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Principal Office:
Portland, Oregon

Additional Office Locations:
Irvine, California
Seattle, Washington
Chicago, Illinois

THE ARBITRATOR'S GUIDELINES FOR YOUR HEARING

I. General Guidelines.

A. Introduction. The Arbitrator has developed the following guidelines, primarily to streamline the process and to ensure the Parties create a clean and indisputable record at the hearing. If at all possible, please follow these guidelines in hearings before me. That said, please understand that these are *guidelines* only, as the Arbitrator recognizes that her arbitrable powers come from the Parties' applicable Collective Bargaining Agreement, Master Agreement, administrative rules, statute or ordinance (in the case of an interest arbitration or fact-finding) or other controlling document (collectively, the Agreement). Thus, if any of the below guidelines conflict with the Agreement, *the Agreement controls*.

B. Communications with the Arbitrator. The following guidelines for communicating with the Arbitrator apply to this hearing:

1. E-mail is the Best Method of Communication. The Parties should use e-mail to communicate with the Arbitrator, as sending a fax or a letter by mail will likely not be seen or read for at least a couple weeks; whereas, at a minimum, the Arbitrator checks her e-mail at least once or twice on a workday, even when she is out of town for work or vacation.

2. *Ex Parte* Communications Will be Deleted and Unread. Importantly, no matter the method of communication, *any* communication sent to the Arbitrator *must* be copied to the opposing Party. In fact, *ex parte* communications, including any attachments, will be summarily deleted.[1]

3. Stay on the Same E-mail String. Going forward, please stay on the same e-mail string the Arbitrator sends acknowledging her selection by these Parties. Also, with the exception of hard copies of exhibits, all submissions such as subpoenas, motions or Post-Hearing Briefs should be sent to the Arbitrator via e-mail, preferably on the same e-mail string.

C. Chief Representation. Each Party should notify the Arbitrator and the opposing Party by e-mail anytime the Party's Chief Representative changes. For example, the Employer's Legal Department may take the matter over from Human Resources, or the Union may have retained outside counsel.

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[1] As addressed below, the only exception to this rule is when the Parties submit their Post-Hearing Briefs.

II. Preparing for the Hearing.

A. Scheduling the Hearing. The Arbitrator is available for in-person, videoconference hearings, or a hybrid of both, depending on the preference of the Parties. In that regard, please meet-and-confer as soon as possible, then inform the Arbitrator as to what kind of hearing the Parties prefer and how many days of hearing are needed. It would also be helpful to know how many months out the Parties would prefer to schedule the hearing.

1. In-Person Hearings. If the Parties agree to hold an in-person hearing, in addition to the above parameters, please attempt to agree on a hearing location. At the very least, the Arbitrator will need to know the city and state where the Parties propose the hearing will be held.

2. Hybrid Hearings. If the Parties agree on a hybrid hearing, where one Party is in-person and the other Party appears via videoconference, the Arbitrator will be present on the side that is in-person, absent any mutual agreement otherwise.

3. Videoconference Hearings. If the Parties agree to hold the hearing by videoconference exclusively, the Arbitrator's personal preference is to hold the hearing via Zoom. Please note that the Arbitrator will not "host" a videoconference hearing.

- **PRACTICE TIP:** Regardless of the kind of hearing the Parties agree to, the Parties should confer concerning the logistics, such as who will host the videoconference or whether any special equipment is needed at an in-person hearing, et cetera. The Arbitrator need not be informed of those details.

B. Motions. Absent language to the contrary in the Agreement, the moving Party *must* meet-and-confer with the opposing Party prior to filing any motion, such as a motion for continuance, or a motion to bifurcate the hearing. All motions must summarize the efforts that have been made to resolve the issue(s) between the Parties.

- **PRACTICE TIP:** In the event of no mutual agreement, the Arbitrator will expect facts and case law or language from the Agreement, if applicable, that support the Party's motion. The moving Party should provide a Declaration signed under oath, and exhibits, if available, in support of the motion.

- **PRACTICE TIP:** If the moving Party fails to meet-and-confer with the opposing Party in advance of filing the motion, more likely than not, the motion will be denied.

C. Prehearing Conferences. The Arbitrator is available to schedule a prehearing conference for up to thirty (30) minutes at no charge to the Parties. The prehearing conference can be held via conference call or Zoom, depending on the Parties' preference.

