NATIONAL ACADEMY OF ARBITRATORS
SOUTHEAST REGION

2025 Regional Arbitration Conference

November 11, 2025
845AM – 430PM

Hyatt Regency Savannah
2 W. Bay Street, Savannah, GA

8:45 a.m. **Conference Opening/Welcome to Savannah** – Hon. Linda Wilder Bryan, Alderwoman, City of Savannah, District 3

9:00 a.m. **Welcome and Orientation** – Christopher M. Shulman, NAA, SE Regional Chair

9:15 a.m. **NAA Presidential Address** – Joshua M. Javits, NAA, President

10:00 a.m. **AI and Other Tools for Arbitrators** – Aaron Schmidt, AAA; Chris Shulman, NAA

10:45 a.m. Break

11:00 a.m. **Employment Arbitration Trends**: *Discussion of EEOC, employment arbitration, and experience under the Ending Forced Arbitration of Sexual Harassment and Abuse Act* – Mark Travis, NAA; Leslie W. Langbein, Arbitrator; Patrick C. Clark, Esq.; and Erika E. Goodman, Esq.

12:15 p.m. **Lunch with NAA** – Jack Clarke, NAA

1:15 p.m. **Arbitrator/Advocate Roundtable**: *How to make arbitration process more efficient; Discovery in Labor Arbitration; What Advocates look for in an arbitrator (private panels)* – Chris Shulman, NAA; Robert Weaver (Union Counsel); Bob Thomas (Mgt Counsel); Reyburn W. Lominack III (Mgt counsel); Paul Daragjati (Union counsel)

2:30 p.m. Break

2:45 p.m. **Remote Work, Flexible Schedules, and Monitoring**: *Interpretation of contract language, employer expectations, and balancing employer monitoring of productivity against employee privacy concerns re: AI-powered surveillance systems* – Philip A. LaPorte, NAA; Amy Sergent, Arbitrator; Shellie Sewell (NTEU Union counsel); Paul Daragjati (Union counsel); Reyburn W. Lominack III (Mgt counsel)

4:15 p.m. **Closing Remarks** – Chris Shulman, NAA, SE Regional Chair

4:30 p.m. **NAA SE Region Business Meeting *for NAA Members Only***

5:00 p.m. **Cocktail Reception** (all attendees and paid guests welcome)

American Arbitration Association® | International Centre for Dispute Resolution®

AI and Other Tools for Arbitrators

NAA Southeast Regional Arbitration Conference
November 11, 2025

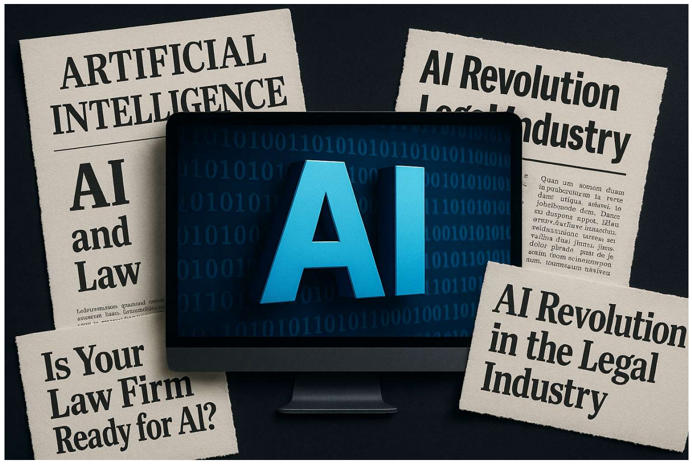
Presented by:

***Aaron Schmidt, Esq.**, AAA Vice President, Labor & Elections, Cleveland, OH*

***Christopher M. Shulman**, Shulman ADR Law PA, Tampa, FL*

American Arbitration Association® | International Centre for Dispute Resolution®

AI in the Legal Industry



3

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Arbitrator using AI for the first time

4

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

How AI is Being Used in ADR

- Legal Research
- Document Review/Document Analysis
- E-Discovery/Data Analytics
- Drafting Support (demand letters, motions, briefs, settlement proposals, awards)
- Language Translation & Interpretation
- Virtual Hearings & Transcription Tools
- Settlement Tools
- Conflicts Checks/Party Background Research
- Arbitration Clause Drafting (ClauseBuilder AI)

Understanding Different Types of AI

Generative AI

- Creates new content (text, images, audio, video, code)
- Learns patterns from vast datasets and produces original outputs
- Examples: ChatGPT, Claude, Google Gemini, Microsoft Copilot, DeepSeek

Predictive AI

- Forecasts outcomes or identifies patterns in existing data
- Uses statistical models to estimate probabilities and future trends
- Examples: Case outcome prediction, settlement risk assessment, damages or award range estimation

Understanding Different Types of AI

Open Source AI
- Code and models are publicly available
- Transparent, customizable, and community-driven
- Examples: Meta's LLaMA, Mistral, Gemma (Google DeepMind), Hugging Face

Closed Source AI
- Proprietary code and models controlled by a company
- Less transparent, but designed for ease of use and professional readiness
- Restricted access to the inner workings, but more secure, stable, and practice-ready
- Examples: Clearbrief, CoCounsel, Westlaw AI, Lexis+ AI, Lex Machina, Harvey, Everlaw

AAAi Standards for AI in ADR

Standard 1: Ethical and Human-Centric Values

Neutrals: Uphold ethical duties, preserve human judgment when using AI, and avoid overreliance on AI.

Advocates: Ensure AI outputs align with law and ethics while retaining independent human judgment.

AAAi Standards for AI in ADR

Standard 2: Privacy and Security

Neutrals: Verify that any external AI tools meet required security standards, preventing leakage of confidential data.

Advocates: Confirm AI tools meet security standards and anonymize or otherwise protect case data to preserve party confidentiality.

AAAi Standards for AI in ADR

Standard 3: Accuracy and Reliability

Neutrals and Advocates:

Outputs from AI tools should be reviewed to verify accuracy against trusted source materials, including evidence, party filings, and legal authorities.

AAAi Standards for AI in ADR

Standard 4: Explainability and Transparency

Neutrals: Assess and communicate to case participants the ways in which AI informs the neutral's process.

Advocates: Examine AI outputs for misstatements, biased outputs, or dubious references. Explain how AI was used, and correct any errors promptly.

AAAi Standards for AI in ADR

Standard 5: Accountability

Neutrals: Stay informed on AI capabilities and risks. Avoid shortcuts that could compromise fairness or quality.

Advocates: Exercise professional judgment on AI use and confirm results through human scrutiny.

AAAi Standards for AI in ADR

Standard 6: Adaptability

Neutrals: Continually update knowledge about AI technologies and selectively apply AI tools to enhance clarity and minimize delays.

Advocates: Continually update knowledge about AI technologies and seek to apply AI in a manner that supports the goals of ADR, such as streamlining discovery, expediting legal research, and delegating certain administrative tasks.

AAAi Standards for AI in ADR

Download the full AAAi Standards for AI in ADR

AAA's Culture of Innovation

- AAA fosters continuous improvement in labor arbitration.
- Encouraging creativity and efficiency in case management.
- Leveraging technology to streamline arbitration processes.

AAA and Labor Arbitration

- AAA remains committed to innovation in labor arbitration.
- AI-powered tools are transforming dispute resolution.
- Encouraging labor arbitrators to engage with new technologies.
- Join us in shaping the future of labor arbitration through AI and innovation!

16 I American Arbitration Association, International Centre for Dispute Resolution

American Arbitration Association® | International Centre for Dispute Resolution

Bright Ideas
Empowering Staff to Innovate

- Encouraging employees to submit innovative solutions.
- Nearly 50 innovation coaches across the AAA.
- Successful ideas implemented to improve labor arbitration, including case processing enhancements and AI-driven tools.

American Arbitration Association® | International Centre for Dispute Resolution®

AI Arbitrator Search Platform (AAAi Panelist Search)

Reduces manual effort and expands access to qualified labor arbitrators.

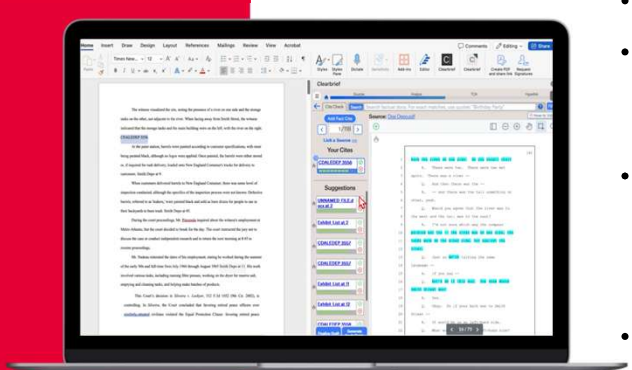
"The AI system can process vast amounts of arbitrator data in seconds, allowing case managers to create well-matched lists faster and with greater accuracy."

adr.org 18

Future of AI in Labor Arbitration

- Expanding AI tools for case analysis and arbitration efficiency.
- Continuous development of AI-driven arbitrator matching.
- Enhancing labor dispute resolution with smart technology.
- AI as an enhancement to human expertise, not a replacement.

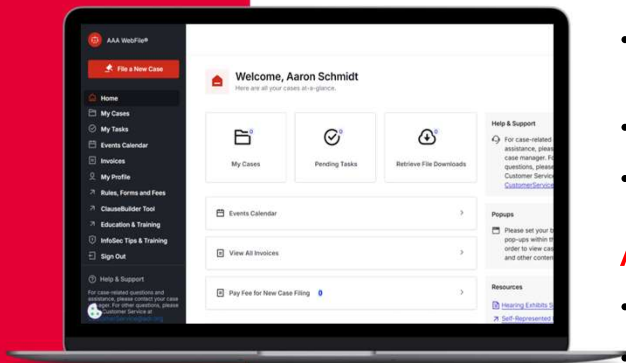
Clearbrief



AAA partnership with Clearbrief

- Arbitrators can use on AAA cases.
- Enhance efficiency by streamlining document summarization, drafting and fact-checking processes.
- Generate timelines, search and summarize evidence, verify facts and laws, and hyperlink citations within draft awards.
- Six month pilot program was successful.
- Training for panelists.
- Check out **clearbrief.com**

AAA WebFile®



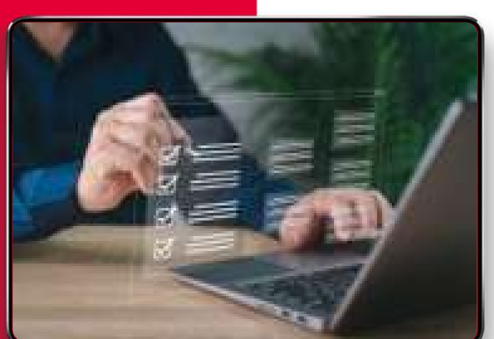
AAA WebFile's New AI Tools

AI Summarize

- Concise overview of a document's main content.
- Review the document's key points.
- Summary is saved on WebFile.

AI Document Q&A

- Ask questions about a single document.
- Receive specific, relevant answers.
- Can switch between documents using the Q&A feature.



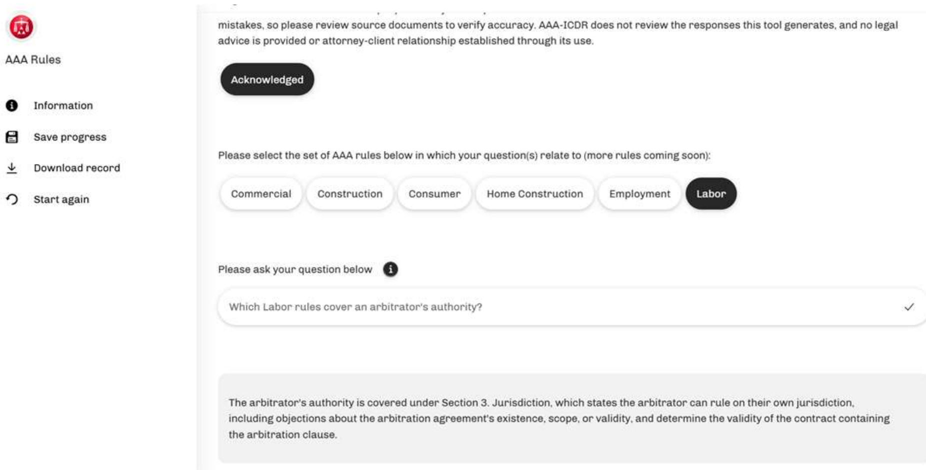
Refresh of Panelist eCenter

- AI Document Summarization
- AI Document Q&A

Why the Refresh?

