Chapter 9

KEEPING IT MOVING: EVIDENCE AND PROCEDURE RULINGS

This was a fast-paced, scenario-based, interactive session with five experienced arbitrators who confronted the most frequently occurring procedural and evidentiary issues in arbitration hearings: pre-hearing issues, evidentiary and procedural issues that arise during the hearing, and post-hearing issues. The scenarios presented in this session touched on such cutting-edge issues as the use of social media; the use of personal electronic devices, global positioning systems, and other tracking devices; and ethics.

Moderator: **Mei L. Bickner,** National Academy of Arbitrators, Newport Beach, CA

Panelists: **Joan G. Dolan,** National Academy of Arbitrators, Brookline, MA

Andria S. Knapp, National Academy of Arbitrators, San Francisco, CA

Daniel J. Nielsen, National Academy of Arbitrators, Lake Bluff, IL

Alan A. Symonette, National Academy of Arbitrators, Philadelphia, PA

Mei Bickner: Welcome to the Friday afternoon session of "Keeping It Moving: Evidence and Procedure Rulings." My name is Mei Bickner. I'm an NAA member from Newport Beach, California. I have for you a wonderful panel of experienced arbitrators from four different regions of the country, so we might get some regional differences in the responses or the answers.

I'm going to fire some rapid questions about procedural issues and evidentiary issues. We hope you will participate and interact, because we don't know all the answers to all these questions. They're pretty tough.

The panel that I have for you today is stellar, experienced, all attorneys—but we won't hold that against them. Andria Knapp is

from the San Francisco area; Alan Symonette, from Philadelphia, Pennsylvania; Joan Dolan hails from Brookline, Massachusetts; and Dan Nielsen is from the Lake Bluff, Illinois, area.

What this session is all about is basically the "nuts and bolts" of conducting an arbitration hearing. We are not going into a high-falutin series. We're going right down to what goes on at the hearing and some of the issues that come up at the hearing. We're going somewhat systematically through the hearing process from pre-hearing issues, to start of the hearing, evidentiary issues, and then specific issues that come up at the close of the hearing.

I will start with some fairly easy questions, and then we will add some complexity and "what ifs" as we go along. Feel free to comment, because we don't know all the answers on this side of the podium either.

Pre-Hearing Subpoenas

We'll start with some pre-hearing issues and subpoenas. Two weeks prior to the hearing, you receive a request to sign a subpoena for either attendance of a witness or to produce documents. Do you simply sign the subpoena, or do you carefully scrutinize it? Do you authorize the requesting party to sign your name rather than mailing it to you and having you mail it back? Andria, what do you do?

Andria Knapp: At the early stage, you will need to recall that the advocates already know what the case is about. My practice is to rely on the parties to alert me if there are issues with respect to any subpoenas.

I routinely give the parties permission to sign on my behalf as long as they send me a copy immediately. I have had circumstances in the past where someone who had been subpoenaed called me up and said, "What is this all about? I have a conflict. Do I have to attend?" and I had no idea that the subpoena had been sent out in my name. With respect to requiring the requesting party to copy the other party, I don't formally do that. But if I notice that the other side has not been noticed, I will "informally" suggest to the requesting party that they do so and let them take it from there.

Mei Bickner: Alan, do you have a different practice in Philadelphia?

Alan Symonette: Yes. It's slightly different. Clearly, there are some regional differences on this issue, and we've had discussions about this, going back years.

As far as I am concerned, I routinely sign the subpoena. I do glance at it. I pay closer attention if it's a subpoena duces tecum because I want to get some idea of what kind of records, in anticipation of any potential dispute over what is being produced. And I also take notice of the timing involved in the delivery of the subpoena, just so I'm ready to respond. But I will not take any other action other than to sign it and send it on. In that respect, I agree with Andria in that it's up to the parties to know what's going on, and hopefully there are no surprises. Most of the subpoenas are usually for people to appear. A lot of times they're pro forma because the individual has to be released from work.

However, I do not authorize another party to sign the subpoena for me. I want to see it, and I want to put either my actual signature or an electronic signature, if we're doing it over the Internet. I want to be the person responsible for signing that. I have never notified the other party about a subpoena coming. It's my hope, and I think as part of the collective bargaining relationship, that at least there have been some grievances in the past that have involved these issues between the parties.

Joan Dolan: I would be thrilled to get a subpoena two weeks in advance, rather than the usual day or two before the hearing. I'm not so sure that anything I'm going to say is representative of practice in New England. I haven't discussed any of this with any of my colleagues up there. I routinely sign a subpoena unless it's so extreme on its face that I know there will be problems. An obvious recent example was a situation in which a union representing someone discharged from a very large company for excessive absenteeism asked me to sign a subpoena covering the attendance records of all employees for the prior 10 years. That would have been several thousand employees.

In these obviously troublesome subpoena situations where it's clear there will be an objection to the subpoena, I take an approach similar to Andria's and ask the lawyer if the other party has been notified. If the answer is "no," then I say that my experience is that the better approach is for me not to sign the subpoena, the party seeking it to notify the other side, try to work it out, and have a conference call with me if the advocates can't come up with a resolution. I've never authorized anybody to sign my name on a subpoena. That's not because I turned down such a request, but no one has asked me in 28 years.

