

# *UNIQUE ATTRIBUTES OF FEDERAL SECTOR ARBITRATION*



**SFLERP  
44<sup>th</sup> Annual Symposium  
Arlington, Virginia  
May 19, 2017**

# *Introduction & Welcome*

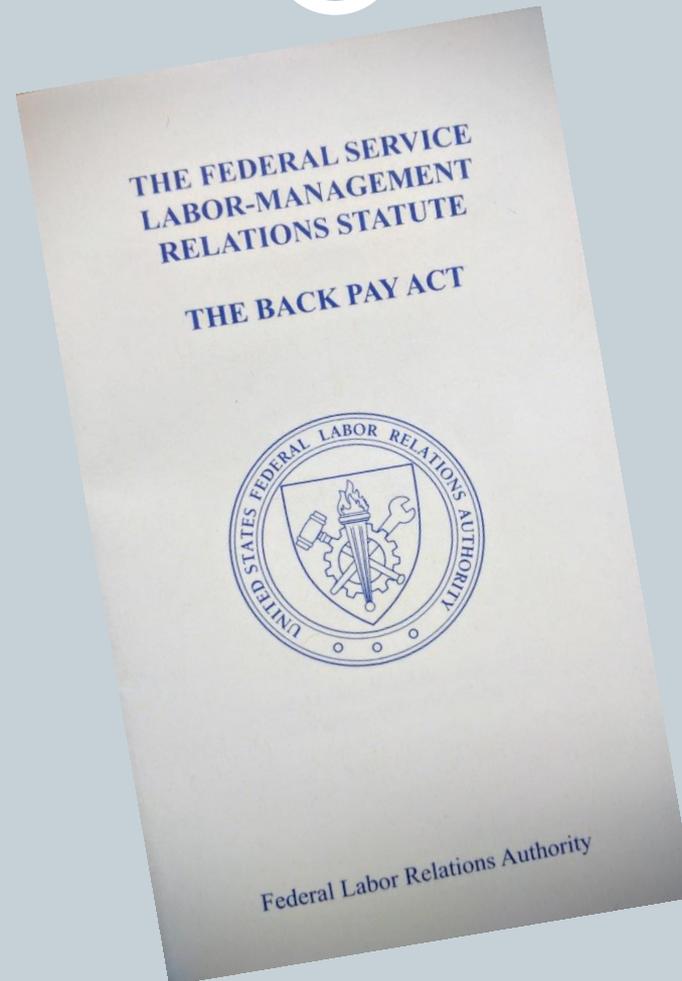
***ERNIE DUBESTER***

***Member, FLRA***



# THE STATUTE: 5 U.S.C. §§ 7101-7135

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# ARBITRATION INITIATIVE

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## FLRA NEWS

FEDERAL LABOR RELATIONS AUTHORITY - WASHINGTON, DC 20424

Contact: Sarah Whittle Spooner [www.flra.gov](http://www.flra.gov) FOR IMMEDIATE RELEASE  
202-218-7791 October 12, 2010

### FLRA ISSUES GUIDE TO ARBITRATION

The Federal Labor Relations Authority (FLRA) announced today the issuance of the *Guide to Arbitration Under the Federal Service Labor-Management Relations Statute* (the *Guide*). The publication of the *Guide* is a significant component of the FLRA's arbitration initiative and follows the October 1, 2010 revisions to the FLRA's regulations concerning the review of arbitration awards, the development and posting of optional forms for parties to use in arbitration cases, and the creation of a nationwide, comprehensive arbitration-training program. "The FLRA's arbitration initiative involves the first update to the FLRA's arbitration regulations in nearly 25 years, and the first FLRA offering of comprehensive arbitration training and tools since the mid-1990s," said FLRA Chairman Carol Waller Pope. "and is yet another step in our efforts to better serve our customers and provide them with meaningful and clear guidance for the processing of cases before the Authority."

The *Guide*, which is available on the FLRA's website, discusses such matters as the negotiated grievance procedure; the procedural and substantive requirements for arbitration exceptions and oppositions with the Authority; the standards of review the Authority applies in arbitration cases; the requirements for complying with arbitration awards; and judicial review of Authority decisions in arbitration cases. The *Guide* was determined in part based on suggestions made by members of the labor-management community. In this connection, over the last 10 months, the FLRA solicited input of arbitrators and practitioners by conducting nationwide focus groups, surveys to parties to recent FLRA decisions, and inviting members of the labor-management community to provide ideas and views on the grievance-arbitration process as well as the FLRA's procedures, regulations and decisions by sending email to "Engage the FLRA" address.

