CHAPTER 5

GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE: STILL HARDLY FINAL AND BINDING?

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Traditional Arbitration

Classically, arbitration is a process of dispute resolution where the parties agree to abide by the decision of the arbitrator. Court challenges are essentially limited to protests that the arbitrator has not carried out his agreed-upon function. Provided that he or she does, the award will not be disturbed. Mistakes of law are tolerated on the basis that the parties, having chosen their arbitrator, also chose his or her fallibilities, unless the parties have "limited" the submission by requiring the arbitrator to adhere to the law. Broad discretion as to remedy is allowed unless restricted by agreement. Otherwise only if the underlying contract itself is illegal or the award compels the violation of law will the courts not enforce the arbitrator's remedy.[1]

This broad tradition of the basic traits of arbitration has been in existence since at least the 1600s and has continued unbroken

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[1]*See* generally Kagel, *Grievance Arbitration in the Federal Sector: How Final and Binding?*, 51 Ore. L. Rev. 134, 139–140 (1971) (hereinafter Kagel). For cases involving limited submissions, *see e.g., Utah Const. Co.* v. *Western Pac. Ry. Co.,* 174 Cal. 156, 161, 162 Pac. 631 (1916). For cases involving illegal awards, *see e.g., Loving & Evans* v. *Blick,* 33 Cal.2d 603 (1949); *Union Employers Div.* v. *Columbia Typo. Union 101,* 353 F.Supp. 1348, 82 LRRM 2537 (D.D.C. 1973); *Amer., etc. Baseball Clubs* v. *Major League Baseball Players Assn.,* 59 Cal. App.3d 493, 130 Cap. Rptr. 626 (1976). In some instances public policy requirements have not allowed enforcement of decisions or orders to arbitrate over matters which are subject to statutory controls, *e.g., Wilko* v. *Swan,* 346 U.S. 427 (1953) (Securities Act); *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 7 FEP Cases 81 (1974) (Civil Rights Act); *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 24 WH Cases 1284 (1981) (Fair Labor Standards Act); *World Airways* v. *Teamsters,* 578 F.2d 800, 99 LRRM 2325 (9th Cir. 1978) (Federal Aviation Act); *Teamsters Local 748* v. *Haig Berberian Inc.,* 623 F.2d 77, 105 LRRM 2172 (9th Cir. 1980) (National Labor Relations Act).

to the present. It is generally applicable to all manner of disputes including labor disputes, in both the public and private sectors.[2]

Federal-Sector Arbitration

The Civil Service Reform Act of 1978 (CSRA) for the first time codified arbitration as a dispute resolution mechanism for employees in the federal service.[3] In doing so, it broke with tradition in many ways. It adopted a broader definition of a grievance than found in most collective bargaining agreements, and it made arbitration awards reviewable either by courts or administrative bodies, or both. At least three separate channels of review were established, depending on the type of case involved. There are separate channels for (1) "adverse action" cases—suspensions of 14 days or longer up to and including discharge, (2) cases where discrimination by the employer is alleged, and (3) all other cases.

The purpose of this paper is to compare this system with traditional arbitration as described above. For the practitioner —the arbitrator, counsel, or party—to understand this comparison, a detailed analysis of the system is required. Also required is an understanding of the force that agencies extraneous to the dispute in question can bring to bear on the finality of a decision. Particular pitfalls or concerns to the arbitrator and the parties in that system, compared to the traditional model, are outlined.

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[2]*See* Arbitrium Redivivum or the Law of Arbitration (1694); A Gentlemen of the Middle-Temple, The Compleat Arbitrator (1731); California Law Revision Commission, Recommendation and Study Relating to Arbitration (1960).

[3]Public Law 95-454, 92 Stat. 1111. The pertinent arbitration provisions are found in Title 5, U.S.C., Reorganization Plans 1 and 2, and Executive Order 11491. The latter three survive, even though nonstatutory, where not overruled by statute. *See* Elkouri and Elkouri, Legal Status of Federal Sector Arbitration, supp. to How Arbitration Works, 3d ed., notes 4, 7 (1980) (hereinafter Elkouris supp.). For sources on the predecessor federal service system, *see* Kagel, *supra* note 1; Elkouris supp., *supra* note 3; Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector,* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1979), 268; Porter, *Arbitration in the Federal Government: What Happened to the "Magna Carta"?,* in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1978), 90; Cooper & Bauer, *Federal Sector Labor Relations Reform,* 56 Chi. Kent L. Rev. 509 (1980); *Legislative History of the Civil Service Reform Act of 1978,* House Comm. on Post Office and Civil Service (1979) (hereinafter *Legis. History*); *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978,* House Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service (1979) (hereinafter *Legis. History Title VII*).

Finally, suggestions for reformation of the codified system are made.[4]

The Grievance and Mandatory Arbitration System

Grievances are defined in the CSRA as complaints covering "*any* matter relating" to employment; the "effect," interpretation, or breach of a collective bargaining agreement; or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. . . ."[5] Excluded from the grievance procedure by statute are matters relating to prohibited political activities, retirement, life and health insurance, "any examination, certification, or appointment," employee classification matters not affecting pay or grade, and removals for national security matters.[6]

Each collective bargaining agreement must contain procedures for settling grievances (including arbitrability) which must be "fair and simple," provide for "expeditious processing," and allow the union or the employer to invoke "binding arbitration."[7]

Adverse Actions

In adverse action cases, the employee must initially and irrevocably opt either to utilize the negotiated grievance procedure including potential arbitration *or* to use the procedures of the Merit System Protection Board (MSPB) as an alternative, statutorily created, decision-making authority.[8]

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[4]This paper does *not* deal with the scope of bargaining, or lack of it, in the new statute. See Kagel, *supra* note 1, 137, 138, 5 U.S.C. §§7106, 7121(c). *See also* 873 Govt. Emp. Relations Rep. 9 (8/4/80) (hereinafter GERR); Coleman, *The Civil Service Reform Act of 1978: Its Meaning and Roots,* 31 Labor L.J. 200 (1980).

[5]5 U.S.C. §7103(a)(9). By agreement, the parties may reduce the scope of their grievance procedure, 5 U.S.C. §7121(a)(2).

[6]5 U.S.C. §7121(c).

[7]5 U.S.C. §§7121(a), (b). While any employee can raise a grievance, only the union can move it to arbitration. 5 U.S.C. §§7121(b)(3)(A), (C).

[8]5 U.S.C. §7121(e)(1) involving matters arising under 5 U.S.C. §§4303 and 7512 "and similar matters which arise under other personnel systems." There are apparently more than 20 of these. *Legis. History Title VII, supra* note 3, at 1371. The MSPB is a spinoff from the old Civil Service Commission, succeeding to its past adjudicatory functions. See Elkouris supp., *supra* note 3. It is composed of three members appointed by the President, and confirmed by the Senate, to one-time seven-year terms. 5 U.S.C. §§1201, 1202(a), 1202(d). The MSPB has, through statute and extensive regulations, established an "appellate" procedure from agency actions including a "presiding officer" step allowing for prehearing discovery as well as setting forth hearing conduct, including taking of a transcript. An appeal or "review" of the presiding officer's decision can be

An arbitrator hearing an adverse action case is required to find that a removal or a grade reduction for unacceptable performance was supported by substantial evidence. Any other adverse action must be supported by the preponderance of the evidence.[9]

The appeal from an arbitration decision concerning an adverse action is to the U.S. Court of Appeals or Court of Claims.[10] Only the employee can appeal to the courts.[11] And an agency action upheld by the arbitrator can be overturned if, from the record, the court finds the agency action to be arbitrary, capricious, an abuse of discretion, not in accordance with law, obtained without lawful procedures, or unsupported by substantial

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made to the Board itself which, by its procedures, may hear oral argument and allow for filing briefs. A review may occur when it is "established" that the presiding officer's decision is based on an erroneous misinterpretation of a statute or regulation as shown by a petition for review. See 5 CFR §§1201.4-117. *See also Note, Federal Employment—The Civil Service Reform Act of 1978—Removing Incompetents and Protecting Whistle Blowers,* 26 Wayne L.Rev. 97, 108–110 (1979). The MSPB has ruled it has the authority to reduce penalties in adverse action matters. *Douglas* v. *V.A.,* MSPB Docket No. NY05209013, Apr. 13, 1981, 909 GERR 12, 42 (4/20/81).

