Federal Labor Relations Authority

Comprehensive Arbitration Training

August 3, 2016

Segment 1:

Introduction to Federal-Sector Arbitration

&

The Negotiated Grievance Procedure

Private-Sector Arbitration

- Submit unresolved disputes to impartial third party
- Agree in advance to accept decision as final and binding
- Result of voluntary agreement

- Negotiated grievance procedure = normally confined to interpretation/application of CBA

- Lack of statutory requirements (different from federal sector)
- *See, generally* 68 FLRA 999, 1004-05 (2015).

Federal-Sector Arbitration

- 5 U.S.C. §§ 7101-7135 The Federal Service Labor-Management Relations Statute (the Statute)

- § 7121(a)-(b): every CBA must include negotiated grievance procedure (NGP) and provide for binding arbitration

Federal-Sector Arbitration: NGP Scope and Coverage

- "Grievance" = § 7103(a)(9)
  - (1) Any complaint by any **employee** concerning any matter relating to the employment of the employee.
  - (2) Any complaint by any **union** concerning any matter related to the employment of an employee.
  - (3) Any complaint by any **employee, union, or agency** concerning—
    - (a) The effect or interpretation, or claim of breach of a CBA
    - (b) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Federal-Sector Arbitration: NGP Scope and Coverage

- Parties negotiate matters out of coverage; otherwise included (with certain exceptions)
- *Tip for arbitrators*: Can enforce laws and regulations, not just CBA, unless CBA or law excludes use of NGP
- Some exclusions are from sources outside the Statute
  - OMB Circular A-76, *see* 52 FLRA 717, 719-21.
  - 5 C.F.R. § 575.311(g), *see* 69 FLRA 7, 9.
- Other exclusions are set forth in the Statute.

Federal-Sector Arbitration: NGP Scope and Coverage

- Statute excludes (5 U.S.C. § 7121(c)):
  - (1) Prohibited political activities.
    - *See* 5 U.S.C. §§ 7321-7326 (Hatch Act).
  - (2) Retirement, life insurance, or health insurance.
    - *E.g.*, 51 FLRA 204, 207-08. *But see* 57 FLRA 415, 416-17.
  - (3) Suspension or removal for national security reasons.
    - *See* 62 FLRA 391, 391 n.2.
  - (4) Examination, certification, or appointment.
    - *See* 57 FLRA 166, 168; 51 FLRA 210, 212-13; 48 FLRA 511, 513-15.
  - (5) Classification of any position that does not result in the demotion of the employee.
    - *See* 66 FLRA 34, 38-39.

Federal-Sector Arbitration: NGP Scope and Coverage

- Classification Matters, § 7121(c)(5) (most common)
  - Analysis and identification of a position and placing it in a class under position-classification plan identified by OPM under 5 U.S.C. Chapter 51.
  - Essential nature of grievance = integrally related to accuracy of classification of grievant's position. (*E.g.*, 64 FLRA 829, 830-31).
  - Not grievances re: temporary promotions (*e.g.*, 68 FLRA 83, 84-85; 64 FLRA 552, 554), promotion within existing career-ladder (*e.g.*, 52 FLRA 217, 220-22), failure to promote under competitive procedure (*e.g.*, 49 FLRA 1387, 1389).

Federal-Sector Arbitration: Election of Remedies

- § 7116(d): grievance or ULP
  - *See* 67 FLRA 442, 444-47; 64 FLRA 1110, 1111.
- § 7121(d): grievance or EEO complaint
  - *See* 65 FLRA 704, 708-09; 61 FLRA 571, 573-74.
- § 7121(e): grievance or MSPB appeal (adverse actions under § 7512, certain performance-based actions under § 4303)
  - *E.g.*, 54 FLRA 235, 237-38.
- § 7121(g): prohibited personnel practice (5 U.S.C. § 2302(b)(2)) – grievance or appeal to MSPB, or through OSC
  - *See* 61 FLRA 571, 574.

Federal-Sector Arbitration: Grievance Bar of § 7116(d)

- Grievance barred by ULP charge when:

(1) Same issue (same factual predicate *and* substantially similar legal theories)

- Statutory claim doesn't bar contractual claim. *e.g.*, 68 FLRA 573, 575; 67 FLRA 442, 445-46; 59 FLRA 112, 114-17.

(2) ULP was filed earlier (note: doesn't matter if ULP wasn't pursued or fully litigated, *e.g.*, 64 FLRA 1110, 1112); **AND**

(3) Selection of ULP procedures was at discretion of aggrieved party (note: must be same aggrieved party; distinguish individual vs. institutional issues, *e.g.*, 63 FLRA 677, 679-80).

Federal-Sector Arbitration: Grievance Bar of § 7121(d)

Grievance barred by EEO complaint when:

(1) Same subject matter; **AND**

(2) Matter was earlier raised by the employee timely initiating an action under the statutory EEO procedure

- *E.g.*, 69 FLRA 292, 294 (2016)(reprimand = personnel action); 61 FLRA 571, 573-74;
- 23 FLRA 414, 417-18 (1986)(timely filing of formal written complaint under EEOC regs, not pre-complaint process).

Segment 2:

Compliance with Arbitration Awards, Arbitral Retention of Jurisdiction, & Interlocutory Appeals

Compliance with Arbitration Awards (5 U.S.C. § 7122(b))

- § 7116(a)(1) and (8) violation for failure to comply with final and binding award; can't challenge validity of award in ULP proceeding.

- Types of cases:
  - No timely exceptions filed: compliance req'd when filing period expires (*e.g.*, 55 FLRA 293, 296).
  - FLRA denies exceptions: compliance req'd upon denial (*e.g.*, *id.*).
  - Compliance not required while exceptions pending (*e.g.*, 56 FLRA 848, 851-52).

Arbitral Retention of Jurisdiction

- "Functus Officio":
  - After arbitrator renders award regarding an issue, no authority to take further action on that issue unless: (1) retained jurisdiction; or (2) parties jointly request.

    E.g., 64 FLRA 823, 825-26.

  - Authority recognizes exceptions to doctrine (*e.g.*, 67 FLRA 19, 22) where Arbitrator:
    - clarifies initial award;
    - corrects clerical or arithmetic error in initial award;
    - completes an award to resolve a submitted issue that the arbitrator's initial award failed to resolve.
      - Including continuing violations occurring after the initial award. 68 FLRA 537, 541-43 (Member Pizzella, dissenting).

Arbitral Retention of Jurisdiction: Attorney Fees

- Back Pay Act confers jurisdiction on Arbitrator to consider attorney fee request at any time during arbitration or within a reasonable period of time after award of backpay becomes final and binding, unless parties agreed to a different time period. *E.g.*, 67 FLRA 721, 721-22 (Member Pizzella dissenting); 67 FLRA 352, 352-53.

- Arb may retain jurisdiction to resolve motion for attorney fees. *E.g.*, 64 FLRA 925, 927.

Final Awards & Interlocutory Appeals

- The Authority does not favor interlocutory appeals
  - 5 CFR § 2429.11 - "ordinarily will not consider interlocutory appeals."
  - 5 CFR § 2429.11 reflects judicial policy of discouraging *fragmentary appeals* of the same case.
    E.g., 66 FLRA 688, 689-90; 61 FLRA 355, 357.

