



## Ohio School Boards Association Capital Conference and Trade Show

November 13 – 16, 2011

Greater Columbus Convention Center  
Columbus, Ohio

# Arbitration – a hill not to die on

Human Resources

Monday, November 14, 2011

3:45 p.m.

D 230—232

Cara Riddel, superintendent, Westfall Local (Pickaway)

William Nolan, managing partner, Barnes & Thornburg LLP

### Arbitration Services

OSBA offers many services to help you find solutions to meet all of your district's ever-changing needs. When considering solutions for your district, consider OSBA's Arbitration service.

OSBA's consultants are dedicated to providing school districts with quality arbitration representation at a reasonable cost. Arbitration services provide districts with hearing representation, assistance in preparation of case, witness selection and proper documentation.

To find out more, contact Renee Fambro at (614) 540-4000 or (800) 589-OSBA.

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<http://links.ohioschoolboards.org/CC11Evaluation>

### OSBA Mission

*OSBA leads the way to educational excellence by serving Ohio's public school board members and the diverse districts they represent through superior service and creative solutions.*

### Ohio School Boards Association

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Ohio School Boards Association  
Capital Conference  
Columbus, Ohio

**ARBITRATION**  
A Hill Not to Die On

November 14, 2011

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Career education administrators will likely be called on to testify at an arbitration hearing during their careers; some administrators might testify at dozens of such hearings. It is an unfamiliar and intimidating setting even after the first time, with a court reporter taking down your every word and knowing that under most bargaining agreements, the arbitrator has near-absolute and unappealable authority to decide the issue. It is important for the district and for the educator that he/she be able to respond effectively in this setting and maximize the district's chances of success, as well as preserving the working relationships that will continue with other individuals involved in the hearing.

This session provides the perspective of both the administrator and the outside counsel in preparing for a hearing. Whether you are regularly called on to serve in such a role, have authority over people who do, or just better want to understand how the arbitration process informs the day to day business of the district, we believe our shared perspectives will be helpful to you in your district's next arbitration. It should also be helpful to you in how you effectively – and cost-effectively – manage your lawyers.

The below represents our summary of what we believe are key issues in preparing for and conducting an arbitration. ***We welcome your thoughts during our discussion.***

### **Do you even need a lawyer?**

#### *Reasons you might*

- They are experienced in presenting your side of a story to third party decision makers
- They give you the ability to employ good cop / bad cop before, during, and after the arbitration
- They can provide fresh eyes on an issue some of your team members may be too close to
- They have access to information about individual arbitrators that you may not, and arbitrator selection may be the most critical aspect of the process

#### *Reasons not to*

- Cost
- Districts may wish to maintain a more informal relationship with the union

**Make sure you are committed to the arbitration process before you go forward***Things to Consider*

- With human decision-makers, you can lose even a good case – be sure you can live with that scenario
- Weigh pros and cons – including monetary and non-monetary costs – of various scenarios
- Attorneys do not (and should not) guarantee results, but it is appropriate for you as the client to demand (e.g. by %) the approximate likelihood of various scenarios, and their costs

*Does not mean you don't remain open to create negotiated solutions that may come up*

**The preparation process: laying the foundation***Start early*

- Not just the obvious benefits of not waiting until the last minute, but having an early focused session gives your arguments time to develop
- We have tended to prepare in 3 focused bursts
  1. soon after we learn the matter is headed for arbitration – do an initial brainstorm to preserve ideas (and evidence) while they're "warm," and identify any potential items that will require particular attention to be able to get started
  2. a middle session to build the arguments and really start to challenge ourselves
  3. final preparation and fine tuning
- At each step, list any document you can think of that may be useful and get people started locating those
- Build your plan in writing each step of the way – a timeline is often helpful
- This approach tends to manage financial and other resources well – time and money are not being spent constantly until the actual hearing, but it provides the efficiency (and good results) that comes from good planning

