CHAPTER 10

FEDERAL SECTOR ARBITRATION

JEAN MCKEE*

It is a privilege for me to be here this afternoon to speak to this distinguished group of arbitrators. I am particularly honored because I understand that I am the first chairman, and for that matter the first member, of the Federal Labor Relations Authority (FLRA) to be invited to speak before the Academy at a members-only meeting. I take that to be a compliment for the work we're doing at the Authority, despite the fact that we probably have set aside one or two of your decisions. But do not despair, I will refrain from boring you with cases and cites. I feel there are certain important issues that need to be addressed. So, instead, I will share with you some thoughts on the federal arbitration process, thoughts that hopefully will stir an interesting discussion later on.

Arbitration has long been recognized as an expeditious, credible, and cost-effective way to resolve disputes, even as far back as Aristotle. For example, Aristotle once observed: "The arbitrator looks to what is equitable, the judge to what is law. And it was for this purpose that arbitration was introduced, namely, so equity might prevail." Aristotle, of course, did not have to wrestle with the Civil Service Reform Act nor the wisdom of the FLRA.

As you know, the Civil Service Reform Act established the FLRA to oversee the federal labor-management relations program. Unlike private sector laws the Act provides that every collective bargaining agreement shall include procedures for binding arbitration. The legislative history of the statute is clear on this point. As Congressman Ford from Michigan stated: "The more issues we can arbitrate, rather than going through the statutory appeals process, the more money we can save the public." There is no doubt that arbitration in the federal sector

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was intended to be the final and binding stage of the grievance procedure.

The reasons are very clear. There is too much litigation. The courts are saturated with cases. Our country cannot continue to pour enormous amounts of money to fund the judicial system. Even Abraham Lincoln was well aware of this situation when he said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often the real loser—in fees, expenses, and waste of time. . . . Never stir up litigation. A worse man can scarcely be found than one who does this."[1] Congress evidently agreed and followed his advice.

Authority Caseload

While giving the parties the right to appeal awards to the Authority, Congress limited the Authority's ability to overturn awards. The law allows the Authority to modify or set aside an award upon review if it finds the award to be contrary to law, rule, or regulation, or on other grounds similar to those applied in the private sector. We continue to stress in our decisions that we will modify or set aside an award with great hesitation. Only 19 percent of arbitration awards we review are modified or set aside at least in part. More than 61 percent of the cases are sustained by the Authority. The fact that so many awards are sustained is a clear indication to the parties that we are serious. Yet, the number of exceptions continues to grow. Sixty-seven new arbitration cases have been filed with the Authority since January, twenty-three in April alone.

Of the total number of arbitration cases in the federal sector, the Authority is asked to review about 22 percent. You might say, well, that means 78 percent are not appealed. And you would be correct. However, 22 percent is high when compared with only 2 percent of private sector arbitration cases appealed. Arbitration cases continue to dominate our inventory. Currently we have twice as many arbitration cases pending compared with other types of cases.

The high number of appeals gives us food for thought. During last year's proceedings of the Academy, Tony Ingrassia from

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[1]From remarks by Chief Justice Warren Burger before the American Arbitration Association and the Minnesota State Bar Association (8/21/85), *reprinted in* 40 ARB. J. 3 (1985).

the Office of Personnel Management touched briefly on this subject. With reference to the fact that a majority of appeals come from unions, he said, "The high number of appeals may reflect inexperience with arbitration and an unwillingness to accept the finality of awards."[2] I agree. But I would add that appeals reflect a certain unhappiness with arbitrators' awards. This is evident from the type of exceptions we receive. People just don't want to take "no" for an answer. For example, many appeals state that the award did not draw its essence from the agreement without giving any reason or explanation, or that the award violates law, rule, or regulation without mentioning which one. We will continue to deny such exceptions. But, in times of budgetary cutbacks and a shrinking federal work force, particularly in small agencies, an increasing caseload places a severe burden on the already limited resources of the FLRA.

Ways to Reduce the Number of Appeals

In my opinion, there are three things we need to address which would reduce the number of appeals to the Authority. I will then share with you how we plan to bring this about. *First*, agencies and unions need to provide arbitrators with adequate and sufficient information regarding federal sector laws. *Second*, arbitrators who regularly do federal sector cases have an obligation to stay informed on the federal laws in order to render legally correct decisions. *Third*, the parties must understand the Authority's limited ability to overturn awards.

