

CHAPTER 9
ARBITRATION
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CHAPTER 9

ARBITRATION

1. DEFINITION. Arbitration is an extension of collective bargaining as practiced in the United States. The purpose of collective bargaining, in part, is the resolution of differences between employers and employees over the terms and conditions of employment. Arbitration is a third-party settlement of disputes between groups or individuals outside a court of law. There are two types of arbitration:

a. Interest Arbitration. This type of arbitration occurs when negotiations have come to an impasse. An arbitrator is called in to resolve the issue. The Ralph C. Dills Act does not mandate interest arbitration in California.

2. Rights/Grievance Arbitration. Arbitration is used most commonly to settle disputes between parties of a contract as to its application or interpretation. Since such arbitration consists of determining the rights of a party to a contract, it is referred to as “rights” or more often, as “grievance” arbitration. The right to arbitration as the final step in the grievance procedure is subject to negotiations. All bargaining unit contracts administered by the Department contain a grievance arbitration provision.

3. VOLUNTARY ARBITRATION IN CALIFORNIA. Almost all arbitration is voluntary. This means that the parties voluntarily accept it, either as a final means of settling all disputes under a contract or as a means of settling a particular dispute. Grievance arbitration within the State of California falls under this category it has been agreed to in the contract. Compulsory arbitration imposes the process on the parties as a matter of law or decree. It is usually associated with disputes involving “essential” public services where the right to strike is curtailed by law. The Dills Act is silent regarding arbitration; therefore, it is not compulsory for state employees in California.

4. PURPOSE. Arbitration performs many functions:

a. Provides a safety valve beyond the normal grievance procedure.

b. Settles disputes without resorting to strikes or other disruptive job actions.

c. Clarifies contracts or tests their application.

d. Creates an important outlet for tension by letting parties save face through the decision of a neutral third party.

5. GRIEVANCE ARBITRATION.

- a. Interpreting the Contract. After the question of representation has been settled, the main problem remaining in employee relations is the interpretation of the contracts. A contract furnishes only a framework of employment conditions. Daily application of the contract further clarifies the meaning of the contract and provides the substance of the collective bargaining relationship.
- b. Final Appeal. Most collective bargaining contracts have established grievance procedures. These procedures normally involve meetings between exclusive representatives and management officials at successively higher levels. In these meetings, the parties themselves attempt to resolve the dispute through clarification of issues and facts. If these discussions ultimately fail, they turn to third-party intervention. Thus, when internal efforts have not worked, outside help or arbitration is utilized to settle a dispute.
- c. Independent Third Party. Arbitration is an extension of the collective bargaining process but differs from other aspects in one crucial respect - the parties have ceased to negotiate with each other and are attempting to convince an independent third party that their position or interpretation should be upheld. In this sense, it is sometimes called a judicial proceeding since the arbitrator must "judge the case before them."

6. DISTINCTIONS – MEDIATION, CONCILIATION, AND FACT FINDING.

- a. Arbitration. This process results in a decision which the parties agree in advance to accept. When an arbitrator makes a final determination, it is binding upon both parties. The ruling of the arbitrator is usually called an award. The award includes an evaluation of the evidence, a summary of the case, and a written final ruling.
- b. Mediation and Conciliation. These processes involve efforts by a third party to bring the parties to an agreement on their own. The mediator or conciliator has no power to enforce a settlement, since the parties did not agree, prior to their entrance, to accept the third party's conclusions.
- c. Fact Finding. This is an attempt to obtain and indicate to the parties the key facts in a dispute. Even when a fact-finding board suggests recommendations, these carry no weight beyond their persuasiveness and the power of the public opinion which they may generate.

7. PREPARING FOR ARBITRATION.

- a. Decision to Arbitrate. Periodically, a grievance cannot be resolved in the appeal process and will be appealed to arbitration. An employee may not appeal an issue to arbitration on their own behalf. Rather, this decision can only be made by the employee's exclusive representative. At that point, California Department of Human Resources (CalHR) and departmental management must decide whether to settle the grievance or proceed with arbitration.
- b. The Department's Role. If a decision is made to proceed with arbitration, a member of CalHR's legal staff will serve as the state's spokesperson during the arbitration hearing. However, the Department's management team will assist in putting the state's case together. Prevailing before an arbitrator takes extensive preparation and expertise. Going back over all the facts, outlining the case, preparing witnesses for hearing, and gathering exhibits are examples of how the Department can assist in effectively preparing for arbitration.

