

**RANDOM THOUGHTS AND OBSERVATIONS  
ON MY FIRST EMPLOYER-EMPLOYEE VIDEO ARBITRATION**

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Although I have been an arbitrator since 1974, on May 5, 2020 I did my first Labor/Management Video Conference Virtual Arbitration. It was a State of Minnesota Bureau of Mediation Services [BMS] Veteran's Preference Hearing. I was the Hearing Officer/Arbitrator. In Minnesota, an honorably discharged veteran, who is terminated from his/her public employment job, has a right to demand a Veteran's Preference Hearing and continue to be paid by the public employer until the case is decided by the Hearing Officer/Arbitrator. The Hearing Officer is selected from the list of approved Minnesota BMS Arbitrators. The public employer pays the entire bill for the Hearing, including the professional fees and costs of the Hearing Officer/Arbitrator.

The public employer is typically keen to get the hearing set and decided as soon as possible. In light of the 2020 Covid-19 pandemic most arbitrators, attorneys and clients have not been permitted or willing to meet together in the same conference room. A virtual Video Conference seems to be the safest and, for now, the best way to have a safe and fair due process hearing with everyone virtually present including witnesses, hearing officer/arbitrator, and lawyers.

Since this was the first Employer/Employee Arbitration Hearing for me, and for each of the lawyers, I decided to make random notes of thoughts which came into my head as the process developed from beginning of the process to the end of the Video Conference Virtual Hearing/Arbitration, with the idea of sharing my thoughts and observations with others who have not yet done a video arbitration hearing. This is not meant to be a scholarly law review article, i.e., no footnotes or citations. It is an article of my random thoughts and observations about how the process went.

So, here are some of my random thoughts and observations about my first Labor/Management Arbitration.

- 1) Getting Agreement of the parties and the advocates to have a Virtual Video Arbitration as the method to resolve the dispute.**

When I was informed in February 2020 by email that I was chosen as the hearing officer/arbitrator, as usual I responded by email, and listed possible dates I was available for the Veterans Preference Hearing. The advocates chose May 5, 2020 as the preferred date for the arbitration.

In the middle of March 2020 Minnesota Governor Tim Walz, because of the Covid-19 crisis, shut down the State of Minnesota and ordered all but essential businesses to close. He issued a "Stay at Home" order to all but essential workers.

Consequently, the hearing which was scheduled to be held on May 5, 2020 at the public employer's main office was possibly going to be problematic, although in mid-March it was unknown how for long the shutdown would last.

Both the employer and the employee wanted to get this case decided ASAP. Although the employee was being paid, this particular employee quickly wanted his "day in court," i.e. his Veterans Preference Hearing, in hopes he would get his job back.

The employer, of course, wanted the hearing held on May 5, as had been previously scheduled, in order to stop having to pay the terminated employee in hopes that the public employer would prove "just cause" for the termination.

In late March this arbitrator/hearing officer began a discussion with the advocates about the possibility of holding the hearing by Virtual Video Arbitration Hearing.

## **2) Training on Video Conferencing**

It dawned on me that I had better learn how to do video conferencing on some platform because it seemed clear that the shut-down was going to last more than a few weeks. Having participated in a Zoom Conference with my children, who live in different parts of the country, I checked the tutorials which Zoom has available. I carefully studied them. They are very helpful. I downloaded Zoom on my computer. Zoom has a free download which allows you to do 40 minutes of free video conferencing. Since the Covid-19 crisis Zoom has lifted the 40-minute time limit. I learned quickly and set up several Zoom Conferences with friends and relatives in order to see them and to practice Zoom with me as "Host".

Then I set up a practice multi-person (about 20 people-many of my relatives) video conference on Zoom in which I was the "Host." Once this Covid-19 virus is controlled it is likely that Zoom will return to a monthly cost of about \$17 for unlimited time.

I told the advocates I was reasonably good at Zoom. The lawyer for the public employer said that the State prefers to use Cisco Webex, which, it turns out, is good, but I don't think as good as Zoom. Zoom as of May 7 has fixed its recent security problems by adding several layers of protection.

While the advocate for the Veteran had often used Zoom, nevertheless, he agreed to use Cisco Webex. I downloaded the Cisco Webex application. It is free and easy. After my experience with this Video Conference I don't think it is as good as Zoom.

## **3) On April 3, 2020 I sent an email to the attorneys discussing:**

A) **Video Platform.** I originally told the advocates we would use Zoom and that I would be the "Host." Each attorney should let the witnesses know the password and teach

their witnesses how to use Zoom. Because the State of Minnesota uses Cisco Webex, we later decided to use Cisco Webex. Because the attorney for the public employer was very familiar with Cisco Webex it was decided he would be the Host. It turned out to be for the best that I not be the “Host”. It was best to let the attorney who has the most experience with Webex deal with the technical aspects so I could concentrate on the testimony. I suggest that one of the advocates be the Host of any on-line arbitration. Having someone else organize the platform and be the Host relieves the pressure and anxiety you might feel if something goes wrong and allows you, the arbitrator, to concentrate on the evidence, procedure and rulings, rather than the technical aspects of the platform you are using. After all, these are the key reasons why the parties chose you to be the Arbitrator i.e., your ability to conduct a fair hearing and make a wise decision.