- Save Time
- Streamline Workflows

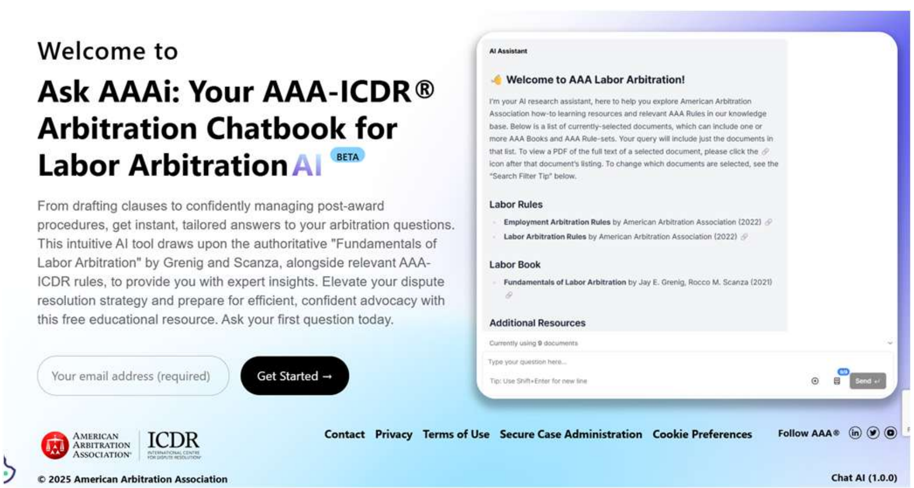
AAA Rules Chatbot



23

American Arbitration Association® | International Centre for Dispute Resolution®

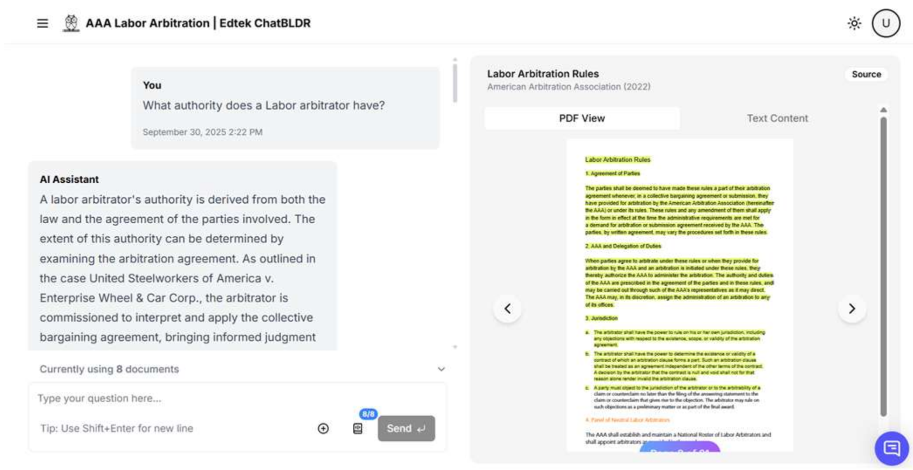
AAAi Chat Book: Labor Arbitration AI



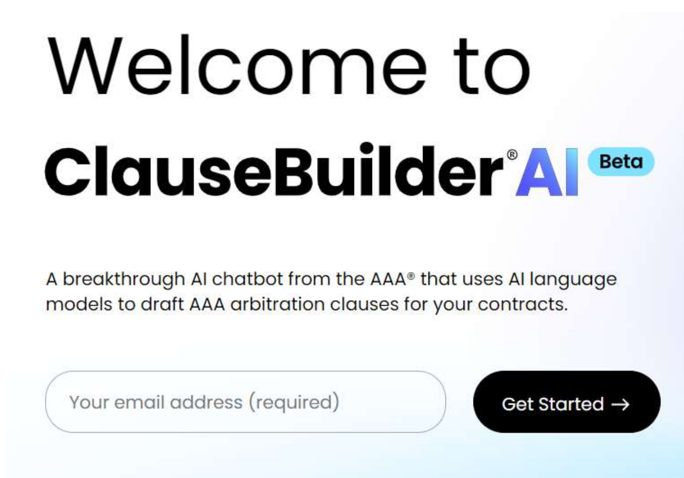
24

American Arbitration Association® | International Centre for Dispute Resolution®

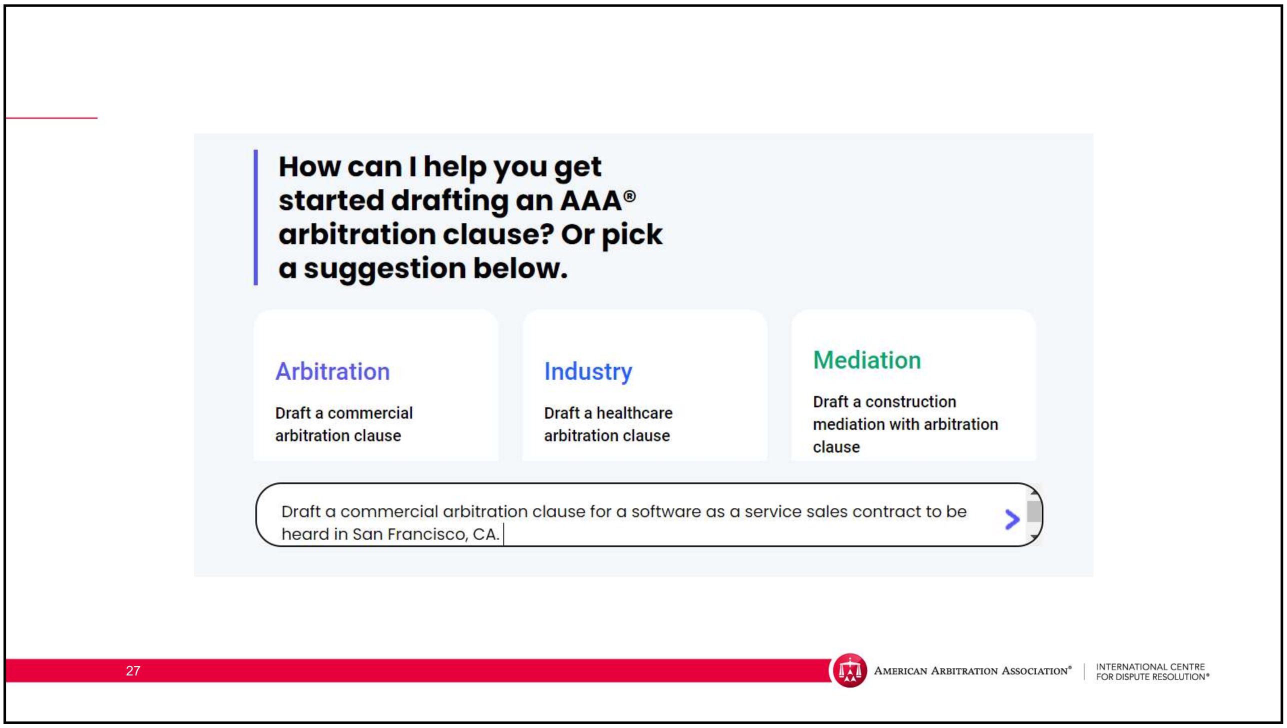
AAAi Chat Book: Labor Arbitration AI

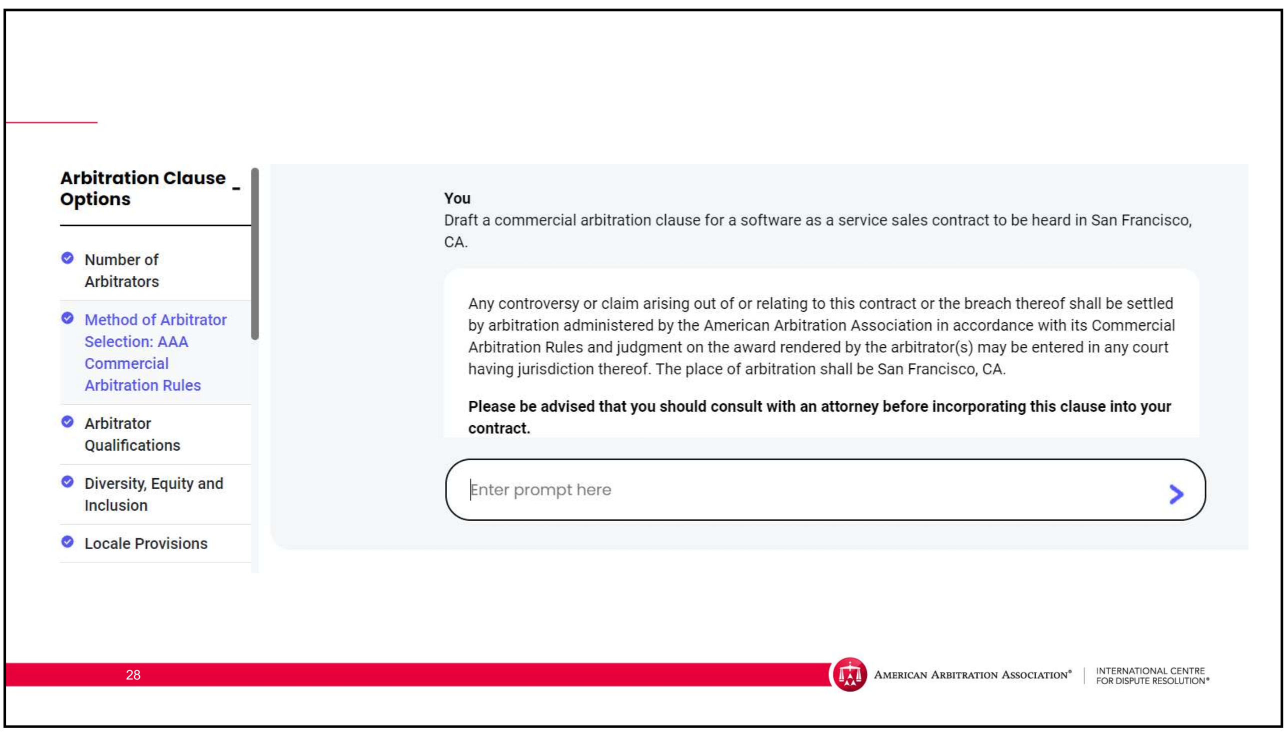


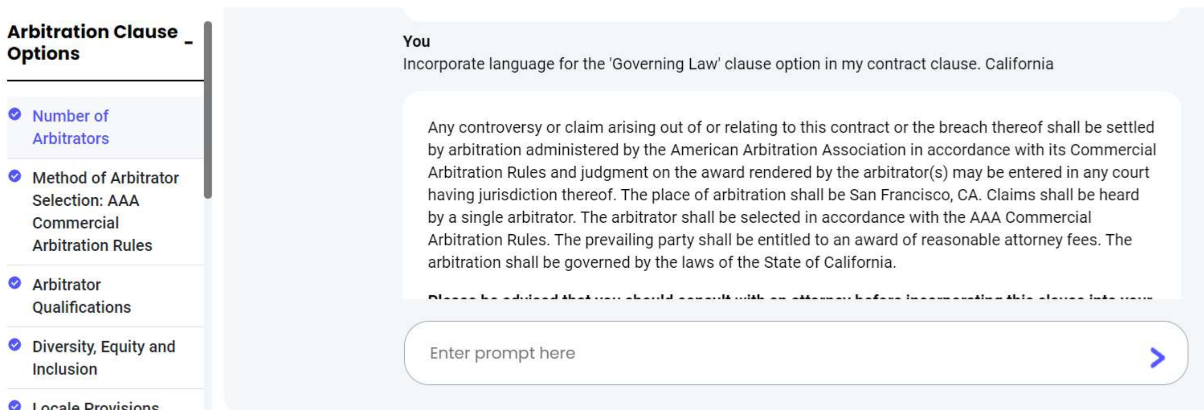
25 American Arbitration Association® | International Centre for Dispute Resolution®



26 American Arbitration Association® | International Centre for Dispute Resolution®


How can I help you get started drafting an AAA® arbitration clause? Or pick a suggestion below.
Arbitration
Draft a commercial arbitration clause
Industry
Draft a healthcare arbitration clause
Mediation
Draft a construction mediation with arbitration clause
Draft a commercial arbitration clause for a software as a service sales contract to be heard in San Francisco, CA.
27
American Arbitration Association®
International Centre for Dispute Resolution®


Arbitration Clause Options
Number of Arbitrators
Method of Arbitrator Selection: AAA Commercial Arbitration Rules
Arbitrator Qualifications
Diversity, Equity and Inclusion
Locale Provisions
You
Draft a commercial arbitration clause for a software as a service sales contract to be heard in San Francisco, CA.
Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The place of arbitration shall be San Francisco, CA.
Please be advised that you should consult with an attorney before incorporating this clause into your contract.
Enter prompt here
28
American Arbitration Association®
International Centre for Dispute Resolution®



29 AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Other Tools for Arbitrators

- Case Shield
- Mobile App for Arbitrators
- Virtual Hearing Support
- AI-Powered Transcription

30 AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AI Resources

AAA News and Insights

AAAi Podcast

Your Dedicated Labor Team

Anna Williams
Antonio Blaydon
Carol Peeples
Christine Naida
Davi Jean-Louis
Jeff Kriegsman
Linda Cook
Megan Roth
Patrick Kimm

Arbitrator using AI for the first time

33

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Arbitrator using AI after our presentation

34

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Questions?

