

General Hearing Preparation

HOW TO SURVIVE DISMISSAL HEARINGS AND ARBITRATION
HEARINGS



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Theories of the Case

- What are the facts relative to the case?
- What facts does management allege?
- What evidence do we have to support our position?
- What evidence does management have to support their allegations?
- What is our fallback position, based upon what management can prove or what we cannot prove?
- Frame the issue in the form of a question:
 - A good practice is to phrase the question so that the person carrying the burden of proof answers “yes” to the question, and opposing side answers “no”.
 - Frame the issue so you can prove your case.
 - Look for backup position or connected issues.
- Assuming you can prove the facts, what interpretation needs to be used to prevail?
- What is the appropriate remedy?
 - This is particularly important prior to the dismissal hearing while discussing possible alternatives to dismissal.
 - Make sure you know from the member early on what his/her expectation is and whether it is realistic.
- Tie all of your theory together to help inform your opening and closing statements. This can be in outline or narrative form, depending on your personal style.

Framing the Issue

Framing your theories into specific issues will help you in focusing your case to the key issues. It's easy to get stuck in the mud in a dismissal case. Stay with the items that will help your case from opening to the questions to closing to the findings of fact/conclusions of law.

- In preparing for the hearing/conference, frame the issue into yes or no questions for the board to answer such that answer resolves the case in your favor.
 - Sample: "Whether the corporation had cause for terminating the teacher?"
 - Or more specific: "Whether the corporation had cause for termination after the teacher used amaretto to flavor dessert for the staff lunch?"
 - Or even more fun: "Whether the corporation had cause to terminate the teacher for using amaretto to flavor dessert for the staff lunch when it had been provided for her use by the principal who helped in the preparation of the dessert on an early student release day?"
- Many cases have more than one issue.
- The remedy is sometimes framed as a separate issue in complex cases. In most dismissal cases the remedy is to not dismiss the teacher, but sometimes the remedy may be to retain and do X, Y and/or Z.
- Frame the issue in such a way that the evidence will support the factual allegations (avoid defining the issue too narrowly).
- Research other dismissals in the local for past results and community standards.
- Use your framed issue(s) as the guiding light when you build your direct questions, order your witnesses, choose exhibits, opening and closing statements, etc...

Exhibits

A few general guidelines

- 1) Exhibits can be:
 - a. Joint
 - b. District or Employer
 - c. Association or Union or Employee
 - d. Also, referred to as Petitioner (party making claim; Corporation in case of dismissal) and Respondent (party responding to the claim; Association in case of dismissal).
- 2) When determining whether an exhibit will be joint or belong to a party, consider its value and its location.
 - a. Items in the personnel file are often marked as joint, because if properly placed in the file, then those items would have been known to be there by both parties, including any rebuttals filed on any item(s) of contention.
 - b. If an item only helps your case, it would be for the Union. If it only helps Administration, it would only be presented by them.
 - c. There is flexibility in this area that can be exercised based on the situation of each case.
- 3) Evidence has to have a reason to be present in the case. For example, we don't need the employee's attendance record if s/he is not being terminated for attendance issues or attendance related issues.
- 4) Hearsay evidence is the most common conundrum in member dismissals. Hearsay is a statement or communication made without being sworn in to demonstrate the truth of the matter asserted by the person present who was sworn in. For example, Principal Blow says, "Sally Mae told me that she saw teacher, Jack Deth, kissing student, Arie Anderson in the hallway." Sally isn't there to testify and be sworn in. We don't know if Sally really said this. Even if she said it, we don't know it to be true. And, we cannot cross examine Sally. So, we are taking Principal Blow at his word.
 - a. We do agree to accept hearsay, at times. When it benefits us or when having the witness present will do more damage than the hearsay itself.
 - b. You have to weigh the pros and cons based on the age of the involved witnesses, their credibility, and their unpredictability.

Direct and Cross Examination

(Borrow, stolen, and found from UD's, trainings, manuals, experience, etc... around the state and the nation.)

