## III. The Federal Sector

**Moderator:** Ira F. Jaffe, NAA Member, Potomac, Maryland
**Panelists:** Jerry Lelchook, Deputy Director of Human Resources, U.S. Department of Labor, Washington, DC
William Harness, National Counsel, National Treasury Employees Union, Atlanta, Georgia

**Jaffe:** I have been a full-time arbitrator for the past 26 years and, prior to that, was in private practice of law. Our distinguished panel is Jerry Lelchook and Bill Harness.

Jerry Lelchook currently is the Deputy Director of Human Resources for the U.S. Department of Labor Headquarters. He has been with the Department for 31 years and served 16 of those years as Director of Employee and Labor-Management Relations.

Bill Harness is National Counsel for the National Treasury Employees Union (NTEU). He has more than 35 years in the field, including 31 years with NTEU and, prior to that, he had been in the private sector on the management side. He will have a mixed set of reactions and views to provide to us.

I do need to note at the front end in case I forget later that the views of my panelists are clearly their own personal views and not necessarily the views of their respective organizations.

A few preliminary comments from me before turning this session over to Jerry and Bill for their reaction to the Mittenthal/Vaughn paper that addresses how arbitrators generally deal with disciplinary penalties and, in particular, discharge cases.

The central premise in the paper is that there has been a shift in arbitral deference toward employer-chosen penalties for employee misconduct. That shift moved essentially from appellate review language—abuse of discretion, focusing on things such as discriminatory, unfair, arbitrary or capricious and the like—to more of a de novo determination of reasonableness based on the facts in the particular case as well as consideration of such things as habits and customs of the industry, the relationship, the community, and industrial life in general.

Some of the key questions deal with where an arbitrator is supposed to get this information about habits and customs of the industry, relationship, community, and the like. I suspect the short answer is from our own personal and professional experience over the years. Presumably the parties are on notice of much of

it. That is a large piece of what the parties are paying for. You will see in a number of the cases language akin to the arbitrator not substituting his or her judgment for that of management and you will have the usual language of reasonableness, excessively harsh penalty, and the like. The paper gave a number of explanations as to the reason for the change in arbitral scrutiny of the discharge penalty. The fact that we are a generation composed largely, but not exclusively, of full-time neutrals also plays some role in the question of arbitral deference to managerial judgments regarding the appropriate penalty. The authors also suggested there may be some improper motives behind mitigation of discipline or discharge penalties.

The paper identified a number of areas where parties have negotiated specific disciplinary responses to specific misconduct, tables of penalty, zero tolerance, and negotiated rules dealing with attendance and drug policies. Not mentioned in the paper, but in the same vein, parties often negotiate agreed-upon penalties with respect to breaches of no-strike clauses and may list a number of "cardinal sins" agreed upon by parties to provide grounds for discharge. Finally, there are the knotty issues with last-chance agreements.

The focus of this session is to look at the federal sector and determine whether it is different and, if so, how it is different. I believe that as compared with the private sector and to a lesser degree the state and local cases, there are meaningful differences in terms of the way discharge penalties are arrived at in the federal sector and the way that arbitrators deal with them. Two decisions underlie this belief. In *Douglas v. Veterans Administration,*[1] the Merit Systems Protection Board (MSPB) laid out an analytical framework for how it would review removal penalties and set forth a number of specific factors that have been institutionalized almost to the point of serving as little more than checklists. In other cases the specific factors probably are applied in the manner that MSPB contemplated.

*Douglas* states that the MSPB sits in the shoes of the old Civil Service Commission and, as a result, is not functioning solely as an appellate body. The MSPB sits as the final government employer decisionmaker on adverse action cases. Under a Supreme Court decision that came out a few years after *Douglas, Cornelius v. Nutt,*[2]

[1] 5 MSPB 313 (1981).
[2] 472 U.S. 648 (1985).

arbitrators are expected to utilize the same general legal principles and approaches used by the MSPB. The Court's primary rationale was to discourage forum shopping, as the unions and employees have a choice of whether an appeal of an adverse action goes to the MSPB's administrative process or to grievance arbitration.