[9]5 U.S.C. §§7121(e)(2), 7701(c)(1). The MSPB is bound to these standards under the latter section as well as being required to reverse an agency decision if there was "harmful error" in the application of its procedures or they were not in accordance with law. 5 U.S.C. §7702(c)(2). These latter criteria were not specified to be applied by arbitrators but, presumably, would come before them in any event. The MSPB has defined "substantial evidence" as: "That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." It has defined "preponderance of the evidence" as: "That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more like to be true than not true" (5 U.S.C. §§1201.56(c)(1), (2)). The substantial evidence standard is that applied in *Universal Camera* v. *NLRB,* 340 U.S. 474, 27 LRRM 2373 (1951); *Parker* v. *Def. Log. Agency* (MSPB), 850 GERR 7 (2/25/80). *See also* 809 GERR 9–10 (5/7/79), 811 GERR 9–11 (5/21/79). In remarks added to the Congressional Record because the conference report came at the end of the session, which "forced the conference documents to be less helpful than normal," Rep. Ford pointed out that the substantial evidence standard has to be applied by the initial triers of fact. "Therefore, the burden [of the task] is greater than that of an appellate body. They are responsible for developing the record." The triers of fact must decide, before admitting evidence, if it is "reliable, probative, and relevant. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera, supra* at 488; II *Legis. History Title VII, supra* note 3, at 2003, 2014–2015. The substantial evidence test was adopted "because of the difficulties of proving that an employee's performance is unacceptable. . . ." *House-Senate Conference Committee Report,* 781 GERR 65 (10/16/78) (hereinafter *Conference Report*). This is probably a lesser standard of proof than applied in many private-sector arbitration cases. *See* Elkouri and Elkouri, How Arbitration Works, 3d ed. (Washington: BNA Books, 1973), 622. For a discussion of this subject generally, *see* Clarke, *Substantial Evidence and Labor Arbitration in the Federal Sector,* 31 Labor L.J. 368 (1980).

[10]5 U.S.C. §§7121(f), 7703. The agency is named as the respondent. 5 U.S.C. §7703(a)(2).

[11]5 U.S.C. §7703(a)(1). *See also* 5 U.S.C. §7703(d).

evidence.[12] Although no trial de novo is held at the circuit court level, the court's statutorily required review amounts to that. The court must look at the agency's action, not the regularity or irregularity of the arbitration process or award.[13]

Once an employee selects his or her avenue of appeal, he or she cannot backtrack.[14] The statute is silent as to what occurs if an employee chooses the route of the negotiated grievance procedure but the union which negotiated it, and which by statute has the exclusive right to bring a case to arbitration, declines to do so or settles the case short of arbitration. Presumably, this is a risk known to an employee when he or she opts for the grievance procedure route. Collateral litigation on the fairness of union representation in such an instance, however, may occur.[15]

Other Nondiscrimination Cases—The FLRA

What is included in this channel are disciplinary cases of up to a 14-day suspension—not harsh enough to be adverse actions —and any other matter covered by a negotiated grievance procedure, keeping in mind the broad types of extra-contractual claims that can be encompassed under the definition of a grievance.[16] In these situations, the negotiated grievance procedure is the sole procedure which may be followed.

After the arbitration hearing, either party to the case may file "exceptions" to the award with the Federal Labor Relations Authority (FLRA) within 30 days of the date of the award. If not, the award is final and the agency must observe it.[17]

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[12]5 U.S.C. §7703(c). See remarks of FLRA Chairman Haughton, 838 GERR 8 (11/26/79). The mandatory transcript of the MSPB proceedings and the need of the court to have a record should spur the parties, if not the arbitrator, to have a transcript as well. "The provision for judicial review is intended to assure conformity between the decisions of arbitrators with those of the [MSPB]. Under the terms of this subsection, an arbitrator must establish a record that will meet the judicial tests provided for in section 7702. . . ." *Senate Report No. 95-969*, 4 U.S. Code Congressional & Administrative News (Govt. Affairs Comm.), July 10, 1978, p. 2833 (hereinafter *Senate Report*).

[13]*Conference Report, supra* note 9, at 66, states that the statute "adopts the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies."

[14]5 U.S.C. §7121(e)(1).

[15]The union's exclusive right to decide whether or not to take a case to arbitration requires that the decision be made in "good faith." *Senate Report, supra* note 12, at 2832. See *Tidewater Virginia Fed. Emps. Metal Trades Council/IAM Local 441 and Burns and Norfolk Naval Shipyard*, 2/3/81, 901 GERR 8 (2/23/81), regarding unfair labor practices involving union not fairly representing nonmembers.

[16]See text accompanying note 5–7, *supra*.

[17]5 U.S.C. §§7112(b), 7122(b).

The FLRA consists of three members appointed to five-year terms by the President and confirmed by the Senate.[18] It is charged with providing "leadership in establishing policies and guidance relating to matters" under the statutory provisions dealing with federal-sector collective bargaining.[19] Involved with numerous duties roughly equivalent to those of the NLRB, it also is required to "resolve exceptions to arbitrator's awards."[20] It can find an award "deficient" on the basis that "it is contrary to any law, rule, or regulation" or "on other grounds similar to those applied by Federal courts in private sector labor relations."[21]

The FLRA standards of these latter grounds are that the arbitrator's award " 'can[not] in any rational way be derived from the agreement'; or is 'so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement' as to 'manifest an infidelity to the obligation of the arbitrator'; or that it evidences a 'manifest disregard of the agreement'; or that on its face the award does not represent a 'plausible interpretation of the contract. . . .' "[22] Mere disagreement with the arbitrator's decision is insufficient grounds to have a petition for review even considered,[23] and, as in the private sector, disagreements with findings of fact will not set an award aside.[24] But if an arbitrator's award from its face is based on a "nonfact," which misapprehension was not chargeable to the parties, was a matter which is "objectively ascertainable," and was the central matter on which the decision was based, then the award will be overturned.[25]

Additional grounds where the FLRA has indicated it could find an award "deficient" include situations where the arbitrator would determine an issue not included in the subject matter

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[18] 5 U.S.C. §§7104(a)–(c).
[19] 5 U.S.C. §7105(a)(1).
[20] 5 U.S.C. §7105(a)(2)(H).
[21] 5 U.S.C. §§7122(a)(1)(2).
[22] *Army Missile Materiel Readiness Command and AFGE Local 1858,* 2 FLRA No. 6, pp. 5–6. *See also Red River Army Depot and NAGE Local R 14-52,* 3 FLRA No. 32 (1980).
[23] *Ibid. FAA Science and Tech. Assn. and FAA,* 2 FLRA No. 85 (1980); *VA Hospt. and AFGE Local 331,* 3 FLRA No. 34 (1980); *VA and AFGE Local 1985,* 3 FLRA No. 91 (1980).
[24] *VA and AFGE Local 2146,* 5 FLRA No. 31 (1981); *Social Security Admin. and AFGE Local 2193,* 5 FLRA No. 33 (1981), 908 GERR 9 (4/13/81).
[25] *Army Missile Materiel Readiness Command, supra* note 22, citing *Electronics Corp. of America* v. *IUE Local 272,* 492 F.2d 1233, 85 LRRM 2534 (1st Cir. 1974). The burden is on the party seeking to overturn the award. *Social Security Admin., supra* note 24.

submitted to arbitration;[26] if an award was to be so incomplete, ambiguous, or contradictory that implementation of it is impossible;[27] or if the arbitrator failed to conduct a fair hearing by refusing to consider evidence that is relevant or material.[28]