***Prep is everything. Prepare yourself for the case. Prepare your witnesses for both direct and cross examination. And, most important to this page, NEVER EVER ASK A QUESTION TO WHICH YOU DON'T KNOW THE ANSWER!!

Direct Examination

- Used when you examine your own witnesses.
- When you examine the other party's witness, it is called CROSS EXAMINATION. This will be discussed later in full. (On very rare occasions, you may call a witness from the other side that their advocate did not call. When you do this, tell the hearing examiner or arbitrator, "I wish to call _____ who is an adverse (or hostile) witness for the purpose of cross-examination.")
- Ask open-ended questions that do not give a hint to the answer you want. You are NOT ALLOWED TO LEAD YOUR OWN WITNESS.
 - Example:
 - "Your name is Jones, isn't it?" WRONG
 - "What is your name?" CORRECT
- Ask clear, concise questions. Preferably questions that can be answered in one word or phrase.
- You cannot, generally, ask a question that assumes facts not yet in evidence. (This is more important in arbitration, than in a dismissal case.)
- Write out questions in advance to help organize your thinking and wording.
- Establish the witness' identity, position with the employer or union, relationship to the case, and length of employment, if relevant.
- Ask the witness what happened, where, and when. Get to the facts quickly, but effectively.
- Take your witness through the entire scenario in sections. (For a dismissal you may want to start with general information, move to evaluations, then to event that led to cancellation, etc... It is helpful to have in it sections, if you need to re-order at the hearing.)
- The purpose is to tell a story that builds your case through a series of questions and answers.
- Don't ask a question that you don't know the answer to!!!!!!

- Anticipate, by your direct questions, some doubts that may be raised in cross.
- Consider carefully the order of your witnesses. Is one required to lay a foundation for a subsequent witness? Is the witness needed to confirm testimony? For rebuttal? Most credible?
- Sometimes, the UD is needed to testify. This should only be used if you are the only person who knows the facts needed in evidence. If it is lengthy, have someone else handle the direct examination of you. You can also request to the arbitrator or hearing examiner if you can testify via narrative. You can question yourself...seems a bit like a split-personality, but it is possible.
- After your witness is cross-examined, you have a second chance to examine your witness through Re-Direct. The purpose is to rebuild any damage done on cross (if possible). It should only focus on areas of cross. Don't dwell on lost causes. Seek details and clarification if cross muddled the water.
- Avoid the use of negative questions. Example: "You do not know whether Smith was there?"
- DOCUMENTS
 - During direct, you will have to get documents in through a witness if you did not stipulate to them initially.
 - Example
 - Advocate: "Please look at Exhibit A." Can you identify this?
 - Witness: "Yes, I can."
 - Advocate: "What is it?"
 - Witness: "An email I received from the principal on April 30, 2014."
 - Advocate: "I move to enter this document as Union Exhibit A."
- Cases are generally won on direct.

Cross Examination

- Used when you examine the witnesses for the other side.
- It is your opportunity to clarify, challenge or refute testimony of a witness given on direct.
- Discredit the testimony of a witness by showing s/he is:
 - Lying
 - Prejudice, biased
 - Testimony is improbable
 - Witness is unworthy of belief; admissions of motive; no foundation for observation; no experience in area testified to
 - Impeach witness showing contrary statements made at other times
 - Incompetent to testify
- Bring to light inconsistent statements.
- It should be short and wisely used.
- Cross is limited generally to issues raised in direct, however, this can be stretched by including facts unique to your own theory, so long as you don't go in to areas which are irrelevant or in which the witness is not competent to respond.
- It is easy to lose a case on cross by asking one too many questions.
- If the witness has not harmed your case, do not cross examine.
 - Before you cross, ask yourself the following:
 - Did any of the witness's testimony damage the case?
 - How important was the witness to the other side? The same percent usually applies to your side.
 - Is opposing counsel trying to lure you into asking questions that will be helpful to them?
 - Will cross yield any information that is helpful to your side?
 - Is this witness difficult? Some witnesses will cause more grief than assistance to your case.
 - Do you know the answer to the questions you are considering asking on cross? If not, don't ask! (I can't repeat this enough.)
- Do not ask a witness to repeat damaging information.
- Be polite. Offensive behavior is never regarded well by arbitrators or especially, school boards. Do not quarrel with the witness.

