



CHALLENGE STRATEGY KNOWLEDGE RESULTS

Labor Law and Labor Arbitration

Oakland
Thursday, October 28, 2010

LABOR ARBITRATION INSTITUTE

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Labor Law & Labor Arbitration

Save money on training, work smarter back at the office, and learn the latest.

We welcome you to this Conference specifically designed for labor and management, and their attorneys. The Conference focuses on the issues so the training is relevant at any step of the grievance procedure.

The faculty members are arbitrators who have received the highest marks in audience evaluations. They draw upon their years of experience and give a real-world and sophisticated approach to the subjects.

There is always more to learn, skills to acquire, and arbitrators to consult. Come to Oakland this Fall and stay up-to-date.



Agenda

7:15-8:00 a.m.

Registration and Continental Breakfast

8:00-8:45 a.m.

■ Rules of Evidence

The Federal Rules of Evidence impact every step of the grievance procedure. When you interview witnesses, you have to consider the rules on relevance, competency and hearsay. In the arbitration hearing room, another complication is added: the arbitrator lets everything into the record, and then ignores any evidence that would have been inadmissible under the Rules. Keep up-to-date with this new lecture.

Arb. Gerald McKay

8:45-10:15 a.m.

■ Discipline and Discharge Cases from 2010

The panelists discuss the principles and laws in the hot areas: workplace threats, insubordination, computer misuse, sexual harassment, job performance, absenteeism, and off-duty misconduct. The arbitrators comment on actual cases from 2010 and specifically, what the parties argued. This format makes the issues come alive and gives you immediate answers.

Panel: Arbs. Angelo, Davis, Kagel, & McKay

10:15-10:30 a.m. **Break**

10:30-11:00 a.m.

■ Due Process Principle & the Affirmative Defenses

The principle of due process continues to change with recent court decisions, new statutes, and even changes in community standards. For example, timelines are not always enforced, disparate treatment can be broadly or narrowly interpreted, and management has flexibility between behavior it condones versus tolerates. The panelists discuss the principle in the context of recent cases.

Panel: Arbs. McKay, Kagel, Davis & Angelo

11:00 a.m.-12:00 Noon

■ Update your Advocacy Skills

Arbitrators will allow you to prepare and present a case your way. But which techniques and strategies are persuasive? Do you stipulate or put every good witness you interviewed on the stand? Do you subpoena all of management's records of discipline for non-bargaining unit employees? Do you argue burden of proof, or hope it will not decide your case? Do you write a brief, or influence the arbitrator with a closing argument in the heat of the case? A long-time labor arbitrator and former advocate covers these issues and more.

Arb. Thomas Angelo

12:00-1:00 p.m. **Lunch (on your own)**

1:00-2:00 p.m.

■ **Discipline & Discharge: Advanced Issues**

The arbitrators issue bench decisions in a range of cases in which the facts are not the issue, but which legal or arbitral principle should prevail. A technician innocently brings an air gun on his route to scare away dogs, a driver upsets a customer, an employee wants to talk about her love life, but not to everyone and especially not the grievant. The arbitrators explain how to cut through the issues.

Panel: Arbs. Kagel, McKay, Davis & Angelo

2:00-2:45 p.m.

■ **Contract Interpretation**

Contract law has evolved through centuries of court decisions and developments in other areas of law, such as commercial transactions. Arbitrators use these principles to decide the most basic and most advanced issues. A new lecture on which principles come into play often and how to argue both sides.

Arb. John Kagel

2:45-3:00 p.m. **Break**

3:00-3:30 p.m.

■ **Past Practice**

After you determine whether the elements of a Past Practice have been established (frequency, longevity, consistency & mutuality) you have to look at the other issues, including a proscribed versus prescribed way of doing business and whether the practice involves a management right or an employee benefit, or both. Add to this the doctrine of changed circumstances (especially technological changes), and you will be ready for your next case.

Arb. Morris Davis

3:30-4:30 p.m.

■ **Applying Contract Law & Past Practice Doctrine**

One of the best ways to learn is to hear the facts of a case, and have the arbitrator explain their decision if they had been the arbitrator in that case. The arbitrators know that in this setting, they have to be succinct and get to the heart of the case quickly. The cases we present to the panel are a wide range of contract cases and cover many of the legal principles and rules. Includes several difficult cases on the Past Practice doctrine.

