# Plain Language

To speak effectively, plainly, and shortly, it becometh the gravity of the profession.
—Sir Edward Coke, 1600

# Clear Expression in Labor Arbitration

By Mary Aslanian-Bedikian

*"Style to be good must be clear, as is proved by the fact that speech which fails to convey a plain meaning will fail to do just what speech has to do . . ."*

Aristotle, *Rhetoric* 1404b, in II THE WORKS OF ARISTOTLE (W. Ross ed. 1946)

Elimination of archaic legalese is the purpose of the Plain English movement. Spawned by pro-consumer advocates in the 1960's, it has had profound impact in the more technical fields of litigation.

Until recently, labor arbitration (a less structured process of dispute resolution which complements litigation) remained insulated from the lawyer's primordial instinct to resort to tautology. But in the last few years the effect of external law, coupled with increased sophistication of advocates in arbitration, have brought many useless, redundant and obtuse phrases into the arbitration forum.

This trend is unfortunate in two respects: It detracts from the utility of labor arbitration as a simple, informal method of dispute resolution, and the introduction of incomprehensible language into arbitration erodes the capstone of arbitration, which is finality.

The labor arbitrator's decision is the bargained-for result of grievance arbitration machinery. Its importance to industrial stability cannot be disputed. Where arbitration awards become unclear, courts can pierce the cloak of protection afforded the process. Parties to a collective bargaining agreement must then seek remedies in court. Justice delayed becomes justice denied.

The object of this paper is to help preserve the unique position of arbitration. Practical guidelines are offered to aid labor arbitrators, the majority of whom are lawyers, in the award-writing phase.

*This is the sixth in a series of articles coordinated by the Plain English Committee of the State Bar of Michigan. The articles are written by sections, committees, groups and individuals interested in promoting plain language in the law.*

## Improving Readability

*Identify the Issues*

The arbitrator should first identify the issues under consideration. Although there are no rigid components to acceptable physical format, it is preferable to identify this portion of the award separately. This allows the parties to determine whether all alleged violations of the collective bargaining agreement have been addressed, without having to review the entire document. It will be immediately clear if the arbitrator discounted certain issues.

More fundamentally, clear identification of the issues provides a logical structure, a building block upon which the arbitrator fashions the decision.

Here is an example of a brief summary of issues in a hypothetical case:

THE ISSUES AGREED UPON FOR SUBMISSION ARE:

1. Is the grievance with respect to John Doe arbitrable? If so, what shall be its disposition?
2. Did the employer violate the collective bargaining agreement when it failed to grant John Doe seniority for the period he served as school administrator? If so, what shall be the remedy?
3. What shall be the assessment of the arbitration cost under Article XI - Sec. 5(d) of the agreement?

*Avoid Reciting Lengthy Paragraphs of the Collective Bargaining Agreement*

It is customary for arbitrators to recite pertinent sections of the parties' contract. Generally, however, too much of the contract is repeated in the award text. A recent in-house analysis of award texts showed that as much as 20% of the wordage does no more than set forth the provisions allegedly violated by the employer.

A criticism often heard from advocates and presenters in arbitration is that arbitrators cite provisions of the collective bargaining agreement which have no direct bearing on disposition of the grievance; they are included merely because they happen to be in the section of the contract subject to arbitration.

For example, a significant number of awards cite recognition clauses. A recognition clause in the collective bargaining agreement establishes the union's right to exclusive jurisdiction. Unless recognition is the subject of the grievance, it should be assumed that the union has exclusive jurisdiction to pursue the grievance through the adjudicatory machinery; recitation of recognition language is superfluous and unnecessarily lengthens the award.

*Summarize the Parties' Positions*

The respective arguments should be briefly noted in the award and addressed by the arbitrator. This provides feedback on the relevancy or nonrelevancy of the arguments. It further permits the parties to assess the consistency of the arbitrator's opinion, and the rationale offered for rejection of arguments. Future grievances could be generated if an arbitrator fails to address all arguments through summary restatement.

Arbitrators typically use this opportunity to embellish the award with direct quotes extracted from the parties' briefs. One recent arbitration award contained an unabbreviated recital of each party's arguments, spanning 12 pages. While some arbitration pundits contend that a lengthy recitation of the parties' arguments demonstrates that the arbitrator heard, understood and assigned proper weight to the arguments, most advocates agree that extensive repetition is not warranted. A succinct paragraph summarizing the respective contentions of the parties is more credible. An example:

> Contention of the Union
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> **The union maintains that grievant X was disciplined based upon her unwillingness to provide confidential medical information. It further suggested that the employer was punitive in its approach because it did not offer the grievant medical leave until after it suspended and discharged her. Finally, it argued that the employer's sick-leave offer was unrealistic because the grievant cannot exist without a paycheck for six months and because the grievant, due to her medical requirements, could not meet the absentee standards upon her return. For these reasons, the union argued that the termination was not for just cause.**
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> Contention of the Employer
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> **The Employer contends that there was just cause for discharge, both under the Code of Conduct, and based upon general principles of labor relations which prohibit excessive absenteeism regardless of the cause. It cites numerous arbitration cases in support of its position that an Employer may discharge an employee, if her absenteeism causes a disruption at the work place. The Employer maintains that the grievant's absences interferred with the efficient management of the Facility and that she caused the hospital to incur excessive over-time expenses. It further believes that it reasonably attempted corrective discipline and that it was justified in terminating the grievant.**