Final Awards & Interlocutory Appeals

- What is an interlocutory appeal?
  - An exception filed before *final award* has been issued. *E.g.*, 64 FLRA 486, 489.
- What is a "final award"?
  - An award that completely resolves all submitted issues. *E.g.*, 64 FLRA 586, 589.
  - Note: Distinct from "final and binding" discussed above.

Final Awards & Interlocutory Appeals

- Are all issues "completely resolved"?
  - If everything is decided, award is final. *E.g.*, 64 FLRA 586, 589.
  - If all decided and jurisdiction retained for implementation, award is final. *E.g.* 66 FLRA 235, 239.
- Award is probably final even if arbitrator directs parties to determine:
  - Amount of backpay/damages/costs (*e.g.*, 67 FLRA 336, 337; 66 FLRA 838, 841-42); or
  - Identification of affected individuals (*e.g.*, 66 FLRA 531, 534; 65 FLRA 252, 254).

Final Awards & Interlocutory Appeals

- If issues are beyond computation of amount of backpay/damages/costs/IDs unresolved, then award probably not final.
  - For example, arb retains jurisdiction, directs parties to:
    - attempt to develop an appropriate remedy (*e.g.*, 61 FLRA 173, 174);
    - determine whether monetary remedy would be appropriate (*e.g.*, 58 FLRA 358, 359).

Final Awards & Interlocutory Appeals

- Party should not rely on arb's characterization of award (not determinative by itself, *e.g.*, 65 FLRA 672, 674; 61 FLRA 355, 357).

- Bifurcated hearings: Just because arb resolved all issues re: 1st part of bifurcated hearing, doesn't mean resolved all issues submitted (*e.g.*, 61 FLRA at 356-57).

- Attorney fees: Retention of jurisdiction to resolve does NOT render exceptions to merits award interlocutory (*e.g.*, 66 FLRA 838, 841-42; 64 FLRA 989, 991).

Exception to Authority's Policy: The Plausible Jurisdictional Defect

- Extraordinary circumstances warrant interlocutory review where plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *E.g.*, 66 FLRA 688, 690; 62 FLRA 344, 346-47.

- "Plausible" = claim is credible on its face; mere assertion not enough. *E.g.*, 63 FLRA 216, 217; 55 FLRA 1230, 1232.

- Advancing the "ultimate disposition" of the case = even if plausible jurisdictional defect, if resolution of the jurisdictional issue would not end the dispute, then may dismiss interlocutory appeal. *E.g.*, 59 FLRA 686, 687.

Exception to Authority's Policy: The Plausible Jurisdictional Defect (cont.)

- Plausible jurisdictional defects are usually statutory.
  - Exception granted: Claim arbitrator lacked jurisdiction to resolve a classification matter under 5 U.S.C. § 7121(c)(5). *E.g.*, 63 FLRA 216, 217-18.
  - Exception dismissed:
    - Claim arbitrator lacked jurisdiction based only on parties' agreement. *E.g.*, 66 FLRA 848, 851; 58 FLRA 745, 746.
    - Claim that arbitrator may not be impartial in determining arbitrability because he had "a financial interest in presiding over a prolonged merits hearing." 68 FLRA 640, 641.

Segment 3:

Filing Exceptions and Oppositions with the FLRA

Filing Exceptions

- 5 U.S.C. § 7122(a): Either party to arbitration may file an exception (other than an award relating to a matter in § 7121(f)).
- "Party" = any person who participated as a party in a matter where an arb award was issued. *E.g.*, 5 C.F.R. § 2421.11.
- Unless grievant participated as a party or is authorized to file exceptions, only union and agency are entitled to file exceptions. *Compare* 60 FLRA 509, 509 n.1 (union authorized grievant), *with* 40 FLRA 1254, 1255 (union did not authorize).

Where to File

Chief, Case Intake and Publication (CIP)

Federal Labor Relations Authority

Docket Room, Suite 200

1400 K Street NW.

Washington, DC 20424-0001

Phone = (202) 218-7740

Fax = (202) 482-6657 (only motions)

How to File

5 C.F.R. § 2429.24:

- eFiling
- In person
- Commercial delivery
- First-class mail
- Certified mail
- NOT email
- NOT fax (except for motions)

eFiling

Exceptions and oppositions may be filed by registered users through the Authority's eFiling system.

Benefits of eFiling:

- *Free*: No need to pay for postage or copies.
- *Saves time and effort*: No need to make 5 copies of filings and attachments. No more trips to the post office.
- *Quick:* No mail delay. FLRA receives your filings immediately.
- *Convenient*: Save your work and come back later. File any time of day or night.


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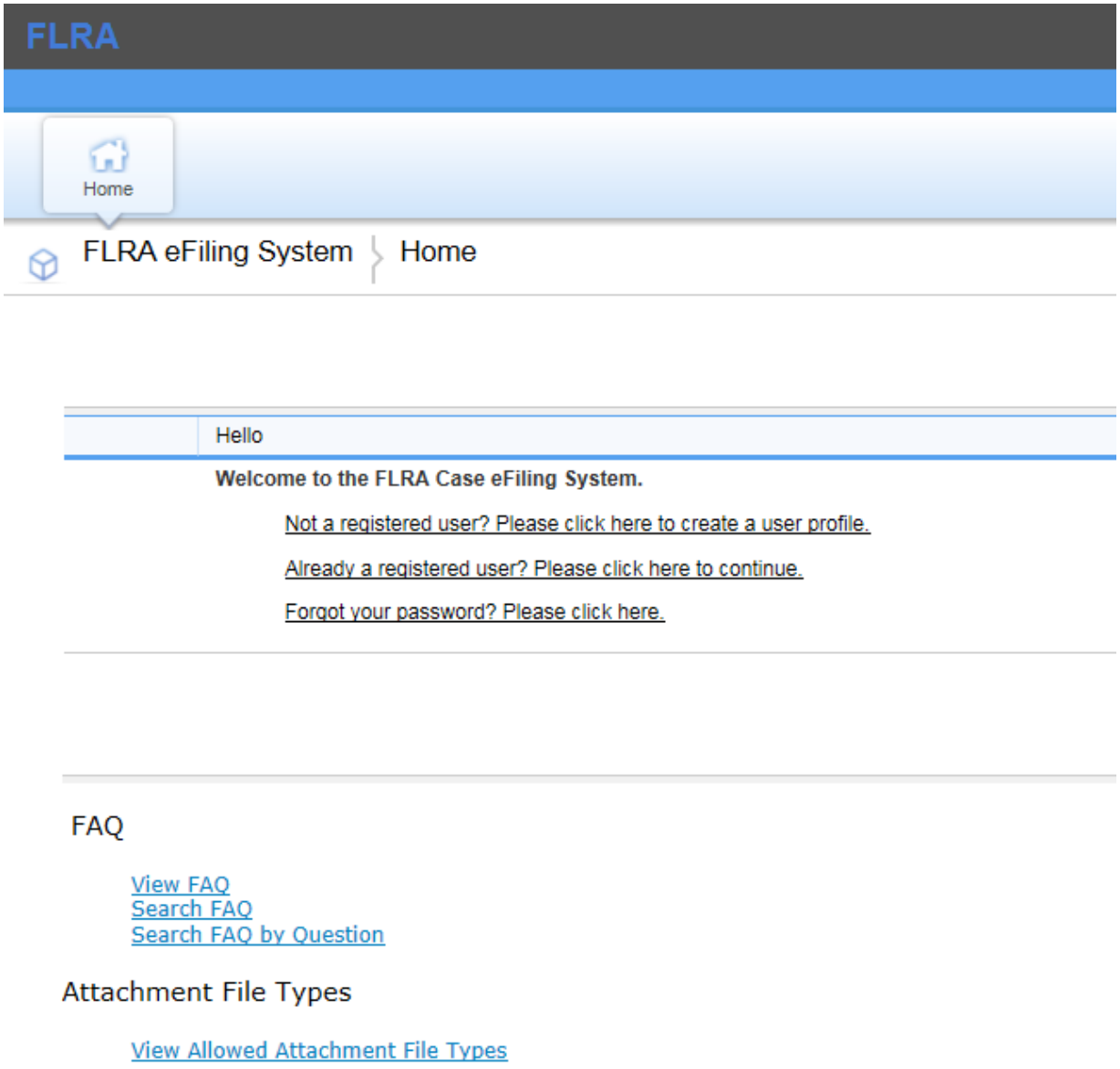
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When to File