*Your case*

- Frame of reference: You are telling a story to somebody who usually is completely unfamiliar with you, the District, the employee, etc. Need to remember this every step of the way.
- Have a one-word theme
  1. OK to have sub-themes but ...
  2. have a touchstone everything goes back to
  3. this is effective story-telling, and it helps you and your team develop your thinking
- Prepare for your weaknesses at least as much as your strengths
  1. usually advisable to tackle weaknesses head on during the hearing – prepare to let the arbitrator hear it from you first if possible
- Don't weaken your best arguments by trying to make every conceivable argument – the average effectiveness (i.e. the arbitrator's impression of your case) of 2 good arguments and 2 long shots is lower than the average effectiveness of 2 good arguments
- Use legal research carefully
  1. some decisions from courts or other arbitrators may be persuasive ...
  2. but focus on how *your facts* support *your theme* and how *your contract* applies to them
  3. arbitrators tend to be less persuaded by and bound by "precedent" than courts
  4. so appropriately scrutinize large legal research projects by your lawyer
- Identify all conceivable contractual language
- Identify any bargaining history such as proposals exchanged during past negotiations
- Identify anything that might be considered a past practice and analyze it
  1. how is it different than this case?
  2. how is it the same?
  3. have there been any negotiated changes or relevant grievances or arbitrations since they occurred?

*Written evidence*

- Determine whether you need to subpoena documents from third parties or the other side
  1. not common in most school arbitration settings
  2. arbitrators not always equipped to move quickly on procedural matters like this – leave plenty of time
- Presentation counts
  1. what is the right level of formality and glitz? The District is Goliath to the employee's David, so be careful how much you "out present" them (usually not hard to do).
  2. but always make the arbitrator's job easy with clear and well-organized information
  3. remember different people learn differently – even arbitrators, so present information in different ways

*Preparing witnesses*

- Help witnesses know what to expect – it will be an uncomfortable setting for almost all of them
- Be mindful of which preparation sessions are subject to attorney/client privilege and which are not
- Explain to witnesses what happens when there are objections
- Practice key subject areas
- There is such a thing as over-preparation
  1. do not want witnesses to over-analyze
  2. overly scripted testimony can be less credible
- Ultimately the ideal amount of preparation is witness-specific, based on your knowledge of the individual's personality and the particular case

***The hearing itself***

*It sounds simple but bears repeating – have the logistics nailed down*

- Hearing room
- Court reporter
- Ensure witnesses will be there

*Have an understanding with your lawyer about communications and decision-making during the hearing*

- Normally you want to be comfortable trusting your lawyer to make a decision on the fly (e.g. to leave out a few planned questions) if there are circumstances that do not allow the two of you to have a strategic consultation

*Tips for testifying at any proceeding*

- Be yourself but show respect for the process by being neat and professional (and tell other witnesses you control to be the same)
- Err on the side of formality when addressing others
  1. what should you call the arbitrator anyway?
- Make a personal connection with the arbitrator

*Cross-examination*

- A good cross examiner barely lets you talk other than to say “yes” or “no” and they are entitled to do that – it’s very unnatural for you as a witness
- Trust your attorney to get YOUR story told at the right time – you’ve got to focus on the questions and answer them

*Other hearing conduct issues*

- Striking the right balance when cross-examining employees
  1. make your points but be perceived as the reasonable party
  2. 2 sides of “you’ve got to live with these people!”
- You may lose an argument over evidence or some other issue – move on
  1. it is unusual to win an argument over arbitrability
- Do not editorialize – even silently – when opposing witnesses are testifying
- There may be surprises

*It usually makes sense to brief the case after the hearing*

- Same approach as the rest of your case – reinforce the theme, focus on how the facts apply to it, and don’t bring down your good arguments with bad ones
- Gently remind the arbitrator what his/her role is under the contract

**Waiting for the decision**

*It usually takes longer than you want it to or than the agreement says*

*If you get a bill from the arbitrator – pay it now!*

*You’ve got to run your district, but be mindful of unfair labor practice risk with employees who are involved in the arbitration and talk to counsel before taking any disciplinary action against them*

**Responding to the decision**

*Appeals typically are very limited under most contracts and state laws*

*Whether win or lose, reach out to the union and make a plan for going forward*

*What does it mean for the next round of contract negotiations?*