CHAPTER 5

PRE-HEARING PROCESSES—OLD AND NEW

I. PRE-HEARING PROCEDURES: WE MAKE THE PROCESS WHAT IT IS

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Although you have graciously opted to attend this session in the face of fierce competition from my learned colleagues, you may still be asking yourself just what we mean by "pre-hearing procedures." It is not an unfair question. I would like to begin today by telling you what they are not. They are not, for example, the procedure once used by parties in a court mediation program. The attorneys marched into my hearing room, each slapped a $50 bill onto the table, announced in unison, "We don't agree about much, but we agree this case shouldn't be mediated!" and marched out again. Nor am I referring to the procedure initiated by one New England Academy member who led the parties around the seven or eight hearing rooms of an old, converted monastery in Maine examining the lighting, the chairs, and the ambiance until, in the grand tradition of Cinderella's prince, he pronounced that he had found the room with the perfect fit and that they could now proceed. Nor is it even the goings-on I faced as a youngish arbitrator when I arrived at a hearing, inquired if everyone was present, and was earnestly told, "We're just waiting for the arbitrator." Imagine their shock and chagrin when I revealed that she had arrived. These are interesting anecdotes in the annals of arbitral oddities, but, alas, they are not my topic today.

I will speak instead about more predictable—and relevant—issues that arise before a hearing begins, that is, in the period before opening statements are made, whether we measure that interval in minutes or in weeks. A few of these procedures are to some degree required, such as agreeing on a statement of the issue or disclosing possible conflicts of interest; but we will not dwell on

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these. Most pre-hearing procedures, however, are discretionary. Parties occasionally negotiate formal pre-hearing procedures for a specific panel or type of case: expedited matters, for example. This is becoming more and more common, and I applaud the change, but these constitute a small subset of the possibilities. Let us think instead about the more interesting ad hoc cases that are governed only by general grievance and arbitration language in a collective bargaining agreement. In these situations, parties can modify their procedure by mutual consent and be as creative as each individual situation dictates.

My simple thesis today is that parties and arbitrators can and should develop pre-hearing processes to suit both their individual styles and the specific situations they face rather than to allow custom—or inaction—dictate their behavior. Alternative dispute resolution (ADR) is the popular catchword of the moment, and some fabulous work is being done in many sectors to tailor dispute resolution to individual needs. Just because it appears to be all "old hat" to us and because we respect a tradition that has worked well for so many years, there is no reason not to expand our horizons and fine-tune our tradition-laden system.

I am going to explore several categories of pre-hearing procedures this afternoon: those initiated by arbitrators and those initiated by parties; those that are classic and have been addressed by countless scholarly articles and those that are newly created in our increasingly complex and litigious world; those that are "run-of-the-mill"; and those that make arbitrators crazy. These groups overlap, of course; in fact, the crazy-making ones can be found in all categories, depending on the particular parties.

Pre-Hearing Procedures Initiated by the Arbitrator

Some arbitrators are indeed known to inject their own out-of-the-ordinary practices into the pre-hearing stage. For example, at the beginning of each and every case, one Academy member explains the arbitral hearing process to the gathered parties and witnesses. She concedes that when she launches into her set speech, advocates who appear regularly before her hide their yawns politely behind a file or two. She reports, however, that they are grateful to her for putting their witnesses at ease. Although I do not routinely follow this practice, I have found it useful for certain participants: those who are students, for example, or otherwise very young, or who have limited English facility, or who are not

employees. These folks often appear anxious, frightened, and confused by the setting and the jargon with which they are confronted. We forget that people in the outside world usually "grieve" over the loss of a loved one, not the loss of a personal day, and often think that mediation is a spiritual form of contemplation. We forget how odd our proceedings may look and sound to someone completely unfamiliar with the genre. Why *not* ask for an arbitrator's explanation and pep talk if you think it might be helpful?

Another pre-hearing activity that arbitrators commonly initiate is an inquiry about settlement possibilities. I have heard advocates say they will not use an arbitrator who "meddles" in this way, but I confess I am at a loss to understand why. When I do this—and again, it is not my practice in every case—parties may tell me that they have already tried to settle, and that it is impossible, or that they do not wish to try, and want me instead to just proceed with the hearing. At other times, however, the advocates leave the room and return some time later with surprised looks and an agreement in hand. I think the expressed or implied fear that an arbitrator's neutrality will be affected because one party spurns a suggestion to try settlement is entirely groundless. Some parties deal with this concern, however, by discussing the possibility between themselves, and if they reject it, not specifying to the arbitrator which party refused. I myself have another solution if this poses a dilemma for you: if you find an arbitrator whose decision would be altered by the rejection of the suggestion that the parties attempt to settle before a hearing, find yourselves a different arbitrator.

