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UNDERSTANDING ADMINISTRATIVE ADJUDICATION AND ARBITRATION PROCEDURES © 2010

Hello, my name is Pilar Vaile, JD, CALJ, and I am a trained and certified adjudicator. Through my training and experience, I am well-versed in the processes and considerations necessary to ensure all parties to an administrative proceeding or arbitration receive a full, fair hearing. This paper is written to explain the process I use, to prospective participants.

Introduction

Administrative adjudication occurs before agencies or other governmental bodies, and is provided for by statute. Arbitration may arise by private agreement between the parties, or by statute. Both use more informal procedures than civil litigation and are subject to a limited judicial review, but both must still meet the fundamental criteria of constitutional due process.

The basic principles or touchstones in administrative law or arbitration are as follows:

- the parties must receive adequate and timely notice of hearings, and other potentially dispositive or critical events or actions;
- the parties must have an opportunity to present all evidence relevant to the issue at hand;
- the parties must have an opportunity to object and/or respond to any evidence offered or received into evidence;
- the decision-maker must be free of bias, and must make his or her decision solely on the evidence received as part of the adjudication or arbitration;
- although State or Federal technical rules of evidence and procedure do not apply, they will often be a helpful guide in ruling on motions; and
- notwithstanding the former paragraph, any loss, diminution or revocation of a fundamental right, such as property rights, must be based on sufficient legally admissible evidence to survive review on appeal.

The foregoing principles are applied in the following manner, generally.

I. The Conduct of Hearings or Arbitrations.

The following hearing procedures govern evidentiary hearings, and also interim hearings where appropriate. The basic procedures include (a) providing notice; (b) providing a full and fair opportunity to be heard, present evidence, and make a record of any objections; and (c) referring as needed to black letter principles of procedure and evidence to ensure (a) and (b) are met.

First, I will ensure the parties are prepared to present and respond to all evidence relevant to the pending matter, at the time designated. I typically do this by setting a Pre-Hearing Conference, with at least two calendar weeks' notice whenever possible, unless the parties agree otherwise. (Frequently, such hearings are conducted at the agency's or employer's main offices, but I have adequate facilities to hold conferences and hearings at my own offices as well if necessary.)

At this Conference, the parties identify and, if possible, narrow the scope and number of issues to be addressed at the hearing on the merits; commit to deadlines for exchanging discovery if warranted, filing and responding to non-dispositive and dispositive procedural motions if warranted, and filing and serving witness and exhibit lists; obtain estimates as to the length of hearing required; and agree to a date(s) and time for the hearing on the merits, and any interim hearings that appear to be warranted. Next, I memorialize the agreed upon terms in a Scheduling Order and Notice of Hearing issued shortly after the Conference.

Second, once a hearing commences, I will follow any promulgated rules, regulations, policies or contractual provisions regarding hearing procedures and evidence. In the event there are no such rules or provisions, I will use black letter rules of procedure and evidence, and general norms of presentment and courtroom control and decorum.

For instance, the hearings will be conducted on the record, and will be open to the public absent good cause that it be closed. Frequently the agency or employer provides for a certified recording or transcription service. In the event they do not, I utilize my own digital recording equipment, from which electronic copies and paper transcriptions can be made at the request and cost of the parties.

I will introduce the case and myself, have counsel and/or any pro se parties introduce themselves, and address any pending motions and/or housekeeping matters. Then, if witnesses are to be excluded by regulation, contract provisions or party request, I will instruct all non-party or non-party-representative witnesses what that means, and send them out of the hearing room with instructions not to discuss their testimony with each other. Thereafter, I will invite opening statements, and have the party with the burden of proof commence its case by calling its first witness.

Once testimony commences, I will swear in each witness (I am a Notary Public); instruct the moving party to commence their direct examination; instruct the opposing party to commence cross-examination after that; hear and rule on any objections raised; and admit or overrule the admission of evidence as appropriate. From time to time, I may also ask the witness questions to clarify confusing or unclear points of his or her testimony. In that event, I allow the parties to follow up with additional questions of their own. At the conclusion of the moving parties' case,

I will entertain and rule on a motion for directed verdict. If that is not requested or is denied, we proceed to hearing the opposing parties' case in chief

Third, when ruling on any procedural and evidentiary motions, my guiding touchstone is to ensure that all parties are provided the utmost process due under the State and federal constitutions. While I will not be bound by the technical rules of procedure or evidence, I may refer to them for guidance as appropriate. As a matter of practice, ensuring due process will involve guaranteeing the parties' rights to due notice, and rights to a full and fair hearing on all relevant claims and defenses properly raised under the relevant law or regulation. In turn, this will involve generally permitting the introduction of any non-cumulative, non-privileged evidence that is relevant to the grievance and discipline imposed. The caveat, of course, is that any ultimate conclusion related to the loss or diminution of a fundamental right must be based on a residuum of legally admissible material. *See Chavez v. City of Albuquerque*, 1997-NMCA-111, ¶ 5, 124 N.M. 239, 947 P.2d 1059.

II. The Hearing Report or Arbitral Award.

After the close of the record, I will prepare a Hearing Report or Arbitration Award, which summarizes the issues and evidentiary record, and makes (or recommend, depending on the relevant regulations or contract provisions) findings of fact, conclusions of law, and/or any recommendations as to the matter's disposition.

First, in an introductory paragraph, I identify the parties and how the matter came before me, and summarize jurisdictional matters and my final legal conclusions.

