CHAPTER 11

COLLECTIVE BARGAINING AND ARBITRATION IN THE FEDERAL SECTOR: AN UPDATE

I. PRESENTATION BY GEORGE BIRCH*

My avowed purpose this afternoon is to review and update the current issues relating to the scope of collective bargaining, arbitration practice, appeals, and the review of arbitration awards. From my 30-year experience in the review of arbitration awards at the Federal Labor Relations Authority (FLRA), I would suggest that an examination of the most common exceptions to arbitration awards filed with the FLRA and an examination of the most common bases on which the FLRA finds arbitration awards deficient can provide instructive snapshots of how the FLRA deals with the arbitration process and the extent of its review of arbitration awards.

For these snapshots to be instructive, an understanding of the FLRA's standard of review of arbitration awards is necessary. The standard of review that the FLRA will use to resolve exceptions filed to arbitration awards will depend on the ground for review asserted in the exception. The Federal Service Labor-Management Relations Statute[1] divides the grounds for review into two categories. The first category is that the award is contrary to law or contrary to regulation.[2] The second category specifies grounds similar to those applied by federal courts in private sector arbitration cases.[3] Under this category, the FLRA has recognized seven so-called private sector grounds for review.[4]

---

*George Birch is an attorney (J.D., LLM) with the Federal Labor Relations Authority (FLRA). The views expressed here are solely his own; he does not speak for the FLRA or any of its members.

[1] 5 U.S.C. §§7101–7135.

[2] *See* §7122(a)(1).

[3] *See* §7122(a)(2).

[4] The seven private sector grounds for review recognized by the FLRA are, as follows: (1) the arbitrator failed to conduct a fair hearing; (2) the arbitrator was biased or guilty of misconduct or the award was obtained by fraud or undue means; (3) the award is incomplete, ambiguous, or contradictory as to make implementation impossible; (4) the arbitrator exceeded his or her authority; (5) the award is based on a "nonfact"; (6) the award fails to draw its essence from the collective bargaining agreement; and (7) the award is contrary to public policy.

The most common exceptions to arbitration awards filed with the FLRA assert that the award is deficient on a private sector ground for review. A snapshot of how the FLRA resolves whether an award is deficient on one of these private sector grounds for review will show that the FLRA's standard of review of the arbitrator's award is very deferential, similar to the deference federal courts give arbitrators in the private sector. The FLRA will defer to an arbitrator's conduct of the hearing. The FLRA will defer to an arbitrator's interpretation of a stipulation of issues and an arbitrator's framing of the issue to be decided in the absence of a stipulation. The FLRA will defer to an arbitrator's determination on the timeliness of the grievance and other issues of procedural arbitrability. The FLRA will defer to an arbitrator's determination of the credibility of witnesses and the weight to be given their testimony. The FLRA will defer to an arbitrator's determination on the burden of proof to be applied unless one is specified by law or the collective bargaining agreement. The FLRA will defer to an arbitrator's findings of fact. But in my view, most significantly for purposes of our snapshot of FLRA review, the FLRA will defer to an arbitrator's interpretation and application of the collective bargaining agreement.

Probably the most common exception filed to an arbitration award with the FLRA is that the award fails to draw its essence from the collective bargaining agreement. Essence is one of the private sector grounds for review identified by the FLRA as a ground similar to those applied by federal courts in private sector arbitration cases. Early on in *United States Army Missile Materiel Command (USAMIRCOM)*,[5] the FLRA assessed federal court precedent for the standard to be met in order to challenge an arbitrator's interpretation or application of a collective bargaining agreement. As a result of that assessment, the FLRA fashioned an essence test from what the FLRA viewed to be the best formulations of a standard for reviewing an arbitrator's interpretation and application of the agreement. The FLRA held that an essence exception will be denied unless the appealing party can demonstrate that the award cannot in any rational way be derived from the agreement;[6] or that the award evidences a manifest disregard of the agreement;[7] or that on its face, the award does not represent a plausible inter-

[5]2 FLRA 432 (1980).