Pre-Hearing Issues Raised by the Parties

Classic Issues

Among the pre-hearing issues raised by the parties, two fall into the "classic" category: subpoenas and discovery. Both are addressed quite extensively in the literature, and I will touch upon them only lightly today. Although some arbitrators and advocates ardently advance the cause of statutory subpoena power,[1] I find that the practice of issuing subpoenas varies informally by jurisdic-

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[1] *See* Bedikian, *Use of Subpoenas in Labor Arbitration: Statutory Interpretations and Perspectives*, 1979 Det. C. L. Rev. 4, 375 (1979); Furlong, *Fear and Loathing in Labor Arbitration: How Can There Possibly Be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?*, 20 Willamette L. Rev. 3, 535 (1984); Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 201.

tion and local custom, a situation that seems acceptable to most everyone. I see no reason, therefore, to impose a uniform procedure on uncomplaining customers.

As to discovery, I wish to note only that I also do not agree with the calls to legislate discovery for labor matters.[2] Although proponents of this idea assert that the legal procedure would affect only a small number of appropriate, complex cases, I believe that the very *availability* of sanctioned discovery would encourage its greater use and increase both the formality and legalism of matters that would otherwise do very nicely without it. (I refer here only to labor arbitration; employment arbitration is another matter entirely.) Rather, if the parties have a specific case that needs extensive discovery, they should engage in pre-hearing ad hoc dialogue with the arbitrator and develop whatever suits their particular needs at the particular time.

Commonplace Issues

Other pre-hearing issues have generated less academic attention but are potentially pertinent in every hearing. One example is a request by one or both parties to have witnesses sequestered, which I routinely grant unless some cause is shown to rule otherwise. A sequestration order, however, does not have to be all-or-nothing, and I generally discuss with the parties exactly what their requirements are. We can and do negotiate which witnesses need to be cloistered and which do not; where witnesses shall wait; what, if any, directives witnesses shall be given by the arbitrator; and whether sequestered witnesses can remain in the hearing room after they have testified.

A second routine issue concerns the record of hearing. One party may wish to use a court reporter; the other balks at the expense. My cardinal rule for this situation, one that is *not* negotiable, is that if a reporter is used, the transcript is the official record of hearing and the party not ordering a transcript must be given access to it (not necessarily a copy) at a reasonable time and place.

A third common procedure I do not negotiate is the swearing of witnesses. If parties want the witnesses sworn in—and that is certainly up to them—I will not swear them en masse. I believe that if the matter is important enough for an oath, each witness should stand and look me in the eye while promising to tell the truth.

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[2]Downey, *Pre-Hearing Procedures in Labor Arbitration: A Proposal for Reform*, 43 U. Pitt. L. Rev. 4, 1109 (1982); Cooper, *Discovery in Labor Arbitration*, 72 Minn. L. Rev. 6, 1281 (1988).

Otherwise, the oath becomes as meaningless as the national anthem before a ball game.

The last common pre-hearing question I will mention is the order of presentation. Generally, of course, there is no dispute about this, but the issue does arise in certain circumstances. For example, the parties may disagree over whether a termination is disciplinary, in which case the burden of going forward is uncertain. I generally request that the employer proceed in such cases, making it clear that I am not thereby allocating the burden of proof but merely asking to hear first from the party who knows more about the events that gave rise to the action.

In fact, I occasionally request this in situations where there is no dispute about burden—in promotion cases, for example. I find that if the story is presented first by the union, it often comes in backward, piecemeal, and incomplete. After all, the union is rarely privy to the details of the selection procedure; it knows only that the result appears to be a contract violation. I suggest, therefore, that the employer proceed first, with the understanding both that the burden has not thereby shifted and that the employer will have ample opportunity to complete its case, if necessary, after the union has rested. Parties generally agree that the process will be best served by this reversed order of presentation, although occasionally they decline to go along with my suggestion. As far as I know, their refusals have had no effect on either my decisions or my subsequent acceptability.

Complex and Emerging Issues

Let me turn now to some of the less common and often "sticky" pre-hearing questions that arise, questions that may need some creativity and finesse to solve in a way that allows the hearing to go forward with a minimum of disruption. One set of issues I am sure you have all faced at one time or other involves grievants who have their own attorneys. This may happen for many reasons, but I find that two circumstances most frequently apply: either the grievants mistrust the union leadership to protect their interests, or they have charges, usually criminal or civil rights, pending in other forums and want their legal counsel in those matters present at arbitration.