### Avoid Verbosity

Where multiple or complex issues are presented for resolution, we often see a tendency to obscure clear thought patterns, possibly to camouflage the arbitrator's lack of knowledge. This attempt at subterfuge becomes obvious to the reader. In the following example, the arbitrator disposed of a grievance where the union alleged that the grievant's illness precluded the need to secure a medical certificate before returning to work:

> **On a first reading of the Agreement between the parties, it would appear that the Authority is restricted to the effect that the Authority may not require an operator returning to duty within seven days of a sick leave to be medically approved by the Authority's doctor; however, when the nature of the Authority's business is taken into account, in which business the Authority must permit its employees to drive transit vehicles which are very powerful machines that can become extremely dangerous instruments if, for some reason or other, such vehicles are not operated in a safe manner; and, further, when we take into consideration the past practice which exists between the parties, it becomes quite evident, in the opinion of the chairman, that Section 43, of the Agreement between the parties, was intended to cover the average type of illness to which an employee may become subject and which requires some days of sick leave, with the illness coming on and rendering the employee unable to work after the end of a full day of work; and, not in the situation present in this case where the grievant was unable to complete the day; but rather, the grievant had to be relieved prior to the end of her shift of duty; therefore, the dictates of safety required a medical certification that the grievant, returning from the emergency sick leave, was not physically qualified to drive one of the Authority's vehicles.**

This is an indisputable example of excess. It could easily (and more effectively) read thus:

> **The parties' agreement may restrict the Authority by not imposing any conditions on any employee recovering from an illness who desires to return to work. Factors to be taken into consideration include: 1) nature of the Authority's business, 2) a past practice of the parties, and 3) circumstances of the grievant's requested sick leave. This type of situation is not covered by the parties' agreement. The grievant here was unable to fully perform her responsibilities during the shift of duty. The transit vehicles which grievant was charged with maintaining are dangerous if not operated in a safe manner. Thus, safety considerations dictate that this grievant needed medical authorization to establish that she was not physically qualified to drive the Authority's vehicle.**

Long paragraphs can be broken down into understandable parts. When, as here, a number of considerations affect the arbitrator's decision, it enhances readability to separate the considerations by numbers. This reduces the number of words in a sentence and adds variety to the writing style, desirable

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qualities if the award is to be correctly interpreted.

*Avoid Unnecessary Citations*

Many arbitrators rely on the extensive use of case citations to give the award a more polished appearance. It creates the impression that a lot of research was involved. But unless a question of external law is involved, case citations are generally not beneficial. Too much reliance on citations deprives the parties of the *arbitrator's* thinking. The very nature of the labor relations environment requires that those who represent the interests involved know and understand the collective bargaining process and its underpinnings. What the parties bargained for is the benefit of their appointed arbitrator's expertise.

*Avoid Inconsistency*

It is a cardinal principle of arbitral jurisprudence that an arbitrator cannot substitute his or her own judgment for that of management. To preserve management discretion, collective bargaining agreements will generally contain a clause which states that "the arbitrator shall not have any authority to add to, subtract from or otherwise modify any of the terms of the agreement." Typically, this is followed by a management rights clause which prevents an arbitrator's decision from affecting the employer's rights to manage and direct the work force absent an explicit grant of authority.

While arbitrators need not necessarily be consistent from award to award where comparable facts are at issue, there should be consistency between the opinion and the ultimate award. In a recent case involving a public sector union, an arbitrator ruled that the grievant's actions violated college work rules prohibiting the commission of an assault and battery while on duty. He went on to find that grievant's action against the supervisor on whom the assault and battery was committed was just cause for discharge.

But the arbitrator then directed reinstatement of the grievant without back pay, on the ground that the grievant had demonstrated remorse and regret at the oral hearing.

The award was not consistent with the finding. Only if the arbitrator had ruled that the assault and battery did not constitute just cause for the employer's actions could the award be consistent with the finding.

A finding that the employer lacked just cause could have been predicated on the grievant's length of seniority, or exemplary work record. But having once established just cause for discharge the arbitrator was required to uphold the management's decision. To do otherwise would thwart the intent of the parties and undermine the collective bargaining process.

In this case it required independent judicial proceedings to correct the major inconsistency.[1] In an unpublished opinion released on August 13, 1984, the Michigan Court of Appeals ruled that, "the arbitrator lacked authority to modify the employee's discharge after his unambiguous finding that the college had just cause to discharge the employee." The arbitrator's award was not enforced.

**Conclusion**

In *Steelworkers* v *Enterprise Wheel and Car Corp*,[2] the U.S. Supreme Court said, "A well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." An arbitrator's award is not intended as a device to impress everyone with the arbitrator's expertise, but rather to express, through his or her eyes, the otherwise elusive intentions of the parties.

Preparing a well-written and non-esoteric decision is imperative. Because of the continuing relationship of the parties, it is as important for the losing party to understand why he or she did not prevail as it is for the prevailing party to know why. Elimination of misty abstractions and sophist reasoning will do much to achieve the goal of labor arbitration: *Final* and binding resolution of the grievance.

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**Footnotes**

1. The Code of Professional Responsibility for Labor Arbitrators mandates that arbitrators give deference to contractual limitations on their authority. Sec. 2E(1) — Jurisdiction which reads: An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves. Failure to do so can jeopardize the sanctity of the award.
2. 363 U.S. 593 (1960).