



Federal Labor Relations Authority

1

***Comprehensive Arbitration
Training
October 26-27, 2010***

Segment 1:

2

Introduction to Federal-Sector Arbitration & The Negotiated Grievance Procedure

Private-Sector Arbitration

3

- ✦ 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)

Federal-Sector Arbitration

4

- 5 U.S.C. § 7101 et seq. (the Statute)
- § 7121(a)-(b): every CBA must include NGP and provide for binding arbitration

Federal-Sector Arbitration: NGP Scope and Coverage

5

- “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

6

- 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 (e.g., OMB Circular A-76, see 52/717), and others are set forth in the Statute

Federal-Sector Arbitration: NGP Scope and Coverage

7

- Statute excludes (5 U.S.C. § 7121(c)):
 - ✦ (1) Prohibited political activities.
 - ✦ (2) Retirement, life insurance, or health insurance. E.g., 59/979; 51/204. But see 61/650; 57/415.
 - ✦ (3) Suspension or removal for national security reasons.
 - ✦ (4) Examination, certification, or appointment. See 57/166; 51/210; 48/511.
 - ✦ (5) Classification of any position that does not result in the demotion of the employee.

Federal-Sector Arbitration: NGP Scope and Coverage

8

- 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., 64/829, 830-31)
 - Not temporary-promotion grievances. (E.g., 64/552, 554)

Federal-Sector Arbitration: Election of Remedies

9

- § 7116(d): grievance or ULP
- § 7121(d): grievance or EEO complaint
- § 7121(e): grievance or MSPB appeal (adverse actions under § 7512, certain performance-based actions under § 4303); e.g., 54/235
- § 7121(g): prohibited personnel practice (5 U.S.C. § 2302(b)(2)) – grievance or appeal to MSPB, or through OSC

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

10

- Grievance barred by ULP charge when:
 - (1) Same issue (same factual predicate/substantially similar legal theory); note: statutory claim doesn't bar contractual claim, e.g., 59/112
 - (2) ULP was filed earlier (note: doesn't matter if ULP wasn't pursued or fully litigated, e.g., 64/1110); **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., 63/677)

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

11

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., 61/571

Segment 2:

12

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

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

13

- 7116(a)(1) and (8) violation for failure to comply with final and binding award; can't challenge validity in ULP proceeding
- Types of cases:
 - No timely exceptions: compliance req'd when filing period expires (e.g., 55/293, 296)
 - FLRA denies exceptions: compliance req'd upon denial (e.g., id.)
 - Needn't comply while exceptions pending (e.g., 56/848, 851-52)

Arbitral Retention of Jurisdiction

14

- “Functus Officio”:
 - After arbitrator renders award regarding an issue, no authority to take further action re: that issue unless (1) retained jurisdiction or (2) parties’ joint request
 - E.g., 64/823, 825-26

Arbitral Retention of Jurisdiction: Attorney Fees

15

- Arb may retain jurisdiction to resolve motion for attorney fees. E.g., 64/925, 927.
 - ✦ Doesn't render exceptions to merits award interlocutory. E.g., id.; 64/989, 991.
- But may resolve fee request along with merits. E.g., 64/1148, 1152.

Final Awards & Interlocutory Appeals

16

- 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., 61/335, 357.

Final Awards & Interlocutory Appeals

17

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

Final Awards & Interlocutory Appeals

18

- Are all issues “completely resolved”?
 - ✦ If everything is decided, award is final (e.g., 64 at 589).
 - ✦ If everything is decided, other than amount of backpay/damages/costs/etc., probably final (e.g., 62/121, 123).
 - ✦ If issues beyond computation of backpay, etc., unresolved, probably not final. Examples: arb declines to order remedy and directs parties to attempt to develop an appropriate remedy (e.g., 58/358, 359).