The parties may agree or may be in high dispute mode over how to handle this matter. When they disagree, rather than listening to the advocates "duke it out" at the table, I find it highly beneficial to

explore with them in private exactly what their respective concerns are. From this, I can either get a stipulation or make a ruling that will allow the hearing to proceed with decreased tension. As a result of these explorations with the parties, I have gone forward with probably every variant of solution to the problem that we could collectively contrive: the grievant's lawyer has presented the case and the union has been absent; the grievant's lawyer has presented the case and the union has been present as an observer; the union has presented the case and the grievant's lawyer has observed; and the grievant's attorney has been excluded. My sole requirement is that if two advocates sit on the same side of the table, only one may present the case. This sometimes results in remarkable flurries—even snowstorms—of note-passing, but so what?

A published 1983 roundtable discussion among advocates and Academy arbitrators revealed a wide range of opinion and practice on this issue among my colleagues. None of them indicated in that forum whether they rule on this matter as they would any other procedural issue, or whether some engage in active attempts to find common ground.[3] Arbitrator Ben Aaron, during the same Academy meeting, noted that, where there is concern that the union may not provide the grievant with adequate representation, the arbitrator may have to act to protect the employee's interest. He cited as an example a situation in which an employee had been disciplined for participation in a wildcat strike in support of a different union. Aaron permitted the grievant to have independent representation at arbitration over the union's objection.[4]

An entirely different sort of issue also arises when grievants have independent counsel, an issue that may affect an arbitrator's ethics, soul, and/or pocketbook. Who pays the arbitrator when the union does not participate? May the arbitrator inquire before the hearing begins? And what if the grievant, not the union, is responsible? How do arbitrators ensure that they will not be working at cut rates—half price, to be exact? Is the perceived depth, or lack thereof, of the grievant's pocket likely to have an impact on the arbitrator's conduct of the hearing and/or the outcome of the case? And even if it has no actual effect, will there be a perception of such effect, especially in the event that the grievant loses?

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[3] *Procedural Rulings During the Hearing,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), 138.

[4] Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing, id.* at 38–39.

One arbitrator faced this dilemma without being aware of it. He arrived at a case in which he served as a named panel arbitrator. He had been on the panel long enough to know that the union occasionally used several different firms for outside counsel. The attorney that day was a familiar outside counsel, and the arbitrator proceeded. (The grievance, by the way, had been filed by the union, not the individual.) The arbitrator issued his award and sent his bill to the union, which it promptly refused to pay on the grounds that the counsel present at the hearing had been retained by the grievant and the union had never agreed to pay the arbitrator's fee for the case.

The odd thing about this particular situation was that the parties had previously developed a procedure to handle cases in which grievants had outside counsel. The employer would so notify the arbitrator and send a standard letter to the employee, stating that escrow was required for the arbitrator's fee. In this case, however, the employer never became aware that the grievant was using outside counsel, so the letter was never sent, and neither the union, the grievant, nor the outside counsel enlightened the arbitrator. We can only speculate why the union would put a permanent arbitrator in such a spot. The arbitrator, himself, who had recently issued several very controversial decisions, suspected that the ploy could have been a hint from the union for him to resign from the panel, since the contract had no provision for removal of an arbitrator who had become unacceptable. In any event, as this news gets around, arbitrators are likely to get even more wary of their regular clients' payment practices.

The Boston office of the American Arbitration Association (and perhaps all others as well) addresses this problem by allowing arbitrators to request an escrow payment of a certain number of per diems prior to the start of the hearing. This policy, however, requires that the same payment be imposed on both parties even though the arbitrator is concerned about only one side's ability to pay. This can raise delicate issues when the employer is one with whom the arbitrator has regular dealings. Further complications set in when a public employer's regulations make it difficult if not impossible to issue payments prior to the rendering of service. The whole matter becomes an even tauter ethical tightrope when there is no administering agency and when arbitrators must negotiate these arrangements on their own prior to the hearing.

