II. FLRA REVIEW OF ARBITRATION AWARDS

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From the beginning of the Civil Service Reform Act (CSRA) in January 1979 to January 1, 1988, there were 1,371 exceptions to federal sector arbitral awards filed with the Federal Labor Relations Authority (FLRA). This averaged about 150 per year. Unions filed 828 of them, about 60 percent. Agencies submitted 528, about 38 percent, and individual employees filed 12, about 1 percent. The FLRA sustained approximately 60 percent of the awards (829), modified or set aside about 18 percent (254), and determined that some 14 percent were untimely filed. Other dispositions were made in the remaining 7 percent (92). These primarily were due to lack of jurisdiction, or the matter was not subject to the filing of exceptions.

Of the union-filed exceptions, the FLRA sustained the awards in 70 percent (582) and dismissed another 20 percent (169) as untimely filed. The FLRA set aside or modified the award in only about 2 percent (19) of union-filed exceptions. By contrast, the FLRA sustained less than 50 percent of the arbitration awards involving agency-filed exceptions (47 percent (248)). It modified or set aside 44 percent of awards which agencies challenged (232) and found that about 5 percent of them were untimely filed.[1] A similar pattern occurred in the 156 decisions which the FLRA issued in calendar year 1988 on exceptions to arbitration awards.

This is a disturbingly high percentage of FLRA reversals in cases where agencies appeal arbitration awards. These figures, however, should be placed in perspective. All these exceptions, whether by agencies, unions or employees, represent a relatively small portion of arbitral awards in the federal sector. As far as I know, there are no hard data on the number of federal sector arbitration decisions. Based on the number of these cases which the Federal Mediation and Conciliation Service processed in FY

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[1]Kenneth L. Smith, a Labor Relations Specialist in the Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy), Washington, D.C., compiled these statistics.

1986 and 1987, and the fact that FMCS does not handle all of them I estimate some 1,000 to 1,500 federal sector awards are issued annually.

A considerable number of modifications or reversals of arbitration awards fall into two broad categories: (1) those involving the Back Pay Act, 5 U.S.C. 5596(b), and (2) where the FLRA found that arbitrators had intruded on management's statutory right to direct and assign employees, 5 U.S.C. 7106 (a)(2)(A) and (B). The latter occurs frequently in performance appraisal cases. To a great extent these reversals or modifications reflect the failure of many arbitrators to appreciate that in the federal sector relevant statutes, rules, and regulations are an integral part of the common law of the shop.

During the past year there have been no new developments in FLRA decisions in connection with the Back Pay Act. However, it is somewhat surprising that the FLRA continues to modify and set aside awards of arbitrators including Academy members, where the arbitrators have not met the requirements of the Back Pay Act in awarding remedies to employees. George Birch of the FLRA legal staff reviewed these requirements at the 1987 NAA Continuing Education Conference in Cincinnati. In order to award back pay an arbitrator first must find that an agency personnel action with respect to a grievant was unjustified or unwarranted. The arbitrator also must conclude that this resulted in the withdrawal or reduction of all or part of the grievant's pay, allowances, or differences, and that "but for" such unwarranted action, the grievant otherwise would not have suffered such withdrawal or reduction of pay. Arbitrators also should know that the Back Pay Act was amended in December 1987 to provide for payment of interest on awards of back pay to federal employees.

In the performance appraisal area the FLRA issued two significant decisions in the past year. The first, *Newark Air Force Station,*[2] was decided in December 1987. It involved the arbitrability of a grievance alleging management violated applicable law when it established the grievant's performance standards and elements. The grievance was filed before management had evaluated the grievant against the standards. Applying then existing FLRA case law, the arbitrator determined the matter was not arbitrable. The union had claimed

[2]30 FLRA 616 (1987).

before the arbitrator that the performance standards were vague and nonobjective in violation of 5 U.S.C. 4302, which requires that performance standards, to the maximum extent feasible, must permit the accurate evaluation of job performance on the basis of objective, job-related criteria and must be defined in measurable terms.