D. Subpoenas. If there is no language in the Agreement that provides for issuance of a subpoena, the Arbitrator is willing to sign a subpoena that requires a witness to appear and testify at the hearing, or that requires the production of documents, when the following conditions are met:

1. The Party seeking issuance of the subpoena (the proposing Party) must first meet-and-confer with the opposing Party to determine if the opposing Party will agree without going through the process of issuing a subpoena.

2. If the Parties are unable to agree, the proposing Party must provide a minimum of fourteen (14) business days' advance notice to the opposing Party of its intent to have the subpoena issued and simultaneously provide a copy of the proposed subpoena to the opposing Party.

3. The proposed subpoena must contain the signature of the proposing Party's attorney or other authorized representative certifying that the subpoena is necessary, proper, and requested in good faith.

4. To the extent the subpoena is for appearance of a witness at the hearing, the proposed subpoena must also contain:

   - the full name (first and last) of the witness;
   - the date, time and place[2] the subpoenaed Party is required to produce the witness; and
   - a detailed description of the subject matter the witness will be required to testify about.

5. To the extent the subpoena is for documents, the proposing Party must first establish that the proposing Party requested the documents through a formal Request for Information (RFI), and the opposing Party did not provide the documents as requested within a minimum of thirty (30) days of the date the RFI was served. If the proposing Party can establish a RFI was served at least thirty (30) days prior, the proposing Party must follow the same procedure outlined in sections D.1-3 above.

6. The proposed subpoena for documents must also contain:

   - the date, time and place[3] the subpoenaed Party is required to produce the documents; and
   - a detailed description of the document(s) the Party seeks.

7. To the extent the opposing Party has objection(s) to the form of the subpoena, the opposing Party must:

   - Meet-and-confer with the proposing Party regarding the opposing Party's objections and attempt to resolve the dispute amongst the Parties within two (2) business days after receipt of the proposing Party's notification.

   - If the Parties are unable to mutually resolve the dispute, the opposing Party must file its objections with the Arbitrator and on the proposing Party no more than two (2) business days after the Parties have attempted to meet-and-confer.

   - The proposing Party has two (2) additional business days to respond in writing to the opposing Party's objections and to file a written response with the Arbitrator and the opposing Party.

8. The Arbitrator will rule on any objection(s) within two (2) business days of the date the objection(s) and the proposing Party's written response to the objections are submitted.

   - If the Arbitrator rules that the proposing Party must make changes to the language in the subpoena, the proposing Party must make those changes within two (2) business days of the date the Arbitrator rules, then submit the subpoena to the Arbitrator to sign.

[2] The "place" could include appearing via videoconference.
[3] The "place" could include producing the documents by e-mail to the proposing Party.

- If the Arbitrator rules that the subpoena is sufficient, the Arbitrator will sign the subpoena within two (2) business days of the date the subpoena and the objections and response thereto have been received.

9. If there are no objections to the form of the subpoena or the Parties mutually agree on the form of the subpoena after conferring, the proposing Party shall provide the subpoena to the Arbitrator to sign. The Arbitrator will sign the subpoena within two (2) business days of the date the subpoena is received.

10. Any fees associated with the issuance of a subpoena must be paid by the proposing Party, absent any language in the Agreement to the contrary.

11. All timelines set forth above may be extended by mutual agreement or for "good cause" as defined by the law in the applicable jurisdiction where the underlying grievance was filed. For example, if the grievance was filed in the State of Washington, "good cause" would be defined by Washington law. Similarly, if the grievance is a Federal sector grievance, the law in the applicable U.S. Circuit Court of Appeals determines the definition of "good cause."

- **PRACTICE TIP:** Hereafter, anytime "good cause" or "prejudice" is mentioned, it shall be defined as set forth above.

- **PRACTICE TIP:** If a Party could have subpoenaed a witness or documents in advance of the hearing but failed to do so, any motion to continue the hearing for reasons that include witness unavailability or documents not produced will likely be denied, absent a showing of good cause.

E. Court Reporter. In the Arbitrator's opinion, whether the hearing is held in-person or by videoconference or a hybrid of both, it is far less costly to have a court reporter present during the hearing than it is to have an audio recording or a Zoom recording of the hearing. Thus, the Arbitrator strongly encourages the Parties to hire a court reporter for the following reasons:

1. Having a Court Reporter is Simply More Efficient. Having a court reporter's transcript streamlines the process and is significantly more efficient as it allows the Parties and the Arbitrator to refer back to the transcript when necessary, rather than spending an exorbitant amount of time winding and rewinding an audio recording or a Zoom recording trying to find the critical testimony.