The FLRA administers the labor-management relations program for 1.6 million Federal employees worldwide, approximately 1.1 million of whom are represented by bargaining units. It is charged with providing leadership in establishing policies related to Federal sector labor-management relations and with resolving disputes, ensuring compliance with, the Federal Service Labor-Management Relations S



## FLRA NEWS

FEDERAL LABOR RELATIONS AUTHORITY - WASHINGTON, DC 20424  
FOR IMMEDIATE RELEASE  
July 21, 2010

Contact: Sarah Whittle Spooner  
202-218-7791

### FLRA ISSUES REVISED ARBITRATION REGULATIONS TO IMPROVE AND EXPEDITE THE REVIEW OF ARBITRATION AWARDS

The Federal Labor Relations Authority (FLRA) announced today final revisions to its regulations concerning the review of arbitration awards. See 75 Fed. Reg. 42283. This is a significant step in the FLRA's arbitration initiative, which includes updating the FLRA's arbitration regulations and creating an arbitration education program -- including training sessions and tools -- to make arbitration case processing more effective and efficient. FLRA Chairman Carol Waller Pope expressed appreciation that "the many comments received helped the FLRA finalize revisions that clarify and enhance the rules originally adopted for the review of arbitration awards created the foundation for building new rules that will enable more expedited and responsive resolution of disputes involving arbitration awards." The issuance of the final regulations is yet another in the FLRA's efforts to better serve its customers and provide meaningful and clear guidance in the processing of cases before the Authority.

The final regulations were developed after extensive study and evaluation of the policies and procedures involving the review of arbitration awards. As part of that process, the FLRA solicited input of arbitrators and practitioners by conducting nationwide focus groups, distributing surveys to parties to recent FLRA decisions, and inviting members of the labor-management community to provide ideas and views on the grievance arbitration process by sending email to the FLRA's [engage@flra.gov](mailto:engage@flra.gov) address.

Under the revised process for the review of arbitration awards, excepting parties may request an expedited, abbreviated decision, and may receive assistance from the Authority to collaboratively resolve their arbitration disputes. Where resolution requires a decision, the revised regulations specifically incorporate the grounds upon which an award may be found deficient. The revised regulations also clarify and incorporate procedural requirements -- such as changing the thirty-day period begins on the day of service of the arbitration award -- which are aimed at limiting the number of errors and improving the quality of the records on which decisions are based. The Authority also allows parties to use forms provided by the Authority to assist them in the



## FLRA NEWS

FEDERAL LABOR RELATIONS AUTHORITY - WASHINGTON, DC 20424

Contact: Gina K. Grippando  
202-218-7776

[www.flra.gov](http://www.flra.gov)

FOR IMMEDIATE RELEASE  
June 16, 2016

### FLRA ANNOUNCES ARBITRATION AND NEGOTIABILITY TRAININGS

The Federal Labor Relations Authority (FLRA) announces today that its Authority Component will offer four complimentary training opportunities in Washington, D.C. -- two sessions of its one-day Arbitration Training, and two sessions of its one-day Negotiability Training. This training is part of the FLRA's ongoing effort to educate the federal-sector labor-management community by providing timely, practical guidance in order to promote and contribute to an effective and efficient government.

**ARBITRATION TRAINING**  
Wednesday, July 20, 2016

**NEGOTIABILITY TRAINING**  
Thursday, July 21, 2016

**ARBITRATION TRAINING**  
Tuesday, August 16, 2016

**NEGOTIABILITY TRAINING**  
Wednesday, August 17, 2016

9:30 a.m. to 4:00 p.m.

FLRA  
2nd Floor Agenda Room  
1400 K Street, NW  
Washington, D.C. 20005

The **Arbitration Training** covers: federal-sector arbitration and the negotiated grievance procedure; compliance with arbitration awards, arbitration and the negotiated grievance procedure; arbitration exceptions and oppositions with the Authority; the grounds for reviewing arbitration awards; management-rights exceptions; arbitration enforcement of, and consistency of awards with, regulations; arbitral remedies and backpay; attorney fees; and judicial review of Authority arbitration decisions.

The **Negotiability Training** covers: the negotiability process, including the parties' filings, alternative dispute resolution, and procedural requirements and deficiencies; bases for dismissing petitions for review; and substantive issues, including conditions of employment, management rights, procedures, appropriate arrangements, applicable laws, and bargaining-obligation disputes.

To register, click on the appropriate link above, which will connect you to the new Event Registration tool found at [www.FLRA.gov](http://www.FLRA.gov). Contact the FLRA's Case Intake and Publication Office at (202) 218-7740 if you have any questions. Space in each course is limited. We encourage you to register early.