Second, I identify the relevant issues before me, based on the relevant case law and any specific fact issues raised relative to that case law. In personnel matters, for instance, the ultimate issue will generally be whether or not the employer had just cause for issuing the discipline in question. However, the facts underlying disciplinary matters obviously vary widely, and the ways that ultimate question can be framed, challenged and/or addressed are almost limitless. Similarly, impasse arbitration ultimately requires identification of the last, best complete offer; however, there will usually be a number of specific factors to address to get to that point. Accordingly, even where the ultimate issue is a given, many if not most cases will also require a statement of the particular issues raised in the instant case, and methodical treatment of any elements indicated therein.

Third, I make my findings of fact. Generally, my findings serve essentially as a summary of the evidence. They are broken down into sections by previously identified issues, and systematically track the elements required to prove or disprove any relevant claim or defense. They include all findings or inferences necessary to support my conclusions of law, or any relevant credibility determinations. They also cite to the witness or witnesses on which they are based.

If necessary, in a following Analysis section I will address two kinds of evidence, generally. First, I will explain my reasoning between the findings of fact and the conclusions of law that will follow and provide the necessary legal citations, unless the issue is a collateral, obvious, or non-controversial one. Second, I may address evidence admitted but not relied upon in writing

the Report because subsequently determined to be irrelevant or unpersuasive. For example, I will do this where it is clear that a substantial part of a party's legal theory or emotional investment depended, rightly or wrongly, on such evidence. I do this to convey to the parties that they have indeed received a full, fair hearing, which my experience teaches me reduces the likelihood of further appeal.

Next, I make my legal conclusions. This is a short section because extensive groundwork has already been laid out in the Findings and/or Analysis sections. The conclusions of law generally just state that the specific claim, including the required internal elements, were or were not established by a preponderance of the evidence. After drawing my conclusions, I also frequently recommend an appropriate remedy, either dismissal or a remedy to make the injured or complaining party whole.

Finally, in a separate Appendix, I summarily describe the source or identify of all testimonial and documentary evidence admitted into the record.

By preparing a systematic and methodical Report, I balance the reviewing body's or bodies' need for succinctness against the parties' and reviewing body's/bodies' need for a full and accurate depiction of the evidentiary record. In a case where the reviewing body is a volunteer Board, and it relies on the prior groundwork performed by the Hearing Examiner, this balance is essential. Both the Board and the parties need to be able to efficiently and effectively navigate the Report. Additionally, both also need to feel confident that the Report fairly and reliably captures the essence of the evidence presented at the hearing on the merits.

In my experience, a thorough written description of the evidence introduced, admitted and/or relied on in proposing findings of fact and recommendations best meets these goals. On one hand, the reader can effectively scan such a written Report as necessary or appropriate, to find specifically desired information. On the other hand, in the event of dispute on appeal as to the contents of "the record below," the reviewing body can put its confidence in the description of the record provided in the Report, which minimizes or eliminates the amount of time it must spend reviewing transcripts and exhibits itself.

When completed, my Report is then issued to the parties and, if necessary, to any appropriate reviewing body. The Report and/or the cover letter will include instructions to the parties how and by when to file any appeal or objection to the Report, and a reference to the statutory, regulatory or contract provisions for review.

III. Appeals.

Appeal of an administrative Report or ruling, or an arbitration Award, will be allowed and determined by statute, regulation, and/or arbitration agreement.

Generally, a hearing examiner or ALJ's Report will be submitted to a reviewing Board or Commission, which may adopt, reverse or modify the Report, or remand the matter for further findings in light of that review. In some cases, the hearing examiner's decision will be the final, appealable order in the matter. After a final decision is issued, there will then be a right of

appeal to the District Court. This right of administrative review will arise under either the relevant act governing the agency hearing, or under other State law. *See, e.g.*, NMSA 31-3-1.1 and NMRA 1-074 (providing for administrative review upon express statutory authorization), and NMRA 1-075 (providing a right of administrative review in the absence of express statutory authorization).

Typically, the standard of review from an administrative determination is deferential, and requires an administrative Order be upheld unless it is:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence on the record considered as a whole; or

(3) otherwise not in accordance with law.

See, e.g., Public Employee Bargaining Act (NMSA 2003), §10-7E-23.

Review of arbitration awards is somewhat different. First, some labor arbitration Awards may be reviewed by an agency. For example, the New Mexico Public Employee Labor Relation Board's rules provide for review upon request of grievance arbitration awards. *See* NMAC 11.21.3.22(C). Generally, however, parties seek review of arbitration Awards at the District Court level.

The second difference is that the standard of review for arbitration Awards is even more deferential than that for administrative rulings. An arbitration Award will generally only be vacated in the case of lack of jurisdiction, fraud, evident bias, or misconduct by the arbitrator. *See* NMSA § 44-7A-24, and Uniform Arbitration Act (UAA), Sec. 23. An Award will only be modified or corrected in the event of mathematical error; if a claim was improperly submitted and its removal will not affect the merits of the decision upon the claim(s) properly submitted; or to correct a matter of form not affecting the merits. *See* NMSA § 44-7A-25, and UAA, Sec. 24.

Conclusion

I hope you have found this explanation of administrative adjudication and arbitration helpful. Please feel free to contact me if you wish to discuss fair hearing or arbitration principles in general, or if you are interested in engaging me as a hearing examiner or arbitrator.

Thank you,

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