Daniel Nielsen: I'm here representing the Big Ten. I'll sign anything they put in front of me. The only thing that I do with a

subpoena is to look at it to try to anticipate what the problem is going to be later on. But, I will modify the subpoenas to be correct, for example, as to the county it's issued from. And I will always add at the bottom "requested by" and then list the name and the phone number of the person who requested it, so that when it's served, it's not me who's getting the phone call, it's them. I will always tell the other side that I have issued the subpoena, or that I've issued five subpoenas, or I will tell the number of subpoenas I've issued. I will not give them copies of the subpoena.

But I will tell them that they're out there, because usually in my experience the subpoenas that are requested are requested to get people off of work, and the employer has the right to know that they're about to lose their entire workforce for the day. So that when the people show up with the subpoenas, the employer is not surprised, and they can talk about sequencing the witnesses and such.

Mei Bickner: We're going to make it a tad more difficult here. Alan, what do you do with an objection to producing subpoenaed documents on the grounds that they're too onerous to produce? For example, in a dispute involving underpayment of a class of workers, the subpoena requests payroll data for the group going back years, 5 to 10 years. Or in a dispute about overtime equalization, overtime assignment data for the past five years. Do you deal with that pre-hearing, conference call, correspondence, or do you deal with that at the beginning of the hearing, even though that might mean that the hearing may not conclude that day?

Alan Symonette: I tend to be pretty fluid with this. But the sooner we engage in resolving the dispute, the better. You've issued the subpoena. The dispute has been engaged. Now, you try to find a method to find some resolution. I think it's our responsibility to try to avoid a postponement of the hearing as much as possible. A conference call usually is probably the best, at least to get some parameters as to the documents and the opportunity to review the documents. As far as the objections are concerned, I know a lot of us are ex–National Labor Relations Board agents. Thus we apply that approach to such requests. If the request has some type of relationship to the dispute, as much as you know about it, then we tend to say, "Well, we're going to overrule the objection unless you have some compelling reason not to produce."

Mei Bickner: Anybody have a different practice?

Andria Knapp: I don't have a different practice, but I just want to make a note here that when you're starting to talk about sheaves

of documents, think also about how you're going to present this information to the arbitrator in a way that makes it possible for her to understand it easily and quickly and to get up to speed.

Joan Dolan: I think you can make it sound so horrible about what's going to happen at that hearing if they can't resolve it in advance: picturing droves of documents, new issues, new witnesses. I've found that to work wonderfully.

Daniel Nielsen: If it's going to be an issue, it's going to be an issue, and if you put it off until the start of the hearing, you're not doing anyone any good. You're responsible for managing this case. That's why they picked you. So engage it as quickly as you can. Try to find some sort of organized way to deal with it so that you're not postponing things.

Mei Bickner: The last question on subpoenas is this: If the grievant's physical fitness to perform a job is at issue, would you sign a subpoena to obtain the grievant's medical records? Would you sign an order directing the grievant to sign a Health Insurance Portability and Accountability Act (HIPAA) form authorizing release of those medical records?[1]

Daniel Nielsen: I would certainly sign a subpoena for the medical records. I'm not sure that I can sign an order directing the grievant to sign a HIPAA form. We had a session on that a few years ago.[2] As I recall, that was a risky thing to be doing. I think what you can do is tell the grievant, tell the union, whomever, that "If you don't sign the release, we can't get the records, and because your medical condition is an issue, if we don't have the records, you've got a real problem."

Mei Bickner: I should mention that HIPAA is the Health Insurance Portability and Accountability Act of 1996, which has a lot of provisions about the privacy of health information.

Alan Symonette: Here are some hypotheticals: A grievant is disciplined based upon some medical issue, and the issue was just cause. The company is now seeking to have the grievant sign a HIPAA form to release medical records, which they did not have in the first place when they made the decision to discipline the grievant. So why do they want the records now? That's the question that gets into the whole context of the hearing. If the union wants to prove that the grievant is not qualified for some medical

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[1]For more discussion of HIPAA, see Chapter 5, "Patient Information and Privacy," Part I, "HIPAA Basics for Arbitrators," this volume.

[2]Fall Education Conference in Cleveland, October 23, 2010 – HIPAA and FMLA Issues.

reason, and their own client does not sign the HIPAA form, then that's the union's problem. I'm trying to figure out in what scenario would I force an individual to sign against his will. Either it's not pertinent to the actual decision in the just cause case or the grievant is trying to justify something, then it's against his interest.

Mei Bickner: Suppose the grievant was discharged for drug abuse issues, and now the employer is trying to subpoena the records from his drug rehab facility. In order to do that, they have to get a release from the grievant for the records.

Alan Symonette: I still come back to my original question: Why do they want medical information after they have made their disciplinary decision?

Mei Bickner: That he's been rehabilitated?

Alan Symonette: To show that he says that he's rehabilitated. The company says he's not.

Andria Knapp: Would you distinguish between whatever certification is issued from the rehab facility to indicate that he has successfully completed the program from the medical records themselves?

Alan Symonette: When we have some other factual scenarios in here. If it's a company-sponsored employee assistance program, I don't know if the requirements to enter the program will provide an automatic release of medical information to say that he's completed what is required under that employee assistance program.