- B) **Documents.** I asked the attorneys to gather all exhibits and, at least one week before the hearing, mail by US Post all the Pre-marked Joint, Employer and Employee exhibits. It required the advocates to meet ahead of time. They met by video and were able to organize the exhibits and get them to me 7 days before the hearing. Any objections to exhibits would be dealt with at the Video Conferencing Hearing/Arbitration. I reminded the lawyers that the Rules of Evidence are not typically applied in an Arbitration Hearing and that it is my tendency to allow evidence for what it is worth. If either advocate had an objection to any piece of evidence, it would be dealt with at the Video Conference Hearing.
- C) **Witnesses.** The attorneys were told to discuss with each of their witnesses before the hearing to explain that this is a video conference, how it will work, and how the witness can sign on to the Video Conference through the invitation sent. Each witness can choose to be at the location of the respective attorney or may testify remotely, as the attorney and/or witness chooses. The attorney for the Veteran chose to have his witness come to his office and for safety testify at a computer in a different room in his office. It was a good idea because during the Video Conference the witness had some trouble and the attorney or his assistant was able to go to the room where his witness was testifying, maintain social distancing and assist the client with the computer. I told the advocates to tell their witnesses that I would swear in each witness, that no one else was to be present in the room when the witness was testifying, that the witness should not be consulting any document while testifying unless told to do so by either of the respective attorneys, and that any documents which the attorneys intended to use during the hearing should be available for the witness to use during his testimony. If the video was to be recorded, each attorney should obtain consent of the respective witness. One of the nice things about Webex and Zoom is the “Record” feature which allows download to the computer or to the I- cloud. The attorney for the public employer is required to make a recording. I told the attorneys to provide me the email addresses and phone numbers of each witness in case of any glitches during the hearing.
- D) **Recording.** The Webex and Zoom platforms allow for recording. But in this case a digital recorder was used by the attorney for the public employer, with the understanding he would send a copy to me and to the attorney for the Veteran.

- E) **Breakout Rooms.** One of the reasons Zoom is good is because of the “Breakout Rooms” which allows for the witnesses from each respective side and each attorney to meet in private with their witness. This works for Mediations also. By using Cisco Webex when we took breaks the attorney could simply use his phone to talk to the witness if the witness was in a different location.
- F) **Reminders.** A key objective of any Arbitration is to provide a fair hearing which assures that both parties have sufficient opportunity to present their respective evidence, witnesses and arguments. For most arbitrators Video Conferencing is a relatively new method of presenting a case, it is expected that there will be some glitches. The attorneys should have phone numbers ready for each witness should there be any problems so the witness can testify over the phone if necessary.

**4) Pre-Hearing Conference on Webex.**

About two weeks before the arbitration, I held a Cisco Webex Pre-hearing conference with only the attorneys to discuss: exhibits, potential problems, glitches, host, platform, and all the usual topics of a Pre-hearing Conference. I decided that I would Host the Pre-hearing conference just to see if I could do it, since I had not used Cisco Webex before. I had trouble connecting and several times had to resend invitations. I had to call each attorney by phone several time and send several emails. But after three tries it worked. We had a 45 minute Pre-hearing Webex Conference. It was decided the attorney for the public employer would Host, because he was most familiar with Webex.

After the Pre-hearing Conference, I followed with an email listing all of the Pre-hearing decisions.

**5) Paper Exhibits.** As agreed, the Exhibits arrived at my office one week before the Video Conference. I took a quick look but did not read them carefully.

**6) Day of the Video Conference May 5, 2020 started 15 minutes ahead of schedule.** It was decided we would all sign on to the Video Conference 15 minutes before the scheduled start of 9:00am. We all signed on at 8:45am. No one had a problem signing on. The Host attorney for the public employer explained to all the technical aspects of the platform. As the arbitrator I explained this was the first time either advocate or I was doing an Employer/Employee Hearing and that if there any glitches occurred not to worry that we would deal with them.

**7) Looking down.** During Arbitration hearings I take extensive notes. It helps me pay close attention and helps me to write the decision after the case is finished, particularly if there are no Post Hearing Briefs. I reminded all that when I am looking down, I am not reading the newspaper but am taking notes. I showed them my legal pad.

**8) The hearing proceeded.** It felt very normal. The advocates made opening statements, each witness was sworn in and the case went nicely before the first glitch, which I will talk about below.

