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—

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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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By this response I am suggesting that the employment relationships in the federal service, and the collective bargaining agreements under the CSRA and the predecessor Executive Orders which permitted them, are so controlled and affected by various statutes, rules, and regulations that grievance arbitration within that system necessarily cannot be final and binding as in the private sector; that to the extent that an arbitrator is required to interpret external law in order to resolve a grievance in the federal sector, such a decision should properly be subject to full review by public bodies charged with the responsibility of assuring uniform application and interpretation of public policy. There is no doubt that private arbitrators in the federal sector not only interpret and apply the terms of the parties' agreement, but also must consider the provisions of any applicable laws and regulations. Hence, what has developed in the federal sector since Executive Order 10988 first granted organizational and bargaining rights to federal employees in 1962, up to the enactment of CSRA in 1978 which refines and codifies this program, is another step toward what David Feller described in his classic thesis at the Academy's 1976 Annual Meeting as "the coming end of arbitration's golden age."[1]

I realize that Feller was talking about arbitration in the private sector, and he made it clear that he was referring to the potential diminution of the special position arbitrators have enjoyed in this country particularly since the U.S. Supreme Court issued the *Steelworkers Trilogy* in 1960.[2] As one whose thinking in this field was lastingly influenced as a third-year law student in attendance at Dean Shulman's great lecture on "Reason, Contract and Law"[3] in private arbitration systems, I tend to agree with Feller's observations about the effect of the interposition of external law on questions arising under private-sector collective bargaining agreements and his admonition that arbitrators in this sector should stick to interpreting the terms of the agreement and avoid deciding disputed questions of external law where the two conflict. However, Feller's arguments and analy-

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[1]Feller, *The Coming End of Arbitration's Golden Age,* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 97.

[2]*Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

[3]68 Harv. L. Rev. 999 (1955).

sis also are instructive on why decisions of arbitrators in the federal sector should not be granted the same special status of limited judicial review as in the private sector, except in those instances where the arbitrator is dealing only with interpretation and application of the terms of the collective bargaining agreement.

Feller stated "that arbitration is a substitute for a strike"; that "the parties to the collective bargaining process have substituted for the strike . . . a system of adjudication against the standards set forth in that agreement; but that system of adjudication, since it is not a substitute for litigation, is not the same in principle, historical background, or effect, as the system of adjudication used by the courts to resolve controversies over the meaning and application of contracts."[4] He went on to say:

> "Essential to the Golden Age of Arbitration was the proposition that the rights of employees and employers with respect to the employment relationship are governed by an autonomous, self-contained system of private law. That system consists of a statute, the collective bargaining agreement, and an adjudicatory mechanism, the grievance and arbitration machinery, integral with the statute and providing only the remedial powers granted, expressly or impliedly, in the statute."[5]

Feller then reasoned:

> ". . . that an arbitrator, as the adjudicator of rights under the rules established by a collective bargaining agreement, performs quite a different function from a court in construing a contract of employment. There are a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist. His so-called expertise is not so much expertise as it is knowledge of the fact that the parties have not called upon him to act as a court in adjudicating a breach-of-contract action, but to act as—perhaps there is no better word—an arbitrator.
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> "It is this unique aspect of arbitration, I think, from which the deference of courts to arbitration decisions derives, and this derivation explains why such deference is awarded only when arbitrators remain within their particular area of concern, of jurisdiction if you will—that is, the interpretation and application of the collective agreement. . . ."[6]

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[4]Feller, *supra* note 1, at 100–101.
[5]Feller, *supra* note 1, at 102–103.
[6]Feller, *supra* note 1, at 106.

He then concluded:

> "Thus, the very special status that courts have awarded arbitrators has little to do with speed or informality or, indeed, the special expertise of arbitrators. The status derives from a not always explicitly stated recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-governance."[7]

While there are some similarities between this private grievance arbitration system, as Feller describes it, and the federal-sector system which has been patterned after it, the differences are more significant and substantial. Grievance arbitration in the federal system is not a substitute for a strike because federal employees have never had that right. The grievance arbitration system in the federal sector is an adjudicatory one to assure compliance with the collective bargaining agreement, but it is more than that. As the Elkouris point out in their supplement to *How Arbitration Works,* it "is to review or police compliance with controlling laws, rules and regulations by federal agency employers and employees alike."[8] The Elkouris also note that:

> "Arbitral disposition of federal-sector grievances will often be governed or materially affected by laws, rules, and regulations apart from the collective bargaining agreement; another highly significant factor is that important areas of unilateral management control in the federal sector exist by statute. For some matters in the federal sector, the collective agreement and custom cannot be made the controlling 'law of the plant.' "[9]

I believe it is because of these differences between federal and public-sector grievance arbitration that federal-sector grievance arbitration decisions should not be accorded the same deference as in the private sector.

This is illustrated by one of the cases to which Kagel referred: *National Council of Field Labor Locals of the AFGE and U.S. Department of Labor.*[10] There, an NAA member ruled that a probationary employee's grievance contesting his termination was not arbitrable. The issue turned completely on the interpretation of applicable statutes. The FLRA reversed the decision essentially on the basis that this interpretation was incorrect. Whether or

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[7]Feller, *supra* note 1, at 107.

[8]Elkouri and Elkouri, Legal Status of Federal Sector Arbitration, supp. to How Arbitration Works, 3d ed., 1980, 7.

[9]*Id.*

[10]4 FLRA No. 51, issued Sept. 30, 1980.

not one agrees with the reasoning of the arbitrator or the FLRA, it is manifest that a final and binding decision on such a question involving public policy should not be left to a private arbitrator, but should be made by the public body or bodies charged with this function.

Recently the Government Employee Relations Report noted that of the 48 arbitration awards which FLRA has reviewed, five have been found deficient.[11] This is a much lower percentage of reversals or modifications than experienced under the Executive Order. However, the percentage of arbitration decisions appealed to the FLRA is still high. I suspect that this will change and there will be more willingness by the unsuccessful party in an arbitration case to accept it as final and binding, if the current trend in FLRA reversals or modifications continues.

As Kagel has noted, there are some grievances in the federal sector that are subject to court review. Such review in discrimination cases is similar to what would occur in the private sector. However, in adverse actions where an employee is removed or reduced in grade for unacceptable performance, the CSRA mandates that the arbitrator, in considering a grievance on such a matter, can reverse the agency decision only if it is not supported by substantial evidence. I am not certain whether this differs from the "clear and convincing" test that most arbitrators appear to use in discipline and discharge cases. However, it definitely is a change from the "beyond a reasonable doubt" test that some arbitrators apply in certain kinds of discharge cases. In footnote 9 of his paper, Kagel refers to an article in the Labor Law Journal which contains a good discussion of this subject and suggests the substantial-evidence test is similar to the clear-and-convincing rule. To date, no court rulings on arbitration awards in this area have come down. However, it is important, as Kagel has indicated, that arbitrators know of the statutory standard on burden of proof in these cases and properly apply it.

I will leave for John Shearer any comments on Kagel's criticism of the Comptroller General's role in reviewing arbitration decisions. However, I believe this presents much less of a problem with the 1978 amendments to the Back Pay Act and now that the Comptroller General has stopped acting like a bull in a china shop.

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[11]908 GERR 9 (April 13, 1981).