- For eFiled: Any calendar day (including Saturdays, Sundays, and holidays) or time (by midnight Eastern Time)

- For in-person: Monday through Friday (not holidays), 9 a.m. to 5 p.m. Eastern Time

Time Limit for Filing Exceptions (5 C.F.R. § 2425.2)

- Exceptions due 30 calendar days from date of service of award (*see also* 5 U.S.C. § 7122(b)) **PLUS** 5 days if award served by regular mail or commercial delivery.

- To calculate filing period for exceptions, exclude date of service of award.

  (*see also* 5 C.F.R. § 2429.21).

Time Limit for Filing Exceptions (5 C.F.R. § 2425.2; *see also* §§ 2429.21, 2429.22)

- Method of service of arbitration award:

  -If not in parties' agreement, the arbitrator may use any commonly used method:

  - Regular mail: postmark date (add 5 days).
  - Commercial delivery (e.g., Fed Ex, UPS) = date deposited (add 5 days).
  - E-mail or fax = date of transmission (DON'T add 5 days).
  - Personal delivery = date of delivery (DON'T add 5 days).
  - Date *received* is irrelevant.
  - If no legible postmark or no date deposited with commercial delivery, then date of award controls.

Time Limit for Filing Exceptions (5 C.F.R. § 2425.2; *see also* § 2429.21)

- More than one method = First controls.
  - Unless the arbitrator indicates that the first method is not the "official service." 68 FLRA 1015, 1017-18 (Member Pizzella dissenting).
- Service by more than 1 method on same day – do you get the 5 days?
  - Could depend on which method of service the Arbitrator identifies as the official method. *See* 68 FLRA at 1017-18.
- Date of Service of Award: _____ **PLUS** 30 Days = ____
  BUT, if weekend or holiday, then next business day= _____
  PLUS 5 days if service by mail or commercial delivery=____
  BUT, if weekend or holiday, then next business day=____

Sunday	Monday	Tuesday	Wed	Thursday	Friday	Saturday
May	23	24	25	26	27 Date of service of award	28 Start counting
29	30	31	June 1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26 30 days!	27 Due date (BUT add 5 days for mail)	28 Start counting	29	30	July 1	2 Fifth day
3	4 HOLIDAY	**5** **ACTUAL DUE DATE**	6	7	8	9

Time Limit for Filing Exceptions (5 C.F.R. § 2425.2)

- Time limit for filing exceptions cannot be extended or waived. 5 C.F.R. § 2429.23(d); 5 U.S.C. § 7122(b).
- However, time limit for filing exceptions *can* be equitably tolled. 68 FLRA 231, 232-34 (Member Pizzella dissenting)
  - Two-pronged test requires that:
    - (1) some extraordinary circumstance stood in a party's way to prevent timely filing; and
      - A computer error causing a delay of only a few minutes is not an "extraordinary circumstance" where the filing party waited until five minutes before the filing deadline to file its exceptions. 68 FLRA 443, 443-45 (Member DuBester dissenting).
    - (2) the party was pursuing its rights diligently.
- Unlike exceptions, the Authority may <u>*waive*</u> an expired time limit in extraordinary circumstances for untimely filed oppositions. 68 FLRA 189, 191; 5 C.F.R. § 2429.23(b).

Exceptions – Other Procedural Requirements (5 C.F.R. § 2425.2)

- Other procedural requirements:
  - 5 C.F.R. § 2429.24: where and how to file
    - File exceptions with Authority's Office of Case Intake and Publication.
    - File in person, by commercial delivery, by first-class mail, by certified mail, or through the eFiling system at www.flra.gov.
    - Original must be signed.
  - 5 C.F.R. § 2429.25 : Original + 4 copies of everything must be filed with the Authority (except eFiling).
  - 5 C.F.R. § 2429.27: Statement of Service
    - Serve all parties with anything you file (*see also* 5 C.F.R. § 2429.12(b)).
    - Submit signed, dated statement of service (or eFiling certification) that includes names & addresses of party served, date served, and method of service.
  - 5 C.F.R. § 2429.29: Table of contents if more than 10 double-spaced pages (except fillable forms in eFiling).

Common Procedural Deficiencies

- Deficiency Orders
  - Failure to provide correct number of copies: Original + **4** copies (except eFiling). 5 C.F.R. § 2429.25.
  - Failure to provide statement of service. *Id.* § 2429.27.
  - Failure to provide table of contents (except fillable forms in eFiling): Must include if submission more than 10 double-spaced pages. *Id.* § 2429.29.

Common Procedural Deficiencies

- Common Show-Cause Orders:
  - Failure to Cure Procedural Deficiencies
  - Timeliness
  - Interlocutory (discussed previously)
  - Moot/Advisory Opinion. 5 C.F.R. § 2429.10. *E.g.*, 64 FLRA 466, 467; 58 FLRA 327, 330.
  - Lack of Jurisdiction – § 7121(f) Matters (discussed below)
  - Lack of Standing – not a party under § 2421.11 (discussed previously)

Common Procedural Deficiencies

- Failure to Comply with/Respond to Show Cause Order (SCO) Will Result in Dismissal of Exceptions Without Regard to Nature of Procedural Deficiency
  - *E.g.*, 63 FLRA 349, 350: Deficiency order for lack of copies and statement of service. As U did not cure, Authority issued SCO. In response, U said (w/o support) deficiency had been cured. U exceptions dismissed; *see also* 67 FLRA 442 (incorrect number of copies).
  - *E.g.*, 67 FLRA 442, 444: Dismissing U's opp'n as untimely and declining to waive the expired deadline. *See also* 68 FLRA 777, 777-78: Though Ag did respond to SCO, Ag's opp'n not considered because date of service, not date of receipt, controls filing due date.
  - *E.g.*, 56 FLRA 829, 830 n.1: Ag failed to respond to SCO re: why exceptions shouldn't be dismissed as interlocutory. Exceptions dismissed.

Exceptions - Content (5 C.F.R. § 2425.4)

- Required content (cont'd):
  - Support for any request for expedited, abbreviated decision.
  - Legible copy of arbitrator's award.
  - Arbitrator's name, mailing address, and (if available and authorized for use by arbitrator) arbitrator's e-mail address or facsimile number.

