# GRIEVANCE ARBITRATION

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# INTRODUCTION

- Arbitration is ever-changing and tends to be more informal than formal court proceedings
  - Many unspoken rules
  - Not a jury trial
- An ongoing relationship between the Union and the Employer affects the arbitration process.
  - CBA is a living document
  - Parties must continue to live and work with each other after arbitration
  - Political realities of grievances
    - Sometimes, parties just need a neutral to make a certain decision

# TWO TYPES OF ARBITRATION FOR DISCUSSION

- *Discipline Arbitration*
- *Contract Interpretation*

# DISCIPLINE ARBITRATION – BEFORE THE ARBITRATION

- Union members must be aware of their rights as union members, be clear on how to invoke these rights, and be able to spot violations of these rights when such violations occur.
  - *Weingarten* rights – What are they, and when do they apply?
  - Rights under the Collective Bargaining Agreement
- Union stewards must be trained to advise and assist members before, during, and after disciplinary measures, such as investigatory interviews.
- Invocation of *Weingarten* slows the disciplinary process down and provides affected members with time.
- Whose Burden of Proof is it?

# HONESTY IS THE BEST POLICY

- Union stewards should get counsel involved as early and fast as possible
  - Incident(s) that gave rise to the case, the reaction by both sides, and possibly any intervention or interrogation have already occurred and cannot be changed
  - While union stewards may handle lower-level discipline, for anything that involves severe punishment, it is best to bring in counsel
- Counsel needs to spend time understanding the events so as to identify areas where there may be variability or questions
  - Prepare affected member on the merits of their case and prevent inferences about dishonesty or inconsistency

# HONESTY IS THE BEST POLICY

- Counsel must know all facts of the case
  - The good, the bad, the ugly
  - Affected members cannot lie to their own legal counsel
- Counsel needs to prepare for the worst-case scenario
  - Cover all bases, including the most detrimental facts, evidence, and circumstances
- Acknowledge and/or concede hurtful points to the case to receive the best possible judgment at arbitration
  - Helps narrow arbitration to fundamental issues in dispute

# HONESTY IS THE BEST POLICY

- You don't have to pretend like you are a perfect employee
- Can be open about work record, good or bad
- Outstanding employees screw up
- Just because an employee may have a blemish in the work record does not mean that the person is guilty in this instance or that the punishment is appropriate, given the violation.  If someone did it once, does that mean they did it again?
- Being proactive about work record can only help.

# *LOUDERMILL* HEARINGS

- *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532 (1985)
  - Certain public-sector employees have a property interest in their employment.
  - There must be some kind of hearing before being terminated
  - Right to oral or written notice of charges against the employee
  - Explanation of employer's evidence
  - Opportunity to present the affected member's side of the story (not a full evidentiary hearing)
- Voluntary
  - Affected members need not attend

# JUST CAUSE

- The employer bears ultimate burden of proof
  - Was there adequate evidence to support the charge?
  - Did the employee receive due process?
    - Consistency, not uniformity
  - Was the penalty appropriate?
    - Reasonable, non-discriminatory, consistent with similarly-situated employees
- The burden then shifts to the Union to prove a claim of lack of consistent rule enforcement, excessive or inappropriate discipline, disparate or discriminatory treatment, etc.

# CONTRACT INTERPRETATION

- What, exactly, is a past practice?
- Clear vs. Ambiguous CBA language
- Extrinsic Evidence – Bargaining notes, e-mails, witnesses, history
- Whose Burden of Proof is it?

# PAST PRACTICE CONSIDERATIONS

- When an employer responds to a recurring situation in the same way over an extended period of time and the response is mutually accepted by the employer and union either explicitly or implicitly as the appropriate response, then an enforceable past practice is established. *See How Arbitration Works*, p. 12-5, citing *3M Co.,* 135 LA 980, 988, (Bognanno, 2015). When a past practice is asserted to be an implied term of the contract, it is the party who asserts the existence of a past practice that bears the burden of proof. *Id.,* pp. 12-4, 12-5 (citations omitted).

- However, to establish a past practice, the occurrence need not be daily or weekly, or even yearly, but when it happens, a given response to that occurrence always follows. *Id.,* p. 12-2, footnote 17, *Monroe County Intermediate School Dist.,* 105 LA 565, 567 (Brodsky, 1995); *see also Inside Arbitration*, p. 271.

# PAST PRACTICE CONSIDERATIONS

- Because by definition a past practice is a pattern of conduct consistently undertaken in a recurring situation and evolves into an understanding that the conduct is the accepted course of action, it inherently does not require nor is dependent upon the existence of a policy, rule, regulation, General Order, Ordinance, handbook, etc. *See The Common Law of the Workplace*, 7th Ed., p. 89, St. Antoine, (BNA, 2005).

- It is universally accepted that the major purposes of introducing proof of past practice in labor arbitration include: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language ; or (3) to support allegations that the "clear language" of the written contract has been amended by mutual agreement to express the intention of the parties that they have impliedly created a contractual obligation. *See How Arbitration Works,* pp. 1-2, 2.

- Thus, a past practice can rise to the level of contractual status. A tenet of labor relations is the collective bargaining agreement includes not only the provisions contained in the four corn ers of the agreement, but the conditions and practices that have been applied. Therefore, a particular practice or condition that is not repudiated during negotiations implies the practice or condition then operating would continue in force. *See Fairweather's Practice and Procedure in Labor Arbitration*, 4th Ed., R. Schoonhoven, p. 259 (BNA, 1999).

