



FEDERAL SECTOR ARBITRATION: LAW AND PRACTICE

THE TOP 5 THINGS YOU NEED TO KNOW ABOUT ARBITRATION IN THE FEDERAL SECTOR

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FEDERAL SECTOR ARBITRATION

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BASICS OF THE FEDERAL SECTOR ARBITRATION

#1

THE STATUTORY FRAMEWORK AND OPERATIONS OF THE FEDERAL SECTOR LABOR RELATIONS

Statutory Structure & Operations of Federal Sector Labor Relations

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 - In contrast to arbitration in the private-sector, arbitration in the federal sector is mostly governed by statutory and regulatory provisions.
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 - The Federal Service Labor-Management Relations Statute (“FSLMRS”), U.S.C. Section 7101, which regulates federal labor-management relations, provides the statutory framework for the arbitration process, and for the review of arbitration awards.
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 - The Statutes covers approximately 2.1 million non-supervisory employees employed by mostly executive agencies in the federal sector.
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 - There are federal agencies specifically excluded from the FSLMS, which are covered by other labor-relations status, including the Postal Reorganization Act, members of the uniform services, supervisors and management officials.

BASICS OF FEDERAL SECTOR ARBITRATION

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 - The FSLMRS established the Federal Labor Relations Authority (“FLRA”), which is the agency of the executive branch that administers and enforces the labor relations program under the statute.
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 - The FLRA has numerous guides posted online relative to unfair labor practices, negotiability, and representational issues, which can be found at <https://www.flra.gov/resources-training/resources/guides-manuals>.
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 - The FLRA is composed of three members that are appointed by the President to serve for five-year terms, is organized into the following three components:
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 - ▶ **1. The Authority**, which adjudicates ULP disputes related to decisions issued by an Administrative Law Judge, reviews decisions related to representation matters, and reviews and determines appeals, referred to as “exceptions” or arbitration awards to determination if the award is “contrary to law.”
 - ▶ **2. The Office of the General Counsel (“OGC”)**, which investigates and prosecutes ULP charges, determines representation matters, and offers alternative dispute resolution services.
 - ▶ **3. The Federal Service Impasse Panel (“FSIP”)** which assist the parties that are at impasse during negotiations.

ARBITRATION:

FEDERAL SECTOR vs. PRIVATE SECTOR

Private Sector Arbitration

- ▶ Parties negotiate what to include in their grievance procedure
- ▶ Usually, disputes involve applying terms and conditions of CBA
- ▶ Arbitration clauses do not necessarily remain in effect after contract expiration
- ▶ Awards overturned by federal courts on very narrow grounds
- ▶ Arbitrators have significant discretion, and a court decision setting aside award is the exception

Federal Sector Arbitration

- Broad coverage unless parties negotiate to exclude (or excluded by law)
- ▶ Often, disputes involve application of CBA terms, laws, rules, regulations and agency policies.
- ▶ Contracts, including arbitration clauses, roll over upon expiration
- ▶ Arbitration subject to appeal to FLRA via “exceptions” or to federal circuit depending on issue.
- ▶ Arbitrators have narrower discretion; not unusual for FLRA to overturn award

HEIGHTENED IMPORTANCE OF LAW & REGULATION IN THE FEDERAL SECTOR

- Though empowered to interpret and apply agency rules and regulations, arbitrators must ensure awards are not “contrary to” laws/regulations that may govern issue in dispute
- Agency's *prior* interpretation of own regulation controls unless “plainly erroneous or inconsistent” with language of regulation
- Agency's “litigative positions” on meaning of agency regulation is not controlling—must be prior



#3.