# ARBITRATION GUIDE

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GUIDE TO ARBITRATION UNDER THE  
FEDERAL SERVICE LABOR-MANAGEMENT  
RELATIONS STATUTE



# FLRA WEBSITE

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The screenshot shows the FLRA.gov website homepage. At the top left is the FLRA logo, a circular seal with a shield in the center. To its right is the text "FLRA.gov" in a large, bold, serif font, with "U.S. FEDERAL LABOR RELATIONS AUTHORITY" in a smaller, sans-serif font below it. On the right side of the header, there is an "RSS FEEDS" icon and a search bar with the word "Search" and a magnifying glass icon. Below the header is a dark blue navigation bar with white text and icons for "ABOUT", "COMPONENTS & OFFICES", "CASE TYPES", "DECISIONS", and "RESOURCES & TRAINING". To the right of this bar is a yellow box with a document icon and the text "eFiling Available Here". The main content area has a dark blue background. On the left, the text "Register for Training" is written in a large, white, serif font. Below it, a paragraph of white text reads: "You can now find in one convenient location all about the FLRA's upcoming trainings. And you can even register to attend right from www.FLRA.gov. Check out the Upcoming Events section below." Below this text is a blue button with white text that says "LEARN MORE »". To the right of the text is a photograph of a man in a dark suit and tie speaking at a podium. In the background of the photo, a screen displays a list of training topics: "Assign empl", "Direct empl", "Layoff empl", and "Retain empl". At the bottom of the page, there are three small thumbnail images with text labels: "REGISTER FOR TRAINING" (with a photo of the speaker), "INTRODUCTION TO THE FLRA" (with a photo of a man sitting at a desk), and "EFILING" (with a photo of a man and a woman sitting at a desk).

 **FLRA.gov**  
U.S. FEDERAL LABOR RELATIONS AUTHORITY

RSS FEEDS Search

ABOUT COMPONENTS & OFFICES CASE TYPES DECISIONS RESOURCES & TRAINING

 **eFiling**  
Available Here

## Register for Training

You can now find in one convenient location all about the FLRA's upcoming trainings. And you can even register to attend right from [www.FLRA.gov](http://www.FLRA.gov). Check out the Upcoming Events section below.

[LEARN MORE »](#)



- Assign empl
- Direct empl  
452; 62 FLRA 1
- Layoff empl
- Retain empl  
841-43; 58 FLR

