

CHAPTER 10

ARBITRATION IN THE FEDERAL SECTOR

I. A PANEL DISCUSSION

1. JEROME H. ROSS*

Collective bargaining was formally recognized in the federal sector in 1961, when President John F. Kennedy signed an executive order. "Paternalistic" is not too strong a word to describe the system of collective bargaining under that executive order. The system was run by the U.S. Civil Service Commission which was the personnel arm of the federal government at that time. Although a few contracts provided for arbitration of grievances, arbitration was virtually nonexistent in those early years.

In 1971 a second executive order was signed. It established the foundation of the present federal labor-management relations program. A Federal Labor Relations Council was created to administer the executive order, which required that collective bargaining agreements contain a grievance procedure. In the early 1970s arbitration began to increase following the negotiation of agreements which provided for binding arbitration.

In 1978 Congress passed the Civil Service Reform Act. "The program," as it is known by practitioners in the federal service, had finally gained status in law. The good news was that the law established an independent agency, the Federal Labor Relations Authority (FLRA). The law also provided that all collective bargaining agreements shall contain a grievance procedure with binding arbitration. The bad news was that the FLRA was empowered to review exceptions to arbitration awards filed by a party alleging that the award was contrary to a law, rule, or regulation, or on other grounds similar to those applied by federal courts in private sector arbitration cases.

Predictably in the late 1970s and into the 1980s, the number of federal sector arbitration cases increased; so did the frustration

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of arbitrators. Arbitrators soon found out that their awards often were not final and binding following appeal to the FLRA. At the National Academy meeting in 1981, John Kagel presented a critique of federal sector arbitration, decrying the lack of finality in the process and the many complications in the system.

The 1980s have seen a continuing high percentage of arbitration awards appealed to the FLRA, and especially unfortunate, a high percentage of those appeals have been sustained, with many awards overturned in whole or in part. In recent years arbitrators have changed their position from one of protesting against the federal sector of arbitration to playing by the rules that govern the system.

From the arbitrator's perspective, too often the parties fail to provide the relevant law, rules, and regulations which must be considered in rendering an award. On the other hand, in the parties' view arbitrators often fail to apply the required standards or to consider the appropriate authority.

This workshop is intended to give both arbitrators and the parties the opportunity to share our differing perspectives with the aim of understanding each other's needs in the federal sector arbitration process.

Now I'd like to introduce the panel. There's no doubt that John Mulholland of the American Federation of Government Employees and Frank Ferris of the National Treasury Employees Union stand out as the two individuals in the union movement who have had the greatest impact in shaping federal sector collective bargaining agreements. Our panelists on the management side—William Dailey, labor relations consultant to the U.S. Department of Agriculture, and William Kansier, senior labor relations advisor to the U.S. Department of Health and Human Services—are two of the most respected and competent practitioners in the federal sector program.

2. WILLIAM R. KANSIER*

I've been involved in federal sector collective bargaining for some time. The difference between the federal and private sectors is that the federal sector is very highly regulated. You all

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know that. But we, the practitioners, owe our very existence to the law. We can't ignore the law, and we don't feel that arbitrators can ignore the law either.

With reference to the high percentage of arbitrations that are overturned, the Office of Personnel Management (OPM) estimates that there are between 600 and 700 arbitrations per year in the federal sector and that 20 percent of those are appealed. But only 4 percent of all awards are overturned. People appeal awards for all kinds of reasons. A lot of the appeals are very political. So we're talking about 24 to 28 awards being overturned each year. I wouldn't dwell on that 4 percent.

I think arbitrators are doing a great job and I applaud that. The federal sector is a labyrinth of laws, rules, and regulations. Most of the people who work for me couldn't look at 600 cases and in 574 of them fashion decisions that met all the requirements of law and regulation. Due to the newness of arbitration in the federal sector and the learning curve required of arbitrators, I think it's a great record.

Basically, arbitrators have to pay attention to four things. There are some more esoteric things, but these are the most important. First, if you look at the management rights clauses in 5 U.S.C. 7106(a), they're nonwaivable. Management has the right to do certain things. We can't dispute that. We didn't make the laws; we only live with them. The second important law involves the harmful-errors standard for review of disciplinary actions in Section 7701 of that same title. The third law (and this is most important in fashioning remedies) is the Back Pay Act, using the but-for test. Finally there are the rules regarding attorney's fees in the federal sector. If you look at those four laws and regulations and apply them, there should be no problem with having an award stand any test before the FLRA.

I know that most arbitrators don't have access to these laws, rules, and regulations. I realize that it's the responsibility of the parties to educate the arbitrators. But there is one thing arbitrators can do for themselves. The OPM publishes a newsletter for labor arbitrators. They have about 600 arbitrators on a master list. No. 12 is the newest issue. Any arbitrator who is not on that list should see to it that his or her name is added to the list. I can give you the address later. If you want back copies, just write OPM and they will send them to you. This newsletter lets you know what is new and current with reference to the impact of laws, rules, and regulations on arbitration.

The parties have responsibilities in this area. We have the duty to train our advocates to present our cases in a clear and concise manner. We shouldn't make complicated issues more complicated by neophyte advocates. The advocates should know the laws, rules, and regulations, as well as know the case. We have to educate the arbitrators. We don't start out with the expectation that they know all about federal sector arbitration. Some of them do because they came out of the federal sector themselves.

I also feel that it is the responsibility of the parties to begin using panels. Using panels helps arbitrators understand the law because of repeat cases in the federal sector. More important, it will help them to understand the organization. For example, my organization, the Department of Health and Human Services (HHS), has 125,000 employees scattered all over the country with about 70 different lines of management authority. That means there are 70 different ways that we deal with union organizations. It's very difficult to understand. I recently was involved in an administrative proceeding where it took us a day and a half to educate the hearing officer about how our Department was organized and how it works.