35

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AAA-ICDR® Guidance on Arbitrators' Use of AI Tools — March 2025

AI technology powers useful tools for lawyers and arbitrators. AI tools can summarize and draft documents, check facts, and verify citations, allowing arbitrators to focus on delivering fair and informed decisions.

The AAA-ICDR encourages arbitrators to embrace this technology while adhering to their professional obligations under the **Code of Ethics for Arbitrators in Commercial Disputes** and the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes** to ensure fairness, integrity, and confidentiality.

Considerations when Using AI Tools

1. **Accuracy and Reliability of Information:**
   - AI tools provide valuable assistance but occasionally generate incomplete or inaccurate information. Arbitrators should apply their expertise to critically evaluate and verify outputs and to ensure that information aligns with the standards of accuracy and reliability required in arbitration.
   - When using AI tools, arbitrators should cross-reference outputs against primary sources to ensure accuracy.
2. **Maintaining Fairness and Due Process:**
   - **Canon I** of the Code of Ethics[1] requires that arbitrators ensure their use of AI tools enhances the arbitration process while maintaining the principles of fairness and due process. The thoughtful use of many tools can streamline workflows without compromising fairness.
   - By understanding the utility and limitations of AI tools, arbitrators can make informed decisions about how best to incorporate them into their practice.
3. **Independent Decision-Making:**
   - **Canon V** requires arbitrators to retain complete control over decision-making. Arbitrators should use AI tools that support—not replace—the arbitrator's judgment and expertise.
   - When using AI tools for legal research or evidence analysis, arbitrators should ensure their decisions reflect their independent evaluation and reasoning.
4. **Transparency with Parties:**
   - Arbitrators should disclose their use of generative AI tools when such use materially impacts the arbitration process or the reasoning underlying their decisions.

[1]The cited canons are from the Code of Ethics for Arbitrators in Commercial Disputes. The Code of Professional Responsibility for Arbitrators of LaborManagement has similar provisions.

Confidentiality and Data Protection

1. **Safeguarding Confidential Information:**
    - Arbitrators must ensure their use of AI tools complies with their confidentiality obligations under Canon VI and applicable arbitration rules. Arbitrators should always use secure tools and platforms to handle sensitive case information.
    - Arbitrators should not put confidential information, such as party names or case specifics, into tools that do not guarantee data protection.
2. **Selecting the Right AI Tools:**
    - By choosing AI tools with robust data security and confidentiality measures, arbitrators can confidently integrate these technologies into their workflows.

Competence and Professionalism

Arbitrators are encouraged to stay informed about AI advancements and their practical applications. Many AI tools are intuitive and accessible, enabling easy incorporation into a practice. Developing proficiency with AI tools reflects an arbitrator's commitment to professionalism and continuous improvement.

Conclusion

AI tools can empower arbitrators to work more efficiently and effectively, allowing them to focus on delivering fair and well-reasoned decisions. No technology is a replacement for an arbitrator's expertise; it may be an enhancement, enabling greater precision and efficiency. By integrating AI tools thoughtfully and carefully, arbitrators can harness the tools' full potential while maintaining the highest standards of professionalism and ethics.

AAAi Standards for AI in ADR

Introduction

The American Arbitration Association-International Centre for Dispute Resolution® (AAA-ICDR®) sets the standards for fair, efficient, and cost-effective alternative dispute resolution (ADR). We pioneer and refine procedural rules informed by our extensive experience administering millions of cases. Our processes work and have kept up with the times for a century. Parties, advocates, and neutrals place their trust in us and rely on our expert staff every day.

Artificial Intelligence (AI) is fundamental to the next century of ADR, and ADR processes must evolve. We embraced this new technology early. We are fluent in AI. We will continue to build it into our processes.

The AAA-ICDR is also a mission-driven nonprofit. We want all users of ADR services to benefit from AI, and we want to lead the field in responsible and ethical use of AI. To those ends, we encourage advocates, neutrals, and other ADR administrators to apply these AAAi Standards.

AI in ADR

The AAA-ICDR is an ADR administrator. Administrators maintain technology platforms and case management processes, and AI has an important and growing role in that. Staff use AI in their own work and uphold the integrity of AI tools deployed for use by parties, advocates, and neutrals.

Neutrals use AI tools to streamline tasks and do quality work. In the spirit of ADR, they should work toward fair, cost-effective, and efficient resolution of disputes while upholding ethical standards. They also have a duty to remain impartial and exercise independent judgment.

Advocates also use AI tools to streamline tasks and do quality work. An ADR administrator does not have a formal role to play in advising lawyers about efficient client service but we encourage advocates to be leaders in incorporating AI for better, faster, and cheaper outcomes.

The AAAi Standards provide a comprehensive framework for responsible AI use in ADR. They address Ethical and Human-Centric Values, Privacy and Security, Accuracy and Reliability, Explainability and Transparency, Accountability, and Adaptability.

Standard 1: Ethical and Human-Centric Values

ADR Administrators: Design AI systems that align with ethical standards, support fair and unbiased outcomes that respect the rights of all participants, and safeguard equity in dispute resolution. Design AI systems with human oversight that are imbued with appropriate values, mitigate bias, and preserve control over critical decisions.

Neutrals: Any existing ethical obligations still apply when using AI. Preserve human perspective and judgment when using AI. Critically evaluate how parties and advocates use AI. Avoid overreliance on technology or outputs provided by one party or one vendor. Rely instead on direct review of evidence and reasoned deliberation in reaching conclusions.

Advocates: Any existing ethical obligations still apply when using AI. Validate alignment between AI outputs and recognized legal principles, ensuring independent human judgment controls. Cooperate with neutrals on how best to leverage AI in presenting a case.

Standard 2: Privacy and Security

ADR Administrators: Manage data responsibly with strict attention to privacy while adhering to data governance standards. Foster trust in the dispute resolution process by protecting data confidentiality, integrity, and system reliability while defending against external threats and ensuring operational resilience.

Neutrals: Confirm that any external AI tools used—whether for document translation, analytics, scheduling, or other purposes—meet relevant security standards, preventing leakage of confidential data.

Advocates: If external AI tools are used, confirm that they meet relevant security standards. Anonymize or otherwise protect case data to preserve party confidentiality and ensure compliance with privacy obligations.

Standard 3: Accuracy and Reliability

ADR Administrators: AI applications should provide reliable outputs, maintain consistency under varied conditions, and communicate any limitations or the need for human oversight at key points in the process. AI applications should adhere to industry standards for uptime and response time to human inputs.

Neutrals and Advocates: Outputs from AI tools should be reviewed to verify accuracy against trusted source materials, including evidence, party filings, and legal authorities.

Standard 4: Explainability and Transparency

ADR Administrators: AI systems should allow staff and participants in the process to understand and trust their outputs. Clearly communicate the choices made in developing AI applications to enhance delivery of services.

Neutrals: Weigh the probative value of AI outputs in submissions by parties and examine them for misstatements, bias, or dubious references. When in doubt, seek clarification. Communicate to case participants the ways in which AI informs the neutral's process.

Advocates: Examine AI outputs for misstatements, biased outputs, or dubious references. Explain how AI was used, and correct any errors promptly.

Standard 5: Accountability

ADR Administrators: Establish human ownership over AI across processes. Carefully select and continuously assess third-party vendors to ensure reliable performance and alignment with values.

Neutrals: Maintain a working knowledge of AI capabilities. Avoid shortcuts that could compromise quality. Understand risks, benefits, and ethical considerations for AI tools. And ensure automated document summaries or data analysis never overshadow firsthand examination of evidence and arguments.

Advocates: Exercise professional judgment when leveraging AI tools for analysis, research, scheduling, or other purposes. Confirm outputs through human scrutiny informed by professional expertise.

Standard 6: Adaptability

ADR Administrators: Establish and apply standards for monitoring and evaluation of AI systems. Commit to staff training, research, and feedback loops that maintain a culture of innovation and AI literacy.

Neutrals: Continually update knowledge about AI technologies. Incorporate AI-assisted scheduling, translation, evidence organization, and other tools if they enhance clarity and minimize delays, but evaluate every dispute according to its unique context.

Advocates: Continually update knowledge about AI technologies, and seek to apply AI in a manner that supports the goals of ADR. Examples include: streamlining discovery, expediting legal research, and delegating certain administrative tasks.

EMPLOYMENT ARBITRATION TRENDS

National Academy of Arbitrators, Southeast Region

Presenters: Mark C. Travis, Arbitrator, N.A.A.

Leslie W. Langbein, Arbitrator

Patrick C. Clark, Esq., Ogletree Deakins Nash Smoak & Stewart, LLP

Erika E. Goodman, Esq. Marie A. Mattox, P.A.

November 11, 2025

I. INTRODUCTION

The last couple of years have seen an increasing number of practical issues arise in the enforcement of employment arbitration agreements. Obviously, the courts' response to the enactment of the Ending Forced Arbitration of Sexual Harassment and Sexual Assault Act has led to a substantial amount of interpretive litigation. Additionally, the increasing use of electronic formation of arbitration agreements has proved to be a source of litigation, as have continuing issues over unconscionability. The Supreme Court's decision in *Morgan v. Sundance, Inc*. has also reopened the door regarding issues of waiver of the right to compel arbitration.

The following hypothetical draws upon these issues and others as a foundation for our interactive discussion.

II. THE SCENARIO

Donna Sue saw an online advertisement seeking an "account executive" for Onward Cargo, an interstate trucking company. The ad contained a link to an electronic job application. She downloaded the form, filled in the blanks and checked all the boxes without reading them. One box provided that if hired, Donna Sue would be subject to mandatory arbitration under the AAA Commercial Rules of "any and all" disputes of "every type arising out of or relating to her position with the company." Donna Sue completed a W-9 for her compensation.

Donna Sue was hired by Onward Cargo and told she would be compensated on a commissioned basis. She also was given a list of 100 possible leads and told to safeguard it. Unfortunately, Donna Sue was rarely able to meet or exceed her commission quota. Six months after she started, Onward Cargo then implemented a new compensation plan for (with lower payments of commissions and bonuses) which provided for payment of accrued unpaid commissions at separation unless Donna Sue resigned or was terminated without good cause. Attached to the plan document was a confidentiality, non-disclosure, and non-competition provisions agreement, that provided the new plan would be considered accepted by the employee's continued employment for 90 days after it was sent. In the event of breach, this document provided for arbitration under the AAA Commercial Rules. Donna Sue resigned from Onward Cargo six months after the new compensation plan took effect. She immediately took a higher paying position with one of Onward Cargo's major regional competitors.

When she did not receive her accrued commissions at the end of the next pay period, Donna Sue then hired an attorney and filed suit in state court for unpaid commissions. Onward Cargo served Donna Sue with interrogatories. In her interrogatory responses, Donna Sue responded that she left Onward Cargo with good cause due to disparity in her base pay relative to male account representatives.

