In other words, a list of specific items followed by more general language will limit the general language to the items, examples, and situations similar to those enumerated.

5. Words judged by their context —

Where words appear in your contract will often determine what was meant by their use.

6. Construing the agreement as a whole —

An arbitrator assumes your local and employer will not write meaningless provisions into your contract. Therefore when one interpretation would give meaning to one section causing an exclusion of other sections and a second interpretation would give meaning to both sections, the broader interpretation will generally be followed.

7. Normal as opposed to technical usage of words —

An arbitrator

will give words their commonly accepted meanings unless it is shown your local and employer intended a technical or uncommon definition.

You will find these different categories often overlap and conflict with one another in any given case. In most instances, they must be considered in conjunction with other guides such as “intent” and “past practice.”

However, the actual wording of your contract agreement is of such importance all your case preparations must begin with a careful study of your contract language.

GOING BEYOND YOUR CONTRACT

After you have thoroughly examined your contract, you will want to make yourself aware of any possible arguments that may go beyond your contract and how these arguments might influence the arbitrator.

When looking for these types of issues, you will want to consider:

- **Intent of the parties** — Where your contract is not a sufficient guide the arbitrator will look beyond it to see if he

can determine the intent of your local and employer. Notes, rough drafts, and written proposals taken and used during negotiations can be helpful in establishing intent. When examining intent, it is important to remember if your contract has been modified, it is assumed the old contract language and the old meanings no longer apply.

- **Contract negotiations**

— The history of your negotiation process, as evidenced by minutes and records, may be important to your case as well. If he is convinced of its accuracy, the arbitrator may also rely on oral evidence.

- **No consideration given to compromise offers**

— Offers that might have been made in negotiations leading up to your arbitration will normally not be considered in your arbitration. An arbitrator recognizes that parties will make offers, looking towards a settlement, that might be less than they consider to be their strict contractual rights.

- **Interpretation in “light of the law”** — When two interpretations are possible, one making your agreement lawful and the other making it unlawful, the former may be used on the assumption the parties intended to have a valid contract.

- **Reason and equity** — Where your language is ambiguous, an arbitrator will usually strive to apply it in a manner that is reasonable and equitable to both your local and employer.

- **Avoiding harsh, absurd, or nonsensical results** — When one interpretation of your contract would bring just and reasonable results and another would lead to harsh, absurd, or nonsensical results, the former would be used by an arbitrator.

- **Avoiding forfeitures or penalties** — Both arbitrators and courts are reluctant to assess forfeitures or penalties on one of the two parties if another interpretation would lead to a more reasonable resolution. However, many arbitrators are inclined to rule that some type of remedy (including back

pay and even interest in some cases) is appropriate in certain types of cases. The question of remedies is one of the most controversial for arbitrators, unions, and employers.

- **Experience and training of the negotiators** —

Most arbitrators are less likely to apply a strict construction of contract language where the negotiators are inexperienced. The assumption is the rules and practices were better understood by the parties than the words by which they tried to express such practices. However, this type of attitude would not be taken with experienced negotiators who were known to scrutinize the language closely.

LOOKING FOR PAST PRACTICE

While it is not common in most arbitration hearings, the possibility of a past practice dispute may exist. Therefore, in some instances, you may also have to prepare your case by determining if a past practice is involved in the dispute.

The term past practice refers to a *uniform response* given to a

recurring situation that has occurred over a *substantial amount of time*. This response is recognized, either implicitly or explicitly by both parties as the proper response to the occurrence.

The *uniformity* of a given past practice must be so overwhelmingly consistent as to leave no doubt your local and employer has regularly handled a matter in an established manner. Any exceptions to this uniformity must be rare enough to be looked upon as unintended errors or departures from the rule. The more uniform the occurrence is, the stronger the evidence of past practice.

A *recurring response* is one that has occurred more than just several times, and not only under exceptional circumstances. The more often a response has occurred in the routine performance of your duties, the stronger the evidence of past practice.

Closely related to recurrence is the *substantial time* in which a practice has existed. The longer the time periods are, the stronger the argument a past practice exists. When a practice exists across two contracts (overlaps a

re-negotiation of the agreement), it strongly suggests to an arbitrator the parties have accepted it because they had an opportunity to deal with it and did not do so.

Essentially, reliance on a past practice can occur in these three situations:

- (1) where your contract language is ambiguous,
- (2) where your contract is silent, and
- (3) where your contract is clear.

In the case of ambiguous language, past practice is extremely important. In essence, your local and employer have resolved any ambiguity by their actions. It can safely be said your actions (the past practice) have interpreted what you believe your contract language to mean.

Where a contract is silent, there seems to be some agreement among arbitrators that if it is a practice involving a benefit, the practice has been accepted as a condition of employment.

If your contract language is clear and unambiguous, the near unanimous opinion of arbitrators is the language should control rather than a contrary past

practice. However, evidence that your local and employer simply made an error when drawing up the contract, or other evidence of mutual intent to continue the practice regardless of the language, could result in an arbitrator upholding the practice in spite of the written contractual terms.

In most instances, the party responsible for proving the existence of a past practice will fall on your local. For a union representative, establishing that a past practice really exists and persuading an arbitrator to make an award based on that past practice can be difficult. To assist you in determining whether a past practice exists or not you should ask yourself the following questions:

- Does the contract say anything on the issue?
- How was the issue interpreted in the past?
- Is the contract language silent or contradictory?
- Does the contract language have double meaning?
- Does the contract permit arbitration or is it an employer prerogative if the issue is not covered by the contract?
- If the language is unclear, what was the intent of the parties?

- Are there witnesses of negotiation discussions?
- What has been general practice?
- Does the practice work a hardship against another practice?
- Does the practice deprive fire fighters of other contractual rights?
- Does the practice create grievances and tensions?
- Did either party permit an interpretation over a substantial amount of time without protest or appeal and with full knowledge?

It should be noted that if your contract contains a “zipper clause” then the freedom of an arbitrator in making a decision concerning past practice is limited since the decision must be based only on the contents of the written agreement. This is because a “zipper clause” specifically states that a written agreement is the complete agreement of the parties and anything not contained in the contract is not agreed to unless put into writing and signed by both parties following the date of the agreement.



You can begin constructing your case only after you have thoroughly examined your contract language, looked at those issues going beyond your contract, and established, if any, an existence of a past practice dispute. The following outline is designed to assist you in the initial development of your presentation.

- 1. Outline your case** — Summarize your case by citing the problem and stating exactly what happened. Also make note of the witnesses who are available and any possible visual materials you may need.
- 2. Develop your arguments over language implementation** — If your case involves arguments over your contract language, you will need to outline all contract provisions, or parts of provisions that support your interpretation. Write out your interpretations using as many words and phrases from the contract as possible. Also, apply any relevant arguments based on equity, common sense, and past practice that will help support your arguments.

- 3. Write out the sequence of events** — If your case involves disputes over an occurrence leading to the grievance, then you need to write out a clear chronological sequence of events. When doing so, you must note the dates and times, the main participants, and the exact locations of events.

You will also need to list any documents and witnesses that will confirm your rendition of the events and use this list to prepare an explanation of the events. (Why did one event follow another?) Also explain why your version of what happened establishes that your employer violated the contract.

- 4. Collect your evidence** — Assemble all the facts and evidence needed to support your assertions. Your employer will often have these documents and records vital to your local's case. To obtain these records you must first make an oral request explaining they are necessary to assess the merits of the grievance. These demands should be

made through the open records requirements of public employees. If your employer refuses to cooperate, submit the request in writing. If your employer still refuses, file a charge with your PERB Board or district court. If you are in the private sector, then your charge should be filed with the NLRB. Also keep a copy of your request to show the arbitrator at the outset of the hearing if you still do not have the information. The arbitrator should give a sympathetic hearing to any reasonable request for information.

- 5. Agree on the evidence** — See what pieces of evidence your local and employer can agree are correct. If both of you can agree on a matter, label it a fact. If your employer is unwilling to sign a written stipulation of the facts, find out what differences between your local and employer exists.
- 6. Review your employer's arguments** — Prepare to rebut or diminish your employer's position by reviewing all the arguments and evidence you anticipate. Write out a

response that either refutes your employer's position or minimizes its importance.

7. Develop your opening statement — Set forth your opening statement, stating the issue and/or problem. List the facts your local concedes and those facts your employer is likely to concede. Describe what happened by discussing the cast of characters, the scene, the description of job or jobs, and the actions and/or reactions. Be sure to cite your source of authority as well (i.e., contract language).

Discuss what your employer is likely to say by identifying, examining, and evaluating his arguments and facts. Then establish effective answers to what he is likely to say (i.e., How may your employer's arguments hurt the city or your local?, How may their facts hurt relations?, or Why is their evidence inaccurate or improper?).

8. Prepare your witnesses — Inform your witnesses in advance about what questions they will be asked. Be sure to plan your questions

according to what they have to offer. When answering, tell them to be brief, non-technical, and not to argue the case. You can have your witnesses prepare for cross-examination by anticipating and developing re-direct questions. If asked by the arbitrator or your employer's spokesperson, tell your witnesses they are to admit meeting with you in advance to prepare for the hearing.