These financial problems do not arise solely on the labor side of the table. One arbitrator was selected for a case, had several days of

hearing, and then learned that the employer had declared bankruptcy. This did not stay the arbitration because reorganization, not closure, was the employer's answer to its difficulties. The arbitrator turned into just another creditor, likely to get some small amount, if any, on the dollar. Yet, there were still more hearing days ahead and all to the study and writing. Could the arbitrator recuse under such circumstances on the theory that neutrality had become threatened, or at the very least, strained? Or is he or she bound to finish cases once they have started, attempting to maintain neutrality throughout? With the growth of the bankruptcy industry, we may be confronted with this issue more and more frequently. Do I hear the sound of a Committee on Professional Responsibility and Grievances (CPRG) subcommittee forming even as we speak?

Another issue that arises more frequently of late occurs when grievants have brought or could bring charges on the same or similar issues in other forums or when the employer has brought or could bring charges against the employee in another forum. The union represents these grievants, but one or both parties may be concerned about the cost of duplicative proceedings and/or possible conflicting results. I have recently had several cases where parties agreed to submit all the pending contractual and statutory issues to me for resolution, even though I had been appointed pursuant only to the collective bargaining agreement. The bulk of these cases have eventually settled through mediation at the parties' request. In the two cases that stand out in my mind, the successful mediations were quite lengthy, but the parties were able to devise solutions that either would not have been available to them in court, or would have been meaningless by the time a court decision had been issued.

A twist on this situation arose in another type of case. Massachusetts has a new Education Reform Act (known without irony as the ERA) that requires that teacher and administrator suspensions and terminations be arbitrated under the statute. In fact, in certain specified circumstances, the statutory arbitrator must be an Academy member. The law is new enough that it is still unclear whether the statute replaces the teacher's contractual rights or merely supplements them. In a case I heard last fall, the school committee wished me to issue a decision under both the statute and the contract, and thereby obviate the need for a second hearing. The union, clearly hoping to have a shot at a more reasonable trier of fact in the event I failed them, refused. Because I had been

appointed under the statute, I concluded that, absent agreement of the parties, I could not require the union to proceed under the contract.

We went forward, therefore, under the ERA alone. The grievant was represented as an individual by the union's general counsel. Both parties requested sequestration of the immense crowd of witnesses, except that the teacher's counsel wished to have both the shop steward and the business agent excluded from the sequestration order. The school committee objected. After I indicated to counsel that I would be inclined to reject the teacher's request because the union was not party to a hearing under the ERA, the union suddenly agreed to include the collective bargaining agreement in my jurisdiction. In exchange, the school committee withdrew its objection to the presence of both union representatives, and we proceeded without further verbal fisticuffs. On that subject, at least.

Another arbitrator faced a similar situation and had a different outcome. She was selected to hear a fitness-for-duty case under a civil service statute while there was an ongoing arbitration hearing on discipline that had arisen from the same facts. The union, which represented the grievant in both cases, wanted to combine the two proceedings, but management refused. The parties, therefore, presented all the same evidence and testimony in two forums. The employer was lucky: the arbitrator who heard the civil service case found the employee fit for duty; the arbitrator who heard the contract claim ruled that the grievant was guilty of insubordination rising from a false disability claim. What however, if the first arbitrator had found the employee unfit for duty and the second had upheld the discipline for falsifying a disability? It certainly suggests that there would have been at least a third proceeding to reconcile the two below. Without all the facts before us, perhaps it is unfair to speculate about why the employer refused to combine the matters, or why its counsel advised them not to do so, but it is nevertheless a temptation difficult to overcome.

Another interesting set of problems arises under contracts that give employees an independent right to grieve, separate from the union, under certain circumstances. These situations can pose tricky political dilemmas for a union and sometimes even for the employer. They may also call for some procedural inventiveness on the part of arbitrators, particularly those who see themselves as having a role in fostering, or at least not undermining, the parties' relationship. It is situations of this sort that make me think we

should amend the Code of Professional Responsibility to adopt a basic principle of the Hippocratic oath: "First, do no harm."

I have seen this predicament arise most commonly in seniority list challenges, particularly in educational settings. Contracts may provide teachers the independent right to challenge the annually published seniority list. Or, this right may arise during a reduction in force (RIF) when a teacher is permitted to challenge the *application* of the seniority list. In both examples, two employees are urging different interpretations of the contract, each to favor the individual's own circumstances. In some of the cases I have seen, the union remained neutral and assigned a representative to each affected person, resulting in a tripartite hearing. The union thus acted only to represent the employees' distinct interests, not the contract's, essentially permitting the arbitrator to determine the outcome without defending a particular interpretation.