[6]The FLRA cited *Ludwig Honold Mfg. Co v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969) (*Ludwig Honold Mfg. Co.*).

[7]The FLRA again cited *Ludwig Honold Mfg. Co.*

pretation of the agreement;[8] or that the award is so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement, as to manifest an infidelity to the obligation of the arbitrator.[9]

In view of this stringent standard, it should not be surprising that a snapshot of the FLRA's resolution of essence exceptions shows that such exceptions are overwhelmingly denied, and I suggest to you that the reason for the denials is that the FLRA defers to the arbitrator. In explanation of the denial of their exceptions, the FLRA has repeatedly reiterated *Steelworkers v. Enterprise Wheel & Car Corp.*,[10] to the parties:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

A good example of this deference that results in the denial of exceptions is *Department of Health and Human Servs., Soc. Sec. Admin., Louisville, Ky.*,[11] which concerned the reprimand of the grievant for alleged unprofessional conduct and was submitted to arbitration on the issue of the agency had just cause to reprimand the grievant. The arbitrator noted that the charge of unprofessional behavior derived from the parties' collective bargaining agreement, which provided that "[e]mployees and [m]anagement shall conduct all relationships with courtesy and professionalism."[12] However, the arbitrator stated that he was uncertain of what the parties intended by this provision because he understood professionalism to involve the characteristics of a profession, particularly the learned professions of law, theology, and medicine. As his award, the arbitrator found no just cause for the reprimand by rejecting unprofessional behavior as a permissible basis for discipline because the grievant was not a professional. The agency filed an exception to the award with the FLRA and contended that the award did not draw its essence from the agreement because

---

[8]The FLRA cited *Holly Sugar Corp. v. Distillery Workers*, 412 F.2d 899 (9th Cir. 1969).
[9]The FLRA cited *Brotherhood of Railroad Trainmen v. Central Ga. Ry. Co.*, 415 F.2d 403 (5th Cir. 1969).
[10]363 U.S. 593, 599 (1960).
[11]10 FLRA 436 (1982) (Member Applewaite dissenting).
[12]10 FLRA at 436 (quoting agreement).

the arbitrator refused to apply a provision of the agreement to the bargaining unit employees it was negotiated to cover.

A majority of the FLRA denied the exception, finding that the agency was attempting to have its own interpretation of the agreement substituted for that of the arbitrator. The majority ruled that merely because the agency, or even the FLRA, would have interpreted the agreement provision differently provided no basis for finding the award deficient. Thus, the majority held that although they did not necessarily agree with the arbitrator's interpretation of the agreement, they could not with certainty find that the award did not draw its essence from that agreement.

But a snapshot of the FLRA's resolution of an exception claiming that the award is contrary to law will show a different standard of review. The standard of review will not be deferential; the standard of review will be de novo. De novo means anew.[13] In reviewing arbitration awards de novo, the FLRA determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law in light of its own independent judgment without giving any weight or deference to the arbitrator's legal conclusions.[14] However, in making this determination, the FLRA does defer to the arbitrator's underlying factual findings.[15]

The FLRA's explicit recitation of this standard is based on the decision in *United States Customs Serv. v. FLRA*,[16] in which the court held that when a party contends that an award is contrary to law, the FLRA must review de novo the legal questions raised by the award and the exceptions. This standard of review also reflects the scope of the negotiated grievance procedure under the statute.

The statute has significantly expanded the basic function of the negotiated grievance procedure and grievance arbitration from its purpose in the private sector, which is primarily to ensure compliance with the terms and conditions of the parties' collective bargaining agreement. In contrast, in the federal sector, an important additional function of the negotiated grievance procedure and grievance arbitration under the statute is as a means of ensuring, and, if necessary, enforcing, compliance with law, as well as enforcing the collective bargaining agreement. Thus, in the federal sector, employees, unions, and agencies are filing grievances directly alleging violations of a wide variety of laws. As

---

[13] *See* BLACK'S LAW DICTIONARY 467 (8th ed. 1999).
[14] *See, e.g., NTEU Chapter 24,* 50 FLRA 330 (1995).
[15] *See, e.g., NFFE Local 1437,* 53 FLRA 1703 (1998).
[16] 43 F.3d 682 (D.C. Cir. 1994).

a result, the FLRA must review awards to determine whether the arbitrator correctly applied those laws. Submitting questions of law to arbitration clearly changes the character of the proceeding before the arbitrator, and the FLRA's de novo review of these awards is a reflection of this changed character of the arbitration proceeding.