9. Prepare your visual material — Arrange your exhibits in the order in which you intend to present them. Be sure any charts, models, and mockups you plan to use are large enough to be exhibited and seen by everyone. You should also make five (5) copies of all exhibits (one for yourself, one for the employer, one for the arbitrator, one for the witness, and one for the court recorder, if used).

10. Make a dry run — Use role-playing to set up a mock hearing. Assign the role of the employer spokesperson to an expert "needler". The role of arbitrator

should be assigned to someone who is not on the "inside" of the facts. You may also want to consider using a "jury" for purposes of evaluation and then use this evaluation to correct your presentation.

11. Prepare for communication during the hearing — Even though you may have several persons working on the case, you should plan to have only one spokesperson for the presentation. Arrange for your associates to sit together so you can use the method of passing notes to the spokesperson. However, do not overdo it. Keep in mind that recesses may be requested for consultation. Assign one individual to take a full set of notes for the hearing, and if the proceeding lasts more than one day, evaluate and plan at the end of each day.

12. Prepare your summation — While your summation cannot be completed until after you have heard your employer's arguments during the hearing, you can prepare for it by including all points brought out for your side and responses to

all possible points that may be brought out by your employer. Be sure to repeat the facts of your case.

The presentation procedures for your hearing may vary according to the arbitrator you have chosen. In general though your arbitration hearing should adhere closely to the following ten steps:

1. Pre-hearing briefs — If it

is decided a pre-hearing brief is to be used it should be filed with the arbitrator at least two weeks before your hearing. This gives the arbitrator the opportunity to know at least something about your case before the hearing begins.

2. Procedural inquiries —

The arbitrator will begin the hearing by asking your local and employer if there are any procedural or substantive arbitration questions. If any questions are raised, the arbitrator will make an effort to find a mutually acceptable way of disposing of them before hearing the merits of the grievance.

3. Stipulation of agreed upon facts and definition of the issue — A

stipulation of the agreed upon facts, joint exhibits, invoking rule and definition of the issue is presented to

the arbitrator. If your local and employer jointly stipulates to the contract meaning, both of you are free to spend more time establishing your respective versions of events. This greatly simplifies both your tasks and the arbitrator's.

Considerable care and caution should go into the framing of the issue. From the standpoint of your local, the issue should neither be so broad a claim that your contract and evidence cannot support it, nor so narrowly drawn that you are tied to a very narrow piece of contract language.

4. Establishing the order of presentation — The

arbitrator will outline his method of conducting the hearing. If he fails to state his procedure, or if you do not understand it, or if you differ with him, this is the time to raise questions or objections. Most importantly, make sure you understand when you are supposed to present your case so you do not stumble through without giving the arbitrator all of your evidence and arguments.

5. Opening statements —

Even though procedures may vary arbitrators will generally give both parties an opportunity to make opening statements. In cases where your local brings the grievance, you will typically make the first opening statement. However, in discharge and discipline cases arbitrators should require the employers to begin because they have made the change in status quo by their action against the fire fighter and consequently have the "burden of proof."

6. Presentation of case by initiating party — In

discharge and discipline cases, you may be using the testimony of witnesses to help you present your case. Visual aids are also generally acceptable for presenting your case as long as they have some general pertinence and will help the arbitrator understand the issue better.

7. Presentation of case by opposing party — (See step 6 above.)

8. Closing statements —

Most hearings will end with your local's and employer's closing

statements. The spokesperson for each party is permitted by the arbitrator to sum up his case. Sometimes the order of summation is reversed with the opposing party giving their summation first and the initiating party following.

9. Subsequent opportunity for additional information — The arbitrator may request the return of the two parties to provide additional data or arguments.

10. Post-hearing briefs — At the request of either your local or employer, or on the instruction of the arbitrator, post-hearing briefs may be provided, either by simultaneous presentation within a stated number of days or by exchange and rebuttal. If both parties have utilized the AAA, the post-hearing briefs may be exchanged through that agency.

The most commonly used procedure for beginning an arbitration hearing is an opening statement made by both parties giving their versions of the issues and the facts they propose to demonstrate by proof. As your opening statement is read at the hearing, it gives the arbitrator an orderly picture of your case that will help him to follow the events and perceive the meaning of your evidence and testimony. Simply put, your opening statement introduces the arbitrator to the issue and hopefully gets him to think in your terms rather than your employer's.

Your opening statement should serve several distinct purposes:

- (1) to cite and explain the contract provisions you believe have been violated;
- (2) to describe your local's version of relevant events;
- (3) to describe or explain procedures, hours, and other operations that are peculiar to fire departments as opposed to private sector employees; and
- (4) to explain, if applicable, how external laws

such as state civil service may directly affect the contract language or interpretation.

While your opening statement greatly adds to the arbitrator's understanding of the issues involved, you should understand it is not a piece of evidence. Anything you assert in your opening statement should subsequently be proven.

You should also prepare your opening statement in writing. This allows you to provide the arbitrator with an available reference during the hearing and later when considering his decision. Also, by writing your opening statement down you are providing yourself with the opportunity to carefully think through your case. Courtesy also demands that at the outset of the hearing you provide a copy of your opening statement to your employer as well.

Allow the arbitrator enough time to look at and read the provisions you cite in your opening statement. Keeping in mind the arbitrator has probably never seen your contract, nor heard about

the specific events of your case either, you may want to read the most relevant provisions of your agreement aloud.

It may also happen that the person who is making the opening statement may himself have testimony to give. Under this type of circumstance there is no reason why the statement cannot be treated as testimony, as long as the person who gives it has personal knowledge of what he says and is willing to subject himself to cross-examination concerning his statement.

In some instances, when the employer has the burden of proof you might want to deter your opening statement until after the employer has presented his case and rested.



Evidence is crucial in establishing interpretation of your contract and winning your case. Your contract agreement is a form of evidence, as are written contract proposals, past practices, and testimony of witnesses.

While arbitration hearings are quite informal compared to normal court proceedings and the rules of evidence are not always strictly followed, you should still be prepared to explain why you believe a given piece of evidence is relevant or irrelevant.

KINDS OF EVIDENCE

In addition to direct or substantial evidence, there are three types of evidence generally associated with arbitration proceedings. They are (1) **hearsay**, (2) **parol**, and (3) **circumstantial**.

If a witness testifies to what somebody else told him, he is providing **hearsay** evidence. A witness's testimony carries more weight if he testifies to what he did or saw, rather than what he heard. Generally, hearsay evidence is objected to.

Parol evidence pertains to "word-of-mouth" or verbal agreements. It is only

admissible "for what it is worth", which is usually little or nothing. It will never prevail against a written agreement. In some instances the contract will specifically state that any verbal agreements that conflict with the written agreement are invalid.

Though not as strong as direct evidence, **circumstantial** evidence is acceptable and sometimes decisive in arbitration cases. This type of evidence tries to prove a fact by showing other events that afford a basis for a reasonable inference about the occurrence of the fact. The test is whether such evidence proves "beyond a reasonable doubt" that a worker performed an alleged act.

ARBITRATORS AND EVIDENCE

Unless a statute or special agreement provides for it, an arbitrator is not bound by legal rules of evidence. Generally, most arbitration hearings are much more informal than courtroom proceedings because arbitration grows out of the collective bargaining process and assumes a continuing relationship between the two parties in dispute. The strict application of technical rules of evidence

might make it appear that all the facts are not being taken into account. For these reasons arbitrators are permitted (and sometimes required) to accept or listen to all evidence a party believes to be pertinent. However, arbitrators have the right to rule in the hearing, or in their decision, against the propriety of certain evidence.

In some areas arbitrators do not have the authority to subpoena evidence nor do they have the power to force a witness to testify. Normally, this type of authority is not necessary in arbitration hearings since both parties usually provide what the arbitrator wants and needs. The failure on the part of your local or employer to produce relevant evidence would be taken into account by the arbitrator and become a disadvantage to the party failing to respond.

Keep in mind an arbitrator will *not* be persuaded by emotional pleas. He will need to be persuaded with facts. When using facts, be as certain as you can of their accuracy.

Also, most arbitrators are usually well acquainted with basic economic data. Therefore, try to avoid

presenting elementary facts the arbitrator probably already knows.

PROCEDURAL PROTECTIONS

Most kinds of evidence are admissible in arbitration proceedings, regardless of the weight that will be attached to them by the arbitrator. However, there are certain types of evidence that are not admissible or have protections that accompany their use. Additionally, there are certain procedures that by common-law rules must be followed in arbitration proceedings. The most important of these rules are discussed below:

- **Right to cross-examination.** An arbitrator will not accept evidence if it is submitted only on the condition the other party not be allowed to see it. The two parties not only have a right to see evidence (or exhibits) but also to cross-examine witnesses making allegations. New data submitted in post-hearing briefs can be grounds for demanding a further hearing.
- **Withholding evidence until the hearing.** To prepare a defense or

rebuttal, parties are usually entitled to copies of all exhibits. There is a strong convention against withholding previously known evidence until the hearing. At the very least the opposing party may claim time to consider such new evidence. In some cases, deliberate delay in withholding evidence will seriously damage the case of the party doing so. Sometimes the contract will say the parties must reveal in grievance negotiations any evidence available to them then. The only exception that is generally recognized is where evidence has only recently come to the knowledge of one of the parties.