Upon advice of counsel, Donna Sue then filed a charge with the EEOC, alleging discrimination on the basis of sex. The charge was filed 18 months after she instituted the state court suit. After receipt of the right-to-sue, Donna Sue filed suit in federal court for sex discrimination. Onward Cargo moved to compel arbitration as Donna Sue had checked the box on the application requiring mandatory arbitration. In response to the motion to compel, Donna Sue asserted she did not check the mandatory arbitration box on the application, and even if she did, the arbitration agreement was otherwise unconscionable based on the cost-sharing provisions under AAA Commercial Rules. While that motion was pending, Donna Sue requested leave to amend her federal complaint to include a count for sexual harassment claiming that her "supervisor" told her that female employees had trouble advancing in the male-dominated trucking industry and that she should be more "engaging" and dress more suggestively when calling on her male customers. "You gotta strut your stuff girl!"

Onward Cargo then moved to compel arbitration in the state court action based on the terms of the commission/bonus plan, or in the alternative, for leave to file a counterclaim based on its discovery of Donna Sue's solicitation of Onward Cargo's customers. In her response, Donna Sue alleged this agreement also was unconscionable due to the cost-sharing provisions in the AAA Commercial Rules, and further that Onward Cargo had waived its right to enforce the arbitration provisions due to its participation in the state court litigation.

III. QUESTIONS FOR DISCUSSION

A. Was There Valid Formation of Either Arbitration Agreement?

1. *Bazemore v Papa John's USA*, 74 F.4th 795 (6th Cir. 2023). Plaintiff filed suit under the FLSA and the defendant filed a motion to compel arbitration based on an alleged electronic signature on an arbitration agreement at the time of hire. The defendant employer's declaration asserted the plaintiff had signed the agreement through a program called E-forms. Under that program, the applicant was assigned a user ID and password, then scrolls the agreement and checks the box in order to sign. The plaintiff asserted in his declaration that he had never seen the agreement and the login credentials were made up of demographic information clearly available from his application. He also stated he had seen his manager log in for other employees to complete training documents. The district court granted the motion to compel, finding the plaintiff's declaration to be a "convenient lapse in memory."

The Sixth Circuit reversed, noting that the moving party bears the burden of establishing the existence of an agreement to arbitrate, and under Kentucky law – while an electronic signature can show a party's consent – it is only valid when made by the action of the person the signature purports to represent. Based on the plaintiff's declaration, there was nothing to prevent a reasonable fact-finder from believing plaintiff's testimony – thus creating a genuine issue of material fact. The court found the district court erred in implicitly placing the burden of proof on the plaintiff when it emphasized the plaintiff did not specifically say he had not signed the agreement. However, the circuit court noted Rule 56 did not require magic words, and a reasonable fact-finder could conclude that since the plaintiff stated he had had not seen the agreement, he had not signed it either.

Regarding the defendant's argument that the agreement was nevertheless enforceable since plaintiff had continued to work even after learning of the agreement during the litigation, the court held that the plaintiff had never manifested his assent to the agreement.

2. *Aldea-Tirado v. Pricewaterhousecoopers, LLP*, 101 F.4th 99 (1st Cir. 2024). Plaintiff filed suit for pregnancy and gender discrimination. Defendant employer filed motion to compel arbitration based on agreement sent to plaintiff post-employment which provided for arbitration of all employment disputes, and that by continuing employment for a period of 90 days, the plaintiff would be deemed to have accepted the agreement. Attached to the motion were affidavits from two company employees who asserted they had taken part in sending the new plan to employees

via email. They also explained the process for sending the emails entailed uploading a template to the employee database and emailing the email to employees in the database via Lotus notes. The defendant also submitted an affidavit from former employee who specialized in digital discovery and digital forensics, which stated the agreement was sent to the plaintiff in the Lotus notes database.

The plaintiff's affidavit asserted she had never received the email or letter modifying her employment terms, and that she had learned of it only after suit was filed. She also contended the email address in Lotus notes was different than her regular work email address, and previous work emails were also sent to her personal email.

The district court granted the defendant's motion and the First Circuit affirmed. The court noted that under § 4 of the Federal Arbitration Act, the non-moving party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests and must identify specific evidence in the record demonstrating a material factual dispute. The court held the plaintiff failed to show there was any non-speculative basis in the record from which a reasonable fact-finder could determine that she did not receive the email which attached the arbitration agreement.

B. Are the Agreements Unconscionable Based on the Cost-Sharing Provisions of the AAA Commercial Rules?

1. *Gavin v. Lady Jane's Haircuts for Men Holding Co. LLC*, 135 F.4th 461 (6th Cir. 2025). Plaintiff hairstylists sued for minimum wage and overtime pay under the FLSA. The defendant filed a motion to dismiss and compel arbitration. The controlling independent contractor agreement contained an arbitration clause that provided for arbitration under the AAA Commercial Rules – requiring the parties to split the costs of arbitration. The contract also contained a severability clause which provided that if any provision is held by a court to be invalid, void or unenforceable, the remaining provisions shall continue in full force without being invalidated. The parties stipulated that the court could not enforce the cost-shifting provision, with the remaining issue of whether the court could sever the cost-shifting provision of the arbitration clause. The stylists argued that the offending "provision" affected the entire arbitration agreement; whereas the defendant argued that the term "provision" only applied to the cost-shifting provision.

The district court found the cost-splitting provision unconscionable and applied the severability clause to sever the provision - enforcing the rest of the arbitration agreement. The Sixth Circuit affirmed. The court noted that when an arbitration agreement at issue includes a severability clause, “courts should not lightly conclude that a particular provision … taints the entire agreement.” Contrary to the plaintiff’s contention, the court held severance was not an impermissible reformation of the contract without a showing of mutual mistake. Rather, the court held it was not reforming the contract, only severing the unconscionable part.

C. Is Donna Sue Exempt from Arbitration under the FAA as a “Transportation Worker”

1. Bissonnette v. LePage Bakeries Park St, LLC, 601 U.S. 246 (2024). Plaintiffs sued Flowers, a national bakery, and one of its distributors for violating federal and state wage laws. Flowers moved to compel arbitration pursuant to a provision in the plaintiffs’ re-distribution agreement. Plaintiffs claimed they were essentially “truck drivers” who were exempt from arbitration pursuant to the exception in §1 of the FAA for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The district court found that truck driving was only a small part of their broader contractual responsibilities and dismissed the lawsuit in favor of arbitration. The Second Circuit affirmed on the grounds that the plaintiffs worked in the bakery industry, not the transportation industry. The Supreme Court held that the exemption provided in §1 of the FAA is properly defined based on what a worker does for an employer, “not what [the employer] does generally. It reversed the Second Circuit finding there was no requirement that a worker must be employed in the transportation industry, but that any worker who is exempt from FAA “must at least play a direct and ‘necessary role in the free flow of goods’ across borders.”

2. Tillman Transp. LLC v. MI Bus Inc., 95 F.4th 1057 (6th Cir. 2024). Tillman, through his LLC, contracted with subsidiaries of MI Bus company to haul goods across state lines. He signed one of the contract individually and the other two through his LLC. Each contract contained a mandatory arbitration provision and a non-compete clause. After Tillman performed three shipments and was paid, MI Bus accused his company of soliciting customers. MI Bus filed suit against Tillman in state court alleging breach of contract. Tillman requested the state court to compel arbitration and it granted that request. The subsidiary then filed for arbitration with AAA. Tillman filed a counterclaim in the arbitration stating he was undercompensated by MI Bus’ subsidiary. Tillman then filed its own suit in federal court claiming that another subsidiary of MI Bus had engaged in a conspiracy to violate the Motor Carrier Act. The subsidiary moved to compel arbitration and Tillman resisted claiming he was exempt under §1 of the FAA as a

"transportation worker." Held: that because Tillman brought the federal suit through his LLC, it did not qualify for the exemption. The exemption is only available to individual workers under a narrow construction of §1 of the FAA. And the non-signatory he sued (wife of owner of the subsidiary) could compel arbitration. The arbitrator subsequently joined the wife as a part to the arbitration.

D. What Impact does the Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021 Have on Either or Both Lawsuits ?

1. *Anderson v. Hansen*, 47 F. 4th 711 (8th Cir. 2022). Plaintiffs, a husband and wife, were independent agents of a life insurance company. They attended a work conference where they encountered a business development manager from company. They socialized at dinner and then the wife and others met the business development manager for a nightcap at the bar. After the group returned to their rooms, the business development manager forced his way into the wife's room and raped her. Plaintiffs sent a demand letter to the life insurance company claiming "Title VII violations" After the insurance company settled, the plaintiffs sued the business development manager for battery, assault and other causes of action. The manager claimed he was a 3rd party beneficiary of the plaintiffs' independent contractor agreement which called for arbitration of all claims including those against "officers, employees and associates" of the company and moved the court to compel arbitration. The court held that those claims "are not claims 'arising under or related in any way to' the Associate's Agreements." Instead, the court reasoned, the "claims [were] for an alleged sexual assault and 'rest" on independent . . . grounds, which have no relation to the terms of the Agreement and in no way depend on its existence.'" The manager appealed but lost.

A majority of the 8th Circuit adopted the holdings of the 5th and 11th Circuit Court of Appeals and held that even a broadly worded arbitration clause "requires the existence of some direct relationship between the dispute and the performance of duties specified by the contract." citing Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109, 1116 (11th Cir. 2001) ["Disputes that are not related—with at least some directness—to performance of duties specified by the contract do not count as disputes 'arising out of' the contract, and are not covered by the standard arbitration clause."]. But the dissent questioned the need to reach out to cases from other circuits when it could have been decided the same way under EFASASH (if it applied).

2. *Yost v. Everyrealm, Inc*. 2023 U.S. Dist. LEXIS 62623 (S.D.N.Y. 2023). Former worker who served as a Chief HR Officer brought a variety of discrimination and retaliation

claims based on her gender, sexual orientation, disability, and marital status. Companies moved to compel arbitration based on 3 different arbitration agreements. Court held that the sexual harassment claim was improbably pled and could not be used to block the claims from proceeding to arbitration under the EFASASH Act.

E. Did Onward Cargo Waive the Right to Compel Arbitration of State Court Action By Participating In Litigation *(post-Morgan v. Sundance)?*

1. *Kloosterman v. Metro Hospital*, 2025 WL 2463138 (6th Cir. 8/27/25 .Kloosterman filed a lawsuit against the hospital and its administrators. The defendants engaged in substantial motions practice, seeking to dismiss all claims on the merits. After a year of litigation, the district court partially granted and partially denied the motion to dismiss, allowing some of Kloosterman's claims to proceed. Only then did the defendants seek to compel arbitration, citing an arbitration clause in Kloosterman's employment agreement. The district court granted the motion to arbitrate, but Kloosterman appealed. On appeal, the Sixth Circuit focused on whether the defendants' conduct in litigating the case for a year before seeking arbitration constituted a "default" under the Federal Arbitration Act, thereby forfeiting their right to arbitrate. The court concluded that the defendants' actions were entirely inconsistent with arbitration, as they sought a complete judicial victory before attempting to arbitrate. This conduct put them in default, and thus they lost the right to arbitrate. The court reversed the district court's decision and remanded the case for further proceedings.

2. *SZY Holdings LLC v. Rico Garcia*, 2024 WL 3983944 (4th Cir. Aug. 29, 2024). In this contract dispute, the defendants initially filed a 12(b)(6) motion in April 2022 for lack of personal jurisdiction, failure to state a claim, and "preemption by a binding arbitration agreement". The court denied the motion in August 2022, and the defendants requested reconsideration or in that alternative, to compel arbitration. The district court denied the motion, finding the defendant had waived its right to arbitration, and the defendant filed an interlocutory appeal to the Fourth Circuit. The Fourth Circuit reversed, stating it gave little significance to the defendant's delay in a formal demand for arbitration, where the defendant had previously requested it in its motion to dismiss.

3. *Warrington v. Rocky Patel Premium Cigars, Inc.*, 2023 WL 1818920 (11th Cir. Feb. 08, 2023). In this shareholder dispute, the defendant initially filed and subsequently amended a state court action, and the plaintiff had brought a collateral action in federal court. The defendant

moved to compel arbitration and dismiss the federal court case. The district court held the defendant had waived his right to arbitration because he had filed (and amended) his state court suit and moved to remand the federal court case.

In affirming, the Eleventh Circuit noted there was no set rule as to what constitutes a waiver of arbitration, but the key factor is whether a party has "substantially invoked the litigation machinery prior to demanding arbitration." On these facts, the court held the defendant had evinced a clear intent to litigate prior to asserting his right to arbitration and thus had acted inconsistently with his right to arbitration.

