CHAPTER 8

NEW APPROACHES TO TERMINATION ARBITRATIONS IN THE PUBLIC SECTOR

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Management: C W. (Bill) Hoffman, Jr., Clark County School District, Las Vegas, Nevada

Bailey: We're going to be talking about the agreement between Clark County, the county that Las Vegas sits in, and some 25,000 teachers and support staff people represented by two unions. This is a big operation and we are talking about a large potential of disciplinary and discharge grievances. The Clark County School District is the 6th largest school district in the United States, and the largest employer in the state. The district is building a new elementary school every month, as 6,000 to 7,000 people arrive and take up residence in the county each month. They have a transiency rate of 33 percent: one-third of the students that begin the year aren't going to be there at the end. Mike Dyer has agreed to give you an overview of the arbitration program the district had adopted and Bill Hoffman is going to walk through the two Agreements. We will take questions after that.

Dyer: I know that our process of arbitration is going to throw some basic procedures on its head and that's exactly what we intended to do. We created an expedited process because with more than 25,000 employees in two bargaining units, the number of dismissal arbitrations is astounding even though it involves only a very small percentage of the employee base.

You might be wondering why we have such a huge school district. Nevada has this unique law that specifies one school district per county. We have 17 counties in Nevada and, therefore, we have 17 school districts. We have about 2.5 million people in the state, of which about 1.5 million are in Clark County. So we have this huge school district and in other parts of the state, the Association represents only 21 teachers—the whole school district has 21 teachers.

We had built up a back log of cases. It had been taking up to two years to get a decision in a dismissal arbitration, and the delays caused by the number of cases were forcing Bill's staff into making decisions on appeals of arbitrators' decisions. We would go a year and a half or two years to get an award and if we prevailed, the district's back pay liability might amount to more than $100,000. Unfortunately, the Nevada Supreme Court several years ago adopted the "manifest disregard standard" for appealing arbitrator's decisions. This means that every arbitrator's decision in Nevada can be appealed: all you have to argue is that the arbitrator manifestly disregarded Nevada law. Bill's people, faced with a six-figure liability, often concluded that appeal was called for and then we get into several additional months in District Court proceedings, and more if the case goes to the Nevada Supreme Court. This situation led us to conclude that we had to do something about the backlog and that we needed a process that would return us to the basic purpose of arbitration—quick resolution of an employee/employer dispute.

I would like to say that we just picked up the phone and called each other and said, "That's a good idea, let's do this." But we had to go through a lawsuit involving procedures under our teacher statute and a counterclaim charging the Associations with delaying the arbitration process. We counterclaimed and the court did us a favor by sending that question to trial. This ruling forced us into a meeting involving most of the key attorneys in these discharge cases, legal researchers, and people in charge of the district's legal services program. We had two full meetings and we hammered out an Agreement for both unions.

Our goal was to develop a process that would enable us to try a dismissal arbitration and have a decision within a maximum of six months and hopefully within three or four months of the date of dismissal. We wanted to get away from making these discharges into complicated cases that required transcripts, briefs, and appeals. We wanted to get a quick answer to whether the District had a basis for dismissal and a speedy remedy if they did not.

None of the changes we made would have been possible if Bill wasn't such a quality person. Working in school districts throughout Nevada, I run into the same people again and again. We've been privileged to have someone on the other side who is not only a very good lawyer but a very good person who can make things happen.

I also want to thank the members of the arbitration panels. One of the things Bill and I thought would happen was that maybe half of the people we wanted would decline. Much to our surprise, I don't think anybody dropped off the panel, and many sent us letters that provided valuable input. It was very helpful to us and we hope we're going to get more information today as the process goes on.

Hoffman: I want to return the compliment to Mike. The two major players here, the Clark County School District and the NSEA (Nevada State Educational Association) were able to get this process together largely because Mike was gracious enough to see that we needed to avoid the litigation.

The purpose of this Agreement was primarily to eliminate the backload of discharge cases. If you have a case backlog, no matter how motivated you are and how zealous you are to try to get rid of cases, the new cases keep coming in and you have to keep adding lawyers and advocates to get caught up. We had to do something different to address this backlog, and as a result of these changes, we've done so. All of the backlogged cases have been calendared out to about a 6-month period. Furthermore, the expeditious processing of these cases is going to have some real benefits. Because evidence will be fresher, we should get better quality arbitration. The back pay liabilities will be reduced. We had an $80,000 back pay award on a custodian a couple of months ago and it really hurt to pay him $80,000 and put him back to work. It would have been to everyone's benefit if we had heard that case quicker. Frankly, if the employer has to put somebody back to work, you would rather do it while it's fresh, while they are still trained, and while they still remember where everything is. All of those interests are served by shrinking the time it takes to get to arbitration.