8. ARBITRATION CHECKLIST.

- a. California Department of Human Resources Notice of Arbitration. When an exclusive representative serves notice on the state that it plans to take an issue to arbitration, CalHR will notice the Department. For the California Highway Patrol, this notification is provided to Office of Employee Relations (OER) (Annex A of Chapter 7, Guidelines for Grievance/Complaint Handling, of this manual).
- b. Office of Employee Relations Notifies Affected Command. Upon receiving this notification, OER will advise the affected commands of the intent to arbitrate within three working days. The command will also be advised to retain all grievance records and related correspondence until the case has been adjudicated (Chapter 7, Annex A).
- c. Preparation of Condensed Arbitration Checklist. If OER and the exclusive representative are unable to resolve this issue in settlement discussions, CalHR's legal counsel will call for completion of the condensed Arbitration Checklist (Annex A). The purpose of this is to provide CalHR with a general understanding of the issue being elevated to arbitration so they can evaluate the merits of the dispute. Normally, this document is prepared by OER staff who may visit with the affected command to ensure the issues are thoroughly investigated and documented on the checklist.
- d. Preparation of Final Arbitration Checklist. If CalHR believes the dispute is worthy of arbitration, a more complete checklist will be prepared. This comes after an arbitrator has been selected. The final checklist is completed by OER, with assistance from the affected command. Comprehensive documentation covering

all facets of the issue in dispute must be developed to be used by CalHR legal staff in defending the Department during the arbitration hearing (Annex B).

9. THE ARBITRATION HEARING.

a. Departmental Representation. Office of Employee Relations and CalHR will handle the arbitration hearing.

b. Hearing Procedures.

(1) Submission Agreement.

(a) Before the arbitrator can hear the case, they must be given the authority to do so. Normally, the contract states the arbitrator's authority. In the absence of such a statement, the parties must enter into a submission agreement that puts the issues before the arbitrator.

(b) If the parties cannot agree upon a submission agreement, either one or both may request that the arbitrator formulate the issues after listening to all the evidence.

(2) Opening Statement.

(a) Normally, the party initiating the grievance makes the first opening statement since the burden is on the initiating party to prove its case.

(b) When the exclusive representative has the burden of proof, management may make its opening statement after the exclusive representative, or may reserve its opening statement until after the exclusive representative has completed putting on its evidence.

(3) Presentation of Witnesses.

(a) Evidence which is not stipulated to be introduced is brought in through the oral testimony of witnesses. Departmental records, charts, and contracts must be put in through the use of questions and answers directed by management's representative to a witness.

(b) Every witness is subject to cross-examination by the opposing party. Among the purposes of cross-examination are disclosing facts the witnesses may not have related in direct testimony, correcting misstatements, placing facts in their "true" perspective, reconciling apparent contradictions, and attacking the credibility of adverse witnesses.

(4) Closing Argument. Both parties have the right to make a closing argument to the arbitrator, either orally or in writing. This is management's opportunity to refocus the arbitrator's thinking back to the important points presented through evidence, and also point out the irrelevancies in the exclusive representative's argument.

10. ARBITRATOR'S DECISION.

- a. After the presentation of evidence and arguments, the arbitrator makes a decision which is final and binding on both parties.
- b. The foundation for the arbitrator's decision should be based upon the following:
 - (1) Not what the arbitrator believes is fair, just, or reasonable; rather what they believe the contract intends in relation to the circumstances presented during the arbitration hearing and to proven past practices.
 - (2) The jurisdiction of the arbitrator is usually defined in the contract; the matters on which they may rule, meaning or intent of the parties, application, interpretation, and the nature of the ruling. Usually excluded from the authority of the arbitrator are additions, deletions or modifications of the contract.

11. COMMON ERRORS. Annex C contains some practices which may harm either party's case during the arbitration process.

12. STANDARDS FOR INTERPRETING CONTRACT LANGUAGE. Arbitrators generally follow certain standards when interpreting contracts. Annex D outlines the standards utilized by arbitrators.

13. CONCLUSION. Management has difficult decisions to make when involved in or preparing for arbitration. It must consider the contract and its interpretation, the effect of the grievance on employee organization/management relations, and the integrity of the first line supervisor. Higher level management must review grievances fairly and equitably. Additionally, grievances should be settled whenever reasonably possible to avoid the cost and uncertainty of arbitration. An adverse decision by an arbitrator can affect the way the Department conducts its business from that point on.

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ANNEX A
CONDENSED ARBITRATION CHECKLIST

I. COVER PAGE

1. Name of Grievant.
2. California Department of Human Resources Case Number.
3. Name of Exclusive Representative.
4. Sections(s)/Article(s) allegedly violated.