4. Schwebke v. United Wholesale Mortg. LLC, 96 F.4th 971 (6th Cir. 2024). Plaintiff filed suit under the ADA in January 2021. The parties' employment relationship was governed by an employment agreement which provided for mandatory arbitration. However, the defendant did raise the agreement in its answer in February 2021, and not file a motion to compel arbitration until August 2021. In the intervening seven months, the defendant had participated in a discovery conference, filed a joint discovery plan, served interrogatories and document requests, produced extensive documents, issued subpoenas for employment records, took several depositions, and filed for an extension of deadlines. In its motion, the defendant admitted that it had not previously asserted arbitration as it didn't know there was an arbitration clause in the employment agreement. The district court denied the motion and the defendant appealed.

The Sixth Circuit affirmed. The court dismissed the defendant's arguments that little weight should be given to its responsive discovery as it was only addressing the issues raised by the complaint. The court held this was irrelevant to a totality of circumstances analysis. Likewise, the court dismissed the defendant's argument to the effect that its discovery initiatives would have been undertaken in arbitration as well as the defendant had otherwise invoked the federal rules of civil procedure in seeking discovery.

F. If Arbitration is the Correct Forum, How Can Onward Cargo get Copies of Donna Sue's Employment File from her Former Employer ?

1. Hay Group Inc v. E.B.S. Acquisition Corp., 360 F. 3d 404 (3rd Cir. 2004). Under the plain meaning of §7 of the FAA, a non-party witness may be compelled to bring documents to an arbitration proceeding under the same procedures found in Fed. R. Civ. P. 45 but may not simply be subpoenaed to produce documents. An arbitrator's only power over parties that are not contractually bound by an arbitration agreement is strictly limited to that granted by the FAA.1.

2. *Managed Care Advisory Group LLC v. Cigna Healthcare Inc.,* 939 F. 3d 1145 (11th Cir. 2020). Here, the 11th Circuit adopts the position of the Second, Third, Fourth and Ninth circuits and finds §7 of FAA must be strictly construed. An arbitrator's power to require a non-party to bring items with him clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. Enforcing § 7's prohibition on pre-hearing discovery forces the parties to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed.

3. *In re Sec. Life Ins. Co. of Am., 228 F.3d 865 (8th Cir. 2000)*. Party to an arbitration petitioned the arbitration panel to issue a subpoena duces tecum and to provide documents for discovery purposes to a non-party. The recipient of the subpoena refused to comply contending that the arbitration panel had no authority over it. The arbitration party moved to compel compliance with the subpoena duces tecum in district court. In response, a magistrate ordered the attorney representing the party to issue his own subpoena under Fed. R. Civ. P. 45. The non-party appealed this ruling to the district court who held the ruling was neither clearly erroneous nor contrary to law. The subpoenaed party then appealed that decision to the Eight Circuit. The appellate court held, "Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."

Arbitrator/Advocate Roundtable

National Academy of Arbitrators, Southeast Region

Moderator: Christopher M. Shulman, Arbitrator, NAA

<u>Panel</u>

Robert Weaver, Esq. – District 3 Counsel, CWA (Union Counsel)

Robert E. ("Bob") Thomas, Jr., Esq. – AVP/Senior Legal Counsel, AT&T (Mgt Counsel)

Reyburn W. Lominack, III, Esq. – Fisher Phillips LLP (Mgt Counsel)

Paul Daragjati, Esq. – Daragjati Law (Union Counsel)

November 11, 2025

This session is intended to answer questions and foster discourse about the nuts and bolts of labor arbitration. Attorneys on each of the three "sides" (Union, Management, and arbitrator) will discuss:

- How to make arbitration process more efficient?
- Discovery in Labor Arbitration
- What Advocates look for in an arbitrator? (private panels)

The attached outlines and monographs are intended to supplement the lively discussion we expect.

Introduction to Discovery in Arbitration,

by Reyburn W. Lominack, III, Esq. – Fisher Phillips LLP (Mgt Counsel)

A commonly cited attribute of arbitration is its efficiency. That efficiency is realized, in large part, by the absence of a formal discovery period. Court litigants are generally guaranteed "discovery" of evidence from the other side through a variety of avenues, including interrogatories, requests for production, and depositions. Those avenues take considerable time to pursue, often because of challenges to the scope or relevance of the information sought (i.e., the dreaded "discovery dispute"). In arbitration, on the other hand, discovery is governed more by principles of fairness, efficiency, and the need to resolve disputes consistent with the parties' contract than formulaic rules. *See Halim v. Great Gatsby's Auction Gallery*, 516 F.3d 557, 563 (7th Cir. 2008) ("The arbitrator's decision not to rule on the additional discovery disputes and instead to remind the parties of their mutual contractual obligations to cooperate in discovery was an attempt by the arbitrator to give the parties what they had contracted for: a cost-effective and efficient resolution of their dispute.").

Arbitrators' General Approach to Discovery

In labor arbitration, parties to a collective-bargaining agreement may specifically agree to pre-hearing discovery procedures, either expressly or by incorporating rules such as those promulgated by the American Arbitration Association (AAA). *See District Council, AFSCME*, 2014 BNA LA Supp. 165815 (Simmelkjaer, 2014) ("Although discovery is limited in labor arbitration [the parties] may avail themselves of witness subpoenas and document production pursuant to AAA rules."). Notably, the AAA rules for labor arbitration do not expressly provide for discovery; however, Rule 27 provides that an arbitrator may subpoena witnesses and documents independently or upon the request of any party.

Even absent a clear agreement between the parties, some arbitrators recognize that the adoption of contractual grievance and arbitration procedures carries with it an implied duty to exchange relevant information in advance of a hearing. *See Evening News Association*, 68 BNA LA 1314 (Volz, 1977) ("Pre-hearing discovery by one party upon request to the other . . . is within the scope of the implied obligations arising from the nature of the grievance procedure."); *E&G Engineers*, 71 BNA LA 441, 444-45 (Jones, Jr., 1978) ("[T]he Company *is* subject to arbitral discovery. The obligation of disclosure to a proper degree and in proper circumstances is implicit in the contractual grievance procedure."); *Social Security Administration*, 130 BNA LA 1136 (Kravit, 2012) ("In the absence of a statutory provision, contract clause or rule such as those of the [AAA], the Arbitrator may rule on discovery issues as a facet of his implied authority to resolve procedural issues.").

Nevertheless, most arbitrators resist an attempt to create an arbitral discovery process that includes specific avenues such as interrogatories and depositions, absent the parties' agreement, because such avenues threaten to hinder the traditional advantages associated with arbitration, including efficiency. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974) ("[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."); Heinsz, Lowry & Torzewski, *The Subpoena Power of Labor Arbitrators*, 1979 Utah L. Rev. 29 (1979) (observing that such procedures are "expensive and technical" and "[t]heir implementation would unduly delay the arbitration and lessen the utility of arbitration as a prompt and inexpensive method of resolving disputes").

Holding Parties Accountable

When parties do agree to formal discovery procedures in arbitration, or where such procedures are inferred from their contract, arbitrators can and do hold the parties accountable for compliance. *See E.Spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 910 (4th Cir. 2002) (affirming district court conclusion that party was "on clear notice" that arbitrator's scheduling order would be "strictly enforced"); *Dep't of Veterans Affairs*, 2020 BNA LA 1315 (Nicholas, 2020) (setting deadlines for parties to make and respond to discovery requests)

The NLRA

In labor arbitration, the National Labor Relations Act (NLRA) plays an ancillary, but critical role in the "discovery" process. Section 8(a)(5) of the NLRA requires employers and unions to bargain in "good faith," which the National Labor Relations Board (NLRB) has held, with judicial approval, includes responding to reasonable requests for relevant information. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) ("The duty to bargain collectively . . . includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."); *Printing & Graphic Commc'ns Local 13 (Detroit) (Oakland Press Co.)*, 233 NLRB 994, 996 (1977) ("[A] union's duty to furnish information relevant to the bargaining process is parallel to that of an employer."), *aff'd*, 598 F.2d 267 (D.C. Cir. 1979).

Although the NLRB is authorized to ensure compliance with this duty by remedying violations, its investigatory and adjudicatory process is often slow and inefficient. *See Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989) (referring to NLRB proceedings as being "notoriously glacial"). Thus, in *Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 559 F. Supp. 875, 882 (M.D. Pa. 1982), the court opined that "given the length of time required to enforce a party's disclosure obligations pursuant to section 8(a)(5)[,] . . . a failure to enforce an arbitrator's subpoena could very well frustrate the policy . . . favoring speedy disposition of grievances through arbitration."

Conclusion

Discovery in labor arbitration reflects the balance between fairness and efficiency that defines the arbitral process. Courts and arbitrators alike emphasize that discovery should facilitate fact-finding without undermining arbitration's purpose of expeditious resolution. Practitioners who respect these limits, while carefully developing the record, are most likely to secure the evidence needed and maintain credibility before the arbitrator.

Discovery/Efficiency in Labor Arbitration and what do Advocates look for in Arbitrators?

by Paul Daragjati, Esq.

1. Discovery in non-Federal Public Labor Arbitration?
    a. Typically, there is no discovery process for public labor arbitrations. When preparing for arbitration, unless the CBA or an arbitrator has a process laid out (addressed below), our firm makes public records requests under Chapter 119, Fla. Stat., for all "discoverable" material.

        i. Florida Public Records Law
            1. Florida has broad public records laws outlined in Chapter 119, Fla. Stat.
                a. "Chapter 119 of the Florida Statutes, The Florida Public Records Act, was enacted to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people." *Cent. Fla. Reg'l Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc.*, 157 So. 3d 401, 404 (Fla. 5th DCA 2015).

            2. In Florida, "every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state…" Florida Constitution, Art. I, § 24 (a).
                a. "Public records" means "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received *pursuant to law or ordinance or in connection with the transaction of official business by any agency*." Fla. Stat. § 119.011(12) (*emphasis added*).
                b. Florida's Supreme Court expanded on this definition and described a public record as "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633, 640 (Fla. 1980).
                c. "Agency" means "any state, county, district, authority, or municipal officer, department division, board, bureau, commission, or other separate unit of government created or

established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." *Fla. Stat.* § 119.011(2).

3. Almost everything can be accessed under Florida Public Records laws.
    a. Where the arbitration is based on disciplinary action, we usually request a complete personnel file, the grievance documents, any IA reports and evidence in support thereof which led to the discipline.
    b. If the arbitration is based on an interpretation of the CBA, we could pull a city's financial records, emails between command if not privileged, etc.

ii. How to make Public Records Requests
1. Bigger cities and municipalities have "JustFOIA" portals where you can make a public records request, the invoice is generated and the records are then released.
2. Smaller cities usually require an email request and then sending a check to get the records, which are then released via CD or USB drives.
3. Our firm has a template that we use for each public records request we make which helps streamline the requesting process.

iii. Issues which may arise when making public records request
1. Unreasonable fee, time consuming redactions
    a. Some cities will accept a release signed by our client releasing all materials requested unredacted
2. Delays
    a. Although we try and make our public records requests as soon as arbitration is set – usually 2-4 months out, many Cities take a long time to release the records
        i. It is our position that if a City has not released records with ample time prior to arbitration, it is cause for a continuance and any penalty fee associated with late cancellation should be invoiced to the City

ii. Enforcing such a penalty, so long as it is not contrary to the CBA, is one way to keep cities accountable and ensure the arbitration process runs smoothly

b. Discovery Process Outlined in CBA
    i. Most of the CBAs we deal with do not have a discovery process laid out. One City, Temple Terrace, FL, has a provision in the CBA that effectively limits evidence/discovery to anything that was presented through Step 3. The CBA Language states: *"No evidence or defense may be represented at arbitration that has not previously been documented during the processing of the grievance through Step 3."*
        1. This issue came up during an arbitration between the FOP and the Temple Terrace Police Department, but ultimately the arbitrator allowed the material into evidence as a "business record" exception.

c. Discovery Process required by the Arbitrator
    i. Some arbitrators have their own "discovery" process by requiring pre-trial conferences, exhibit lists, witness lists, and exchanging all materials prior to arbitration. This is especially helpful because it:
        1. Ensures no evidentiary issues arise during the hearing
        2. Ensures witnesses are relevant and material to the discipline
            a. In 2-arbitrations in South Miami in 2021, the arbitrators did not require witness lists and time was wasted objecting to witnesses and listening to cumulative testimony
        3. Ensures transparency and ensures that both parties are working off the same material
            a. i.e., the union was provided redacted material and the city has un-redacted material – exchanging exhibits levels the playing field

2. What advocates look for in an arbitrator?
    a. Choosing Experienced Arbitrators
        i. As counsel to the Public Employee labor union, we look for arbitrators who possess any of the following experience:
            1. Real world experience with public employment – i.e., were they public employees themselves (teachers, police/fire, prosecutors).
            2. Have served as counsel to both City and Labor side of the table – these arbitrators tend to have the most "neutral" thought processes.
            3. Have been selected as permanent panelists with various unions/cities or as special magistrate for the Public Employee

Relations Commission or similar organizations showing they are familiar with labor related issues and the law here in Florida.

a. Choosing arbitrators who possess these qualities make the arbitration process more efficient – for example, they tend to anticipate evidentiary issues and move hearings along more briskly.