We have two agreements. One for the teachers and the other for the support staff—custodians, bus drivers, secretaries, and the like. We have two different expedited arbitration agreements, but we didn't make them part of the collective bargaining agreement because we wanted to see how it was going to go. Mike's group represents the entire NSEA and my group does all of the in-house work on employment disputes for the district. The relationship between those two sets of lawyers in large part has made this program successful. We probably could not have reached such an agreement if we were working with a half dozen law firms because their interests would have been different. Anyway, we set this for a

three-year test period to see how it works and then, assuming that it's successful, we'll make it part of our collective bargaining agreement.

Each of the collective bargaining agreements describes how we'll go about selecting arbitrators. On each panel there are 12 or 13 arbitrators, although four or five arbitrators are on both panels. We told these arbitrators about our scheme to reduce backlog and sometimes got a pretty strong reaction. Our scheme was this—for each month we asked the arbitrators for a block of days, a two-day, three-day, or five-day block, to enable us to create a master calendar. Thus, virtually every week on the master calendar will have three or four days of possible arbitration dates. The master calendar is actually coordinated between Mike's staff and mine: each of us has a person to perform calendaring. Understandably, the arbitrators were concerned about making sure that the dates they offered were filled. I think that process has worked well, but I'm interested in feedback from the arbitrators who have had to suffer through our ideas.

So we have a calendar, hearing dates, and each side has attorneys. The parties agreed that, in order to stimulate settlement discussions, the first thing we would do would be to exchange documents. The exchange is one sided: Management has made a decision to terminate the employee based upon evidence that supported that termination. Because it possesses the evidence, it would bundle up evidence together with the personnel records of the individual and put this material in the employee's lawyer's hands. And then, within 30 days of providing those documents, there is a requirement that both counsel schedule a meeting—hopefully to arrive at a settlement.

The dynamics of settling an old case are different from those associated with a new case. A case that's two or three years old is a more "settleable" than a brand-new case. Witnesses may have disappeared or the teachers or the administrators who made the recommendation for the dismissal may have moved on, and the motivation to settle those older cases is different from the fresher cases. If you have a case where you terminated a teacher just 30 days or 45 days ago for misconduct, probably nothing has changed over that time, and the line that the district has drawn in the sand will not change very much. Nevertheless, these discussions force both sides to get together to talk about their interests and we have had some success, even in the newer cases, in bringing about a quick resolution. Those resolutions usually carry some sort of an im-

posed probationary time on the employee—in other words, a last chance agreement.

If no settlement is reached at this meeting, the lawyers go to that master calendar filled with the dates from the arbitrators, figure out how many days they need to resolve the case, and set the schedule. This works because they know their schedule of court appearances, other arbitrations, and the rest of their work load. It seems to me that counsel are more aggressive in setting a case even if it is three or four months away, because they're creating their own workload.

Dyer: The calendars are fully computerized and the computers talk to each other. When the lawyers who are assigned to try a particular case get together, they don't have to postpone setting the date because they are waiting for one secretary to call another back. They literally go to the computer right there, and both of them are looking at the same calendar. Some of our newer attorneys got together and set four or five cases in one "settlement conference" and literally scheduled all the arbitration dates at that time.

Hoffman: One of the other interesting issues that comes up during those settlement discussions is determining who has settlement authority. Counsel come together sometimes not knowing what the other side is going to propose. I always thought Mike's side had it easier because at least they had the final decision maker sitting there in the form of their client. They could decide whether or not they were going to accept the deal. It's been a little more difficult for my counsel, who sometimes have to listen to a settlement proposal that seems like a good deal and then, like the used car salesman, say that he or she has to talk to the manager. That's a little unfair because Mike's person will give his best offer on behalf of the employee and management will be able to come back later with other conditions. Frankly, I don't know how we avoid that unless ahead of time, we set up what counsel can and cannot accept on behalf of the district. Sometimes we do that. In a case involving an allegation that a teacher abused a student, for example, we're not going to put that teacher back to work, but there may be other ways to resolve that case. We might agree to some back pay and allow a resignation.

