

FROM A UNION PERSPECTIVE

By Josh Bowers

A STRONG OPENING STATEMENT IS YOUR TICKET TO SUCCESS

Your first opportunity in an arbitration hearing or the presentation of a grievance is your opening statement. That is when you can win or lose your case. To illustrate this point, consider that the overwhelming majority of jurors report the most influential part of a case is the opening statement. Although it is inappropriate, most jurors admit that from the opening statement they develop a theory of which side should win. When the testimony and evidence is presented, the jurors tend to credit evidence that supports their theory of the case and discredit the other evidence. Although their professional training and positions make them less likely to adopt a bias theory at the outset of a case, the opportunity to move the arbitrator in your favor should not be missed.

A strong opening statement sets out your case in an orderly way that allows the arbitrator or deciding official to quickly grasp the problem and understand that your proposed solution is the appropriate outcome for the case. How you present the opening statement will tell the arbitrator or deciding official if you are well prepared. It will demonstrate whether you are familiar with the collective bargaining agreement, law and regulations and whether you are familiar with the facts of your case.

In most cases, the arbitrator will not know anything about the case other than what is in the grievance file. A deciding official in a grievance will have heard only the agency's side of the case. Your opening statement must flesh out the case and make it come alive. The opening statement is not an argument, it is a roadmap to the case. The opening statement must (1) identify the issue, (2) briefly discuss and identify the applicable authorities such as laws and regulations, (3) discuss the facts, and (4) propose a resolution.

1. Identify the issue. (e.g. discipline or performance and employee affirmative defenses — reprisal for union activity, discrimination or whistleblower reprisal)
2. Briefly discuss the collective bargaining agreement provisions, laws and regulations and let the arbitrator know the union will provide copies of the laws and regulations and administrative decisions (e.g. EEOC, MSPB or FLRA decisions.) Discuss the agency's burden of proof. In whistleblower or discrimination cases, discuss the shifting burden of proof between the union/employee and the agency.
3. Discuss the employee's background:
 - employee's job duties
 - veteran status
 - years of federal service

- last three performance appraisals
 - lack of prior discipline
 - cash awards
 - letters of commendation
4. Discuss the facts in chronological order and the evidence to be presented:
- "On April 15, 19 Susan was assigned to the night shift...."
- "The witnesses will testify that this is normal conduct or the procedure for addressing this problem...."
- "The witnesses, having known Susan for a long time, will testify she is truthful, honest and can be trusted."
- "The evidence will demonstrate that other similar employees did not receive the same discipline for similar conduct."

Briefly identify and discuss the testimony of each witness and the exhibits.

5. Tell the arbitrator or deciding official the remedies you are requesting. The remedies may be presented as alternatives:
- "First, we will ask you to conclude that there was no wrongful conduct."
- "Second, we will ask you to conclude the agency failed to follow the required procedures, and as a result, the employee was denied an effective opportunity to respond."
- "Third, if you conclude there was wrongful conduct and the agency followed the appropriate procedures, we will ask you to conclude the discipline is too severe and should be reduced."

Opening statements should not be read from a pre-prepared statement which can be stiff and boring. Instead, make your presentation from notes in a well prepared outline. For beginners or even seasoned advocates, I suggest sitting down with a tape recorder and repeating the opening statement over and over until it sounds convincing. If you do not have a tape recorder, most answering machines have a recording function. Better yet, practice your opening statement before your spouse, neighbor or children. The best audience for practicing an opening statement is someone unfamiliar with your case. Their questions may be very insightful on what you should clarify, leave out or emphasize. Finally, good luck!