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THE SELECTION OF AN ARBITRATOR: A HUMAN RESOURCE MANAGEMENT PERSPECTIVE

By Kenneth Anderson

ABSTRACT

With the increase in the popularity of employment arbitration, renewed attention has been given to the issue of arbitrator selection. This article reviews the issues involved and cautions parties not to look for simple answers and solutions. Instead, those responsible for the selection of an arbitrator should focus their efforts on identifying the requirements of the arbitration task, determining the skills and characteristics necessary for the performance of the task requirements, and developing the best methods for measuring the necessary skills and characteristics.

INTRODUCTION

The dispute resolution process known as arbitration is well known to most followers of our legal and employment systems. Two parties, unable to settle a dispute themselves, turn to an independent third party to settle the issue. Regardless of the specific relationship between the two parties, the essence of arbitration is the same: arbitrators make decisions that are binding on both parties. Additionally, the decision of the arbitrator is often final in the sense that it is typically not subject to judicial review.

Arbitrators, then, have more than a fair amount of authority and power. Cognizant of this authority and power and of the lasting and pervasive impact of an arbitrator's decision, attention has always been directed at the issue of arbitrator selection. In fact, this attention has increased in recent years because of the advent of what is known as "employment arbitration," i.e., the use of arbitration to settle employer-employee disputes in non-union situations. More and more organizations are recognizing

the advantages inherent to arbitration and are looking to learn more about the process.

This article makes a contribution by bringing a discussion of basic selection theory to bear on the issue of choosing an arbitrator. In the course of giving the reader concepts and ideas to consider, I would hope to develop in them an educated and mature appreciation for the difficulties inherent to arbitrator selection.

ARBITRATION

Traditionally, arbitration has been most closely associated with labor-management relations. While arbitration can be used to resolve a bargaining impasse, it is most commonly used to resolve grievances that exist between labor and management. The grievance-arbitration process is part of the contract administration stage in a typical labor relations model and it is put into place as the result of negotiations between the two parties. In other words, it is a mutual effort, designed and agreed to by both parties with many of the details of the process codified in the collective bargaining contract.

The grievance-arbitration process is typically a multi-step process, beginning with the filing of a grievance by a union member. The design of the process will usually dictate what can and cannot be grieved as well as how quickly a grievance must be filed. The number of steps in the process, the timeliness with which grievances must move between steps, and the identification of the individuals who are involved at each step, is also part of the basic design. Regardless of the specific number of steps agreed to by the parties, earlier steps are marked by the two parties at-

tempting to resolve their differences themselves. If they are unsuccessful, arbitration is the final step in the process. It is the very much the norm that both parties agree that the decision of the arbitrator is binding on both sides. The selection of the arbitrator is another important consideration. Many times, the two parties will start with a list of potential arbitrators that has been supplied by a group such as the American Arbitration Association. The list is whittled down until the requisite number of arbitrators is left. Both parties usually have the opportunity to strike an arbitrator from consideration and in many cases both parties must, at the very least, "sign off" on the ultimate choice. The whole tone or context of the process is also a matter of agreement for both parties. The arbitration context itself will vary by degree in terms of formality, rigidity and urgency, among other variables, based on the desires of the two sides. Finally, the costs of arbitration are usually split 50/50 between the two parties.

Grievance arbitration procedures have been in place for decades and have been the subject of much scrutiny and study. The continued inclusion of grievance arbitration procedures in labor-management agreements speaks to the relative satisfaction of unions and organizations with them. While there are notable disadvantages (e.g., the chilling effect of arbitration), observers almost inevitably note the benefits of efficiency and reduced costs. These benefits become more attractive when compared to the handling of a similar matter in a court of law. In recent years, these advantages have led to arbitration becoming popular in non-union employment cases as well. Employment arbitration, as it is commonly known,

represents the application of the basic grievance arbitration model to the non-union segment of the workforce. As a condition of the employment relationship, both employer and employee agree to submit disputes (e.g., discrimination claim) to grievance arbitration.