Parties' Responsibility

There is no question in my mind that agencies and unions need to provide arbitrators with adequate and sufficient information regarding other federal, or sometimes referred to as external, laws. In fact, it's the responsibility of the parties to so inform the arbitrator. It seems logical. Agency and union officials deal on a daily basis with the "convoluted myriad" of federal laws, rules, and regulations. Yet, despite the 17-year history under executive orders and 40 volumes of Authority decisions, each with nearly a thousand pages, agencies and unions neglect

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[2]Ingrassia, *Federal Sector Arbitration: A Management Viewpoint* in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1991), 207.

to inform arbitrators on the law. We see it in the cases that come before us.

For example, in one case the arbitrator specifically requested further guidance on the issue of attorney fees. Both the union and the agency neglected to provide this information to the arbitrator. When the case came before the Authority, we set aside the award in part because the arbitrator failed to provide the necessary findings required under the Back Pay Act. Who got the short end of the stick? The grievant. It's clear that the parties should have apprised the arbitrator but didn't.

Arbitrators' Responsibility

In addition to the parties' responsibility to furnish arbitrators with the appropriate information, arbitrators share in that responsibility. Arbitrators need to stay informed with regard to external laws. Unlike the private sector, where the arbitrator in most instances is limited to the four corners of the agreement, federal arbitration is a breed apart. Arbitrators need to look beyond the contract. They need to apply the proper laws. It's in their interest and in the interest of the parties.

In a recent speech, Ed Philbin, chairman of the Interstate Commerce Commission, gave a short anecdote that is relevant here today. A retired "electrical wizard," Mr. Steinmetz, was hired by General Electric (GE) as a consultant when a machine malfunctioned. None of the GE people could figure out what was wrong. Steinmetz came in, walked around the machine, bent down, looked here, looked there, then reached inside his pocket for a piece of chalk and marked an "X" at a particular spot on the machine. After the GE people took apart the machine, they were amazed to find out that the defect was exactly where Steinmetz had made his chalk mark. Well, Steinmetz charged $10,000. Shocked at the amount, GE asked him to itemize it. This is what he sent them: "For making one chalk mark on the machine, one dollar. For knowing where to put the mark, $9,999."

Now, GE would not have been able to fix the machine without Steinmetz' chalk mark. To some extent, a similar thing happens in federal sector arbitration. Arbitrators need to be cognizant of other laws that affect the matter in dispute—that's how they leave their mark! For example, an arbitrator's award must include in the decision specific findings when granting attorney fees. Otherwise, the Authority will set aside or modify, as appro-

priate, such awards. Similarly, in discrimination cases, awards for attorney fees must be consistent with the Civil Rights Act of 1964. Yet, we continue to see arbitrators' decisions that fail to comply with these statutes. These and other statutes are integral parts of the federal labor relations program. As Winston Churchill once observed: "It is no use saying, 'We are doing our best.' You have got to succeed in doing what is necessary."

Authority's Responsibility

The FLRA must find ways to ensure that the parties understand the Authority's limitations when setting aside awards. The Authority cannot be used in the pursuit of one more bite at the apple. Filing an exception with no reasoning or justification is very costly, inefficient, and time consuming. What does the Authority plan to do? There are several resources available to assist the parties and the arbitrators.

The first and basic source of assistance can be found in the decisions of the Authority. Since I became a member of the FLRA in 1986, and more so since I was appointed Chairman, I've worked hard to ensure that our decisions are clear and understandable. The majority of the individuals involved in federal labor-management relations are not attorneys. Our decisions, the backbone of the labor relations program, should be written with that in mind and should be clearly written for laypersons to understand.

So, we undertook some changes. We began following a more orderly, outline-type format, making our decisions easier to follow. We began using a new font print, making our decisions more legible. To expedite the process, we did away with some things, like the signature on the decisions, which meant decisions could not be issued when a member was absent. I feel our decisions now are more concise and to the point. Our changes seem to be making an impact. Allow me to share with you an unsolicited letter I received from an employee of the Social Security Administration:

> I went to the law library last month and was amazed at the number of cases you issued last year. You and your staff can take credit for the most productive year in the history of the Authority. [I'm not sure that's actually right. But we'll take all the compliments we get!] The quality of decision writing has been exceptional. Keep up the good work!

So, I take this opportunity to urge: If you haven't read one of our decisions recently, pick one up. Even take it to bed. I assure you, you will *not* fall asleep trying to understand it!