That leaves some arbitrators in an interesting position. They function as neutrals and outside adjudicators yet, in a legal sense, arbitrators hearing those cases function as the final governmental decisionmaker.

The second significant premise is that the MSPB noted that it had jurisdiction to mitigate a reduced penalty as part of its independent, quasi-judicial function within the executive branch. This authority was not merely a question of whether the penalty was too harsh or arbitrary but whether the penalty was unreasonable. The key part of the *Douglas* case, as applied by most agencies, unions, and arbitrators, deals with the question of the factors that will be utilized to determine if the penalty imposed by the agency is or is not reasonable. The primary factors that are relevant for consideration in determining the appropriateness of the penalty are known as the *Douglas* factors, named after the case.

The first factor to be considered is the nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical, or inadvertent, was committed maliciously or for gain, or was frequently repeated. The second factor to contemplate is the employee's job level and type of employment (supervisory or fiduciary role), his or her contacts with the public, and the prominence of the position. The third factor is a review of the employee's past disciplinary record. The fourth factor to consider is the employee's past work record, including length of service, performance on the job, ability to get along with co-workers, and dependability. The fifth factor to evaluate is the effect of the offense upon the employee's ability to perform at a satisfactory level and the effect upon supervisor's confidence in the employee's ability to perform assigned duties. (This is the reason almost always articulated by the supervisor at hearing to support a termination, that is, that the particular misconduct undermined the supervisor's trust in the individual or undermined the employee's ability to function on the job.) The sixth factor to review is the consistency of the penalty with those imposed on other employees for the same or similar offenses. The seventh factor to examine is the consistency of the penalty with any applicable agency table of

penalties. The eighth factor to take into account is the notoriety of the offense or its impact upon the agency's reputation. The ninth factor to consider is the clarity with which the employee was on notice of the rules that had been violated or whether he or she had been warned about the conduct in question. The tenth factor to evaluate is the employee's potential for rehabilitation. The eleventh factor to review is additional mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of others involved in the matter. The twelfth and final factor to deliberate is the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee and others. These factors are not supposed to be exhaustive of the factors that may be relevant in any given case when determining the appropriate penalty, but as a practical matter, are the only factors that proposing and deciding officials and arbitrators reference in these cases.

The key issue in adverse action cases typically involves not the factors, which probably mirror those used in the private sector in "just cause" determinations, but the weight of the factors to the facts of the particular case.

I will turn the discussion over to Jerry Lelchook if he wishes to comment first.

**Lelchook:** My comments or reaction after listening to the plenary session with Dick Mittenthal and Dave Vaughn is that the evolution of the process means there is no predictability. Unions and management both prefer some predictability in this arena. If an outcome is based on the cultural, social, authoritarian, nonauthoritarian upbringing, education, or whatever that goes into the makeup of an arbitrator, then that is not a very good way to make decisions for management and the union. When deciding whether to take a case to arbitration or settle it at the Department of Labor, we discuss the fact that arbitration is a crap shoot because of the unpredictability of arbitral decisions.

My other comment is that management always values a reasoned and thorough decision setting forth all the rationales for the outcome and specifically stating whether the agency is sustained or not sustained. A reasoned and thorough decision has nothing to do with length. Some of the best decisions the Department receives are short and terse but to the point.

**Jaffe:** Thank you. I turn now to Bill for reaction and comment.

**Harness:** When I read Richard and David's paper, I began thinking that the paper, and the dialogue we will have to provoke thought, are what makes the Academy great because it sharpens and refines our professional skills. I agree with much of what Richard and David wrote, but there are a couple of items that deserve comment.

When I began my career in this business many years ago, I was a management representative in the private sector. I negotiated contracts and suffered through a few strikes and I served as an advocate in arbitration hearing. The corporation had 57 plants in many different states. Some plants were covered by union contracts and others were, essentially, at-will employees dependent upon whatever the state statute said about employment at will. I have seen all aspects of these kinds of cases.

