

BEST PRACTICES TO PREPARE FOR LABOR ARBITRATION

CALPELRA ANNUAL CONFERENCE

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MONTEREY CALIFORNIA

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What are Best Practices?

The Six P's

- PROPER
- PRIOR
- PREPARATION
- PREVENTS
- POOR
- PERFORMANCE

Agenda and Checklist

- Obtaining the File(s)
- Case Investigation
- Review the MOU and Grievance Procedure
- Calendar all Deadlines Carefully
- The Question of Substantive vs. Procedural Arbitration
- Identifying Witnesses and Exhibits
- Sample Cast of Characters
- Subpoenas
- Information Requests

Agenda and Checklist

- Possible Information Requests (?)
- Selection of the Arbitrator
- Pre-Arbitration Administration Issues
- Physical Construction of a Witness File
- Exhibit Book
- Exhibit List
- Back-up Exhibits
- Framing the Issue
- Presenting the Case
- Selected Issue
- Briefing and Closing Arguments

Obtaining the File(s)

- Personnel File of the Grievant
- Personnel File(s) of Witnesses?
- Grievance File
- Payroll Records
- Other?

Case Investigation

- Witness Interviews and Statements
 - To Tape, or Not to tape?
 - Formal Statements
- Witness Files (Contents TBD...)
- Evaluate Credibility
- Collect Documents. Ensure They are Complete and Final

Reviewing the MOU and Grievance Procedure

Step 1. If a solution to the grievance, satisfactory to the represented attorney and the immediate supervisor is not accomplished by informal discussion, the grievant may pursue the grievance further.

The represented attorney and/or his/her representative shall submit a written statement of the grievance to the immediate supervisor within thirty (30) days of the facts or event giving rise to the grievance or the date the represented attorney or MAA should have known of the occurrence thereof except for cases alleging sexual harassment, in which case the time limit herein shall be four (4) months.

The immediate supervisor will make every effort to arrive at a prompt resolution by investigating the issue. He/She shall respond within seven (7) days.

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Reviewing the MOU and Grievance Procedure

Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievance shall be submitted in writing, containing a specific description of the basis for the claim and the resolution desired, and submitted to the department head or his/her designee within fourteen (14) days. The parties may meet. In any event, the department head/designee shall, within fourteen (14) days of receipt of the written grievance, respond, in writing, to the grievant and MAA, specifying his/her reason(s) for concurring with or denying the grievance.

Step 3. If the decision of the department head/designee is unsatisfactory, the grievant and/or MAA representative may, within fourteen (14) days after receipt of such decision, submit the grievance to the Employee Relations Director.

The Director shall have fourteen (14) days after receipt of the written grievance in which to review and seek resolution of the grievance and respond in writing.

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Reviewing the MOU and Grievance Procedure

Step 4. Should there be no satisfactory resolution at Step 3, MAA has the right to submit the grievance to final and binding arbitration, by notifying the Director of Employee Relations, in writing, within twenty (20) days of receipt of the Step 3 response.

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Calendar Your Deadlines

- Read the timelines
- Is the grievance timely?
- Preserve timeliness defenses

The Question of Substantive vs. Procedural Arbitrability

- Procedural Arbitrability: Submitted to the Arbitrator Per Government Code section 3505.8
- Substantive Arbitrability:
 - Submit to Arbitrator for Decision?
 - Unless submitted, question for Superior Court
 - Be cautious of AAA and JAMS rules

Identifying Witnesses and Exhibits

Sample Cast of Characters

Name	Contact	Description
Duck, Donald	City Manager, Vallejo (209) 828-1723 d.duck@cityofvallejo.org	Mr. Duck testified that Mr. Fudd has verbally threatened Mr. Bunny's wellbeing.
Bunny, Bugs	Mayor, Vallejo (925) 763-9372 b.bunny@cityofvallejo.org	Mr. Bunny claims Lieutenant Fudd has threatened his well being, dropping hints that it is "rabbit season" while wielding his rifle.
Fudd, Elmer	VPD Lieutenant (425) 907-6859 bunnyhunter@cityofvallejo.org	Lietenant Fudd testified that Mr. Bunny has always initiated confrontation with him.
Pig, Porky	Chief of Police, Vallejo (510) 848-7890 p.pig@cityofvallejo.org	Chief Pig alleges that Mr. Bunny provoked Mr. Fudd on numerous accounts, always asking the lieutenant "What is up, Doc?"