Our decisions serve as the initial source of information. In them the parties and arbitrators can find out about our statute, the Back Pay Act, and other external laws that affect the program. And where can our decisions be found? In nearly 500 depository libraries around the country. I'm certain there's one near you. From Portland, Maine, to Portland, Oregon; from Waco, Texas, to even Moscow, Idaho.

While I'm on the subject of decisions, how would you react if the Authority were to attach arbitrators' decisions to our decisions? The Federal Mediation and Conciliation Service (FMCS) used to publish the decisions. The Office of Personnel Management (OPM) continues to keep them in its files. They're available for review. Think about it.

Training Initiatives

In addition to our decisions, I see the FLRA taking a leadership role in promoting cooperative efforts in labor-management relations. Our statute mandates that the FLRA facilitate and encourage the amicable settlement of disputes. This charge, given to us by Congress, provides us with the opportunity to develop a comprehensive approach to cooperative programs.

The FLRA will soon announce a joint labor-management initiative. Aimed primarily at management and labor officials, this initiative is intended to assist parties in their negotiations by giving them the knowledge, skills, and abilities necessary for effective dealings. The initiative will serve to highlight the process for review of arbitration awards. Through seminars, training sessions, and actual case studies, the parties will become more familiar with our statute and the federal arbitration process. Already, with the full support of the FMCS, we have brought on board an expert in joint labor-management training. She will coordinate our effort and act as liaison with federal agencies and unions in implementing the program. In addition, we are working with the Equal Employment Opportunity Commission in coordinating a joint conference on dispute resolution to be held in September. Over 700 people are expected to attend. At the conference the FLRA will be responsible for

putting together a two-and-a-half-day program which will include, of course, the process of arbitration and recent arbitration decisions.

A third step we're taking to assist the parties and arbitrators is already under way. Our staff is drafting a pamphlet aimed at assisting arbitrators, particularly those new to the federal sector, on the status of the law. The pamphlet will explain the statutory framework for grievance arbitration in the federal sector. It will also explain the FLRA role and the grounds for review of awards. More importantly, it will discuss particular problem areas which I alluded to earlier, such as the requirements for granting back pay and attorney fees. The pamphlet is intended to be updated on a regular basis and should be distributed to arbitrators in the federal sector. I hope that, together with other useful information, updates can be forwarded automatically to arbitrators as soon as they're assigned a case. While not intended to be exclusively relied upon by the arbitrators, the pamphlet will facilitate their work. It will include citations of significant Authority decisions and a list of the depository libraries. In this way arbitrators will have the resources available to keep informed.

Finally, we will take one last step. We will request the assistance of organizations such as the National Academy of Arbitrators to support our work. The Academy is in an excellent position to disseminate information about the work of the FLRA. In fact, you could be tremendously helpful in distributing our publications to your members. In addition, I urge the Academy to continue its recent trend of including federal sector arbitration as part of its Annual Meeting. Until 1989 federal arbitration had been covered by the Academy only once, during the Proceedings of the 34th Annual Meeting back in 1981.[3] By keeping federal arbitration as part of your program, you will assist us in providing arbitrators with the knowledge essential to our work.

Conclusion

The FLRA stands ready to assist in making the federal labor relations program work more effectively. We continue to look for innovative ways to assist you in your work. But we can

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[3]Arbitration Issues for the 1980's, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981).

succeed only if we have the cooperation of managers, unions, and neutrals. The tools are there. We need to put them to good use.

The recent experiences in the Persian Gulf serve as a good lesson to all of us. In a recent address to Congress, General Norman Schwarzkopf praised our men and women in the armed forces as the most extraordinary patriots this country has ever seen. But he also acknowledged our fine tanks, aircraft, ships, and military equipment. The talent of our people, the tools available to them, and the knowledge to use those tools allowed the coalition forces to come out winners.

If those of us involved in the federal sector would use our talents and the tools available to us, we also can come out winners.

Comment—

JEROME H. ROSS*

An important contribution of the arbitration process in the workplace is stability: by ensuring that disputes are resolved in a timely fashion, and by providing guidance for the implementation of procedures affecting terms and conditions of employment. By these measures the arbitration process in the federal service has not proven effective.

In a system where a party has a one in three chance to revise or modify an award on appeal, the choice will often be to take a chance and file an exception to an award. In the federal system where very few arbitrators are experts in federal personnel law, the seeds for a successful exception are sown when both parties, either by design or by oversight, fail to explain to the arbitrator the required steps to be taken in a case. The result in the federal program has been, and will continue to be, an absence of finality in the arbitration process and a lack of stability in federal service labor relations.

