Arbitration in the Federal Sector

I. Trump Executive Order Excluding Agencies Under National Security Provision

- Brief background re § 7103(b)(1)
- Update concerning pending legal actions

II. Differences Between Federal-Sector and Private-Sector Collective Bargaining

III. Coverage of the Negotiated Grievance Procedure

Section 7103(a)(9) broadly defines "grievance" as any complaint:

> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning –
>
> > (i) the effect or interpretation, or a claim of breach, of a [CBA]; or
> >
> > (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment

Certain grievances subject to "election of remedies" restrictions:

A. ULPs (§ 7116(d)): grievance barred if (1) issue that is subject matter of the grievance is same as issue that was the subject matter of the ULP charge; (2) that issue was raised earlier under ULP procedures; and (3) the selection of the ULP procedures was in the discretion of the aggrieved party

- 73 FLRA 581 (sets forth standard; grievance not barred because it alleged violation of union's rights)

- 64 FLRA 1110, 1112 (issue is "raised" when the ULP is filed, even if charge is withdrawn and not adjudicated on the merits)

B. Adverse Actions (§7121(e) and (f)): matters covered under § 7512 (suspensions exceeding 14 days, removals from federal service, furloughs of 30 days or less, reductions in pay or grade)

- if grieved, arbitrator must apply MSPB standards (§ 7701(c)) - see § 7121(e)(2); FLRA 286, 288; and appeal of award must be taken to Federal Circuit (73 FLRA 876; 73 FLRA 666)

IV. Matters Excluded from Scope of Negotiated Grievance Procedure (NGP)

A. Matters excluded by the parties in the NGP (§ 7121(a)(2)) – see 63 FLRA 536

B. Section 7121(c) excludes from the NGP grievances concerning:

(1) claimed violations of the Hatch Act;

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 (national security matters);

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee

"Examination, certification, or appointment":

- Pertains to matters regarding an individual's initial entry into federal service – not matters regarding an agency's hiring (or not hiring) of an individual who already is a federal employee (73 FLRA 47; 69 FLRA 144)

"Classification of any position":

- Where essential nature of a grievance concerns the grade levels of the duties assigned to and performed by grievants in their permanent positions – Congress decided this is solely for OPM to determine – see 74 FLRA 219 (reiterating standard re-implemented in 73 FLRA 379)

- Often arises when grievance seeks temporary promotion – see 68 FLRA 83, 84-85; 64 FLRA 552, 554

C. Negotiability Issues

- Generally, parties may not use NGPs to resolve negotiability issues that the Authority has not previously ruled on – § 7105(a)(2)(E)

- But arbitrators may address negotiability in grievances alleging ULP (61 FLRA 729, 732-33)

D. Bargaining Unit Determinations

- Arbitrators may not resolve questions concerning whether employees are included in a bargaining unit (66 FLRA 193, 195-96; 70 FLRA 172, 174)

V. Scope of Review (Exceptions of Awards to the Authority)

A. Statute:

Section 7122(a): Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that 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;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

B. Regulations:

5 CFR § 2425.6 (a): The Authority will review an arbitrator's award to which exceptions have 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.

VI. Essence exception

Recent History:

- *FCI Miami*, 71 FLRA 660 (2020)
- *DODEA*, 71 FLRA 765 (2020)
- *NWSEO*, 966 F.3d 875 (D.C. Cir. 2020)
- *DODEA* (on reconsideration), 73 FLRA 398 (2022)

FCI Miami:

- "clarifies the discussion about essence exceptions – and any reliance on private-sector arbitration awards"
- "[t]he Statute does not address what degree of deference should be accorded to arbitrators"
- the "foundational principles of collective bargaining that the Supreme Court outlined for the private sector in the *Steelworkers* cases does not extend very far into the collective-bargaining framework that Congress established for the Federal government"

DODEA:

- Citing *FCI Miami*, grants essence exception challenging arbitrator's procedural-arbitrability determination that grievance was timely filed

NWS:

- "When reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review that a federal court uses in private-sector labor-management issues."

