

Hello NWP Reps and members;

Welcome to LR Chronicles number 12. This is part 3 of a multiple part LR Chronicles of the full and complete explanation of the "Arbitration Process." The last version of the LR Chronicles explained how the Union's advocates are selected, how the Arbitrator is selected, as well as the date(s) and location of the actual Hearing. This version will explain the process that takes place between the Union's advocate and the agency's advocate to prepare for the actual Arbitration Hearing. This version will also cover the "other" issues that need to be resolved prior to the Hearing taking place.

Once the coordination is complete to select the date(s), location and Arbitrator for a Hearing, then the coordination continues between the Union's case advocate and the agency's case advocate. One of the first things that these two advocates attempt to agree upon is the "issue" that will be presented to the Arbitrator for his/her decision." Black's Law Dictionary defines "issue" as **"A point in dispute between two or more parties."** The issue is vitally important as it is the question and the basis for how the Arbitrator will decide the case. In accordance with Article 9, Section 13 of the CBA, **"The Arbitrator shall confine himself/herself to the precise issue submitted for Arbitration and shall have no authority to determine any other issues not submitted to him/her."**

This does not mean that the two case advocates need to agree upon a certain issue, or have the issue framed in a certain way. Quite often, the Union's advocate and the agency's advocate DO NOT agree on how to frame the issue. In this case, the Union's advocate frames the issue as he/she deems fit, and the agency's advocate frames the issue as he/she deems fit. Both versions are submitted to the Arbitrator and the Arbitrator then makes one of three choices:

- Accepts the Union's version of the issue;
- Accepts the agency's version of the issue; or
- Frames the issue in their own way

As stated above, the issue is the basis for how the Arbitrator will render their decision.

Another point of contention between the parties, is whether or not there are (or will be) any "threshold issues" to be resolved. Merriam Webster's Dictionary of Law defines a "threshold" issue as **"A minimum requirement for further action."** An example of a threshold issue can be found in Article 9, Section 18 of our CBA which states **"Questions as to whether or not a grievance is on a matter subject to the grievance procedure in this Agreement or is subject to Arbitration shall be submitted to the Arbitrator for decision."** For example, Article 9, Section 3 states **"This procedure shall not apply to any grievance concerning:"** Article 9, Section 3e states **"The classification of any position which does not result in the reduction-in-grade or pay of any employee;"** This is a perfect example of the threshold issue of "arbitrability." If the agency is of the opinion that a particular grievance concerns the classification of a position without the reduction-in-grade or pay of an employee and we do not agree with the agency's stance, then that issue would be presented to the Arbitrator FIRST, and the Arbitrator would have to decide this "threshold issue" PRIOR to reviewing the merits of the grievance itself. More often than not, the arbitrator will conduct a hearing on both the procedural matter as well as the substantive issue during the same hearing period. If this happens, the parties will present their arguments concerning the procedural matter through stipulations and/or testimony as well as their arguments concerning the actual grievance. After the hearing, the parties will brief both issues. Less frequently, the parties may agree to bifurcate the issue. In that case, the parties will solely hold a hearing on the procedural matter. If the matter is deemed appropriate for arbitration, the parties will then continue with the hearing on the merits. Where the parties conduct hearing on both matters, if the Arbitrator decides in favor of the Agency on the threshold issue, the merits of the grievance will not be part of the ruling. Where the parties have engaged in a bifurcated process, a ruling in favor of the Agency on a threshold matter will preclude arguments on the substantive matter. According to Merriam Webster's Dictionary, the term "bifurcate" means **"to divide into two branches."** Therefore, for these purposes, the two branches are the "threshold issue" and the "merits" of the grievance itself.

Another possible item that the two advocates may agree upon is a "stipulation." Black's Law Dictionary defines a "stipulation" as **"A material condition or requirement in an Agreement"** and **"A voluntary Agreement between two opposing parties concerning some relevant point."** Black's Law further states the following regarding "stipulations": **"Stipulations with respect to form and procedure serve the convenience of the Parties to litigation and often serve to simplify and expedite the proceeding. In some cases they (stipulations) are supported by the policy of favoring compromise in order to reduce the volume of litigation. Hence they are favored by the courts and enforced without regard to consideration."** This is a very good explanation of exactly what a stipulation is, how it is applied and how they serve a very useful purpose. For example, if the Union's case advocate has seven witnesses that were all eyewitnesses to an event and places all seven witnesses on our witness list and they will ALL testify to the same event and will say the same thing, the agency and the Union can "stipulate" to the testimony of these witnesses and place this stipulation into a written and signed agreement. This written stipulation agreement will become part of the record and the Arbitrator will consider it as fact without any further consideration. As explained above, "stipulations" save our Union many resources including time, money and preparation.

Quite often, both parties have "observers" in an Arbitration Hearing. As far as the Union is concerned, any member that has an interest in observing a Hearing may do so with our permission. Prior coordination must be done with the agency to ensure they have no issues with having observers in the Hearing. Additionally, it is required for a prospective Arbitration Advocate, to observe a Hearing prior to them second seating a Hearing. Sometimes, the agency requests to have observers in the Hearing. It is required for them to contact us to ensure that we have no issues with their observers. There are codes of conduct for observers and all observers will be briefed by the Arbitration advocate, prior to the Hearing, on the conduct required. For any observer in an Arbitration Hearing, each party is required to introduce their observers to the Arbitrator so that he/she knows who the observers are, and why they are present in the proceeding.

One last item that must be discussed between the parties to a Hearing is the witness list. In accordance with Article 9, Section 10, **“The Parties will exchange lists of potential witnesses to an arbitration Hearing five (5) days prior to the scheduled Hearing.”** The exchanging of the witness lists is mandatory but does NOT need to be all inclusive, however, the Union’s advocate needs to err on the side of caution and include ALL KNOWN witnesses on the witness list. Just because a witness is listed on the witness list, they advocate is not required to call a particular witness to testify. The lists must include the witnesses that will testify in each party’s “case-in-chief”, but does not need to include any “rebuttal” witnesses the parties may call. (I will explain both of these terms in a future LR Chronicles.)

Quite often, the agency has information that they relied upon in making their decision to discipline an employee, or that they relied upon to support their decision regarding a contract interpretation. Sometimes, the Union either does not have this information, or we are not aware of any such information. Therefore, it is incumbent upon the Union advocate to request any and all information in which the agency relied upon to arrive at their decision. This is done by the Union advocate contacting the agency advocate in writing and requesting any and all information that the agency may have that we may not. This is called the Final Discovery and the agency is required to provide us with this information prior to discussing and/or agreeing on any “threshold” issues or any “stipulations”.

As usual, if you have any questions regarding this, or any other LR Chronicles, please feel free to contact me.

Mike Hull  
NWP LR Lead