Final Awards & Interlocutory Appeals

19

- Examples – issues completely resolved:
 - ✦ Arb retains jurisdiction to: resolve questions/problems that might arise while implementing remedy (e.g., 37/1193, 1200); or resolve questions or problems as to computation of backpay/costs/damages (e.g., 62/at 123)
- Examples - issues not completely resolved:
 - ✦ Arb retains jurisdiction, directs parties to: attempt to develop an appropriate remedy (e.g., 61/173, 174); determine whether monetary remedy would be appropriate (e.g., 58/at 359); review work schedules to determine if employees are entitled to overtime (e.g., 33/868, 868-69)

Final Awards & Interlocutory Appeals

- Party should not rely on arb's characterization of award (not determinative by itself, e.g., 61/at 357)
- Bifurcated hearings: Just because arb resolved all issues re: 1st part of bifurcated hearing, doesn't mean resolved all issues submitted (e.g., id. at 356-57)
- Attorney fees: Retention of jurisdiction to resolve does NOT render exceptions to merits award interlocutory (e.g., 64/989, 991)

Exception to Authority's Policy: The Plausible Jurisdictional Defect

21

- Extraordinary circumstances warrant interlocutory review where plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. E.g., 62/344, 346.
- “Plausible” = claim is credible on its face; mere assertion not enough. E.g., 63/216, 217; 55/1230, 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., 59/686, 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/at 217-18.
 - Exception dismissed: Claim arbitrator lacked jurisdiction based only on parties' agreement. E.g., 58/745, 746.

Segment 3:

23

*Filing Exceptions with
the FLRA
&
The FLRA's New
Arbitration
Regulations*

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 60/509, 509 n.1 (union authorized grievant); with 40/1254, 1255 (union did not authorize).

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

25

- Exceptions due 30 days from date of service of award (see also 5 U.S.C. § 7122(b)).
- Cannot be extended or waived (see also 5 C.F.R. § 2429.23(d); 5 U.S.C. § 7122(b))
- Calculation of 30-day filing period for exceptions (see also 5 C.F.R. § 2429.21): Effective 10/1/10, include date of service of award (one more day than under prior rule)

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

26

- Method of service of arbitration award:
 - Parties' agreement controls
 - Absent agreement, any commonly used method
 - Regular mail = postmark date (get 5 days)
 - Commercial delivery (e.g., Fed Ex, UPS) = date deposited (get 5 days)
 - E-mail or fax = date of transmission (DON'T get 5 days)
 - Personal delivery = date of delivery (DON'T get 5 days)
 - Date actually received is irrelevant

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

27

- More than one method = 1st controls
- Service by more than 1 method on same day – do you get the 5 days?

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

28

- Expressly refers to other procedural requirements:
 - 5 C.F.R. § 2429.24 (place and method of filing; acknowledgment)
 - ✦ File exceptions with Authority's Office of Case Intake and Publication
 - ✦ File in person, by commercial delivery, by first-class mail, or by certified mail
 - ✦ Original must be signed

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

29

- 5 C.F.R. § 2429.25 (number of copies and paper size):
Original + 4 copies = 5 total
- 5 C.F.R. § 2429.27 (service; 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 that includes names & addresses of party served, date served, and method of service
- 5 C.F.R. § 2429.29 (content of filings): Include table of contents if more than 10 double-spaced pages

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

30

- 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)

31

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

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

32

- Not permitted:
 - ✦ If you could have, but didn't, raise below (see also revised 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)

33

- E.g., 63/202: Arb awarded U's requested remedy: Ag to provide sign-language interpreter. Ag exception, alleging remedy violates mgmt's right to assign work, dismissed under § 2429.5.
- E.g., 63/178: Arb found Ag violated placement process by not posting internal vacancy announcement. Ag exception, alleging award violated mgmt's right to select from any appropriate sourced, dismissed under §2429.5.

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

34

- E.g., 63/213, 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.
- *NTEU*, E.g., 63/70, 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.