Subpoenas

- The arbitrator has the authority to issue subpoenas.
- Commonly, the side requesting the subpoena simply prepares them, and the arbitrator will sign.
- For actual enforcement, a party must go to Superior Court.

Information Requests

- There is a duty to provide information related to enforcement of memoranda of understanding.
- The duty applies to unions, as well as employers.
- Failure to comply can violate MMBA, and result in a PERB charge.

Possible Information Requests (?)

- Witness Statements
- Union's File
- Prior Grievances on MOU Sections at Issue
- Bargaining Records
- Other?

Selection of the Arbitrator

- Arguably the most important aspect of arbitration
- Obtaining lists through PERB
 - Consider adding criteria, such as NAA affiliation; police experience; fire experience; local government; interest arbitration
- Due Diligence
 - Published opinions; word of mouth; ask the neutral

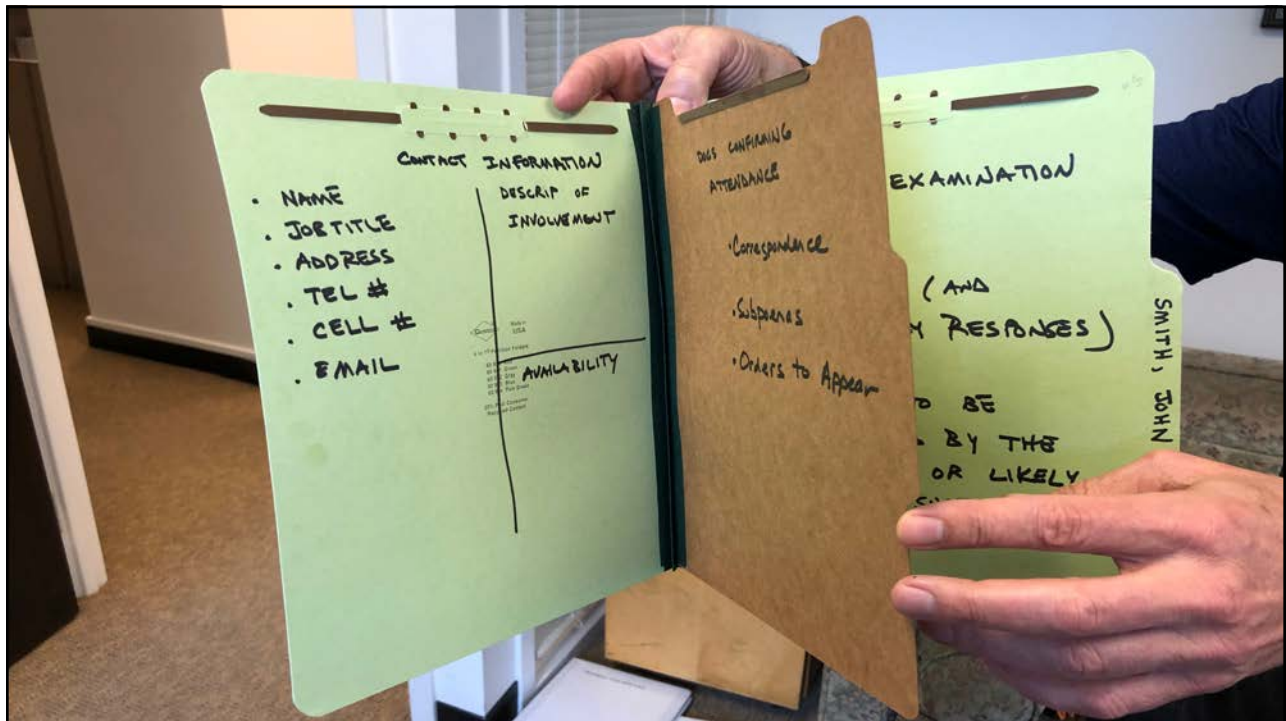
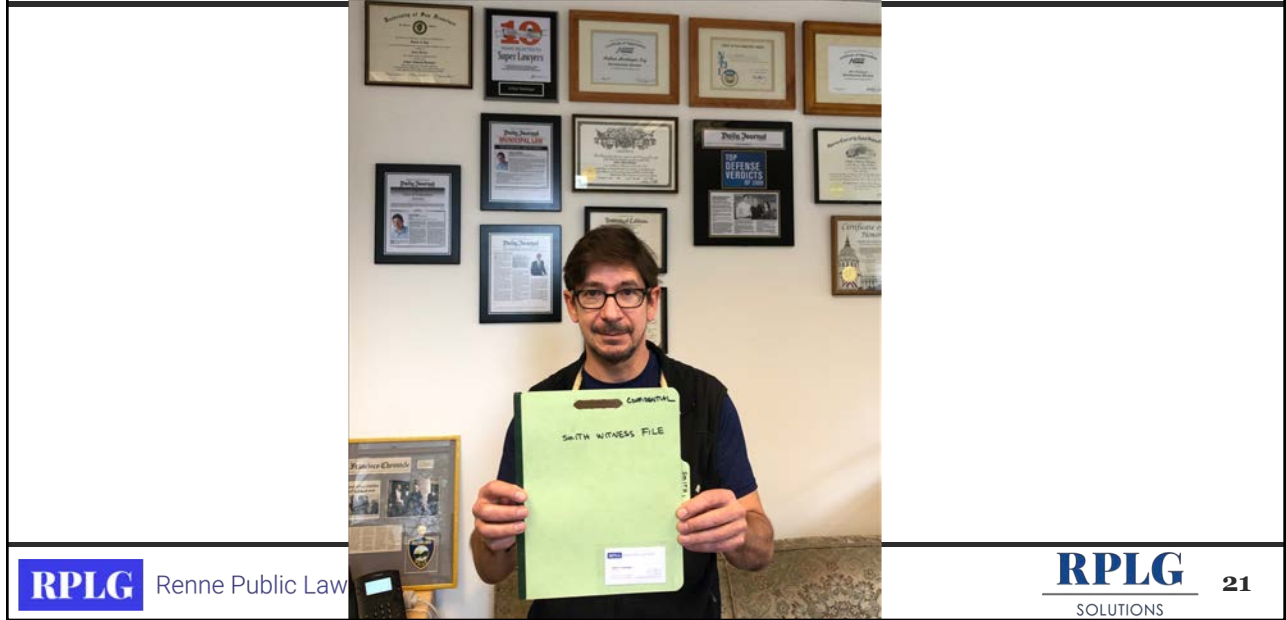
Selection of the Arbitrator