Although this standard of review is criticized, despite the expanded scope of the grievance procedure in the federal sector, it even has support in private sector arbitration cases. As our fireside chat judge has recognized, the context of labor arbitration is quite different from the context of arbitration where individuals are seeking to vindicate statutory rights. In statutory rights arbitration, arbitration serves merely as a substitute for litigation and the arbitrator serves simply as a private judge. Judge Edwards, for the U.S. Court of Appeals for the D.C. Circuit, ruled in *Cole v. Burns Int'l Sec. Servs.*,[17] that in such cases, review must be "sufficiently rigorous" to ensure that the arbitrator has correctly resolved issues of public law. In my view, this is precisely the Authority's approach in reviewing questions of law de novo.

Snapshots of the most common bases on which the FLRA finds awards deficient are probably the most instructive snapshots of FLRA practice because they can provide lessons to arbitrators on issuing awards that can withstand review and they can provide lessons to arbitration advocates on how cases should best be presented to an arbitrator in the federal sector. For example, let us take a snapshot view of the most common private sector ground on which awards are found deficient, which is that the arbitrator exceeded his or her authority.

The FLRA will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration and when they fail to resolve an issue that was submitted to arbitration.[18] A snapshot of how the FLRA resolves exceeded authority exceptions is likely to have some good news and some news the audience may not view as good. It will also give me my best opportunity of a teaching point for arbitrators on what to me is the most avoidable deficiency under the statute.

In resolving exceptions claiming that the arbitrator resolved an issue not submitted in cases where the parties have stipulated the

---

[17] 105 F.3d 1465, 1487 (D.C. Cir. 1997).

[18] *See, e.g., Washington Plate Printers Union Local 2, IPPDSPMEU & Graphic Communications Int'l Union Local 4B, AFL-CIO,* 59 FLRA 417 (2003) (*Plate Printers*).

issues for resolution, the FLRA permits arbitrators to resolve, in addition to the stipulated issues, all issues that necessarily arise from the stipulated issues.[19] Moreover, the FLRA in examining the arbitrator's interpretation of the stipulation will grant that interpretation the same deference the FLRA grants an arbitrator's interpretation of a collective bargaining agreement.[20] In other words, to be deficient, the arbitrator must resolve an issue that is not plausibly encompassed by the stipulated issues and that does not necessarily arise from the stipulated issues. It seems to me that this is good news to arbitrators who will be found to have resolved an issue not submitted only if they fail to confine their awards to issues reasonably encompassed by the parties' stipulation.

In cases where the parties do not stipulate the issue for resolution, the discretion granted arbitrators is even greater. The FLRA permits arbitrators to frame the issues for resolution and so long as the award is confined to the issues as the arbitrator framed them, the FLRA will not find that arbitrators exceeded their authority.[21]

In particular, the FLRA will not find that an arbitrator failed to resolve an issue submitted to arbitration unless the alleged issue had been stipulated or expressly included by the arbitrator. What our snapshot shows is that in cases that are becoming increasingly common, the FLRA will deny exceptions, typically filed by unions, asserting that they submitted to arbitration claims that the agency violated law, but the arbitrator framed the case solely in terms of whether the agency violated the parties' collective bargaining agreement and failed to resolve the alleged violation of law.[22] The FLRA's consistent practice in cases where the parties have not stipulated the issues for the arbitrator to resolve has been to grant arbitrators the discretion to determine what issues are to be resolved in the grievance, which includes the discretion to decline to address issues, as well as the discretion to determine what issues to consider.[23]