In several cases I have had, however, the union believed that the employer's application of the seniority list language was correct. The grievants appeared *pro se*; the union was present to protect the collective bargaining agreement. The first time this arose, the parties were uncertain how to proceed. If we had a tripartite hearing, the union would be in the uncomfortable position of siding with the employer in opposing its members yet it wanted to defend what it considered the proper interpretation of the language. After some discussion, we agreed that the union would act only as an observer, although the staff could be called by the employer to testify about bargaining history. The parties asked me to coach the two *pro se* grievants by speaking to them privately before we began, explaining the hearing process, and answering any questions or concerns they had about procedure. The parties also expected that the hearing would be run with considerable leeway to account for the grievants' lack of representation.

The last example in this category occurs when employees seek to intervene in an arbitration where a union win could have an adverse effect upon them. This arises most frequently in RIF or promotion challenges. I had one RIF case—teachers again—where the language specifically provided that employees could intervene when the outcome of an arbitration could have a negative effect on their own employment status. I was in the unusual situation of having the union and the employer jointly request that I disregard the plain language of their contract and bar two employees from intervening. I, who am generally known for insisting that anything is permissible as long as the parties agree,

refused to take their stipulation and permitted the intervenors to participate.

That, of course, was under an unusual contract. Most agreements are silent about the fate of such employees—those previously blessed by the employer's decision and now in jeopardy from a union challenge. Under a silent agreement, when the parties agree to prohibit a potential intervenor's participation, I accept the stipulation. When the parties agree to allow it, of course I go along. When they disagree, however, I believe I do not have the authority to give employees a day in court that is separate from their union representation, and I deny the request. I operate on the assumption that the union has provided adequate protection or at least explanation to affected employees.

Procedures That Produce Nightmares

The final category I will address today—I promise—consists of those inventive procedures suggested by the parties that give arbitrators nightmares. There is the casual attempt to prejudice a case—an offhand remark, for example, made by the union out in the hall or in the restroom (depending on the respective genders of the advocates and the arbitrator), that disparages the grievant and leaves no doubt in the arbitrator's mind that the union, too, would like to see this employee permanently gone from the workplace.

More sinister is the joint approach from both advocates who announce they have agreed on how the case should come out. In both discipline and contract cases, they want the arbitrator to hold a hearing and then issue an award along the lines they specify.[5] Do they want to own up to it as a stipulated award? Not on your life. Those of you who cannot imagine doing such a thing, be assured that it happens, not frequently, perhaps not even regularly, but it does happen.

Here again, needless to say, the parties' stipulation is not or should not be enough to engender acquiescence from an arbitrator. And the reason is the same as in the RIF and the wildcat cases I spoke about earlier: individual employees, who are not signatory to the contract, need protection from collusion by the two parties who are. This role of the arbitrator is not often discussed, but I think it merits staunch adherence by neutrals.

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[5] *See* Epstein, *The "Agreed" Case: A Problem in Ethics*, 20 Arb. J. 1, 41 (1965).

What do I wish you to take away from my remarks this afternoon? I would like you, particularly advocates, but neutrals as well, to think about your upcoming cases and ask yourselves whether there are things that could be done in advance of the hearing that would make the process more aptly suited to your particular circumstances. Might pre-hearing discovery smooth out and shorten the hearing? Can the arbitrator assist you with devising a plan? Do your witnesses need special attention or special procedures? Are there jurisdictional questions that could be discussed in a pre-hearing conference so that precious hearing time is not squandered? Advocates: do not assume that because the arbitrator you have already selected for a case is not open to creative suggestions just because he or she has never before deviated from a standard procedure. Arbitrators: do not assume in turn that you have been selected for your known habits and therefore cannot alter your longstanding practices when you see that innovation might be needed. Both of these assumptions are foolish. The process is ours—that is what makes it wonderful—and we should continue to adapt it to our needs. Take a page from our comparatively fledgling ADR colleagues and begin to think of labor arbitration more as a framework for resolving disputes than a rigid, unchanging, and unchangeable routine for processing grievances.

II. MANAGEMENT PERSPECTIVE

DAVID GRUNEBAUM*

Introduction

After listening to Susan Brown discuss her proposal for pre-hearing procedures, I find it difficult to argue against the concept. Because I find myself in the unusual position of actually agreeing with an arbitrator, I am compelled to take a second look at the proposal. Consequently, I will focus on some slightly different situations where pre-hearing procedures might be appropriate. Although arbitration is clearly understood to be an inherent part of the collective bargaining process, it is nonetheless an example of the breakdown in the consensual aspect of collective bargaining.

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