- Always use leading questions.
 - Examples:
 - “Isn’t it true that Jane was present at the staff meeting on August 12th, 2012?”
 - “You recorded on the April 2011 evaluation that Jane was highly effective, correct?”
 - Leading questions should only be able to be answered with yes or no.
 - You put the words in to the witnesses’ mouths.
- Hold the witness’ eye. It’s important that the witness feel you watching his/her every movement.
- Do not permit a witness to repeat what the witness said on direct examination. Well prepped leading questions help avoid this.
- Questions should always be narrow.
- Never ask a witness “why” or “to explain.”
- End on a high point.

Objections *(more on this later)*

- The purpose of raising objections is to exclude information, prevent prejudice, to modify the questioning, to change momentum or to instruct/calm the witness.
- Common Objections:

*Asked and answered	*Argumentative	*Assuming facts not in evidence
*Badgering the witness	*Irrelevant	*Leading (on direct)
*Hearsay	*No foundation	*Compound question
*Opinion/conclusion	*Witness is volunteering	
- Make your objection. State the ground for the objection. The arbitrator or hearing examiner will rule if it is sustained or overruled.
- Hearsay is most common. Note that it is allowable, but you should still object until the hearing examiner/arbitrator tells you that it is allowable for what it is worth.

Stipulations

- Stipulation can save time.
 - Work on stipulations well before the pre-hearing meeting.
 - Some cases may settle if facts are agreed to early.
- Some exhibits can nearly always be stipulated to.
 - Examples: master contract, evaluations that have been signed by the member, most of what is in the personnel file, board policies, chain of letters showing procedural accuracy and/or timeliness of the dismissal letters (*recommendation from principal, letter requesting supt conf, supt response, letter requesting board conf, etc...*)
- Even when other side declines to stipulate, it will help to identify their position and where more proofs are needed.
- Don't waste time seeking stipulations on matters you know they disagree with.
- Stipulation to Facts:
 - Write out facts that you wish to stipulate in detail. Don't take a chance that the stipulation will be misunderstood.
 - Example: Wrong → "Prior to November 4, teacher was seldom tardy." Correct → "Prior to November 4, teacher was 10 minutes late on October 1 and 7 minutes late on October 11. These were the only incidents of tardiness this school year."
 - Distinguish between stipulating to "all relevant facts" and stipulating to the "following facts." Unless you are certain that nothing else is relevant, leave room to supplement the record via witnesses.
- Stipulation to Exhibits:
 - Check exhibits carefully to be sure they are complete and authentic.
 - Clearly express what you are stipulating to regarding the exhibit.
 - Stipulating to the "truth of the matter"?
 - Relevance?
- Stipulation to Issues:
 - Proceed with caution...Don't stipulate yourself out of business.
 - This is more of use in arbitration, but is used in dismissals occasionally.
 - It is acceptable to have more than one issue.

Opening and Closing Statements

Opening Statement

- This is your first impression on either an arbitrator or on the school board. Make it count.
- Key components include:
 - A clear statement that identifies the issues
 - An indication of what is to be proven
 - Explanation of the facts you want known (the circumstances around the situation)
 - Main arguments of the case. (w/o argumentative statements)
 - Reference to relevant contract provisions (when needed)
 - The remedy or relief sought
 - Any stipulated facts, if not dealt with in the beginning procedural conversations
- Be concise.
- Use plain language.
- Don't exaggerate or try to over-sell the facts.
- PRACTICE, PRACTICE, PRACTICE. Time yourself. Practice out-loud.
- Don't read your opening statement. You don't have to memorize it, but be familiar enough to not have to read verbatim.
 - Have a written copy prepared in case you are asked to provide it to the arbitrator or board. It can be in outline form or narrative, at your own preference.
- Whoever has the burden of proof will go first. In a contract interpretation arbitration, you will present your opening statement first. In a dismissal/discipline situation, either for arbitration or a dismissal conference/hearing, you will go second.
 - You can choose to hold your opening until the beginning of your case or go after the opposing side does their opening.
 - Weigh the strategic advantage of withholding your opening until the presentation of your case, against losing the opportunity to influence the arbitrator/board's initial impressions of the case.
- You can object to the opening statement of the other side if that advocate is "testifying, not giving an opening." But, do so with caution, as you may also want to do a bit of testifying.