II. JURISDICTION/ARBITRABILITY

1. Date of cause of action which led to filing a grievance.
2. Frame the issue.

III. FACTS

1. Detail facts in chronological order.

IV. ANALYSIS

1. Detail what was done at each level of the grievance procedure.
2. Discuss any potential credibility problems with our witnesses and union witnesses, if known.
3. What settlement efforts have been made. Give specifics.
4. Are there any cases pending on the same or similar issues?
5. Detail any past practices which may impact issue.
6. What are the larger issues, if any, being asserted by the exclusive representative?

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ANNEX B

FINAL ARBITRATION CHECKLIST

I. Cover Page

1. Name of Grievant.
2. Case Name.
3. Name of Union.
4. Name of attorney for union.
 - A. Address.
 - B. Telephone number(s).
1. Subject matter of grievance.
2. Name of facility where incident took place.
3. Name of supervisor of grievant.
 - A. Address.
 - B. Telephone number(s).
1. Name of Director of facility.
 - A. Address.
 - B. Telephone number(s).
1. Name of Department investigator.
 - A. Address.
 - B. Telephone number(s).
1. Name of Labor Relations Officer.
2. Name of Labor Relations Officer support person.

ANNEX B

FINAL ARBITRATION CHECKLIST (*continued*)

3. Frame the issue.

II. Jurisdiction/Arbitrability

1. Date of cause of action which led to filing of grievance.
2. Are there any time limits and if so, have they been complied with?
3. Detail what was done at each level of the grievance procedure.
4. Were there any waivers of time at any step and if so, who made such waivers?

III. Facts

1. Detail facts in chronological order.

IV. List Witnesses

1. Address – residence and employment.
2. Telephone numbers (residence and employment).
3. Note whether willing or non-willing to testify.
4. Note necessity of subpoena.
5. Summarize what each witness would be able to testify about – append relevant documents.
6. Immediately take written statements from each witness, including proviso statement:

“This statement is provided freely and willingly of my own desire and if called upon to testify, I would testify similarly to the facts and events described herein.”

ANNEX B

FINAL ARBITRATION CHECKLIST (*continued*)

- V. List applicable sections of the contract involved, list who drafted, note supersession clauses.
- VI. List documents we need to obtain which are in possession of opposing parties.
- VII. List documents needed to prove our case and attach clear, reproducible copies and have originals available at hearing.
- VIII. Detail union's assertions, i.e., what will the union base its case upon.
- IX. Detail any past practices that impact the issues.
- X. Note any similar cases arising from this or other units.
- XI. Analysis, Conclusions, Recommendations
 - 1. Discuss any potential credibility problems of our witnesses and union witnesses.
 - 2. What settlement efforts have been made? List participant's date of discussion, what was said and the result.
 - 3. What are the desires of individual grievant(s)?
 - 4. What are the larger issues being asserted by the union?
 - 5. Are there any Unfair Labor Practice cases pending on the same or similar issues?
 - 6. List any prior arbitrations on the same or similar issues, with result and name of arbitrator.
- XII. Possible Stipulations
 - 1. Frame the issue for submission to arbitrator.
 - 2. Employment status of grievant (if necessary), including dates of service and prior records.
 - 3. Admissibility of documents.

ANNEX B

FINAL ARBITRATION CHECKLIST (*continued*)

4. Subpoenas – on contract interpretation cases, try to obtain copies of union's notes and proposals.

XIV. List Any Legal Issues Needed To Be Researched

ANNEX C

COMMON ERRORS IN ARBITRATION

The following practices may harm a party's case:

1. Using arbitration and arbitration costs as a harassing technique.
2. Over-emphasizing the grievance by the union or exaggerating an employee's fault by management.
3. Relying on a minimum of facts and a maximum of arguments.
4. Concealing essential facts; distorting the truth.
5. Holding back books, records, and other supporting documents.
6. Tying up proceedings with legal technicalities.
7. Introducing witnesses who have not been properly instructed on demeanor and on the place of their testimony in the entire case.
8. Withholding full cooperation from the arbitrator.
9. Disregarding the ordinary rules of courtesy and decorum.
10. Becoming involved in arguments with the other side. The time to try to convince the other party is before arbitration, during grievance processing. At the arbitration hearing, all efforts should be concentrated on convincing the arbitrator.

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ANNEX D

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE

The ability to interpret the language contained in the contract is essential to the supervisor in day-to-day administration of the contract. Questions regarding what was meant by the words used in the contract will be decided through the negotiated grievance procedure.

1. CLEAR AND UNAMBIGUOUS LANGUAGE.

Clear and unambiguous language (the language does not have two or more reasonable explanations) will generally be taken at face value (i.e., as sufficient indication of what the parties wanted the language to mean).

2. AMBIGUOUS LANGUAGE INTERPRETATION.

If language is not clear and unambiguous, it must be interpreted. The following principles are used to interpret ambiguous contract language:

a. Legality.