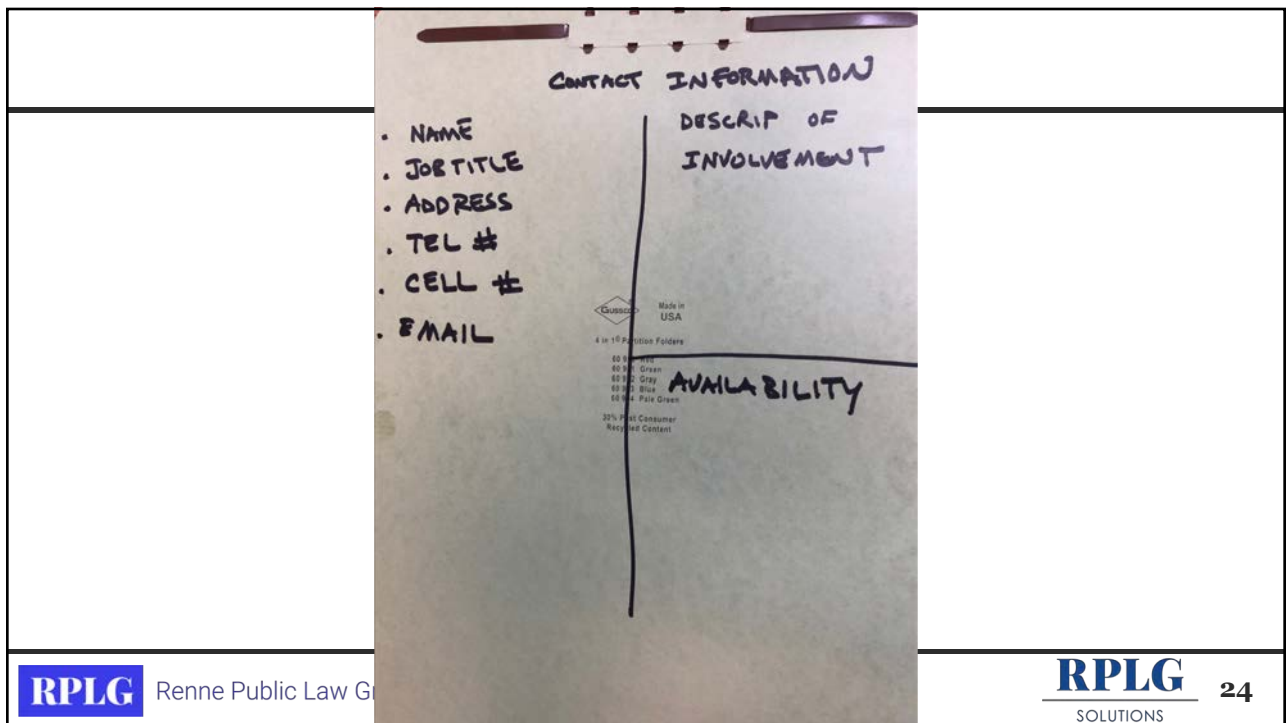
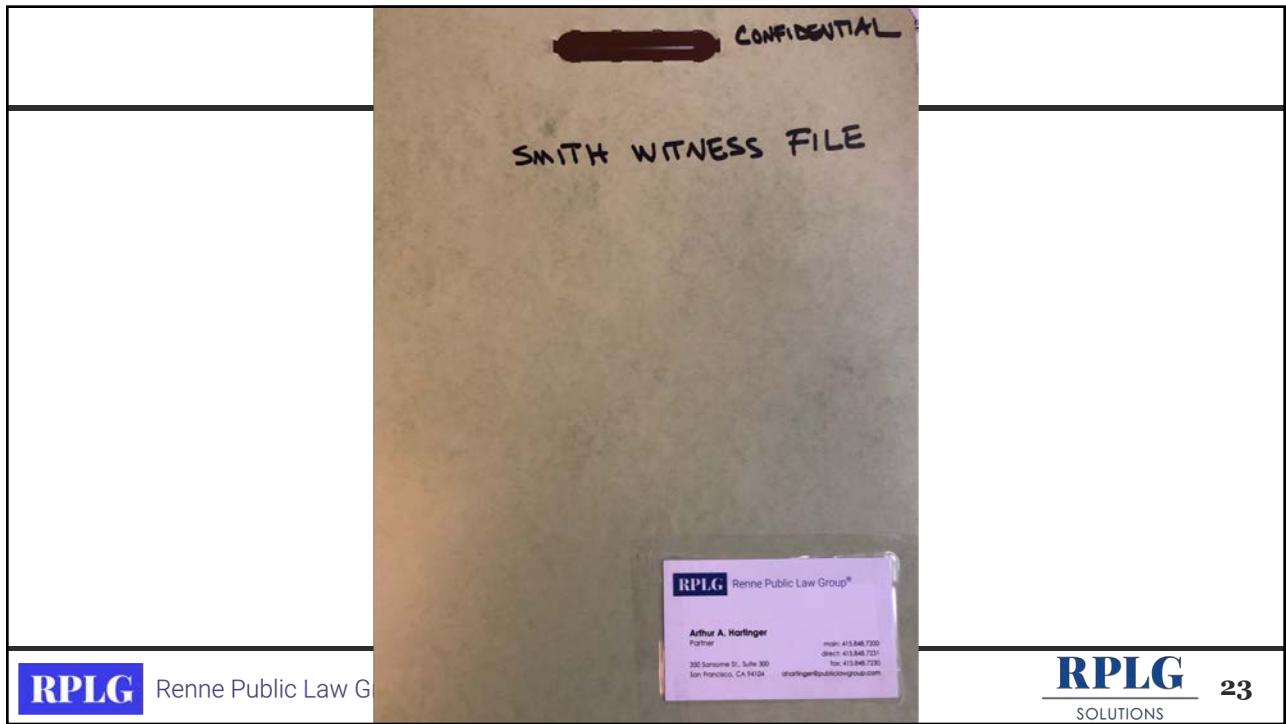
- Mutual agreement?
- The methodology for a coin toss
- Consider: cointossr.com
- If you win the toss, and there is an odd number on the list, strike second.