# PAST PRACTICE CONSIDERATIONS

- Established arbitral doctrine holds that when both Parties' interpretations of contract language are reasonably possible, an ambiguity can exist. *Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases* at pp. 244-245, (Abrams, Bloomberg BNA, 2013). Arbitrators may then consider extrinsic evidence to help clarify contractual content. Such information may include the Parties' bargaining history and past practice to determine the intent of the Parties. *The Common Law of the Workplace*, 2nd ed., St. Antoine, p. 74 (BNA Book, 2005).

- A tenet of contract interpretation is that mutuality may be inferred, and that the continued failure of one party to object to the other party's interpretation may be held to constitute acceptance of such interpretation so as to make it mutual. *See Elkouri & Elkouri – How Arbitration Works*, 8th Ed., p. 12-22 (Bloomberg BNA, 2016), *citing Fairbanks, Ohio, Local Bd. Of Educ*., 112 LA 966 (Sewart, 1999), *et. al.*

# WHAT A PAST PRACTICE IS NOT

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.

A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice. …

- *See* Elkouri, *How Arbitration Works,* 8th Edition at p. 12-10 to 12-11, *citing Ford Motor Co.* 19 LA 237, 241-242 (Shulman, 1952)

# RESOLVE AS MUCH AS POSSIBLE AHEAD OF TIME

- Arbitration is costly, time-consuming, and unpredictable.
  - If significant weaknesses, unless the politics of the situation demand proceeding to arbitration, settlement is usually the best option
- Is hearing even necessary to establish facts?
  - Understand the implications of a bad decision.
  - A lousy settlement between the parties could be better than a great resolution because the parties have come to the settlement mutually.
- Can you stipulate to most facts?
  - Hone the issues to those actually in dispute.
    - Determine what the Union can concede, what the Employer can concede, and what can be easily and quickly resolved.
- Normally, for discipline, the dispute comes down to whether the employer terminated the grievant for just cause, and if not, what is the appropriate remedy?

# PREPARE SMARTER

- Union stewards
  - Ensure timelines are preserved and double-check deadlines in the CBA
- Affected members
  - Be thoroughly fluent in every aspect of the case
    - Understand not only the strengths but weaknesses as well
    - What is opposing counsel likely to say/ask about?
- Be concise and clear
  - Is this piece of evidence relevant? Helpful? Confusing?
- Witnesses
  - Their testimony or lack of testimony can be helpful or hurtful

# EVIDENCE

- Testimony, writings, material objects, etc.
  - Things offered to prove the existence or nonexistence of a fact
- Must be relevant
  - Tendency to make the existence of any fact of consequence to the determination of the action more or less probable
- Most arbitrators let in evidence and let counsel argue weight and credibility
  - Don’t want to get bogged down in evidentiary matters

# DECORUM

- Professionalism and a friendly/courteous approach
- Dress appropriately
- Ask for a standard list of instructions from counsel
  - What to expect from arbitration generally
  - What to expect from your specific arbitrator, if applicable
  - What to bring/what not to bring
  - Where to show up/what time
- You can never overprepare or be too nice

# DECORUM

- Don’t piss off your arbitrator
- Demeanor during hearing goes a long way
- You can advocate for yourself without getting nasty, difficult, or embarrassing.
  - Arbitration can be a cathartic process for the grievant, the Union, the Employer, or all.
    - Is the Soapbox speech and/or chip on your shoulder essential?
  - AGAIN, remember the ongoing relationship of the Union and the Employer
- Arbitrators are always the least informed person in the room. When they walk into a Hearing, this is the first time they’re learning anything about the case, whereas the parties already know every last detail and have lived it from Day One.
  - Want the process to be as smooth as possible.

# EMBRACE MODERN WEIRDNESS

- Shift to online arbitration procedures
  - No travel costs
- Things will go wrong. What type of equipment should you use?
  - Do a practice run with counsel and witnesses if possible
  - Ensure a good Wi-Fi connection and a stable environment for a professional setting
- Online proceedings can change how arbitrators perceive members and witnesses
  - Certain things may come across better or worse in person vs. online
  - Sympathy and sincerity factors
  - Body language

# PENALTY CONSIDERATIONS

- Extenuating/mitigating circumstances
  - Difference between an explanation and an excuse
- Length of service
  - It can work in favor as well as against an employee's favor
- CBA language
  - Employee disciplinary policy
    - Progressive discipline, if appropriate

# HEARING

- Opening statement
  - Solid and concise preview of the case
- Presentation of evidence and testimony
  - Only the most important and necessary information
- Motion practice
  - Informal and reasonable
- Objections
  - Limited
- Closing arguments?  Post-Hearing Brief?  Both? One AND the other?
  - Distinguish the strengths of the case and highlighting what the other side failed to prove

# HEARING

- There are only three rules for giving testimony
  - Tell the truth and only the truth
  - Only answer the question asked
    - Regardless of who asked the question
  - If the question is outside of prep, refer back to rules 1 and 2

# REMEDIES

- The grievant has duty to mitigate damages in discharge cases
- Wide latitude of arbitrator to formulate remedy unless explicitly restricted by CBA language
  - Reinstatement - Discipline
  - Back pay
  - Removal of items/expungement from employee file
  - Cease and desist
  - Some type of make-whole remedy.
- Unpredictable
- Do NOT try to get at arbitration what you could NOT get at the table.
- If you lose, how does that affect your next round of CBA negotiations?

# THE FINAL WORLD

- For discipline cases - The Arbitrator's role in a discipline case is not to give leniency but rather to determine if, under the Contract and long-established arbitral doctrine on Just Cause, the Grievant violated the rules and, if so, whether the discipline was appropriate in light of the totality of circumstances. If the answer to both those questions is "Yes," the fact that the Arbitrator might have given a different penalty had it been the Arbitrator's decision to make does not justify substituting their judgment for Management's.
- For contract cases – To interpret the Contract. That's it, plain and simple.

# QUESTIONS?????