- Authority must review arbitrators' interpretations of CBA provisions "highly deferentially"

- The "sole inquiry" under the "proper standard of review" for essence exceptions "should be whether the [a]rbitrator was 'even arguably construing or applying the [collective-]bargaining agreement.'" (quoting *United Paperworkers v. Misco*, 484 U.S. 29, 38 (1987))

DODEA (on reconsideration):

- Applying *NWS*, concludes *DODEA* erred in granting essence exception because arbitrator "applied the plain language of [the NGP] in finding the grievance was timely filed"

- And *DODEA* "fail[ed] to afford proper deference" to the arbitrator's finding regarding the incident that gave rise to the grievance;

- Reiterates that it is "not eliminating the Authority's existing tests for analyzing essence exceptions," in which it will find that an award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award:

  (1) cannot in any rational way be derived from the agreement;
  (2) is so unfounded in reason and fact and so unconnected with the working and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator;
  (3) does not represent a plausible interpretation of the agreement; or
  (4) evidences a manifest disregard of the agreement

- And that, "to the extent that other Authority decisions have applied those tests in a way that do not comport with *NWSEO*, those decisions will no longer be followed."

VII. Contrary to any law, rule or regulation exception

- Authority reviews challenged legal conclusions of the arbitrator *de novo*

- Applies to arbitrator's application of statutes, such as FLSA, Title VII, FOIA, Privacy Act, **and** the FSLMRA (the Statute – 5 U.S.C. § 7106)

A. Management Rights (5 U.S.C. § 7106):

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

B. *New* Management-Rights Test: *CFPB*, 73 FLRA 670 (2023):

"Taking all of the above together, our revised test for assessing management-rights exceptions to arbitration awards in CBA-violation cases is as follows:

1. Does the excepting party demonstrate that the arbitrator's interpretation and application of the CBA and/or the awarded remedy affects the cited management right(s)? If no, then deny the exception.

If yes:

2. Did the arbitrator correctly find, or does the opposing party demonstrate, that the CBA provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b)?

If no, then:

(a) If the excepting party successfully challenges the underlying finding of a CBA violation, then the Authority will set aside *both* the finding of a violation *and* the remedy for the violation;

(b) If the excepting party successfully challenges *only* the remedy, then the Authority will set aside only the remedy. If it is the sole remedy, then, absent unusual circumstances, the Authority will remand the matter to the parties for resubmission to arbitration, absent settlement, for an alternative remedy.

If the answer to question 2 is yes:

3. Does the excepting party challenge the remedy separate and apart from the underlying CBA violation? If no, then deny the exception.

If yes:

4. Does the excepting party demonstrate that the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator? If no, then deny the exception. If yes, then set aside the remedy and, if it is the sole remedy for the CBA violation, then, absent unusual circumstances, remand for an alternative remedy."

Key points:

- Test only applies where the arbitrator has found a CBA violation
- Under Step 1, award may "affect" a management right where (1) arbitrator interprets or applies a CBA in a way that either limits or requires the exercise of a management right; or (2) awarded remedy directs the agency to take or refrain from taking an action that involves the exercise of a management right
- In applying Step 2, Authority looks to whether the CBA provision, as interpreted and applied by the arbitrator, is enforceable under § 7106(b)
- This does not assess whether the arbitrator misinterpreted the CBA – that is reviewed under the deferential essence standard
- Also, "what matters is not necessarily what the parties said about the provision at the bargaining table, but how the arbitrator has interpreted and applied the CBA in the arbitration award" - 73 FLRA at 679
- When parties have properly raised § 7106(b) arguments at arbitration, "the arbitrator should address those arguments in the first instance"; however, "if an

arbitrator fails to address a properly raised § 7106(b) argument," then "the opposing party – typically the union – should have the burden to demonstrate that the CBA provision at issue, as interpreted and applied, is enforceable under . § 7106(b)"