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

35

- Compare: Addressed Issue Below In Contrary Way:
64/325, 328: Authority dismissed agency's argument on exceptions that parties' agreement *did not incorporate* certain regulations where agency conceded to arb that agreement *did incorporate* such regulations.
- *But see* 61/637, 639: Authority denied union's claim that agency's argument was barred by 2429.5 where agency showed that argument was raised in its post-hearing brief to arbitrator.

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

36

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

Oppositions (5 C.F.R. § 2425.3)

37

- 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 (addit'l time after service by mail or commercial delivery)

Oppositions (5 C.F.R. § 2425.3)

38

- 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)

39

- Optional (but useful); available at www.flra.gov
- 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)

40

- 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

Common Procedural Deficiencies

○ Deficiency Orders

- ✦ Failure to provide correct number of copies: Original + 4 copies (5 C.F.R. § 2429.25)
- ✦ Failure to provide statement of service (5 C.F.R. § 2429.27)
- ✦ Failure to provide table of contents (5 C.F.R. § 2429.29): Must include if submission more than ten pages

Common Procedural Deficiencies

42

- Common Show Cause Orders:
 - ✦ Failure to cure procedural deficiencies
 - ✦ Timeliness
 - ✦ Interlocutory (discussed previously)
 - ✦ Moot/Advisory Opinion. 5 C.F.R. § 2429.10. E.g., 64/466, 467; 58/327, 330.
 - ✦ Lack of Jurisdiction – § 7121(f) Matters (discussed below)

Common Procedural Deficiencies

43

- Failure to Comply with/Respond to Show Cause Order (SCO) May Result in Dismissal of Exceptions Without Regard to Nature of Procedural Deficiency
 - ✦ E.g., 63/349, 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.
 - ✦ E.g., 56/829, 830 n.1: U failed to respond to OSC re: why exceptions shouldn't be dismissed as interlocutory. Exceptions dismissed.

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

44

- Excepting party may request
 - ✦ Opposing party may respond in opposition
- Authority considers all circumstances, including:
 - ✦ Complexity
 - ✦ Potential for precedential value
 - ✦ Similarity to other, fully detailed decisions involving same/similar issues
- May issue even absent request
 - ✦ But not in cases subject to judicial review or cases involving a ULP

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

45

- 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)

46

- 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
- Any other appropriate action

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

47

- 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., 61/476, 744-78.
 - ✦ 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., 62/107, 108.
 - ✦ Similar matters arising under other personnel systems. E.g., 59/545, 546 (non-appropriated fund employees).
 - ✦ Matters “related to” – i.e., “inextricably intertwined with” – those matters. E.g., 62/505, 506-07 (claim for compensatory damages).

- Failure to raise or support ground or “otherwise fails to demonstrate a legally recognized basis for setting aside the award”

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

48

- 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:

49

Grounds for Reviewing Arbitration Awards (Overview & Private-Sector Grounds)

FLRA Review

50

- Exceptions to arbitration awards = majority of Authority's case load
- Types of exceptions:
 - Private-sector grounds
 - ✦ Deference to arbitrator
 - Contrary to law, rule, regulation
 - ✦ *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. Compare 64/686, 687 with 60/28, 30.
- (2) Resolved issue not submitted. Compare 63/476, 478-79 with 51/1645, 1647.
- (3) Disregarded specific limitations on authority (but allegations of adding to/altering/modifying CBA won't demonstrate, e.g., 64/547); OR
- (4) Awarded relief to non-grievants, e.g., 64/383.

Private-Sector Grounds for Review

52

1. Exceeds Authority (cont'd):
 - Stipulated issue: Arbs don't exceed auth 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., 64/982, 986.
 - Framed issue: Absent a stip, arb's framing of issue gets substantial deference. E.g., 64/1126, 1129-30.

Private-Sector Grounds for Review

53

2. Bias

- (1) Award procured by improper means;
- (2) Arbitrator was partial or corrupt; OR
- (3) Arbitrator engaged in misconduct that prejudiced parties' rights
 - ✦ E.g., 52/387, 398

3. Fair Hearing

- (1) Arb refused to hear or consider pertinent & material evidence; OR
- (2) Actions so prejudiced as to affect fairness of proceeding as a whole
 - ✦ E.g., 62/360, 363

Private-Sector Grounds for Review

54

4. Essence

- (1) Not rationally derived from 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
 - ✦ E.g., 59/540, 541.