ARBITRATOR SELECTION

The surge in the popularity and usage of arbitration across union and non-union situations has led to an increased interest in various components and aspects of arbitration. There has been interest in such areas as arbitrator authority, the interaction of the courts and other agencies (e.g., the EEOC) with arbitration, and how arbitrators make decisions.

Another traditional topic of interest has been arbitrator selection. Interest in this issue has not abated for, unlike a traditional court setting wherein an attorney has no say in the choice of the judge, arbitration is a process in which each participating party usually has a direct role in the selection of this ultimate decision maker. The strategic and tactical possibilities associated with this direct role have led parties to spend time and effort on the selection of the arbitrator. Articles abound on how to select an arbitrator, arbitrator acceptability, and the relationship between an arbitrator's individual characteristics (e.g., age) and their decisions. Those responsible for the selection of an arbitrator are usually looking for any advantage they can. In other words, what can be done in the selection process to get a better handle on the arbitrator and, ultimately, on the type of decision he or she will make?

When cast in this way, the issue of arbitrator selection becomes very similar to that of employee selection. As such, there are three important questions. First, what are the requirements of the arbitration task? Second, what knowledge, skills and other characteristics does an individual have to possess in order to perform the requirements of the task? Finally, how does one determine if an individual has the requisite knowledge, skills and characteristics necessary to perform the requirements of the task? Each of these

questions will be considered in turn below.

TASK REQUIREMENTS OF THE ARBITRATOR

What do arbitrators do? An arbitrator's primary task was stated above: arbitrators make decisions. This is without question the most important task requirement. Job analysis is the human resource management content area that focuses on analyzing and describing jobs and tasks. In job analysis, the determination of the relative importance of task requirements is often made based on considerations of time and money. Decision making is the task requirement on which the arbitrator will likely spend the most time. Furthermore, from a compensation perspective, it is the equivalent of an orthopedic surgeon's ability to put your knee back together after a trauma. You are paying for his/her ability to repair your knee, not their bedside manner. Decision making is the task requirement that the involved parties are paying for.

Arbitrators are asked to do other things as well. Arbitrators are often asked to help organize the arbitration process, conduct and manage meetings and hearings, solve conflicts within and between parties during these proceedings, and render a written decision. While these are relatively less important than the primary task requirement of decision making, they still are part of the overall package of arbitration tasks.

CHARACTERISTICS OF THE ARBITRATOR

What knowledge, skills and other characteristics are necessary in an arbitrator in order to allow for the performance of the position's task re-

quirements? Any listing is likely to be incomplete as well as not perfectly germane to the specific case under consideration. On the other hand, there must be some common characteristics that serve arbitrators well across all situations. The current discussion will focus on these common characteristics.

In order to make solid decisions in an arbitration case, it would seem necessary that arbitrators must have knowledge of arbitration theory and practice. This would include knowledge of arbitration processes, strategies and tactics as well as a good understanding of the current arbitration literature (both academic and practitioner). Possession of this body of knowledge would also be beneficial in helping the arbitrator organize the arbitration process so that it is fair to all parties as well as helping to insure an efficient and effective

process. It would also seem logical that arbitrators would have knowledge of the specific technical or legal issues or areas under consideration, such as the Civil Rights Act.

In addition to knowledge, the arbitrator's decision making ability is also a function of the arbitrator's ability to gather information. This would call on such things as observation, listening and questioning skills. Furthermore, an arbitrator must process and evaluate this information in order to reach a decision. In doing so, does the arbitrator employ a template or specific set of criteria or questions? For example, in a labor arbitration case involving the discharge of an employee for the breaking of a rule, an arbitrator may always want the answer to the question of "was the rule communicated to the employee?"

The ability to conduct and manage meetings/hearings is another task requirement. The ability to manage

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meetings/hearings successfully is likely a function of knowledge and interpersonal skills. A successful meeting manager probably has some familiarity with the concepts surrounding meeting management. The successful meeting manager must also have the ability to organize the meeting as appropriate, the skill to move the meeting along while ensuring all relevant information is presented, and the ability to make sure that both parties feel the process is fair and balanced.