As participants in the federal service labor relations system in 1991, arbitrators are well beyond the finger-pointing exercises of the 1970s and 1980s in which we blamed the parties, the Federal Labor Relations Authority (FLRA), the U.S. General Accounting Office, the Office of Personnel Management

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(OPM), or the Congress for creating a legalistic process without finality. Arbitrators have come to accept that labor relations in the federal service is conducted within a maze of laws, regulations, rules, and orders which often bear on labor agreement provisions. To knowledgeably interpret labor agreements in this context, arbitrators must be aware of these outside requirements and their effect on findings and remedies in decisions.

Based on Chairman McKee's comments, it appears that after 20 years the FLRA finally has realized that it can have a meaningful role in increasing arbitrators' understanding of these unique requirements. Occasionally in past years OPM has issued guidance to arbitrators on a variety of subjects. I think most arbitrators who have read those publications view them as management position papers, as opposed to guidance from a neutral and objective source. As a result, those documents may have had the negative effect of reinforcing in arbitrators the opinion that the federal service labor relations program has a decidedly management tilt. The FLRA, however, as the agency responsible for the administration of the Civil Service Reform Act, is perceived as having a leadership role in the program, and its guidance would be more acceptable to arbitrators.

Rather than focusing on specific problem areas that arbitrators have encountered in federal sector cases, as we have done in prior Annual Meetings, I think this session can provide Chairman McKee with an understanding of our concerns and needs as the FLRA develops its guidance for arbitrators.

With that objective, my remaining comments contain suggestions for actions the FLRA might take to assist arbitrators in improving their understanding of federal service requirements. The workshop participants can offer additional suggestions during this session.

The Chairman, in effect, has proposed a learning process for arbitrators to become familiar with federal service requirements. An effective teaching technique involves learning by doing. Instead of the FLRA simply overturning awards on technicalities, it might consider remanding some of these matters to the arbitrators with instructions to do whatever is necessary to make the decisions consistent with law or regulation.

This could be done, for example, with an award of attorney fees in which the arbitrator departs from the required analysis. Remands could be appropriate in performance appraisal cases in which arbitrators indicate substitution of their judgment for

that of management, as opposed to finding that management failed to follow its own procedures. Cases in which arbitrators find a contract violation but fashion an incorrect remedy could also be remanded. For example, a case awarding retroactive promotion to an employee who has not been properly considered for a vacancy could be returned to the arbitrator with instructions to award a proper remedy, such as priority consideration for the next opening.

Instead of being told the grievance was denied because the arbitrator failed to use the magic words or ordered an illegal remedy, this remand procedure would give the arbitrator an opportunity to learn by doing and provide grievants with answers they could understand.

Secondly, arbitrators do not need another booklet on the state of federal personnel law. If arbitrators are interested in this subject, they can read Peter Broida's 1,400-page book. Most arbitrators hear very few federal service disputes, and it is not a wise use of their time to maintain currency in this area. More importantly, I don't believe arbitrators need this knowledge to render decisions which conform to law and regulation.

A more beneficial aid would be a listing of the questions arbitrators face in deciding cases and the step-by-step analysis they need to follow in answering those questions. A brief explanation of the law and the required standards in this context would be useful, especially for back-pay remedies and attorney fees. In preparing this guidance, the FLRA should consider creating an advisory committee composed of union and management representatives and arbitrators. The best means of coordinating such an effort would be through the Society of Federal Labor Relations Professionals.

Finally, the FLRA should consider using its approach to settling unfair-labor-practice charges as an alternative for exceptions to arbitration awards. An FLRA representative could contact the appealing party, discuss the matter, and provide advice and counsel, especially when the exception has no merit. This approach might educate the parties and ultimately reduce the number of exceptions filed.

It appears that the FLRA is making every effort to narrow its ability to overturn arbitration awards. For example, recent FLRA decisions require that awards "not totally abrogate management rights," as opposed to "not excessively interfere with management rights." The combination of exercising restraint in

overturning awards and providing meaningful guidance to arbitrators will promote confidence in arbitration decisions and in turn provide stability in federal service labor relations.

