specifically endorse its members' participation in these arbitration systems.

Speaking of disclosure, Part 2.B of the Code of Professional Responsibility requires:

> 1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, *or consultative relationship with any company* or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. . . .
>
> 3. . . .
>
> Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship *or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality* [emphasis added].[4]

If I have served as an arbitrator for Employer X under a nonunion employer-promulgated arbitration procedure and later am selected—say through the AAA or FMCS—to hear a case between Employer X and Union Y, am I required to disclose my earlier service for Employer X? Was I serving in a consultative relationship with Employer X in that type of situation? Even if not, might such service reasonably raise a question as to my impartiality? Does it make a difference whether instead of hearing a single case in which I was jointly selected from an AAA or FMCS panel, I heard 10 cases as a semipermanent hearing officer solely appointed by Employer X? Disclosure in the latter case surely seems required. In the former, I would think not.

III. FEDERAL SECTOR ARBITRATION: A MANAGEMENT VIEWPOINT

ANTHONY INGRASSIA*

Remember when Rex Harrison, as Professor Henry Higgins in *My Fair Lady*, sadly sang to his male colleague, Colonel Pickering, "Why can't a woman be more like a man? Yes, why can't a

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[4]Code of Professional Responsibility for Arbitration of Labor-Management Disputes (NAA, AAA, FMCS: 1985), 7–8.

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woman—be—like—me?" That wonderful little ditty went through my mind as I prepared my remarks for today's meeting. I remembered all the discussions I have had with arbitrators who entered the byzantine atmosphere of federal arbitration without benefit of prior experience in federal labor relations and how they longed for the arbitration they knew and loved.

An arbitrator newly exposed to federal arbitration can easily become confused and bewildered by the magnitude of mandatory management-rights provisions governing permissible remedies; the far-reaching impact and control on awards of external law, which includes considerable layers of rules and regulations; the mandatory application of precedents established by other adjudicators; the mandatory yet varying standards of proof required in major disciplinary cases; the easy availability of administrative and judicial review; and, often, the inexperience of the litigating parties.

Just like Higgins' plaintive plea, an arbitrator's desire to mold the federal dispute-resolution system to something familiar and comfortable is understandable. Why can't federal arbitration be just like the private sector? At least in Higgins' case, if his eyes had not been blinded by male conceit, he should have been able to see the differences between his fair lady Eliza Doolittle and his male colleagues. No such help in federal arbitration.

Until you get to fashioning a remedy or become involved in an appeal, federal arbitration has more in common with arbitration elsewhere than it has differences. Generally arbitrators are selected as they are in other sectors; they have similar authority to make substantive arbitrability determinations; they control the conduct of the hearing and can frame the issues if the parties don't agree; they make findings of fact, evaluate, weigh, and apply evidence; they interpret and apply agreement language.

When it comes to "final and binding" awards, however, the differences are paramount. While it is generally accepted that less than 2 percent of all private sector awards are appealed, an average of 22 percent (about 130 of the 600–700 federal sector arbitration awards) are appealed to the Federal Labor Relations Authority (FLRA) each year. A high percentage of appealed cases are set aside or at least modified in part (almost 19 percent), but those figures may be misleading. Put into perspective, of the approximately 7,500 awards currently on file at the Office of Personnel Management (OPM) involving 1,481 arbitrators, only 286 were set aside or modified from January 1979 through

December 1988, or less than 4 percent. Since we suspect as many as 20–25 percent of the awards may be missing from the files, that figure could be less than 3 percent of the total, which is not, at least statistically, really so different from the private sector.

Today I will give a general overview of the legal boundaries within which federal arbitration takes place, and the impact they have on remedies. For those of you with little or no federal experience, I have some helpful hints on how and where to get the necessary tools for rendering a decision in the federal sector. Also, I will provide some pertinent statistics and discuss some recent decisions, which will affect your decision making.

Historical Background

First, let me give a brief history of the events leading to passage of the statutory framework for the federal labor relations program. Before Congress passed the Civil Service Reform Act (CSRA) in 1978, containing mandatory grievance procedures and binding arbitration, the government had the benefit of almost 17 years of federal service arbitration and many more years of arbitration in the private sector. Executive Order (E.O.) 10988, issued by President John F. Kennedy in 1962, provided the catalyst for the development of federal sector arbitration. Though primitive in comparison to the guidelines of the CSRA, E.O. 10988 offered the first opportunity for negotiated grievance procedures in federal labor agreements. Arbitrators had broad authority to consider grievances and issue awards, but decisions were advisory and subject to approval by the agency head. Negotiated grievance procedures coexisted with the agency grievance procedures, offering parties two avenues of dispute resolution. Experience with arbitration and the dual systems for resolving grievances provided the basis for the changes made in E.O. 11491 in 1969 by President Richard M. Nixon.