Dyer: When Bill agreed that his people would have the burden of getting the documents to us in a very short period of time, it totally changed the dynamics. Previously, some middle-level manager, such as a principal or a bus driver supervisor, decides to

terminate somebody and, while Bill might take some issue with this, the decision generally is rubber stamped up the line. Bill's lawyers might not see the actual dismissal documents until far into the process because the documents wouldn't come from his office but from another School District office. If Bill has to give us the termination documents, his lawyers get to see them early, and perhaps ask some hard questions of the supervisors involved. That may spur some settlement discussions. I think that's really helped a lot, not only in settling cases, but in framing the issues so that we don't try cases involving some middle-level manager's allegations or statements and six months later we're arguing over what was actually said. With the documents, we can now go to our people and ask them if this what really happened. I think that that's been a very positive part of the process that will make the arbitrator's job easier because we're not going to be getting into a lot of ancillary issues.

Hoffman: Once we get to a hearing, the arbitrator is in charge and we don't get into the middle of that. A court reporter appears at the hearing but we've instructed the court reporter that there will be no transcript because, as a general rule, we don't want to burden the entire process with a transcript that is then used as a basis for a closing argument and that sort of thing. Court reporters have not been particularly happy to hear about that because they get paid for transcribing the record.

From the Floor: What's the problem with transcripts?

Dyer: When you know you're going to have a transcript there's a tendency to decide to brief it because you think this other guy's making too many points, especially if you think your case isn't going well. I may think that a witness didn't do well but that I can make it look good in black and white. And if one lawyer wants to brief, the other will want to brief as well. In our minds the creation of a transcript leads to the creation of a brief. I remember when many arbitrators brought tape recorders. We have no problem if people want to record for their own notes. Bill and I both know that it's hard to write and listen at the same time, but what we're trying to avoid is the idea of our attorneys getting a transcript that, by its very nature, encourages a brief.

Hoffman: The normal rule is oral arguments. There are times when a transcript and a specific detailed briefing are important to both sides, particularly in those multi-day hearings. There may be some "nuggets" that need to be mined from the transcript and so both parties can agree to the creation of a transcript and follow with a written briefing.

Dyer: What normally happens is that both sides will provide the arbitrator with a hearing brief that basically outlines their case and gives any authorities that aren't readily available or that wouldn't be readily known. If one attorney wants to make a written closing, he or she can do that but can't add additional authority or anything that hasn't been put in their hearing brief. It doesn't allow a lot of flexibility but it is necessary from our standpoint because otherwise it perpetuates the concept that the case is huge when in reality we're talking about a bus driver, with two years' service, who was terminated.

Hoffman: One burden that we put on the arbitrator is to give us days even though we are not sure we are going to fill them. The other burden is this next rule: within 20 working days of receiving either the oral argument or written briefs, the arbitrator must issue a reasoned opinion that includes a statement of the issues, the findings of fact, the arbitrator's analysis, relevant conclusions of law, and an award. We decided that we were going to put this into the package—if you're going to be an arbitrator for us, you have to agree to respond with an award within 20 working days.

From the Floor: I'd just be curious on two issues. Prior to this new process, how many of your cases were going up to the District Court and how has that changed?

Dyer: I don't have a percentage but I can say that at one time it seemed that every case where we prevailed went to District Court. I think that stopped because many of those were upheld. We've had none go to the District Court since the new process and we don't anticipate any. When Bill and I met last week, he said that if he was going to have to pay somebody a couple months of back pay to put him back to work, its not worth our time dollarwise to appeal. But if I have to pay them a year's back pay, it's worth my time to do that.

Hoffman: Our system is so new, we've just started getting results. Many cases have settled. From the District's point of view there are certain cases that have to be appealed to the courts for political reasons, fairness, or the needs of the District. This is particularly true in two types of cases: one involves abuse of a student where a student is injured or claims to have been injured and we want to get a review if the dismissal isn't upheld. The other type is a drug case. In these cases, we feel the need for a review because of the safety of the students.

Dyer: Those were not the cases that we were seeing appealed before. The cases we appealed before were ones essentially involv-

ing back pay and whether the person should have been put back to work. They did not usually involve abuse.

From the Floor: I'd be curious to know what you're settling at the pretermination stage.