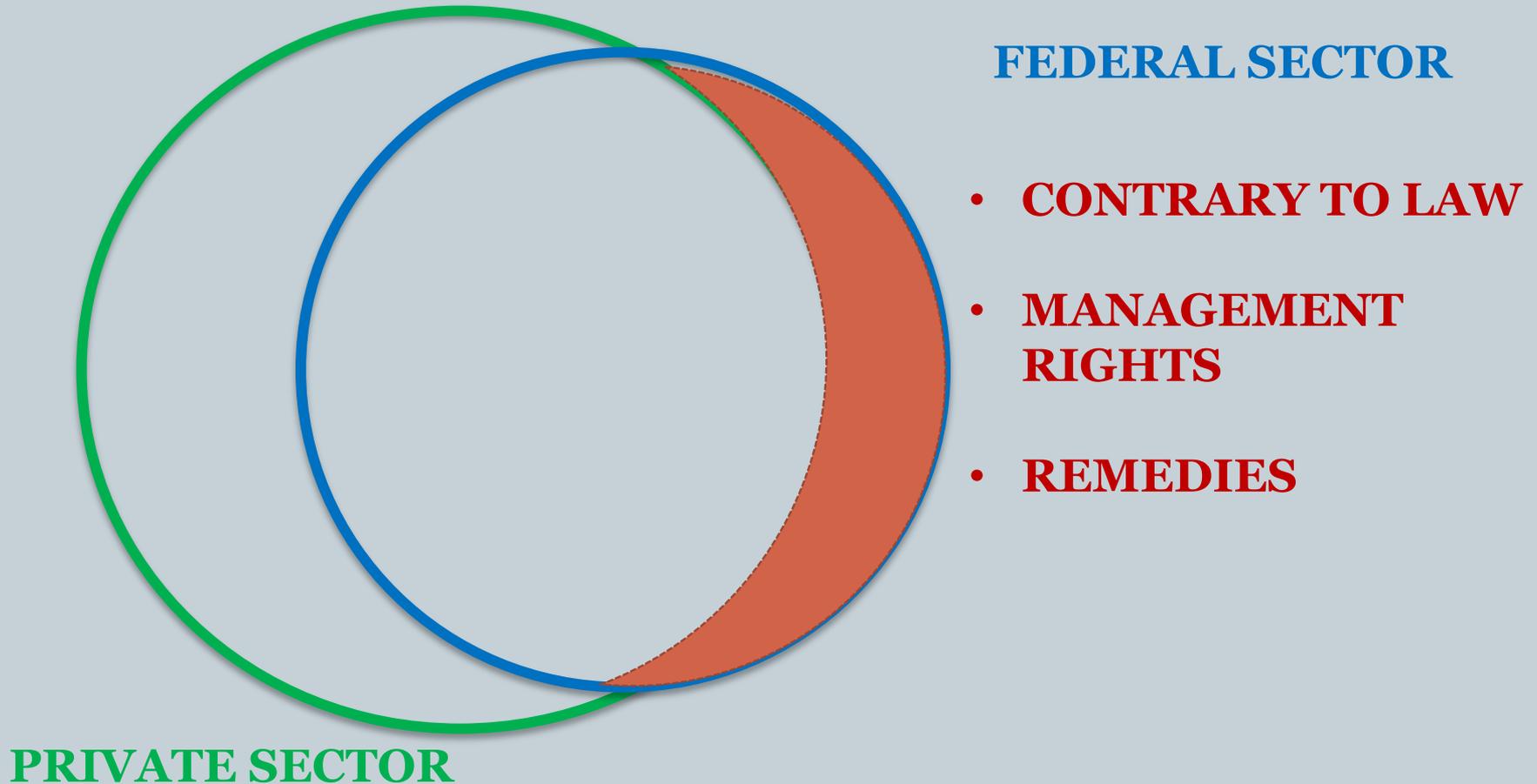
 REGISTER FOR TRAINING

 INTRODUCTION TO THE FLRA

 EFILING

# UNIQUE ATTRIBUTES OF THE FEDERAL SECTOR

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# *Foundations of Federal Sector Labor Arbitration*

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## *Issues of Arbitrability and Choice of Forum/Election of Remedies*

*SFLERP 44<sup>th</sup> Annual Symposium*

*May 19, 2017*

*Tabitha G. Macko  
Senior Attorney  
Office of Acting Chairman Patrick Pizzella*

# Public v. Private-Sector Arbitration

- Federal-sector arbitration is **statute-based**:
- The Federal Service Labor-Management Relations Statute (Statute)  
**5 U.S.C. §§ 7101-7135**
- In the federal sector, a CBA **must** include a **negotiated grievance procedure (NGP)** and provide for binding arbitration: **§ 7121(a)-(b)**
  - *See Independent Union of Pension Employees for Democracy & Justice, 68 FLRA 999, 1004-05 (September 2015)*
  - The NGP is the exclusive means to address disputes involving matters covered by, and not excluded from, the NGP, except when election of forum is allowed.

# Federal-Sector Arbitration: Grievances

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## **“Grievance” under § 7103(a)(9) - Broadly Defined**

- (A) Any complaint by any employee concerning any matter relating to the employment of the employee, or
- (B) Any complaint by any union concerning any matter related to the employment of an employee, or
- (C) Any complaint by any employee, union, or agency concerning—
  - (i) The effect or interpretation, or claim of breach of a CBA
  - (ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

# Federal-Sector Arbitration: Scope of Arbitration/Arbitrability

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- Usually defined by the **scope of the grievance**.
- The parties **may bargain to exclude** certain issues from their agreement's negotiated grievance procedure.
  - NAGE, Local R4-45, 55 FLRA 695, 699 (1999)(agreement excluded complaints of discrimination from the grievance procedure, which arbitrator interpreted as racial discrimination).
- **Statute excludes certain grievances, § 7121(c):**
  - (1) Prohibited political activities.
  - (2) Retirement, life insurance, or health insurance.
  - (3) Suspension or removal for national security reasons.
  - (4) Examination, certification, or appointment.
  - (5) Classification of any position that does not result in the reduction in grade or pay of the employee.

# Federal-Sector Arbitration: Choice of Forum/Election of Remedies

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- **Grievance or ULP Charge to the FLRA:**
  - § 7116(d); grievance is barred by ULP charge when:
    - ✦ the same issue (facts & legal theories),
    - ✦ ULP charge filed earlier, AND
    - ✦ selection of forum was at discretion of (same) aggrieved party.
- **Grievance or EEO (formal) complaint:**
  - § 7121(d); grievance barred by EEO complaint when same subject matter and matter was raised earlier by employee's timely election (written formal complaint).
- **Grievance or MSPB appeal:**
  - § 7121(e)(1):  
adverse actions under 5 USC § 7512 (removal, suspension greater than 14 days; reduction in grade; reduction in pay); certain performance-based actions under 5 USC § 4303 (removals under PIPs).
- **Grievance or MSPB appeal:**
  - § 7121(g): prohibited personnel practices (5 U.S.C. § 2302(b)(2)--- grievance or appeal to MSPB, or through OSC).