If the FLRA determines that an award is "deficient," it can take such action as it deems necessary, "consistent with applicable laws, rules, or regulations." No direct judicial review is available from either an unappealed arbitrator's award or an FLRA ruling "unless the order involves an unfair labor practice."[29] The FLRA has indicated that if a party does not comply with an award, the winning party must pursue and win an unfair labor practice charge before the FLRA, and then, if the losing party still refuses to comply, the winner will finally get a court-ordered enforcement of the award of the FLRA by the circuitous route of enforcing the unfair labor practice decision.[30]

The FLRA has issued sparse regulations as to how it exercises its authority to review arbitration awards. It does demand strict adherence to the statutory 30-day filing period, requiring that the filing contain the arguments of the petitioner, and then gives 30 days for a response.[31]

Two other areas of FLRA authority directly impact on the arbitration process. First, when a case is being reviewed for

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[26] *Dept. of Air Force and AFGE Local 1364,* 5 FLRA No. 7 (1981); citing *Dept. of Air Force and AFGE Local 1778,* 3 FLRA No. 38 (1980) and *Fed. Aviation Science and Tech. Assn. Local 291 and FAA,* 3 FLRA No. 38 (1980).

[27] *VA Hospt. and NAGE Local R1-109,* 5 FLRA No. 12 (1981), citing *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960); *Bell Aerospace* v. *Local 516 UAW,* 500 F.2d 921, 86 LRRM 3240 (2d Cir. 1974); *UMW Dist. 2* v. *Barnes & Tucker Co.,* 561 F.2d 1093, 96 LRRM 2144 (3d Cir. 1977).

[28] *National Border Patrol Council and INS,* 3 FLRA No. 62 (1980), citing *Harvey Aluminum* v. *Steelworkers,* 263 F.Supp. 488, 64 LRRM 2580 (C.D.Ca. 1967); *Shopping Cart, Inc.* v. *Amal. Food Emps. Local 196,* 350 F.Supp. 1221, 82 LRRM 2107 (E.D.Pa. 1972); *Newark Stereotypers Union 18* v. *Newark Morning Ledger,* 261 F.Supp. 832, 64 LRRM 2024 (D.N.J. 1966), *aff'd,* 397 F.2d 594 (3d Cir.), *cert. den.,* 393 U.S. 954 (1968); Aaron, *Some Procedural Problems in Arbitration,* 10 Vand.L. Rev. 739 (1957).

[29] 5 U.S.C. §§7122(a)(1), (2).

[30] *Army Communications Command and AFGE Local 1662,* 2 FLRA No. 101 (1980). *See also* 895 GERR 6 (1/12/81), 5 U.S.C. §§7123(c), (d). Direct judicial review of arbitration awards was not adopted in the CSRA. *Legis. History Title VII, supra* note 3, at 1062. *But see Columbia Power Trades Council* v. *U.S. Dept. of Energy, Bonneville Power Admin.,* 1979–80 Pub. Barg. Cases ¶37,115 (W.D.Wa. 8/22/80). One case to test this question at the time of this writing is *AFGE Local 1286 and FLRA* (D.D.C. No. 80-2015), 905 GERR 8 (3/23/81).

[31] 5 C.F.R. §§2425.1, .2. Given governmental hierarchies, including that technical claims of violations of law or regulation may more likely be raised at central headquarters than in more remote areas where the case may have been heard, the timeliness requirement may bar valid exceptions from being considered. In one case the FLRA reconsidered a decision in which a petition had been untimely filed, based on later filed documentation. *Immigration and Naturalization Service and AFGE Local 1656,* Case No. 0-AR-81 (6/26/80).

compliance with law, rule, or regulation, the problem is determining which rules or regulations are to be considered.[32] They must predate the collective bargaining agreement[33] or have been later enacted on less than a government-wide basis because of "compelling need."[34] If so enacted, they may be challenged by the union before the FLRA in an independent proceeding. It appears that the challenge must be made at the time the regulations are sought to be imposed, not for the first time in arbitration.[35] Otherwise, they will be binding on the parties to the arbitration matter. Nonetheless, experience teaches that an arbitrator in the first instance, and the FLRA in the second, need to interpret regulations. Both forums also will be required to determine what legal effect to give those regulations that the parties contend are controlling as to whether they are entitled to be considered as lawful.

The second area where FLRA authority impacts directly on the arbitration process involves a more familiar role for the arbitrator, which has been institutionalized in the legislation. All federal service agreements must contain provisions for arbitrability determinations. Although not specified, the expected route of these determinations—without distinction as to substantive or procedural questions—will be to the arbitrator and, on review, to the FLRA.[36] The FLRA has by decision adopted the private-sector rule that procedural arbitrability determinations are solely for the arbitrator.[37]

This authority has already had specific impact on statutory interpretation. In one instance a probationary employee was fired. He sought to arbitrate his dismissal. The agency contended, and the arbitrator agreed, that the matter was not arbi-

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[32] *See generally* Elkouris supp., *supra* note 3, at 15–19; Smith & Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 Hastings L.J. 855, 879 (1980).

[33] 5 U.S.C. §7116(a)(7), making it an unfair labor practice to seek to enforce a post-dated rule or regulation except ones dealing with prohibited personnel practices under 5 U.S.C §2302.

[34] 5 U.S.C. §§7117(a)(2), (3), dealing with duty to bargain.

[35] 5 U.S.C. §§7117(a)(2), (b), 5 C.F.R. §2424.11.

[36] 5 U.S.C. §7121(a)(1). The *Conference Report, supra* note 9, at 70, stated that all questions concerning orders "to proceed to arbitration will be considered at least in the first instance by the . . . FLRA."

[37] *EPA and NFFE Local 1907*, 5 FLRA No. 36 (1981), 908 GERR 10 (4/13/81), citing *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 55 LRRM 2773 (1964), and *Tobacco Workers Local 317* v. *Lorillard Corp.*, 448 F.2d 949, 78 LRRM 2273 (4th Cir. 1971). Strict adherence by the arbitrator to the parties' negotiated grievance procedure will not overturn the award. *EPA, supra*, citing *Chambers* v. *Beaunit Corp.*, 404 F.2d 128, 69 LRRM 2732 (6th Cir. 1968); *Newspaper Guild Local 10* v. *Philadelphia Newspapers, Inc.*, 87 LRRM 2670 (E.D.Pa. 1974); *Amer. Can Co.* v. *United Papermakers*, 356 F.Supp. 495, 82 LRRM 3055 (E.D.Pa. 1973).

trable, based on the statutory exemption from arbitration of "any examination, certification, or appointment." The FLRA reversed, holding that probationary status was not part of any of these.[38]

In another case the FLRA has seemingly adopted a view that even if arbitrability is raised, a case cannot be found nonarbitrable based on the statutory provision reserving specific rights to management. The FLRA held that the impact of that statute was to be resolved either with respect to the merits, or remedy, but if a particular agreement section was alleged to be violated, the management rights statute does not "in and of itself prevent an arbitrator from deciding if there has been a violation of a particular contract provision."[39] These cases portend an apparent willingness by the FLRA to interpret the CSRA broadly, thereby enhancing the substantive and symbolic importance of the bargaining agreement and the arbitration process.[40]

Discrimination Cases

If an employee alleges that an agency action involves discrimination against him or her,[41] an extraordinary system of hearings and appeals comes into play. Fortunately, the arbitration aspects are among the simplest of the tortuous paths that may be followed. The employee has the option to use the negotiated grievance procedure or other routes to pursue his or her claim. Once having opted for arbitration, the employee is foreclosed from pursuing any other procedure, at least until the arbitration award is in.[42]

An appeal from the award not involving an adverse action can be made to the FLRA by either party as in any nondiscrimination case. Thereafter, in that case or in an adverse action case, a variety of things can occur, depending on how the claim is le-

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[38]*AFGE and U.S. Dept. of Labor,* FLRA Case 0-AR-60, 884 GERR 8, 59 (10/20/80).