- **Improperly obtained evidence.** Evidence obtained by illegal or unethical means, such as unauthorized locker searches or searches of personal belongings, may be refused by arbitrators. Another example of improperly obtained evidence is entrapment. Entrapment is a plan that is pursued solely for catching a person in a wrongful act.

- **Offers of compromise.** While it is not common, offers of compromise made in negotiations may be received by arbitrators. If they are accepted they are usually given little weight since they represent normal and desirable efforts to reach a settlement.
- **Outside testimony.** Certain types of cases, such as incentive rate disputes, sometimes are helped by the testimony of outside persons. Generally, arbitrators try to restrict testimony of outsiders (especially “character witnesses”) or get the agreement of the parties to their appearance. However, testimony by doctors or other expert witnesses (who have knowledge of conditions of witnesses or fire department operations) may be considered essential by an arbitrator in certain types of cases.

In most arbitration hearings the facts of your case are presented through your witnesses. The spokesperson for your local is responsible for questioning all witnesses including those from your side under direct examination and those for your employer under cross-examination.

CHOOSING YOUR WITNESSES

Even though you are permitted to prep your witnesses, you can never be 100% positive of what a witness will say once he is on the stand. Therefore, never feel you have to call a witness to help you establish a fact. In some instances it is better not to call a witness than to put a witness on the stand who has a weak grasp of the truth. If you are able to establish a fact without the use of a witness, then do so.

When trying to make a determination on which witnesses to use, you should consider if they will be able to stand up to a tough cross-examination from your employer's spokesperson. If you feel they cannot stand up to a strong line of questioning then you may want to reconsider their use.

You need to also carefully consider whether you want to call representatives of your employer who may know something concerning your contract or events that would prove helpful to your case. If you choose to call this type of witness, you must inform your employer of your intent to do so during your grievance procedure. You must never wait until the day of the hearing to ask your employer to produce a witness with whom you have had no discussion. To do so may elicit testimony you do not want the arbitrator to hear.

Even though you may be the person representing your local and presenting the case, you are allowed to testify as well. However, keep in mind you are subject to the same procedures as any other witness including cross-examination.

PREPARING YOUR WITNESSES

It is essential to prepare your witnesses before an arbitration hearing. It is important to know your witnesses and their stories before putting them on the stand. The arbitrator and your employer also assume you have talked with your witnesses

before calling them for direct examination.

Each of the following guidelines should be considered when preparing your witnesses for testimony:

- Never tell your witnesses what to say. However, it is appropriate to guide them as to what they will say and go over questions with them and know the general nature of their responses.
- Warn your witnesses not to argue with the arbitrator or your employer's spokesperson during the hearing. Urge them to stay calm and answer all questions honestly and to the best of their abilities.
- Have another representative from your local ask your witnesses questions your employer may ask them under cross-examination. This should be done in a tough fashion so they know what to expect.
- When witnesses testify they are not only heard by the arbitrator, but seen by him as well. Their facial expressions and physical manner-

isms may have an impact on the arbitrator and his perception of the worth of the testimony. This is simple human nature. Therefore it is best to consider the probable impact of the witnesses' personality (as revealed by their physical appearances and conduct) when preparing your witnesses for a hearing.

QUESTIONING A WITNESS

DIRECT EXAMINATION

Direct examination of witnesses is that part of their testimony that is brought out by questions asked of them by the party who called them as witnesses for their side.

When you call your first witness for direct examination you are promptly faced with a question of tactics. You must decide whether to ask the witness to tell his story in his own words, in narrative fashion, or whether you should ask the witness specific questions to which there must be specific answers.

The decision on this tactical question will most often be determined by the character of the wit-

ness himself. Generally, if he is a person who is able to remember and recount an incident completely, it may be best to let him give his testimony in his own words in narrative fashion. On the other hand, if he is a person not accustomed to speaking in public and if he lacks the ability to express himself easily, it may be better to bring out his story by means of specific questions and answers.

It is suggested that each of the following guidelines be observed when directly examining any person who is testifying on behalf of your local.

- Before questioning the witness, you should introduce him by having him state his name, rank, and position, how long he has been with the department, his union position, and how long he has held his position, etc. Your introduction should also include any special expertise the witness may possess.
- On direct examination you are usually not allowed to lead your witnesses. (*See below for additional information on leading questions.*) The degree of

how strict this rule is applied varies with each arbitration and situation.

- There should never be any guess work in questions asked of your witnesses. If you have properly prepared your case, all questions and answers should be established and understood before the hearing.
- You should have your witnesses describe their observations instead of expressing their opinions.

LEADING QUESTIONS

A leading question is one in which the person questioning a witness suggests the answer he wants to hear by the form of question he uses. Leading questions make it appear you are giving testimony yourself (in the form of a question), leaving it to the witness to merely respond "yes" or "no." For example, "You only saw Bill arrive late for one of his shifts, didn't you?" is a leading question.

When leading questions about a basic matter are asked of a witness on direct examination, they open the door to valid

objections by the opposing party. It is generally assumed the questioner, knowing the witness's story, is attempting to present the answers in such a way as to distort the facts desired by the questioner.

While leading questions are usually objected to by both parties, they can still be valuable and time-saving and not objectionable when asked about preliminary matters or about matters that are not in dispute or when asked during cross-examination.

To avoid leading your witness, ask straightforward questions and encourage your witness to answer each question in his own words. However, you can (and often should) use leading questions when cross-examining your employer's witnesses. This is because it is your job to expose any contradictions in their evidence.

CROSS-EXAMINATION

Cross-examination allows the opposing party to check or discredit by a series of questions the answers given by a witness under direct examination. Any witness who has been put on the stand for direct examination may be cross-examined.

The penalty usually imposed upon a party whose witnesses refuse to answer on cross-examination is that of striking out all the testimony given by the witnesses on direct examination.

As the representative of your local, you need to anticipate what may be asked by the representative of your employer during cross-examination and prepare your witnesses for the same. You should always pay close attention to the questions being asked of your witnesses on cross-examination. As an advocate of your local it is your responsibility to protect your witnesses.

Sometimes your employer's spokesperson will demand that your witnesses answer a question either "yes" or "no." A witness confronted with such a demand should state that in his judgment the question cannot be answered "yes" or "no" and it requires a certain amount of elaboration. Also, your witnesses should never volunteer information during cross-examination. All that is required is they answer the questions truthfully.

When being cross-examined, your witnesses

should take a sufficient amount of time to clarify their thoughts before answering a question. Many people tend to respond instantly to a question before considering what direction the aspects of the question may go. This can lead to making regrettable statements. Your employer's spokesperson can then use these statements to attempt to destroy the credibility of your witnesses. This is a part of an arbitration hearing and should not be overlooked during cross-examination.

WHEN AND HOW TO CROSS-EXAMINE

Cross-examination of a witness is an art form. It can effectively undo a witness's testimony if used knowledgeably and carefully. However, if executed poorly, cross-examination can have the effect of more strongly confirming the witness's story or putting the witness in a sympathetic light. It may even antagonize the arbitrator or have a number of other adverse effects.

You do not have to cross-examine every witness used by your employer. If a witness has said nothing injurious there is no point in cross-examining him

unless you believe there is particularly favorable information to be elicited from him. You should always ask yourself these questions before making a decision on whether to cross-examine a witness or not:

- Did the witness's testimony hurt our local's case?
- Was the witness credible or believable?
- Was his testimony important?
- What do I reasonably expect to accomplish by cross-examining him?

If after asking yourself these questions you make a decision to cross-examine a witness, some guidelines you will want to follow include:

- Never ask a question on cross-examination unless you are reasonably certain what answer you will receive to your question.
- Never ask cross-examination questions at random. Every question you ask should be asked with some purpose in mind. As the cross-examiner, you should know whether you are building the witness up to a serious

contradiction, whether you are attempting to show that the witness was unfamiliar with the details of the matter, etc.

- Never cross-examine a witness over his direct testimony in a manner that will permit him to merely restate his direct testimony. When you do this you only reinforce the witness's story.
- Keep careful notes of the direct testimony of the witness and examine them only for bringing out omissions, contradictions, falsehoods, or other elements that will induce the arbitrator to discount the direct testimony of the witness.
- Consider your employer's choice of witnesses before the hearing by requesting a list ahead of time. Be prepared to exchange your list of witnesses for theirs unless you believe your employer may try to intimidate your witnesses.
- Anticipate what your employer's witnesses will say and be prepared to discredit their testimonies. The best

way to accomplish this is to find contradictions or inconsistencies in individual testimony or between the statements of different witnesses. The simplest way to demonstrate a witness's lack of credibility to the arbitrator is by pointing out that a witness has contradicted himself in matters of time, place, or personnel.³

- Do not plan to attack a witness's background, character, lifestyle, or intelligence unless it has some type of clear bearing on your case. Embarrassing a witness for the sake of his embarrassment makes you look small in the eyes of most arbitrators.
- The purpose of examining a witness on cross-

³ *Finding inconsistencies in testimony and then exploiting them requires experience as well as a sensitive ear and a quick mind. If your local anticipates major questions of credibility within your employer's testimony or between your employer and your local's testimony, have a union representative assist your local's spokesperson in keeping track of and noting inconsistencies. However, the spokesperson for your local should always remain the same.*

examination is to elicit statements from the witness in response to questions. Your purpose is not to provide yourself with an opportunity to argue with the witness about his answers or any other issues.