Other news for arbitrators in exceeded authority cases, which you may view as not so good, is the tendency of the FLRA to confine arbitrators to their narrowest expressed statement of the issues for resolution. Our snapshot shows that once an arbitrator formulates

---

[19] *See, e.g., United States Dep't of the Treasury, United States Mint, Denver, Colo.,* 60 FLRA 777 (2005).
[20] *See, e.g., Air Force Space Div., L.A. Air Force Station, Cal.,* 24 FLRA 516 (1986).
[21] *See, e.g., AFGE Local 1547,* 59 FLRA 149 (2003).
[22] *See, e.g., Association of Civilian Technicians, N.Y. State Council,* 60 FLRA 890 (2005).
[23] *See id.*

the issue for resolution and fully resolves the formulated issue, an arbitrator may not address any issue that "is not sufficiently linked to the resolution of the issues as framed by the [a]rbitrator."[24] Accordingly, as advised by the FLRA, when an arbitrator unambiguously frames the issue for resolution as whether specified conduct of an agency was improper and unequivocally determines that the specified conduct of the agency was not improper, the arbitration process must end, and any remedy provided by the arbitrator is deficient.[25] Our snapshot shows that in assessing whether the award is deficient, the FLRA does not question whether the arbitrator could have formulated the issues to include the issue for which a remedy was provided, but, rather, whether the award was confined to the issues as the arbitrator specifically formulated them.[26]

It seems to me that the lesson here for arbitrators is simple and the deficiencies that have been found by the FLRA are easily avoided. Do not anywhere in your award specifically set forth the issues for resolution in terms that could be construed as narrower than your overall award. In particular, when you find that certain conduct of an agency is not improper, but other conduct is improper and provide a remedy, be certain that you have framed the issues for resolution to include the conduct that you have found improper.

The discretion is yours. If you ensure that you exercise it consistently, you will not be found to have exceeded your authority by resolving an issue that was not submitted.

As I said, I think a snapshot of the most common bases on which the FLRA finds awards deficient can be the most instructive. We have taken a snapshot of exceeded authority. Let me conclude by taking a snapshot view of the most common basis on which arbitration awards are found deficient under the statute, which is that the award is contrary to management's rights under section 7106(a) of the statute.

In my view, section 7106(a) of the statute has been and remains the most common basis on which awards are found deficient for essentially three reasons: (1) the scope of the rights; (2) the severity of the constraint; and (3) the limited exceptions. The breadth of the enumerated rights in section 7106(a) is substantial, while the specified constraint is that nothing in the statute shall affect

---

[24] *National Labor Relations Bd., Tampa, Fla.*, 57 FLRA 880, 881 (2002).
[25] *See Plate Printers,* 59 FLRA at 420–21.
[26] *See United States Dep't of the Treasury, Fed. Aviation Admin.*, 59 FLRA 776 (2004) (Member Pope dissenting).

the authority of management to exercise the enumerated rights, which includes grievances and arbitration awards. The limited exceptions to this severe constraint are section 7106(b) of the statute and applicable law. As a result of these exceptions, nothing in section 7106(a) precludes the negotiation of the matters set forth in section 7106(b)(1), (b)(2), or (b)(3). Applicable law is an additional exception to section 7106(a)(2) rights because these rights must be exercised in accordance with applicable law.

One of the most important decisions of the FLRA for a federal sector arbitration advocate and a federal sector arbitrator to know is *United States Dep't of the Treasury, Bureau of Engraving and Printing, Washington, D.C. (BEP)*,[27] in which the FLRA established the framework it employs for resolving exceptions that allege that an arbitration award is contrary to management rights under section 7106(a). Based on the statutory language of section 7106(a), *BEP* sets forth some basic principles that must guide arbitration in the federal sector.

The basic principle as to the rights enumerated in section 7106(a)(1) of the statute is that an arbitration award may affect the exercise of one of these rights only when remedying the violation of a contract provision negotiated under section 7106 (b) of the statute. The basic principle as to the rights enumerated in section 7106(a)(2) of the statue is that an arbitration award may affect the exercise of one of these rights in only two circumstances: (1) as a remedy for the violation of a contract provision negotiated under section 7106(b); or (2) as a remedy for the violation of an applicable law.