Comment—

J. EARL WILLIAMS*

To put federal sector arbitration into proper perspective, we need to be reminded that the Civil Service Reform Act of 1978 (CSRA) replaced Executive Orders that had served to administer labor relations in the federal sector. It was presumed that an improved labor relations system would result because the statute expands the scope of bargaining, permits a wider range of conduct to constitute an unfair labor practice (ULP), aligns reserve management rights with current practice, authorizes negotiation of expanded grievance arbitration coverage, and grants specific remedial authority and subpoena power to the Federal Labor Relations Authority (FLRA).

A few years ago at least 62 percent of all nonpostal federal employees were in bargaining units, and 95 percent were covered by negotiated agreements. The Postal Service has an additional 750,000 employees covered by negotiated units. While many of these federal employees are not members of unions, they are still covered by the negotiated agreements to a far greater extent than is true in the private sector.

Since collective bargaining and arbitration have been declining in the private sector, we could assume that arbitrators would be fighting for a place at the federal sector arbitration table. Instead, many arbitrators never have attempted to enter the federal sector, and many of those who have been arbitrating there have dropped out. Many arbitrators specifically notify the FMCS that they are not available for federal sector arbitration. Perhaps this is explained by the size and complexity of the federal labor relations monster. At least that appears to be an appropriate place to start our analysis.

Organizational Complexity of Federal Labor Relations

Based upon the law, the scope of bargaining in the federal sector is extremely limited. Any subject proscribed by law, gov-

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ernment-wide rule, or agency regulation as determined by the FLRA, as well as an extremely broad area of management rights, is excluded from the scope of bargaining. In addition, strikes and lockouts are proscribed, and informational picketing is extremely limited. Thus it is not surprising that Jean McKelvey, our moderator for this session, concluded: "Serious imbalance of power exists in the federal sector." She added: "What is amazing is not that collective bargaining in the federal sector is anemic but that it exists at all."[1]

Overlapping Jurisdiction

A myriad of entities administers this limited process. One is the FLRA, an independent, neutral, full-time agency within the executive branch. The FLRA's responsibilities are to (1) determine the appropriateness of units for labor organization representation, (2) supervise or conduct elections, (3) prescribe criteria and resolve issues relating to the granting of national consultation rights, (4) prescribe criteria and resolve issues relating to the need for agency rules or regulations, (5) resolve issues relating to the duty to bargain in good faith, (6) conduct hearings and resolve complaints of unfair labor practices, and (7) resolve exceptions to arbitrators' awards.

Another administrative system is under the Merit Systems Protection Board (MSPB), whose jurisdiction is based on statute and regulation. Approximately 24 categories of agency and Office of Personnel Management (OPM) actions are appealable to this Board. Federal employees have a choice between arbitration and the MSPB in matters of adverse action, removals, or demotions for unacceptable performance. There is also the Equal Employment Opportunity Commission (EEOC) and the OPM, as well as the Federal Service Impasses Panel (FSIP), each with its own standards and guidelines.

The existence of these overlapping systems has led to administrative and jurisdictional confusion as David Feder, Assistant to the General Counsel of FLRA, concluded in May 1989:

> The administrative systems established by the Civil Service Reform Act of 1978 (CSRA) to adjust and adjudicate disputes in the federal workplace between federal employees, agency management, and their exclusive representatives are overlapping, time consum-

[1]McKelvey, *Collective Bargaining in the Federal Sector: A Neutral's Perspective*, Society of Federal Labor Relations Professionals, Occasional Paper No. 4-89, at 4–5.

> ing, costly, and frustrating. Disputes arising out of the same set of circumstances can be pending at the same time before [the] Federal Labor Relations Authority (FLRA), Merit Systems Protection Board (MSPB), Special Counsel of the MSPB (OSC), and Equal Employment Opportunity Commission (EEOC).[2]

Feder added that, even within the same CSRA agency, disputes arising out of the same facts may be pending in as many as four forums. For example, to determine whether a particular issue is negotiable one could: (1) file a ULP charge in the regional office under the General Counsel, (2) file a request that the FLRA review an agency's declaration that the union proposal is non-negotiable, (3) assert that an impasse has been reached and, on that basis, seek the assistance of the FSIP.

Feder described a typical scenario: There is a simple shoving match among three federal employees at lunch time. Two are members of the bargaining unit and one is a confidential employee excluded from the unit. One employee believes he was treated unfairly because he is the union president, and he files a ULP. The second member of the bargaining unit files a grievance under the agreement while the third, whom the agency claims instigated the disturbance, is suspended for 14 days and appeals this adverse action to the MSPB. Thus, one incident involving three employees can be processed in three separate forums, each with its own time limits, procedures, and appeal routes.