Expedited, Abbreviated Decisions (5 C.F.R. § 2425.7)

- Excepting party may request
  - *E.g.*, 67 FLRA 257, 257.
- But Authority has discretion over whether to grant request
  - *E.g.*, 68 FLRA 718, 719.
- Opposing party may respond to request in opposition
- Authority considers all circumstances, including:
  - Complexity
  - Potential for precedential value
  - Similarity to other, fully detailed decisions involving same/similar issues
- Authority may issue even absent request
  - But not in arbitration cases involving a ULP

Exceptions - Content (5 C.F.R. § 2425.4)

- Required content:
  - Dated, self-contained.
  - Statement of grounds (*see* 5 C.F.R. § 2425.6).
  - Supporting arguments and citations.
  - Legible copies of documents cited in arguments.
    - Only documents that are not readily accessible by the Authority (*e.g.*, CBA provisions, internal agency regs).
    - Need NOT submit:
      - Authority and Federal court decisions.
      - U.S.C.
      - Current C.F.R.

Exceptions - Content (5 C.F.R. § 2425.4)

- Not permitted:
  - If you should have known to, but did not raise below (*see also* 5 C.F.R. § 2429.5):
    - Evidence
    - Factual assertions
    - Arguments (including affirmative defenses)
    - Requested remedies
    - Potential challenges to a requested remedy

Exceptions – Failure to Raise Below (5 C.F.R. §§ 2425.4, 2429.5)

- *E.g.*, 67 FLRA 155, 156: Arb awarded U's requested remedy: Quality Step Increase. Ag exceptions, challenging remedy, dismissed under § 2429.5.
- *E.g.*, 63 FLRA 178, 179-80: Arb found Ag violated placement process by not posting internal vacancy announcement. Ag exception, alleging enforcement of placement process violated mgmt's right to select from any appropriate source, dismissed under §2429.5.
- *E.g.*, 68 FLRA 116, 117: Arb awarded U's requested remedy by restoring grvt's clinical privileges. Merely submitting Ag rules and regulations as part of the record, without any explanation, was insufficient to establish that Ag raised the argument before Arb that remedy violated those rules and regulations.

Exceptions – Failure to Raise Below (5 C.F.R. §§ 2425.4, 2429.5)

- *E.g.*, 63 FLRA 213, 214: Arb found Ag did not violate case law by canceling U rep's telework. U exception alleged award contrary to § 7116(a)(1) and (2). Authority dismissed exception under § 2429.5: U could have, but did not, raise ULP claim to arb.
- *E.g.*, 63 FLRA 70, 74: U filed exception alleging arb should not have considered parties' bargaining history. Authority dismissed exception under § 2429.5: could have, but did not, raise to arb.
- *E.g.*, 68 FLRA 829, 832-33: Ag filed motion for reconsideration alleging that the Authority erred in dismissing exception under § 2429.5. Agency's argument was based on misunderstanding of Authority's decision
- *E.g.*, 67 FLRA 609, 610-11: Authority dismissed Ag's argument because Ag made § 7106(b) argument for the first time in its exceptions.

Exceptions – Failure to Raise Below (5 C.F.R. §§ 2425.4, 2429.5)

- Addressed Issue Below In Contrary Way
  - 64 FLRA 325, 328: Authority dismissed Ag's argument on exceptions that parties' agreement *did not incorporate* certain regulations where Ag conceded to arb that agreement *did incorporate* such regulations.
  - *See also* 68 FLRA 116, 118: Ag alleged award was contrary to law because a particular article in CBA was unenforceable. Authority dismissed Ag's argument because Ag argued to arb that the same article could be enforced.

- *But see* 61 FLRA 637, 639: Authority denied U's claim that Ag's argument was barred by § 2429.5 where Ag showed that argument was raised in its post-hearing brief to arb.

Exceptions – Failure to Raise Below (5 C.F.R. §§ 2425.4, 2429.5)

- Opportunity to Argue Below, 67 FLRA 287, 288-89: Authority dismissed exceptions because Ag did not respond to arguments in U's post-hearing brief during the two weeks between brief and award.
  - *See also* 67 FLRA 715, 716-17: denying Ag's motion for reconsideration; 67 FLRA 356, 357: Argument barred based on failure to respond to remedy requested in U's closing brief; 67 FLRA 257, 257: Argument barred based on U's failure to dispute interpretation of CBA provision that the Ag argued before the arb.

- *But see* 67 FLRA 387, 388-89: U should have argued that *Agency* denied the grievant due process below, but U could not have known to argue that *Arbitrator's award* violated grievant's due-process rights until award issued.

Potential Dismissal or Denial of Exceptions (5 C.F.R. § 2425.6)

- Under 5 U.S.C. § 7122(a), no jurisdiction over awards relating to:
  - Reductions in grade/removals based on unacceptable performance under 5 U.S.C. § 4303. *E.g.*, 61 FLRA 476, 477-78.
  - Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days under 5 U.S.C. § 7512. *E.g.*, 62 FLRA 107, 108.
  - Similar matters arising under other personnel systems. *E.g.*, 59 FLRA 545, 546 (removal of non-appropriated fund employees).
  - Matters "related to" – i.e., "inextricably intertwined with" – those matters. *E.g.*, 62 FLRA 505, 506-07 (claim for compensatory damages).
- Failure to raise or support ground or "otherwise fail[] to demonstrate a legally recognized basis for setting aside the award."

Potential Dismissal or Denial of Exceptions (5 C.F.R. § 2425.6(e)(1) – Failure to Raise or Support)

- "An exception [to an arbitration award] may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" recognized in 5 C.F.R. § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award" (on a ground not listed in the Authority's Regulations).

  5 C.F.R. § 2425.6(e)(1) (underlining added).

Failure to Raise
(5 C.F.R. § 2425.6(e)(1))

- The Authority will dismiss an exception that (1) does not raise a currently recognized ground for review, or (2) does not cite legal authority to establish a ground not currently recognized.

- Currently recognized grounds listed in 5 C.F.R. § 2425.6:
  - The arbitrator: (1) exceeded his or her authority; (2) was biased; or (3) denied the excepting party a fair hearing.
  - The award: (1) is contrary to any law, rule or regulation; (2) fails to draw its essence from the parties' agreement; (3) is based on a nonfact; (4) is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible; or (5) is contrary to public policy.

Failure to Raise
(5 C.F.R. § 2425.6(e)(1))

- Members disagree about the level of specificity required to raise a recognized ground.

- Examples where all Members agreed to dismissal for failure to raise a ground: 67 FLRA 375, 375; 67 FLRA 147, 147-48.

- Example where Members disagreed: 67 FLRA 239, 240, 243 (2014) – fn.19 at 240 (DuBester); concurrence at 243 (Pizzella).

Failure to Support
(5 C.F.R. § 2425.6(e)(1))

- If an exception raises a recognized ground, but does not offer sufficient argument or authority to support that ground, then the Authority denies exception.

- *E.g.*, 68 FLRA 311, 313: Argument that an arb "misapplied the doctrine of past practice" does not raise a recognized ground for review.
- *E.g.*, 67 FLRA 327, 328.
  - Dismissing argument for failing to raise a ground.
  - Denying another argument as raising, but not sufficiently supporting, a recognized ground.
  - Disagreement in applying § 2425.6(e)(1) noted: fn.21 at 328 (DuBester); fn.22 at 328 (Pope).