It is inevitable that conflicts will arise during the course of arbitration. A skilled arbitrator will have the ability to resolve conflict. Again, this ability is likely a function of both knowledge and interpersonal skill. There is an extensive academic and practitioner literature on conflict resolution, focusing on identifying types and sources and conflict, as well as on techniques and tactics for resolving conflict. An arbitrator would be well served to have this knowledge at his/her disposal. The ability to resolve conflicts is also regarded as a fundamental management/interpersonal skill and training in this area is the subject of much effort and attention.

The final task requirement presented above was the rendering of a written opinion. While by no means the rule, this requirement can help the two parties better understand the decision and make whatever changes are appropriate as a result. The development of a valuable written opinion will be a function of the arbitrator's written communication skills. The written opinion should be logical, complete, and clear. It should leave little doubt as to why the arbitrator ruled as she/he did.

In summary then, we have identified the following skills and characteristics:

- General knowledge of arbitration theory and practice

- Specific knowledge of any technical or legal issues under review

- Ability to gather information (e.g., listening skills)

- Ability to process information (e.g., specific criteria or questions)

- Ability to manage meetings

- Conflict resolution skills

- Written communication skills

The measurement of these skills and characteristics will be discussed below.

MEASURING ARBITRATOR CHARACTERISTICS

In a well constructed selection process, organizations attempt to gather as much information as they can through the use of measures, tests, and other techniques. The process of measuring necessary characteristics must produce accurate and meaningful information. This is not an easy thing, however, and many organizations do not do a good job in the area of measurement. A major reason: many individuals do not adequately understand reliability and validity. Information is only useful and valuable if it is reliable and valid.

Reliability is closely associated with measurement error. The more potential for error

in a measure or test, the less reliable that measure or test will be. Error reduces both accuracy and consistency. There are two types of error: systematic and random. Systematic error would tend to repeat itself across situations. A situation in which an individual scores poorly on a pen-and-paper test because they are illiterate would be consistent with systematic error. A situation in which an individual incorrectly answers a test question because of a unique, one-time environmental distraction (e.g., a loud noise in the room) would be consistent with ran-

dom error. Often overlooked and of critical importance, reliability is a necessary condition for validity, i.e., if a test is not reliable it cannot be valid.

There are different types of validity, two of which are most relevant in the current paper. The first is construct validity. For a test or measure to be construct valid, it should measure what it is suppose to measure. This is particularly important when relying, as many times we do, on indirect measures of a skill or characteristic. An excellent example is the measurement of any cognitive variable (e.g., job satisfaction). Job satisfaction is an emotional state; it exists between our ears. We cannot directly observe it. If we cannot directly observe it, it follows that we cannot directly measure it. As a result, we are always concerned with the construct validity of job satisfaction measures. How do we know we are actually measuring job satisfaction and not some other variable or construct?

The second type of validity is predictive validity. For a test or measure to have predictive validity, it should predict what it is suppose to predict. Predictive validity is much more straightforward than construct validity, for it is based on the strength of the relationship between a test and the outcome variable of interest. Selection tests and measures should be predictive of or associated with outcomes of interest, yet many times organizations fail to study or establish the relationship between test and outcome.

Organizations commonly use many different techniques to gather information about applicants. Biographical data will be collected from a resume, questionnaires and surveys will be administered, and interviews will be conducted. Information may also be collected via assessment centers, references, personal networks of those responsible for selection, and actual work product. Data may be collected first-hand by the organization or the organization may hire a contractor to collect the data for them.

A review of the relevant arbitration literature leads to the conclusion that only some of these techniques are common to the selection of an arbitrator. First, parties selecting an arbitrator

While there are notable disadvantages (e.g., the chilling effect of arbitration), observers almost inevitably note the benefits of efficiency and reduced costs."

usually have access to biographical data, references, and actual work product (e.g., previous arbitration decisions, when available). Second, parties may also try to gather data through their own personal networks. Finally, the interviewing of candidates is relatively rare and little use is made of questionnaires, surveys, and assessment centers when selecting arbitrators.