Contract provisions negotiated under section 7106(b)(1) pertain to the method or means of performing work or employee staffing patterns. These are matters over which an agency may elect, but is not required, to bargain under the statute. Once an agency elects to bargain and agrees to a contract provision pertaining to these matters, the contractual obligation is enforceable by an arbitrator consistent with management's rights set forth in section 7106(a). Contract provisions negotiated under section 7106(b)(2) pertain to procedures that management must observe in exercising any management right, and the procedure is enforceable by an arbitrator. Contract provisions negotiated under section 7106(b)(3) pertain to arrangements for employees adversely affected by the exercise of a management right.

---

[27]53 FLRA 146 (1997) (*BEP*).

For a contract provision to constitute an arrangement that was appropriate for negotiation, the arrangement must seek to ameliorate or mitigate adverse effects that flow from the exercise of a management right. For the contract provision to be enforceable by an arbitrator, the enforcement must not excessively interfere with the exercise of a management right.[28]

Applicable laws that are enforceable by an arbitrator consistent with management's rights under section 7106(a)(2) encompass not only statutes and the U.S. Constitution, but also judicial decisions, executive orders, and regulations having the force and effect of law.[29]

These basic principles are reflected in the framework established in *BEP*. Under *BEP*, the FLRA first examines whether the arbitration award affects the exercise of a management right. If the award is determined to affect the exercise of a management right, the FLRA applies a two-pronged test to determine whether the award is deficient. Under prong 1, if the affected right is set forth in section 7106(a)(1), the FLRA examines whether the award provides a remedy for the violation of a contract provision negotiated under section 7106(b). If the affected right is set forth in section 7106(a)(2) rights, the FLRA examines whether the award provides a remedy for the violation of either a contract provision negotiated under section 7106(b) or an applicable law. If an award affects the exercise of a management right and does not satisfy prong 1, the FLRA will find that the award is deficient.

If the award does satisfy prong 1, under prong 2 of *BEP*, the FLRA examines whether the arbitrator's remedy reflects a reconstruction of what management would have done if management had not violated the contract provision or applicable law. If the award does not satisfy prong 2, the FLRA will strike the remedy. If the award does satisfy prong 2, the FLRA will deny the agency's management right exception to the award.

This is a complicated area, but I think advocates and arbitrators can better deal with management rights by focusing on three things: (1) effect; (2) enforceable violation; and (3) reconstructive remedy. By this I mean that unions and arbitrators need first to think about whether an award sustaining the grievance will af-

---

[28] *See, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Oklahoma City, Okla.*, 58 FLRA 109 (2002) (Chairman Cabaniss and Member Armendariz concurring; Member Pope concurring as to result).

[29] *See NTEU*, 42 FLRA 377 (1991).

fect the exercise of a management right. If a management right is likely to be affected if the grievance is sustained, unions need to be asserting, and arbitrators need to be relying on, violations by management of contract provisions or applicable laws that are enforceable in arbitration consistent with any affected management right. Last, but not least, any remedy requested or ordered must reflect what management itself would have done had it acted properly.

II. PANEL DISCUSSION

Moderator: Earle William Hockenberry, Jr., NAA Member, Great Falls, Virginia

Panelists: Suzanne R. Butler, NAA Member, Bethesda, Maryland

Charles A. Hobbie, Deputy General Counsel, American Federation of Government Employees, Washington, DC

Roger P. Kaplan, NAA Member, Alexandria, Virginia

David S. Orr, Management Consultant and Trainer, Silver Spring, Maryland

Hockenberry: I am Bill Hockenberry, the moderator. I would like to introduce the panel at this time.

David Orr is a consultant specializing in federal sector human resources management. He has many projects. Some of his most recent projects involve the Transportation Security Administration, the U.S. Capitol Police, and the U.S. Secret Service. David has served in many different positions but what I found most important was the fact that he appears from time to time in the news media, in print, and on radio where he speaks on behalf of his firm as well as on behalf of management. I have known David for a very long time, dating from when he worked with the U.S. Customs Service. David holds an M.A. in sociology.