# Federal Labor Relations Authority

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*Contrary to Law, Rules, or  
Regulations*

*May 19, 2017*

# Federal-Sector Arbitration

- As always, The Statute, The Statute, The Statute....  
5 U.S.C. §§ 7101-7135 (the Statute)
- 5 U.S.C. § 7105(a)(2)(H): The Authority shall . . . resolve exceptions to arbitrator's awards under section 7122 of this title.
- Arbitrators can enforce laws and regulations, not just a collective-bargaining agreement (CBA)
  - (unless CBA or law excludes use of negotiated grievance procedure for a particular grievance)

# Grounds for Review by the Authority

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- Contrary to law, rules, or regulations
- 5 U.S.C. § 7122(a)(1); 5 C.F.R. § 2425.6 (a)(1)
  - The Authority reviews the challenged legal *conclusions* of the arbitrator “de novo”
    - ✦ Authority does not have to agree with the rationale or analysis; it’s the conclusion that matters.
    - ✦ De Novo” means: the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law.
  - Deference to arbitrator’s factual findings, absent a successful “nonfact” challenge.

# Law, Rules, or Regulations

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- Contrary to law, rules, or regulations means:
  - U.S. Constitution is a “law.”
    - ✦ *Indep. Union of Pension Employees for Democracy & Justice*, 68 FLRA 999, 1011-12 (2015)(First Amendment, union newsletter); *Panama Canal Comm’n*, 33 FLRA 15, 20-22 (1988)(First Amendment, 10 day suspension);
    - ✦ *U.S. Dep’t of VA, Nat’l Mem’l Cemetery of the Pac.*, 45 FLRA 1164, 1174-1179 (1992)(due process, 5 day suspension).
  - Statutes – federal, such as:
    - ✦ The Statute
    - ✦ The Privacy Act
    - ✦ Freedom of Information Act (FOIA)
    - ✦ Fair Labor Standards Act (FLSA)
    - ✦ Title VII

# Law, Rules, or Regulations

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- Contrary to law, rules, or regulations also means:
  - Regulations
    - ✦ “Government-wide” rules and 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.
      - (easy hint – as issued by Office of Personnel Management (OPM) or General Services Administration (GSA))
      - For example: the Federal Travel Regulations (a.k.a. FTR’s)

# Law, Rules, or Regulations

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- Contrary to law, rules, or regulations includes:
  - Agency regulations:
    - Rules, regulations, and official declarations of policy *prescribed by an agency to govern matters within that agency.*
      - *See U. S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky, 37 FLRA 186, 192-95 (1990)(Fort Campbell).*
    - that are “governing”
      - 1) “specifically linked” or set the standard or provide “dispositive criteria” or “substantively” address the matter in dispute;
  - AND
  - 2) Do Not “conflict” with the collectively bargained/negotiated agreement.

## So Now What?....

- Government-wide regulations govern a matter in dispute to which they apply, even if the same matter is covered by a collective bargaining agreement under the Statute.
  - *See Fort Campbell, 37 FLRA at 193.*
- But, government-wide regulations are treated differently than agency-specific regulations, because.....
  - Award must (only) be consistent with any agency rules or regulations that *govern* the matter in dispute;

# Racking & Stacking the Regulations and Agreements...Even more to consider...

- If a government-wide regulation preceded CBA, then the government-wide regulation governs (fairly typical situation).
- If CBA preceded the government-wide regulation, then the CBA governs until that CBA expires.
  - E.g., 65 FLRA 817, 819 (2011); § 7116(a)(7).
    - ✦ However, be mindful: gov't-wide regulations that implement 5 U.S.C. § 2302 (prohibited personnel practices).
      - *See* 60 FLRA 398, 399 n.6 (reciting the standard).

# Don't Forget the Agency Regulations

- Agency rules or regulations “govern” matters only when there is *no* applicable, *conflicting* CBA provision.
- Where no conflict with CBA, then *both* CBA and agency rule may affect disposition of matter;
  - See *NTEU Chap. 215*, 67 FLRA 183, 184-85 (2014); *BOP, Coleman, Fla.*, 63 FLRA 191, 193-94 (2009).

But,.....

- The collectively-bargained agreement, not *agency* regulations, governs matters to which they both apply when there **is** a “conflict.”
  - Because that is what both parties bargained for.