[39]*Marine Logistics Support Base and AFGE,* 3 FLRA No. 61 (1980), interpreting 5 U.S.C. §7106.

[40]For reaction to these types of determinations and reaction to FLRA independence generally, *see* address of OPM Asst. Dir. A. F. Ingrassia to Dept. of Defense Labor Management Relations Conference, 1/23/80, 847 GERR 35–37 (2/4/80). *See also* Ingrassia, *Reflections on the New Labor Law,* 30 Labor L.J. 539 (1979), and 848 GERR 9 (2/11/80).

[41]"Discrimination" as used here is synonymous with "prohibited personnel action," including discrimination based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation as prohibited by law. 5 U.S.C. §§2302(b)(1)(A–E), 7121(d).

[42]5 U.S.C. §7121(d).

gally characterized. In these instances, the employee can bring his or her claim, now presumably including an unfavorable arbitration decision, to the MSPB, the EEOC, and/or the federal courts.[43] In instances where the MSPB could hear the case initially, it can go to the MSPB, the EEOC, back to the MSPB, and then to a mixed MSPB-EEOC special panel with a neutral member also sitting.[44] From there it can still go to federal court. At these steps and in the courts, the matter may be viewed de novo.

For the curious reader, I have appended two charts with notes prepared by, and with the courtesy of, FLRA Assistant Chief Counsel C. Brian Harris tracing these procedures. I have also included the House-Senate Conference Committee Report, giving its explanation of what Congress has wrought. The reader should note, among other things, the committee's listing of *eight* different times during these processes when an employee has an opportunity to move the matter to the federal court.[45]

Finally, it should be noted that none of this has affected the rights of an employee to go directly to the EEOC, thereby bypassing the entire CSRA scheme, but using it only to raise

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[43]A case which the MSPB may hear is a "mixed" case. If it had no jurisdiction over the matter, it is a "pure" case. The MSPB's jurisdiction is described as "any personnel action that could be appealed to the MSPB" under 5 U.S.C. §7121(d) and an employee can appeal to the MSPB "from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. §7701(a). OPM has identified 28 categories of instances where this can occur. Eighteen of those identified possibly as being subject to arbitration (and the FLRA may or may not have a broader interpretation) are: adverse actions (5 U.S.C. §7512); removal or demotion for performance deficiencies (5 U.S.C. §4303); overtime pay under the Fair Labor Standards Act (P.L. 93-259); withholding of within-grade salary increases (5 U.S.C. §5335); actions against administrative law judges (5 U.S.C. §7521); OPM administered employment practices, except examinations, certifications, or appointments (5 C.F.R. §300.104); reductions in force (5 C.F.R. §351.901); violations of reemployment priority rights (5 C.F.R. §330.202); restoration to duty after military service (38 U.S.C. §2023) or recovery from compensable injury (5 C.F.R. §353.401); reemployment rights based on movement between executive agencies during emergencies (5 C.F.R. §352.209), following details or transfers to international organizations (5 C.F.R. §353.313), after service under the Foreign Assistance Act of 1961 (5 C.F.R. §352.508), in the Economic Stabilization Program (5 C.F.R. §353.607) and the Indian Self-Determination Act (5 C.F.R. §352.707); grade and salary retention under the CSRA (5 U.S.C. §5337 and 5 C.F.R. §531.517), and termination of such benefits based on refusal to accept a reasonable offer (5 U.S.C. §5366); and removal based on adverse suitability rating (5 C.F.R. §754). Untitled OPM compilation.

[44]The MSPB has, by regulation, determined to view any discrimination appeal from an arbitration award (and in nonadverse action cases, the FLRA) de novo. 5 C.F.R. §§1201.152, 157. *See* 5 C.F.R. §1201.154 for how the MSPB seeks to deal with late-filed discrimination claims.

[45]*See also* Elkouris supp., *supra* note 3, at 8–9. Congress bypassed proposals which would have skipped all of this for direct appeal to the district court from either the MSPB or an arbitration decision. Ink, *President's Reorganization Project, Personnel Management Project, Final Staff Report, Dec. 1977, Legis. History Title VII, supra* note 3, at 1483. Instead, Congress became embroiled in determining which could better handle this type of claim, the MSPB or the EEOC. *See* remarks of Sen. Glenn, *Senate Report, supra* note 12, at 2852.

contract or statutory claims and reserving discrimination ones initially for the EEOC and ultimately, if necessary, for the courts de novo.[46]

Noblesse Oblige

By statute, both the FLRA and the MSPB are to be independent agencies.[47] Yet, at least as to the FLRA, there has been one severe instance of failing to so act.

Under the statute, the FLRA ". . . *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."[48]

The Office of Personnel Management (OPM) inherited the managerial authority of the Civil Service Commission. It sets the personnel standards to be followed by federal agencies.[49] On its establishment, the President described OPM's director as "the government's principal representative in Federal labor relations matters."[50] Its management has attacked the FLRA for how it has asserted its authority to date, maintaining that the FLRA has significantly expanded its mandate beyond what Congress intended.[51] Yet, in at least two cases, the FLRA obtained an advisory opinion from OPM as to how to interpret law and relied thereon for its decision. In one case, it was reported that OPM's opinion was contrary to the appealing agency's opinion.[52] In another, OPM's opinion, where it was obtained by the FLRA and then circulated to the parties who didn't comment, was relied on by the FLRA to reverse the award.[53]

This practice, if it becomes one, of getting such opinions is a bad one—not unlike letting the fox into the hen house. In its

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[46]5 U.S.C. §2000e-16, Reorganization Plan No. 1, in annot. to 5 U.S.C. §2000e-4 (*see* note 3, *supra*). A de novo court hearing is assured. *E.g., Vetter* v. *Frosch,* 599 F.2d 630 (5th Cir. 1979). *See* generally Martin, *Equal Employment Opportunity Complaint Procedures and Federal Union-Management Relations: A Field Study,* 34 Arb. J. 34 (1979).

[47]*E.g., Senate Report, supra* note 12, at 2729.

[48]5 U.S.C. §7105(i) (emphasis supplied).

[49]*See* Elkouris supp., *supra* note 3, at 4, 5 U.S.C. §1104(b)(1). The MSPB can review OPM rules and regulations for legality. 5 U.S.C.§§1205(a)(4), (e).

[50]President Carter's message to Congress, May 23, 1978, in annot. to 5 U.S.C. §1101.

[51]*See* note 40, *supra.*

[52]*VA Hospt. and AFGE Local 2201,* 4 FLRA No. 57, 886 GERR 10–11 (11/3/80).

[53]*National Bureau of Standards and AFGE Local 2186,* 3 FLRA No. 98 (1980).

statutorily mandated "leadership" role,[54] the FLRA must, of course, be impartial between labor and management. It has the independent role of determining whether or not to uphold arbitration awards, and it must make those decisions itself. It cannot rely upon the invited opinions of management's principal executive. If OPM wants to participate in the arbitration process, it should do so as a party, and Congress has indicated an intent to allow it to petition to intervene in FLRA exception proceedings.[55] Since it is fair to assume that OPM will attempt to keep track of decisions in which it has an interest, such intervention is far more appropriate a role for management's representative than a participatory role in the decision-making process of the FLRA. Clearly, the FLRA, not OPM, is to make the necessary decisions when exceptions to arbitration awards are lodged.