When one realizes that the FLRA, MSPB, EEOC, OSC, OPM, and NLRB have joined together to produce a guide for federal employees on dispute-resolution systems, which is 104 pages long and contains 13 flow charts, the conclusion that there is confusing and overlapping jurisdiction is inescapable.

MSPB and Arbitration

Ralph Smith, a top federal management official in 1984, who currently is a top official of the Federal Personnel Management Institute, stated the following:

> While the CSRA allows employees to appeal more substantial issues of a greater variety through negotiated grievance procedures, the most significant changes introduced by the CSRA in this area have resulted from the interaction between the MSPB, arbitrators, and

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[2]Feder, *Pick a Forum—Any Forum: A Proposal for a Federal Dispute Resolution Board*, 40 LAB. L.J. 268 (1989).

> policies established by the judicial system. The interaction of these three factors is altering the status and actions of unions, employees, and federal management in ways that could not have been accurately predicted in 1978.[3]

The impact and confusion begin with a federal employee who has been suspended for more than 14 days, or been removed, or against whom action for unacceptable performance has been taken, files a grievance or an appeal with the MSPB. The MSPB maintains it should control and therefore broadens its influence whenever possible. The courts have generally gone along with MSPB standards, allegedly to promote consistency in resolving issues and to avoid forum shopping. Consequently, there is a statutory standard of conformity between arbitration and MSPB processes. Here are a few examples:

(1) Both the arbitrator and the MSPB are bound to a statutory standard of review because 5 U.S.C. §7701(c)(1) sets forth a "substantial evidence" test for agency actions based on unacceptable performance and a "preponderance of evidence" standard for adverse actions under 5 U.S.C. §7512.

(2) The harmful error requirement of section 7701 states that an agency's decision will not be upheld if there is harmful error in the application of agency procedures. The MSPB has defined harmful error, and the courts have held that same definition applicable to arbitrators.

(3) Decisions of an arbitrator or the MSPB may be appealed to the appropriate federal court by any federal employee adversely affected or aggrieved by a final award or order. Management appeals are channeled through OPM, continuing the confusion. To add to the confusion, the FLRA and MSPB overlap, often holding different opinions on the same section of the law.

The Back Pay Act

In a widely distributed paper, Fishgold and Jacksteit stated:

> The Comptroller General interprets the Back Pay Act, as well as other statutes authorizing pay, leave, travel benefits and other expenditures of government funds. Comptroller General opinions are frequently cited by the FLRA as grounds for setting aside arbitration awards. In some instances not even the agency party to the arbitration is aware of the ruling relied upon by the FLRA.[4]

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[3]Smith, *From Bowen to Devine: The Quandary Facing Federal Unions*, 35 LAB. L.J. 435 (1984).

[4]Fishgold and Jacksteit, *Implications of Cornelius v. Nutt for Federal Sector Arbitrators*, 43 ARB. J. 145 (1988).

This becomes even more complex when court decisions are used in a similar manner.

Under the Back Pay Act, the FLRA has laid down standards which an arbitrator must utilize to authorize back pay. These include the famous "but for" test, indicating that, but for an unjustified or unwarranted personnel action, the grievant would not have suffered the loss, that is, the grievant would have received the compensation in dispute.

There is an interesting overlap between the Back Pay Act and CSRA for the awarding of attorney fees. The FLRA's role is to assure that the arbitrator complies with the applicable statutory standards, including that the award of fees is warranted in the interest of justice. A court decision has determined the criteria to be applied in the interest of justice, usually emphasizing that the agency "knew or should have known that it would not prevail on the merits" when bringing the proceedings.

Problem Areas for the Arbitrator

The federal sector arbitrator is constantly reminded the award must be consistent with laws, rules, regulations, and contracts. For the arbitrator to become knowledgeable in all these areas it would be so time consuming and costly that the parties would be unwilling to pay the bill. Further, the parties themselves are not aware of many of these laws, rules, and regulations. Worse yet, they may make arguments related to these mandates but never furnish copies to the arbitrator. Perhaps they have not even seen a copy; they've just heard about it.

In this state of confusion, both covered and exempt agencies often utilize anything they think an equally confused arbitrator will accept. Some of the greatest problems are with exempt agencies. The Tennessee Valley Authority (TVA) is a case in point. On one occasion a TVA advocate indicated to the arbitrator at the beginning of the hearing, "We are not covered by CSRA." The arbitrator agreed since TVA is specifically exempt in the law. But 30 days later the same advocate stated: "TVA *is* covered by CSRA."