For the first time E.O. 11491 permitted, but did not require, binding arbitration and empowered a newly established Federal Labor Relations Council (FLRC) to review exceptions to arbitration awards. Awards could be overturned if they violated laws, rules, or regulations or on the basis of private sector grounds. When included in the agreement, the negotiated grievance procedure was the sole procedure for resolving covered grievances.

Matters such as adverse actions, for which a statutory procedure existed, were excluded from coverage.

E.O. 11491 was amended by two other executive orders aimed at improving the existing guidelines, but it continued to be criticized by those who felt that the FLRC, which was composed of the chairman of the Civil Service Commission, the Assistant Secretary of Labor, and the director of the Office of Management and Budget, was not an independent, impartial decision-making body. In addition, the difficulty in distinguishing between matters subject to the negotiated or the statutory appeals process was complicated by the requirement to submit these issues to the Assistant Secretary of Labor for Labor Management Relations. These and other concerns were addressed in CSRA.

CSRA

The CSRA establishes a statutory framework for the arbitration of employee grievances in the federal sector. It requires every negotiated agreement to contain a grievance procedure that provides for binding arbitration as the last step. Coverage is mandated by statute and is very broad. By definition, a grievance includes any employee complaint concerning any matter relating to the employment of the employee as well as disputes over the interpretation and application of the negotiated agreement. Additionally, the term grievance includes claimed violations, misinterpretations, or misapplication of any law, rule, or regulation affecting conditions of employment. In addition to a few statutory exclusions, the parties can negotiate further limitations to the coverage. The negotiated procedure is the exclusive procedure for all covered grievances except major disciplinary actions, performance-based actions, and discrimination complaints.

While allowing broader coverage, the statute provides an appeals process which makes it easy for the parties to appeal in most cases. All awards, except adverse and performance-based actions, are subject to review by the FLRA—the successor to the FLRC, the independent federal agency charged with implementing and overseeing the federal labor-management program. Decisions of the FLRA on appeals from arbitration awards are final and cannot be appealed except when they involve discrimination. Awards dealing with adverse and per-

formance-based actions cannot be appealed by either the union or management. However, either the grievant or the OPM can seek judicial review from the federal circuit court.

The FLRA will review an exception to an arbitration award if timely filed. For awards that can be appealed to the Authority, the statute provides that an exception must be filed 30 days from the date the award is served on the parties. The FLRA will modify or set aside the award (1) if it violates any law, rule, or regulation, and (2) on other grounds similar to the private sector. Since its inception, through December 1988, the FLRA has decided 1,516 cases based on exceptions to arbitration awards. The Authority sustained 918 (60.6 percent) and, as I noted, modified or set aside in part 286 (18.9 percent). The remaining 312 were untimely filed or otherwise disposed of.

The majority of appeals, about 75 percent, were by the union or the grievant. Those filed by grievants, about 15 percent, were dismissed because grievants lack standing to appeal. Of the 60.2 percent filed by unions, only 21 cases (3.1 percent of the cases where the Authority considered the merits) resulted in the award being modified or set aside. The high number of appeals may reflect inexperience with arbitration and an unwillingness to accept the finality of awards. Authority decisions dismissing exceptions typically characterize them as mere disagreements with the arbitrator's reasoning.

Although agencies file fewer exceptions with the Authority, about 39 percent of the total, they are far more successful. When the cases dismissed for timeliness or other reasons are discounted, the Authority modifies or sets aside almost 50 percent of the awards appealed by management. The reason for management's higher success rate can be found in statistics on the reasons awards are modified or set aside. Of the 286 cases in which the Authority modified or set aside the award, only 14 were for typical private sector reasons. In 11 cases arbitrators exceeded their authority, in 2 the award was based on a nonfact, and in the remaining case the award did not draw its essence from the agreement. All the other Authority decisions were based on a finding that the award violated law, rule, or regulation. The fact that management appeals succeed far more often than those of unions is not surprising. In almost all union appeals there is no remedy in the award; the arbitrator has denied the grievance. In almost all management appeals the grievance has been sustained, and the arbitrator has provided a

remedy which must run the gauntlet of compliance with law, rule, or regulation. This is an issue that must concern all of us, and it is an issue to which I will return before closing.