2. Having a Court Reporter Refreshes the Parties' and the Arbitrator's Recollection. It is also much less likely that the Parties or the Arbitrator will forget or misremember anything that may have occurred during the hearing. For example, an advocate may ask a question that raises an objection by the other Party. By the time the objection is made, the Arbitrator may or may not recall the question. If a court reporter is present, the court reporter can simply read back the question to refresh the Parties' and the Arbitrator's memory so that the Arbitrator can efficiently and timely rule on the objection.

3. The Court Reporter Acts as the Custodian of Record. Additionally, the court reporter acts as the custodian of the record, tracking which exhibits were admitted and which were not. Having a custodian of record is much more preferable than relying on the Arbitrator's memory.

4. The Court Reporter Creates a Clear and Indisputable Record. Lastly, and most importantly, the Arbitrator's number one (1) goal during a hearing is to create a clear and indisputable

record. Having a verbatim transcript provided by a certified court reporter is the best way to ensure that happens.

- **PRACTICE TIP:** While it is the Arbitrator's strong preference to have a court reporter present, the Arbitrator stops short of ordering the Parties to do so because, ultimately, it is up to the Parties to make that determination. In any event, if one or more of the Parties agree to have a court reporter at the hearing, please make arrangements at least fourteen (14) calendar days in advance of the hearing date(s).

F. Stipulations. If at all possible, please be prepared to stipulate to a joint statement of the issue(s) to be decided as well as to the admission of Joint, Employer or Union exhibits, in advance of the hearing date(s). Also, to the extent some or all of the underlying facts are undisputed, the Arbitrator encourages the Parties to prepare a stipulated set of facts which eliminates the need for testimony concerning those facts.

- **PRACTICE TIP:** In nearly every hearing the Arbitrator has previously held, inevitably, the Parties submit the same document as an exhibit. Meeting-and-conferring on the exhibits in advance eliminates the Parties' submission of duplicate copies of exhibits and streamlines the process.

- **PRACTICE TIP:** If the Parties are in an industry where acronyms are frequently used, it would be helpful if the Parties prepare a stipulated list of the acronyms and their meanings in advance of the hearing.

G. Exhibits. Regardless whether the Parties stipulate to the admission of exhibits in advance, each Party must provide the Arbitrator with a copy of their exhibits in both hard copy and electronic format.

1. Hard Copy Exhibits. The Arbitrator strongly *suggests* that hard copy exhibits should be presented in a binder with tabs for each individual exhibit rather than providing a stack of documents with no way to tell which exhibit is which.

- **PRACTICE TIP:** Marking each exhibit by either the Exhibit number or Bates-stamp number and numbering each page of each exhibit in advance is extremely helpful and greatly appreciated.

- **PRACTICE TIP:** It is also very helpful if an Exhibit List is provided along with the hard copies of the exhibits. That way the Arbitrator knows exactly where to find the particular exhibit referenced during the hearing.

2. When to Provide the Proposed Exhibits.

a. In-Person Hearings. If the hearing is held in-person, the Parties may provide the Arbitrator with a hard copy of the exhibits at the date and time of the hearing. The electronic copies of all exhibits that were admitted can be submitted by e-mail after the close of the hearing.

b. "Hybrid" or Videoconference Hearings. If the hearing is a hybrid hearing or is held completely via videoconference, the Party appearing by videoconference must mail, FEDEX or UPS the hard copies of the exhibits to the Arbitrator at least seven (7) calendar days in advance of the hearing to ensure that the Arbitrator receives them in time. The Arbitrator will let the Parties know in advance to

which office address the Parties should send the hard copies of exhibits. Again, the electronic copies of the exhibits can be submitted by e-mail after the close of the hearing.

- **PRACTICE TIP:** Typically, the Agreement is admitted as Joint Exhibit 1. If at all possible, please provide the electronic copy of the Agreement to the Arbitrator in both PDF and Word format.

H. Be Prepared to Educate the Arbitrator.

1. Your Industry. While the Arbitrator has general knowledge, background and expertise in a variety of industries, the Parties should be prepared to educate the Arbitrator on the specific aspect of your industry that will be at issue at the hearing. If acronyms are used extensively, be prepared to educate the Arbitrator on what those acronyms mean.

