

No Absolute Truth

Most cases involve disputes over the facts, but as one arbitrator cautioned at a recent conference, parties should not equate factual disputes with battles over the truth. Arbitration (and the grievance procedure) is not about deciding who is lying and who is telling the truth, and here's why.

1. Arbitrators cannot divine the truth.

Arbitrators listen to one party, and then set that version of the truth aside when they listen to the other party. In general, the arbitrator does not say that one side is offering truth and the other side is lying. Instead, the arbitrator reviews all of the evidence while sequestered in his or her office. And after reviewing the evidence says to him or herself: one side is more credible than the other.

When you put a case together, do not go on the theory that someone is lying. For most arbitrators, cases do not involve someone lying; Someone may be lying, but arbitrators do not have god-like powers to determine that. Moreover, it could be that both sides are wrong, as opposed to intentionally lying. What arbitrators know is that witnesses are relying on imperfect memories, imperfect recall abilities, and imperfect abilities to perceive.

2. Seeing is not always believing.

Sometimes, parties want the arbitrator to see the witness. The hope is that your witness will appear as an angel and the other side's as a buffoon. And thus, you win. This might be a realistic hope. Veteran arbitrators advise, however, that most testimony in a case should have been stipulated to because there is no disagreement on the facts. In other words, the real dispute is over one or two points. A witness's demeanor or attitude is rarely the deciding factor when it comes to those one or two points.

3. A good illustration of Finding the Facts as opposed to Finding the Truth.

The grievant and his supervisor describe to the arbitrator what happened on the day in question. There were no other witnesses.

The grievant allegedly threatened the supervisor and refused an order. The grievant does not have any history of poor performance, misconduct, or bad work relationships.

There were many preliminary facts, but let's skip to the key point in time when the supervisor gave a direct order. The grievant responded: I don't have to listen to this. After a few more exchanges, the supervisor said: Clock out and go home. According to the supervisor, the grievant then said: No problem, you're a dead man. (The grievant denies making this last statement.)

The supervisor calls the police while the grievant is clocking-out. The police arrive and listen to the story. They don't arrest the grievant. They send him home.

There are other facts, but the case boils down to whether the grievant said "No problem, you're a dead man."

Even if you took a poll of the best judges in the world, who could say that the supervisor is lying or that the grievant is lying? The most you can say is that there are indicators of

truth.

Many arbitrators and judges are unwilling to even do this. They either say that management has not met its burden of proof or the union has cast sufficient doubt that the penalty cannot be supported.

Finally, arbitrators and judges know there can be consequences to their decision. This after-effect occurs when the arbitrator orders reinstatement. On one hand, if indeed the supervisor was telling the truth, yet the arbitrator reinstated the grievant, the supervisor knows his credibility has been undermined. On the other hand, if the employee was telling the truth, the employee has to work with a supervisor who he cannot trust. In other words, there is now a built-in animosity, going both ways.

Arbitrators are keenly aware of this post-decision consequence. It is just another reason why arbitrators make findings of fact and not absolute truths.

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