DISCOVERY & COMPULSION OF EVIDENCE IN THE FEDERAL SECTOR

by Robert Weaver, Esq. – District 3 Counsel
Communications Workers of America (Union Counsel)

The federal labor relations statute, the Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101, *et seq.*, includes two substantive provisions which relate to the question of the right to discovery in arbitration, or the authority of the arbitrator to compel testimony or the production of evidence in arbitration. Akin to the employer's obligation to produce relevant and necessary information under the NLRA, under the FSLMRA a federal sector employer's duty to bargain includes the duty

> to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> **(A)** which is normally maintained by the agency in the regular course of business;
>
> **(B)** which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> **(C)** which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

5 U.S.C. §7114(b)(4). Unlike the NLRA, the FSLMRA includes specific language creating the framework for grievance and arbitration procedures that are included in collective bargaining agreements. The FSLMRA provides that

> Any negotiated grievance procedure referred to in subsection (a) of this section shall--
>
> **(A)** be fair and simple,
>
> **(B)** provide for expeditious processing, and
>
> **(C)** include procedures that--
>
> **(i)** assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
>
> **(ii)** assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
>
> **(iii)** provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

5 U.S.C. § 7121(b)(1).

The weight of arbitral authority is that Section 7114(b)(4) alone does not authorize an arbitrator to compel discovery. In Social Security Administration, 130 Lab. Arb. (BNA) 1136 (Kravit, Arb.) (2012), the union submitted to the arbitrator a proposed discovery order requiring production of information related to the underlying grievance, and also submitted a proposed subpoena duces tecum seeking the same information. Citing language of the parties' CBA that allowed for unfair labor practices to be grieved, and that arbitration proceedings could be stayed by the union pending resolution of a ULP (or ULP submitted as a grievance) over the production of requested information, Arbitrator Kravit neither ordered discovery nor issued the requested subpoena. Arbitrator Kravit concluded that "when a contract specifies a process the Arbitrator is bound by it", noting that Section 7114(b)(4) and the contract language, taken together, provided the union's only recourse. To that point, however, the union was not without recourse. The arbitrator directed the union to promulgate an information request; and if the requested information was not produced by the agency, would permit the union to amend the grievance to raise the discovery issue for resolution in a first day of hearing in advance of hearing the merits.

In Defense Contract Audit Agency, 1989 LA Supp. (BNA) 106338 (Kubie, Arbitrator) (1989), the union grieved performance reviews and appraisals issued by the agency. Prior to hearing the union objected to the adequacy of the agency's production of information in response to requests, and at hearing asked that an adverse inference be drawn against the agency. The agency objected, noting that the union had withdrawn a ULP over the information request, and did not avail itself of a subpoena to seek the evidence at hearing. Arbitrator Kubie observed that the "problem at hand is not one of applying rules to ensure the fair conduct of a sporting contact, but of obtaining the information necessary to reach an appropriate resolution of the controversy." He noted his position articulated to the parties prior to hearing was that "beyond the signing of subpoenas returnable to the hearing itself I lack discovery powers and that I would not undertake to adjudicate claims of unfair labor practices." While finding that an adverse inference was not necessary based on the facts of the case before him, he noted that adverse inference is appropriate where a party withholds pertinent information, and that the parties are expected "to facilitate arbitration by free and prompt disclosure" of such information.

Rock Island Arsenal, 99 Lab. Arb. (BNA) 1043 (Brunner, Arb.) (1999) presented a similar issue. The grievance involved a performance appraisal, and post-hearing the union cited Section 7114(b)(4) for reasons about which the arbitrator was uncertain. To the extent the union may have cited Section 7114(b)(4) in support of its objection to consideration of agency evidence not disclosed prior to hearing, Arbitrator Brunner observed that he "cannot see why it was cited", but that "I do not read Sec. 7114 as an omnibus 'Freedom of Information Act' for pre-hearing discovery in grievance arbitration."

In U.S. Department of Treasury, 82 Lab. Arb. (BNA) 1209 (Kaplan, Arb.) (1984), the arbitrator questioned the absence of testimony from a management official involved in the underlying events, and observed that "a proceeding where the key player is unseen and inaudible behind the scene makes for a very imprecise and incomplete scenario." Questioning why neither the agency nor the union had sought to obtain the testimony (even if only by affidavit), he noted that the rules of discovery and disclosure are not available in arbitration (and also noted that under the relaxed rules of evidence he would have accepted an affidavit).

FDIC, 120 Lab. Arb. (BNA) 1441 (Moreland, Arb.) (2005) represents a broader interpretation that the duty to provide information under Section 7114(b)(4) authorizes an arbitrator to compel the production of documents requested in anticipation of arbitration. In that case the union requested information from the employer in a grievance regarding a bonus award. When the employer resisted producing the requested information, the union filed an unfair labor practice alleging a violation of Section 7114(b)(4) and a motion with the arbitrator seeking to compel disclosure of the information. Citing the employer's obligation to provide relevant information under Section 7114(b)(4) and language of the parties' CBA providing that "the arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him or her by the representatives of the parties", Arbitrator Sidney Moreland granted the union's motion to compel. FDIC is cited by Elkouri & Elkouri for the proposition that the FSLRMA has "been interpreted to require the timely production of documents" (about which the case does not speak), "and to compel agency officials to testify at a hearing." Elkouri & Elkouri, How Arbitration Works, Ch. 8, Section 8.3.C, n. 76 (2021).

The authority of an arbitrator in the federal sector to issue a subpoena was raised in one reported U.S. District Court decision, AFGE Local 922 v. Ashcroft, 354 F. Supp.2d 909 (E.D. Ark.) (Nov. 3, 2003). In that case the union requested issuance of a subpoena compelling a management official to testify at arbitration. The agency and witness refused to comply, and the union initiated an action in federal court to enforce the subpoena. The agency defended on the grounds that the arbitrator had no authority to issue the subpoena; had no authority to compel a witness who lives and works in Dallas to appear in Forrest City, Arkansas; and that the testimony sought was irrelevant. The court noted that the FSLMRA is silent on the issue, but instead created the framework in Section 7121(b) regarding what provisions were required of a grievance and arbitration procedure negotiated by the parties. The CBA at issue in the case, however, did not specify whether an arbitrator had authority to issue a subpoena. Analogizing to the subpoena power of the Merit Systems Protection, and to federal common law under the Federal Arbitration Act and Section 301 of the Labor-Management Relations Act authorizing issuance of subpoenas in arbitration, the court found that the arbitrator had authority under the FSLMRA to issue the subpoena. The court further ruled that the witness could be compelled to travel to Arkansas. The court concluded that it would not make its own assessment of the relevance of the testimony, however, consistent with the federal policy favoring (and deferring to) arbitration. Ashcroft has been cited in support of an arbitrator's authority to issue subpoenas compelling testimony in federal sector arbitration. See, e.g., Sierra Army Depot, 137 Lab. Arb. (BNA) 698 (Staudohar, Arb.) (2017).

A Labor Arbitrator's Take on Discovery – by Christopher M. Shulman, NAA

Labor arbitration is different from litigation; it is also different from arbitration of employment cases, which often mirror litigation. Litigation and employment arbitration of statutory or contractual disputes brought by individuals are usually one-off events, where the parties need – and are entitled to – the organized exchange of information known as discovery. In contrast, labor arbitration (especially grievance arbitration) entails a continuation of union/management negotiations over application and interpretation of the collective bargaining agreement (CBA) between parties who have been working together and against one another for years or decades. Because of this fundamental difference, there is typically little in the way of "discovery" in labor arbitration.

Typically, once a CBA is in place, and the parties begin working under it, when a dispute arises that is not informally resolved, the Union files a grievance with the Employer. The grievance sets forth the factual basis for the claim the Employer has violated the CBA and, usually, the specific CBA provisions at issue. Thereafter, most CBAs provide for one or two meetings between the Union and the Employer, usually involving successively higher-level representatives of each party. At these grievance meetings, the representatives engage in more formal discussions, presenting arguments and evidence to support their positions and, ultimately, seeking to resolve the grievance. If those discussions do not lead to a resolution, the Union may request arbitration.

Once the arbitration process is commenced, it is not uncommon for either or both parties to engage counsel to present each side's case to the arbitrator. (Of course, parties are not required to have attorneys represent them in labor arbitration; at least one quarter of the labor arbitrations I have conducted entailed at least one side represented by a non-lawyer advocate.)

Because the Parties have already had the opportunity to exchange information and "evidence" during the grievance meetings process, formal discovery in advance of a labor arbitration hearing is generally unheard of. Instead, the expectation is that the Parties, through requests for bargaining information or the like, will have sought that information before and during the grievance process. There are certain statutory means by which parties may request further information; these vary by jurisdiction. For example, in Florida, the Florida Public Records Act, Chapter 119, Fla. Stat., has a very broad scope and is often used by unions bringing grievances to arbitration against covered public employers to gather documentary evidence that may exist. Likewise, certain procedural protections are, in some states, afforded to law enforcement officers and firefighters, requiring formal investigations and access to the entire investigative file the employer may amass, *before* an accused law enforcement officer (or firefighter) can be made to answer questions in the course of a disciplinary investigation. See, e.g., Fla. Stat. §§ 112.531 – 112.536, 112.80 – 112.84.

However, it is important to recognize that traditional discovery, e.g., interrogatories, requests for production, requests for admission, depositions and the like are typically NOT part of the labor grievance arbitration milieu. If you ask your arbitrator for these, you should expect the arbitrator to deny the request – unless yours is the unusual CBA that provides for them. Likewise, subpoenae are typically only issued for attendance at the final arbitration hearing. Depending on the witness subpoenaed and your explanation of why you need them to bring specific documents with them, the arbitrator may (or may not) issue subpoenae duces tecum.

Having said that, arbitrators do not like "arbitration by ambush," that is, where a party raises something for the first time at hearing. Thus, some arbitrators, myself included, require the parties to disclose, sometimes in a Joint Prehearing Statement, (a) the identity of witnesses a party expects to call, with a short description of what the witness is expected to testify about, and (b) what exhibits each party intends to proffer at hearing. Indeed, I require parties to identify objections they may have to the opposing party's proposed exhibits *before* the hearing. That way, I accept into evidence, at the beginning of the hearing, all exhibits to which no objection has been made; as to those which caught objections, I defer ruling on their admissibility until they are proffered with an appropriate witness in due course of the hearing.

By the way, if a party objects to admission of a document on the basis that they requested the document sooner and the opposing party failed or refused to provide it, there is a very good chance an arbitrator might sustain that objection. Again, grievance arbitration is supposed to be part of the parties' continuing negotiations and arbitrators tend to take a dim view of parties who play hide the ball with something those parties might later wish to offer into evidence.

<u>REMOTE WORK AND FLEXIBLE SCHEDULES AND MONITORING</u>

I. WELCOME AND INTRODUCTION OF THE PRESENTERS (NAA Arbitrator Phil LaPorte)

II. INTRODUCTION (Arbitrator Amy Sergent)

What are flexible working arrangements?

Flexible work is any arrangement that deviates from the traditional Monday-to-Friday, 9-to-5 office schedule. It provides employees more control over when and where they work.