The paper opines that there are two elements in these cases that you need to consider: the guilt or innocence and the penalty, and the paper focuses primarily on the penalty. I would offer that there are three elements. David and Richard are of the opinion that there is not a universal definition of just cause but if you read the material closely there is or there can be a universal definition.

The third element that must be considered in all of these cases—private sector and federal sector—is whether the action furthers a legitimate employer interest. If that threshold question cannot be answered, then there is no need to examine issues of guilt or innocence or the penalty. Employers should discipline employees for only those actions that have a nexus to their mission or work. There is some thinking that when we talk about nexus, we are talking about off-duty conduct, but not necessarily.

Another response to their paper was the idea that when an employee returns to work—an employee who has been discharged and who returns to work after 12 to 18 months—that the receipt of back pay is a windfall. I am prepared to argue for a long time whether or not back pay is a windfall. The person is out of work for a long time, may lose a house during that time, and suffers financial stress that affects a marriage. To conclude that the union seeks only reinstatement of the employee without concern for back pay is not a correct statement. The union is interested in back pay, and that is an important part of making the employee whole and not a windfall.

Why does it take so long for these cases to arrive at arbitration? My experience is that the grievance process takes awhile to work and sometimes there are reasons in addition to the grievance pro-

cess itself. The union may agree with the agency to hold the case in abeyance because there is another case similar to it that is being litigated, so there is no sense in doing both. One of the primary reasons that it takes so long to do cases is that the union cannot secure dates from arbitrators on our panels. An arbitrator should take a close look at why a case has taken so long to arrive at hearing when presented with an issue of whether there should be back pay.

With respect to the issue of zero tolerance, a few years back the Internal Revenue Service (IRS) had some bad experiences with employees browsing taxpayer information. Employees have access to an information system that allows them to see tax returns. Contrary to what employees are taught, contrary to the agency's code of ethics, and contrary to the law, employees take a look at taxpayer returns and sometimes it's more than browsing, and there are cases where employees were working with practitioners.

The Commissioner announced that when there was a violation of this policy in the future, the agency position would be zero tolerance, which meant that if an employee violated the policy, termination followed. When the Commissioner gave that briefing, NTEU asked about whether the agency would apply the *Douglas* factors. To remedy a violation of a zero tolerance policy by means of automatic removal, with no consideration of the *Douglas* factors, is a violation of the law. Arbitrators hearing such cases have reached the same conclusion. *Douglas* is the state of the law and absent some statutory requirement that provides for removal when there is a violation of the policy, *Douglas* must be considered.

In the federal sector there is a difference between conduct and performance. They are covered by two separate statutes. With conduct cases, there is a higher burden of proof and mitigation is possible. With performance cases, there is a much lower burden of proof and there is no mitigation. Those cases are up or down. Arguments can be made that there ought to be some mitigation based on the way the statute's written, but the law is that there is not.

Finally, I agree that arbitrators should use the standard of reasonableness and the standard of abuse of discretion in reviewing these cases. An arbitrator functions as a trial judge to determine the facts, hear all the evidence, listen to testimony, review the documents, make judgments, and apply a penalty. All of that occurs after an arbitrator determines whether there is a nexus between the action and the mission or work of the employer.

**Jaffe:** Jerry, would you like to respond?

**Lelchook:** I totally agree with Bill's third element. I think it is inherent in any federal sector discharge or major adverse action case that the basis for the action must promote the efficiency of the service. By definition, the actions that management takes must further legitimate employer interests and the agency must demonstrate that when presenting its case.

On another point that is often misunderstood, the approach at the Department of Labor in discipline cases short of removal is that discipline is remedial and not punitive. A lot of money and time is dedicated to recruiting and training employees. It is a big investment in human capital. The Department has fairly sizeable turnover, so the Department's interest is in salvaging through the disciplinary process employees who have engaged in misconduct. I am reminded of my former boss and mentor saying something to the effect that sometimes a person has to be fired two or three times just to get his or her attention.

