

SHEET METAL | AIR | RAIL | TRANSPORTATION

SMART
UNIVERSITY



Mediation/Arbitration

Mediation



FMCS

FEDERAL MEDIATION &
CONCILIATION SERVICE

- Mediation is a procedure in which the parties discuss their disputes with the assistance of a trained impartial third person(s) from the Federal Mediation & Conciliation Service (FMCS). The mediator(s) then attempt to assist the parties in reaching a settlement.
- Mediators have no decision-making authority to remedy disputes. Rather, they act as facilitators to assist the parties in reaching potential resolution of their dispute.
- It is a free service but both parties must agree to submit their dispute to mediation (unless contract says otherwise)
- Request Mediators from: [fmcs.gov](https://www.fmcs.gov)

Mediation

Example: *Article X Appeal to Arbitration*

"By mutual agreement of the parties, any matter subject to this article may be submitted to mediation through the State Mediation and Conciliation Service prior to arbitration."

Arbitration



- Arbitration is a procedure in which a dispute is submitted, by agreement of both parties, to an arbitrator.
- Arbitrators have decision making authority to remedy disputes similar to a judge.
- Cost is high. Typically, parties split the cost unless the contract specifies otherwise.

Before Arbitration

**Selecting an
Arbitrator**

**Schedule
Arbitration**

**Develop
Strategy for
Witnesses**

**Prepare Joint
Exhibits with
opposing
party**

**Submit
union's list of
witnesses for
Arbitrator**

Selecting an Arbitrator



- Request a list of Arbitrators from the American Arbitration Association, the Federal Mediation and Conciliation Services or State Mediation Agency.
- Research each arbitrator (get feedback from attorneys that have used them)
- Schedule a date to strike out names from provided list to select an arbitrator with opposing party.

Develop a Strategy for Witnesses

- List each witness for the union
- Prepare your witnesses for cross examination (devil's advocate)
- Predict the witnesses for the opposing party and their testimony
- Write down the union's goals to get on record for every witness listed
- Determine what questions are necessary to ask witnesses in order to establish a factual record supportive of the union's goals
- Organize all documents the union intends to use as support and label them for quick reference