Dyer: Now that the cases are handled more quickly, we are getting more cases involving last-chance reinstatement agreements. We have many problems with these agreements because they require the employee to either fish or cut bait. Our function is to make sure that once the person has been given a fair warning and a fair chance, they have to step up. We're not in the business of being a constant protector of people who won't do what they need to do on the job. If we have a last-chance settlement agreement that we feel was abused, certainly we'll appeal that. On the teacher's side, most of these cases involve teachers who fail to do lesson plans, or what they're supposed to do in the classroom, or they have lost control of the classroom. On the classified side, you often have someone who isn't cleaning the building correctly, who isn't showing up on time, who isn't showing up at all, or is leaving early. Unfortunately, that covers a vast majority of our dismissals. Thank God it's not teachers or classified employees abusing kids. So, if we can cut down on these performance-related cases, we can cut down dramatically on the number of cases that go forward to arbitration and it will make the issues a lot easier when we get there.

From the Floor: What is your practice in closing arguments in allowing the submission of prior arbitration awards? Do you do it regularly? Do you have a limit on the number?

Dyer: No, we don't.

From the Floor: Do you have any sense whether a lot of cases are settling between the time they are calendared and the time scheduled for arbitration? In other words, are you using the dates the arbitrators commit to or does settlement occur before you actually calendar it for arbitration?

Dyer: My experience is that the cases are settling before we calendar it for arbitration. This is part of the reason for the early case conference. Under the Nevada Rules of Civil Procedure, we have a requirement of an early case conference in civil cases. We wanted to impose that on the arbitration process because we wanted the sides to come in early. Some cases are not going to settle, and we know that, and there are certain cases that we cannot settle because the settlement is not acceptable to either the Association, to the member, or both. We wanted to identify those early. I think that we're going to find that the vast majority of cases that

are calendared are ones that will either go to hearing or will be resolved within a matter of weeks of being set. This is where we need feedback from the arbitrators. We are not really anticipating tying up dates that aren't used that are held to the point that they create a problem for the arbitrators. We listen very carefully when arbitrators tell us that if they are going to provide a large number of dates, they need a bigger lag time to fill those dates in case of cancellations.

Hoffman: I don't anticipate that we'll get a lot of "courthouse steps" settlements now because one of the benefits from having that settlement conference is that you've pretty much considered the issues, know what you're willing to do and not do, so it would be surprising to me to get a settlement between that settlement conference and the arbitration. And when you have only a four-month window, probably nothing's going to change dramatically. But if it did change, my view is a good settlement is always better than a bad or good arbitration decision, so we will continue to settle. However, I don't think we're going to see it because we're going to have pretty much made our decisions on what we're willing to do ahead of time.

From the Floor: The experience I've had with some of the public sector expedited procedures in Ohio is that once they became very active in trying to resolve it without having to go to arbitration, they wasted fewer arbitration dates, and my cancellation fees dropped quite a lot. But on the other hand, my calendar was more predictable.

From the Floor: Suppose the arbitrator gives you three days to hear a case, blocks that off, and the case is over in one day. Do you give him another case to work on during those two remaining days, and if not, what do you pay him?

Dyer: You write him a check for all three days. The people on our panel aren't going to let us do anything different than that if we're going to keep good arbitrators on the panel.

Hoffman: So the burden is going to be to fill those days.

From the Floor: I do some arbitration of teachers' cases in Arkansas. They fill the days. You might come home with two or three cases.

Dyer: We hope to be able to fill. If we have something two weeks down the road we recognize is not going to go, one of the things we're going to look at is whether we have a one-day arbitration that we can stick in there. If we do, that's great. We'd rather not write the check without getting the decision but we also want to make

sure that the arbitrators on the panel are happy with the way it works.

From the Floor: Why not publish decisions?

Dyer: I can tell you the reason. Whether it works or not has yet to be seen. Many of you have used the expedited arbitration process under the AAA rules and know that you get a very brief opinion, usually three or four pages. We know that arbitrators are oftentimes like academicians in the sense that their career is somewhat enhanced by the number of published decisions, especially if they are well-reasoned and well-written. We believe there may be a tendency for the arbitrator to write more than is absolutely necessary if we allow the arbitrator to operate under the assumption that the decision may be published. In addition, the Clark County School District a long time ago took the position that they would not allow the decisions to be published. I don't know if that's still the District's position, but that was one of the initial reasons.