But the OPM skirmish is only that. A much greater threat to the arbitration process in the federal service continues to come from the Comptroller General. An arm of the Congress, the Comptroller General's legislative role and consummate interference with arbitration prior to the new statute has been well spelled out for the Academy by Alexander Porter and Howard Gamser as well as elsewhere.[56] As the watchdog of the propriety of federal expenditures, it had sharply limited arbitrators' remedy authority, especially the use of back pay to correct contract violations before the CSRA. In fact, the Comptroller General put out its own manual of what remedies were or were not awardable by arbitrators.[57]

Congress, in the CSRA, did two things about this. It first expressly made final an unappealed arbitration award or an FLRA decision, requiring an agency to follow it unimpeded by the Comptroller General. And it amended the Back Pay Act of 1966 to allow monetary recovery for an "unjustified or unwarranted personnel action" which has affected the grievant's pay.[58] It did this notwithstanding at least testimony and half a dozen pleas by the Comptroller General before the appropriate legislative committees. In one such plea it described its role in federal service arbitration as "a positive one. We have upheld

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[54]See text accompanying note 19, *supra*.
[55]*Conference Report*, *supra* note 9, at 70.
[56]Porter and Gamser, *supra* note 3; Kagel, *supra* note 1.
[57]Gamser, *supra* note 3, at 277, note 28.
[58]5 U.S.C. §§5596(b), 7122(b).

most arbitration awards that have been referred to us . . . ," stating that it would overrule an arbitration award only as it would a decision from an agency head.[59] Specific amendments introduced in the House Committee to this effect were not adopted.[60]

Undaunted, in September 1980 the Comptroller General published a new set of regulations. They allow parties to get advisory opinions, provided the requesting party served the request for that opinion on the other party to the dispute, allowing that party to file a written response.[61] They allow "arbitrators and other neutral parties authorized to administer 5 USC Chapter 71" to likewise request such an opinion from the Comptroller General in any case "which is of mutual concern to Federal agencies and labor organizations." Service of the request is "discretionary" in this instance.[62]

While admitting that payments pursuant to a final arbitration award "will be conclusive on GAO in its settlement of accounts" and "the Comptroller General will not review or comment on the merits of such an award," the regulations went on: "*However, such payments made pursuant to such an award do not constitute precedent for payment in other instances not covered by the award.*"[63]

The Comptroller General's regulations are asserted to be based on statutes giving federal officials the right to opinions as to whether claims may be paid from government funds, the same ones on which it pleaded its case to Congress to no avail.

Consider the impact of these regulations: Ideally, parties in the traditional collective bargaining setting try to do two things. The first is to settle as many grievances as they can short of arbitration, and, second, if they go to arbitration, generally they will use the arbitration award to resolve and give guidance in like cases that arise between them in the future—at least until their

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[59]*Legis. History, supra* note 3, at 747; *Legis. History Title VII, supra* note 3, at 1096, 1102, 1103, 1120–1121, 1127.

[60]*Legis. History, supra* note 3, at 693–694; *Legis. History Title VII, supra* note 3, at 1092.

[61]4 C.F.R. §§21.2–4.

[62]4 C.F.R. §§21.5(a), (b). It should be noted that arbitrators are bound to assume full personal responsibility for the decision in each case. Since an arbitrator may not consider submissions of one party that have not been provided to the other, it cannot be understood how, ethically, an arbitrator could, without such "service," use this process, even assuming there is no breach of the duty to take full personal responsibility for the award. *See* NAA, AAA, FMCS, *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (1974), ¶¶59, 125. To the extent that the law may allow the arbitrator to base an award on information not obtained at the hearing, the arbitrator may be required to disclose it and allow the parties to meet it. *E.g., Calif. Code of Civil Proc.*, §1282(g).

[63]4 C.F.R. §21.7 (emphasis supplied).

collective bargaining agreement is amended through negotiations. With its historic antipathy to arbitration and its tradition of interference in the federal service collective bargaining process,[64] the Comptroller General has expressed a view that will continue to thwart these goals. As seen, the Comptroller General has only begrudgingly acceded to Congress's will as to actual arbitration awards themselves, contrary to what a grievance and arbitration system is intended to accomplish—to provide means of peaceful and final dispute resolution which thereby reduce employer-employee tensions.

The Statute and the Arbitrator

On the whole, the arbitrator's role in the process retains many of its traditional characteristics. Specific note should be made that, while the CSRA confers subpoena authority on several agencies and officers, arbitrators are excluded from that list.[65] Unlike the private sector where no specific statute may confer such authority, but either state law or reference to the U.S. Arbitration Act has supplied subpoena power,[66] the CSRA is a specific statute which has not included that power for arbitrators. While eventually the general policy of encouraging the use of arbitration may, by extension, include the granting of such authority in federal-sector cases, arbitrators and the parties may have to be content with drawing adverse inferences against those who withhold witnesses or documents that subpoenas ordinarily might produce.[67] One route against a recalcitrant

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[64]Kagel, *supra* note 1, at 147. *But see* 765 GERR 6–8 (6/26/78) where the Comptroller General recommended the expansion of the scope and fairness of government grievance procedures.

[65]5 U.S.C. §§1205(b)(2), 7105(g), 7132.

[66]9 U.S.C. §7. *See* Kagel, *supra* note 1, at 27. *Great Scott Supermarkets* v. *Teamsters Local 337,* 363 U.S. 1351, 84 LRRM 2514 (E.D.Mich. 1973); Heinsz, Lowry, & Torzewski, *The Subpoena Power of Labor Arbitrators,* 29 Utah L.Rev. 29, 42–45 (1979).

[67]The contention that not listing arbitrators is an expression of congressional intent to exclude them from such authority may distinguish the CSRA from Section 301 of the Labor-Management Relations Act. There, it has been forcefully urged, the policy encompassed in Section 301 itself of favoring arbitration over industrial strife is the source of uniformly applied subpoena power. Heinsz et al., *supra* note 66, 48–51. The same arguments for subpoena authority should apply to the CSRA. *Cf. UPS* v. *Mitchell,* 451 U.S. 56, 49 LW 4378 (1981); *Teamsters Local 135* v. *Jefferson Trucking Co.,* 105 LRRM 2712 (7th Cir. 1980), *cert. den.,* 49 LW 3527 (1981); *Typographical Union* v. *Newspapers, Inc.,* 106 LRRM 2317 (7th Cir. 1981). A Freedom of Information request may be inadequate as a means of providing information. *NTEU* v. *IRS,* 862 GERR 5–6 (4/24/80) (D.D.C. 1980). One device that has been used is to file a discrimination claim (*see* text and note 46 *supra*) while independently pursuing the grievance, and then to use the investigation file as a form of discovery.

party might be an independent unfair labor practice to the FLRA, a time-consuming, collateral process. Moreover, without subpoena authority, nonparty witnesses or information, often crucial, could be beyond the reach of the parties to present to the arbitrator.

The primary impact of the statute on the arbitrator is in the area of interpreting laws, rules, and regulations, unless the parties have negotiated to exclude those considerations from their grievance procedure. This problem existed under the Executive Order predecessors to the statute, and it continues. A higher order of initial sophistication for the arbitrator will be needed to guide the parties to produce the relevant portion of regulations and statutes and administrative agency decisions, such as those of the FLRA, on which the arbitrator is to rely. For, quite clearly, the arbitrator, as the first link in one or more appellate chains, is serving as a magistrate in this regard. He or she should insist on transcripts. The practical burden, however, is on the parties to make the appropriate record on which a proper decision can be made.

That the matter may be reviewed once or multiple times, on a de novo basis, is not a new situation especially as it concerns discrimination, for that can occur in the private sector.[68] Whether reviewing agencies or courts will give deference of any particular kind to arbitrators' decisions, as may occur on at least a limited basis in the private sector, remains to be seen.[69]

The arbitrator will need to know—or at least need to attempt to find out—what particular route his or her decision will take in terms of potential appeal. Adverse actions require the arbitrator to apply statutorily mandated burdens of proof in varying situations. Obviously, knowledge of these requirements is necessary to do the job properly.[70]

In terms of remedy, since the arbitrator acts independently, but nonetheless within the law as he or she interprets it and as it may be reviewed under the statute, a Comptroller General manual of preordained remedies is inappropriate. But, given the Comptroller General's predilection to volunteer its opinion, arbitrators may have to deal with its advisory opinions and adopt

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[68]*Alexander* v. *Gardner-Denver, supra* note 1.