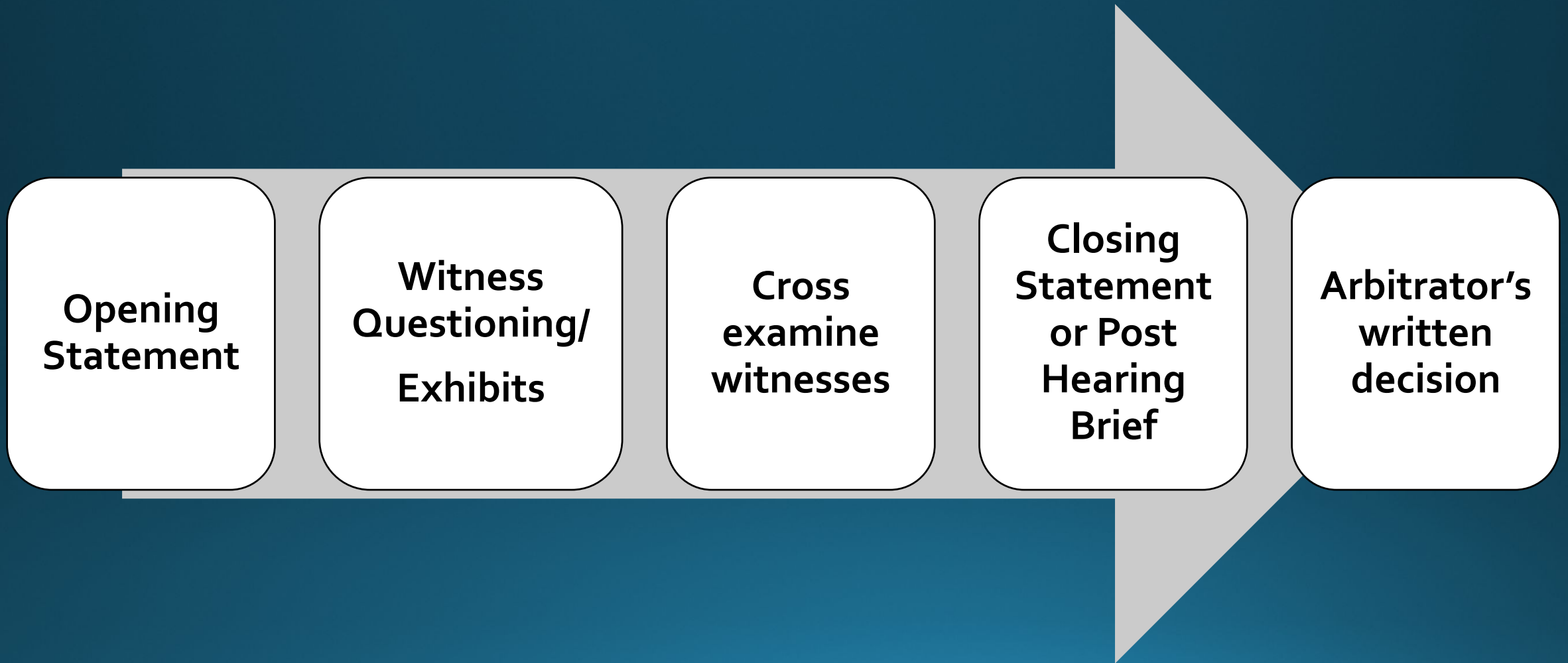


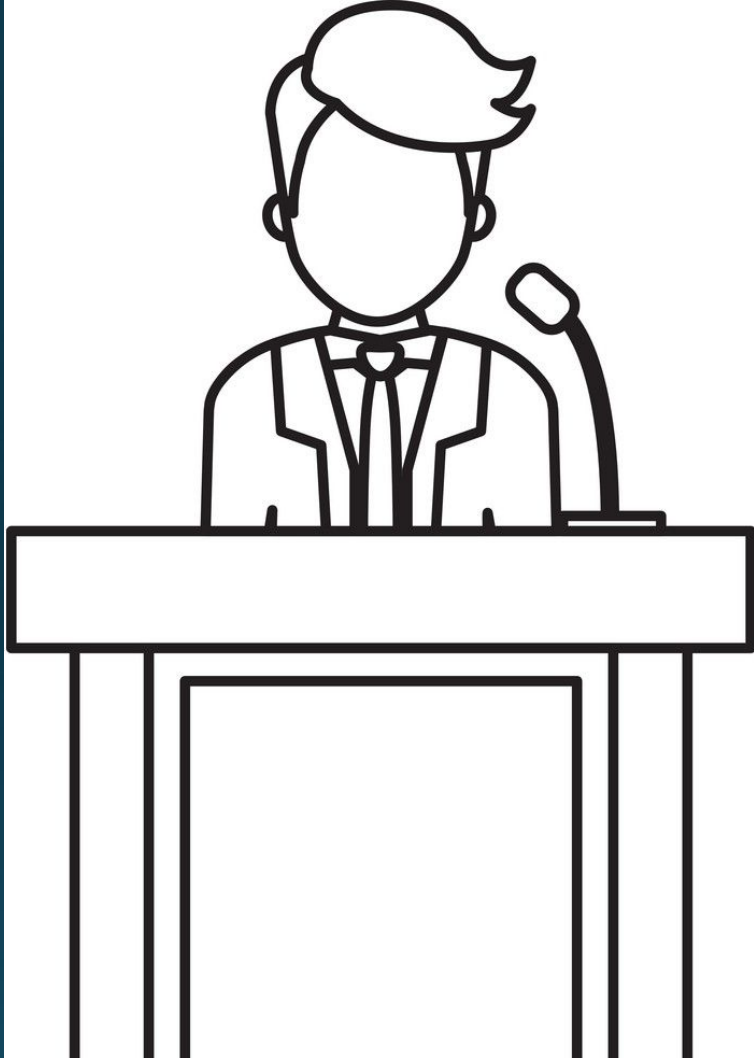
Prepare Joint Exhibits

- Joint exhibits are often offered by the parties who use the term to mean only that there are no objections to the admissibility of the exhibits.
- The parties may still disagree with statements made in the joint exhibits and offer evidence to refute the statements.
- Arbitrators will request joint exhibits to expedite Arbitration.
- The parties work together to submit the joint exhibits.
- The documents can include:
 - The Collective Bargaining Agreement
 - The Employer's Rules and Policies Handbook
 - Videos
 - Pictures
 - List of Charges from Employer
 - Grievance Form
 - Grievance Responses