- "In conducting the § 7106(b) assessment, arbitrators and parties should rely on Authority precedent and standards concerning the three subsections of § 7106(b)" – 73 FLRA at 680. Where § 7106(b)(3) is at issue, *CFPB* applies the "excessive-interference" test (*KANG*, 21 FLRA 24) but without "tailoring" analysis

CFPB applied:

- 73 FLRA 781 (denies exception where Union demonstrated (b)(2) exception)
- 73 FLRA 784 (grants exception where Union failed to make sufficient showing that CBA provisions interpreted and applied by arbitrator are enforceable under § 7106(b))
- 73 FLRA 822 (denies exception where Agency conceded that the arbitrator's CBA interpretation would not violate management rights if Authority upheld arbitrator's interpretation under essence standard, which it did)
- 73 FLRA 855 (remands award where Authority couldn't determine whether Arbitrator was applying a CBA provision in enforcing a past practice)
- 73 FLRA 880 (applies Step 4 to conclude that arbitrator's remedy to change grievant's rating "reasonably correlates to the enforced CBA provision, as interpreted and applied by the arbitrator)
- 73 FLRA 888 ("Absent any arbitral analysis of under § 7106(b), the opposing party – the Union, in this instance – has the burden to demonstrate that the Arbitrator's interpretation and application of [the CBA] is enforceable under § 7106(b)"; here, Union failed to do so in opposition to exceptions (failed to file supplemental brief); note – Union's motion for reconsideration of this decision was denied in 74 FLRA 126
- 73 FLRA 860 (grants exception where arbitrator did not find, and Union fails to argue, that CBA provision applied by arbitrator is enforceable under § 7106(b))
- 74 FLRA 6 (denies exception, applying all four CFPB steps)

C. "Contrary to law" exception *also* applies to arbitrators' application of:

- Government-wide rules and regulations (generally applicable throughout the federal government, e.g. issued by OPM or GSA, Federal Travel Regulations)

- But if CBA preceded government-wide regulation, then the CBA governs the matter until it expires – § 7116(a)(7); 65 FLRA 817, 819, except for regulations implementing 5 U.S.C. § 2302 (prohibited personnel practices) – 60 FLRA 398, 399 n.6

VIII. Remedies

A. Sovereign immunity – there is no right to monetary remedies against a U.S. government agency unless Congress has waived sovereign immunity in a statute – see, e.g., 68 FLRA 960, 963-66

- Waiver must be "unequivocally expressed in statutory text" – 73 FLRA 919, 921
- Common examples: Back Pay Act, 5 USC § 5596; FLSA, 29 USC §§ 201-219
- May be raised at any time, even if not before arbitrator – 68 FLRA 841, 842; but see 74 FLRA 13, 15-16 (rejecting sovereign immunity argument where agency failed to raise underlying Back Pay Act argument at arbitration)
- Bars "equitable" remedies – 68 FLRA 960, 965

B. Back Pay Act: to justify an award of backpay under the BPA, an arbitrator must find that:

(1) the aggrieved employee was affected by an unjustified or unwarranted personnel action;

- A violation of an applicable law, rule, regulation or provision of a CBA constitutes an "unjustified or unwarranted personnel action"

AND

(2) the personnel action resulted in the withdrawal or reduction of pay, allowances, or differentials.

