

Expedited Arbitration Preparation

(Discipline)

September 15, 2015

HR Labor Forum

(CONFIDENTIAL)

- Review relevant MOU provision regarding applicability of expedited arbitration. (SEIU: disciplinary cases up to and including 15 day suspensions; Most other MOUs: 15 day suspensions and lower and contract interpretation cases where amount in dispute does not trigger BOS approval (i.e., less than \$50k). Other matters can be sent to expedited arbitration by mutual agreement. Be sure to contact ERD if you are handling an expedited arbitration on a contract interpretation matter, i.e., something other than discipline.
- Overview: In disciplinary arbitrations, you must prove up the case against the employee with live witnesses and admissible documentation. The case you prove up has to be based on the documents attached to the Skelly letter.
- Identify potential witnesses (e.g., the employee's supervisor) based on the Skelly documents.
- Ensure witness availability on assigned hearing dates. It may be possible to reschedule the hearing if a key witness is unavailable. Notify and confirm via email time and location of witnesses. Create list of witness contact information, e.g., work and cell phone numbers.
- Identify and collect Skelly documents plus relevant portions of MOU, e.g., cover page and sections related to filing grievances. Other documents may be introduced for impeachment purposes only, credibility, or to rebut allegations made by Grievant.
- Consider whether there are any special burdens of proof, higher standards of conduct, or intersecting areas of law such as FMLA, FLSA, ADA, FEHA, etc. Consult ERD or your City Attorney.
- Other good references: *How Arbitration Works*; *Pocket Guide to Public Sector Arbitration: California*; *Just Cause: The Seven Tests*; *Practice and Procedure in Labor Arbitration*; *Remedies in Arbitration*; *How to Prepare and Present A Labor Arbitration Case*
- Consider settlement – most arbitrators will ask the parties to discuss settlement before starting the hearing. Think about whether it's worth agreeing to a shorter suspension, as opposed to arbitrating the matter. **Consult with ERD, as the grievance is now at Step 4 and ERD and DHR Director must approve any settlement.**
- Work up the case for hearing:
 - (a) Create chronology;
 - (b) Read relevant provisions of MOU;
 - (c) Research issues so that you know what evidence you must elicit from witnesses (e.g., in insubordination case, what are the two elements you must prove to establish this charge?);
 - (d) Draft your direct and cross examination questions;
 - (e) Draft your opening statement – think about your theory (and theme) of the case –

anticipate the Union's defense to the discipline;

(f) Draft a short closing statement;

(g) Meet with all potential witnesses and ask them all the questions you intend to ask (and possible questions from the Union) – revise as necessary;

(h) If necessary, inspect site of the misconduct

(i) Organize and copy exhibits (Bring four copies to the arbitration – one for you; one for the witness; one for the arbitrator and one for the Union) – consider contacting the Union representative to stipulate to joint exhibits. Also consider creating binder of exhibits for the arbitrator with an exhibit index;

At the hearing, you are allowed to have one client representative who can remain in the room and testify as a witness, as well. Other witnesses must wait outside – check with the Arbitrator. You may need an assistant to help you coordinate witness schedule as you do not want to make the arbitrator wait for your witnesses to show up. Also, be sure to mark and retain a copy of each exhibit admitted into evidence. And be prepared to make basic objections if necessary, e.g.: (i) relevance; (ii) lack of foundation; (iii) calls for speculation; (iv) question intrudes on third party privacy rights; (v) vague and ambiguous with respect to a certain words or phrase.

Arbitrator will give a bench decision followed up by a short written award.