Hoffman: I don't know that that's our policy but it seems to me that we don't get very much benefit out of having a published opinion.

From the Floor: I'm a member of the panel and a lot of us think there are issues that we'd like to discuss with you off the record. I do wonder about the extent of your understanding of the impact of the 20-day time limit. If you say that you want findings of fact, conclusions of law, etc.—you want the same things that are contained in other decisions now but, because of the time limits, they're going to be very, very much abbreviated and you're not going to get a full discussion of the issues. Another aspect has been that in the past you have litigated some of these cases to death, raised all kinds of issues. Some of these, especially teacher dismissal cases, can get very complicated and you're going to end up having decisions that are not going to discuss all those issues except in the most summary fashion.

Hoffman: When Mike and I talked about making this presentation, we said that one of the things we wanted to do is to get some feedback from the arbitrators because we really don't have a way to do that. It may be that 20 days is not enough time for you to do what you feel that you need to do. The 20 days was arbitrary.

From the Floor: I can give you a 20-day decision, but you are going to get what you pay for. It's going to be very abbreviated. I can decide most cases in 20 days, but I'm not going to discuss the issues in any detail. If you want more of a discussion than that, then you're

going to have to give me more time. In a complicated teacher dismissal case, I normally get the decisions back in 60 days. That's what the past has been. I don't know to what extent you want to modify that to get quicker decisions.

Dyer: What we're really trying to do is take a look at which cases need to be addressed in more detail. That's why the agreement provides for the parties to agree in advance that there will be a transcript and written briefs. Maybe we should define situations where additional time will be given to the arbitrator because we'll be expecting a more thorough written analysis. But, your classic dismissal case should take no more than a half-day to a day to try, especially with classified employees, and we don't feel that we need a lot of writing there. And we don't expect a 20-day decision on a teacher dismissal case (I think one of my law partners holds the record of 11 days on a teacher dismissal case). Nor would we ever tell you that we would, nor would we expect that you would do it without a transcript, nor would we expect that you would do it without written briefs. What we wanted to do was be up front and say that unless we as the parties say we want those things, this is what we expect if you want to participate on the panel. Some day we will have a case where we get an abbreviated opinion and Bill doesn't like the award and he wants to appeal it—and there's not enough facts there. My belief is Bill's going to say to his people that we got the decision and that's done. From our standpoint I know that's what we're going to say because we don't want to litigate these cases to high heaven unless we see that we have to because it has statewide issues. Just the other day we had come up what will probably be a four- or five-day teacher dismissal case. That one will no doubt have a transcript, a briefing schedule, and more time for the arbitrator.

From the Floor: Has the Nevada Supreme Court created its own jurisprudence of manifest disregard or has it simply adopted the Ninth Circuit standard or adopted a standard from another federal circuit?

Dyer: They've created their own standard. Like many things that our court has done, they created a standard that they haven't articulated very well and they've had only three opinions on that until now. One of these cases, that unfortunately I was involved with, went up and back to the Nevada Supreme Court three times trying to decide what the manifest disregard standard meant. Ultimately, the case was settled before any final decision. Basically they have created their own standard and it is unclear.

From the Floor: The manifest disregard standard says that no reasonable person could have possibly come to this conclusion. One doesn't want it to become the kind of touchstone that some of the language in the Trilogy has become, that you simply tug your forelock before the God of the Trilogy and then you go and say, "I don't really like what this arbitrator decided so I'm going to vacate the award and decide the case myself." If the Nevada Supreme Court vacates on manifest disregard, does it send it back to arbitration again or does it decide it?

Dyer: They have done both and the district courts have done both. They have both sent the case back to the same arbitrator and they have both sent it back to different arbitrators, but they have not said what the disregard was. The first case involved a commercial arbitration where an arbitrator, in a two-page decision, awarded more than $500,000 in punitive damages to one party to a commercial contract. The Nevada Supreme Court reversed that. There was no transcript, there was nothing, and it was a two-page decision. The court said that it had to acknowledge the manifest disregard standard, that in this case it wasn't met, and it sent it back for a new arbitration. In the second case the court basically said it's possible that the arbitrator may have manifestly disregarded the law but it's unclear because we can't tell from the opinion. This again was a commercial arbitration involving a significant amount of money. The case went back up, and they sent it back down again, saying that it was still not sure that there may have been manifest disregard.