Daniel Nielsen: I haven't really encountered someone saying, "You don't have the authority." The question was would you sign the subpoena in the first place, not what would you do when the motion to quash comes in. I'm assuming in most of these cases that there's going to be a motion to quash at some point or an objection.

Theodore St. Antoine: Just like Dan, I once signed a subpoena without even being aware that the subpoena was directed to a nonparty. About a year later, I was reading this Sixth Circuit Court of Appeals decision and the facts began to sound a little familiar. Eventually, I came to the realization that it was me. Indeed, the Sixth Circuit sustained the subpoena. This, I should note, was a labor-management case, decided under Taft Hartley. The court did sustain the validity of the subpoena against a third party.

John Paul Simpkins: My practice is to sign a subpoena just as everyone on the panel indicated. It is not my practice, however, to enforce the subpoena. Pennsylvania law gives me the authority to sign a subpoena. If it's requesting something that one or the other

party does not like, they, under my practice, have to go to court to get the subpoena quashed. I take no position on enforcing my own subpoena.

Security in the Hearing Room

Mei Bickner: We're now at the start of the hearing. Everybody's in the hearing, and now a number of issues might come up. So the first issue that comes up is that the grievant has been terminated for making threats to a number of employees including his supervisor. At the hearing, the employer requests that a security officer be allowed to be present in the room, claiming that some of the witnesses would not testify without his presence. The union strenuously objects, arguing that the mere presence of the officer prejudices the arbitrator against the grievant.

Joan Dolan: I have no reservations whatsoever about allowing the security officer to stay in the room, I have done so at least five times and I do not give in to objections to having security present. I explain that the burden of proving just cause for the grievant's discharge is on the employer, that arbitrators see and hear all kinds of things all the time that have nothing to do with the reasons given for discharge, and that we're expert at shutting out all those things. The employer has to prove the reasons why it discharged the employee, and it's irrelevant that there's a security officer in the room.

In one of the three situations I handled in one year, the Business Agent and the Director of Labor Relations contacted me together a week before the hearing to let me know that they had an unusual situation. The grievant had been terminated for allegedly threatening to kill several of his co-workers. The day the parties called me, the grievant had threatened to kill someone else—the Business Agent. They said that they were concerned for my safety. I assured them that I would not be prejudiced against the grievant. Security was two plain-clothes detectives who sat with guns at an angle to me so that they could shoot the grievant before he shot me. No one wanted to try to search the grievant. I thought that in light of those circumstances, having the detectives in the room was a really sensible thing to do.

Ed Render: I had the very same thing happen to me one time, and it was the company that made the request for the security people to be there. I didn't do what you did. The first thing I did

was to talk to the grievant privately and ask if he had a gun, which he said he did not. I said to him, "Do you realize you cannot get your job back if you shoot me?" Then I had him sit right next to me. My thought was that if he pulled a gun, it would be aimed at the parties and not me.

Mei Bickner: Anybody on the panel have different thoughts about a security officer's presence?

Andria Knapp: With the exception of the case of a truly unbalanced individual that Joan talked about, it's a little ironic to me that employers say, "We have to have a security officer here." Because if there is one time that grievants are going to be on their best behavior, it's when they're trying to get their jobs back from an arbitrator.

I have had circumstances where the parties have agreed to have the security officer immediately outside the room. It's up to the arbitrator in every case to set the tone of what the hearing is going to be like. In my case, that tone is: It's going to be an orderly, civilized proceeding, and I'm in charge. Now that being said, it's very difficult for employees to come in to testify against other employees. Nobody likes to do that, and I acknowledge that up front and explain to the witnesses that their most important job is to educate me. It is not their job to testify for anyone or against anyone. That is the advocate's job, to make the case for or against. Theirs is just to tell me what happened.

If there are serious concerns, the grievant is placed on the far side of the table from the witness stand. The witness chair is not going to be within 10 feet of the grievant. There are subtle ways that arbitrators can minimize and diffuse these kinds of situations.

Roger MacDougall: I had a case with an attempted murder. In that case, the parties held the hearing in a federal building so that the grievant would have to go through the metal detectors in advance. That seemed to work fairly well.

Alan Symonette: The Federal Mediation and Conciliation Service (FMCS) offers its offices at no cost, and most FMCS offices are still in federal buildings. That usually provides a solution as well.

Terry Bethel: I had a hearing once when I was still with the law school and there were lots of people in the room. I didn't know who most of them were. At a law school function about a month later, one of the members of the same firm that had this case told me that there had been two heavily armed guards in the room, which was news to me. As it turns out, the union didn't know anything about it either. I disclosed to both the union and

the company, thus making an enemy of the guy who told me and creating an issue about whether I should continue with the case. But I didn't see any way that I could have that information and not disclose it.

Mei Bickner: I think I just have one experience, which did not include a security officer but which included one of the witnesses lunging at the grievant in the middle of the hearing. I stood up and took control by telling everyone to sit down and to stop this behavior. Fortunately, they did.