Part of your cross-examination process may also include impeachment of a witness's testimony. Impeachment of a witness involves showing that his story is not to be trusted. There are several lines of questioning by which the testimony of a witness may be impeached, including:

- showing on prior occasions the witness made statements inconsistent with his present testimony;
- showing the witness is biased;
- showing the witness has a reputation for untruthfulness;
- showing the witness has defective ability to observe, remember, or recount matters testified about; and
- showing the witness is guilty of specific error, that is, proof by other witnesses that material facts are different from those testified to by the witness under attack.

Finally, keep in mind that as an advocate for your local, your spokesperson has much more latitude in cross-examination because he is free to ask leading questions. As a result, your spokesperson can sometimes lead a hostile witness into agreeing with or at least give the appearance that he may be agreeing with him. However, never try to make your case on your employer's witnesses. You must establish and win your case with your witnesses and their testimonies.

REDIRECT AND RECROSS-EXAMINATION

Once the cross-examination of a witness is completed, the party who presented the witness is again given an opportunity to ask direct questions of the witness. Generally, redirect examination is limited to counter the effect of cross-examination and on occasion to introduce something that was forgotten or omitted on the first examination.

When redirect examination is concluded, the opposing party has the opportunity to recross-examine the witness. However, this recross-

examination is restricted to those matters testified to on redirect. In arbitration cases it is not unusual for the parties to continue the process of redirect and recross-examination several times.

OBJECTIONS

There may be times during an arbitration hearing when you will want to object to a question raised by your employer's spokesperson. When this type of occasion arises you must act swiftly in making your objection to the question. In most instances the impact of an objection to a question or a line of questions is lost if the objection is made too late.

Any objection that is raised should be made by the person who is presenting the case. This means your local's spokesperson must always be attentive to the questions and answers that arise during direct and cross-examination.

When an objection is raised, the arbitrator generally asks that the grounds of the objection be stated. It is at this point your local's spokesperson must be able to state a reason or reasons for leading him to the opinion that

the arbitrator should exclude the question from testimony. Keep in mind that “because a piece of evidence is damaging to my case” is not a valid argument for raising an objection.

Either party raising an objection is entitled to an answer from the arbitrator. An experienced arbitrator will usually indicate how he will handle the objection. He may “sustain” the objection, which means the witness may not answer the question, or he may “overrule” the objection. If one of your objections is overruled, it should be accepted gracefully.

You should always adamantly object to any effort by your employer to introduce evidence showing you offered to “compromise” the case before the hearing. These types of offers should never be allowed into evidence because they may prejudice the arbitrator.

QUESTIONS BY THE ARBITRATOR

In some instances an arbitrator may address questions to a witness. This is permissible and sometimes necessary even though it may appear this is going beyond the scope

of the arbitrator’s function. If asked questions by the arbitrator, your witnesses should be reminded to answer the questions the same as any other questions they may have answered during the hearing — truthfully and to the best of their knowledge.

SWEARING A WITNESS

The requirement of a witness taking an oath before testifying varies with each arbitrator. Statutes may authorize an arbitrator to administer an oath. However, many arbitration cases go on without having the witnesses under oath. In cases in which the truthfulness of a witness is an issue, most arbitrators make it clear to both parties they will disregard any testimony they believe to be untrue, whether under oath or not.

HEARSAY

Hearsay is evidence based not on a witness’s personal knowledge but on matters told to him by another individual. Any statements made by a witness concerning facts of which he does not have firsthand knowledge (hearsay), are subject to objection and may be admissible only if they

qualify as exceptions to the rule requiring personal knowledge. When a witness testifies to a fact that can be perceived by the senses, the witness is required to have observed the fact. In the majority of cases firsthand knowledge is generally required.

SEQUESTERING A WITNESS

There may be instances when your local or employer may request the sequestering of a witness. The purpose of this is to insure that one witness does not hear the testimony of another and then use this information to alter his testimony. Your local should not fear the sequestering of any of its witnesses as long as they are reminded to tell the truth to the best of their knowledge.

SIGNED STATEMENTS

Even if they admit them into evidence, arbitrators will usually give little weight to signed statements (affidavits) concerning the case made by persons not present at the hearing. Not much is added to the value of the statement by the fact it was made under oath (an affidavit). Whether under oath or not, the opposing party does not have an

opportunity to cross-examine the person who made the statement, nor can the arbitrator observe him as he testifies both on direct and cross-examination.

EXPERT WITNESSES

If your local calls a witness who is giving an opinion based on personal expertise, a foundation for that expertise must be laid. The expert should first be asked questions that establish his qualifications as an expert. He should then be permitted to tell the arbitrator what examinations, tests, inspections, etc., he has made. Finally, he should be asked his opinion. In some instances, the expert witness may also be asked hypothetical questions that have the effect of disclosing his opinion. This opinion then serves as a recognized piece of evidence. As with any other witness, an expert witness is subject to cross-examination.

ARBITRATION ON AGREED STATEMENT OF FACTS

Sometimes an arbitration is held in which no witnesses appear. This can occur when your local and employer agrees on the facts as well as in

cases calling for contract interpretation. Your local and employer submits to the arbitrator a single agreed upon statement of facts (in writing) called a stipulation. The arbitration procedure then consists of arguments based on the agreed upon statement of facts.

WITNESS GUIDELINES

The following is a list of guidelines an arbitration witness should observe before testifying at an arbitration hearing:

1. Dress sensibly for the hearing. Remember, when you testify you are not only heard by the arbitrator but seen by him as well.
2. Tell the truth in respect to facts and tell it as clearly and briefly as you can.
3. Speak clearly and distinctly. Be sure the arbitrator can hear you as well as understand you.
4. Listen to each question carefully so that you will not try to answer before you know what has been asked. If you do not understand a question, ask that it be clarified for you.
5. Never lose your temper or show personal feelings. You are at the hearing to give the arbitrator the facts, not emotional pressure.
6. Don't be a "smart aleck." If the questioner "gets smart with you," you will do your local the most good by remaining cool, clear, calm, and in self-control.
7. Never let the questioner on either side lead you into statements of facts of which you do not have full knowledge. Tell only the facts you do know. Don't be led into stating your inferences from the facts. The arbitrator is required to draw his own inferences.
8. Don't volunteer information. Simply answer the questions.
9. Answer truthfully if you are asked if you have discussed your testimony with your local's spokesperson. You are expected, by the arbitrator and your employer, to discuss your testimony before the hearing. This is the only proper way to decide whether to offer you as a witness.
10. If you are asked if you are being paid for the time you are acting as a witness, tell the truth. Such conduct is sound and proper but it can be made to seem reprehensible if falsely denied.
11. Be polite if your employer's spokesperson indicates he wants time to state an objection. Keep still until he has spoken. To blurt out an answer in these circumstances is to invite suspicion of your good faith and reliability as a witness.
12. Don't try to testify to facts on a secondhand or "hearsay" basis. Be patient and let the spokesperson for your local lay a proper foundation for it if testimony expected of you is within an exception to the hearsay rule. When you say, "I know John hit Bill first because Jim said so," you are not the witness. Jim is. He should be called.
13. Never argue with the person questioning you. It makes no difference which side he is on. Answer the questions and then be silent. Give more facts or say "no" if he asks, "Is there anything you would like to add?" Don't offer your inferences from the facts or opinions. This is not part of your responsibilities as a witness.
14. If you don't know the answer to a question when you are sure you understand it, say "I don't know." No other answer will do as well. Too many witnesses try to guess the answers they don't know. They involve themselves in rambling speculations and sometimes lose a good case for their local.
15. There are times when facts, once well-known to individuals, will partly or completely pass from their memories. Don't hesitate to say "I don't remember," if that is the truth. In many cases regularly kept records or other memoranda may be used to supplement or revive the memory. The spokesperson for your side should be ready with these when they can be used.
16. Don't write out a full statement of your expected testimony and plan to read it. It

never sounds convincing that way.

17. Never let a cross-examiner get you to make a “yes” or “no” answer unless it is correct. If you are sure the answer must be qualified, state your reply accordingly and respectfully, but firmly indicate you do not believe “yes” or “no” will be a truthful statement.

18. Never talk to the opposing party before the hearing about your intended testimony. This forewarns them and may, with or without justification, open you to the charge that as a witness you have contradicted the statements you made in any pre-hearing conversations.

19. Be prompt in arriving at the beginning of the hearing and after each recess. If you are working and your shift ends before you are called to testify don’t leave until you are assured you will not be needed as a witness that day.

Of course it is up to the arbitrator to decide what weight he will give to your piece of testimony and to what extent he believes

you. In making such a determination, arbitrators will take into account the following factors:

- whether your statements “ring true”;
- your conduct on the stand;
- whether you speak from firsthand knowledge or hearsay;
- your experience in the matter on which you are testifying;
- inconsistencies in your testimony; and
- your past record or personality.