**Jaffe:** A few brief comments and then some dialogue. If this is an area of either professional or personal interest, you may want to take a look at some of the individual employment cases where courts have purported to interpret and apply the term "just cause" in cases involving claims of breach individual employment contracts. The majority of those cases focus on very different things compared with the focus in the private sector dealing with collectively bargained agreements. In the federal sector, using the phrase "for such cause as will promote the efficiency of the Service" is essentially the same as just cause. Most of the court cases involving individual employment contracts focus on employer good-faith belief that the employee engaged in misconduct sufficiently serious to support or merit discharge. The employer does not need to prove the underlying misconduct but simply prove that it honestly believed the employee engaged in that misconduct. That is more of a process than a substantive limitation and it is very different from the way arbitrators traditionally apply just cause.

In the private sector and certainly in the federal sector, if the employer or the agency reasonably believes that the individual stole, but the evidence does not support that particular charge, then there is no ground for discipline. In my opinion, the doctrine of deference developed in the early private sector cases involved more of a focus on the process by which discipline and discharge decisions were reached and less with a de novo substantive review by the arbitrator. The change in deference marched lock-step with

the change in what just cause means in the collectively bargained arena.

The other difference in the federal sector that truly is different from the private sector is that the arbitrator has to consider the constitutional requirements for notice and response. Invariably there is a proposing official followed by an oral or written reply followed by a decision from a deciding official. To my panelists I ask "Do you think it is necessary, either in most cases or in every case, for the arbitrator to hear from both the proposing official and the deciding official? Is it sufficient for the agency to tender proof of the underlying misconduct in the decision letter, rest its case, and let the arbitrator reach the determination of whether, in fact, it was for such cause as will promote the Service?"

**Harness:** The question is better posed to arbitrators whether they think it helps. The union frequently wants to examine both officials in removal and discipline cases. The union wants to know what discussions and dialogue existed between them, whether a report was prepared that was provided to the deciding official, how involved the deciding official was in making the decision or was it a rubber stamp of the proposal and probably the work of the labor relations staff.

**Lelchook:** I argue with our own attorneys on this matter because only the decision is challenged and not the proposal but our attorneys like to present the proposing and deciding officials to cover their bases. I think only the deciding official is necessary because the arbitrator needs to know whether or not that deciding official considered the *Douglas* factors in terms of the penalty. In any disciplinary situation—company or government bureaucracy—management does not act in a vacuum and there is seldom a single case issued in terms of discipline where the proposing and deciding officials have not held at least a conversation. Usually, a proposing official needs another official's permission to propose the action. First- and second-line supervisors are not independent in what they want to do and can do; they will hold a discussion with their superior and indicate what the issue is and the manager will approve or disapprove it. That official who approves of the proposed action must ultimately decide the case. The fact that the manager was aware it was in the works does not mean that he or she cannot act in an objective, independent way under the law to decide the case, especially because the manager has not heard from the employee or the employee's representative. Only

if it is so biased would I view that discussion by the officials as a problem.

**John Murphy:** I am from Cincinnati, Ohio. From my point of view, given the fact that I have no clue as to what the case is all about prior to the hearing, go toward presenting both officials even though it may be obvious they both discussed the case. I find it helpful to me in trying to understand the case.

**Audience Member:** [3] I would say that always happens because it is usually the proposing official that is going to be crucial to bringing certain testimony into the record as that person may have observed or been involved in whatever the situation was.

**Roger Abrams:** I want to pick up a comment that Jerry made about when they do talk and trying to determine if there was bias, I think that is exactly right and that is why arbitrators want to know what is proposed and what has been proposed in other cases like this.

Doesn't that contribute to the length of the hearing? In many cases an arbitrator may need to hear from everybody who had input or a formal role. Did the assault take place? Was the theft proven? Or was there some other kind of act that in and of itself may be sufficiently egregious given the employee's job and potentially modest service that you may not need to hear all that stuff.