Appeals from adverse and performance-based actions can be taken, at the option of the employee, to either the Merit Systems Protection Board (MSPB) or to arbitration unless management and the union have agreed to exclude these appeals from the negotiated procedure. An issue of concern to agencies has been the disparity between decisions and awards issued by arbitrators and those issued by the Board. Some statistics illustrate this concern:

1. Roughly 80 percent of MSPB decisions sustain the management action.
2. Since 1984, 452 adverse and performance-based actions were heard by federal arbitrators. Of these the management action was sustained in 222 (49 percent), mitigated in 132 (29 percent), and reversed in 93 (22 percent). Thus, slightly more were reversed or mitigated than upheld.

Clearly, arbitrators are more likely to mitigate a penalty than is the MSPB. In some cases arbitrators have reinstated grievants without back pay, effectively mitigating the management action to a suspension of several months. This tendency to mitigate has led agency representatives to criticize arbitration as a process, and there were at one time some who proposed subjecting these awards to MSPB review or even excluding them from arbitration.

Unlike grievance awards, which can be appealed only to the FLRA, arbitration awards in adverse and performance-based actions can be appealed only to the Court of Appeals for the Federal Circuit. Employee grievants (but not the union) may directly petition the court for review. The OPM (but not the agency involved) is empowered to seek review in these cases only when the director determines that the arbitrator erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the arbitrator's decision will have a "substantive impact" on a law, rule, regulation, or policy directive. However, before doing so OPM must request reconsideration from the arbitrator, citing all statutory grounds for review. The Federal Circuit recently ruled[1] that an arbitrator must consider OPM's request and issue a decision on the merits, although the arbitrator is not required to issue a "reasoned analysis."

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[1]*Newman v. Corrado*, No. 89–3026 (Fed. Cir., Mar. 7, 1990).

Arbitrators may not declare themselves *functus officio.* When arbitrators uphold their initial awards, OPM may petition for judicial review.

Rarely has OPM exercised its authority to obtain judicial review in these cases. Most appeals by OPM have involved alleged failure of arbitrators to apply the statutory standards of proof, the statutory harmful error standard as interpreted by MSPB, or other applicable MSPB precedent. The Federal Circuit reviews these cases carefully and, as it stated in *Devine v. Sutermeister,*[2] it will exercise "even greater scrutiny" of OPM's petition in arbitration cases than MSPB cases. If the issue raised is essentially a matter of judgment closely tied to the facts of the case, it will deny review.

This is the essence of arbitration and arbitration appeals procedures in the federal sector. In other ways, as noted previously, arbitration is quite similar to arbitration in the private sector. Arbitrators are selected by the parties, management and union, generally from a Federal Mediation and Conciliation Service (FMCS) list—sometimes from an American Arbitration Association (AAA) list. Parties having large numbers of cases often establish a panel from which the arbitrator for a specific case is chosen. Usually the cost is split, although some agreements provide for the loser to pay. There is one other significant difference: federal sector arbitration awards are much more likely to be publicized. Agencies are required to submit all awards to OPM, which provides the awards to anyone who wishes to see them.

Limits on Remedies

In many respects, arbitrators have the same authority when deciding cases in the federal sector as they have when deciding private sector cases. With certain important exceptions the arbitrator decides on the standard of proof. The arbitrator is free to interpret the negotiated agreement and, within limits, to interpret the rules and regulations governing the issue. In most cases the arbitrator may fashion a remedy similar to one in a private sector case. There are important limits on that authority, however, as mentioned previously. All personnel actions, whether taken unilaterally, negotiated by the parties, or

[2]733 F.2d 892, 116 LRRM 2501 (Fed. Cir. 1984).

awarded by an arbitrator, are subject to limits imposed by law, rule, or regulation, more specifically by Title 5 of the U.S. Code of Federal Regulations, mandatory provisions of the federal personnel manual and applicable agency regulations.

Arbitrators must be particularly wary of the management-rights section of CSRA.[3] More awards are reversed or modified because they interfere with the exercise of a management right than for any other reason. In fact, one or more of management's enumerated rights were cited in over one third of cases in which the FLRA set aside or modified the award. Specifically, awards often are rejected because they interfere with the retained right of management to direct employees, to assign work, or to select employees from any appropriate source.