When two interpretations are possible, one making the contract valid and lawful, and the other making it unlawful, the first will be used.

b. Contract to be Interpreted as a Whole.

- (1) Generally, the meaning of the provision is not taken from a single word or phrase, but from the contract as a whole. The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.
- (2) All parts of the contract have some meaning or the parties would not have included them. If one interpretation of a section renders another section meaningless, and a second interpretation gives the section meaning, the second interpretation will be used.

c. Specific Versus General Contract Language.

Where the language is specific, it will supersede a more general clause. If there is conflict between general and specific, specific will control.

ANNEX D

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE (*continued*)

d. Avoidance of Harsh, Absurd, or Nonsensical Results.

When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used.

e. Expressing One Thing Excludes Another.

To expressly state certain exceptions indicates that there are no other exceptions. To mention one item or a group or class of items, and not to mention the others, means they were intentionally excluded. To expressly include some guarantees excludes other guarantees.

f. Doctrine of Ejusdem Generis.

When general words follow a list of specific terms, the general words will be interpreted to include or cover only things of the same general nature or class as those only things of the same general nature or class as those listed, unless it is shown that a wider sense was intended. Example: A clause providing that seniority shall govern all cases of layoffs, transfer, “or other adjustments of personnel” should not be interpreted to require that overtime be allocated on the basis of seniority.

g. Context.

Definite meaning may be given to ambiguous or doubtful words by viewing them in light of their context in the contract.

h. Negotiating History.

- (1) If the language is ambiguous, the arbitrator will look at bargaining notes, proposals, and counterproposals for the mutual intent of the parties as to what the language in question was meant to accomplish. Who initially proposed the language? What were the reasons for any objections the other side may have made to the initial language and what concessions, if any, were made by the initiating party in order to reach agreement?

ANNEX D

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE (*continued*)

(2) If a party tried to get a particular clause in the contract but did not succeed, that sense of the clause will not be used in the overall interpretation.

i. Reason and Equality.

Arbitrators will choose the interpretation yielding the fairest result.

j. Prior Settlements.

Prior settlements involving the ambiguous provisions may be used as precedents in determining the award.

k. Interpretation Against the Party Selecting the Language.

The crafter of the language should have been able to prevent doubt about the meaning. If both parties agree the language is ambiguous, the crafting party will probably lose.

l. Standards of Proof and Evidence.

If the case is inconclusive, the arbitrator may apply technical standards of proof or evidence.

(1) Burden of Proof - Normally the moving party (the party that has taken action to change the status quo) is expected to bear a heavier burden of proof. In contract language cases, this is usually the union. If both appear equally strong, the moving party will have failed to prove the case.

(2) Hearsay Evidence - Seeing something carries more weight than hearing it from someone else.

(3) Offer of Compromise While Processing Grievance - If one party offered to settle for less than what they are asking for in the arbitration hearing, the arbitrator will not consider the offer. Arbitrators recognize that parties will make offers of settlement for a number of reasons other than acknowledging weakness of their position. They may want to avoid the expense of arbitration.

ANNEX D

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE (*continued*)

3. CUSTOM AND PAST PRACTICE.

Past practice refers to a practice which is a reasonable and uniform response to a recurring situation over a substantial length of time. How binding a past practice is depends upon the following:

- a. Has the practice been applied consistently in contrast to a written policy?
- b. Does the majority of management actively support the practice?
- c. Has the practice been accepted and acted upon by both parties? Continued failure of one party to object to the other party's interpretation is considered acceptance.
- d. Has the practice covered a reasonably long period of time?
- e. What are the underlying circumstances creating the practice? Isolated use in one unit does not establish a past practice.

To be given significant weight, the practice need not be absolutely uniform. A predominant pattern of practice may be held to be controlling even though there have been scattered exceptions to the rule. Past practice is not used to give meaning to a provision which is clear and unambiguous. If the practice is conflicting or unclear, it will probably not be given much weight.

4. INDUSTRY PRACTICE.

When a practice in a particular department or unit does not provide a sufficient guide, it may be necessary to look at practices in other departments. This would be especially true in these cases:

- a. Where the practice was found in other units of the same employer under the same clause.
- b. Where the same agreement was entered into by one employer with several unions.
- c. Where the same agreement was entered into by several employers with one union.

ANNEX D

STANDARDS FOR INTERPRETING CONTRACT LANGUAGE (*continued*)

5. OTHER CRITERIA.

a. Avoidance of Forfeiture or Penalty.

If a contract can be interpreted in two ways, one which results in one party paying a penalty and one which would not, the latter interpretation will usually be used.

b. Penalties and Forfeiture.

Unless the contract clearly stipulates there is to be a penalty in the award, the arbitrator will construe the contract in a manner that does not penalize parties.

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