**Audience Member:** It might prolong the hearing. We are not interested in a repetitive testimony but I think that this is pretty important. If it makes the hearing a little bit longer, so be it.

**Roger Johnson:** If the proposing official does not testify, how does the arbitrator know whether the proposing official has considered the mitigating factors raised by the employee? To me it is extremely important to hear from that person to determine whether or not that person considered the mitigating factors and that person's rationale. I don't think the deciding official is nearly as important because a lot of times the deciding official is reciting the proposed notice.

**Audience Member:** Roger is correct because there have been cases where an arbitrator is told that the agency is not going to put the deciding official on the stand. Why would they do that? I don't know but now we have a dilemma. Does the arbitrator call that official because he needs him to go through all of these things?

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[3]The majority of questions posed or comments made during this session were not distinguishable or audible on the tape.

How can an agency argue that it considered all these things when it does not present the official for testimony? The deciding official is important.

**Audience Member:** I agree that the deciding official is absolutely essential and I also agree that the proposing official is less important.

**James Sherman:** I'm an arbitrator in Tampa, Florida. I wonder if this sounds familiar to you because I've experienced this several times within the last year. The advocate sounds almost like a hired gun. He comes in and he tells us all about the *Douglas* factors and so forth and so on and then the management witness is frustrated because it is so obvious that the witness does not know about the *Douglas* factors.

**Lelchook:** If that occurs, the manager has not been served well by his or her staff. Managers are not labor relations experts. They are to manage a program, administer the Occupational Safety and Health Act (OSHA) or the Fair Labor Standards Act (FLSA). They have advisors to give them technical assistance and advice and they will go to those people for advice. I have often heard people say that the human resources or labor relations staff make the decisions, but that is a myth. They provide all the guidance and advice and technical assistance necessary and then the manager makes a decision. The staff explains the factors to the manager. In the Department of Labor, the staff make sure that does not happen at hearings.

**Jaffe:** Let me pose another question to the panel members. Under *Douglas*, if a removal action is mitigated, it is to be mitigated to the maximum reasonable penalty based on the facts as proved ultimately at the hearing. Where is the arbitrator supposed to go ahead and get the evidence concerning what that maximum reasonable penalty may be? As an advocate you don't necessarily know at closing argument or briefing what facts the arbitrator may ultimately credit or fail to credit.

**Audience Member:** I guess maybe I'm a little more old fashioned in this whole arena. I have been on both sides but never have been a neutral. What the arbitrator needs to look at is did management have all the information before them, did it make a reasoned decision, and what facts did it base that decision on? As long as the decision is sound and based on all the facts and there are no procedural violations or due process problems, then arbitrators should not be substituting their judgment for that of management.

**Audience Member:** Any union that has the ability to negotiate for this kind of arbitral review as opposed to deference or an abuse of discretion is always going to bargain for your judgment because that is what it wants. An arbitrator functions as a judge. The union is not interested in deferring to the decision of the agency as long as it meets standards but it seeks a de novo review of that agency decision.

**Jaffe:** Would an award of reinstatement with no back pay be lawful in the federal sector given the requirements of *Douglas* and its progeny?

**Harness:** I think it's pretty questionable.

**Lelchook:** It happens in the federal sector.

**Harness:** If an arbitrator has a case where somebody's been removed and it is 15 months before a decision issued, regardless of the reasons for the delay in getting to hearing, why would the arbitrator return the person to work without back pay, thereby effectively reinstating the employee after a 15-month suspension? Agencies don't give 15-month suspensions!

**Audience Member:** If the agency had proposed and decided a 485-day suspension, and that is what the arbitrator is deciding, you would think the agency was nuts but that, in effect, is what some arbitral decisions result in. The employee's official personnel records, that follow the employee forever, show a 485-day suspension.

**Audience Member:** The process right now is moving to make arbitrators simple fact-finders. If we say this event happened, then this consequence is dictated by statute or by regulation.