During Arbitration





Opening Statement

- Opening statements are intended to give the arbitrator a preview of the case.
- An opening statement outlines the nature of the issue in dispute and presents a concise overview of the facts and evidence so that the Arbitrator can better understand the overall case and the arguments and supporting facts the party intends to introduce during the proceeding.

Witness Questioning/Introducing Union Exhibits

1. You must create the foundation for each exhibit in order to submit it into evidence. This ensures the document is authentic and the witness has personal knowledge of its contents.
2. You create the foundation for an exhibit by asking the witness:
 1. "Does this document look familiar to you?"
 2. "What is this?"
 3. "Has it been altered since you last saw it?"
 4. Ask the arbitrator to submit the exhibit into evidence
3. Label documents for identification (I.e., Union exhibit A)
4. Submitting exhibits through zoom or in person can be different depending on the arbitrator



Union Exhibits

(Tab 1) Union Exhibit A (Running red light)

1. Picture of intersection - Elizabeth [redacted]
2. CVC 21453 - Elizabeth [redacted]

(Tab 2) Union Exhibit B (Bus assignments and Blocks that proves Julio was not the driver of 1st incident) - Elizabeth [redacted]

(Tab 3) Union Exhibit C (Passenger mirror issue)

1. Picture showing back of bus - Leo [redacted] Anna [redacted]
2. Picture showing priority seating - Leo [redacted] Anna [redacted]
3. 4200 mirrors - Leo [redacted] Anna [redacted]
4. Convex mirror on 9800 bus - Leo [redacted] Anna [redacted]
5. Email Alex & Ciro - Anna [redacted]

(Tab 4) Union Exhibit D (retraining and onboard evaluations)

1. Julio's onboard evaluations - Leo [redacted] Anna [redacted]
2. Julio's verbal counseling log - Anna [redacted]

(Tab 5) Union Exhibit E (Retraining record for other operators)

1. [redacted] (passenger fall) - Anna [redacted]
2. [redacted] (running red light) - Anna [redacted]
3. NOI - Anna [redacted]

(Tab 6) Union Exhibit F

1. Anna admitting no discipline for GPS
2. (Anna admitting prior cases had no discipline) - Anna [redacted]
3. (Passenger Falls chargeable 2017 2018 2019 and non-chargeables (yellow are similar cases and green are Julios) - Anna [redacted]
4. SC0418-26 Joshua [redacted] - Leo [redacted] Anna [redacted]
5. SC0119-07 Lynn [redacted] - Leo [redacted] Anna [redacted]
6. SC0418-26 Lynn [redacted] - Leo [redacted] Anna [redacted]

7. SC0219-24 Alicia [redacted] - Leo [redacted] Anna [redacted]

(Tab 7) Union Exhibit G (Julio [redacted] incidents)

1. SC0319-26 Julio [redacted] Anna [redacted]
2. SC0319-26 Julio [redacted] non-chargeable - Anna [redacted]
3. SC0619-07 [redacted] Julio - Anna [redacted]
4. SC0919-11 [redacted] Julio - Anna [redacted] - Elizabeth T [redacted]

(Tab 8) Union Exhibit H (Discipline case Mark [redacted])

1. 2004 June 21 Notice of Intent
2. 2016 October 11 One day suspension NOI 16-258-601-SC and Agreement signed
3. 2016 October 12 Five-day suspension (Passenger fall) NOI 16-278-601-SC
4. 2016 October 7 deal (16-258-601-SC & 16-278-601-SC)
5. 2018 April 19 case # 18-071-601-SC deal

OBJECTIONS

- The purpose of an objection is to strike a piece of evidence (whether a physical piece of evidence or testimony) before it can be incorporated into the record of the case.
- Some examples include:
 - Hearsay
 - Vague
 - Lacks foundation
 - Leading the witness
 - Speculation
 - Relevance
 - Asked and answered