Issue Amendment

Next is issue formulation. The employer wants to amend the termination charges against the grievant, a driver, to include falsification. After making a decision to terminate the grievant for an off-duty driving under the influence arrest, the employer discovered that she had also falsified her employment record. The union objects to the amendment of the issue that is before you.

Joan Dolan: We all know the ultimate situation with these cases. It is that, if you reinstate the employee, he's immediately fired for the second offense. You confine the arbitration hearing just to the things for which the employee was discharged. You order the employee reinstated, and the employee goes back to work on Monday, and on Tuesday is fired for the second offense.

Margie Brogan: I had a case where the underlying discipline was a problem because the employee was fired for attendance issues, and the employer really didn't have the goods on him. But as the supervisor told the employee that he was being fired, the employee decked the supervisor to the ground. So the employer then said that they were firing him for this conduct as well. But they had already issued a discharge letter that said he was being fired for attendance, and I reinstated him.

Mei Bickner: There are really two schools of thought on this. One is to allow an amendment to the issue, and the other is to strictly adhere, as Margie did, to whatever the employer had at the time of discharge.

Nancy Walker: As an advocate in the room, I recommend you don't allow the employer to show up at the hearing and change the reasons for the discharge. If the employer fires the grievant upon return to work and that termination is tied to the employee exercising rights under the contract, I file an 8(a)(3) charge under the National Labor Relations Act, alleging discriminatory

treatment due to union activity . That charge likely will be incorporated into a subsequent arbitration case.

Mary Ellen Shea: When the employer says it has post-discharge conduct that it wants to fold in, I deny the request because it was not the reason for the discharge. If the grievance is sustained, then the post-discharge conduct may be considered as it relates to the remedy.

Mei Bickner: Yes. I tried that as well.

Dick Adelman: Arbitration is supposed to be a quick, inexpensive resolution of disputes. It's a total waste of time to not allow the parties to talk about what's going to happen after you reinstate the person for an offense that isn't able to be proven. Every time I've had that situation, the case settled, because it's obvious that somebody who decks a supervisor ought to be discharged, and that ends up being the result.

Alan Symonette: One of the things that I haven't heard anyone discuss yet is when is the actual dispute joined? And, my view of that is that the dispute is really joined when the grievance is filed, because that kind of gives full faith and credit to the contract. But once that grievance is filed, that is what frames the basis for the issue. Because at that point, they go through their steps, the parties ostensibly have the opportunity to discover what the issues are and where the evidence lies, and it is really disingenuous for an employer to suddenly amend it after you've gone through all those steps. It disrespects the concept of the collective bargaining agreement.

Andria Knapp: The employer can't come to the arbitration hearing and add a new claim. The issue most frequently comes up where, in the course of an investigation, the employer finds that there's other information. At that point, it becomes essentially a matter of balancing efficiency and economy. Because if, say, two weeks after the initial termination, as part of its ongoing investigation, the employer finds other information that undeniably constitutes just cause for termination—falsifying the employment record, for example—that's the point at which the employer is entitled to terminate the person. What I would expect to hear from the employer is, even if the person were reinstated for discharge number one, the person would be entitled to back pay only up to the point in time where the employer had just cause to discipline him for the second reason for discipline. Why go through two proceedings? When the issue is known to the parties early on, before the case gets to hearing, it just makes sense to

permit that kind of an amendment so that you can take care of the problem once and for all.

Howell Lankford: In the northwest, we've been consistently telling employers for such a long time that they finally got it, and the solution is what sometimes is referred to as "shoot the corpse." Bring the discharged employee back (if you're in the public sector) and say, "We've discovered these new things. Looking at your original employment application, we noticed that there are substantial falsifications, and would you like to respond?"

The question is, what's an employer to do when the employee has already been fired and is no longer around when the second offense comes to light? Common examples: Once the bad guy is gone, other victims of his sexual misbehavior on the job decide it's safe to come forward. Or, preparing the case for arbitration is the first time anybody notices that the job application is pure fiction. When there's a later-discovered dischargeable offense, the usual rule is that the arbitrator in the *first* discharge case will not let the later-discovered misbehavior into the decision about the first discharge. (I think that's the compellingly correct rule.) So the employer's only safe choice is to fire the employee a second time, this time for the later-discovered misbehavior. But if it's a public sector employer, *Loudermill*[3] still applies, and the employer cannot make the second discharge decision before the employee gets the opportunity to respond to the new charges. So the employer has to bring him back and fire him a second time. There's room for argument about whether or not the already-fired employee has to be returned to the clock for his opportunity to respond to the new charges. But all things considered, the cost of putting him back on the clock for half an hour or even for a minimum callout—is spilled beer compared to the *Loudermill* hazard.

If you've got a public sector case, you can't really skip over the potential *Loudermill* issue if there's an additional factual predicate to the newly discovered charge. At least in the Ninth Circuit, there's case law that suggests that if you don't do a righteous *Loudermill* step even in a newly discovered evidence case, you get an automatic free pass back to work. So bringing the discharged employee

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[3]Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Certain public sector employees can have a property interest in their employment, per constitutional Due Process. *See* Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). This property right entails a right to "some kind of hearing" before being terminated—a right to oral or written notice of charges against them, an explanation of the employer's evidence, and an opportunity to present their sides of the story. *Id.* at 570.

back to have a chance to respond to the new charges and then firing him or her a second time resolves all of those problems, and preserves the process, and serves the employer's interest and the union's interest as well. And where I work, employers have really gotten that message, and they do that with great regularity.