**Harness:** There is no question that this administration is trying to move in that direction. The Department of Homeland Security's regulations, currently enjoined, provide for Mandatory Removal Offenses (MROs). They want to have a different process in terms of how cases are heard, how penalties are meted out, and the appeals themselves. This is already in place on the performance side where there is no mitigation.

**Suzanne Butler:** I'm an arbitrator in the Washington, DC, area. Could the panel address security clearances and access to classified information?

**Harness:** The Authority has re-looked at the idea of seeing classified information if you have a security clearance and changed its decision on whether or not the position should or should not be in a bargaining unit. My experience since 9/11 is that every

opportunity that can be taken to wrap 9/11 and deal with security and not have to deal with the union is being done. We have a unit where employees have security clearances and many of these employees were given these clearances for a specific task force and the security clearance may have been given 10 years ago and they have not used it. The agency is mining this information and every place it finds somebody with a security clearance, the agency boots them out of the unit.

**Lelchook:** It's a very complex issue. There are different types of security clearances. They aren't all the same. Every employee who comes into the government has to go through something that's called a NACI, have his or her fingerprints taken and sent to the FBI where they check for any kind of a criminal record and so forth. There are higher level clearances up to top secret, which is more common in the Department of Defense. Certain agencies deal with classified information so the answer is not simple. I have not thought about it in terms of making a change in the area of just cause and discharge but my initial reaction is I do not think so.

**Harness:** In the private sector, an employee is not in the bargaining unit because of exclusions based on a conflict of interest. The employee is a supervisor; a supervisor is excluded due to conflict of interest. People who are confidential because they work for people that formulate labor relations policies shouldn't be in the bargaining unit—it's a conflict of interest. Nobody can explain why an employee with a security clearance should not be in a bargaining unit.

**Lelchook:** Requiring a security clearance is a function of the work that you do. Whether or not you are in or out of the bargaining unit is dependent upon the statutory criteria of the labor management relations statute and nowhere in there does it say simply because you have a security clearance that is a reason to exclude anyone from the bargaining unit. The Department of Labor has never made that attribution that I'm aware of at least.

**Audience Member:** If an award reinstates without back pay, would that eliminate the union's ability to seek reasonable attorneys' fees under the Back Pay Act?

**Harness:** My initial reaction would be that if the only basis for attorneys' fees was the Act and no back pay was awarded, you lose

that entitlement. If, on the other hand, you've got some other basis for claiming attorneys' fees, it might not.

**Lelchook:** I would agree with that.

**Jaffe:** To collect attorneys' fees you also need to be a prevailing party and it also has to be in the interest of justice.

**George Birch:** I am an attorney at the Federal Labor Relations Authority (FLRA). Almost all attorneys' fees are engaged under the Back Pay Act. One of the statutory criteria is that the employee must receive an award of back pay, so if an arbitrator reinstates without back pay then there is no eligibility for attorneys' fees.

**Audience Member:** You may also have the Equal Access to Justice Act in appropriate cases. If you have a violation of Title VII and a mixed case, for example, you may have some other basis. In terms of the traditional run-of-the-mill case, I suspect that that's correct that if you don't qualify under the Back Pay Act, then you're out of luck.

**Roger Abrams:** I am an arbitrator from New York. Jerry seemed to indicate that arbitrators are subjective in the way they handle cases but the kind of predictability he may be suggesting is not possible. Each case is determined by its facts and each set of circumstances, whether it's federal sector or private sector.

**Lelchook:** I agree with you. There is this element of subjectivity in the process and there is no way that anyone can compartmentalize to that degree. What I indicated earlier is that the discussion in the back rooms at my Department whether to proceed to arbitration or not is the staff's comment that "it's a crap-shoot" and that comment leads to "should we try to settle this case." There is no way to erase the subjectivity, so it's Catch-22. You want to examine it objectively but there is subjectivity within you that cannot be erased. That's the way the process works and it's a good process. The Department is not dissatisfied with it but we do the best we can to marginalize your subjectivity.