Panel: Arb. McKay, Davis, Angelo & Kagel

4:30 p.m.

Adjournment



Register Early & Save

This conference program offers one of the best values in continuing education. You save not only in dollars, but in how you spend your time back at work.

The cost is \$325, but if you register before June 30, 2010, the cost is \$250. This fee covers admission to all sessions, the course book on CD, the workbook, and the coffee breaks.

For more information, please call the Labor Arbitration Institute at 507-663-1220. You can also fax your registration to 507-645-2474.

This program has been approved for 7 recertification credit hours toward PHR, SPHR and GPHR certification through the HR Certification Institute. For more information about certification or recertification, please visit the HRCI website at www.hrci.org



The use of this seal is not an endorsement by HR certification Institute of the quality of the program. It means that this program has met HR Certification Institute's criteria to be pre-approved for recertification credit.

Don't miss out – Oakland is the place to come for this training.

More to learn

The faculty will cover numerous legal and arbitral principles. But they do more than explain — they give advice on how to argue the legal and arbitral points.

Here are just three areas in which the faculty members go in-depth and help us become better prepared.

Bargaining History

The common belief is that bargaining notes are more persuasive than testimony about bargaining. But this is not necessarily so, says a prominent labor arbitrator. For him, the question is not which is more persuasive, but what makes the most sense in the context of everything that happened.

He told the audience at a recent conference: "In one collective bargaining relationship, both parties are new and because I have been the umpire for 20 years, I have more memory of bargaining history than they do. When a union elects entirely new leadership, there's no one with any institutional memory and that's a problem.

"It is as simple as this: If you can't present evidence of what occurred, you can't prove your case. So, if one side presents a witness who was there 20 years ago and can testify to what was negotiated, and the other side can't produce any witness to contradict that, the arbitrator has to weigh that. People can have faulty memories; they can even lie, but in the end, the arbitrator needs evidence. If you don't have the evidence — and I don't mean to sound harsh about it — there's nothing I can do about it."

Notes are probably better than memories without notes, but not necessarily. In fact, it may not matter what the notes say, if the party's argument doesn't make sense, given the context of what else occurred. Arbitrators weigh all of the evidence.

Workplace Violence

Zero-tolerance policies are common, but this does not mean you can skip the investigation, even when the participants admit to fighting, an obvious violation of the policy.

From an actual case, an arbitrator wished these questions had been asked by management during the investigation:

1. Who was the aggressor? A hard and fast rule on fighting does not mean that every person, even a hapless victim, must be discharged.
2. What was the basis for the altercation? Did one

worker hurl a racial slur at the other, which would understandably lead to an altercation? There are triggering events which cause others to lose control. It does not justify their conduct but it may be a mitigating factor and a reason to reduce the discharge.

3. What would be the impact on the workplace if either or both combatants went back to work? Could they be separated, so they would not have to work with each other?

Supervisors & Bargaining Unit Members

Audience Question: In our workplace, supervisors have violated the same rule that bargaining unit employees have allegedly violated. Is the union entitled to know what penalty the supervisors received?

Answer: Probably not. The union can subpoena the discipline records of the supervisors. And arbitrators will sign the subpoena, because they routinely sign them. The employer, however, may or may not honor the subpoena. At the hearing, the union advocate can argue for the arbitrator to force the employer to produce the records. Or the union can go to court and ask a judge to enforce the subpoena.

The union argues: why are bargaining unit members subject to harsher discipline? It is disparate treatment. Some of the arbitrators on the panel commented that they will want to know all of the circumstances surrounding the treatment of the supervisors. For example, management may argue that supervisors are held to a different standard. How similar are the facts of the cases?

All of the arbitrators on the panel felt that a disparate treatment claim complicates management's case. Take the simple case where a supervisor and bargaining unit employee are involved in a fight. Management decides to issue a suspension to the supervisor and fire the employee. Yet, both look to be at fault.

The principle of due process or fundamental fairness applies here.

Employees are entitled to fair discipline consistent with the practices of the employer and the employer's business interests. This is why arbitrators are likely to bring the parties together and work out a solution at the hearing, dealing with the union's subpoena.

Come to Oakland and learn from top-notch teachers about the issues that matter.