Daniel Nielsen: I agree that the appropriate response in an instance like this is to fire the person separately for the second offense. Send the person a letter describing the additional offense, and allow him or her to respond to that allegation. Then come to the arbitration and ask to have a hearing on the remedy after the decision on the merits is rendered so that the additional information can be introduced.

It's very inefficient from the arbitrator's perspective to have two hearings. But if you haven't got a grievance in front of you that raises this second incident, then where does your jurisdiction come from? We do not have a roving commission to do good. You can't reach out to that second incident. The only way in which it's relevant is to the question of remedy. If the employer is not smart enough to have discharged the grievant again and just brings it up at hearing, then they've got a problem. They're just increasing their damages from the defective discharge by not properly discharging the grievant in order to terminate the running back pay.

Last Chance Agreements

Mei Bickner: We probably will continue to disagree on how to deal with amending the issue. I want to move on to another issue formulation problem that has come up at different hearings. That is where the grievant has signed a last chance agreement in lieu of discharge for violating the employer's drug and substance abuse policy, and he was terminated when he violated the policy again by testing positive on a random drug test. Assuming that the evidence of the violation is undisputed, would you allow the issue to be limited to a determination of whether the grievant violated the last chance agreement as the employer proposes? Or would you allow the union to insist on a more traditional termination for just cause issue formulation?

Alan Symonette: This is an issue without a dispute. That is, the question of the violation of the last chance agreement is really subsumed in the issue of just cause. So if you say the issue is whether the grievant was terminated for just cause, then I guess we can all

agree that we all don't necessarily, mechanically go through all seven tests every time we say "just cause." But the question then comes factually under just cause whether there was a violation of the last chance agreement. I wouldn't say that it is a waste of time to argue whether we should write that into the issue, because it gets resolved in the context of the hearing and the opinion anyway.

Joan Dolan: What do you do if you've got somebody with a hideous attendance record? The person signs a last chance agreement in which the last paragraph reads, "If I do this again, I hereby waive all my rights to go to arbitration." Then, the guy is driving to work, and there's a big car crash for which he's not responsible, and he is late for work. The employer fires him, and the union wants to prove that there was not just cause for any discipline against the guy or maybe not such severe discipline or some gradation in there somewhere. The employer always argues that the last chance agreement says if the person is late again, he has waived his right to arbitrate. However, the parties are there arbitrating on what the last chance agreement means. So, the only dispute that we can deal with is whether or not the grievant violated the terms of the last chance agreement. It could reasonably be concluded that being the innocent victim of a car crash is not the type of willful absence that was the basis for both the original discharge and the last chance agreement language.

Alan Symonette: I would like to see that agreement, because it would be interesting to see that if a union signs off on an agreement that waives a grievant's right to arbitration; there's a duty of fair representation issue there. Then there's the question of the union making an argument since the union owns the contract. So we may decide to bring this forward.

Joan Dolan: Both the union and the grievant sign the last chance agreement. In addition, there's also a provision at the front saying the signers are of sound mind and sound body. They are done in a way that is not offensive at all, and they keep somebody employed who would have been out on the street.

Mei Bickner: You can get a grievant to sign a last chance agreement when he or she is basically forced to sign by the union, and it all comes out at the hearing. The grievant may not have understood that if he didn't sign the last chance agreement, he would be discharged.

Hal Smith: There are some awards out there that say the last chance agreement actually removes the just cause issue from consideration by the arbitrator.[4]

In an unpublished award I upheld discharge for violation of a last chance agreement where the grievant's signature was not on the document but his initials were. He denied placing his initials on the document but there was credible evidence that he did initial the agreement, and the fact is he was reinstated as a result of having initialed the agreement. In my opinion I noted that although last chance agreements are normally negotiated between the employer, union, and employee, and signed by all, a signed agreement is not always required to be binding. I cited *Crown Cork & Seal Co.*,[5] where the arbitrator used minutes from a reinstatement meeting to conclude that a last chance agreement was binding. In *Western Textile Products*,[6] neither the union nor the grievant signed the last chance agreement, but the arbitrator concluded that there was a "tacit agreement" in that the grievant and union rep were present at the meeting and knew about it.

After determining that the last chance agreement is enforceable, the arbitrator's role usually is limited to determining whether the employee violated the terms of the agreement.[7] In *Genie Co.*, the arbitrator said, "Last chance agreements ordinarily remove elements of just cause from an individual's job protections."[8]

Another subject discussed at the annual meeting was arbitrator's practice in issuing subpoenas. I am quite surprised at some of the responses. such as, I paraphrase: "I sign anything put in front of me"; "I am authorized by state statute to sign subpoenas so I sign them and let it up to the one requesting the subpoena to get them enforced if necessary"; "I let the attorney sign my name so long as they immediately send me a copy."