- "Pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation" – 5 CFR § 550.803
- Causal connection between violation and withdraw/reduction must be shown – 63 FLRA 646, 648; 68 FLRA 38; see also 73 FLRA at 803

As recently applied…

- 73 FLRA 631: reverses $2,000 award to grievant related to agency's failure to timely remove reprimand from grievant's personnel file, where award did not find that agency's violation of CBA resulted in lost pay or benefits

- 73 FLRA 762: reverses award of hazardous pay differential (HPD) to prison employees for COVID-19 exposure because governing regulations do not authorize differential for ambient exposure; even though arbitrator based award on finding that agency violated a CBA provision requiring it to provide safe work environment, a CBA "may authorize monetary awards only where the requirements for a statutory waiver of sovereign immunity – such as under the [BPA] – have been satisfied; after striking HPD award, Authority remands for determination of appropriate non-monetary remedy, if any, for CBA violation

- 74 FLRA 205: reverses temporary promotion back pay where arbitrator didn't base entitlement to back pay upon policy or CBA provision)

- 73 FLRA 919: 5 U.S.C. § 1214 waives sovereign immunity for compensatory-damages remedy where based on finding of a prohibited personnel practice under 5 U.S.C. § 2302; here, compensatory damages authorized for expenses incurred by employees due to agency's retaliation for union's filing of grievance

C. Attorney Fees

- Primary source for awarding attorney fees is the BPA
- But also authorized under FLSA, Privacy Act, Rehabilitation Act

BPA confers jurisdiction on arbitrators to consider attorney fee requests at any time during arbitration or within a reasonable time after award becomes final and binding, unless parties agree to a different time period – 67 FLRA 721, 721-22; 67 FLRA 352, 352-53

- And arbitrator may retain jurisdiction to resolve motion for attorney fees – 64 FLRA 925, 927; 64 FLRA 586, 589; 66 FLRA 235, 239

BPA requires that an award of fees be:

(1) awarded in conjunction with award of backpay to the grievant on correction of the personnel action;
(2) reasonable and related to personnel action; and
(3) in accordance with standards established under 5 USC § 7701(g), which pertains to attorney fee awards by the MSPB

Section 7701(g) requirements:

(1) the employee must be the prevailing party – see 68 FLRA 120, 122; see also 57 FLRA 784, 786 (degree of success is not determinative under this factor)
(2) the fees must have been incurred by the employee
(3) the award of fees must be warranted in the interest of justice – see, e.g., the five *Allen* factors; and
(4) the amount of fees must be reasonable.

As applied:

- 64 FLRA 925, 928 (when resolving a request for attorney fees, arbitrators must set forth specific findings supporting the determinations on each pertinent statutory requirement)

- 64 FLRA 819, 820 (outlines the 5 *Allen* factors)

- 74 FLRA 129, 133-38 (reverses how 71 FLRA 211 applies two of the *Allen* factors in non-disciplinary cases because they are "unnecessarily restrictive and misleading")

- 74 FLRA 129, 138 (remands attorneys fee award of $30,283 related to award of $93 in lost overtime for arbitrator to determine reasonableness of fees, noting that, in making that determination, reduction of fee award is appropriate if relief, however significant, is limited in comparison to scope of the litigation as a whole)

- 74 FLRA 201 (in FLSA award, arbitrator correctly rejected union's claim to attorney fees at attorneys' current rates rather than the rates that applied when legal services were rendered, because there is no waiver of sovereign immunity for interest on fees)

IX. Resources

https://www.flra.gov/resources-training/training/course-materials:

Arbitration Training (Authority)

- After Arbitration: Filing Exceptions with the Authority (Slides) (July 2017)
- After Arbitration: FIling Exceptions with the Authority (Handout) (July 2017)
- Arbitration Training Slides (August 2016)
- Arbitration Training Procedural Exercises (July 2015)
- Arbitration Training Exercises with Answers (August 2016)
- SFLERP: Unique Attributes of Federal-Sector Arbitration (May 2017)

https://www.flra.gov/resources-training/resources/guides-manuals:

Guides & Manuals

We created guides to help you understand specific issues, such as unfair labor practices, representation petitions, arbitration appeals, negotiability appeals, and impasses. You can also find the manuals that we use to process certain kinds of cases.

Arbitration Guide

Guide to Arbitration – An overview of the arbitration-appeals process, including the grounds on which the Authortity will review an arbitration award.