[69]*E.g., ibid.,* note 21; *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955). That the MSPB will not do so in discrimination cases is shown by its regulations. See note 45 *supra.*

[70]*See* note 9 *supra.*

or reject them as the arbitrator independently interprets the relevant law.

One area of remedy deserves mention. The statute specifically authorizes payment of attorney's fees if an employee prevails in a case where he or she wins back pay in a grievance if "warranted in the interests of justice" or, if in a discrimination case, in accordance with the 1964 Civil Rights Act.[71] Arbitrators, accordingly, will be asked, and are authorized, to award such fees. The MSPB, which has the same authority,[72] has issued decisions which allow attorney's fees, maintaining that it has substantial discretion by statute in this regard. It has developed an "illustrative" list of when such fees are warranted: When prohibited personnel practices as defined by statute have been shown to exist; that the agency's action was "clearly without merit" or "wholly unfounded"; where the employee is "substantially innocent" of whatever charges are brought; if bad faith or harassment by the agency has occurred; where gross procedural error prolonging proceedings or resulting in "severe prejudice" has taken place; if a determination has been reached that the agency "knew or should have known it would not prevail on the merits"; or agency officials "unjustifiably fail to undertake prudent fiscal inquiries, which would have led the agency to discover at the outset that the removal action was wholly unfounded." Legal fees which are the responsibility of the appellant-employee's union have been ordered paid by the MSPB.[73] Since the authority of the arbitrator and the MSPB is the same in awarding attorney's fees, at a minimum the former should at least match the latter's standards.[74] Not only would the employee have, in many instances, opted for arbitration instead of MSPB hearings but, further, such payments, being authorized by statute, are thus necessarily within the expectation of the parties as part of the federal sector arbitration process.[75]

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[71] 5 U.S.C. §§5596(b)(1)(a)(ii), 7701(g)(1), (2).

[72] 5 U.S.C. §7701(g).

[73] 873 GERR 7–8 and cases cited therein (8/4/80); *Conference Report, supra* note 9, 66. *See also* 899 GERR 8 (2/19/81).

[74] *See* 824 GERR 5, 33 (8/20/79).

[75] The MSPB has ruled that fee awards must be conservative: "[A] fee award . . . must not provide a windfall to counsel at the expense of the public fisc." The MSPB has required that counsel's customary hourly billing rate, or any special rate if lower, is the starting point for determining the amount of fees, after the amount of billed hours has been scrutinized for duplication or padding. The amount may then be increased for quality of performance, the handling of an unusually unpopular cause, and any contingency factor where considered justified, citing *Lindy Bros. Bldrs.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 624 (6th Cir. 1979) and *Johnson* v. *Georgia Highway*

The Statute and the Parties

Attorney's fees are only one area where the statute has changed or challenged the traditional avenues of a grievance and arbitration system.[76] The burden of these remarks clearly underlines those distinctions without much necessity for further elaboration—review based on law; discovery of law as expressed in regulation; different standards of proof; appeal of all cases, including appeals to the courts on the merits, let alone varied forms of appeal based on varied circumstances; an array of avenues to pursue grievances, some, especially in the discrimination area, with bewildering, if not unknown, consequences. Moreover, there is evidence that the arbitration process has not been fully understood by, nor its nuances of straightforwardly seeking a full, fair, impartial, and final determination fully known to both federal management and union personnel.[77]

The statute can be viewed as requiring unions, without union security clauses to finance their efforts, to bargain about a myriad of subjects except such vital items as wages, but to necessarily include arbitration clauses where grievances may be unlimited in their scope. If a legal duty of fair representation—and potential liability—is imposed on federal-sector unions in their roles as exclusive bargaining agents,[78] there is no reason to expect their experience will not parallel private-sector unions' increased use of arbitration to avoid or minimize liability. But in doing so, they may have to take the case much further since the federal-sector processes are so much more complex. And, at the same time, despite some progress, Congress has apparently not corralled its own watchdog, the Comptroller General.

All should not be viewed negatively by this catalogue. There is vast diversity among federal activities, managers, and unions. Some are very sophisticated and have utilized arbitration under

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Express, 488 F.2d 714 (5th Cir. 1974), 873 GERR 8–9 (8/14/80). Arbitrators have awarded such fees. *See* 824 GERR 5–6, 33 (8/20/79). It is assumed that if fees are granted, their computation would initially be remanded to the parties, the arbitrator retaining jurisdiction to determine fees if the parties cannot agree.

[76]*Cf. Litton Systems* v. *Local 572,* 90 LRRM 2964, 3177 (S.D.Ohio 1975).

[77]*E.g.,* 803 GERR 29–38 (3/26/79); Sulzner, *The Impact of Grievances and Arbitration Processes on Federal Personnel Policies and Practices: The View from Twenty Bargaining Units,* 9 J. Coll. Neg. in the Pub. Sector 143 (1980). *See also* 908 GERR 9 (4/13/81).

[78]*See* note 15, *supra.* Lack of funding by the prohibition on union security clauses, 5 U.S.C. §7115, or otherwise, early began to take its toll in terms of the ability of unions to finance appropriate administration of a statutory grievance procedure, requiring a narrowing of its scope in bargaining. *See, e.g.,* remarks of A. F. Ingrassia, OPM Asst. Dir., SPIDR 7th Ann. Conf., 839 GERR 6 (12/3/79). *See also* 863 GERR 12–13 (5/26/80).

the new statute to achieve what it can at its optimum—resolution of disputes and reduction of industrial tensions.

Yet, if you recall our model of the traditional arbitration system, you can see that the federal model has strayed from it. While in several important respects it is better than what it supplanted, it still falls short of traditional arbitration in other significant ways. The federal-sector process may work in many instances to provide the kind of resolution of disputes that the traditional model does. But if either party chooses not to have it so work, then, unfortunately, there are numerous pitfalls and traps for the unwary—often for no apparent meritorious reason —written into the statute which can be used for delay or in other dilatory ways.

The result seems to be particularly tragic in the discrimination field. Numerous avenues of appeal have been created for the employee with a token claim, taking a high toll of employer time and money in two or three de novo hearings.[79] But for the employee with a proper and meritorious claim, he or she runs the risk of being thrown out of court for improper or nonexhaustion of administrative remedies, even though he or she may not be able to predict accurately what they are, in trying to get to a federal court which may be the place where that claim can get proper and appropriate recognition. This conclusion is patent from an examination of the statute. Yet the House and Senate conferees seem almost proud of the labyrinth that they created notwithstanding that it almost appears to mock law as a tool of governance.[80]

There had been urgings in the days of the Executive Order that Congress write a statute tailoring grievance arbitration in the federal service to mirror its counterpart in the private sector, maintaining that a statute was required to transfer effectively and fully the private model to the federal-sector job. Those of us who did so[81] did not contemplate what has occurred. It will, I venture, be far more difficult to enact a new statute to untie the complications of the current one that I have reported to you.[82]

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[79]In this instance the private sector is hardly a model. *See Aponte* v. *Nat'l Steel Serv. Center*, 24 FEP Cases 609, 613 (N.D.Ill. 1980).

[80]*Conference Committee, supra* note 9, reproduced *infra*.

[81]*See e.g.*, Kagel, *supra* note 1, 150.

[82]See remarks of FLRA member Applewhaite, 907 GERR 33 (4/6/81).

Suggestions

But, assuming a new statute were to be adopted, the following are suggestions of what it should contain to correct these problems. This short list does not address broader policy questions such as the scope of bargaining and the permissibility of effective union security clauses.[83]

Nonetheless, it is readily apparent that arbitration as a process in the federal sector is intended to reflect the traditional model of arbitration described earlier. To accomplish this within the context of federal employment, the following should be considered:

1. If a grievance is defined as being broader than the interpretation or application of an agreement to include questions of law, then review of arbitration decisions should be either by the FLRA or, if that body does not review it, by the federal district court. If the FLRA reviews an award and upholds it, a party should be allowed to secure its direct enforcement. Motions to vacate should also be allowed in the district court directly from an FLRA ruling to the contrary.