Closing Statement

- Use your opening statement as an outline, but be prepared to modify based on the evidence presented during the case.
- Fill in and flush out the theory of the case.
- Highlight and emphasize favorable evidence.
- Be direct. Develop your argument in a lucid manner. Your closing should be impossible to misunderstand.
- Emphasize the significant aspects of your case.
- Anticipate or respond to opposing party's arguments.
- Conclude with a specific request for action or remedy.
- Always do a closing in a dismissal conference/hearing. It's your last chance to impress the facts upon the board, as they don't always read your Findings of Fact, Conclusions of Law.
- In arbitration, you may choose to waive the closing, as you will be filing briefs. If it is a simple case in which you will not file briefs, you should do a closing. Or, if the arbitrator requests a closing, along with briefs, roll with it. 😊

At the Hearing: General Guidelines

- ☐ If they are there already, shake hands with the hearing examiner, opposing counsel, the school board, etc. Introduce your second chair to them.
- ☐ Find your place. Organize your materials (pens, recorder, post-its, exhibits, paper, etc...)
- ☐ Review process for the conference/hearing. Determine where witnesses will be sequestered, if you are sequestering.
- ☐ The hearing examiner will open the record. If you don't already have your device recording, turn it on now. (Most schools will record, too. I like to have my own device as the turnaround time on ff/cl is quick, plus I'm suspicious of "technical difficulties.")
- ☐ Procedural agreements and stipulations will all be announced for the record. Spokesperson(s) and witnesses will be identified.
- ☐ Witnesses may be sworn in during this time or will be sworn in as they appear.
- ☐ For dismissal, the district will begin with their opening statement. The association will go second or can withhold until the beginning of their case.
- ☐ The first district witness will be called for direct. S/he will be crossed by the association, if needed. District may re-direct, if needed. Repeat until the corporation finishes their witness list.
- ☐ The association will then do their opening if not already done earlier.
- ☐ First association witness called following same procedure as #8.
- ☐ Rebuttal witnesses will be called by the corporation, if needed; then, by the association, if needed.
- ☐ The corporation will give their closing, followed by the association's closing.
- ☐ The hearing examiner will confirm the due date of the findings of fact/conclusions of law and the board meeting date for the public vote.
- ☐ The record will be closed. Hands will be shook. We all fall down. *Just kidding ☺*

Objections

! General Process for Objections

- An advocate will raise the objection. “Object.”
- Then, state the reason/grounds for the objection, for example: “Hearsay.”
- If answer had already been given before you could object, move to strike the answer.
- Opposing advocate will respond to justify the question s/he asked.
- Hearing examiner will either sustain or overrule objection

! Grounds for Objections

- Asked and answered
- Argumentative
- Assuming facts not in evidence
- Badgering the witness
- Best evidence
- Compound question
- Hearsay ***
- Invades province of hearing examiner as fact finder
- Irrelevant
- Leading
- Misquoting a witness
- Narrative answer
- Non-responsive-can only be made by examiner
- Opinion and conclusion
- Self-serving
- No proper foundation
- Outside of the scope of direct (cross)
- Witness is volunteering-made by party not examining

Ten Attributes of an Effective Advocate

1. Preparation
2. Evaluate the weaknesses in your case
3. Take time to come up with a strategy (theory)
4. An effective direct examination goes to the issues in the case
5. Objections are made for a reason
6. Minimize the personalities
7. No extreme statements, posing as arguments
8. Don't assume facts. Trust, but verify
9. Use simple direct language and avoid repetition
10. Know the case better than the other side