Another area of confusion is due to the fact that an exempt agency relates to CSRA only because the Veterans Preference Act allows veterans to appeal to MSPA any case involving discipline of more than 14 days, removal, or demotion. TVA has decided since the Veterans Preference Act is administered by

OPM it is bound by OPM regulations. Consequently, it picked an OPM regulation and decided that its action was proper. In fact, it felt so strongly about this it appealed to the courts when the arbitrator did not agree. Fortunately, the judge agreed with the arbitrator.

Misuse of the "harmful-error" standard is rampant. Parties in both covered and exempt agencies are prone to cite *Cornelius v. Nutt*[5] as proof that harmful error must be considered even when the case does not involve disciplinary action.

Since the arbitrator's award may not be contrary to law, rule, or regulation, and since broad management rights are spelled out in the law, arbitrability issues abound. I experienced the height of ridiculousness a few years ago, when management at a southern military base placed into evidence and made arguments on eight issues to negate arbitrability. After analyzing each one, I found that the first seven did not support their claim. Only their eighth point proved the case was not arbitrable. There is also the question of when to consider statutory and/or MSPB standards of evidence.

There can be conflicts between the arbitrator and the MSPB in terms of jurisdiction, standards, and precedents. MSPB is prone to expand its jurisdiction and preferential status whenever it can. Agencies and unions often reference MSPB awards as if they were binding on the arbitrator regardless of the issue or its relationship to the law. If they find a good MSPB decision to support their case, they want the arbitrator to believe it is binding.

The system encourages appeal of arbitration awards to the FLRA by having broad grounds for such appeals. It is not unusual to go to a federal arbitration hearing and have the parties jointly state: "It doesn't make any difference how you rule; whoever loses will appeal." There is no such thing as finality; therefore the arbitrator must be aware of the FLRA's standards and its application of the Back Pay Act.

The FLRA

In the midst of this conglomerate of federal sector arbitration sits the FLRA. Because of the appeal process it is the agency which concerns arbitrators most. In 1987 Henry Frazier, a mem-

[5]472 U.S. 648, 119 LRRM 2905 (1985).

ber of the FLRA since 1979, indicated that of the 1,274 cases closed, the FLRA had modified or set aside only about 17 percent of the arbitration awards appealed, or less than 4 percent of all awards from January 1979 through September 1986.[6] All these awards were modified or set aside because they were deficient as contrary to law, rule, or regulation. Arbitrator Dennis Nolan challenged Frazier's statistics indicating a comparison with the private sector was more important than federal sector percentages.[7] According to Nolan, the losing party in the federal sector is at least ten times, perhaps a hundred times, more likely to win on a challenge than in the private sector.

It is not surprising there has been criticism of the FLRA from the parties as well as from arbitrators. William Harness, General Counsel for the National Treasury Employees Union, expressed his unhappiness with the Authority's decisions relating to nonnegotiability of performance standards, the need to sit silently during investigatory interviews, bargaining for health and safety committees, and not allowing arbitrators to determine appropriate performance ratings.[8]

From management there is criticism of the current administration of the FLRA. In the FPMI Communications publication sold to labor, management, and arbitrators, which reviews and updates decisions in all areas of federal labor and employee relations, a recent editorial was very critical. It suggested "the winds of change have been in the form of weakly reasoned doctrinaire decisions that appear to reflect the personal agendas of the Authority members and its chair rather than plain intent of the law." The article concluded that the current appointees are rewriting the statute to conform to what they think it should be rather than making their decisions consistent with the law.[9]

In the past FPMI has had good analyses of FLRA awards, in terms of arbitration appeals and unfair labor practices. Therefore we can review current analyses to determine what is disturbing FPMI and reach our own conclusions. In general, rather

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[6]Frazier, *Federal Arbitration: The FLRA Perspective*, in Grievance Arbitration in the Federal Service, eds. Dennis K. Reischl and Ralph R. Smith (Huntsville, AL: Federal Personnel Management Institute, 1987), at 46–47.

[7]Nolan, *Federal Sector Labor Arbitration: Differences, Problems and Cures*, in Grievance Arbitration in the Federal Service, *supra* note 6, at 10.

[8]Harness, *Federal Sector Arbitration: A Union Perspective*, in Grievance Arbitration in the Federal Service, *supra* note 6, at 41–43.