Since 1985, Charles "Chuck" Hobbie has served as deputy general counsel for the American Federation of Government Employees (AFGE). He also served in the Peace Corps in Korea and Thailand. He holds a J.D. degree and, most interestingly, he ar-

gued on behalf of the union in the seminal decision from the U.S. Supreme Court that all of us look to, *Cornelius v. Nutt*.[1]

Suzanne Butler holds a J.D. and a Ph.D. Suzanne started her arbitration practice in 1979 in the New England area but has been in the Washington, DC, area for some time. Suzanne served with me on the Foreign Service Grievance Board and has been a member of the National Academy of Arbitrators since 1988.

Batting cleanup will be Roger Kaplan. Roger is a colleague, a very good friend. I am going to use his expression: If I need something squeezed, I will tell him to speak faster. If I want him to speak slower, I am sending a message for more time. Roger is a former labor counsel for the Internal Revenue Service and has been an arbitrator since 1981. He has worked with professional football players, hockey players, baseball players, and basketball players. He also has served as Chair, Personnel Appeals Board, for the U.S. General Accounting Office.

The paper that I have left you with deals with two trial court decisions that adjudicated issues raised by the Department of Defense (DOD) and the Department of Homeland Security (DHS).[2] Based upon legislation that was passed in 2002 for DHS and 2004 for DOD, both agencies are creating new personnel human resources programs and both have created a labor relations board that is internal to the department.

Judge Rosemary Collier's decision, issued first, was 50-plus pages. Her decision was followed by Judge Emmett Sullivan's 70-plus page decision. Both judges came to the same conclusion; they found that the regulations both departments were attempting to implement under the new legislation needed to be enjoined. These decisions are on appeal. The DHS case is before Justice Harry Edwards. The DOD case is further behind on appeal. Those are two decisions that certainly are of cutting edge interest.

Additionally, we will discuss review of arbitration awards by the Federal Labor Relations Authority (FLRA) based on the comprehensive paper presented by Attorney George Birch, FLRA. George's paper sets forth the analytical framework used by the FLRA in reviewing awards with a special emphasis on remedies, a troublesome area that an arbitrator can run afoul of instead of receiving the FLRA's declaration "appeal denied" that arbitrators

---

[1] 477 U.S. 648 (1985).

[2] *Nat'l Treasury Employees Union v. Chertoff*, 385 F. Supp. 2d 1 (D.D.C. 2005); *Am. Fed'n of Gov't Employees v. Rumsfeld*, 422 F. Supp. 2d 16 (D.D.C. 2005).

love to hear. We are going to talk about items from the management perspective and from the union perspective and we will hear from Suzanne and Roger about the arbitrators' perspective.

Orr: For most of my professional career I was an agency labor relations director, practitioner, and an advocate for management. It is that perspective from which I am talking today. I also want to say that it may not be readily apparent, but Bill actually prepared us for today so we are speaking in some logical fashion.

I will follow George Birch's paper and focus on the arbitration process. One of the beauties of being retired—you get paid to not work, which is a concept I've always been in favor of—is you can speak very, very freely, which I tended to do even before I was retired but now I am worse.

The federal arbitration process is alive, but I am not sure how well it is. I am focusing on the fact that during my 35 years there are still too many appeals filed. I am trying to patronize the audience. I know this because I appealed my first case. I wanted to look for a title for these remarks and I looked to the famous philosophers that I used to guide my career—Socrates, Santayana—and I focused on Berra, Yogi Berra. To paraphrase one of his famous lines—it ain't over 'til it's over and, even then, it's still not over.

We appeal almost everything. Compared with the private sector, we do not have the same sense of finality. I do not have any magic rationale for that, but I do know some of the reasons. Part of it is that some federal advocates have the attitude that the federal government cannot possibly be wrong. How could an arbitrator possibly rule against us? Given what's been happening the last few years, that's an amazing attitude to have but there is that attitude in some quarters.