Further, I think it's important that the arbitrator spend enough time to fashion a proper decision. Most arbitrators don't like to charge the parties a lot, and we don't like to get big bills. But we also don't like to have awards overturned because an arbitrator thought it could be done in a quick and dirty manner, and neglected to study an important law, rule, or regulation which required that the decision be overturned. That doesn't help either party.

The parties have a duty to negotiate an expedited arbitration procedure, and use that procedure for relatively easy matters, such as short suspensions, leave denials, or official time disputes. These matters can be handled at a relatively low level with an informal hearing in four or five hours with bench decisions. We don't need to spend money on transcripts for matters that are easily resolved and easily understood.

There are some common aspects between federal sector and private sector arbitrations. In both sectors arbitrators are vested with full authority to make determinations concerning arbitrability issues, authority to control and conduct the hearing, and making all procedural and evidentiary rulings. Absent stipulations or joint submission of issues, arbitrators are free to frame the issues as they see fit. They are also empowered to

make all findings of fact, to weigh evidence, and to interpret the contract using private sector standards usually drawn from the contract. Arbitrators are vested with broad authority to fashion remedies so long as they don't violate certain provisions of law or regulations, such as the Back Pay Act.

I've told you what I think the parties' responsibilities are. I believe that arbitrators have some responsibilities also. Arbitrators should take command of the hearing, not let the advocates go off on issues that are not on point. Arbitrators should control advocates, making them give the information needed to fashion an intelligent remedy. Arbitrators should lean on the advocates to provide specific laws and regulations. Ask about any issue you're not sure of, and require the parties to brief it. Have them provide the supporting documentation. It's the job of the advocates to educate arbitrators so that they can fashion proper decisions. Arbitrators should rely on previous decisions, and the parties should be required to cite them and furnish copies. Most arbitrators don't have access to the 33 volumes of the Federal Labor Relations Authority decisions. If the parties are going to rely on them, they should be required to append them to their briefs.

Finally, arbitrators need to spend enough study time to fashion proper awards. It doesn't help the parties when an award is overturned because somebody did a quick job under the mistaken perception that the parties couldn't afford much study time.

In addition to traditional arbitration, arbitrators are currently being used in contract negotiation and in EEO cases. We endorse the concept of mediation/arbitration. We have used it for four or five years. It is a type of interest arbitration. We suggest that mediation/arbitration be built into the negotiation process. That requires prior approval of the Federal Service Impasses Panel, but getting that approval is generally no problem. Mediation/arbitration is helpful to us in the federal sector because we don't have deadlines. There are no strike dates; people can't walk out; they have to keep working. So negotiations tend to drag on. In the absence of a deadline people are not likely to engage in serious negotiation. Therefore, having a mediation/arbitration schedule established and ready to go creates deadlines and causes the parties to face the issues and negotiate a contract. For us that reduces the cost of negotiations. It reduces the potential for negotiability disputes later on because the mediator/

arbitrator can ask the questions of the parties and fashion remedies that meet the standards of law, rule, and regulation.

We appreciate the fact that it is difficult for arbitrators to get involved in interest arbitration because they have to schedule large blocks of time. That's one of the reasons for deciding early in negotiations that we're going to do it, so that we can get on an arbitrator's calendar. We also understand that most interest arbitrators require larger fees for those services because of the number of hours and the energy it takes to perform this service. We don't have a problem with that.

The last area I see growing is Equal Employment Opportunity (EEO). In EEO we have regulations from the EEOC, entitled 1613, a really thick volume. It takes about 700 days on average in the federal sector for a person who has an EEO complaint to have that matter moved through the agency processes so that it is appealable to the EEOC. That's a long time, nearly two years, and that's the average. The Department of Health and Human Services and the National Treasury Employees Union (NTEU) have been looking at that, and we decided to begin a process known as negotiated discrimination complaint arbitration procedure. Employees can elect this as an alternative to that two-year 1613 EEOC procedure. The employee first sees an EEO counsellor and files a formal complaint; then the parties meet to develop the record and make an assessment about merit. If the case appears to have merit, it moves on, and arbitration is invoked at that time. We have a two-step grievance procedure prior to the actual arbitration hearing. The expectation is that we'll be able to do these cases within 180 days. As a quid pro quo for the union's willingness to use arbitration for these cases, management has agreed to pay 70 percent of the arbitrator's fee while the union pays 30 percent. We think it's a good deal because it costs a lot of money to have these complaints around for two years.

Another requirement of this process that is creative is that the arbitrator must spend the first day in a mediation effort. We think mediation/arbitration works. An arbitrator who has the authority to decide a matter becomes a very powerful mediator when he or she begins to make suggestions for settlement. Recently the EEOC signed a new law, 1614 (which still must be published in the Federal Register for comment), forcing agencies to process complaints within 180 days, after which they will be appealable to the EEOC. There will be more opportunity for

arbitration of these issues. It's one of the ways we can reduce the processing time from two years to six months.

3. JOHN MULHOLLAND*

My comments will focus on two areas of concern to arbitrators in the federal sector. First, what the union looks for in an arbitrator, and second, some of the things a federal sector arbitrator should look out for. In both areas the process of arbitration remains substantially the same as it is in the private sector, but there are some differences that you should be aware of.