Remote work is a type of flexible arrangement that allows employees to work from anywhere, while flexible working encompasses various arrangements like compressed workweeks, flextime, and job sharing, all designed to offer greater autonomy over work schedules and locations to improve work-life balance and job satisfaction for employees. Both approaches provide benefits like increased employee morale and productivity, expanded talent pools for employers, and potential savings on overhead costs.

<u>Examples of flexible working arrangements</u>

- **<u>Remote work</u>:** Working from home or another location away from the main office.
- **<u>Hybrid work</u>:** A combination of remote and in-office work days.
- **<u>Flextime</u>:** The ability to adjust start and end times, often with core hours of availability.
- **<u>Compressed workweek</u>:** Working the standard number of hours over fewer days, such as four 10-hour days.
- **<u>Part-time work</u>:** Working fewer hours than a full-time position.
- **<u>Job sharing</u>:** Two or more employees sharing the responsibilities of one full-time position.

<u>Benefits for employees</u>

- **Improved work-life balance:** Greater control over schedules helps to balance personal and professional commitments.
- **Increased job satisfaction:** Autonomy and flexibility can lead to higher morale and engagement.
- **Reduced stress:** Less commuting and more personal control can decrease stress levels.

<u>Benefits for employers</u>

- **Wider talent pool:** Remote work allows companies to hire from anywhere, not just the local area.
- **Higher employee retention:** Flexible options can attract and retain talented employees.
- **Reduced overhead costs:** Less need for office space can lead to savings on rent and utilities.
- **Increased productivity:** Many studies show that motivated employees are more productive, especially with autonomy.

Cons of remote and flexible work include social isolation, increased distractions, blurring of work-life boundaries, potential difficulties with communication and collaboration, technology issues, negative impacts on career advancement and company culture, increased home costs, and potential negative health effects. Employees may also experience burnout from overworking, while companies may face challenges with security and managing a dispersed workforce.

Cons For Employees

Social Isolation & Loneliness:

Lack of daily in-person interaction can lead to feelings of isolation, loneliness, and a disconnected work environment.

Distractions & Unproductive Conditions:

The home environment can present numerous distractions, making it difficult to maintain focus and productivity.

Blurred Work-Life Balance:

Without a physical separation between work and home, it can be hard to "switch off" from work, leading to overworking and burnout.

Communication & Collaboration Challenges:

Remote work can hinder spontaneous collaboration and face-to-face interaction, potentially leading to misunderstandings and slower project completion.

Technology & Security Risks:

Remote workers often rely on personal technology and internet, which can be unreliable. There's also an increased risk of data security breaches when sensitive company information is handled outside the office.

Missed Career Opportunities:

Some remote employees fear they are "out of sight, out of mind," potentially missing networking, mentorship, and advancement opportunities.

Increased Costs:

Employees may face higher utility bills and need to pay for home office equipment and internet.

Health Issues:

Inadequate home workspaces and prolonged sitting can lead to physical issues like back pain and eye strain.

Cons for Employers

Challenges with Company Culture:

It can be harder to build and maintain a strong company culture when employees are not physically together.

Reduced Productivity (Potentially):

While not universal, some remote employees may struggle with self-motivation, leading to decreased productivity without direct supervision. Monitoring employees to ensure compliance with company policies and expectations creates its own set of challenges including technology and software requirements, privacy concerns, and employee resentment, to name but a few.

Security Risks:

Dispersed employees may be more vulnerable to security breaches, requiring robust IT policies and tools.

Equitable Distribution of Remote Work and Flextime:

Some employees may resent the fact that others receive more flexibility and opportunities to work remotely, (or work in-office). While employers may have legitimate business/security reasons for granting remote work to some and denying others, employees may feel they are being singled out, discriminated against, or treated unfairly.

Job Sharing:

Office space can become an issue when two or more employees are assigned to work some days in the office and others remotely. It can also be an issue when circumstances demand a greater in-person presence of employees (e.g., during a weather-related or other emergency; or during peak season when volume is high and more customers require in-person consultation).

III. UNION CHALLENGES TO TRUMP'S RETURN TO THE OFFICE MANDATE (PUBLIC SECTOR): - (and Shellie Sewell, NTEU Counsel)

There have been multiple arbitration challenges to former President Trump's 2025 executive order mandating that most federal workers return to the office full-time. Some challenges have taken the form of civil litigation, while some unions representing federal employees have filed grievances and pursued arbitration, arguing that the order violates existing collective bargaining agreements.

Context of the Trump administration order

- Executive Order: In January 2025, the Trump administration issued a presidential memorandum directing all executive branch departments to "terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis".
- Justifications: The administration claimed the order was necessary to improve accountability and boost the economies of cities with large federal workforces. Some officials also framed it as a measure to prompt the voluntary resignation of federal workers who prefer remote work.
- Union Response: The order prompted swift and forceful opposition from federal employee unions like the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU). They filed lawsuits and initiated grievances under their collective bargaining agreements (CBAs).

Overview of the challenges to the return-to-office order

- **Federal employee resistance** Many federal employees and unions have expressed strong opposition to the mandate, arguing that it is vindictive, lowers morale, and ignores the established telework practices that have proven effective.
- **Concerns over office conditions** As employees have returned, some have raised concerns about the condition of federal buildings, citing issues such as mold, pests, and broken elevators. Some believe the administration is neglecting office maintenance to encourage workers to quit.
- **Legal and arbitration challenges** Federal employee unions, such as the American Federation of Government Employees (AFGE), have challenged the order through

litigation and arbitration. The unions argue that the mandate violates their collective bargaining rights and, in some cases, existing telework agreements.

- **Union strategies** Some unions, such as the Environmental Protection Agency union, have filed grievances and demanded to bargain with agencies over the return-to-office mandate. The outcome of these negotiations or arbitrations could result in awards that override the general order, particularly if an arbitrator finds that the mandate violates a specific collective bargaining agreement.
- **Agency-specific outcomes** The impact of the order and the results of arbitration challenges are determined on an agency-by-agency basis. For example, some agencies are excluded from certain collective bargaining programs, limiting the scope of arbitration.
- **One example:** AFGE responded to the return to the office order at CDC. CDC ordered personnel to return to work after the shooting incident at headquarters declaring that working remotely would not be viewed as a "reasonable accommodation" to satisfy requests for an accommodation under the Americans with Disabilities Act (ADA). AFGE filed a grievance and a complaint with the U.S. Department of Labor.

While President Trump's executive order aimed for a government-wide return to the office, the outcomes in specific agencies are dependent on the results of ongoing arbitration and union negotiations. Therefore, it is possible for an arbitration award to "trump" the general order for a particular group of employees if it is determined that the order violates their specific collective bargaining rights.

As of September 2025, no single arbitration award has "trumped" or overturned the order for all federal employees. However, unions have won some significant, narrow victories that push back on the mandate and may set important precedents.

Key union arbitration victories

While the broader fight continues, unions have secured some specific wins through arbitration:

- AFGE vs. Environmental Protection Agency (2023): In an earlier case against the EPA (not directly related to the 2025 order but setting a precedent), an arbitrator ruled in favor of an employee whose remote work request was denied. The arbitrator found that the denial was unreasonable and based on "managerial preference" rather than valid business reasons, a violation of the union's contract.
- AFGE Local 704 Grievance (2025): AFGE Local 704 filed a grievance in February 2025 challenging the "mass rescissions" of remote work agreements. The union argued that the agency terminated the agreements without individually assessing employees,

violating the existing collective bargaining agreement. The union's brief noted that the remote work was already deemed portable and effective under the previous agreement.

- Pending NTEU Arbitration (2025): In April 2025, NTEU invoked arbitration against the Department of Health and Human Services (HHS) over the termination of telework agreements. An arbitration hearing was set for August 2025, with NTEU pushing to restore telework rights.

What this means for the broader return-to-office push

Arbitration decisions don't automatically negate the presidential order across the board. Instead, they establish specific limitations based on the language of individual collective bargaining agreements. Key takeaways include:

- Contract Language is King: Arbitrators are bound by the terms of the specific union contracts. Where a CBA protects remote or telework, an agency may have difficulty rescinding those agreements without a strong, specific justification that is more than just "managerial preference".
- Individual Assessments are Key: Unions have successfully argued that blanket policies and mass rescissions violate contract terms, which typically require individual consideration of employee needs and job duties.
- The Broader Legal Challenge Continues: While arbitration addresses specific grievances under existing contracts, the unions have also pursued broader legal challenges to the executive order itself. These legal battles will continue in the courts and likely play out over a longer period.

IV. ISSUES PERTAINING TO REMOTE WORK AND FLEXIBLE SCHEDULES IN THE PRIVATE SECTOR (Paul Daragiati, Union Counsel and Reyburn Lomack, Management Counsel)

Public Safety and Remote Surveillance

1) Body Worn Camera ("BWC") and GPS Locators
   a) *Jacksonville Consol. Lodge 5-30, FOP v. City of Jacksonville*, 44 FPER P129; 2017 FL PERC LEXIS 384 - Implementation of BWC system is a management right, but the impacts are mandatorily negotiable.
   b) Potential impacts on discipline, safety, and privacy
2) Main area of conflict between management and unions occur in the realm of discipline, termination and discharge
   a) Contractual issues

i) Under what circumstances can management review BWC?

ii) How often can management review BWC?

iii) Who is revieing BWC for the employer?

iv) Disciplinary matrix for BWC violations?

v) Is the investigation built completely around BWC?

vi) How far back is the “buffer?”

b) Artificial Intelligence applied to BWC and GPS Locators

i) Technology applied to enhance surveillance capabilities of management

(1) Benchmark Analytics LLC developed First Sign, "which applies machine learning algorithms that compare the present action of an officer by observing his/her past activities for any display of excessive force or problematic behavior." Claims to predict 85% of "major adverse investigations" before they happen.

(a) "First Sign analyzes arrest records, stop and service-call information, use-of-force data, internal affairs reports, dispatch information, and other data to monitor officer's conduct."

(2) Truleo - "virtual Sgt." - reviews mountains of BWC data

ii) Bargaining over AI applications

(1) Disclosure by employer

(2) Impact on working conditions – discipline and privacy

(3) Evidence issues in discipline and arbitration

(4) AI in employee evaluations

3) *Florida State Lodge FOP v. City of Cape Coral* – FMCS Case No. 200305-04583

a) using remote surveillance specifically to discovery policy violations

b) discussion of facts and arbitration award

V. QUESTIONS FROM THE AUDIENCE

In the Matter of Arbitration Between:)
)
The Florida State Lodge, Fraternal)
Order of Police, Inc.) Federal Mediation And Conciliation Service
(FOP)) Case No. 200305-04583
) Amanda Tobler-(Grievant)
And)
)
City of Cape Coral)
(Employer))

Hearing: Remotely By Zoom: March 15 and 16, 2021

Post Hearing Briefs Filed: May 21, 2021

For the FOP: Paul A. Daragjati, Esq.

For the Employer: Robert C. Shearman, Esq., John Marra, Esq.

Arbitrator: William P. Hobgood

BACKGROUND

Grievant was hired by the Employer on July 15, 2013, sworn in on December 27, 2013, and served as a police officer until her termination on September 26, 2019. The basis for her termination was a chain of events beginning with the initial assertion by her supervisor, Sergeant Jennifer Matlock, that Grievant *became insubordinate after being counseled over her failure to properly document a domestic disturbance.* The Employer also asserted that Grievant had responded to a domestic disturbance call from dispatch but had *failed to file a report on the incident.*[1]

While the parties may differ on some details, it appears from the record that the matter escalated from an initial counseling of the Grievant, by Sergeant Matlock, to the Grievant, while in her vehicle, engaging her supervisor, Matlock, at a gas station in Grievant's coverage zone. During that encounter, Grievant requested, and was denied by Sergeant Matlock, the opportunity to speak with Sergeant Matlock's supervisor, Lieutenant Donakoski. Grievant then followed Sergeant Matlock for a period

[1] Employer's Post Hearing Brief, p.1

of time in her patrol vehicle despite communications from Sergeant Matlock to Grievant that Grievant return to her assigned zone.