Private-Sector Grounds for Review

55

5. Nonfact

- ✦ Central fact is clearly erroneous, but for which different result
- ✦ Cannot challenge factual matters disputed before Arbitrator
- ✦ E.g., 64/672; 56/38, 41.

6. Incomplete, Ambiguous, or Contradictory

- ✦ Must make implementation of the award impossible.
- ✦ E.g., 56/1057, 1074; 40/937, 943.

Private-Sector Grounds for Review

56

7. Public Policy

- ✦ Must be explicit, well-defined, and dominant; and
- ✦ Violation of policy must be clearly shown.
- ✦ E.g., 61/88, 91.

8. Other?

- ✦ Must provide cites (*see* 5 C.F.R. § 2425.6)

Challenges to Arbitrability Findings

57

- Procedural arbitrability
 - Whether procedural conditions to arbitrability have been met or excused. E.g., 64/772, 773; 64/612, 613-14.
 - E.g., determinations re: timeliness (64/772, 773), who's covered by NGP (61/681, 682-83).
 - Can't challenge directly, but can challenge based on:
 - ✦ Bias (e.g., 61/681; 60/83)
 - ✦ Exceeded authority (e.g., 61/681; 60/83)
 - ✦ Fair hearing (e.g., 60/813)
 - ✦ Law that establishes procedural req'ts that apply to NGP (e.g., 58/480, 481)

Challenges to Arbitrability Findings

58

- Substantive arbitrability
 - Whether subject matter of dispute is arbitrable. E.g., 64/612, 613-14.
 - If determination is based on CBA, then essence standard. E.g., 64/606, 609.
 - If determination is based on law, then *de novo* standard. E.g., 64/1132, 1133.

Additional Grounds for Review

59

- Contrary to law, rule or regulation
 - U.S. Constitution
 - Statutes
 - Regulations
 - ✦ Government-wide
 - ✦ Agency

Segment 5:

60

Management Rights (5 U.S.C. § 7106)

Management Rights - 7106

61

- 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 65/102 & 65/113

Management Rights - 7106

62

- 7106(a)(1):
 - **Mission.** E.g., 59/159, 163; 58/341, 342-43.
 - **Budget.** E.g., 61/201, 205.
 - **Organization.** E.g., 63/530, 532; 62/459, 460-61.
 - **Number of Employees.** E.g., 46/298, 316-17.
 - **Internal Security Practices.** E.g., 64/1153, 1156-57.

Management Rights - 7106

63

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

Management Rights - 7106

64

- 7106(a)(2)(A) cont'd:
 - **Suspend employees.** E.g., 48/908, 911-12.
 - **Remove employees.** E.g., 46/298, 319-20.
 - **Reduce in grade or pay.** E.g., 53/539, 579-80; 40/1181, 1200-01.
 - **Take other disciplinary actions.** E.g., 62/174, 180; 61/341, 346.

Management Rights – 7106

65

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

Management Rights - 7106

66

- 7106(a)(2)(C):
 - **With respect to filling positions, make selections for appointments from:**
 - ✦ **(1) among properly ranked and certified candidates for promotions; or**
 - ✦ **(2) any other appropriate source**
 - E.g., 65/13, 15; 64/76, 77; 62/419, 424; 61/226, 228-29; 61/618, 622; 59/780, 782-83; 58/411, 412.

- 7106(a)(2)(D):
 - **Take whatever actions may be necessary to carry out the agency mission during emergencies**
 - E.g., 58/549, 551-52.

Management Rights - 7106

67

- 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., 41/795, 823.
- Parties should brief arbitrators on possible effects (and/or exceptions to management's rights); arbitrator should be cognizant of possible effects and exceptions.