Because the law does not permit an agency shop or servicing fee, the decision to take a case to arbitration means spending a significant part of a federal union's budget. Invoking arbitration is a weighty action, particularly when in an adversarial process the federal employer has unlimited amounts of money to spend. In fact, it is not unusual for federal employers to stonewall disputes just to force the union into arbitration. The federal employers can do that because they don't stand to lose any money since the taxpayers pay for the whole process. For example, the Social Security Administration (SSA) has filed over 2,000 grievances against the union just on the issue of official time. They refuse to consolidate these cases or otherwise streamline the process, and we anticipate a cost between \$2 million and \$3 million for the union and a similar amount to come from the Social Security fund.

Once a case reaches the arbitrator, it is likely to be a major issue for the union, so it is extremely important that the cost of arbitration be reasonable. Locals have complained that they were overcharged for their half of the arbitration costs because the arbitrator took eight days of study time on a case that took only a half day of hearing. This kind of billing is the quickest way to get a reputation that will make it difficult for the union to pick you in future cases. For example, on a recent case an arbitrator charged \$13,400 to rule on just the threshold issue of arbitrability.

Another signpost of an arbitrator's desirability is whether the arbitrator defers to management only because it represents the

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federal government. Unions share information about how even-handed arbitrators appear to be, and an arbitrator who kisses the altar of management will have a hard time being seen as a candidate for impartiality. There is no reason to defer to management in federal sector arbitration, because the law provides that the federal employer is required to subject its actions to final and binding arbitration. The merits of the case, not the sacred cow of the mission of the agency or management rights, should dictate your approach in deciding the case. If you feel that the government should be immune or otherwise protected from the full reach of an arbitrator's remedial powers because of some inherent sovereignty, you should decline to hear federal sector cases.

As long as the Civil Service Reform Act (CSRA) contains a final and binding provision, and a statutory mandate that all collective bargaining agreements in the federal sector include such provisions, then the employer should not be treated as other than the union's equal. The employer must not be permitted to hide behind the undocumented defenses of management rights, management determination, management prerogatives, or other spurious refuge. The arbitrator who nods knowingly at a crucial point in the hearing to indicate that he or she understands how the bureaucracy works will be hard for us to hire in the future.

Agency-speak is the employer's deliberate tactic to avoid discussing the merits of the case. This ploy of deliberate confusion is so common that the first expectation a union representative has about an opposing case is that it will be heavy on regulations and light on merit. Your job as a neutral is to cut through this and to get to the essentials: Did the employer violate the contract? And if so, what shall the remedy be? With rare exceptions most of the regulations offered by the employer require no more deference than you would give a company's personnel manual. Agency regulations cannot, for example, be implemented in a manner that conflicts with the contract. In 95 percent of the cases agency regulations are subservient to the union contract.

A third characteristic that is important to unions is the degree of activism that the arbitrator demonstrates. There is nothing worse than a decision that hangs on the evidence the arbitrator wanted to have but didn't ask for. An activist arbitrator isn't afraid to make an inquiry, even if the parties did not examine that issue in the presentation. The point of the arbitration is to

arrive at a neutral distillation of conflicting and strongly held versions of the facts. In a charged atmosphere it may be in the interests of one or both parties not to look under all the rocks. What is an obvious piece of evidence to the arbitrator may not be obvious to the union. In that situation it is the mark of arbitral professionalism to look for the evidence through your own initiative, if that's necessary. So don't hold back. Ask the parties and the witnesses the questions you think you need to have answered to reach the correct decision. The result will be a better base of evidence and a more reasoned outcome.

Let me give you some food for thought on what federal sector unions look for in an arbitrator. Here are a few tricks of the trade, also known as relevant case law that you should be aware of. Some were mentioned earlier, but I'll go into a bit more detail on them.

I mentioned one already, namely, the primacy of the labor contract over regulations that are issued after the date of the contract; the contract is already superior. There are three other areas where the differences between the federal sector and the private sector commonly arise—performance appraisals, back pay, and the award of attorney's fees.

Employee performance appraisal is one of the more important nondisciplinary areas of contract interpretation. In the federal sector employees may be fired, suspended, or kept from promotion lists on the basis of an erroneous performance appraisal. On an even more adverse level, employees' rankings for layoff are now included in the consideration of performance appraisals. An accurate and objective appraisal of an employee's performance is consequently most important.

Typically, employee performance appraisal disputes come before the arbitrator as either or both of two alleged contract violations: the union may assert (1) the management violation of contract language specific to the established performance system, or (2) a violation of more general language requiring that the employer administer personnel matters in accordance with applicable laws and regulations. In either case this is one area in which a correctly worded decision will withstand challenge.

Although it took the Federal Labor Relations Authority (FLRA) some two years to develop its approach to performance appraisal arbitration, the lead case was issued 18 months ago.¹

¹*Social Sec. Admin.*, 30 FLRA 1156 (1988).

In this case the FLRA clued the parties to the necessary elements of an arbitration decision which directed correction of an employee's performance appraisal. I read briefly from that decision:

When the arbitrator finds that management has not applied the established elements or standards or that management has applied established elements or standards in violation of law or regulation or a properly negotiated provision of the parties' collective bargaining agreement, the arbitrator may cancel the performance appraisal or rating. If the arbitrator is able to determine on the basis of the record presented what the rating of the grievant's product or performance would have been under the established elements or standards if they had been applied or if the violation of law, regulation, or the collective bargaining agreement had not occurred, the arbitrator may direct management to grant the grievant a specific rating. If the record does not enable the arbitrator to determine what the rating should have been, the arbitrator should then direct that the grievant's work product or performance be reevaluated by management as appropriate.

Thus, the FLRA has ruled that arbitrators have authority not only to set aside an incorrect performance appraisal but also to direct the proper rating, provided that they can determine from the record what the correct level of performance should have been.