Pre-Arbitration Administrative Issues



- Payment of Fees
- Location of the hearing. Dates and Duration.
- Court reporter? Real Time?
- Dates for Exchange of Witness and Exhibit Lists; Briefing?
- Subpoenas?

Physical Construction of a Witness File





	<p>DOCS CONFIRMING ATTENDANCE</p> <ul style="list-style-type: none">• Correspondence• Subpoenas• Orders to Appear	
 Renne Public Law G		 25 SOLUTIONS

	<ul style="list-style-type: none">• STATEMENTS• VERIFICATIONS• DISCOVERY ANSWERS• DEPOSITIONS• DOCS AUTHORED BY THE WITNESS	
 Renne Public Law G		 26 SOLUTIONS

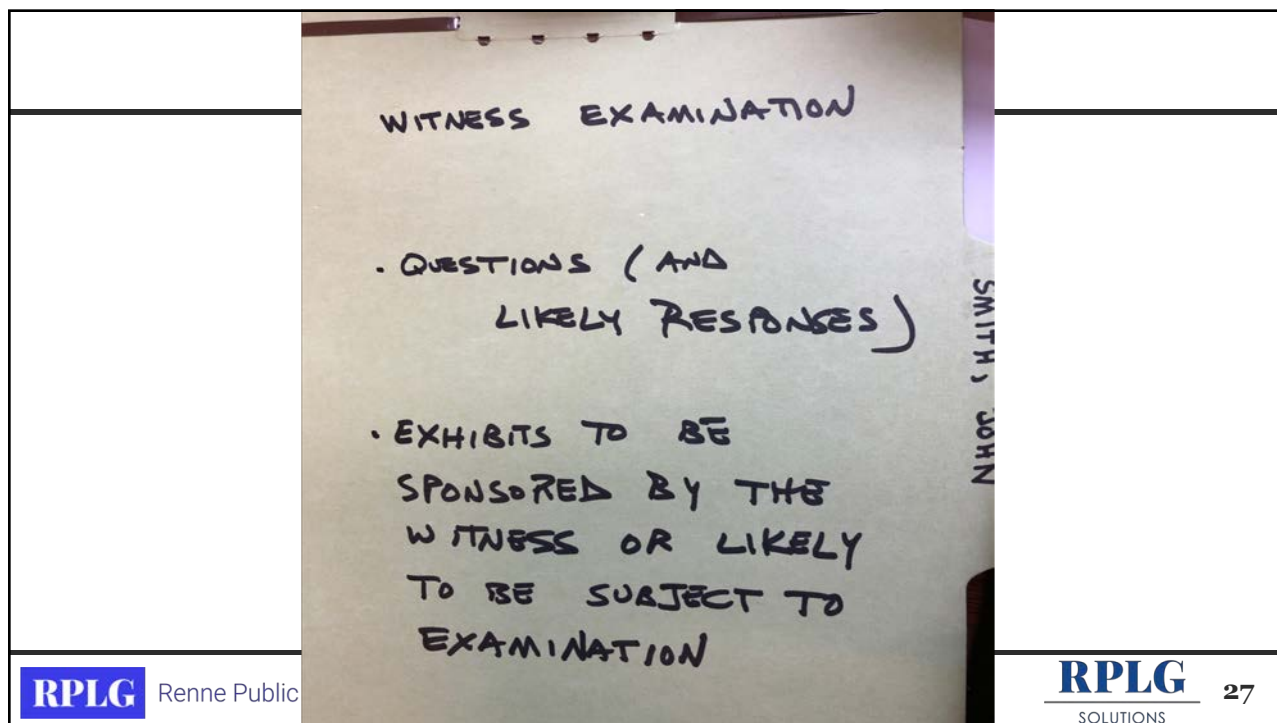


Exhibit Book

EX. NO.	DESCRIPTION	Date	I.D.	ADMIT
1	Whoville Police Department Joint Powers Authority, <i>Amended and Restated Agreement</i> , January 3, 2017	1/2/18		
2	Findings and Recommendations Pursuant to Whoville Government Code 7492.9; <i>In the Matter of a Controversy Between the City of Whoville and Whoville Police and Fire Non-Sworn Association, Collective Bargaining Impasse Factfinding; PERB Case No. WA-HER-435-S</i>			
3	Whoville Police Department Joint Powers Authority and the International Association of Police, Local 1994, RPL-GRP-LGR; <i>Memorandum of Understanding, Union Proposal 3/13/17</i>	3/13/17		
4	Comprehensive Union Proposal	2/22/18		
5	Letter on Behalf of Union with Settlement Proposal	3/8/18		
6	Union Last Best Final Offer (LBFO)	5/19/18		

Exhibit List

EX. NO.	DESCRIP	OFFERED BY	I.D.	ADMIT

Back-up Exhibits

- Set of exhibits that not part of initial exhibits, but which may become relevant