Another reason is that some advocates believe that the FLRA will bail them out. When exceptions or appeals are filed over law and regulations, the FLRA quite often will do that. Not because they see their role as to bail us out but because, as George pointed out, the review is de novo. We may not be smart enough to figure out what to appeal but the Authority can and sometimes will bail us out. Contrary to the private sector model, the FLRA is free. District court is not free. I know about this because I did it. I had a merit promotion case before the Federal Labor Relations Council (FLRC) some 30 years ago. I appeared in my three-piece suit because I did not go to law school but I wanted to look like I did. Everything was perfectly well-organized, color-coded exhibits, assistant at hand. The union shows up late, its advocates totally dis-

organized. The arbitrator admitted everything including hearsay. Didn't have copies of their exhibits? The arbitrator ruled against me on equity and fairness. I was absolutely outraged, so I appealed the award. The FLRC ruled for me on some arcane provision from the Federal Personnel Manual (FPM), which is no longer in use.

In retrospect that was probably a case of an inexperienced management advocate blindsiding the arbitrator, although not intentionally. I did not properly educate the arbitrator on the FPM and all those Civil Service Commission rules and regulations that often led to appeals. As George pointed out, that is usually where exceptions are granted. As he also pointed out, some grievance issues are over law and regulation but others are not so obvious and more subtle, particularly with remedies.

In a reduction in force, an arbitrator may find that someone was adversely affected in an improper manner and, as a remedy, reinstate the employee to his job. A few advocates know the unbelievable details of the reduction in force procedure. The agency may re-run the reduction and find the proper remedy and another person gets a job back but not the grievant. It's akin to unscrambling eggs. Some arbitrators can be expected to understand all this. Most cannot or should not. The advocate's responsibility—management and union—is to educate the arbitrator. The advocate should not be waiting for de novo review from the FLRA.

This brings me to an issue from the retiree's perspective—the youngsters coming up behind us are not as good as we were. That conclusion is based on conversations with arbitrators—my own observations—and conversations with some highly placed anonymous officials at the FLRA. I think that my observation is true and I do not know if you have experienced it in hearings, but it also surfaces in the decisions on exceptions that I have read. The quality of legal research has decreased even though the research is easy to access. I know of cases filed at the Authority on exceptions that did not have any citation—only argument. "You should grant this exception because . . ." with no citations? To paraphrase my friend, Yogi Berra: It's res judicata all over again. We are losing our institutional knowledge at agencies and unions because of the retirement wave. On the agency side it is downsizing and insufficient funding for more training.

Not all exceptions to arbitration awards are based on blindsiding the arbitrator. Sometimes the arbitrator is presented with a specific law or regulation and cannot believe that the federal government could be that stupid. Those of us who have been in

the federal government, of course, know different. In terms of advice, guidance, or a plea for help, I have several suggestions. If a practitioner on either side is savvy enough to direct the arbitrator to issues of law and regulation, particularly with regard to a remedy, take note, because a red flag has been raised. I credit advocates for raising it before the arbitrator instead of waiting until they lose and filing exceptions. Any time a remedy involves back pay, a reduction in force, overtime, or anything involving money where events must be reconstructed—law and regulations will be in play.

Another suggestion is to take advantage of all of this incredible expertise in the room. If there is an opportunity to participate in training sessions for practitioners, I would ask arbitrators to take advantage of that because practitioners need that training. At the national seminars that I attend, the highest rated sessions are the "how-to-present" at a hearing, whether it is before the Merit Systems Protection Board or before arbitrators. Practitioners love mock hearings where an arbitrator can point to where a practitioner slid off base. Many of us, particularly me, learn more from our mistakes than our successes. If arbitrators offer their expertise in those "how to" trainings, then an excellent process becomes even better.

Hockenberry: Our next speaker will be Chuck Hobbie.

Hobbie: Let me start by thanking you on behalf of AFGE and our members and other federal employees for your assistance over the years in these arbitrations, whether you find for us or against us. I know from experience that the vast majority of you have served as arbitrators in the federal sector.