# Rule on CBA Enforcement

- Why does the agreement, not agency regulations, govern matters to which they both apply when there is a “conflict”?
  - Reason: The Statute does not prevent an agency from agreeing to an agreement that alters or modifies an agency regulation.
    - *See Fort Campbell*, 37 FLRA 186, 194.
- The Authority defers to an arbitrator’s finding that the CBA governs.
  - *E.g., U.S. Dep’t of Treasury, IRS*, 64 FLRA 720, 721-22 (2010); *U.S. Dep’t of the Army, Blue Grass Army Depot, Lexington, Ky.*, 41 FLRA 1206, 1209-11 (1991).

# Incorporation

- An arbitrator may find that *agency* regulations have been incorporated into CBA. E.g., 51 FLRA 1210, 1217; 41 FLRA 284, 292-93.
- If CBA says matters will be conducted “in accordance with an agency regulation,” that wording “effectively incorporates” the regulation into the CBA.
  - See 51 FLRA 1210, 1216-17 – unless the arbitrator indicates otherwise in the award;
  - *But see* 65 FLRA 13, 17 n.5 (Arbitrator did not specifically determine agency program was incorporated and treated the two separately, and so, Authority reviewed de novo).
- Review of the arbitrator’s interpretation and application of the incorporated agency regulations = essence standard. E.g., 65 FLRA 1004, 1008.
  - “Essence standard” is deferential to the Arbitrator’s interpretation of the collectively bargaining agreement.

# -Hypothetical- Contrary to Law, Rule or Regulation

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- CBA says: “In accordance with Federal Law, Government-wide regulation, and this Agreement, an environmental differential will be paid to eligible wage-grade employees who are exposed to hazard or physical hardships.”
- Agency regulation says: “Reduction of exposure to unusually severe hazards, ...to a level consistent with the accepted standards [in] Agency instructions, OSHA or other recognized national consensus standards.”
- **How would you resolve this grievance over EDP?**

# -Hypothetical- Contrary to Law, Rule or Regulation

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- For § 7122(a)(1), a “rule” or “regulation” includes government-wide regulations or governing agency rules or regulations.
- An agency reg will “govern” when it specifically addresses the matter at issue and does not conflict with the CBA.
- *See AFGE, Local 1617 and U.S. Dep’t of Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Tex.*, 58 FLRA 63, 66 (2002) (then-Member Pope, dissenting).

**THE END**

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***Questions,  
Feedback,  
&  
Thank You***

# Management Rights IN A NUTSHELL



*Debbie Shrager*  
*Senior Attorney*  
*Office of Member DuBester*

# Management Rights

## 5 U.S.C. § 7106

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### § 7105

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

### § 7106. Management rights

(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;

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### § 7106

(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.

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# THRESHOLD ISSUES

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- DOES THE PROVISION **AFFECT** THE EXERCISE OF A MANAGEMENT RIGHT?
- IF YES, DOES THE PROVISION FALL UNDER AN **EXCEPTION** IN THE STATUTE?

# 5 U.S.C. § 7106(a)(1) - Management Rights

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## Agencies have the right to determine:

- \* **Mission**
- \* **Budget**
- \* **Number of Employees**
- \* **Organization**
- \* **Internal Security Practices**

# 5 U.S.C. § 7106(a)(2) - Management Rights

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**Agencies have the right *in accordance with applicable laws*—**

- (A) To hire, assign, direct, layoff, and retain employees, to suspend, remove, reduce in grade or pay, or take other disciplinary action
- (B) To assign work, contracting out, and to determine the personnel by which agency operations shall be conducted;
- (C) To make selections for appointments from—among properly ranked and certified candidates for promotion; or any other appropriate source; and
- (D) To take whatever actions may be necessary to carry out the agency mission during emergencies.

# § 7106(b) - Management Rights Exceptions

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**Management Rights in  
§§ 7106(a)(1) & (a)(2)  
are “subject to”  
§ 7106(b)**

# § 7106(b)(1) - Management Rights Exceptions

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Agencies are *permitted* to negotiate:

- **Numbers, types, and grades** of employees or
- **Positions** assigned to any subdivision, work project, tour of duty or
- **Technology, methods, and means** of performing work.

# § 7106(b)(2), (3) - Management Rights Exceptions

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Agencies are *required* to negotiate:

**Procedures** which management officials of the agency will observe in exercising any authority under 7106(a)

and

**Appropriate Arrangements** for employees adversely affected by the exercise of any authority under 7106(a) by such management officials.