**GROUND FOR FLRA REVIEW OF
ARBITRATION AWARDS**

GROUND S FOR FLRA REVIEW OF ARBITRATION AWARDS

- ▶ (a) The Authority will review an arbitrator's award to which an exception has been filed to determine whether the award is deficient—
 - (1) Because it is contrary to any law, rule or regulation; or
 - (2) On other grounds similar to those applied by Federal courts in private sector labor-management relations.
- ▶ (b) If a party argues that an award is deficient on private-sector grounds under paragraph (a)(2) of this section, then the excepting party must explain how, under standards set forth in the decisional law of the Authority or Federal courts:
 - (1) The arbitrator:
 - (i) Exceeded his or her authority; or
 - (ii) Was biased; or
 - (iii) Denied the excepting party a fair hearing; or
 - (2) The award:
 - (i) Fails to draw its essence from the parties' collective bargaining agreement; or
 - (ii) Is based on a nonfact; or
 - (iii) Is incomplete, ambiguous, or contradictory as to make implementation of the award impossible; or
 - (iv) Is contrary to public policy; or
 - (v) Is deficient on the basis of a private-sector ground not listed in paragraphs (b)(1)(i) through (b)(2)(iv) of this section.

ARBITRAL REMEDIES

Generally, arbitrators have broad remedial discretion

- ❑ For violations of applicable law
- ❑ For violations of procedures or appropriate arrangements negotiated under § 7106(b)
- ❑ A remedy cannot exceed the scope of the grievance or the issues in the case before the arbitrator; must be responsive to the violation of the CBA, law, rule, or regulation found to have been violated; and must address the harm that is to be remedied
- ❑ If there is no violation found, there should be no remedy awarded

LIMITATIONS OF ARBITRAL REMEDIES

SOVEREIGN IMMUNITY

In order for a grievant to recover against the federal government, the government must unambiguously waive its sovereign immunity

- ❑ It is not enough for a collective bargaining agreement to require that the government or a government agency make monetary payments without an underlying statutory authority for the payment
- ❑ *Department of the Air Force, Minot Air Force Base, North Dakota and AFGE Local 4046*, 61 FLRA 366, 370 (2005)
- ❑ Or for an arbitrator to order the agency to do so
- ❑ “[A]n award by an arbitrator that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy.” *Minot*, 61 FLRA at 370

THE BACK PAY ACT

(5 U.S.C. Section 5596)

An employee who suffers:

- ☐ 1) An unjustified or unwarranted personnel action
 - ☐ 2) In violation of applicable law, rule, regulation, or collective bargaining agreement, including governing agency-wide regulations
 - ☐ 3) Resulting in loss of pay, allowances, or differentials
- ✓ Is entitled to an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period
 - ✓ There is a statutory entitlement to interest on an award of backpay.

ATTORNEY'S FEES

THE ARBITRATOR'S AUTHORITY

Arbitrators in the federal sector may award attorney fees on the basis of the statutory authority provided by the Back Pay Act, the Fair Labor Standards Act, or any other statute that provides a waiver of sovereign immunity as to an award of attorney fees.

- ❑ Sometimes, arbitrators are explicitly vested with authority by the Parties' collective bargaining agreement.
- ❑ For example, "Reasonable attorney fees and costs will be provided to the Union in cases where it represents employees who suffer unjustified or unwarranted personnel actions, in accordance with 5 USC Sec. 5596 or other applicable law. "
- ❑ *Functus officio* does not apply to requests for attorney fees in the federal sector.

ATTORNEY FEES

THE ALLEN FACTORS

In *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980), the MSPB identified five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice:

- ❑ (1) where the agency engaged in a prohibited personnel practice;
- ❑ (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency;
- ❑ (3) where the agency initiated the action in bad faith;
- ❑ (4) where the agency committed a gross procedural error; and
- ❑ (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

5.

THE BUSINESS ASPECT OF ARBITRATION IN THE FEDERAL SECTOR

- The System for Award Management (“SAM”)
 - Prerequisite for all federal sector contractors
 - Beware solicitations from SAM “help” contractors
 - Don’t be intimidated – first time is only real challenge
- The Contracting Process
 - Make sure PO authorization is obtained before performing work, or receive confirmation none is required. (Some agencies pay by CC)
 - Make sure authorization covers all work and period of performance
- Getting Paid For Your Services
 - Remember – different agencies use different platforms