Not one of these factors by themselves, but all of them taken together determine how much weight or credibility an arbitrator will give to your testimony.



One sound reason for using exhibits during an arbitration hearing is complex subjects can be made more readily understandable by a visual approach rather than a verbal approach. People tend to more readily understand what they see than what they hear. For this reason, exhibits become essential in establishing your facts and proving your case and should always be carefully selected.

When presenting your exhibits, you should explain them through your witnesses. These witnesses should be prepared to thoroughly explain the exhibit and respond to cross-examination concerning it. Often the weight given to your exhibits depends on when and through whom they are presented. For example, it might be effective for you to present certain exhibits through opposing or hostile witnesses.

When selecting and preparing your exhibits you should make sure:

- (1) they suggest a specific and relevant point or establish a statement as fact;

- (2) they are not voluminous in nature; and
- (3) they can be supported by testimony.

Because it may be necessary to refer to your exhibits during the hearing and also in post-hearing briefs, you should always prepare adequate copies of each exhibit for the arbitrator as well as your employer.

If you are planning to use pictures and/or photographs among your exhibits, make sure they are clear and show whatever point the witness is testifying to at the time the exhibit is introduced.

When using graphs and charts it is best to remember the most easily seen combination of color is black on white. The next is dark red or dark green on white. You should also be sure what you show can be easily and completely explained in a very few minutes. It shouldn't be necessary to devote a large portion of time to explaining the significance of lines on a chart.

Documents also play an important part in the proof of your case and can be used as exhibits as well. Your collective bargaining agreement describes

most of the procedures and rights of your local and employer as they pertain to your grievance procedure. In most cases this is your strongest piece of evidence.

Other documents, such as the written grievance or records of negotiation meetings, may be pertinent to the issue before the arbitrator too. All such documents should be introduced as part of the record of the hearing.

Certain documents, such as your collective bargaining agreement and the grievance should be introduced as a joint exhibit. Others should be labeled with the name of the party that introduces them.

If you decide to introduce documents as exhibits, make certain that on each document the imprint is clear and the typeface is large enough for those who read the documents to do so easily. Keep the documents as brief as possible as well. If an arbitrator gets voluminous documentation it can create a barrier to your case because of the amount of material presented.

As a practical matter, when preparing your exhibits try to put yourself in the place of the individual — namely the arbitrator — who is going to make some effort to comprehend what has been placed on the record. Also apply the simple test of whether a proposed exhibit will be helpful in the comprehension of testimony.



A brief is a written statement that supports your position and is submitted to the arbitrator either before and/or after the hearing. Briefs can be expensive to prepare as well as time-consuming to read. Therefore it is suggested that the use of briefs only be encouraged when necessary for the arbitrator's understanding of your case.

PRE-HEARING BRIEFS

A pre-hearing brief is a written opening statement and when used serves three general purposes, including:

- (1) a document to be submitted in advance to the arbitrator, providing him with an overview of your case;
- (2) a means of narrating your case as well as a self-reminder of all the elements necessary in it; and
- (3) a speech prompter from which to read all or portions of your case in making either your preliminary statement or your summation, or both.

If it is decided that a pre-hearing brief will be used, it should be filed with the

arbitrator at least two weeks before the hearing. This gives the arbitrator the opportunity to know at least something about your case before the hearing begins.

Your pre-hearing brief should simply recount the factual statements upon which your evidence will be based. It should not go into the substance of your testimony or the arguments you plan to use to sustain your case.

When constructing your pre-hearing brief be sure it contains each of the following elements: (1) **form**, (2) **style**, and (3) **facts**.

The **form** of any good pre-hearing brief includes each of the following attributes:

- a statement of the issue;
- background of the issue;
- definitions and descriptions of terms, jobs, and place;
- citations of pertinent contract clauses;
- recitation of events from your point of view; and
- your argument.

The **style** of any good pre-hearing brief includes

each of the following attributes:

- short sentences;
- simple words; and
- non-legal terminology.

The **facts** of any good pre-hearing brief include each of the following attributes:

- what happened;
- who saw it happen;
- when it happened;
- where it happened;
- its relation to the past; and
- rights based on your contract, practices, and general standards of fairness.

Each of the facts stated in your pre-hearing brief should include references to their evidence at the hearing. This is because your facts support your position and refute your employer's arguments.

A final note on pre-hearing briefs concerns one of its limitations. In some instances your pre-hearing brief may become too rigid a statement of your case. If so, this will not allow you to adapt for unexpected angles that may arise during the hearing.

POST-HEARING BRIEFS

Other than the fact that a post-hearing brief may be desirable on your part as a way to additionally educate the arbitrator or to clarify aspects of your case, there really is very little justification for submitting a post-hearing brief. If one is used though, a copy should simultaneously be mailed to the arbitrator and your employer or exchanged through the AAA if you have used that agency in the case.

The only instances when you should consider submitting a post-hearing brief are:

- when your employer wants to submit one;
- when there is a disagreement on facts or a conflict of testimony;
- when your case is complex or technical;
- when the arbitrator is inexperienced;
- when the arbitrator's questions show confusion or when you feel he has not grasped the case;
- when there is no opening statement; and/or
- when you need more time to prepare a strong argument.

In most arbitration hearings, your local may feel pressured to submit a post-hearing brief, particularly if your employer does so. With some justification, many locals fear an arbitrator may view a failure to do so as an indication their union thinks its case lacks merit. In a situation such as this it is up to you to decide how not submitting a post-hearing brief will affect the outcome of your case.

The best justification for using a post-hearing brief is when your case may be so complex both your local and employer needs additional time to fully prepare their arguments after listening to all the evidence presented during the hearing.

If you decide to submit a post-hearing brief, it should include:

- a version of what you believe the issue to be;
- the facts, support for contested facts, and references to testimony (never include new evidence);
- quotations of relevant provisions of your contract agreement;
- your arguments, listed concisely;
- rebuttal of your employer's arguments;

- a repeat of any valid objections you raised during the hearing;
- a citation of other cases⁴; and
- a requested remedy (argue the remedy and any possible alternatives.)

Some arbitrators may wave an oral summation in place of your briefs. However, an oral argument will give you a better chance to know your employer's contentions and a chance for you to impress the arbitrator.

In some cases the entire arbitration hearing is waived and in its place briefs are submitted. This type of situation includes cases where there is no disagreement on the facts, where there is no need for witnesses, and where the case is simply one of contract interpretation.

⁴ Your case may appear weak if you cite only a few other cases in your post-hearing brief. However, if you cite cases that are irrelevant, they may give an impression of "grasping at straws." It is important that you find the right balance.

Proof in arbitration cases is generally a matter of common sense. There does not exist any accepted standard of whom must prove what since it may differ depending on the nature of the issue, the contract language, or the practices of the local and employer.

In general there are three degrees of proof that are commonly used concerning arbitration cases as well as to courts of law.

They include:

1. **“Beyond a Reasonable Doubt”** – Fully satisfied, entirely convinced, and having moral certainty.
2. **“Fair Preponderance”** – Sufficient evidence exists to create a conviction that the party upon who is the burden has established its case.
3. **“Clear and Convincing Evidence”** – A degree of certainty somewhat less than “beyond a reasonable doubt”, but more than a “preponderance.”

With the exception of disciplinary and discharge cases, the order in which evidence is presented and a case is proved is not necessarily that important.

This is because both parties will eventually have the opportunity to present all of their evidence. However, the party initiating the arbitration case normally presents its evidence (or “goes forward”) first. This procedure is generally reversed in disciplinary cases. The rule of innocent until proven guilty should always apply when the employer has taken any disciplinary action against a fire fighter.

“BURDEN OF PROOF”

“Burden of proof” is the duty of proving a disputed assertion or charge made against an individual or party. For example, if your local files a grievance on behalf of a fire fighter who has been disciplined, the “burden of proof” falls upon your employer to show that the disciplinary action taken was appropriate.

In most instances arbitrators will decide cases without ever stating who has the “burden of proof”. An arbitrator will normally have in his own mind an idea of who must prove what in a case and as the case progresses will make up his mind about the amount of proof he will need to satisfy him.

In general, the “burden of proof” should not be a matter of great concern to your local. In all instances you should be fully prepared to support your arguments with evidence, testimony, and sound reasoning.

DISCIPLINARY AND DISCHARGE CASES

Cases that involve disciplinary action and discharge are more easily defined as to who has the “burden of proof.” The “burden of proof” and the amount of proof an arbitrator will require in such cases depends on your contract language, the seriousness of the offense and how your local and employer has treated such offenses in the past.

If your contract has a broad employer’s rights clause and long and inclusive causes for discharge, the “burden of proof” may rest with your local. The “burden of proof” rests on your employer if your contract states a fire fighter may be discharged only for “just and sufficient cause”. Most arbitrators will make the employer prove its case clearly since discharge is the ultimate penalty an employer can impose on a fire fighter. Sometimes they will

make the employer do this even “beyond a reasonable doubt” or with “clear and convincing evidence.”