Based on all of the above, and following Sergeant Matlock's meeting with Lieutenant Donakowski, both Sergeant Matlock and Lieutenant Donakowski met with the Grievant. The purpose of the meeting was to allow Grievant to give her version of the evening's events. Following this meeting, Lieutenant Donakowski determined that Grievant was *insubordinate for defying Sergeant Matlock's orders, and (Grievant) was found in violation of CCPD policy for failing to take a report of the domestic disturbance.*[2]

All of the above prompted Lieutenant Donakowski to order the opening of an inquiry into Grievant's performance. This review involved Sergeant Matlock's review of Grievant's Body Worn Camera (BWC) footage to determine if Grievant's behavior was *an anomaly or whether other similar incidents had recently occurred demonstrating a pattern of failure to follow proper protocol.*[3] This review covered BWC footage in reverse order, from May 11, 2019 to March 31, 2019. This period covered twenty-one duty days and resulted in the Employer's assertion that *Grievant had engaged in eighteen different instances of insubordination.*[4]

Based on the above review, Captain Ellis, Lieutenant Donakowski's supervisor, initiated an internal investigation conducted by the Professional Standards Bureau (PSB). The Grievant appeared before the PSB on June 17, 2019, accompanied by her FOP representative. Following the PSB hearing, the PSB sustained thirteen of the eighteen allegations. Based on the PSB review, *Chief David Newman made the decision to terminate* Grievant's employment.[5]

---

[2] Employer's Post Hearing Brief, p. 2

[3] Employer's Post Hearing Brief, p. 3

[4] Employer's Post Hearing Brief, p.3

[5] Employer's Post Hearing Brief, p. 3

RELEVANT CONTRACT LANGUAGE

Article 3

Management Rights

Section 1 - Management Rights

Except as specifically abridged or modified by a provision of this Agreement, City will continue to have, whether exercised or not, all of the rights, powers and authority heretofore existing, including, but not limited to, the following: to determine the standards of service to be offered by the Police Department; to determine the standards of selection for employment; to hire transfer, promote and demote employee; to direct employees, to take disciplinary action up to, and including termination; to relieve employees from duty because of lack of work or for other legitimate reasons; to issue rules and regulations; to contract and subcontract all existing and future work or services; to determine the methods, means and personnel by which City's operations are to be conducted; to establish and revise or discontinue policies, programs and procedures to meet changing conditions and to better serve the needs of the public; to determine the content of job classifications; to exercise complete control and discretion over its organization and the technology of performing its work; and to fulfill all of its statutory and Charter responsibilities.

Section 2 - Application of Rules and Regulations

If work rules and regulations are not uniformly applied, Union may file a grievance in accordance with the grievance procedure contained in this Agreement.

...

Article 10
Discipline

Section 1 -Discipline

The provisions of the Florida Statutes, Section 112.531, et seq., or as such Section shall be amended, shall herein be incorporated as if those provisions were fully set forth in this Agreement, and shall be applicable to all employees.

Section 2- Forms of Discipline

Forms of corrective action utilized by the City with the approval of the Police Chief shall include:

Written Reprimand - Documentation warning the employee of the consequence of future misconduct of a similar nature;

Suspension - suspension from duty without pay;

Demotion-a change to a position of lesser responsibility and salary; and

Termination-dismissal from the Police Department

The final disposition form completed by Internal Affairs of all Reprimands, Suspensions, Demotions and Terminations will be placed in the employee's personnel file in the Human Resource Department.

Section 3 - Progressive Discipline

Progressive corrective action shall be applied based on the severity of the offense.

ARTICLE 11
Grievance Procedure

Section 1 - Grievance Procedure

In a mutual effort to provide harmonious working relations between the parties to this Agreement, the parties agree that there shall be a procedure for the resolution of grievances arising from the application or interpretation of this Agreement.

Discipline that results in time off, a loss of pay, or benefits will be subject to mediation or arbitration.

Any and all disciplinary actions taken against an employee or class of employees shall be for just cause, and shall be subject to the grievance procedure.

...

Step 3

...

Arbitration

...

The arbitrator shall have no power to add to, subtract from modify, or alter the terms of this Agreement, but shall determine only whether or not there has been a violation of the Agreement as alleged in the grievance. The decision of the arbitrator shall be based upon the evidence and arguments presented. The arbitrator shall render a decision not later than thirty (30) calendar days after the conclusion of the final hearing. The arbitrator's decision shall be in writing, and shall set forth the arbitrator's opinions and conclusions on the issues submitted. Findings of the arbitrator made in accordance with the jurisdictional authority of this Article shall be final and binding on both parties.

This Agreement constitutes a contract between the parties which shall be interpreted and applied by the parties and the arbitrator in the same manner as any other contract under the laws of the State of Florida. The function and purpose of the arbitrator is to determine disputed interpretations of terms actually found in the Agreement or to determine disputed facts upon which the Agreement's application will depend. The Arbitrator shall not have the authority to decide any issue not submitted by the parties, nor to interpret or apply the Agreement as to change what can fairly be said to have been the intent of the parties as determined by generally accepted rules of contract construction.

The compensation and expenses associated with any arbitration, including attorney fees, shall be borne by the losing party as determined by the Arbitrator, in the event of a compromise award (neither party prevails on all issues), the costs of the services of the arbitrator shall be borne equally by the parties, however each party shall bear its own expenses, including attorney's fees.[6]

ISSUE

Was Grievant terminated for just cause? If not, what is the appropriate remedy?

EMPLOYER'S POSITION

Even preceding the events leading to Grievant's termination, Grievant had a history of both formal and informal disciplinary action. This history included:

a. In January 2015, a Performance Deficiency Notice/remedial training for violation of policy on the proper preparation of reports.
b. In December 2015, an eight hour suspension for violation of policy/dereliction of duty.
c. In June 2016, a Memorandum of Counseling/Retraining for Violation of Policy on the proper preparation of reports.
d. August 2016, an eight hour suspension for violation of policy for failure to safeguard prisoner property.
e. February 2018, a Memorandum of Counseling for violation of policy on evidence preservation.
f. In April 2018, a Memorandum of Counseling for violation of policy on BWC.

[6] Jt. Ex. #1

g. In March 2019, a Memorandum of Counseling for violation of policy of the proper performance of duties.
h. Memorandum of Counseling (undated) for turning in a Notice to Appear excessively late.[7]

Based on Grievant's encounter with Sergeant Matlock and the subsequent review of Grieveant's Body Worn Camera footage, the Employer asserts that Sergeant Matlock determined that Grievant violated her duties in eighteen incidents. Thirteen of these incidents were ultimately sustained following a PSB review.

An in depth review of the inquiry report on the above thirteen incidents through the Employer's chain of command was followed by an internal affairs investigation. This investigation included a review of BWC footage that was available. The process also included an interview of the Grievant, along with a Notification to Appear which listed charges against her. Grievant was also given the opportunity to respond to all of the allegations.[8]

At the conclusion of the investigation, Captain Ellis sustained thirteen of the eighteen allegations against Petitioner, including insubordination, dereliction of duty, failure to adhere to BWC policy, and failure to write a report for domestic disturbances. (TR. 238:14-246:9)[9]

The Employer asserts that it could not ignore Grievant's repeated violation of state law and Cape Coral Police Department policy. The Employer points to the importance and rationale for its rules on activation of Body Worn Cameras and the requirement for filing a written report in instances of domestic disturbances, a requirement repeatedly ignored by the Grievant.

---

[7] Employer's Post Hearing Brief, p. 5

[8] Employer's Post Hearing Brief, P. 18

[9] Employer's Post Hearing Brief, p19

Based on all of the above, the Employer asserts that just cause for Grievant's termination has been established.

<u>FRATERNAL ORDER OF POLICE'S POSITION</u>

The Fraternal Order of Police (FOP) contends that the Employer did not have just cause to terminate the Grievant. The FOP asserts that issues concerning Grievant's performance only arose after Grievant began working under Sergeant Matlock. The FOP contends it was only then that the Grievant began experiencing mistreatment from Matlock and failure of other officers to assist her when she was busy and *not backing her up on potentially dangerous calls.*[10]

For whatever reasons, the FOP argues that Matlock set out on a campaign to look for any errors in Grievant's performance upon which she, Matlock, could justify a full blown investigation of the Grievant. This campaign by Matlock resulted in a record of *eighteen purported violations, wrapped them up into one single biased report, and sent it to the Professional Standards Bureau (PSB).* These actions subsequently resulted in the Grievant being placed on administrative leave and then terminated.[11]

The FOP contends that the Employer's investigation of the Grievant was biased and heavily influenced by Matlock's efforts to cherry pick, mischaracterize and ignore facts so that any report fit Matlock's narrative that Grievant was a *disrespectful and neglectful employee.* The FOP asserts that...despite the overwhelming amount of "good" Tobler did during her employment, thirteen incidents that were framed to be "bad" by a supervisor who was out to get Tobler for causing her strife, formed the basis for her termination[12]

The FOP also points to the transfer, in early 2019, of Officer Kurt Suskevich, a close friend of Sergeant Matlock, to Grievant's district. It was then, asserts the FOP, that

---

10 FOP's Post Hearing Brief, p. 3

11 FOP's Post Hearing Brief, p. 4

12 FOP's Post Hearing Brief, p. 4

Grievant began to experience difficulties with Sergeant Matlock and her colleagues. Grievant believed that it was following Suskevich's joining the district that she began *being treated differently by Matlock and other officers by ignoring her calls when she was busy, and most concerning, other officers were refusing to back her up on calls for service.*[13]

Despite Grievant's objections voiced to her supervisor concerning the failure of her fellow officers to respond to Grievant's request for assistance, the situation did not change and no corrective actions were initiated by Sergeant Matlock.

In contrast to the biased treatment of Grievant by Sergeant Matlock, the FOP points to the Grievant's *yearly evaluations, and the number of commendations she was awarded, including a Meritorious Service Award, a Life Saving Award and multiple Team Citations.*[14]

The FOP contends, and believes the record supports its contention, that the Grievant's *fellow officers admitted that because they did not like Tobler, they were not responding to her calls, and it was therefore her fault she was responding to calls alone.* It is this failure of Matlock and Donakowski to properly supervise their squad that placed the Grievant in the position of experiencing *disrespect, mistreatment, and lack of assistance from her fellow officers.* As an example of the failure of appropriate supervision by Matlock and Donakowski, the FOP points to an incident involving a three-car traffic crash in an intersection. This is the type of incident, asserts the FOP, is typically handled by multiple officers. *Neither Suskevich nor DeArmond took the initiative to assist Tobler with the crash. Id. Rather, they cancelled her backup and left her stranded.*[15]

---

[13] FOP's Post Hearing Brief, p.6

[14] FOP's Post Hearing Brief, p. 5

[15] FOP's Post Hearing Brief, p.9

Finally, the FOP argues that the Employer has an obligation under Article 10 of the parties' Collective Bargaining Agreement to use progressive discipline against FOP members. In the instant matter, the Employer, argues the FOP, *violated all norms and notions of progressive discipline by gathering a number of purported violations in separate incidents and charging them in a single disciplinary report. This error was compounded by immediately terminating Tobler. Essentially, the CCPD has used modern technology to abandon sixty years of legal precedent and social policy in labor and employment law and asserted that their actions were proper. As a matter of public policy, such an argument cannot stand. CCPD violated the collective bargaining agreement's requirement for progressive discipline by combining a mosaic of purported violations into a single composite to terminate this employee.*[16]

OPINION AND AWARD

The record supports the FOP's assertion that, for the most part, the problems associated with Grievant's performance occurred in the last year of her employment and focused on a concentrated review, after a conflict incident between the Grievant and her supervisor, Matlock, of her Body Worn Camera (BWC) covering eighteen incidents. These incidents were subsequently reduced to thirteen. There is nothing in the record that indicates that such a concentrated review of BWC footage for the purpose of assessing officer performance and possibly issuing discipline was a normal, established and well publicized Employer procedure.

It is also clear from the record that there were significant tensions between the Grievant and her co-workers, tensions which may have led to slow or inadequate support for the Grievant on calls requiring such support. There are no indications that Grievant's supervisor, while aware of these tensions, initiated any actions to determine the source of the conflict or, if determined, did anything to address them.

Based on the above, I must conclude that any disciplinary decisions regarding the Grievant were clouded by the contentious work environment in which Grievant worked

[16] FOP's Post Hearing Brief, pps. 49, 50

and the failure of management to address those tensions. I also must conclude that because of this failure, Grievant should be reinstated with full back pay and benefits less any earnings during her period of separation.

AWARD

Grievance sustained. As provided in the parties' Collective Bargaining Agreement, the Employer will be responsible for compensation and expenses, including attorney fees associated with this grievance.

William P. Hobgood June 16, 2021