In other cases the FLRA has shown that it meant business when it established that requirement. For instance, in a more recent case also involving the SSA, the arbitrator determined that the grievant had not been appraised in accordance with the parties' collective bargaining agreement. So far so good. Then the arbitrator ordered management to change the performance appraisal to a specified rating level, unfortunately basing the relief on the general right of equity rather than the magic words "on the basis of the record of evidence." Therefore, the award was modified on exceptions to the FLRA, with the result that the employee was simply reevaluated by the employer. Even if the employee's appraisal were to be raised, which is not at all a sure prospect, the effect of the arbitrator's drafting error was to dilute his otherwise warranted decision as to what the employee's correct performance appraisal should have been.

A similar frustration of the process occurred more recently in a case where the arbitrator's meaningful remedy was successfully challenged because the decision said that management's capricious and arbitrary action violated the intent and spirit of

the agreement, and again didn't use the magic words.² The award would have been immune from modification by the FLRA if the arbitrator had simply said that management did not apply "established elements and standards in violation of law, regulation, or a properly negotiated grievance provision," and that the arbitrator was determining "on the basis of the record" what the rating should have been.

Based on these cases, the FLRA has given every indication that it will not interfere with the performance-related arbitral decisions which are issued using the correct words and containing the necessary findings. When you get a performance-related case, don't make the mistake of using the wrong words if the grievant is entitled to a remedy.

On the other hand, the FLRA has put less rigidity in the form of the award in the area of back pay. The government has codified the whole authority of the Back Pay Act in Title V of the U.S. Code, and there are regulations implementing that law. All of these provide that back pay is applicable where there is "an unwarranted and unjustified personnel action." Those are the magic words. The net result is that arbitrators have appropriate authority to order back pay, assuming that the statutory and regulatory requirements are met to make such an award legal.

In a decision issued last fall involving the William Jennings Bryan Veterans Hospital,³ the FLRA reiterated that the elements for a back pay award are (1) a finding that an agency's personnel action was "unwarranted and unjustified," (2) that such unjustified and unwarranted personnel action "directly resulted" in the withdrawal of the grievant's pay, allowances, or differentials, and (3) that "but for" such action the grievant would not have suffered the loss of these benefits. The Comptroller of the United States has ruled that a contract violation is as much an unwarranted and unjustified personnel action as a violation of any other rule or regulation.

Interestingly enough, the use of the magic words in the back pay area has become a bit more realistic, or at least in that case. The arbitration involved a suspension that resulted in a loss of pay for the grievant. The arbitrator found for the grievant and ordered back pay, but the employer claimed that the award lacked the necessary findings. In dismissing the employer's claim

²*Ft. Eustis*, 33 FLRA No. 50 (1988).

³*William Jennings Bryan Veterans Hosp.*, 32 FLRA 1223 (1988).

that the requisite findings were missing from the award, the FLRA allowed some paraphrasing. The arbitrator found that there was “insufficient evidence to support the agency’s actions” in its disciplinary suspension. These findings were deemed by the FLRA sufficient to constitute a finding that the grievant’s suspension was “an unjustified and unwarranted personnel action” within the meaning of the Back Pay Act. In addition, the arbitrator’s order to management to remunerate the grievant for lost pay during the suspension was interpreted by the FLRA as meeting the remaining two criteria, namely, that the personnel action “directly resulted” in loss of pay and that “but for” the personnel action the employee would not have lost the money.

Why the rules for performance appraisals should be more strictly applied than those of back pay remains a mystery to me. The FLRA has yet to change its mind and reimpose more stringent wording requirements for back pay awards. However, if you are going to award back pay, the safest thing to do is to use those three criteria as they were enumerated in the *William Jennings Bryan Veterans Hospital* case.

The last matter is about attorney’s fees, which has been undergoing some development in the federal sector. Since in these cases the determination will have been made that the case was handled by an attorney, I’m going to assume that representatives will present you with a basic listing of the elements necessary for attorney’s fees. The lead case is the *Naval Air Development Center*,⁴ decided in 1986. Another relevant case published the same year held that the employee must have prevailed in the case to collect attorney’s fees. *Internal Revenue Service (Baltimore)*⁵ stands for the proposition that partial attorney’s fees are allowable if part of the personnel actions were unwarranted and unjustified and part were not. The arbitrator can dispose of different parts of the case in different appropriate ways, and order attorney’s fees for that part of the attorney’s time spent defending the employer’s charges against which the grievant prevailed.

There are more recent developments in *Philadelphia Naval Shipyard*,⁶ which was issued last summer. In that case it was decided that the arbitrator has continued jurisdiction under the

⁴*Naval Air Dev. Center*, 21 FLRA 131 (1986).

⁵*Internal Revenue Serv. (Baltimore)*, 21 FLRA 918 (1986).

⁶*Philadelphia Naval Shipyard*, 32 FLRA 417 (1988).

Back Pay Act to consider a request for attorney's fees that was filed within a reasonable time after the initial award became final and binding. That case followed the reasoning that it would be premature to decide requests for attorney's fees before an award becomes final and binding, since until that time it is not clear that the grievant prevailed and thus the essential element for awarding attorney's fees is missing. The decision does not preclude filing requests for attorney's fees before the arbitrator issues an initial award. But, underscore this, a postdecision request is not untimely.