There are two areas of proof arbitrators consider in the arbitration of disciplinary and discharge cases. The first is the proof of wrong doing and the second, if guilt of wrong doing is established, concerns the question of whether the punishment assessed by the employer should be upheld or modified. In making such assessments some of the factors an arbitrator considers are:

- due process and procedural requirements;
 - lax enforcement of rules;
 - unequal or discriminatory treatment;
 - grievant’s past record and length of service;
 - knowledge of rules and warnings;
 - progressive discipline;
 - the employer’s role and fault; and
 - mitigating or extenuating circumstances.
-
- the nature or seriousness of the offense;
 - any previous penalties imposed by the employer;

When both sides have completed their presentations it is a common practice for both of them to summarize their cases to the arbitrator in their closing statements. In your closing statement, you should review any testimony and other evidence that supports your arguments. This review of your evidence should be accompanied or followed by persuasive reasoning to lead the arbitrator to accept the conclusion you are seeking.

In some hearings the two parties choose not to present their closing statements orally preferring to make their arguments in a written brief. In most instances both parties agree to follow the same procedure. Both will either argue orally or both will write briefs. Some parties may even do both if they desire.



The main purpose of a remedy or award is to assist your local and employer by resolving the specific dispute and clarifying the agreement for future cases. Therefore, when another grievance arises on the same matter, your local and employer should be able to resolve the dispute long before it reaches the final step of the grievance procedure.

Before the hearing you should spend some time defining exactly what it is your local feels will settle the dispute. In most instances the remedy requested is one in which the individual or group of fire fighters will recover any loss they may have incurred. This type of remedy is known as a “make whole” remedy.

The standard advice to most locals requesting an award is to ask for money plus any necessary corrective action such as reinstatement or promotion. Money is generally asked for because it is assumed any behavior that costs money will be corrected and not repeated. If employers only had to correct their actions at no cost they would have little or no incentive to change their practices.

Your local should always make an effort to obtain a clear and exact remedy from the arbitrator by being prepared to indicate to the arbitrator the losses your local anticipates. If your local and employer is unable to agree on a remedy then you should make sure the arbitrator retains jurisdiction to subsequently award a precise remedy.

An additional advantage of having a clearly defined remedy is of informing the grievant(s) of what they can expect if your local completely prevails. It is always best to make clear to the grievant(s) the possible outcomes in any given case and not to encourage false expectations. It does not do your local any good if its membership still feels aggrieved after they receive an award.

Under the AAA and FMCS guidelines, an arbitrator has thirty (30) days to render his decision. These thirty days are measured from the date of the hearing or the date of receipt of the last communication (transcript or brief). Any “time extensions” made to one party should be made to the opposing party as well. If your local feels there has been an unwarranted

delay in the rendering of an award it should complain to the appointing agency and the arbitrator after it receives its award. This is so your grievant(s) does not feel his case has been prejudiced by complaining.

The IAFF advises all of its locals to carefully read each word of every decision they receive, not just the outcome. This is so your local can be fully familiar with the specific award’s application to the given grievance and learn how arbitrators reason and on what they base their decisions.

You may also want to consider keeping a file of awards according to subject matter. If your local has enough awards to justify the clerical work, you may also want to consider classifying your awards by arbitrator. The first set of records enables your local to easily identify all awards that affect various provisions of your contract. The latter record, if there is sufficient volume, permits your local to become familiar with a given arbitrator’s reasoning, prejudices, and biases.



Under the National Labor Relations Act your local is legally obligated to represent all of its fire fighters undiscriminatingly and fairly. This means your local must handle each grievance on its own merits and must be sure when it drops a grievance it is not because of animosity towards the grievant(s).⁵

For your local to avoid violating its “duty of fair representation” its fire fighter members must be kept informed of the status of their grievances. Sometimes a fair representation suit is filed because a member does not know about his local’s efforts on his behalf. When a grievance is dropped, the member should be told of his local’s position and the reasons for making the decision. The member should also be given the opportunity by his local to present any additional evidence or arguments he may have in his behalf. By doing this the local can avoid being accused of treating a grievance in a superficial manner.

Your local is not required to process every grievance its members believe shows that contract rights have been violated. Your

contract language may be such that the grievance is obviously without merit or a prior grievance may have been settled which answers the same issue. However unless it is a clear-cut instance such as one of these, the best thing to do is file the grievance for the member, investigate the facts, and then withdraw the grievance with notice to the member if it lacks merit.

To avoid violating its “duty of fair representation” your local should be aware of the following facts:

- all members of your local are entitled to the same treatment and cannot be treated differently because of internal political considerations;
- your local cannot charge a fee to a non-union fire fighter for

⁵Some IAFF locals that represent state and municipal government workers are not subject to the National Labor Relations Act. These locals should consult their state statutes or PERB decisions for any requirements concerning “duty of fair representation.” Federal locals are required under section 7114(a)(1) of Title 5, United States Code, to represent all their members without discrimination.

processing his grievance if the other bargaining unit members are not subject to the same charge; and

- if your local is found by a court to have violated its “duty of fair representation” in processing a grievance, the member is entitled only to recover the actual losses caused by the union’s violation of its duty.

Obviously it is to the advantage of your local to avoid any possibility of being sued for breach of “duty of fair representation.” Court costs are substantial even if your union wins. Of course there is no single way to prevent a member from filing a suit but there are things that can be done which can reduce this possibility. For example:

- All officers of your local should know what standards exist for fair representation and the duty it imposes. Your local should also make certain all of its newly elected or appointed officials receive thorough training and instruction in processing grievances and “duty of fair representation.”

- All officers of your local should be aware of the time limits that exist in your contract concerning the filing of a grievance and following the grievance through the different steps of the grievance procedure. In many of the more recent court cases involving the violation of “duty of fair representation” the union has lost its case because of negligence to act in a timely fashion.
- Good records should be kept of every grievance filed. This is because a majority of “duty of fair representation” suits filed involves claims that the union did not act properly concerning a member’s grievance. The name of the member who filed the grievance, the date it was filed, and any documents relating to the grievance should be included in these records. Each file should also contain written notes of every action taken at each step of the grievance procedure. For example, if a telephone call is made on behalf of the grievant, a note should be placed in the file with the date of the call, who was spoken to and a summary of what was said.
- Your grievance procedure should include a requirement regarding a grievant’s right to file a written appeal to your local’s decision not to process a grievance further. This requirement should clearly state the amount of time in which the grievant may file the appeal as well as the address to which it must be sent.
- A notification by your local of its decision not to process a grievance further should be mailed to the grievant with a return receipt requested so your local will have proof the notice was received by the member. This notice should inform the member of your local’s decision and of the fire fighter’s right to appeal.

A major source of difficulty with arbitration for public employees is the cost of the process. Arbitrators are paid on a per diem basis and therefore receive a fee for each day they work on a case. Your local may also have an added expense of an attorney. If so, the charges to your local for his services will be based on an hourly rate. Other common expenses include transcripts and briefs. A hearing that is conducted with the full scope of these items can become a very expensive venture.

In the early 70's, in response to the concern of parties over rising costs and delays in grievance arbitration, the Labor-Management Committee of the AAA recommended the establishment of expedited procedures under which a case could be scheduled promptly and an award rendered on or before five days after the hearing. In return for giving up certain features of traditional labor arbitration, such as transcripts, briefs, and extensive opinions, the opposing parties use simplified procedures, receive quick decisions and realize certain cost savings.

These expedited rules can provide your local with a cost effective procedure for use in appropriate cases. Most leading arbitrators indicate a willingness to offer their services under these rules, and the AAA makes every effort to assign the best possible arbitrators with early available hearing dates. Since the establishment of these procedures, numerous parties have taken advantage of them. Your local may want to consider using this type of proceeding to save on the costs of its arbitration hearing.

If your local chooses not to use these expedited rules there are additional techniques it can use to aid in keeping down the expenses of a case. They include:

- **Making sure the arbitration hearing is prompt** — A hidden cost in grievance arbitration is the time lost to your employer, your union representative, and any fire fighter who may be involved in the hearing. This type of cost can be reduced by expediting the arbitration process. Even when financial risk is not involved, a quick decision is usually better because "stringing"

a fire fighter along is bad for relations.

- **Not ordering a transcript unless it is necessary** — Court reporting is expensive and a transcript will delay your local's award. If a record is used, the arbitrator cannot begin writing his decision until he has read the transcript. Most arbitrators feel obliged to read the entire transcript and this means study time at the per diem rate. In some instances, a transcript is worth what it costs, but generally it serves only to double the total expenses of arbitration.
- **Questioning the arbitrator's fee if it is thought to be too high** — Every arbitrator should receive a fair fee. Under AAA procedures, you are told the arbitrator's per diem rate before his appointment. By reducing travel time, the number of hearings, and study time, you have some control over the amount of the arbitrator's fee. When necessary, you can ask the AAA to speak up about what you might consider an unreasonably high fee.