**9) Breaks.** I told the advocates and the witnesses that we would be taking short breaks about every 1-1/2 hours, which we did. I told the advocates and the witnesses that I would turn off my audio and video during breaks and suggested they each do so, which they did. At the first break I said it would last “5 minutes”. That was a mistake because people have different understandings of just how long 5 minutes is. Thereafter, I said we will break until “exactly 11:00am”. “Please turn your video and audio on at 11:00am.” It worked.

**10) Have a big desk.** Although I have a home office, I did the video arbitration in my home at my dining room table. I set it up with a nice window in the background and fresh flowers sitting on a stand behind me. It looked very nice. I set up two lights next to my computer, out of view of the camera, to make the lighting better, and turned on all the lights in the dining room. My dining room table is bigger than my desk. And it was a good thing I did since there were many exhibits. Even so, I knocked over one of the lamps I had sitting next to my computer while I was maneuvering some exhibits. Luckily it did not break. No one was home but me. I did not have to be concerned with anyone walking in during the video Conference.

**11) Social Distancing.** The reason for having this case on-line was to maintain Social Distancing. I have realized there are other reasons to hold an on-line arbitration beyond the pandemic. Cost of travel is eliminated. Airfare, hotels, car rental, restaurant costs are all eliminated. Costs for travel days no longer drive up the number of days charged. The savings can be considerable. I realized I could still make “credibility” judgements. It felt like the witnesses were close to me and I could make some of the usual observations which help to determine credibility. I am hesitant to make credibility decisions based on how simply a witness testifies. I prefer having documents backing up the oral testimony and other witnesses’ testimony that is in line with the Grievant’s testimony. I have discovered that there are some really good liars and some fairly poor truth tellers. For examples, Mr. Smooth has been lying for so long that he is quite convincing; while Mr. Very Nervous Truth Teller comes across poorly, yet he is telling his truth. I have come to the conclusion that sometimes the answer is “Yes” and “No”. One witness swears that he heard the Grievant say “I did it”, while another witness swears he heard the Grievant say “I didn’t do it.” Both might telling “their truth”, both might pass a lie detector test, and both might meet their maker with a clean slate. But only one of the statements is scientifically true. While credibility of each witness is important, it is not the only criteria that an arbitrator decides the case.

**12) What to Wear.** For sure wear pants. What if during a break you get up to get a drink of water and you forget to turn off the video during the break? I wore exactly what I would wear at any arbitration hearing, a suit. I want all, especially the person who was

terminated from his job, to recognize that I take this very seriously. Don't think that just because you are at home a Video Arbitration Conference is not serious. It is.

**13) Showing exhibits.** The parties showed a video. It is important you and the lawyers know how to focus in on the exhibits. It turned out that one of the witnesses did not have a complete copy of all the exhibits, several had been accidentally left out of his packet, so the lawyer was able to pull it up and show it on the video conferencing.

**14) Glitches.** While the grievant was testifying, it became difficult to hear him. Several times during his testimony he could not hear the questions being asked. It was useful that he was in his attorney's office and someone could help him. I am not sure what we would have done if he was at his home with no one to assist. Glitches will happen. I suspect no matter what platform you use there will be glitches. "Zoom Bombing" is where an unauthorized party gets into the Video Conference and disrupts the meeting. Zoom has fixed that problem with new protocols. The Host is important because the Host typically controls who gets into the conference and who is out.

**15) Witness caught in a lie or a mistake.** I could see he was uncomfortable. At least this gave me a hint as to his credibility. I was observing his face. It seemed like he was only a few feet from me.

**16) Turn off audio and video during breaks.** You might accidentally make a noise or say something you wish you hadn't. Tell all the witnesses to turn off their audio and, maybe their video, when they are not testifying.

**17) Best way to view the Video Conferencing.** Cisco Webex and Zoom allows a "Grid" view where the lawyers and the witness are all on the screen at the same time in equal size; a "Thumbnail" view is where the witness who is testifying is enlarged and everyone else is a thumbnail size at the top, bottom or the side; or only the "Active Speaker" view is on the screen. My preference is the Grid View. It reminded of a traditional arbitration, where I can see the witness, the advocates and everyone else in the room if their video is turned on. It is a matter of individual taste.

**18) Will the typical parties to an Arbitration choose a Video Conference?** I have seen and participated in the future. I think many arbitrators and advocates will still prefer live arbitrations where all are present in the same room. Change is difficult. My experience has convinced me that Arbitrations by Video Conferencing will develop to be as common as the ordinary arbitrations. It will save money and time. As I was writing this article, I received an email from an advocate in Oregon asking me to be the arbitrator in a case and stating "I am unsure what the status will be re: COVID-19 and social distancing requirements...and would therefore like to know whether you are open to considering a hearing platform, assuming an in-person hearing is inadvisable." My answer is:

“absolutely.” After all, the key objectives of arbitration are quick, efficient economical and fair resolution of the dispute. In my judgement all of these objectives were achieved in my first Employer/Employee Video Arbitration Conference.