The FLRA is taking the position that arbitrators can correct and clarify a final and binding award to a limited extent, namely, as necessary to correct a clerical error or a mathematical miscomputation; but unless both parties request it, an arbitrator lacks the authority to reverse an award which has become final and binding. This holding was recently issued in a decision involving the Overseas Federation of Teachers.⁷

The point of this discussion has been to provide a union perspective on what makes a good arbitrator, and to alert arbitrators to the nuances of a few common issues in the federal sector. In the final analysis, the quality of the decision and the efficiency of the hearing to provide a record of the proceedings are the duty of the arbitrator. Union representatives are happy if the arbitrator employs an activist method of operating, investigates the facts at the hearing, and treats the parties as equals. The arbitrator should be more comfortable knowing that the federal employer is not immune to carrying out meaningful remedies where the union or the employees prevail, and that the way a decision is written can affect whatever will be challenged before the FLRA.

4. WILLIAM DAILEY*

The previous speakers have highlighted some very important decisions of the Federal Labor Relations Authority (FLRA). Especially in the area of performance appraisal, they seem to be willing to take a decision and overrule it. In many contexts they have said that arbitrators cannot substitute their judgment for

⁷*Overseas Fed'n of Teachers (AFT)*, 32 FLRA 410 (1988).

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that of management. I'm an advocate; I don't mind going before an arbitrator and insisting, "Don't substitute your judgment for management," and I've done it. But the FLRA has said quite frankly that performance evaluation is a matter of judgment; it's very subjective. We all know that. You're a 3.0; you're a C; you're superior—whatever you call it in your system. In the last analysis, it's a gut reaction. You can sit around and try to quantify it and call it objective, and say that the federal government finally has a system that is close to what private industry does. But we all know that it's just as subjective in private industry as in the federal sector.

I think what the FLRA is beginning to say, or at least they've implied it, is that arbitrators have the authority in that area, if they use the rules that have been mentioned. If you play your cards right, walk your way through it, you can substitute your judgment and give grievants the rating you think they deserve just the way you can in applying the just cause standard.

If you think about it, in the area of just cause, there are no limits. In a discipline case it's your decision. Is the penalty going to be 15 days, 30 days, or are you going to put the grievant back to work with full back pay? So too, in the performance evaluation area, if I'm reading the Authority right, if you apply the rules, making a finding that the correct standards were not applied or that the agency applied the proper standards but did so in violation of law, regulation, or the collective bargaining agreement, at that point you can substitute your judgment for that of management if there's enough evidence in the record to make a finding, namely, the correct rating that should have been made if management had correctly applied the law, regulation, or the collective bargaining agreement.

As has been pointed out, the Authority is applying those tests, those criteria, and there have been several cases that have followed that lead decision. If you use those criteria, you can substitute your judgment for management's. So it's an opening.

I think it is even more important to look at the reasons the Authority gave for its reversal of the previous ruling. They're indicating that in the Civil Service Reform Act, Congress said there was to be binding arbitration, that grievance procedures would culminate in final arbitration. That was the law. If Congress said that, and if they also said that the scope of the grievance procedure could be negotiated (they took some 27 statutory appeal matters and made them subject to the grievance pro-

cedure), they must have known that arbitrators might substitute their judgment for management's. That's what it was all about. I think that's a positive.

Many of us who have had experience in the private sector continue to chafe over the constraints in the federal sector. I'm not going to criticize it as a Mickey Mouse operation because it's the law passed by Congress. It's nothing new; the executive orders did the same thing for some 18 years, if we go back to Executive Order 10988. We have to learn to live with it.

The substance of the rest of my remarks is from a critique of Dennis Nolan's article on the federal sector, in which he talked about the problems and the cures.¹ This was reproduced in a publication of the Montana Arbitration Association in the Fall 1988 issue. The point of the article was that there are things the parties should do to improve federal sector arbitration, most importantly to educate the arbitrator. The article also focused on poorly written arbitration decisions mentioning one court decision by Judge Harry Edwards of the U.S. Court of Appeals for District of Columbia, who wasn't kind, tactful, or polite in what he said about an arbitrator's decision. This has long been a problem in the federal sector. During my tenure at the Federal Labor Relations Council we studied some arbitration decisions and we saw some really bad ones.

I'd like to concentrate on what arbitrators can do to improve the process. Early on, there was the feeling that the federal sector ought to conform to what arbitrators wanted, that there was something about the federal sector that was strange, and that it ought to become more familiar by adapting to arbitrators whose experience had been confined to the private sector. That's not going to happen. All of us have had to adapt to the various state programs; so too you're going to have to adapt to the federal program. The overlay of law and regulation is there. Labor relations, when it came along as a structure in 1962, was required to accommodate itself to law in Title 5 and beyond, everything in regulations starting with the 5 CFR, the FPM, and beyond. And then you get into agency regulations. As was pointed out earlier, unless you can support your agency regulations by compelling need, a lot of that is negotiable.

¹Nolan, *Federal Sector Labor Arbitration: Differences, Problems, and Cures*, in *Grievance Arbitration in the Federal Service* (Huntsville, Ala.: Fed. Personnel Mgmt. Inst., 1987).

Unions have been asking agencies to sit down and negotiate regulations that touch on personnel matters, and in my agency we do negotiate a lot. Our internal regulations have been worked out with the union and are just as binding as the collective bargaining agreement. But the reality is that the system is not going to change; it was superimposed on this long history of law and regulation. And in interpreting the collective bargaining agreements, arbitrators in the federal sector have to remember that the law and the governmentwide regulation must prevail.

To illustrate my point, let me tell you about two experiences we had with arbitrators—one was a good experience; the other was a bad one. The good one was a case that we lost. We had a two-day hearing. It dealt with a midweek schedule change, a tour-of-duty change. We came in on a Wednesday and told employees that tomorrow they would have to work the afternoon shift instead of the morning shift. We felt we could do that, and we weren't prepared to accommodate the employees in any way. So they filed a grievance, not confronting our right to make the basic change or to determine when they would work, but to require that they be paid premium time for what we did to their work schedule. Since our action had interfered with their plans for that afternoon, they wanted 16 hours' pay for 8 hours' work.