In *Newark Air Force Station,* the FLRA noted the broad definition of a grievance under the CSRA, and stated the congressional intent that all matters under the provisions of law can be submitted to the grievance procedure unless the parties specifically agree that certain matters are not covered by it. Earlier in 1987 the federal circuit court of appeals had already decided that an arbitrator, in a removal action for unacceptable performance, has jurisdiction to review whether the performance standards comply with law.[3] The FLRA had previously held that, in a grievance alleging an employee had been adversely affected by management's application of performance standards, an arbitrator could sustain the grievance on the basis that management had applied the standards in violation of law or regulation.

Therefore, in *Newark Air Force Station* the FLRA reconsidered its prior decisions and held that a grievance alleging that management violated applicable law when it established the grievant's performance standards and elements is arbitrable. This is so, even though management had not yet evaluated the grievant, unless the parties had excluded such a grievance from the scope of the grievance procedure. The FLRA could see no reason why an arbitrator should not have the same power to examine the content of performance standards and elements for consistency with law *before* an agency takes action against an employee, as an arbitrator does *after* the agency imposes an adverse action based on poor performance.

The other important performance appraisal case is *Social Security Administration,*[4]decided in January 1988. There the FLRA reconsidered the remedial powers of arbitrators in resolving disputes concerning performance appraisal matters. The FLRA held that where certain conditions are met, an arbitrator may direct management "to grant employees the performance ratings they would have received if they had been appraised

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[3]*Rogers v. Department of Defense Dependent Schools, Germany Region,* 814 F.2d 1549 (1987).
[4]30 FLRA 1156 (1988).

properly." The FLRA reemphasized its holding that proposals offered by unions in collective bargaining "which improperly interfere with management's rights to identify elements and establish standards are nonnegotiable." The FLRA said this continues to apply for arbitration awards to which exceptions are filed, if they "alter or determine the content of established performance standards." The FLRA also noted its recent decision in *Newark Air Force Station.*[5]

Against this background the FLRA concluded in *Social Security Administration* that an arbitration award requiring an agency to change a grievant's performance rating does not necessarily violate management's rights under Section 7106 (a)(2)(A) and (B) of the CSRA to direct employees and assign work. The FLRA observed that disputes relating to the application of established elements and standards to an individual employee are grievable and arbitrable. The FLRA accordingly held that arbitrators may sustain such a grievance, if they determine that management has not applied the established elements and standards, or that management has applied them in violation of law, regulations, or a properly negotiated provision of the collective bargaining agreement. When such a finding is made, the FLRA stated:

> The arbitrator may cancel the performance appraisal or rating. When the arbitrator is able to determine on the basis of the record presented what the rating of the grievant's work product or performance would have been under the established elements and 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 that rating. If the record does not enable the arbitrator to determine what the grievant's rating would have been, the arbitrator should direct that the grievant's work product be reevaluated by management as appropriate.[6]

In applying these principles to the facts of the case, the FLRA concluded that the arbitrator impermissably altered the content of the established standards in issuing his award. The award was modified to provide for reevaluation of the grievant.

Another notable FLRA decision occurred in *Overseas Federation of Teachers.*[7] In that case the FLRA held that an arbitrator lacks authority to reopen and reverse an award which has

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[5]*Supra* note 2.
[6]*Supra* note 4 at 1160–1161.
[7]32 FLRA 410 (1988).

become final and binding. There the arbitrator had denied a grievance alleging that the agency had violated a provision of the collective bargaining agreement. The union filed exceptions to the award, which the FLRA dismissed as untimely. After that, the union submitted a motion to the arbitrator, requesting him to reopen the award for the purpose of correcting his allegedly erroneous interpretation and application of FLRA precedent. The agency opposed the motion on the ground the arbitrator had no jurisdiction to reopen the matter.