Direct Examination

- Direct testimony is provided by a witness called by the party who intends to use the witness to support their case.
 - As example, the union calling the grievant to explain the facts of the matter.
- Direct testimony should be straightforward and concise, laying out the facts supporting the party's case.
- Open ended questions such as, "tell me what happened on the day of the incident" are the standard for eliciting testimony in a direct examination.
- Leading questions, such as, "isn't it true..." are disfavored in direct testimony.
- It is important to plan direct testimony with the witness in advance so they know to expect the questions and how to answer.

Cross Examine Witnesses



- The questioning of a witness who has already testified, for the purpose of discrediting the witness' testimony, knowledge of the event, or reputation.
- When possible, use documentation or other evidence to contradict important pieces of testimony or to impugn the witness's credibility.
- Requires extensive preparation to know all the facts and what evidence contradicts the testimony.
- Unlike direct examination, leading questions are the standard for cross examination.



Closing Statement or Post Hearing Brief

- You have the choice to do a closing statement or submit a post hearing brief after each party rests their case.
- It is usually best to do a post hearing brief for complex cases.
- You can use the court report transcript for additional point of arguments for your post hearing brief.

Post Hearing Brief

- Written document of all the union's arguments.
- Post hearing briefs are typically due within 30 days after the arbitration hearing.

IN THE MATTER OF THE ARBITRATION)
BETWEEN)
INTERNATIONAL association of)
Sheet Metal Air Rail)
Transportation Division Local)
0023 (SMART))
"THE UNION")
AND)
Santa Cruz Metropolitan Transit)
District (METRO))
"THE EMPLOYER")

ARBITRATOR
Alexander
"Buddy"
Cohn

Wrongful Termination Grievance
Julio [REDACTED], Grievant
C.S.M.C.S. Case # ARB-19-0222

UNION'S POST HEARING BRIEF

Representing the Union:
James Sandoval
General Chairperson

Representing METRO:
Jerri K [REDACTED]
Attorney

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- Quick reference for Arbitrator

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Table of Authorities

- Cite previous precedent in the form of arbitration cases to make your case stronger.
- Cases with similar fact patterns and positive outcomes is the most desirable type of precedent.

Arbitration Decisions:

A. Salem-Keizer School District, 128 LA 1404, 1422 (Reeves, 2011)
.....pg.9

"I find terminating an employee without first imposing a significant suspension requires some showing by the employer that the employee committed some extraordinary offense or is recalcitrant."

B. Dresser Industries, Inc., 83 LA 577, 580 (Harrison, 1984)
.....pg.10

"Just cause usually requires that an employee be given a final warning to either improve performance or face the likelihood of discharge."

C. T.W. Recreational Services, 93 LA 302, 309 (Richard, 1989)
.....pg. 18

"Employer cannot reasonably distinguish between offending employees with similar duties of care on the basis that the feared consequences of such negligence, though sheer luck, did not come to pass."

D. See Consulate Healthcare of Cheswick, 129 LA 828, 832 (Harlan, 2011)

"Disparate treatment defense upheld where nurse fired after one incident of losing controlled substance while another not terminated until third incident"

E. Maryland Transit Administration, 124 LA 1618, 1622-1623 (Hockenberry, 2008)

"Employee denied a meaningful opportunity to correct her behavior"



- Make sure to get a court reporter
- Prepare your grievant
- Learn your objections
- Investigate every grievance as if it might go to arbitration
- Keep a record of everything. Keep a record of the people you have contacted, your discussions, telephone calls, names, dates, times of your contacts and the subject matter of your conversation. Get time stamps if possible.
- The purpose of a grievance process is to share all information during the process. Arbitrators are not big fans of 'gotcha' moments. Convince management that the union has a good case by having a lot of proof.
- Arbitrators' authority does not exceed the power of the Collective Bargaining Agreement.
- Arbitrators are not bound by previous precedent setting cases. However, they do take them into account.

\$20

ROBERT M. SCHWARTZ

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Any Questions?

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