Failure to Raise or Support (5 C.F.R. § 2425.6(e)(1))

- Other examples:
  - 69 FLRA 149, 151. Denying a contrary to law exception for failure to support.
  - 67 FLRA 330, 331. Dismissing for failure to raise; Member Pizzella writes separately to contrast with 67 FLRA 239.
  - 67 FLRA 333, 333-34. Dismissing certain exceptions for failure to raise, denying others for failure to support.
  - 67 FLRA 378, 379. Denying one exceeded-authority exception for failure to support, denying another on its merits.

- *See also* 67 FLRA 171, 172.
  - To support a ground not currently recognized, a party must cite the legal authorities relied upon.

Exceptions - Forms (5 C.F.R. § 2425.4)

- Forms for Filing Exceptions:
  - Optional
  - Available at www.flra.gov

Oppositions
(5 C.F.R. § 2425.3)

- Not required
- 30 days to file (from service of exceptions)
- Refers to other rules for computing filing date:
  - 5 C.F.R. § 2425.8 (use of Collaboration and Alternative Dispute Resolution Office)
  - 5 C.F.R. § 2429.21 (computation of time for filing papers)
  - 5 C.F.R. § 2429.22 (add'l time after service by mail or commercial delivery)

Oppositions
(5 C.F.R. § 2425.3)

- Refers to other procedural requirements:
  - 5 C.F.R. § 2429.24 (place and method of filing; acknowledgement)
  - 5 C.F.R. § 2429.25 (number of copies and paper size)
  - 5 C.F.R. § 2429.27 (service; statement of service)
  - 5 C.F.R. § 2429.29 (content of filings)

Oppositions
(5 C.F.R. § 2425.5)

- Should address:
  - Arguments, including § 2429.5 issues.
  - Any request for expedited, abbreviated decision.

- Should include:
  - Documents relied on UNLESS provided with exceptions.
  - Documents not readily accessible by the Authority.

"Other Documents" (5 C.F.R. § 2429.26)

- Authority may consider "other documents," but filing party must:
  - Request leave to file
    - 5 C.F.R. § 2429.26
  - Argue *why* submission is necessary
    - *E.g.*, Addresses new argument raised by opposing party
  - Serve copies on other parties

Collaboration and Alternative Dispute Resolution Office (CADRO) (5 C.F.R. § 2425.8)

- Objective: Encourage parties to resolve dispute through mediation and facilitation, rather than litigation
- Voluntary
- Before or after opposition filed
- Authority will toll filing for opposition if time hasn't expired

Clarifying Records or Disputes (5 C.F.R. § 2425.9)

- Direct parties to provide evidence (including arbitration record, *see* 5 C.F.R. § 2429.3)
- Direct parties to respond to requests for further information
- Meet with parties
- Direct oral argument
- Take any other appropriate action

Regulations List Grounds for Review (5 C.F.R. § 2425.6)

- Contrary to Law, Rule, Regulation

- Private-Sector Grounds:
  - Exceeded authority
  - Bias
  - Fair hearing
  - Essence
  - Nonfact
  - Incomplete, ambiguous, or contradictory so as to make implementation impossible
  - Public policy
  - Other? (Must provide cites).

Segment 4:

Grounds for Reviewing Arbitration Awards

(Overview & Private-Sector Grounds)

FLRA Review

- Exceptions to arbitration awards = majority of Authority's case load.
- Types of exceptions:
  - Private-sector grounds (5 U.S.C. § 7122(a)(2); 5 C.F.R. § 2425.6(a)(2)).
    - Deference to arbitrator
  - Contrary to law, rule, or regulation (5 U.S.C. § 7122(a)(1); 5 C.F.R. § 2425.6 (a)(1)).
    - De novo review of legal conclusions
    - Deference to arbitrator's factual findings

Private-Sector Grounds for Review

1. Exceeds Authority

(1) Arbitrator failed to resolve submitted issue (but arb not required to address every argument raised);
- *Compare* 65 FLRA 91, 95, *with* 64 FLRA 686, 687.

(2) Resolved an issue not submitted;
- *Compare* 63 FLRA 476, 478-79, *with* 51 FLRA 1645, 1647; *see also* 67 FLRA 609, 611-12.

(3) Disregarded specific limitations on authority (but allegations of adding to/altering/modifying CBA won't demonstrate, *e.g.*, 64 FLRA 547, 550) OR

(4) Awarded relief to non-grievants (remedy too broad).
- *E.g.*, 65 FLRA 657, 663-64.

Private-Sector Grounds for Review

1. Exceeds Authority (cont'd):
   - Stipulated issue: Arbitrators do not exceed authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues in stipulation.
     - *E.g.*, 67 FLRA 489, 492; 64 FLRA 982, 986-87.
     - 68 FLRA 992, 993-95 (Member Pizzella dissenting): Arb did not exceed his authority when interpretation of a stipulated issue was not irrational, unfounded, or implausible, and the award was responsive to the issue as interpreted by the arb.
   - Framed issue: Absent a stipulation, arbitrator's framing of issue gets substantial deference.
     - *E.g.*, 68 FLRA 189, 191-92; 64 FLRA 1126, 1129-30.

Private-Sector Grounds for Review

2. Bias
   (1) Award procured by improper means;
   (2) Arbitrator was partial or corrupt; OR
   (3) Arbitrator engaged in misconduct that prejudiced party's rights.
   - *E.g.*, 67 FLRA 291, 292; 64 FLRA 713, 716-17.

3. Fair Hearing
   (1) Arbitrator refused to hear or consider pertinent and material evidence; OR
   (2) Actions so prejudiced a party as to affect fairness of proceeding as a whole.
   - *E.g.*, 68 FLRA 116, 119; 67 FLRA at 292; 62 FLRA 360, 362.

Private-Sector Grounds for Review

4. Essence

   (1) Cannot be rationally derived from parties' agreement;

   (2) So unfounded in reason and fact, unconnected w/wording and purpose of agreement as to manifest infidelity to obligation of arbitrator;

   (3) Implausible interpretation of agreement; OR

   (4) Evidences manifest disregard of agreement.

   - *See* 59 FLRA 540, 541 (granting exception).
   - *But see* 69 FLRA 149, 152; 68 FLRA 83, 85-86.

Private-Sector Grounds for Review

5. Nonfact
   - Central fact is clearly erroneous, but for which different result.
   - Cannot challenge factual matters disputed before arbitrator.
     - *E.g.*, 67 FLRA 306, 308; 64 FLRA 692, 696.

6. Incomplete, Ambiguous, or Contradictory
   - Must make implementation of the award impossible.
     - *E.g.*, 64 FLRA 622, 624; 56 FLRA 1057, 1074.

Private-Sector Grounds for Review

7. Public Policy

   (1) Must be explicit, well-defined, and dominant; AND

   (2) Violation of policy must be clearly shown.

   - *E.g.*, 61 FLRA 88, 91.

8. Other?

   - Must provide citations (*see* 5 C.F.R. § 2425.6) and explain how cites support finding award deficient.