# ENFORCEABLE CONTRACT PROVISIONS AFFECTING A MANAGEMENT RIGHT

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- Provision in which management has *elected to bargain* over subject in § 7106(b)(1).
- Provision involving *procedures* management will observe in exercising a right in § 7106(a).  
(§ 7106(b)(2)).
- Provision that sets out an *appropriate arrangement* for employees adversely affected by the exercise of a management right in § 7106(a).  
(§ 7106(b)(3))

# *Arbitral Remedies & Backpay*



# Arbitrator Remedial Discretion

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- Generally, arbitrators have great latitude to fashion remedies that are meaningful in the circumstances of particular cases.
- The parties don't get to decide on the remedy.
  - The Authority denies exceptions that merely attempt to substitute different remedy for the one the arbitrator awarded.
- But there are more limitations than in the private sector.

# Limitations on Arbitrators Remedies: Management Rights

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- Broad discretion to formulate a remedy for a meritorious grievance even if it affects a management right.
- An award may provide a remedy for
  - A violation of applicable law under § 7106(a)(2) (e.g. hire, assign, select)
  - or
  - A violation of a provision negotiated under § 7106(b) (Procedures, Appropriate Arrangements)

# Limitations on Arbitrator Remedies: Scope of the Issues

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- **A remedy cannot exceed the scope of the grievance or the issues before the arbitrator.**
  - Ex. If the issue involves only a single employee, then the remedy should be limited to that individual.

# Limitations on Arbitrator Remedies: Scope of the Issues

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- **A remedy must address:**
  - The violated contract provision or legal provision (law, rule, or regulation)
  - The harm being remedied.

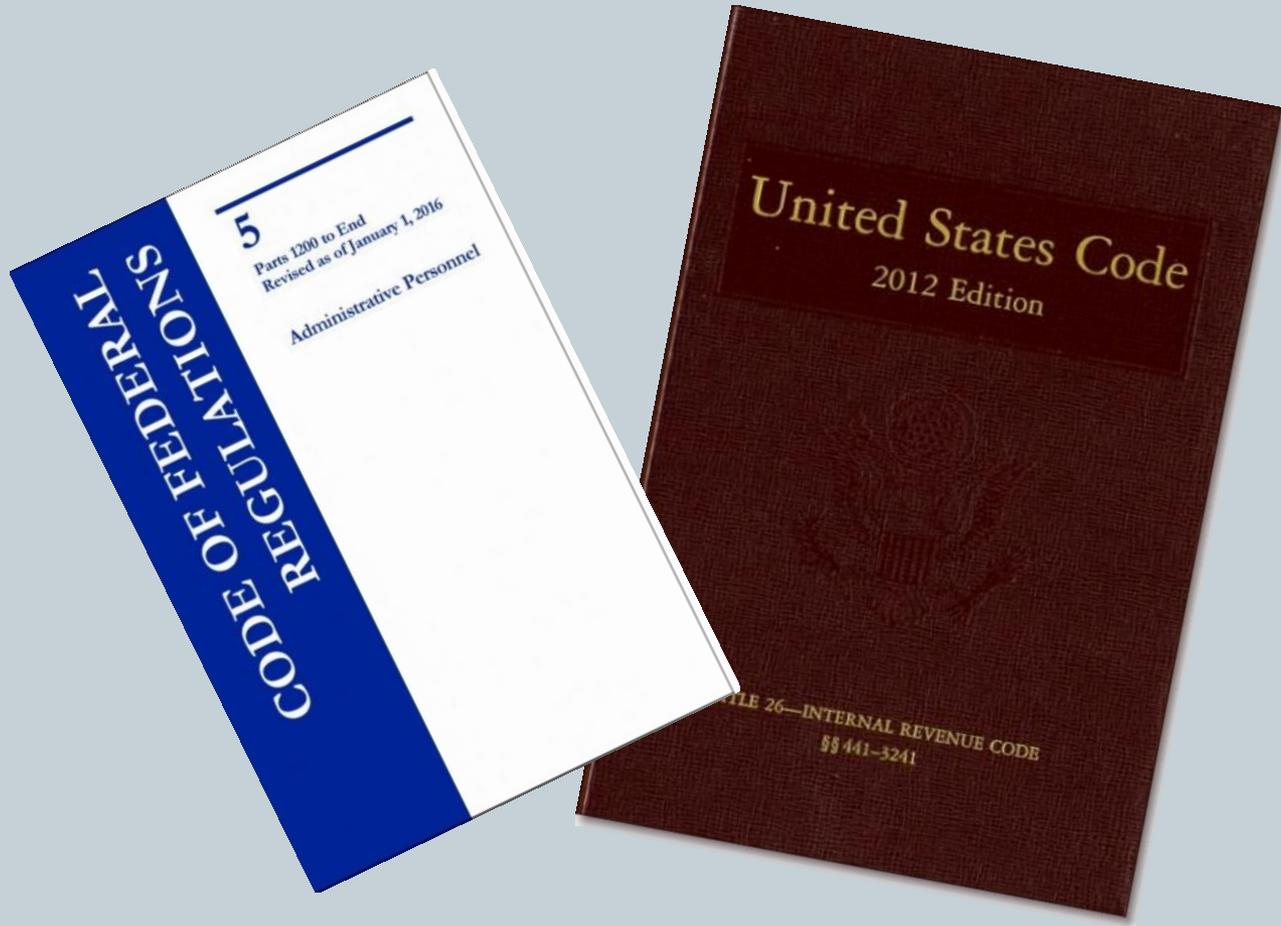
# Limitations on Arbitrator Remedies: Scope of the Issues