- E.g. back up policies, impeachment exhibits

Framing the Issue

- Common: Was the grievant discharged for good cause? If not, what is the remedy? (Pros / Cons)
- Contract Violation: Did the employer violate section 123 of the MOU and, if so, what amount of back pay is owed?
- Avoid conferring 100% remedial discretion.
- Question: Conferring jurisdiction on the arbitrator to frame the issue.

Presenting the Case

- Who goes first?
 - The party with the burden of proof goes first.
 - Witnesses are presented, subject to cross examination.
 - When a party rests, the other party presents his/her case.
 - In discipline cases, the employer typically has the burden of proof by a preponderance of the evidence. Some arbitrators require a heightened standard (e.g., clear and convincing evidence) in certain cases – e.g., theft and dishonesty.
 - In contract violation cases, the grievant has the burden of proof and goes first.

Selected Issues

- Calling the grievant as an adverse witness – pros and cons
- Motions to exclude witnesses (Parties and Party representatives have a right to attend, even if they are witnesses)
- Evidentiary objections
- Permitting the arbitrator to retain jurisdiction after an Award is issued – pros and cons

Briefing and Closing Arguments

- Initial Briefing?
- Post hearing briefing in lieu of a closing argument
- Oral closing arguments (e.g., employer leaves the room, and the union makes the argument to the court reporter)

Thank You!