- **Clarifying the issues before the first hearing** — Do not spend hours of expensive hearing-room time establishing facts that aren't in dispute. If you come to the hearing prepared with details of record such as names, seniority dates, amounts of money involved, etc., it not only cuts the length of the hearing, but shortens the arbitrator's time as well. A badly organized presentation serves no good purpose.
- **Eliminating extremely long opinions** — Your local and employer has the option to ask the AAA to request the arbitrator to simplify or eliminate his opinion. In a few cases it may be appropriate for the arbitrator to handwrite his award and a brief opinion at the close of the hearing, delivering it to your local and employer at once. If you don't need an opinion as a guideline for the future, consider the possibility of eliminating it. The arbitrator's bill will be smaller and the dispute may be resolved more quickly.
- **Avoiding unnecessary citations** — When the opposing parties indulge in needless citations they only compel the arbitrator to verify the information himself. This takes study time. Citations of awards by other arbitrators may be necessary in some situations, however if you use these make sure you are accurate and above all, selective.
- **Selecting a labor arbitrator who is an experienced professional** — Exercise restraint in submitting arguments about procedural matters. Generally, a simple but accurate presentation of your facts and arguments will enable a sophisticated arbitrator to make a decision.
- **Never breaking a date with the arbitrator** — When you set a hearing date, be sure you keep it. Never ask for postponements unless absolutely necessary. Some arbitrators charge for postponements that are received on short notice.
- **Finding out about an arbitrator before he is selected** — A person who has never arbitrated your local's particular dispute may have to be educated at your expense. You can find out about an arbitrator's experience by looking him up in the Summary of Labor Arbitration Awards and other reporting services. It is also advisable to contact other locals in your area who may have used the arbitrator in the past. This type of research will give you a better idea of an arbitrator's qualifications.
- **Using the resources of the IAFF** — There are a variety of ways for keeping arbitration costs at a minimum. The easiest way to do so is to use the resources and staff of the IAFF, including your District Vice President and Staff Representatives. Of course, a majority of your costs can be cut by handling many of these matters yourself.





Ad Hoc Arbitrator - An arbitrator who is jointly selected by the opposing parties to serve on one case. Many employers and unions believe that decisions are more likely to be fair and equitable if the arbitrator is chosen on a case by case basis. If both parties are satisfied with the arbitrator's ability, they may select him again for another case. The ad hoc system enables the parties to retain their freedom of choice.

Adjournment of Hearing - The arbitrator has the power to postpone a hearing until another time at the request of either party. If the arbitrator unreasonably refuses to postpone a hearing, a losing party may have grounds for vacating the award.

Administrative Agency - An impartial private or governmental agency that maintains panels of labor arbitrators. Administrative and appointing services can be obtained by an appropriate reference to the agency in the collective bargaining contract.

Affidavit - A statement in writing made upon oath, before a notary public or other authorized officer. Such statements are sometimes submitted and

received as evidence in labor arbitration hearings. However, most arbitrators will give little weight to affidavits because the opposing party does not have the opportunity to cross-examine the witness.

American Arbitration Association (AAA) - A private, nonprofit organization established to promote arbitration as a method of settling labor disputes. The AAA is one of several services that provides lists of qualified arbitrators to employee organizations and employers on request, as well as rules of procedure for the conduct of arbitration.

Appeal - A proceeding for obtaining a review of a decision. In arbitration the right to an appeal is seldom provided.

Appointment of Arbitrators - Arbitrators are chosen by the opposing parties in accordance with the procedures designated in the arbitration clause in their collective bargaining agreement. Most provisions call for the appointment of a single arbitrator.

Arbitration - A method of settling a labor-management dispute by having a

neutral third party or panel hold a formal hearing, take testimony, and render an award. The decision may or may not be binding upon the parties. The two major types of labor arbitration are grievance arbitration and interest arbitration.

Arbitration Clause - A provision in the collective bargaining agreement requiring the parties to submit unresolved grievances to arbitration. It may be broad enough to include "any dispute" or it may be confined by the parties to specific areas or issues.

Arbitrator - A neutral third party to whom disputing parties submit their differences for a decision.

Arbitrator's Authority - The power of an arbitrator to hear and determine a dispute is derived from law and from the agreement of the parties. The extent of authority can be determined by examining the arbitration agreement.

Award - The decision of an arbitrator in a dispute. The arbitrator's award is based upon the testimony and arguments of both parties. In labor arbitration, the arbitrator's reasons are generally

expressed in the form of a written opinion which accompanies the award.

Bargaining Unit - A group of employees that the employer has recognized and/or a state or federal administrative agency has certified as an appropriate unit to be represented by a union for purposes of collective bargaining.

Brief - A written statement in support of a party's position, which is submitted to an arbitrator either before or after the hearing. In grievance arbitration, briefs are generally used to cite court decisions, prior arbitration awards, and the language of the contract. The filing of such briefs tends to prolong the proceeding and to increase the costs of arbitration. Briefs should only be used when they are necessary for the arbitrator's understanding of the case. They are expensive to prepare and time-consuming to read.

Caucus - A meeting for planning strategy or policy by a small group of members.

Closing Argument - A statement customarily made by each party at the close of an arbitration hearing. The arbitrator

will always allow the parties to make such a summation if they so desire, but may impose time limitations. Parties frequently use the closing argument to emphasize the points upon which they wish to base their case. Such a presentation leaves their position fresh in the mind of the arbitrator.

Collective Bargaining Agreement - A written agreement or contract that results from negotiations between an employer and a union. It sets out the conditions of employment (wages, hours, fringe benefits, etc.) and ways to settle disputes arising during the term of the contract. Collective bargaining agreements run for a definite period — usually one, two, or three years.

Counter Proposal - An offer made by one party in response to a proposal by another party. Agreement is usually reached after a series of proposals and counter proposals have reduced the range of disagreement.

Discharge - Dismissal of an employee usually for breaking the work rules or policies of the employer, incompetence, or other good cause. Collective bargaining agreements

usually protect employees from arbitrary or discriminatory discharge. A discharge means loss of seniority and other rights and affects the employee's chances for employment elsewhere.

Discriminatory Discharge - Discharge for union activity or because of race, color, religion, sex or national origin.

Duty of Fair Representation - The obligation of a union to safeguard the rights of all members of the bargaining unit. This duty is imposed by federal labor law. Some union constitutions provide remedies for members who are dissatisfied with the union's handling of their grievances. The union's duty to represent its members in a fair manner does not require that every grievance be carried to arbitration.

Employer Rights - Certain rights that the employer feels are intrinsic to its ability to manage and therefore are not subject to collective bargaining. These rights are often expressly reserved to the employer in the employer rights clause of the agreement. They include the right to hire, promote, sus-

pend or discharge employees; to direct the work of employees; and to establish policy.

Exclusive Recognition - The type of recognition that provides the recognized labor organization as the sole representative for all employees in the bargaining unit without regard to membership in that labor organization and which prohibits the employer from dealing with any other labor organization.

Exclusive Representative - The employee organization that has been accorded exclusive recognition.

Expert Witness - A person with special skill or experience in a profession or with a recognized knowledge of a technical area. As with any other witness, an expert witness is subject to cross-examination.

Fact-Finding - A method of resolving contract negotiations disputes where a neutral individual or a neutral three person panel hears the parties arguments supporting their positions and issues, findings of fact, and recommendations to resolve the dispute. The report is generally made public after a period of time if the

parties have not yet reached agreement. Fact-finding generally follows mediation.

Federal Mediation and Conciliation Service (FMCS) - An independent Federal Agency created in 1947 under the Taft-Hartley Act to provide mediators for labor-management disputes in which interstate commerce is involved. In August 1978 the FMCS extended its jurisdiction to public sector disputes.

Fringe Benefits - Compensation in addition to direct wages such as paid vacations and holidays, overtime premiums, medical insurance and pensions.

Grievance - A complaint, made on behalf of an employee by his union representative, against an employer, alleging failure to comply with the obligations of the collective bargaining contract. The grievance may result from disciplinary action against the employee. Any complaint relating to employee's pay, working conditions, or contract interpretation is generally considered to be a grievance. A grievance may also be a complaint which an

employer has against the union.

Grievance Arbitration - A method of resolving disputes that arise over the interpretation or application of the existing collective bargaining agreement. Grievance arbitration is sometimes referred to as "rights" arbitration. The parties present their cases to an arbitrator who, acting like a judge, interprets and applies the contract. The award, which is usually final and binding, is based on this presentation.

Grievance Committee - The group of union and/or employer representatives which reviews grievances that remain unresolved at the lower levels of the grievance procedure.

Grievance Procedure - A method of dealing with a complaint made by an individual or by a union or employer which allows the work place to continue operating without interruption. The procedure generally provides for efforts to resolve the grievance at progressively higher levels of employer authority with arbitration typically being the last step.

Hearing - The presentation of a case in arbitration. The fundamental requirements for a valid hearing are (1) that the arbitrator be present, (2) that the persons whose rights are affected be given notice of the proceedings, and (3) that the parties be heard, and allowed to present all relevant and material evidence and to cross-examine witnesses appearing against them.

Individual Rights - Those rights which individual employees still retain despite the designation of a union as their exclusive bargaining agent. An employee may sue his union if he believes it has failed to represent him fairly. However, the employee does not have an absolute right to have his personal grievance taken to arbitration. Although the union is the representative of all the employees, union interests rest with the majority. The union must be free to decide which grievances should be pursued.