An attorney or union representative is not authorized by law to issue a subpoena in an arbitration proceeding. The Federal

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[4]The following published awards address the various ways arbitrators have treated the effect of a last chance agreement on subsequent consideration of a termination of the grievant: Interstate Brands Corp., 128 LA 280 (H. Smith, 2010); Kellogg Co., 124 LA 1674 (H. Smith, 2008); Martin Cnty. Bd. of Comm'rs, 116 LA 1697 (H. Smith, 2002).

[5]73 LA 896 (G. Dash, Jr., 1979).

[6]107 LA 539 (G. Cohen, 1996).

[7]*See* ELKOURI & ELKOURI: HOW ARBITRATION WORKS 970, 971 (Alan Miles Rubin, ed., 6th ed. 2003). *See also* Ingersoll-Dresser Pump Co., 114 LA 297, 301 (Bickner, 1999), where Arbitrator Bickner stated, "A Last Chance Agreement is, in essence, the parties' agreement defining what is just cause in respect to the Grievant during the specified time period."

[8]97 LA 542, 545 (J. Dworkin, 1991).

Arbitration Act (FAA)[9] requires that subpoenas be issued in the name of the arbitrator and be signed by the arbitrator. No doubt arbitrators have successfully obtained compliance with subpoenas that otherwise would not be enforceable. However, I would not sign a subpoena that has the appearance of a legally enforceable document if I knew it was not enforceable. Most people receiving a subpoena don't know they can challenge it in court if they don't want to appear for a deposition or produce certain documents. In this litigious environment I can see someone bringing an action, perhaps including the arbitrator, for damages if he or she gives up documents or information pursuant to a subpoena that was issued without legal authority behind it.

There are many reasons for an arbitrator to examine subpoena requests carefully, such as:

- Jurisdictional limits. There are jurisdictional limitations on the distance a witness can be required to travel to a hearing. Where a witness cannot be subpoenaed, or is unable to attend a hearing, an arbitrator may authorize a deposition and then the deposition transcript can be used in the hearing.
- HIPAA consequences. There may be serious consequences under HIPAA if an arbitrator issues a subpoena for protected health information without complying with HIPAA confidentiality restrictions.
- Subpoenas to third parties (nonparties to the contract that provides for arbitration). In general, courts have denied enforcement of third-party subpoenas for pre-hearing depositions.[10] There are ways of convening a hearing to take testimony by deposition to use at the final hearing. Some courts have enforced subpoenas for production of documents without testimony from the one subpoenaed to produce the documents. I have done substantial research on the subject and am in the process of writing an article to submit to the Florida Bar for publication in the *Florida Bar Journal.* There are many cases issued later than the ones I cited herein, which will be cited in the article if and when I get time to finish it.

[9] 9 U.S.C. §7.

[10] Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 72 (S.D.N.Y. 1995); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 409–11 (3d Cir. 2004).

Many arbitrators are used to operating pretty informally in labor arbitration because subpoenas are rarely requested except for current employees, who sometimes need them to get relieved from work or to get paid for attending the hearing, or to attend the final hearing. However, with statutory claims being raised more and more in labor arbitration, subpoenas are being requested pre-hearing for depositions and production of documents. The academy probably should have more sessions on this subject at annual meetings and the FEC.

Mei Bickner: There are many arbitrators who find that the issues are folded in together. You cannot separate last chance agreements from just cause consideration.

Harvey Nathan: I have a different view. I find last chance agreements to be highly offensive. I have experienced them when I was a practitioner, and I've certainly seen many dozens of them as an arbitrator. First of all, if an appropriate representative of the union doesn't sign the last chance agreement, there's no agreement. In fact, I had a case once that didn't even go to hearing. In the opening statement it was clear that the union had nothing to do with the last chance agreement, and I just ruled on it right then and there. I wasn't even going to waste everybody's time with a hearing.

But in another case, I threw out a last chance agreement when it was signed by a local steward. I said that that steward did not have authority. This is a multi-location, large employer. I said there are times when a steward has authority to represent the union, and there are times (such as amending the collective bargaining agreement) when they do not, and the last chance agreement would be an amendment to a collective bargaining agreement. So, I found that the steward in that case was not competent to waive the grievant's rights to just cause.

Arbitrability

Mei Bickner: We have so many issues yet to discuss. We're just at the start of the hearing. The next issue is arbitrability. And the question is: At the hearing, the employer raises for the first time the issue of timeliness of the grievance, noting that the union did not file the grievance until five days beyond the timeliness set forth in the collective bargaining agreement. The grievant had been processed through all of the steps of arbitration without objection from the employer. So, what do you do?

Andria Knapp: If you've been all the way through the grievance process and no one has raised timeliness as a problem, then the employer has waived the issue of timeliness. This comes up most frequently when the employer's human resources people have been handling the case, and timeliness is not addressed until the company's attorney is the first person to notice that there may be a problem. Arbitrators look to see how consistent the parties are about enforcing the time limits in the contract: Do they insist on strict compliance with the time limits, or are they more relaxed? Different workplaces vary, and the arbitrator will rule consistent with the parties' past practice.

Mei Bickner: Do any of you inquire into what the practices of the parties are or what the exact language of the agreement provides?