Additional Grounds for Review

- Contrary to law, rule, or regulation
  - *See, e.g.*, 69 FLRA 149, 151; 69 FLRA 144, 145; 68 FLRA 531, 532-33; 68 FLRA 311, 314-16; 68 FLRA 116, 118-19.
  - Absent allegation of nonfact, Authority defers to arbitrator's factual findings. *See, e.g.*, 66 FLRA 74, 78.
  - U.S. Constitution
  - Statutes
  - Regulations
    - Government-wide
    - *Governing* agency rules or regs

Separate and Independent Grounds

- When award based on separate and independent grounds, appealing party must establish that all grounds are deficient. *E.g.*, 68 FLRA 324, 326; 67 FLRA 597, 604; 65 FLRA 946, 949.
  - For example:
    - If arb bases award on interpretation of two CBA provisions and interpretation of either provision provides a sufficient basis for the award, excepting party must show arb's interpretation of both provisions deficient. *See* 67 FLRA at 604.
    - If arb bases award on interpretations of CBA and Statute, excepting party must show arb's interpretation of both CBA and Statute are deficient. *See, e.g.*, 66 FLRA 325, 332.

Challenges to Arbitrability Findings

- Procedural arbitrability
  - Whether procedural conditions to arbitrability have been met or excused. *E.g.*, 64 FLRA 772, 773-74; 64 FLRA 612, 613.
    - *E.g.*, determinations re: timeliness (64 FLRA 772, 773), who's covered by NGP (61 FLRA 681, 682-83).
  - Can't challenge directly, but can challenge based on:
    - Bias (*e.g.*, 61 FLRA 681, 682-83; 60 FLRA 83, 86).
    - Exceeded authority (*e.g.*, 61 FLRA 681, 682-83; 60 FLRA 83, 86).
    - Fair hearing (*e.g.*, 60 FLRA 813, 815-16).
    - Law that establishes procedural req'ts that apply to NGP (*e.g.*, 68 FLRA 728, 730-31 (filing period for ULPs established by the Statute); 58 FLRA 480, 481-82. *But see* 67 FLRA 264, 264-65).
    - *But see* 68 FLRA 852, 853-54 (procedural-arbitrability determinations cannot be challenged on essence grounds); 68 FLRA at 730 (same).

Challenges to Arbitrability Findings

- Substantive arbitrability
  - Whether subject matter of dispute is arbitrable.
    - *E.g.*, 64 FLRA 612, 613.
  - If determination is based on CBA, then essence standard.
    - *E.g.*, 64 FLRA 606, 609.
  - If determination is based on law, then de novo standard.
    - *E.g.*, 64 FLRA 1132, 1133-34.

Segment 5:

Management Rights
(5 U.S.C. § 7106)

Burden in Arbitration Context

- Party asserting that arbitration award is contrary to management rights must show both:
  - Award affects management right(s), and
  - Contract provision arbitrator enforced was not negotiated under § 7106(b).
  - *E.g.*, 67 FLRA 597, 601-02 (Member Pizzella dissenting); 66 FLRA 426, 428 & n.5.

Management Rights - § 7106

- Does the award *affect* a management right under § 7106(a)?
- If so, was arbitrator enforcing:
  - Contract provision negotiated under § 7106(b) (for any management-right claims); or
  - applicable law (for § 7106(a)(2) claims)?

See 65 FLRA 113, 115; 65 FLRA 102, 106 (Chairman Pope concurring in part).

Management Rights - § 7106

- **§ 7106(a)(1)**, to determine the agency's:
  - **Mission**. *E.g.*, 59 FLRA 159, 163; 58 FLRA 341, 342-43.
  - **Budget**. *E.g.*, 61 FLRA 201, 205.
  - **Organization**. *E.g.*, 63 FLRA 530, 532; 58 FLRA 175, 178-79.
  - **Number of Employees**. *E.g.*, 46 FLRA 298, 316-17.
  - **Internal Security Practices**. *E.g.*, 64 FLRA 1153, 1156-58.

Management Rights - § 7106

- **§ 7106(a)(2)(A):**
  - **Hire employees**. *E.g.*, 62 FLRA 93, 94-95.
  - **Assign employees**. *E.g.*, 64 FLRA 161, 165; 63 FLRA 222, 225.
  - **Direct employees**. *E.g.*, 64 FLRA 532, 534; 63 FLRA 450, 452; 62 FLRA 15, 16-17.
  - **Layoff employees**. *E.g.*, 64 FLRA 813, 815-16.
  - **Retain employees in the agency**. *E.g.*, 60 FLRA 839, 841-45; 58 FLRA 344, 345-46.

Management Rights - § 7106

- **§ 7106(a)(2)(A)** cont'd:
  - **Suspend employees**. *E.g.*, 48 FLRA 908, 911-12.
  - **Remove employees**. *E.g.*, 46 FLRA 298, 319-20.
  - **Reduce in grade or pay**. *E.g.*, 53 FLRA 539, 579-80; 40 FLRA 1181, 1200-02.
  - **Take other disciplinary action**. *E.g.*, 62 FLRA 174, 180-81; 61 FLRA 341, 346-47.

Management Rights - § 7106

- **§ 7106(a)(2)(B):**
  - **Assign work.** *E.g.*, 65 FLRA 13, 15; 64 FLRA 136, 138; 63 FLRA 530, 532.
  - **Make determinations with respect to contracting out.** *E.g.*, 64 FLRA 474, 479; 61 FLRA 209, 210.
  - **Determine the personnel by which agency operations will be conducted.** *E.g.*, 61 FLRA 371, 373-74.

Management Rights - § 7106

- **§ 7106(a)(2)(C):**
  - **With respect to filling positions, make selections for appointments from:**
    - **(1) among properly ranked and certified candidates for promotion; or**
    - **(2) any other appropriate source**
  - *E.g.*, 65 FLRA 13, 15; 64 FLRA 76, 77; 62 FLRA 419, 424; 61 FLRA 226, 228-29; 61 FLRA 618, 622; 59 FLRA 780, 782-83; 58 FLRA 411, 412.
- **§ 7106(a)(2)(D):**
  - **Take whatever actions may be necessary to carry out the agency mission during emergencies**
  - *E.g.*, 58 FLRA 549, 551-52.

Management Rights - § 7106

- **Effects on management's rights:**
  - Look to Authority precedent. What constitutes an effect is not necessarily self-evident.
  - For example, mere fact that an award requires agency to assign work to someone does not mean it affects right to assign work. *E.g.*, 41 FLRA 795, 823.
  - Parties should brief arbitrators on possible effects (and/or exceptions to management's rights); arbitrators should be cognizant of possible effects and exceptions.

Management Rights - § 7106

- What if the award does not affect a § 7106(a) management right?
  - Exception denied!
  - *E.g.*, 64 FLRA 76, 77-78.
- What if the award does affect a § 7106(a) management right?
  - Then …

Management Rights - § 7106

- … ask whether the arbitrator was enforcing:
  - A provision negotiated under § 7106(b)(1), (2), or (3) (for all § 7106(a) rights); and/or
  - An applicable law (for § 7106(a)(2) rights).

Management Rights - Exceptions

- **§ 7106(b)(1):**
  - Numbers, types, and grades
  - Of employees or positions
  - Assigned to any
    - Organizational subdivision,
    - Work project, or
    - Tour of duty
    - *E.g.*, 54 FLRA 807, 816-17; 32 FLRA 944, 959.
- Permissive (an agency may, but is not required to, bargain); but enforceable in arbitration

Management Rights - Exceptions

- **§ 7106(b)(1)** (cont'd):
  - Technology, methods, & means of performing work
    - Technology = technical method used in accomplishing or furthering performance of agency's work. *E.g.*, 62 FLRA 321, 326.
    - Method = the way agency performs its work ("how")
    - Means = any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work ("with what"). *E.g.*, 54 FLRA 1582, 1589-91 & n.6.