2. If Suggestion 1 is adopted, then no distinction need be made between types of cases of any kind, except to allow an employee the initial and sole option in adverse action cases as to whether to use the negotiated grievance procedure or an optional one such as the MSPB.

3. Discrimination cases should be handled as they are in the private sector, which assumes a trial de novo after either arbitration or MSPB handling without further ado.

4. The FLRA should require that any nonparty move to intervene if it wishes to participate in FLRA proceedings, and the FLRA should make its own decision.

5. The Comptroller General should be finally and fully eliminated as a factor in grievance and arbitration determinations. If fraud is alleged, already existing criminal process should be used.

6. Subpoena power of the arbitrator should be made specific.

These are relatively simple notions. But within the federal service, if they were to be adopted, the grievance and arbitration

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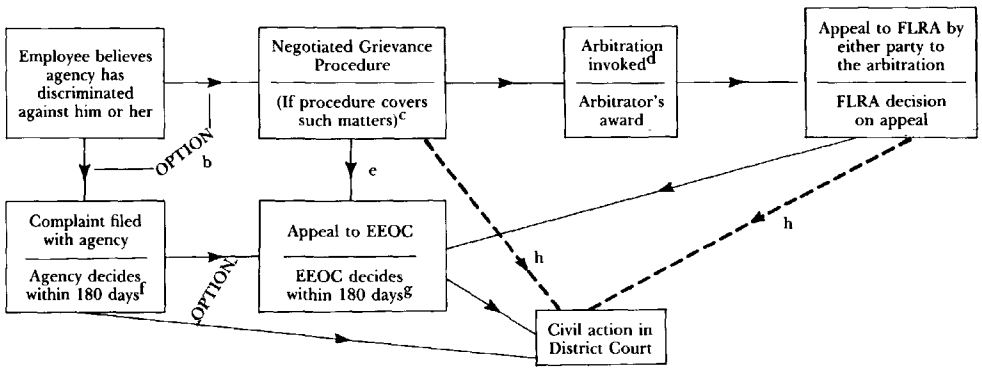
[83]Lack of union security fee protection, in the end, may denigrate any effort to move federal service employee representation to the quality and quantity of that provided in the private sector, even as to those matters which may be bargained about or grieved. See note 78 *supra*.

process would then more fully and fairly mirror the traditional arbitration process which has been so successful for resolving commercial disputes for the last four centuries, and labor disputes for at least the last two generations.

Pure Discrimination Case[a]



Prepared by Arbitration Division, Federal Labor Relations Authority (B. Harris).

[a]An allegation of discrimination that does not also involve a matter appealable to MSPB.

[b]A complaint of discrimination may, in the discretion of the aggrieved employee, be raised under a statutory procedure or the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing under the provisions of the grievance procedure, whichever occurs first. [5 U.S.C. §7121(d).]

[c]Any collective bargaining agreement may exclude any matter from the application of the grievance procedures. [5 U.S.C. §7121(a)(2).]

[d]A grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency. [5 U.S.C. §7121(b)(3)(C).]

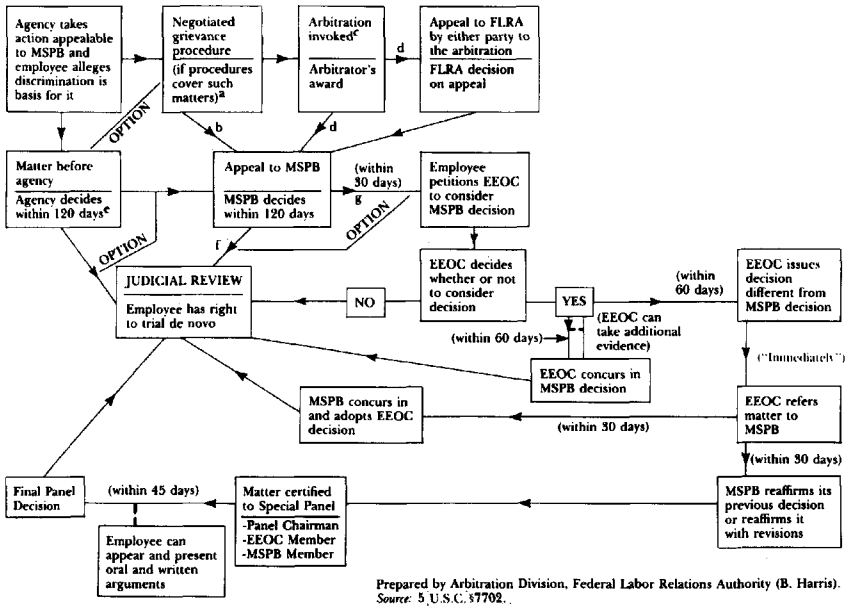
[e]Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request EEOC to review a final decision in a matter involving a complaint of discrimination of the type prohibited by any law administered by EEOC. Such "final decision" could conceivably come at a step of the grievance procedure prior to arbitration. [5 U.S.C. §7121(d).]

[f]An employee may file a civil action in an appropriate district court after 180 calendar days from the date of filing a complaint with his agency if there has been no decision. [42 U.S.C. §200e-16(c).]

[g]An employee may file a civil action in an appropriate district court after 180 calendar days from the date of filing an appeal with EEOC if there has been no EEOC decision. [42 U.S.C. §2000e-16(c); Reorganization Plan No. 1 of 1978.]

[h]An employee has an option, after a final agency action on his or her complaint of discrimination, to appeal to EEOC or to file a civil action in an appropriate district court (see figure). It is unclear as to whether this option exists if the employee chooses to pursue the matter through the negotiated grievance procedure since 5 U.S.C. §7121(d) only refers to the right of an employee to request EEOC to review a final decision. Thus it may be that an employee who chose the grievance procedure would have to go to EEOC before he or she could go to a district court.

Mixed Discrimination Cases



Prepared by Arbitration Division, Federal Labor Relations Authority (B. Harris).
Source: 5 U.S.C. §7702.

[a]Any collective bargaining agreement may exclude any matter from the application of the grievance procedures. [5 U.S.C. §7121(a)(2).]

[b]Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request MSPB to review the final decision. Such "final decision" could conceivably come at a step of the grievance procedure prior to arbitration. [5 U.S.C. §7121(d).]

[c]A grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency. [5 U.S.C. §7121(b)(3)(C).]

[d]Either party to arbitration may file an exception to any arbitration award with FLRA except for an award relating to a reduction in grade or removal for unacceptable performance (5 U.S.C. §4303); or a removal, suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less (5 U.S.C. §7512). Awards involving these matters may be appealed directly to MSPB. [5 U.S.C. §7122(a); 5 U.S.C. §7121(d).]

[e]If the agency doesn't decide within 120 days, an employee may appeal the matter to MSPB or file a civil action in court. [5 U.S.C. §7202(e)(2); 5 U.S.C. §7702(e)(1)(A).]

[f]An employee may obtain judicial review of the MSPB decision if the employee doesn't choose to petition EEOC to consider the decision. Also, the employee may file a civil action in court if MSPB doesn't decide within 120 days. [5 U.S.C. §7702(a)(3)(A); 5 U.S.C. §7702(e)(1)(B).]

[g]From this point on, if this path is followed, the total time frame for all the remaining steps may not exceed 180 days or the employee may file a civil action in court. [5 U.S.C. §7702(e)(1)(C).]

House-Senate Conference Committee Report on CSRA

Appealable Actions in Which Allegation of Discrimination Has Been Raised

Both the Senate bill and the House amendment adopt special procedures for resolving appealable actions where an allegation of discrimination is raised. The Senate bill provides that, whenever an issue of discrimination is raised in the course of a hearing before the Board, the Board must notify the EEOC and the EEOC has the right to participate fully in the proceeding. After action by the Board, the EEOC has an opportunity to review the decision and revise it. The Board may then accept the EEOC's decision, or issue a new one. Where the two agencies are unable to agree, the matter is immediately certified to the Court of Appeals for resolution. Before the Court of Appeals, the expertise of both the MSPB and the EEOC is to be given weight in their respective areas of jurisdiction. While the matter is pending in the Court, the EEOC is authorized to grant interim relief to the employee.