Daniel Nielsen: I used to say that it's jurisdictional. You can raise it at any time. Over time, I've come to realize that in fact the grievance procedure is not a constitution, it's not a statute. It's a piece of contract language, and it means different things in different settings. Even the same language means different things in different settings, as between different parties, because they have different practices and they've applied it differently. So I'm going to want to know, historically, what have they done as far as the processing of grievances? Have they ignored this in the past? Because if they have ignored it in the past, if that's been their practice to ignore it in the past, then there's a very strong argument to be made that they can't sandbag someone with this at the arbitration step. If they have no past practice of any kind in terms of how to deal with late filing and it's coming up for the very first time, there's a strong legal argument to be made that it's jurisdictional.

Andria Knapp: It's important to understand that what we're talking about here is procedural arbitrability versus substantive arbitrability. Procedural arbitrability is, "Are you complying with time lines, this, that, and the other?" Procedural matters are subject to waiver. Substantive arbitrability can be raised at any time. That is, "This subject is outside of your jurisdiction as an arbitrator." If a dispute is not covered by the contract, it is not and can never be arbitrable. Those are issues that are never waived. It's just the procedural arbitrability issues that I think we're focusing on here.

Joan Dolan: I just finished a case that had been through all three levels of the Massachusetts courts, one of them twice. The issue was procedural arbitrability. The union filed the grievance two days late, and the employer didn't raise the point until they got to arbitration. Two levels of judges wrote quite erudite opinions

on the subject of procedural arbitrability. They made it clear that procedural arbitrability is like a statute of limitations. You miss by two days, one day you're out of luck.

The litigation in the courts had gone on for six years before I finally heard the case. It wasn't until it reached the level of our state supreme court that anyone mentioned the longstanding principle that arbitrators decide procedural arbitrability issues. They sent it back for me to decide the procedural arbitrability question. I read a lot about how labor contracts are not exempt from the principles of contract or anything else that has a statute of limitations in the courts.

I couldn't agree more that it doesn't feel good to knock a case out because somebody's two days late. It isn't in the spirit of constructive labor relations, but one cannot just ignore something that is jurisdictional. Many years ago, the practice was to first ask if anyone suffered any harm. If not, the arbitration went forward. But I believe we do not live in that world any more.

Mei Bickner: But what if you have a situation where the language in the contract is ironclad? It's five days or it's late, or whatever the language is. Then you find out that in practice what they've done for the last 20 years is they've never observed the five days. In some situations, it's verbal, it's okay. In some situations, it's written. But, say, verbal is okay and they never observed it. So, what do you do in that case?

Joan Dolan: I think you write your decision with those facts, the practice prevails, and the case is arbitrable.

Stipulated Award

Mei Bickner: Just before the start of the hearing, the two counsels ask to meet with you in the hall. They tell you that they have worked out a resolution of the case and need you to issue the agreed-upon settlement of the award. Would you agree to issue such an award?

Daniel Nielsen: It depends. If these are parties that I know and I work with a lot and I trust, I'm more inclined to do that. It depends on what the substance of the award is. I'm going to want to see the contract language that's at issue and have some sense that what they're proposing is consistent with what was actually negotiated in the contract. My biggest concern is going to be whose ox is being gored here. If it's an agreement to flush an employee down the drain and make it look like that's not what

they're doing, then I'm going to have some concerns about it. I haven't run into any of those where I thought it was a put-up job to blame me for an employee going down. But that would be a principal concern that I would have. But I will say I have routinely done this where those concerns were not present. I know some of my colleagues just strongly object to the idea of signing something that you didn't come up with all by yourself. But I didn't come up with the arbitration clause all by myself. It's their relationship, and they're the ones who are going to be bound by my award.

Alan Symonette: There's going to have to be a discussion. If there is a court reporter in the room, then I would like to have it on the record that there is a stipulation and have the advocates say, "I agree to the stipulation." Then I'll sign the award. If it involves a grievant, I typically do query the grievant about the stipulation, and whether he or she understands that. I have to have some affirmation from the grievant that he or she understands what this is. There's something that bothers me when counsel pulls you out to say, "We have a stipulated award. We've got the stipulation, but we want it as an award." Why can't that be said in the light of day? If it involves all of those parties, then they should be willing to say "We have the stipulation, but we want to have it with the enforceability of an award."

Rick Reilly: In an interest arbitration the public believes that the neutral comes in from on high, hears evidence, "bites the bullet," and makes the decision. The reality is that both parties want a consent/stipulated award without any mention of it in the formal decision due to political issues. This is becoming commonplace in most interest awards, and it puts the arbitrator in a difficult position. Parties for a three-year contract will accept 2 percent/2/2 or even 1 percent/1/1 or 0 percent/0/0, but cut a deal for a drug testing bonus, pension bounce, etc., to be in the award. What should the neutral do, as this conflicts with the Code of Ethics based on positions of the parties at hearing and what was said in Executive Session are 180 degrees different.

Alan Symonette: Welcome to the world of Pennsylvania Act 111. For those of you who don't know, the interest arbitration statute in Pennsylvania is pretty wide open. The parties state an issue in dispute. They nominate the party arbitrators, and the party arbitrators usually go through the American Arbitration Association to come up with a neutral. A presentation is made during a hearing. Then the party arbitrators and the neutral sit down and iron out an agreement. The bottom line is that it's permissible under

the law for the party arbitrators to come to the neutral and say that they have worked out a contract. Because there's no requirement in Pennsylvania that there be an opinion or any kind of explanation, then that is the agreement. It's within the parameters of Act 111. The parties know that. Everybody knows that.