Another pitfall for arbitrators is the Back Pay Act,[4] cited in almost 20 percent of the cases. In the federal sector an employee may not be awarded back pay unless the arbitrator or other appropriate authority finds that the employee would have received the pay "but for the unwarranted personnel action." It is not enough for an arbitrator to find that an aggrieved employee was affected by an unjustified or unwarranted personnel action (e.g., violation of a negotiated agreement or law, rule, or regulation). The arbitrator also must find that the violation resulted in withdrawal or reduction of the grievant's pay, allowance, or differentials, and "but for" such action the grievant would not have suffered the withdrawal or reduction. In other words, the arbitrator must determine, for example, that the grievant would have been selected for a promotion or an overtime assignment before awarding back pay. Failure to address the issue in the decision and to make a clear finding is likely to result in reversal of the award. This section also governs an award of attorney fees, and the criteria set forth must be met and the reasoning of the arbitrator articulated in the award.

The effect of law is even greater with respect to cases involving removals, reductions-in-grade, or suspensions of employees. The standard of proof is set by statute.[5] For actions based on performance the decision of the agency must be sustained if it is supported by "substantial evidence" and, for other actions, by a "preponderance of the evidence." However, the agency action

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[3] 5 U.S.C. §7106(a).
[4] 5 U.S.C. §5596(a).
[5] 5 U.S.C. §7701(c)(1).

may be set aside if the grievant shows "harmful error" in the agency's procedures in arriving at its decision, and the arbitrator is bound by MSPB's application of the "harmful error" principle in *Parker v. Defense Logistics Agency.*[6]

As an indication of how pervasively, yet carefully, the courts get into federal arbitration, it took a Supreme Court decision to establish that MSPB precedent is binding on arbitrators on this issue.[7] Precedent plays an important role in federal sector arbitration. While arbitration decisions are not precedent setting, decisions of the FLRA, the Federal Circuit, and the MSPB are to some degree controlling.

The FLRA, for example, has issued numerous rulings on requirements for finding that grievants are entitled to back pay under the Back Pay Act. The Authority has ruled that the doctrine of *functus officio* does not preclude an arbitrator from considering a request for attorney fees after the decision on the merits of the grievance becomes final.[8] The Authority has ruled that the arbitrator must provide an articulated decision on the request.[9] Arbitrators should look to the FLRA for direction with respect to the application of the management-rights section of the CSRA.[10] In addition to its harmful error standard, other MSPB standards are binding on arbitrators when they decide adverse and performance-based action cases. For example, when mitigating disciplinary removals or long-term suspensions, arbitrators must apply the factors set forth in *Douglas,*[11] an MSPB decision. In line with MSPB precedent limiting its own authority, arbitrators do not have the authority to mitigate actions based on unacceptable performance. Finally, decisions of the courts, usually the Federal Circuit, are binding on arbitrators.

Significant Issues

It is not surprising that arbitrators find the notion of "final and binding" arbitration awards in the federal sector somewhat misleading even though, as noted, only a small number ultimately

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[6]1 MSPB 489 (1980).
[7]*Cornelius v. Nutt,* 472 U.S. 648, 119 LRRM 2905 (1985).
[8]*Philadelphia Naval Shipyard,* 32 FLRA 417 (1988).
[9]*FAA, National Aviation Facilities, Experimental Center,* 32 FLRA 750 (1988).
[10]*Supra* note 5.
[11]*Douglas v. Veterans Admin.,* 5 MSPB 313 (1981).

are modified or set aside. One reason for the concern expressed by arbitrators is the high visibility of FLRA decisions, combined with the fact that Authority actions rarely involve traditional private sector reasons and often are based on law or regulations the arbitrator did not know about. To arbitrators new to the federal sector, there is a seemingly endless profusion of laws, regulations, case law, and government rules lurking in the shadows, ready to overrule their normally unchallengeable awards. (Violation of law is a ground for setting aside an appeal in the private sector, of course, but the number of laws an arbitrator generally contends with is minuscule compared with the federal sector labyrinth).

Like it or not, the burden of issuing a proper award in the federal sector eventually rests on the arbitrators. It is their decisions, not the shortcomings of the litigants, that are subject to challenge. The parties may choose to educate the arbitrator or not; there is no legal requirement to do so. However, arbitrators should be alert to outside limits on arbitrable authority and may insist that the parties identify all pertinent law, rules, and regulations including prior case law that may affect the award. Also, OPM can give assistance in obtaining necessary research materials.