[9]*Who Needs Congress? (We've Got the FLRA)*, FPMI Communications, Inc. (May 1991) at 16.

than rewriting or ignoring the law, the current direction of the FLRA is more consistent with the law and total legal rights of the parties than ever before. We will review the few general areas which apparently aroused the ire of FPMI. (It should be remembered, of course, that this is an organization with a management perspective.) The areas of complaint include the following:

1. In the past there have been many contract-related cases in which the FLRA has held that an issue must be resolved through the grievance and arbitration process. This is similar to deferral under the NLRA. If so, what the FLRA is saying now makes sense. When protected activities, that is, the statutory rights of the union and individuals, are at stake, it might be an unfair labor practice.
2. In the past management has denied information to the union. The FLRA is now saying such information cannot be denied when it is necessary to determine whether a grievance exists or to investigate a grievance. This is consistent with private sector awards.
3. Constitutional rights of individuals are recognized, as they should be.
4. The D.C. Circuit Court overturned an FLRA decision that would have required the employer to provide the union with names and home addresses of union employees. The court held it was a violation of the Privacy Act. However, the FLRA decision does not appear to be a violation of that act since it is consistent with the right of "routine use" of names contained in the language of the CSRA.
5. Management in the federal sector traditionally claims the right to assign work as well as other rights over a wide range. FLRA has held that the parties may make "appropriate arrangements" to modify management rights to some extent. In fact, arbitrators also have the authority to declare those arrangements legal, provided that the arbitrator is familiar with the appropriate arrangement standard developed by the FLRA. This is consistent with section 7106(b) of CSRA (management rights), which states the following:

> Nothing in this section shall preclude any agency or any labor organization from negotiating . . . (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by management officials.

6. The FLRA does not allow management indiscriminately to refuse to arbitrate. Such refusal can be a union labor problem.
7. In the past any contract language on a particular topic proposed by union or management was considered fully bargained, so that further negotiation was not appropriate. The FLRA currently recognizes that, if a topic is only partially covered in the contract language, it has not been fully bargained and so negotiation may be ordered. This is as it should be.

Recommended Changes

Despite the overall positive marks given to the current administration of the FLRA, problems from an arbitrator's standpoint remain with the overall system, the law, and some agencies, including the FLRA. Consequently, the following recommendations are made:

1. The most pressing need is a basic change in the structure of federal labor relations, particularly as it affects arbitration. The best recommendation on structure was made by David Feder:

   > I propose that the FLRA, MSPB, OSC, offices and divisions of the EEOC involved in processing federal employee EEOC complaints and overseeing the federal EEO program, those resources of the FMCS designated to mediating federal sector bargaining disputes, and those divisions of the DOL mandated to monitoring the internal operations of federal sector labor organizations be merged into a new administrative agency—the Federal Dispute Resolution Board (FDRB). The FDRB would be composed of five members and a General Counsel appointed by the President with the advice and consent of the Senate. The FDRB would be empowered to enforce all rights and adjudicate all disputes that are currently under the purview of the FLRA, MSPB, and the OSC, and the federal sector jurisdiction of the EEOC, FMCS, and DOL.[10]

2. At a minimum, the MSPB should be eliminated, as well as appeals of arbitration awards to the FLRA. Any remaining judicial functions could be performed by the FLRA.

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[10]Feder, *supra* note 2, at 276.

3. The veterans preference tie of exempt agencies to CSRA should be eliminated. The law should be clear that exempt agencies are not covered by CSRA.
4. The FLRA already is recommending changes in the law. One suggestion is a waiver of rights to give parties more flexibility in setting up cooperative labor relations programs. Assuming basic structural changes cannot be made, the FLRA's recommendations are the minimum that should take place; specifically most reserved management rights should become permissive subjects of bargaining.
5. Assuming that filing exceptions to arbitration awards continues, there is an urgent need for the FLRA to establish a policy requiring the parties to reference applicable laws and submit them as exhibits. When an exception is filed with the FLRA, an FLRA decision to overturn should contain a history of legislation and court decisions showing the award was not consistent with the law.
6. The FLRA should issue papers, guidelines, and critical cases to federal sector arbitrators so they can stay abreast of relevant changes in the law, especially FLRA standards or policy.
7. The FLRA is planning seminars and conferences for labor and management officials to educate them on issues related to federal labor laws, including review of arbitration awards. I would go beyond that and suggest regional seminars for federal sector arbitrators. Some of the seminars could be sponsored jointly with the National Academy of Arbitrators.