Calling the Grievant as the First Witness

Mei Bickner: The employer calls the grievant, who has been terminated for fighting, as its first witness. The union objects, arguing that the employer should make its prima facie case. How do you handle that?

Andria Knapp: The employer has the burden of proof. The grievant has no obligation to testify at the arbitration hearing. So I'm not going to permit the employer to call the grievant as its first witness.

Joan Dolan: I think the employer has the right to call the grievant. Where the burden of proof falls is a different issue from the question of whether you have the right to call the grievant. After the union objects, I ask the union if it is going to call the grievant during its case. My experience is that almost all of the time, they say "yes," so I tell the employee that they can ask whatever questions they want when the union calls the grievant. It is form over substance. But it does serve to calm things down and then we move on. If the union is not planning to call the grievant, then I allow the employer to call him or her. Since we don't have an arbitration Fifth Amendment right to remain silent, I don't feel comfortable completely denying an employer parties' rights to call the witnesses they choose.

Alan Symonette: I know we've had this discussion time and time again. Sometimes this is more of a strategic step to put the grievant's story in one context so that he or she can't change it after hearing the employer's case. But I'm usually looking for an explanation of why the company made its decision. Because it made it without the grievant's input.

I've had an instance in which, after the employer presented a case that involved an investigation that included a statement submitted by the grievant, the employer at the end called the grievant, and the union objected. I said that if the union does not want to call the grievant, we have a statement by the grievant that was given during the investigation. Our goal here as triers or adjudicators is to hear the best evidence. That statement becomes the

best evidence. The grievant heard this, and he or she knows the statement is in evidence. If he or she doesn't have a problem with it and doesn't want to testify, then that's the evidence that stands. The union thought long and hard about it and decided they did not want the grievant to testify, so they just went on that statement.

Mei Bickner: Do you draw an adverse inference if the grievant does not testify?

Daniel Nielsen: I don't. I don't allow the employer to call the grievant as a first witness, the second witness, or the last witness. That's a bit of a regionalism, I think. The further away from Chicago you get, the less likely you are to get that ruling. I don't draw any adverse inference. If a grievant doesn't testify, it may just be that they think the case hasn't been made and nothing good can happen from calling the grievant.

Andria Knapp: I think that it's not the Chicago area as the center. I think as you move further to the Left Coast, you find arbitrators less and less willing to permit the employer to call the grievant in a termination case.

Alan Symonette: Margie and I are about ready to say the same thing because the Right Coast kind of has the same position.

Daniel Nielsen: We're speaking in sort of absolute terms here, but the practice may differ if the parties typically allow the grievant to be called. I'm not going to change their practice. If they've got a practice, you defer to their practice; if they don't have a practice, I'm not going to let it happen.

A Teacher's Facebook Profile

Mei Bickner: The last issue is this: A teacher's contract was not renewed after the district received complaints that his Facebook profile included nude pictures of himself. He was not identified as a teacher, and the district was not named. Would you order the district to renew his contract based on his First Amendment rights because the postings did not address matters of public concern?

Daniel Nielsen: How they can be sure it's him?

Andria Knapp: I may be showing more of my West Coast bias here. Actually, the number one fact that's missing here is whether or not the teacher is tenured, because that is going to definitely make a difference, and I think you need to consider the photographs. Is it a "Full Monty" shot? Or are these carefully composed art shots? What if his wife is a commercial photographer or an art photographer and has won first prize in an international

photographic competition. It's his body but it's really hard to tell that, in fact, it's a human body at all because of the way it's artfully arranged, and nothing indelicate is showing. So it may not be as simple as "there is a nude photo on his Facebook page."

Or another hypothetical: He is a member of the local Polar Bear Club, which every year on January 1st goes swimming in San Francisco Bay, and it's a group shot from the rear of all of the members of the club. Yes, it's a nude photo. But is it a nude photo that justifies not renewing someone's contract? This is a fairly fact-intensive case, particularly because you need to look at what is the nexus with the individual's employment.

Teachers are obviously a special group. You may also have to look at what grade level the individual is teaching, whether it's elementary school or high school. Social media are dissolving traditional bounds and ideas of privacy. Further, transition periods are always difficult because people have different expectations about what their privacy entitles them to. I have a 20-year-old son, and it's become very clear to me that his expectation of privacy is almost nonexistent. Except, of course, as it relates to telling his mother anything about what's going on in his life. All he will say is, "Why don't you get on Facebook, Mom?" I reply, "Because I have no interest in having everyone who is on the Internet know what is going on in my life." Not that there's anything to hide. It's just a matter of privacy. Young people who have grown up with social media just don't have that same expectation until it operates to their disadvantage in their employment situation.

Mei Bickner: Unfortunately, time will not permit us to discuss more of the evidentiary and procedural issues that come up during hearings, disclosure and recusal issues for the arbitrator, nor issues that often arise at the close of hearings. They will undoubtedly be revisited at subsequent Academy meetings. We now close the session with many thanks to our panel for the wonderful session.