After the hearing there were posthearing briefs; there were the law, governmentwide regulations, agency directives, interpretive decisions, legislative history. We really laid it on. Seventeen study days later, 43-page opinion, \$10,000 fee—the arbitrator threw it all back in our faces and sustained the grievance. But what we got was an opinion that we could apply in the future, and it has become part of the fabric of the collective bargaining agreement. From day to day we refer to this decision; it continues to guide us.

However, another decision—the bad one—we won; the arbitrator denied the grievance. It dealt with management's right to select certain employees for a training assignment during which they would train their fellow employees. We felt we had to reach out and pick the very best employees for the job. We weren't willing to share that judgment. The union wanted to set up some sort of equitable procedure for that assignment.

It went to arbitration in the context of a refusal to bargain because we were refusing to negotiate on that issue. The union would not present a proposal because we would have called it

nonnegotiable. We had numerous decisions in our favor, and they didn't want to give the FLRA a chance to uphold management's position. So there we were before a private sector arbitrator, trying to convince him that there was no duty to negotiate because of our superior management right.

This case probably should not have been in arbitration; it should have been before the Authority as an unfair labor practice charge or as a negotiability issue. We really laid a record on the arbitrator of FLRA decisions. He gave us 14 study days, an 8-page decision, \$8,000 + fee, and it's garbage. The union admits it; we admit it; there's nothing there that we can apply in the future. We didn't get anything back in return, whereas in the earlier case with the 43-page decision we have something we can apply in the future.

The lesson I draw from all of this is that the second arbitrator should have stayed out of the case. He was ill-equipped to operate in the federal sector. The arbitrator should be an attorney or somebody who can think like an attorney. I'm not talking about the personal-injury type attorney or the sort who hangs around the criminal courts. I'm not talking about the workers compensation attorney. I'm talking about the corporate type, the trust department type, the careful kind of attorney who can handle that overlay of law and regulation, or somebody with those skills, careful analytical skills. There is no substitute for this. Dennis Nolan says this too, so read that article.

In the federal sector there's hardly any case that is a nuts-and-bolts contract interpretation type. They just aren't there. In all of them you have to look at law and regulation. Although the advocates are there to educate you, they're not beyond steering you a little askew. We need arbitrators who can sift through all of that, just like in the first case. He took the study time, he wrote the 43-page decision, and we got the answer we could use.

Another thing is that the Federal Mediation and Conciliation Service (FMCS) could do something here. The FMCS will let anybody with five cases get on their arbitrator list. That's not enough. I'm not saying that arbitrators should take the same examination that an administrative law judge has to take, but at least you ought to be required to show federal sector decisions. The FMCS could create a meaningful examination. If the arbitrators can't screen themselves, we urge FMCS to do that, to get people who are qualified and capable of handling the federal

sector, who are prepared to roll up their sleeves and work to adapt to the federal sector.

5. FRANK FERRIS*

I would like to talk to you today about a small corner of federal sector arbitration, i.e., interest arbitration. I focus on this area in that there is good news, especially for the people in this room. In 1988 we had more negotiation impasses in the federal sector than in any previous year. Moreover, those people who keep track of the numbers tell us that this next year is also going to be another record-setting period. This is hardly good news for anybody else in the labor relations field. It certainly does not reflect well on the practitioners in the field; however, the reaction among arbitrators such as yourselves is probably somewhat akin to that among a group of orthopedic surgeons on the brink of the football season. Moreover, given the changes associated with the new political administration in Washington, the next few years should continue to be very active ones in the growth of interest arbitration. Because the Federal Service Impasses Panel has been very liberal in approving the use of outside neutrals in connection with interest arbitration, I think members of the Academy should give some thought to how they should operate in these types of disputes.

As is so often the case with any good news, there is also bad news. Though the federal sector parties are going to need experts such as yourselves more and more, you need to be aware that these same parties tire very easily of neutrals who like to make decisions for the parties, especially those who are quick to make decisions. Even though those of us in federal sector labor relations say we are looking for a few good "interest arbitrators," I think we are actually in search of a few tough mediators to help us make our own decisions. Like other negotiators, we want to avoid having an outsider make decisions for us.

I am not saying that someone who comes in and makes interest arbitration decisions is not going to be successful. I have seen many different styles of arbitration work. Indeed, one arbitrator entered a dispute, went through a list of the issues, and then taking them one by one told us how he would decide the substan-

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tive dispute before he had even heard the positions or arguments of the parties. We did not formally object to the final outcome; indeed, the relationship remained intact and continued to be healthy. However, I must point out that this type of arbitrator behavior is rarely rewarded, even where a good contract is produced. We never used this arbitrator again and this little story quickly spread through the labor-management community alerting our colleagues to the dangers of using this particular arbitrator. By way of emphasis, let me say that arbitrators can close interest arbitration disputes by using many of the same decision-making techniques they use in grievance arbitration. Yet it is unlikely that these approaches will be rewarded by the parties. As I said earlier, we are looking for mediation skills rather than arbitration skills.

Consequently, I will concentrate the remainder of my talk on the ability of an arbitrator to function largely as a mediator. From my perspective, this is a critically important skill. For example, NTEU just finished negotiating its largest contract. The dispute went to impasse with over 150 issues between the parties. However, even though we gave the interest arbitrator only five days to resolve the dispute, he wrapped up the entire contract without having to make one substantive decision. Now, how do you go about doing the same in your arbitration practice? What follows are my thoughts about how to be a successful interest arbitrator in the federal sector.