The arbitrator concluded that he had jurisdiction to correct the award to bring it into conformance with FLRA precedents, since the record in the initial arbitration proceeding was incomplete due to the failure of both parties to submit an accurate statement of the law to him. The arbitrator thereupon issued an award reversing his prior award and sustaining the union's grievance. The agency filed exceptions to the corrected award.

The FLRA found in *Overseas Federation of Teachers* that the corrected award was inconsistent with Section 7122(b) of the CSRA and exceeded the arbitrator's authority. The FLRA ruled that the authority of an arbitrator to clarify or correct an award after its issuance permits the correction of clerical mistakes or obvious errors in arithmetical computation, but does not empower an arbitrator to reopen and reverse an award which has become final and binding. The FLRA said the award became final and binding when no exceptions were filed with the FLRA within the time period established in 7122(b), and the parties were bound by it.

The FLRA also remarked that failure of both parties to cite applicable law does not provide a basis for an arbitrator to assert jurisdiction and correct an award to bring it into conformance with precedent. The FLRA ruled that in the absence of a joint request from the parties, the arbitrator had fulfilled his role and was *functus officio* when he issued the corrected award. The FLRA stated:

> The responsibility to identify applicable law is one which is jointly shared by the arbitrator and the parties to an arbitration proceeding. The failure of the parties to identify applicable law may make an arbitrator's task more difficult, but it does not confer jurisdiction on an arbitrator to change an award in an attempt to make the award consistent with the Statute.[8]

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[8]*Id.* at 415–416.

This contrasts with the FLRA decision in *Philadelphia Naval Shipyard.*[9] In that case the FLRA decided that the Back Pay Act confers jurisdiction on an arbitrator to consider a union request for attorney's fees after the issuance of the arbitrator's decision awarding back pay. The FLRA held that in those circumstances the doctrine of *functus officio* did not apply, as long as the request was filed within a reasonable time after the award was issued or became final and binding. The FLRA indicated that it is permissible for such requests to be submitted during the course of an arbitration proceeding, but that nothing in the CSRA or applicable regulations requires this.

The final noteworthy FLRA decision is *Federal Aviation Administration, National Aviation Facilities Experimental Center.*[10] In that case an arbitrator decided that the agency had not proved the grievant was negligent in performing his work or gave false information to a supervisor. The arbitrator vacated the three-day disciplinary suspension and awarded the grievant three days' back pay. However, the arbitrator denied the union request for attorney's fees on the grounds that: (1) the agency had reason for bringing the charges against the employee, and (2) the agency could not have known in advance that it would "lose in arbitration." The union excepted to this denial on the basis that its request was warranted "in the interest of justice," and because the grievant was determined to be "substantially innocent."

The FLRA held that the arbitrator failed to apply the correct standards under 5 U.S.C. 7701(g)(1) for determining whether the union's request was warranted "in the interest of justice." The FLRA indicated that such a request is warranted under 5 U.S.C. 5596 and 7701(g)(1), when the result of the appeal shows that: (1) the agency's action was "clearly without merit" or "wholly unfounded," or (2) the employee was "substantially innocent" of the charges. The FLRA vacated the award and remanded it for resubmission to the arbitrator for "a fully articulated, reasoned decision" addressing both these standards, as well as reasonableness of the amount of the fees, if they were to be awarded.

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[9]32 FLRA 417 (1988).
[10]32 FLRA 750 (1988).

In the federal sector it is incumbent on arbitrators to keep abreast of FLRA decisions and other legal precedents. Arbitrators must be sure in each case that any applicable statutes, rules, or regulations are carefully considered. Otherwise, the rate of FLRA reversals or modifications of arbitration awards to which agencies file exceptions will continue to be unacceptably high. This will tend to call into question the competence of arbitrators to resolve successfully labor-management disputes in which some law, rule, or regulation may have an effect. Of course, an arbitrator cannot prevent modification of an award, if the FLRA chooses to reverse its own decisions. However, this has not been the reason for the great bulk of the FLRA's modifications or reversals of arbitral awards.