2. The Five (5) W's. Unlike a judge in a court proceeding, the Arbitrator holds the hearing with no advance knowledge of the facts, the evidence, the issue(s), or the applicable contract language. Thus, the Parties should be prepared to answer the five (5)-W's during the hearing: "Who, What, Where, When and Why."[4]

III. The Hearing.

A. The Opening of the Hearing. Generally, the Arbitrator takes care of preliminary matters, such as motions to sequester witnesses, admission of exhibits and a statement of the issue(s) to be decided at the beginning of the hearing. If a court reporter is present, the Arbitrator's preference is to talk to the Parties off the record, then address these preliminary issues on the record once the Parties have concluded whether there is an agreement, or not. The hearing can commence once those matters have been addressed.

B. The Order of Witnesses. Unless the Parties stipulate otherwise, the Party who has the burden of proof and the burden of production will present first. Having said that, sometimes a witness is only available at certain times during the hearing. If it is necessary to request that a witness be called to testify out of turn (i.e., during the opposing Party's case-in-chief), normally, the request will be granted absent a showing of prejudice to the opposing Party.

- **PRACTICE TIP:** If a Party knows about the witness' limited availability in advance of the hearing date, the issue should be raised with the opposing Party and the Arbitrator as soon as possible, and, in any event, before the hearing starts. Absent a showing of good cause, a motion to continue or cancel the hearing on the date of the hearing will be denied.

C. The Rules of Evidence. While the rules of evidence are more relaxed in an arbitration, the burden of proof remains the same as if the hearing is held before a judge in State or Federal court. In that regard, the Arbitrator relies on the rules of evidence as a *guideline* during the hearing. To quote Arbitrator William H. Lemons:

> …I generally use the rules of evidence *as a guide* in determining admissibility of exhibits and the appropriateness of questions and testimony. While the rules governing admission of evidence at the arbitration hearing will be more relaxed than in a court proceeding, counsel will be expected to lay an appropriate foundation and to observe normal witness interrogation rules regarding the form of questions (leading one's own witness on

[4] *See* Bleyer, Willard Grosvenor (1913). "IV. Structure and Style in News Stories." *Newspaper Writing and Editing*. Cambridge, Massachusetts: Houghton Mifflin. p. 66. Retrieved January 28, 2024.

> substantive matters, for example, will not ordinarily be permitted). Hearsay evidence will normally be admitted if it is of the sort that business people and others commonly regard as trustworthy and rely on. The key word there is *trustworthy.* Double-and triple-hearsay will not normally be admitted.[5]

I agree with Arbitrator Lemons and follow the same practice.

- **PRACTICE TIP:** Generally, the Arbitrator follows the Federal Rules of Evidence (FRE) for uniformity; moreover, most State rules are the same or similar to the FRE.

- **PRACTICE TIP:** Generally, if a Party makes an objection on the grounds of "relevance" toward the beginning of the hearing, the Arbitrator will likely overrule that objection, simply because the Arbitrator has no way of knowing what is relevant and what is not. Moreover, the Arbitrator loathes saying things like "I'll admit it for what it's worth," or "I'll give it the weight it deserves." Depending on the reason for a relevance objection, the best practice would be to preserve a relevance objection as a standing objection, if necessary.

- **PRACTICE TIP:** The Arbitrator ascribes to the "rule of three (3)" during cross-examination. Put simply, if the same question has been asked in a slightly different way more than three (3) times, the Arbitrator will tell the Party's advocate to move on and will not allow the same or similar question to be asked again.

D. Stipulations During the Hearing. If it appears that some of the facts are undisputed during the hearing (such as dates, times and places of occurrence), the Arbitrator will likely ask the Parties to stipulate to those facts.

E. The Conclusion of the Hearing. Generally, before closing the hearing, the Arbitrator will ask the Parties if they are willing to stipulate to the Arbitrator retaining jurisdiction once the Award is issued, should there be an issue regarding a remedy, if awarded. The Arbitrator will also ask the Parties to stipulate to a date the Post-Hearing Briefs will be submitted. Absent any unforeseen circumstances, the record will be closed upon the Arbitrator's timely receipt of the Parties' Post-Hearing Briefs.

IV. Post-Hearing Matters.

A. Submission of Post-Hearing Briefs. Please submit Post-Hearing Briefs to the Arbitrator by e-mail in both PDF and Word format by 11:59 p.m. on the date the Parties agreed to at the hearing. If a Party's Post-Hearing Brief cites a previous arbitration award between the Parties, or a Party cites a case that is not available on Bloomberg or Westlaw, please provide a full copy of the decision with the Party's brief. Briefs submitted to the Arbitrator after the due date (after 12:00 a.m.) may not be considered.