Management Rights - 7106

68

- The award does not affect a § 7106(a) management right?
 - ✦ Exception denied!
 - ✦ E.g., 64/76, 78.

- The award does affect a § 7106(a) management right?
 - ✦ Then ...

Management Rights - 7106

69

- Was the Arb 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

70

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

Management Rights - Exceptions

71

- 5 U.S.C. § 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.*, 62/321, 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.*, 54/1582, 1589-90 & n.6.
- Permissive (an agency may, but is not required to bargain); but enforceable in arbitration

Management Rights - Exceptions

72

- 5 U.S.C. § 7106(b)(2): The “procedures which management officials of the agency will observe in exercising” any management rights under 7106
- Look to the case law
- E.g., 63/585, 586; 62/328, 330.
- Mandatory (agency must bargain); enforceable in arbitration

Management Rights - Exceptions

73

- 5 U.S.C. § 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 65/113.*
- Mandatory (agency must bargain); enforceable in arbitration

Management Rights: Applicable Laws

74

- For § 7106(a)(2) rights, was arb enforcing an “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., 42/1333, 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., 61/201, 206.

Segment 6:

75

Arbitral Enforcement of, & Consistency of Awards with, Regulations

Award Contrary to Regulations

76

Fort Campbell, 37 FLRA 186

- Award must be consistent with any regulation that governs the matter in dispute

Government-wide regulations

77

- Rules, regs, and official declarations of policy that are applicable generally throughout the federal government and are binding on the federal agencies and officials to whom they apply. E.g., 53/403, 416.
- Govern nearly all matters to which they apply regardless of CBA. E.g., 42/121.
- Only limitation is § 7116(a)(7). *Id.*

Agency Regulations

78

- Rules, regs, and official declarations of policy prescribed by an agency to govern matters within that agency. *See Fort Campbell, 37/186.*
- Govern matters only when there's no applicable CBA provision. E.g., 64/1126.

Rule on CBA Enforcement

79

- CBA, not agency regulations, governs matters to which they both apply. E.g., 64/1126.
- Reason: Statute does not prevent agency from agreeing to a CBA that alters or modifies agency regulation. *See Fort Campbell*, 37/186.
- Deference to arbitrator's finding that CBA governs. E.g., 41/1206.

Incorporation

80

- Arb may find that regulations have been incorporated into CBA. E.g., 51/1210.
- Review of finding = essence standard. *Id.*

Segment 7:

81

Arbitral Remedies & Backpay

Arbitrator Remedies

82

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

Arbitrator Remedies - Limitations

83

- Private and federal sectors: Can't dispense "own brand of industrial justice." E.g., 64/916, 920.
- Additional federal-sector exceptions – stem from:
 - Laws and regulations governing employment
 - Expanded scope of grievance procedure (arbitrators substitute for other forums)

Monetary Remedies

84

- Sovereign immunity
- Must be explicit statutory waiver. E.g., 52/46, 49.
- Common examples:
 - Back Pay Act, 5 U.S.C. § 5596. Id.
 - FLSA. E.g., 63/100, 102-03.

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

85

- Unjustified or unwarranted personnel action
 - Violation of applicable law, rule, regulation, or CBA. E.g., 64/861, 861-62.
 - ✦ Includes governing agency-wide regs. E.g., 64/922, 923.
- Resulting in loss of pay, allowances, or differentials
 - “Monetary and employment benefits to which an employee is entitled by statute or regulation ...” 5 C.F.R. § 550.803. Accord 60/202, 212.

The Back Pay Act: “Resulted in”

86

- Causal connection necessary. E.g., 63/646, 648.
- Most common deficiency: lack of causal connection. E.g., 64/775, 776.
- Essential because backpay is make-whole.
- FLRA reviews for evidence of connection; does not review for words or phrases (such as “but for”). E.g., 52/938, 942.

The Back Pay Act: Recovery Period

87

- 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 60/565, 569.
- Does not establish when period can end/total recovery period. *Id.*

Interest on Backpay

88

- 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., 58/447, 447.
- Common arbitrator error: Denying interest. E.g., 64/906, 907.