Arbitration involving removals, long-term suspensions, and reductions-in-grade for disciplinary reasons or unacceptable performance appears on the surface to present special challenges for an arbitrator. I have discussed the many statutory and other limits placed on arbitrators who must decide these cases. In practice, however, these cases may not be so difficult, because the parties are likely to know and inform the arbitrator of the required standard of proof, mitigating factors, the harmful error standard, and other MSPB precedents affecting the decision and award. The parties have dealt with these problems because many more actions are appealed to MSPB than are grieved through negotiated grievance procedures.

A subject of concern to management, unions, and employees involves multiple forums when an employee claims discrimination or an unfair labor practice as part of the grievance. Arbitrators encounter this issue, usually as part of an arbitrability dispute, but it is not a major issue since less than 8 percent of federal cases involve grievability/arbitrability issues. (The most common arbitration issues are discipline, about 28 percent, and promotion, 16 percent. Other common issues

are leave, work assignment, pay practices, overtime entitlement, hours of work, and performance.)

Another perplexing concern is the relatively small number of arbitration awards. As I mentioned earlier, OPM currently has on file about 7,500 awards issued since January 1979 when CSRA took effect, an average of about 700 a year. That may seem like a lot until the number is considered in the perspective of the size of the federal labor relations program. As of January 1989, the latest date for which we have statistics, there were over 1,200,000 federal employees under agreements in 1,982 bargaining units. This works out to less than four arbitration awards per agreement over a period of 11 years. We know that some units are more active than these figures suggest, but we also know that many activities never have had a case which went to arbitration. Even allowing for 20 to 25 percent of decisions presumed missing from the file, the figures are lower than predicted when the federal labor-management relations law was enacted. At that time I recall predicting the impetus of broader coverage and binding authority would result in a manyfold increase in the annual number of about 475 arbitrations.

There was an immediate jump of over 50 percent to about 960 cases in 1983, but the number leveled off to about 600–700 and has remained there. I suspect the lack of dues dollars from static membership under the government's open shop policy and the easy availability of no-cost appeals to the MSPB and Equal Employment Opportunity Commission explain the limited activity. An indication of the unions' financial problems is the willingness of some to permit unit members to hire their own attorneys who serve as the union representative in arbitrations.

In closing, I would like to emphasize that the practice of arbitration in the federal sector is not as difficult as this discussion may make it sound. The statistics suggest that many of the problems encountered stem from inexperience and the reluctance of parties to accept the finality of an award when there exists an easily available route of appeal. Many arbitrators have decided only a handful of cases, and some are deciding their first case. The statutory, regulatory, and precedential constraints are not overly difficult to understand, interpret, and apply if the parties do their part in educating the arbitrator, and the arbitrator, in turn, has access to and makes use of relevant authorities.

Arbitrator Dennis Nolan[12] put it this way in advocating that the parties select only those arbitrators familiar with federal sector arbitration and competent to deal with it:

> An arbitrator . . . must have available and know how to use the U.S. Code of the Code of Federal Regulations, a reporter system of federal court decisions, and reports of FLRA and MSPB decisions. No arbitrator has all of these in his office; indeed only a good law library or Federal agency library would have all of them. Accordingly parties should select only arbitrators with access to such a library.

Incidentally, Nolan lists five other suggestions for union and management representatives as a means of improving a system which he says is working but not as well as it should: (1) Screen cases carefully before going to arbitration; (2) recognize that federal sector arbitration is different and prepare accordingly; (3) educate the arbitrator; (4) be prepared to pay the cost of a good arbitration; and (5) do a better job of training advocates to deal with arbitrators.

Arbitrators who are unwilling to look outside the four corners of the agreement occasionally will find their awards set aside or modified, and there will be cases in which the best informed and most careful arbitrators will fall victim to changing case law. Arbitration in the federal sector exists in a unique framework of legal requirements. But arbitrators who accept the challenge of drawing out from the parties the information necessary to issue an award which will withstand appeal can be successful in the federal program.

Why can't a woman be like a man? Why can't federal sector arbitration be like the private sector? Maybe like Professor Higgins the real answer to our dilemma is to understand, accept, and appreciate the differences. Vive la différence!

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[12]Nolan, *Federal Sector Labor Arbitration: Differences, Problems, and Cures, in Grievance Arbitration in the Federal Service* (Huntsville, Ala.: Fed. Personnel Mgmt. Inst., 1987), reproduced in Mont. Arb. A.Q. (Fall 1988).