Interest Arbitration - A method of resolving disputes that arise during the course of contract negotiations where the arbitrator makes a decision on what will be contained in

the agreement. It is usually employed after mediation and/or fact-finding have failed to resolve the conflict. Some forms of interest arbitration require the arbitrator to accept the final offer of one party on an issue-by-issue basis. The procedure is similar to fact-finding but is usually final and binding.

Labor Dispute - A conflict which may include a dispute between parties to a collective bargaining agreement over the terms (interests) or the interpretation of the terms (rights) of their contract.

Labor Relations Board - State or federal agency which primarily administers labor relations statutes. These boards usually handle unfair labor practices and supervise representation elections. At the State level these agencies are generally known as Public Employment Relations Boards (PERB's) and also provide mediation and fact-finding services.

Liability of Arbitrator - A labor arbitrator is immune from civil or legal action for any award he may render. An arbitrator is not required to explain the reasons for his award or testify as to his perfor-

mance. Without such immunity, a losing party could expose the arbitrator to the hazards of a lawsuit.

Mediation - An attempt by an impartial third party, called a mediator, to bring the parties in a labor dispute together. The mediator has no power to force a settlement but rather operates primarily through persuasion to help the negotiating parties reach an agreement.

Mediator - An individual who acts as an impartial third party to help settle collective bargaining disputes. May be appointed by an administrative agency or be chosen by both parties. The mediator's role is to meet with the parties, act as a go-between and help the parties discover areas of agreement in order to reach a settlement in negotiations.

Multiple Grievances - The filing of two or more unrelated grievances by the union to be heard in a single hearing before the same arbitrator. The union's right to file multiple grievances depends upon contract language and past practice.

National Labor Relations Act (NLRA) - A federal law passed in 1935 that has served as a model for nearly every subsequent labor relations law in the United States, including many public sector laws. The law guarantees private sector employees the right to form, join and assist unions, to bargain collectively and to act together for the purpose of collective bargaining or other mutual aid. It provides for secret ballot elections to choose collective bargaining representatives and gives the union the right to be exclusive bargaining agents for all workers in the bargaining unit. The law declares certain acts to be unfair labor practices. The law created the National Labor Relations Board (NLRB) to administer the Act. It was significantly amended by the Taft-Hartley Act in 1947.

National Labor Relations Board (NLRB) - A board created by the National Labor Relations Act (NLRA) in 1935 and continued by the Taft-Hartley Act. The Board is the administrative agency for the NLRA and its primary duties are to hold elections to determine union representation and to interpret and apply the

law concerning unfair labor practices.

Negotiation - The process by which representatives of employees and employer try to reach agreement on conditions of employment, such as wages, hours, fringe benefits, and the processes for handling grievances.

Opening Statement - Brief statements made at the opening of a hearing by the advocates, intended to inform the arbitrator of the nature of the dispute and of the evidence they intend to present. It is usual for the claimant to be heard first, but the arbitrator may vary this at his discretion.

Opinion - A written document in which the arbitrator sets forth the reasons for his award. In most labor cases the parties want the arbitrator to explain his reasoning in order to give them some guidance for similar situations that may arise under the contract. However, the opposing parties may notify the arbitrator that no opinion will be required. This can substantially reduce the cost and delay of arbitration.

Past Practice Clause - A clause in a contract stating

that previous practices of the employer will continue except as modified by the contract.

Past Practice - A way of dealing with a grievance by considering the manner in which a similar issue was resolved before the present grievance was filed. Past practice is often used to resolve a grievance when contract language is ambiguous or contradictory or when the contract doesn't address the matter in dispute.

PERB - (Public Employment Relations Board) A State agency which primarily administers labor relations statutes. These boards usually handle unfair labor practices and supervise representation elections. These boards also provide mediation and fact-finding services.

PERB Permanent Arbitrator - An arbitrator who is selected to serve for the life of a contract or for a stipulated term, hearing all cases that arise during this period.

Reinstatement - The return of a discharged employee to his former job. The crucial issue in discharge cases is whether the discharge

was for just cause and whether the penalty was fair and reasonable. An arbitrator may reinstate an employee with full pay for the time lost, or may reduce such back-pay by various amounts, or may reinstate the employee with no back-pay. Under some contracts, the arbitrator's power to fashion an appropriate remedy has been limited by the parties.

Rules of Evidence -

Courtroom rules of evidence are not applicable in arbitration. The arbitrator determines whether evidence is relevant and material. He determines when hearsay may be admitted, when to accept a copy instead of an original document, and when to admit evidence of oral agreements. Ordinarily, labor arbitrators are willing to accept evidence submitted by either party, for whatever value it may have. This attitude should not be abused though. An arbitrator is unlikely to be persuaded by irrelevant or immaterial evidence and it isn't wise to encroach upon an arbitrator's patience.

Transcript of Hearing - A verbatim record of an arbitration hearing, in the form of a stenographic report.

The use of a reporter in labor arbitration is the exception rather than the rule. A reporter may be used at the request of either party. If only one party asks for a transcript, that party is obliged to pay for it. Otherwise costs are shared by both parties. Since the cost of such transcripts can be substantial, parties are able to sharply reduce the costs of arbitration by eliminating the transcripts. Labor arbitrators often use tape recorders to refresh their memory as to evidence in extended cases.

Unfair Labor Practice - A practice on the part of either the union or the employer which violates provisions set forth by state or federal labor relation statues. Examples on the part of the employer include: 1) controlling or interfering with unions, 2) discriminating against employees working for the support of their union, 3) retaliating against workers for complaining to an administrative agency, and 4) refusing to bargain collectively with the exclusive representative.

Voluntary Arbitration - An agreement between two parties to submit unresolved disputes to a neutral third party for final and

binding decision without any legal mandate to do so.

Work Rules - Rules regulating on-the-job standards and conditions of work often incorporated in the collective bargaining agreement when negotiations occur. Work rules are usually negotiated at the insistence of the union to restrict the employer's ability to unilaterally set production standards and assign employees as the employer wants. The union's goals in establishing work rules are to maximize and protect the number of jobs available to its members, protect the health and safety of employees, and to promote stable work assignments for employees.



The authority for your local's arbitration is the clause in your contract agreement setting forth the circumstances under which it will be used and the procedure that will be followed. The following elements are common in arbitration clauses although some of them are omitted where the parties see fit to do so.

Element	Example of Language
1. Prerequisites to invoking the arbitration clause	“Any Grievance which remains unsettled after having been fully processed pursuant to the grievance procedure ...”
2. Its scope	“... and which involves either (a) the interpretation or application of a provision of this Agreement, or (b) a disciplinary penalty (including discharge) ... alleged to have been imposed without just cause ...” (some agreements make an exception to arbitration of production standards.)
3. Scope of arbitrator's authority	“The arbitrator shall not have the power to add to, subtract from or modify any of the terms of this agreement, or any agreement supplementary thereto, nor to pass upon any controversy arising from any demand to increase or decrease wage rates, except as provided in Article X of this agreement.”
4. Method of initiating arbitration	“If a grievance is not settled in the fourth step, either party must submit the dispute to arbitration ...”
5. Time limits on initiating arbitration	“... within 30 days of the date of receipts of a written answer in step four of the grievance procedure.”

Element	Example of Language	Element	Example of Language
5. Time limits on selecting an arbitrator	“If the parties cannot agree on a third member within 20 days of the reference to arbitration, then the Union shall have the right to apply to the American Arbitration Association to appoint the third member.”	9. Status of arbitrator’s award	“The arbitrator’s award shall be final and binding on both parties. Any award of the Arbitrator may be modified or rejected by mutual written agreement of both parties. Each case shall be considered on its merits and the collective agreement shall constitute the basis upon which decisions shall be rendered. No decision shall be used as a precedent for any subsequent case.”
6. Composition of arbitration board	“An arbitrator will be agreed upon by the two bargaining committees. The arbitration board will be composed of one member appointed by the City, one member appointed by the Union, and one member agreed upon by the parties.”	10. Costs of arbitration	“The parties shall share equally the arbitrator’s fee, the cost of a hearing room, and the cost of a shorthand report, if requested by the arbitrator. All other expenses shall be paid by the party incurring them.”
7. Method of selection of the arbitrator	“The usual methods are to strive first for agreement and then in case of a deadlock to ask the American Arbitration Association or the Federal Mediation and Conciliation Service for a name or a panel. A final selection is then made.”		
8. Procedural rules to be followed	“The arbitration shall be conducted under the rules of the American Arbitration Association.”		

**APPENDIX B:
FIRE FIGHTER
GRIEVANCE FORM**

Fire Fighter's Name: _____

Fire Fighter's Job Title and/or Classification: _____

Department: _____

Division: _____

Grievance Presented To: _____

STATEMENT OF GRIEVANCE: (state facts, witnesses, work assignment)

· See attached for further information

RULE, POLICY, AGREEMENT, ETC. VIOLATED

· See attached for further information

SPECIFIC REMEDY OR CORRECTIVE ACTION REQUESTED

· See attached for further information

SIGNATURE: _____ DATE _____
(Fire Fighter)

SIGNATURE: _____ DATE _____
(Party Receiving Grievance)

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