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**If the arbitrator does not find a violation, then the arbitrator may not award a remedy.**

# Limitations on Arbitral Remedies: Applicable Laws and Regulations

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# Money Changes Everything!

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# Limitations on Arbitratral Remedies: Sovereign Immunity

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**Rex Non Potest Peccare**

# Monetary Remedies

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- Must be an **explicit, unequivocal, unambiguous** statutory waiver of sovereign immunity.
- The Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135) **does not** waive sovereign immunity
- Examples of explicit waiver:
  - Back Pay Act, 5 U.S.C. § 5596 (BPA).
  - Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

# The Back Pay Act (5 U.S.C. § 5596)

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An award of backpay is authorized---**and mandatory** --  
-when an arbitrator finds that:

- (1) The aggrieved employee was affected by an **unjustified or unwarranted personnel action**; AND
- (2) The personnel action **directly resulted in** . . .
- (3) the withdrawal or reduction of the grievant's **pay, allowances, or differentials**

*See also Definitions, 5 C.F.R. § 550.803.*

# Equitable Remedies



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- No sovereign immunity waiver required for monetary remedies that are “equitable” in nature.
  - Even if the remedy is a financial expense for the agency does not itself mean the remedy violates sovereign immunity
- Attempt to give the grievant the very thing to which she was entitled. (*E.g., Fort Benjamin Harrison v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995))



# REMEDIES HYPOTHETICAL

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Would you grant the Union's request for the cleaning fee reimbursement?



# REMEDIES HYPOTHETICAL

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What if the Union asked that the Agency be required to spend money on a contractor to clean the Union's office?



# REMEDIES HYPOTHETICAL SUMMARY

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- There is no right to money damages in a suit against the United States without a waiver of sovereign immunity.
- A CBA may require monetary payments to employees only where there is an underlying statutory authority for the payment.
- But, sovereign immunity does not bar equitable remedies.
  - Monetary damages v. an equitable remedy that imposes a financial cost on the agency.

**CASE : 64 FLRA 325**

# Slides Available on FLRA.gov

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The screenshot shows the FLRA.gov website header and navigation. The logo for the U.S. Federal Labor Relations Authority is on the left. The main navigation bar includes links for Home, About, Components & Offices, Case Types, Decision Making, and Resources & Training. The 'Resources & Training' link is circled in red. To the right of the navigation bar is an 'eFiling Available Here' button. Below the navigation bar is a breadcrumb trail: Home / Resources & Training / Training / Course Materials. The main content area is titled 'Course Materials' and contains a paragraph of introductory text, a note about OGC materials, and a section for 'Basic Statutory Training Slides (OGC)' with a list of links. On the right side, there is a sidebar titled 'IN THIS SECTION' with links for 'Upcoming FLRA Training', 'Training Contacts', 'Course Materials', and 'Customer Feedback'. Below the sidebar is an 'Additional Information' section with a link for 'Introduction to the FLRA'.

**FLRA.gov**  
U.S. FEDERAL LABOR RELATIONS AUTHORITY

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ABOUT COMPONENTS & OFFICES CASE TYPES DECISION MAKING **RESOURCES & TRAINING** eFiling Available Here

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## Course Materials

Below you will find FLRA training slides, course materials, and other handouts.

Note: The OGC materials are representative of the OGC's course materials. The Regional Offices have discretion to modify the content or create their own.

### Basic Statutory Training Slides (OGC)

- [Introduction to the FLRA's organization and the ULP process](#)
- [Bargaining](#)
- [Bypass](#)
- [Meetings \(formal discussions and Weingarten examinations\)](#)

**IN THIS SECTION**

- [Upcoming FLRA Training](#)
- [Training Contacts](#)
- **Course Materials**
- [Customer Feedback](#)

**i Additional Information**

- [Introduction to the FLRA](#)

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



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