Management Rights - Exceptions

- **§ 7106(b)(2)**: The "procedures which management officials of the agency will observe in exercising" any management right under § 7106
- Look to the case law
- *E.g.*, 63 FLRA 585, 586; 62 FLRA 328, 330.
- Mandatory (agency must bargain); enforceable in arbitration

Management Rights - Exceptions

- **§ 7106(b)(3)**: "appropriate arrangements for employees adversely affected by the exercise of" any management right under § 7106

- Ask whether the provision, as interpreted and applied by the arbitrator:
  - Is an "arrangement" for employees adversely affected by the exercise of a management right; and
  - "Abrogates" management's rights.
  - Don't apply "tailoring" or "excessive interference" (different from negotiability). *See* 65 FLRA 113, 116 (Member Beck concurring).
  - *But see* 739 F.3d 13 (D.C. Cir. 2014).

Management Rights - Applicable Laws

- For § 7106(a)(2) rights, ask whether the arbitrator was enforcing an "applicable law."
- Applicable Law: lawfully enacted statutes, the U.S. Constitution, controlling judicial decisions, executive orders issued pursuant to express statutory authorization, and regulations having the force and effect of law. *E.g.*, 42 FLRA 1333, 1337.
  - Regulations have the "force and effect of law" where they:
    - (1) Affect individual rights and obligations;
    - (2) Were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and
    - (3) Were promulgated in accordance with procedural requirements imposed by Congress.
      - *E.g.*, 65 FLRA 657, 661-63; 61 FLRA 201, 206.

Management Rights - Exceptions

- **Arbitral remedies**:
  - Must provide a remedy for a violation of either an "applicable law" within the meaning of § 7106(a)(2) or a contract provision that was negotiated pursuant to § 7106(b) of the Statute.
  - But need not "reconstruct" what management would have done in the absence of a violation.
  - *See* 65 FLRA 102, 106-07 (Chairman Pope concurring in part).

Segment 6:

Arbitral Enforcement of,

&

Consistency of Awards with,

Regulations

Award Contrary to Regulations

Fort Campbell, 37 FLRA 186, 190-96:

- Award must be consistent with any rule or regulation that governs the matter in dispute.
- Government-wide regulations treated differently than agency-specific regulations.

Government-Wide Regulations

- Rules, regulations, and official declarations of policy that are generally applicable throughout the federal government and are binding on the federal agencies and officials to whom they apply. *E.g.*, 53 FLRA 403, 416.
- If gov't-wide regulation preceded CBA, regulation governs.
- Generally, if CBA preceded gov't-wide regulation, CBA governs until it expires. *E.g.*, 65 FLRA 817, 819.
  - Exception: gov't-wide regulations that implement 5 U.S.C. § 2302 (prohibited personnel practices). *See* 60 FLRA 398, 399 n.6 (reciting the standard).

Agency Regulations

- Rules, regulations, and official declarations of policy prescribed by an agency to govern matters within that agency. *See Fort Campbell*, 37 FLRA 186, 192-95.
- Govern matters only when there's no applicable, conflicting CBA provision. *E.g.*, 67 FLRA 183, 184-85; 64 FLRA 1126, 1128; 63 FLRA 191, 193-94.
  - A party alleging that an award is contrary to a governing agency regulation must provide a copy of the agency regulation (or citation to the C.F.R.) and address whether there is an applicable, conflicting CBA provision. *See Fort Campbell*, 37 FLRA at 195 n.2.

Rule on CBA Enforcement

- CBA, not agency regulations, governs matters to which they both apply when there is a conflict. *E.g.*, 64 FLRA 1126, 1128-29.
- Reason: Statute does not prevent agency from agreeing to a CBA that alters or modifies agency regulation. *See Fort Campbell*, 37 FLRA 186, 194.
- Authority defers to an arbitrator's finding that CBA governs. *E.g.*, 41 FLRA 1206, 1209-11.

Incorporation

- An arbitrator may find that agency regulations have been incorporated into CBA. *E.g.*, 51 FLRA 1210, 1217; 41 FLRA 284, 292-93.
- And if CBA says matters will be conducted "in accordance with an agency regulation," that wording "effectively incorporates" the regulation into the CBA, *e.g.*, 51 FLRA 1210, 1216-17 – unless the arbitrator indicates otherwise in the award, *see* 65 FLRA 13, 17 n.5.
- Review of the arbitrator's interpretation and application of the incorporated agency regulations = essence standard. *E.g.*, 65 FLRA 1004, 1008.

Segment 7:

Arbitral Remedies

&

Backpay

Arbitrator Remedies

- Broad remedial discretion. *E.g.*, 64 FLRA 922, 924.
- Authority denies exceptions that don't support setting aside remedy/attempt to substitute different remedy. *E.g.*, 55 FLRA 789, 793.

Arbitrator Remedies - Limitations

- Private and federal sectors: Can't dispense "own brand of industrial justice." *E.g.*, 64 FLRA 916, 920.

- Additional federal-sector exceptions – stem from:
  - Laws and regulations governing employment
  - Expanded scope of grievance procedure (arbitrators substitute for other forums)

Monetary Remedies

- Sovereign immunity. *E.g.*, 68 FLRA 960, 963-66.
- Must be explicit statutory waiver. *E.g.*, 52 FLRA 46, 49.
- Common examples:
  - Back Pay Act, 5 U.S.C. § 5596. *E.g.*, 52 FLRA 46, 49.
  - FLSA, 29 U.S.C. §§ 201-219. *E.g.*, 63 FLRA 100, 103.
- May be raised at any time, even if not raised before arbitrator. *E.g.*, 68 FLRA 841, 842.
- No sovereign immunity waiver required for monetary remedies that are "equitable" in nature. *E.g.*, 68 FLRA 960, 965.

The Back Pay Act (5 U.S.C. § 5596): Requirements

- Unjustified or unwarranted personnel action
  - Violation of applicable law, rule, regulation, or CBA. *Compare* 56 FLRA 887, 888, *with* 68 FLRA 841, 842-43.
    - Includes governing agency-wide regs. *E.g.*, 64 FLRA 922, 923.
- Resulting in loss of pay, allowances, or differentials
  - "Pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation …." 5 C.F.R. § 550.803; *accord* 60 FLRA 202, 212.

The Back Pay Act: "Resulted in"

- Causal connection necessary. *E.g.*, 63 FLRA 646, 648.
- Essential because backpay is make-whole remedy.
- FLRA reviews for evidence of connection; does not require particular words or phrases (such as "but for"). *E.g.*, 52 FLRA 938, 942.
- No requirement to identify specific employees when award sufficiently identifies specific circumstances warranting backpay. *E.g.*, 68 FLRA 718, 720

The Back Pay Act: Recovery Period

- Recovery period cannot exceed "a period beginning more than 6 years before the date of the filing of a timely appeal" (e.g., a grievance).
  5 U.S.C. § 5596(b)(4). *Accord* 60 FLRA 565, 570.

- Does not establish when period can end/total duration of recovery period. *See* 67 FLRA 384, 385; 60 FLRA 565, 570.