**Harness:** The work you do is subjective and that is not bad or a dirty word. You listen to the testimony of witnesses, determine who is more credible, and determine the facts. You are subjective when you do that. You look at the *Douglas* factors that are listed for you but you are making subjective interpretations on all of the testimony you hear on each one of those. That is expected and desired. If you want to be objective, then we could have the zero tolerance policy like we had in one of the agencies and you would be fired. We are asking you to examine de novo and determine the

penalty. We could do our jobs better by helping you in terms of being consistent with the penalty and many of the agencies keep records where we can get this information. In fact, my union, they provide it to us. They provide it to us even without cases and we get it on a regular basis. The union should tell the arbitrator that in these circumstances and in these cases, this is what the agency proposed and these are the penalties that the agency imposed. The union can argue inconsistency or mitigation.

**Audience Member:** I want to ask a question as a group. What do you think about the Academy having guidelines on just cause? In other words, there would be these elements and does it support employer action, is there guilt or innocence, and the penalty? Is that so nebulous?

My question is whether in the federal sector that may be contrary to *Douglas* and the law? This sector has a whole nuance attached to it. The phrase "for such causes will promote the efficiency of the Service" is a legal concept as distinct from the bargain of the parties. There may be some interesting limitations on the party's ability or authority to define what particular behavior will merit what particular responses.

**Harness:** The efficiency of the Service incorporates all three elements in the federal sector. The overwhelming majority of your work is in the private sector and that third element should be a consideration.

**Jaffe:** A word of caution to the neutrals in the group. The MSPB defines disparate treatment in ways that vary significantly from the private sector. Before you address and rely on that consideration, educate yourself to the particular nuances. I'd like to pose a general question to the audience as well: How many neutrals are comfortable independently researching the MSPB case law where the parties have failed to provide it in a removal case? Alternatively is it the parties' burden and, if they don't do it, do you march forward?

**Audience Member:** It worries me because I don't think that the parties give me all the information I need.

**Audience Member:** At the conclusion of the hearing when you have this feeling that the parties have not provided everything you need, do you give direction that you want this briefed?

**Audience Member:** I do that. I certainly do.

**Audience Member:** How does an arbitrator, standing in the shoes of MSPB, deal with per se violations or harmful error?

**Panel Member:** I think an arbitrator must use a "but for" concept. If you deny an employee's right to representation, that can be almost a per se violation if not harmful error. When examining other situations in terms of recruitment or applying for a position and something happened, then a "but for" analysis is necessary. But for this error, this person would have achieved some entitlement to something. That is how the harmful error analysis should be applied. Look at it from the view as what occurred that prejudiced this individual's rights in this proceeding? Failure to provide the proposal in specificity in detail so that they had a meaningful opportunity to defend themselves? Failing to give the required time? Failing to provide the information upon which the decision was made? Harmful error decisions are narrow. Most of our agencies are good in terms of substantive procedure.

**Jaffe:** As a related matter, there are a number of federal district court cases dealing with failure to provide notice and an opportunity to reply before either suspension or termination actions are taken in connection with police officers. A number of those cases award back pay up to the date when the error was allegedly cured and then treated beyond that based on its merits. That doctrine may have some application in a given case as well and provide a basis for pay up to the point when the agency listened to a response.

**Audience Member:** If the arbitrator sustains the grievance, an agency can appeal to the FLRA or, if it affects the civil service in general, the agency can go to OPM and then OPM has to show a violation of law or regulation. My question to Jerry is whether the Department of Labor has ever gone to OPM or the Justice Department to have those agencies appeal in federal court on mitigation of penalty?

**Lelchook:** Usually, we would not mess with it because OPM and Justice would say go away. We did appeal a situation where an arbitrator took a pure performance case and switched it to a conduct case and OPM sustained on appeal.

**Panel Member:** One last comment. Ira began this session by asking whether the federal sector is different. When you stand back and look at the bigger picture, except for some nuances having to do with some legal issues, I do not think the concept of just cause in the federal sector is much different than the private sector.

**Jaffe:** Thank you for being such an attentive and involved audience and thank you to my panelists.