Segment 8:

89

Attorney Fees

Attorney Fees - Sources of Authority to Award

90

- Primary: BPA, 5 U.S.C. 5596
- Others: FLSA and Privacy Act

Attorney Fees: Prerequisites I

91

- 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., 64/925, 928.

Attorney Fees: Prerequisites II

92

- Standards established under 5 U.S.C. § 7701(g):
 - Prevailing party
 - Warranted in the interest of justice
 - Reasonable amount
 - Incurred by the employee
 - E.g., 64/925, 928.
 - Note: Arb must make specific findings supporting each pertinent statutory requirement.
Id.

Attorney Fees: Standard of 7701(g)

93

- Prevailing party
 - Enforceable judgment on the merits
 - *Buckhannon*, 532 U.S. 598
 - Degree of success not a consideration. E.g., 57/784.

Attorney Fees: Standard of 7701(g)(2)

94

- Applies to all cases of employment discrimination
- In accord with standards of CRA of 1964
 - Fees to prevailing employees unless special circumstances make award unjust

Attorney Fees: Standards of 7701(g)(1)

95

- Apply to all cases other than employment discrimination
- Fees must have been incurred by employee
- Award must be warranted in the interest of justice
- Amount must be reasonable

Attorney Fees: Fees Incurred

96

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

Attorney Fees: Interest of justice

97

- Under 7701(g)(1)
 - *Allen v. USPS*, 2 M.S.P.R. 420 (1980), criteria
- Under Statute
 - Service to federal workforce
 - Benefit to the public
 - Example: grievance brought to correct environmental hazard. E.g., 21/131.

Attorney Fees: *Allen* criteria

98

- 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*

99

- Prohibited personnel practice
 - 5 U.S.C. § 2302
 - Distinct from “unjustified and unwarranted personnel action.” E.g., 64/819.

Attorney Fees: *Allen 2*

100

- Clearly w/o merit/wholly unfounded
 - Examine competing interests of fault of employee and reasonableness of agency action. E.g., 64/925.
- Employee substantially innocent
 - Employee prevails on substantive rather than technical grounds on major charges. E.g., 63/317.
- Focal point is result of merits award. *Id.*

Attorney Fees: *Allen 3*

101

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

Attorney Fees: *Allen 4*

102

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

Attorney Fees: *Allen 5*

103

- Agency knew or should have known would not prevail
 - Analysis of agency evidence and agency conduct of investigation. E.g., 64/819.
- Focal point is reasonableness of agency actions in view of information available at the time of the action. *Id.*

Attorney Fees: Reasonable Amount

104

- The Lodestar Method
 - E.g., 63/100, 100 n.2; 32/1084
 - ✦ Customary hourly billing rate
 - ✦ Reasonable number of hours
- Degree of success is a consideration. E.g., 60/202.

Attorney Fees: Procedural Notes

105

- Petition for fees and opportunity to respond
- May resolve in merits award, but ...
- BPA jurisdiction
 - Doctrine of *functus officio* does not permit refusal to consider timely request
- Requests for fees determined by “appropriate authority” as defined by 5 CFR 550.807

Segment 9:

106

Judicial Review of Authority Decisions

Judicial Review

107

- § 7123(a): FLRA decisions in arb cases reviewable only if “the order involves an unfair labor practice.”
- Courts have construed narrowly: ULP must be either an explicit or necessary ground for the final order issued by the FLRA. E.g., 507 F.3d 697, 698-700 (D.C. Cir. 2007); 145 F.3d 1313, 1315-16 (Fed. Cir. 1998).
- No jurisdiction where CBA was basis for arb’s award and FLRA’s review. E.g., 453 F.3d 500, 501-02, 505 (D.C. Cir. 2006); 981 F.2d 1339, 1342, 1344 (D.C. Cir. 1993).

Judicial Review

108

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

THE END

109

***Questions,
Feedback,
&***

Thank You For Participating