I think you have to abandon the reluctance grievance arbitrators normally have about questioning witnesses. The substantial concern in your mind flows from grievance arbitrators taking the initiative to examine or cross-examine witnesses on issues the advocates did not touch or fully explore. There is always the worry that if you conduct your own inquiry you will unfairly help one party over the other and thereby win the undying wrath of the advocate who lost because of your questioning. You must know that in my experience this type of reaction from the advocate isn't likely in interest arbitration. The negotiations dispute is typically as much a communication breakdown as it is a dispute about formal rights. The parties generally are looking for a neutral to get involved in their discussions and help them look at the issues differently or more fruitfully.

Let me give you an example. In a typical case, we will put a proposal on a specific subject, such as performance appraisal, in

front of you, spend a short time explaining how our proposal works, and then give you some documentary evidence or testimony to support the need for our proposals. The opposing party will respond in kind. This is hardly the level of communication necessary to produce an agreement. Your job is to make sure the parties consider the actual, causal problem as well as alternative solutions. You can only do this by getting involved and questioning the parties as well as the witnesses. Do not just ask what the issue is, but also why it is an issue between the parties. Then, force them to list alternative ways to solve the problem and explain why they chose the particular approach contained in their proposals. By getting involved with the parties through questions such as these, you can begin to send subtle, and not so subtle, hints as to the weaknesses in each proposal and the more productive or fruitful approaches the parties should be taking to solve the problem.

Although it is hardly a secret in the labor-management community at this time, the best seller, *Getting to Yes*, written by Roger Fisher and William Ury, contains excellent advice to the parties on how to move through interest arbitration in a problem-solving manner. The interest arbitrator needs to read this book as if it were entitled *Helping Others Get to Yes*, looking for various ways to improve communications and practice multiparty problem solving.

The second suggestion I would give you as part of any effort to improve the mediation skills among the members of the National Academy of Arbitrators is that you begin looking over your shoulders at the fast growing occupation known as "facilitator." Generally these people are in the full-time employ of management and are trained in group dynamics as well as problem solving. In the federal sector they were originally used as part of efforts to improve the management of the quality of the work produced by the government, where they have generally done an excellent job of building confidence in their problem-solving techniques. Today, they are used more and more by the parties to solve all sorts of workplace problems. For example, in one recent contract we negotiated, the parties came extremely close to replacing arbitrators with facilitators in those disputes that traditionally go to expedited arbitration. Our thinking was that all too often there is no contract answer for the types of problems encountered in grievances that go to expedited arbitration. As a result, we should not use an arbitrator to search

for the answer, but employ a problem solver who can help us create an answer.

Facilitators have been able to build up this kind of following not only because they use problem-solving techniques rather than the principles of contract construction, but also because the labor-management community is quickly realizing that the workplace is changing so quickly that we are less and less able to rely on answers in a labor agreement negotiated months or years earlier. The best solution is to look at the problem as it exists today, in light of the traditions of the past, and create new solutions tailored to this specific problem. This requires mediation and facilitation, not arbitration.

Facilitators are predisposed to helping the parties create experiments to test several different solutions to a problem. In contrast, arbitrators try to find the one best answer based only on evidence of what happened in the past. In other words, arbitrators restrict problem solving efforts rather than energize them.

Facilitators are respected because of their ability to go beyond the stated issue to help the parties search for the root of a problem. In contrast, arbitrators are comfortable agreeing to stay within the artificially created limits of a stated issue even before they have heard the facts or had an opportunity to assess the disputing parties.

A third piece of advice would be that if you feel compelled to continue to act as decision-making arbitrators, you at least delay imposing a substantive decision as long as possible. Perhaps the least harmful decision you can make is to help the parties decide what the problem is. If they come to the bargaining table thinking a particular issue has to do with the institutional rights of two parties and you can help them discover that it is much more simply a matter of determining how to deal with a law or regulation that stands in the path of a solution, then you have done them a great service. Moreover, you have probably put them on the way to solving their own problem.

If, however, the dispute takes more than providing a decision as to what the root problem of the disputed issue is, then I would suggest that you resort to the next level of decision making by merely giving the parties a direction in which they should go to seek their own solution. For example, if they are arguing over how many steps should be in the grievance procedure and who should attend at each step, you might want to think about advising them to search for a grievance procedure that permits all

levels of management and union officials to participate at some point while assuring that the process takes no longer than X number of days to conclude. This sort of direction will often enable the parties to focus more clearly on a resolution and the potential to create package offers, which often settle many issues at once. Finally, when you do provide a decision on the substance you might want to look for ways to give the parties, orally and informally, a choice of a particular resolution. If you do, you will often learn something from their reactions and you may find that once their choices are narrowed to two or three alternatives, at that point they can make the decision themselves.

Federal sector interest arbitration is an extremely interesting area of practice for an arbitrator. You could walk into an agency which has over 100,000 employees and through your efforts, redirect the direction of that agency and government. You can have some impact on the values of the workplace, not just the language of the simple contract clause, and you can promote the building of long-term, mature, labor-management relationships that yield benefits long after you have closed out the dispute. This type of arbitrator is the one that has real impact in the workplace, the one who is frequently rewarded with additional work, and the one who can truly enjoy the practice of arbitration.

Questions from the audience—

Q: In med/arb cases involving interest arbitration, when do you decide that you are no longer a mediator and become an arbitrator?