B. Extension to Submit Post-Hearing Briefs.

1. Mutual Agreement. If either Party needs an extension of time to submit its Post-Hearing Brief, the Party who needs the extension (the proposing Party) must first meet-and-confer with the opposing Party to determine if there is mutual agreement to extend the date to submit Post-Hearing Briefs. If there is mutual agreement, simply inform the Arbitrator of the agreed upon date. If a further extension is needed, the Parties must follow the same process.

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[5] William H. Lemons, *I AM YOUR ARBITRATOR. HERE IS WHAT TO EXPECT FROM ME . . . AND WHAT I EXPECT FROM YOU*, at page 16 (all emphases in original), www.whlemonsadr.com.

2. Failure to Mutually Agree. If the opposing Party does not agree to an extension, the proposing Party must first inform the Arbitrator of its attempts to obtain mutual agreement. Thereafter, the Arbitrator will determine whether the deadline may be extended.

- **PRACTICE TIP:** Generally, the Arbitrator does not deny a request for an extension to file a Post-Hearing Brief unless a request for an extension has been made more than three (3) times and the Party requesting the extension has not shown good cause for a further extension.

C. The Exchange of Post-Hearing Briefs. The Parties are responsible for the exchange of their Post-Hearing Briefs. Briefs may be sent by e-mail to the other Party up to one (1) business day after the due date scheduled for filing with the Arbitrator, or otherwise shall be sent on the same date the brief is submitted to the Arbitrator.

D. The Award. Unless the Agreement or controlling legislation provide otherwise (or the Parties otherwise stipulate), the Arbitrator has at least thirty (30) days from the date the Parties' Post-Hearing Briefs are received to issue an Award.

E. Record Retention. The Arbitrator's policy is to shred all paper files and delete all electronic files within five (5) calendar days after issuing the Award.

F. Billing. Statements will be sent at the time the Award is issued unless the statement is for cancelation or continuation fees. All statements are due and payable within thirty (30) days from the date the statement is sent.

1. Per Diem Rate. The per diem rate for hearings is $2,500.00 ($1,250.00 per Party) for each day of hearing scheduled ($3,000.00 for interest arbitrations), plus study time. All billing for this matter will be for "days." So, for example, if the Parties ask for a one (1)-day hearing and the hearing does not last a full day, the Parties will be billed for a one (1)-day hearing. An additional hourly fee of $150.00 per hour will be charged for all hearing time spent after 5:00 p.m. in whatever time zone the hearing is held.

2. Special Billing Requirements. If a Party has any specific billing requirements (i.e. mileage logs, receipt retention, EEO compliance, etc.), please let the Arbitrator know immediately. Time spent on additional paperwork required for payment will be billed at the rate of $150.00 per hour to the requesting Party.

3. Travel Costs. Travel costs will be billed from the Arbitrator's nearest office location. For example, if the hearing is held in Southern California, travel costs will be billed from Irvine, California.

4. Split Fees and Costs. All fees and costs charged will be borne equally between the Parties, unless the Agreement or controlling legislation provide otherwise. However, if any Party fails or refuses to pay its share in accordance with such provision(s), each Party agrees to be jointly and severally liable for payment of all fees and expenses.

5. Cancelations and Continuances. If this matter is canceled or continued more than thirty (30) business days prior to the calendared hearing date(s), there *may* be a calendaring fee charge of $200.00. Matters canceled or continued within thirty (30) business days or *less* prior to the calendared hearing date(s) will be charged the full $2,500.00 per diem rate ($1,250.00 per Party) for each day of hearing scheduled ($3,000.00 for interest arbitrations). Each Party is liable for half of any cancelation or

continuance fee, unless the Parties mutually agree to a different arrangement or the Agreement provides otherwise.

6. Late Payments. Beginning thirty-one (31) days from the date a statement has been sent, a Party whose statement remains unpaid will incur a nine percent (9%) per annum interest on the unpaid balance, calculated from the first day of the month in which the statement is dated, for each month the statement remains unpaid, until the statement has been paid in full.

Questions? E-mail the Arbitrator at shianne.scott1234@gmail.com.
Please ensure you copy the opposing Party.