Interest on Backpay

- Statutory entitlement (5 U.S.C. § 5596(b)(2)(A)).
- Begins on date of loss; ends on a date not more than 30 days before date on which paid.
  E.g., 58 FLRA 447, 447.
- Common arbitrator error: Denying interest.
  E.g., 64 FLRA 906, 907.

Segment 8:

Attorney Fees

Attorney Fees - Sources of Authority to Award

- Primary: Back Pay Act, 5 U.S.C. § 5596
- Others: FLSA, Privacy Act, and Rehabilitation Act

Attorney Fees: Prerequisites I

- The Back Pay Act requires that an award of fees be:
  - (1) Awarded in conjunction with backpay award;
  - (2) Reasonable and related to personnel action;
  - (3) Awarded in accordance with standards established under 5 U.S.C. § 7701(g).
  - *E.g.*, 64 FLRA 925, 928.

Attorney Fees: Prerequisites II

- Standards established under 5 U.S.C. § 7701(g):
  - Prevailing party
  - Incurred by the employee
  - Warranted in the interest of justice
  - Reasonable amount
  - *E.g.*, 64 FLRA 925, 928.

  - Note: Arb must make specific findings supporting each pertinent statutory requirement. *Id.*

Attorney Fees: Standard of 7701(g)

- Prevailing party
  - Enforceable judgment on the merits.
    - *See, e.g.*, 68 FLRA 120, 122; 65 FLRA 921, 922 (citing *Buckhannon*, 532 U.S. 598 (2001)).
  - Degree of success not a consideration.
    - *E.g.*, 57 FLRA 784, 786.

Attorney Fees: Fees Incurred

- Attorney-client relationship. *E.g.*, 53 FLRA 1688, 1691.
- Legal services rendered. *Id.*
- Under certain circumstances, attorney fees may be awarded for the services of non-attorney representatives. *E.g.*, 63 FLRA 492, 493-94.
  - 5 C.F.R. § 550.807(f): fees for law clerks, law students, and paralegals assisting attorneys.

Attorney Fees: Interest of Justice

- There are two ways to meet § 7701(g)(1)'s interest-of-justice standard:

- 1. Under Allen v. USPS, 2 M.S.P.R. 420, 434-35 (1980)
  - By satisfying one of the "Allen Criteria."

  2. Under the Statute if:
    - Service to federal workforce; or
    - Benefit to the public in maintaining the action.
      - *See, e.g.*, 64 FLRA 925, 928.

Attorney Fees: *Allen* criteria

- 1 - Prohibited personnel practice
- 2 - Clearly w/o merit/wholly unfounded or employee substantially innocent
- 3 - Bad faith
- 4 - Gross procedural error; OR
- 5 - Agency knew or should have known would not prevail

Attorney Fees: *Allen* 1

- Prohibited personnel practice
  - 5 U.S.C. § 2302
  - Distinct from "unjustified and unwarranted personnel action." *E.g.*, 64 FLRA 819, 821.

Attorney Fees: *Allen* 2

- Clearly without merit/wholly unfounded
  - Examine competing interests of fault of employee and reasonableness of agency action. *E.g.*, 68 FLRA 690, 691-92; 64 FLRA 925, 929.
- Employee substantially innocent
  - Employee prevails on substantive rather than technical grounds on major charges. *E.g.*, 63 FLRA 317, 319-20.
- Focal point is result of merits award.
  - *Id.* at 319.

Attorney Fees: *Allen* 3

- Bad faith
  - Action brought to "harass" the employee. *E.g.*, 64 FLRA 925, 928.
  - Action brought to exert improper pressure on the employee to act in certain ways. *Id.*

Attorney Fees: *Allen* 4

- Gross procedural error
  - Prolonged proceeding or severely prejudiced employees. *E.g.*, 61 FLRA 582, 586.
  - More than simple harmful error warranting reversal of agency action. *Id.*

Attorney Fees: *Allen* 5

- Agency knew or should have known would not prevail
  - Analysis of agency evidence and agency conduct of investigation. *See, e.g.*, 65 FLRA 575, 578.

- Focal point is reasonableness of agency actions in view of information available at the time of the action. *Id.*

- Penalty an aspect of merits; if penalty mitigated on evidence available to agency, and no new info presented at hearing, then agency knew or should have known.

  See 66 FLRA 22, 24 & n.5.

Attorney Fees: Reasonable Amount

- Billing rate
- Reasonable number of hours
  - *See, e.g.*, 64 FLRA 1003, 1007-09.
  - *See* 65 FLRA 54 No explicit provision for interest on attorney fees; therefore, arbitrators not permitted to award retroactive application of current hourly rate to make up for the delay in payment of fees.
- Degree of success is a consideration.
  - *See, e.g.*, 65 FLRA 452, 454.

Attorney Fees: Procedural Notes

- Petition for fees and opportunity to respond
- May resolve in merits award, but …
- Back Pay Act jurisdiction
  - Doctrine of *functus officio* does not permit refusal to consider timely request.
  - Arbitrator may resolve fee issue at any time during arbitration, or within reasonable period after award becomes "final and binding," or the parties agree to a different period. *E.g.*, 67 FLRA 721, 721-22; 67 FLRA 352, 352-53.
- Requests for fees determined by "appropriate authority" as defined by 5 C.F.R § 550.807.

Segment 9:

Judicial Review of Authority Decisions

Judicial Review

- § 7123(a): FLRA decisions in arb cases reviewable only if "the order involves an unfair labor practice."

- Courts have construed narrowly: Though discussion need not be explicit, an FLRA order must "reach and discuss the merits" of a statutory ULP or "in some 'other way affect[] substantive law regarding' a statutory issue." 752 F.3d 453, 459 (D.C. Cir. 2014); *see also* 665 F.3d 1339, 1345 (D.C. Cir. 2012); 507 F.3d 697, 698-700 (D.C. Cir. 2007).

  - Look at order - not award, not grievance. 453 F.3d 500, 504 (D.C. Cir. 2006).

  - Conduct must *actually have been characterized* as a ULP. 824 F.2d 61, 66 (D.C. Cir. 1987).

Judicial Review

- No jurisdiction where CBA was basis for arb's award and FLRA's review. *E.g.*, 981 F.2d 1339, 1342-44 (D.C. Cir. 1993).

- No automatic grant of jurisdiction when an agency claims order violates sovereign immunity.
  - "Routine statutory and regulatory questions—in this case, the meaning of the "shall not exceed" clause in the Back Pay Act and "administrative error" in [the agency's] assignment policy—are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *See* 784 F.3d 821, 823-24 (D.C. Cir. 2015).

Judicial Review

- Legislative history: Given limited nature of FLRA's review, would be inappropriate to have subsequent review by the courts of appeal in such matters. *See, e.g.*, 507 F.3d 697, 699-700 (D.C. Cir. 2007); 824 F.2d 61, 63 (D.C. Cir. 1987); 792 F.2d 25, 28-29 (2d. Cir. 1986).

- Standard of review:
  - Arbitrary/capricious;
  - Court will uphold remedial order for a ULP "'unless it can be shown that the order is a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" 647 F.3d 514, 517 (4th Cir. 2011) (quoting 910 F.2d 964, 968 (D.C. Cir. 1990) (en banc)).

THE END

Questions,

Feedback,

&

Thank You For Participating