A: In a recent case we gave the mediator/arbitrator five days from Monday morning to Friday midnight to handle the case. He hadn't decided one issue by 11:30 Friday night, but by one or two in the morning we had it done. Some arbitrators I've dealt with will take the small issues and give the parties some nudges and early decisions to let them know he's there. Others have said: "I will not make a decision. If you want a contract by midnight, go get it." That scares me but it's starting to work. Arbitration has developed in this country as a decision-making process, and we're going to have to find people who think that making a decision is an exception in interest arbitration.

Q: If that's the case, why do you need an outsider at all?

A: Well, we get locked into positions during negotiations. Often we can't see the forest because we have all these trees

around us. Somebody else objectively looking from the outside often can help us find our own path through the woods. Sometimes they can't because we're locked into position politically because that's where we have to be. If helping us see those options doesn't work, I would expect that the mediator/arbitrator would begin to use the authority of the office, maybe without saying what the ruling will be, but suggesting to either party that some of the issues are losers. I react to such signals. If I need to get more authorization in that area, that's what I'll do rather than lose the issue. I'll get the authority to change my position to negotiate my way through. When it's clear that mediation is not working, the arbitrator can start calling the shots, which he or she always has the right to do. Those who are successful don't make decisions unless it is unavoidable, but sometimes it's unavoidable.

Sometimes the arbitrator's main job is to get the parties to look at the problem. They are more in love with their language than they are able to see a problem.

Q: What do you do about a whole pile of FLRA decisions and FPR interpretations when you don't have a chance to read any of them to ask questions about them at the hearing? Then when you get home and start writing the decision, you see all kinds of things that seem to apply, but the parties haven't mentioned them during the hearing. What do you do about that?

A: I'd say that the parties before you did not do their job very well. They didn't take their responsibility of educating the arbitrator seriously enough. We come in with expert witnesses who talk about all these things and lay it all out for the arbitrator so that what you say happened, doesn't happen. Since the personnel in labor relations in the federal sector work with law and regulation every day, they sometimes take for granted that the arbitrator knows as much as they do, which is usually a mistake.

The governmentwide regulation applies if it was in effect before the contract was negotiated, and the parties must bring that to the arbitrator's attention. You're entitled to adjourn the hearing for a few minutes or to take a half hour to read all the material and make sure that you comprehend enough of it at the time to ask the right questions about it.

The union has the obligation to make it very clear when some regulations do not apply in a particular case or are overruled by provisions of the agreement and what relation the various documents have to the dispute at hand.

Q: The FMCS currently does not make provision for an arbitrator's listing mediation experience on the bio form. What can be done to let the parties know about an arbitrator's mediation experience?

A: I think the FMCS would be interested in having this information. I know management and union advocates share this information. As I told you, we avoid arbitrators who try to decide everything immediately in interest arbitration instead of trying to mediate. That is probably an excellent suggestion because alternate dispute resolution (ADR) is chipping away at arbitration.

I think that's something that the Academy could communicate to the Mediation Service, to have some place on that bio sheet for ADR and mediation experience and background.

Q: I have a problem interfering in the parties' presentation of their cases. I don't think that they want a so-called activist arbitrator in the grievance cases I handle even in the federal sector.

A: I didn't mean that the arbitrator should take over the case handling and examine and cross-examine witnesses. But when an agency wants to dump 15,000 pages of regulations into the record, and the arbitrator doesn't challenge that, I have a problem with that. I had an arbitrator ask: "Do I really have to read all this stuff? It really doesn't seem to be relevant to the case." The arbitrator should control the process so that it doesn't get out of hand. Government agencies are expert at doing that. With all the regulations they have, they'll do everything they can to prevail in that case. Arbitrators should not let that happen. But I don't expect them to put on our case.

Q: How do management advocates feel about activist arbitrators? I just came from a workshop where the management people opposed that sort of thing.

A: I like to have management advocates who can put on their own case without the arbitrator's help. People are all different; some are better than others. But we work very hard to train our people to present cases in a clear and convincing manner. But in the federal sector often we understand some things that you as arbitrators are totally unfamiliar with, and in those cases you should certainly ask questions. But as a general rule, the parties put on the case; so let them put on the case.

I personally welcome questions from the arbitrators because that's a sign that they understand the case or at least know where we're coming from.

Q: My impression is that federal sector arbitration cases take much longer than those in the private sector. It seems to have something to do with the process and the method of presentation. Is there something that can be done about this?

A: Maybe we can negotiate it into the arbitration clause in the agreement, if there is something that can be done.

I don't think that's a problem we can do anything about. It's a function of the skill of the people putting on the case. Less is better, in my judgment. The more you clutter up the record, the worse the presentation. As more and more regulations go in, I have to improve my defense against a long litany of regulations.

Q: I've found that federal sector advocates try to put in every piece of paper they can get their hands on, and they use 16 witnesses to testify to the same thing. I request in federal sector cases that they jointly docket materials with me in advance of the hearing so that we don't have to start off by wasting an hour for presentation of exhibits. There's got to be a better way to do it.

A: There is a better way. I talked about overcharges in arbitration cases and I also talked about abuses of the system. When I get complaints about exorbitant fees, I tell my constituents, "Well, you put all these documents into the record and insisted that the arbitrator read them. What did you expect?" After that we got more training for the advocates on how to better present a case because they caused their own problems.

Q: Where are all these interest arbitrations taking place? In Washington, D.C., or in other places?

A: They are taking place all over the country. Wherever there is a local impasse, it's ripe for interest arbitration.

Q: How are panels formed?

A: We have a number of panels on expedited arbitration in AFGE and they are working quite well. When people want to get on the panel, they send me a bio, and we sit with management and go over the names and select them. Most of my referrals come from the state central labor bodies. When we need names in a particular area, we call the central labor body of the AFL-CIO and ask them to send names.