The House amendment allows the EEOC to delegate to the MSPB authority to make a preliminary determination in an adverse action in which discrimination has been raised, but it directs the EEOC to make the final determination in such cases. The decision of the EEOC constitutes final administrative determination in the matter, and there is no further review in the courts, unless the employee decides to appeal.

The conference substitute in section 7702 adopts the Senate approach at the administrative level, with some modifications, but it places an administrative tribunal, ad hoc in nature, at the apex of the administrative process, rather than depending upon the Court of Appeals to resolve conflicts between the two agencies. The conference substitute maintains the principle of parity between the MSPB and the EEOC and establishes an appropriate balance in regard to the enforcement of both the merit system principles of Title 5 of the United States Code and Title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination. At the same time it preserves for EEOC, as proposed in Reorganization Plan No. 1 of 1978, authority for issuing general policy directives implementing Title VII of the Civil Rights Act. This preserves an important policy role for EEOC which it may invoke, consistent with the requirements of law,

regardless of the outcome of a particular case. The conference substitute also protects the existing rights of an employee to trial de novo under the Civil Rights Act after a final agency action or if there is no administrative decision after a specified number of days.

Appeals Procedure

This section applies to both employees and applicants. In all mixed cases, that is, cases involving any action that could be appealed to the MSPB and which involve an allegation of discrimination, the MSPB will hold hearings and issue a decision on both the issue of discrimination and the appealable action. The EEOC will not participate in this proceeding. The term "decision" as used throughout this section includes any remedial order the agency or panel may impose under law.

It is expected that the Board will make adequate training and resources available for the training and supervision of these appeals officers provided for in section 7702(a) to avoid the possibility of inadequate preparation for the processing of those appeals matters which involve allegations of discrimination.

The decision of the Board shall be final agency action unless the employee files a petition with the EEOC to reconsider the case. In the case of class actions, the law generally governing the right of one or more members to appeal an initial decision shall be applicable in this case as well. If the EEOC decides to reconsider the MSPB decision, it may remand the case to the Board for further hearing or provide for its own supplemental hearing as it deems necessary to supplement the record. This amends the procedures established in the Senate bill which did not allow the EEOC to take additional evidence. In making a new decision, the EEOC must determine that: (1) the MSPB decision constitutes an incorrect interpretation of any law, rule, or regulation over which the EEOC has jurisdiction; or (2) the application of such law to the evidence in the record is unsupported by such evidence as a matter of law.

If the EEOC concurs in the decision of the Board, including the remedy ordered by the MSPB, then the decision of the Board shall be final agency action in the matter. If the EEOC decision differs from the MSPB decision, then the case must be referred back to the MSPB. The MSPB may accept the EEOC decision, or if the MSPB determines that the EEOC decision

(1) constitutes an incorrect interpretation of any civil service law, rule, or regulation; or (2) the application of such law to the evidence in the record is unsupported by such evidence, as a matter of law, it may reaffirm its initial decision with such revisions as it deems appropriate.

If the Board does not adopt the order of the EEOC, the matter will immediately be certified to the special three-member panel. The panel will review the entire administrative record of the proceeding, and give due deference to the expertise of each agency in reaching a decision. The employee and the agency against whom the complaint was filed may appear before the panel in person, or through an attorney or other representative. The decision of the special panel will be the final agency action in the matter.

Upon application by the employee, the EEOC may, as in the Senate bill, issue certain interim relief as it determines appropriate, to mitigate any exceptional hardship the employee might incur. The bill establishes mandatory time limits to govern the maximum length of time the employing agency, the MSPB, the EEOC, or the Panel may take to resolve the matter at each step in the process. The Act makes compliance with these deadlines mandatory—not discretionary—in order to assure the employee the right to have as expeditious a resolution of the matter as possible. The conferees fully expect the agencies to devote the resources and planning necessary to assure compliance with these statutory deadlines. The bill imposes a statutory requirement that the delays that have been experienced in the past in processing discrimination complaints will be eliminated. Where an agency has not completed action by the time required by this statute it shall immediately take all necessary steps to rapidly complete action on the matter.

It is not intended that the employing agencies, the Board, the Commission, or the special panel would automatically lose jurisdiction for failing to meet these time frames. Congress will exercise its oversight responsibilities should there be a systematic pattern of anybody failing to meet these time frames.

Rights of Employees Under Civil Rights Act

The conference substitute fully protects the existing rights of employees to trial de novo under Title VII of the Civil Rights

Act of 1964 or other similar laws after a final agency action on the matter. Under the Act's provisions, this final agency action must occur within 120 days after the complaint is first filed. After these 120 days, the employee may appeal to the Board or file a complaint in district court in those cases where the agency in violation of the law has not issued a final decision. If the employee files an appeal of the agency action with MSPB, the employee may file a suit in district court any time after 120 days if the Board has not completed action on the matter by that time. Finally, the Act gives the employee the right to sue in district court 180 days after it petitions EEOC to review the decision of MSPB even if the administrative process is not completed by that time, as required by other provisions in the section. Once the employee files a petition with EEOC, however, it may not bring an action in district court until the end of this 180-day period, or until there is final agency action on the matter.

There are in all eight different times when the employee may have the right to bring suit in Federal district court. They are as follows:

1. 120 days after filing a complaint with the employing agency even if the agency has not issued a final decision by that time.
2. 30 days after the employing agency's initial decision.
3. 120 days after filing a petition with the MSPB if the MSPB has not yet made a decision.
4. 30 days after an MSPB decision. If the employee petitions EEOC to review the matter and EEOC denies the petition, the 30-day period in this case runs from the denial of such a petition by EEOC.
5. 30 days after the EEOC decision, if EEOC agrees with the MSPB.
6. 30 days after MSPB reconsideration if MSPB agrees with the EEOC.
7. 30 days after the special panel makes a decision.
8. 180 days after filing a petition with the EEOC for reconsideration of an MSPB decision, if a final agency decision by EEOC, MSPB, or the Panel has not been reached by that time.

If a suit is brought in district court, the rules of equity provide that minor procedural irregularities in the administrative process for which the employee is responsible should not predetermine the outcome of the case.

Special Panel

The special panel will be comprised of one member of the EEOC designated on an ad hoc basis by the Chairman of the EEOC, one member of the MSPB designated on an ad hoc basis by the Chairman of the MSPB, and a permanent chairman who will be an individual from outside the government. The members appointed by EEOC and MSPB to represent the agency in a particular case must be able to represent the views and decisions of the majority of the Board or Commission in that particular case. The chairman will be appointed by the President with the advice and consent of the Senate to a term of six years, and shall be removable only for cause.

The MSPB and the EEOC shall make available to the panel appropriate and adequate administrative resources to carry out its responsibilities under this Act. The cost of such services must, to the extent practicable, be shared equally by EEOC and MSPB.

Because it is anticipated that the special panel will not have to be convened often, the conferees do not expect that it will need substantial resources or administrative support. For instance, the EEOC, because it is larger could provide a convenient place for the panel to meet.

Comment—

JAMES M. HARKLESS*

In his paper John Kagel has cogently outlined for us the new grievance arbitration system in federal-sector employment under the Civil Service Reform Act (CSRA) and compared it to the one that has developed in private-sector employment in this country, primarily since the 1940s. I have no major quarrel with this analysis. However, since receiving Kagel's paper some weeks ago, I have had a problem figuring out why his comment in the title ends with a question mark. I haven't been able to. Therefore, I think it permissible for me to preface my reaction to the main thrust of his paper with a rhetorical question: "So what did you expect already?"

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