Each of the above mentioned methods and techniques has its own place in a selection process, as well as its own set of strengths and weaknesses. An important key to successful selection is the thoughtful application of measurement concepts to the specific situation, in this case the selection of an arbitrator.

PUTTING IT ALL TOGETHER: AN EXAMPLE

How do task requirements, necessary characteristics and skills, and measurement techniques all fit together in the selection of an arbitrator? An examination of the primary task requirement of decision making (What do arbitrators do? Arbitrators make decisions) will be illustrative.

The following characteristics and skills were identified above as most relevant to the requirement of decision making: general knowledge of arbitration theory and practice, specific knowledge of any technical or legal issues under review, ability to gather information (e.g., listening skills), and the ability to process information (e.g., specific criteria or questions).

Given the more common methods of gathering information about arbitrator candidates, it would seem that biographical data would be an important method of assessing a candidate's general knowledge of arbitration theory and practice as well as the candidate's specific knowledge of any technical or legal issues. Biographical data straight from an unverified resume may not be reliable. Stories and surveys abound with tales of inaccurate and misleading data. On the other hand, biographical data from trusted sources like the AAA is usually very reliable. Validity, how-

ever, is a different issue. The construct validity of biographical data may be suspect in terms of the above characteristics. Years of arbitration experience or educational background should be considered at best indirect measures of knowledge and may not accurately or adequately capture what the candidate knows at the present time. A more direct measure of a candidate's knowledge, such as a pen-and-paper test, is usually not practical. The predictive validity of biographical data is also problematic. Over the past twenty years, the research suggests little to no relationship between biographical variables and arbitrator decisions. So in this case, biographical data is usually reliable with somewhat questionable validity.

The ability to gather information is rooted in such things as listening, observation, and research skills. It would be difficult to measure this ability using biographical data or work product. Neither lends itself to an assessment of these types of skills. Since surveys, questionnaires, and interviews are not commonly used to select arbitrators, references and personal network contacts may be the only source of information about a candidate's ability to gather information. Unfortunately, methods of this type (e.g., letters of recommendation; shared experiences of peers or colleagues) are usually not very reliable. A lack of validity necessarily follows.

The ability to process and evaluate information would be best captured by a close examination of the candidate's work product. If available, these previous arbitration decisions would likely be an excellent source of information about how the candidate makes arbitration decisions. The research literature tells us that work sample/work product data should be relatively high in reliability and validity, consistent with the notion that the best predictor of future behavior is past behavior. One caveat: gather as much work product as possible and know what percentage of a candidate's overall decisions you have obtained. The more information you have access to, the more confident you can feel about the

reliability and validity of the information. The more confident you can feel about the reliability and validity of the information, the more confident you can be in generalizing from the past to the future.

CONCLUSION

The selection of arbitrators has long been an important topic in the arbitration literature. The current paper addresses this topic from a traditional human resource management perspective, i.e., how should we go about "hiring" an arbitrator? A model was presented based on three questions: (a) what are the requirements of the arbitration task?; (b) what are the skills and characteristics necessary to perform the task requirements?; and (c) how are the skills and characteristics best measured?

Common arbitration practices, as well as constraints due to the very nature of arbitration (e.g., one of the main advantages of arbitration over a court proceeding is reduced expenditure of resources), limit the available selection methods. Of those available, the current paper suggests that the most effective measurement methods are likely to be a review of biographical data and previous work product. These are the available methods that have the best combination of reliability and validity, thus providing the best possible information to those selecting the arbitrator. Other methods, while discussed in the literature and seemingly logical and effective, tend to have significant measurement issues. The bottom line is straightforward: understand the task, decide what characteristics and skills are important, and, keeping in mind basic concepts of measurement, be thoughtful in deciding how to measure those characteristics and skills.

BIOGRAPHY

Ken Anderson is a Professor of Management at Gonzaga University's School of Business Administration in Spokane, Washington. He has extensive consulting experience in the areas of arbitration and employment law.