For those of you present who are with DHS or DOD, please do not take offense at my remarks, because I am going to tell you a story about a labor relations specialist at DHS and DOD. Labor relations specialists believe that they're practicing the world's oldest profession. The story goes like this: A group of professionals are discussing, arguing among themselves, as to which, in fact, was the world's oldest profession. This was a group of doctors, a group of engineers, and a group of labor relations specialists from DHS and DOD. The doctors, citing to the Old Testament, pointed out that according to the book of Genesis, on the sixth day, God took a rib from Adam and created Eve. The doctors were saying God was clearly a surgeon in that capacity and this established medicine as the oldest profession. The engineers objected, stating that prior to the sixth day, God created the heavens and the earth out

of darkness, chaos, and confusion. God is an engineer. The labor relations specialists from DHS and DOD chimed in and reminded everybody that before God created Eve and the heavens and the earth, who created the darkness, chaos, and confusion?

Today we address the darkness and confusion created by the proposed new regulations of DHS and DOD. Bill alluded to them in his introductory remarks. Two separate decisions in the U.S. District Court enjoined implementation of significant parts of DHS's regulations and DOD's regulations. I will discuss these cases from the union perspective, and I will talk about DHS, DOD, and the Office of Personnel Management (OPM), as they should return to the drawing board and listen to their employees and to the representatives of their employees.

The "new civil service" is definitely not up-and-running as the government boasted last year. The current cover of the *New Yorker* is a picture of red, white, and blue Uncle Sam. This is the Memorial Day issue with no face or body behind the patriotic clothes. The caption on the inside, "losing face," could be a symbol for DHS' and DOD's failures, although I would change the caption to "mindless."

Whether DHS' and DOD's proposed regulations ever are implemented may depend upon the agencies' ability to learn from their mistakes, and to work with their employees and not against them. Agency management, employees, the union representatives of their employees, and the American public all share the overriding goal of ensuring that DHS and DOD meet challenges successfully—such as Hurricane Katrina's devastation—with speed, efficiency, and positive results.

Turning to DHS, during much of 2004, DHS and OPM met and conferred extensively with employees and unions regarding the proposed human resources system. From the union's view, the process could result in effective regulations. Instead, the agency's final regulations (February 1, 2005) ignored the advice of the unions in these discussions. The regulations clearly were agenda driven, unlawful, and totally ignored employees' suggestions. Hypocrisy at work, however, there may be hope for both agencies. The unions had no choice but to file their lawsuits. The DHS case before Judge Collier challenged the four most egregious areas dealing with, first, collective bargaining; second, the role of the FLRA; third, employee appeals; and finally, the role of the Merit Systems Protection Board (MSPB).

Allow me to provide a brief summary of Judge Collier's decision. Regarding collective bargaining, the regulations contained an expansive management rights provision making virtually nothing negotiable. Collective bargaining is limited to procedures by which DHS makes its decisions and appropriate arrangements for employees affected by decisions to layoff, discharge, discipline, and promote. Collective bargaining is to take place only with respect to the procedures attendant to specific personnel actions. Everything else is off the table. Notices of a layoff, discharge, discipline, or promotion would not be issued until such time as DHS actually took action. Collective bargaining over any other subject would be prohibited. Management could confer—or would confer—but not bargain concerning procedures for its exercise of all other management rights.

As if this virtually total management discretion was not enough, other provisions allow DHS to reject any term of a collective bargaining agreement if a subsequent, implementing directive or other policy or regulation is deemed by management to be inconsistent. Impasses in bargaining and all bargaining-related disputes are resolved by a new entity, the Homeland Security Labor Relations Board, which is comprised of members appointed by, and removable by, DHS' Secretary. That's an independent board?

Concerning the role of the FLRA in this new scheme, the regulations limit the FLRA's power to the determination of the appropriateness of bargaining units and conducting elections, ruling on exceptions to arbitration awards but not those exceptions involving management rights, and adjudicating certain unfair labor practices but not those involving bargaining. Issues involving the duty to bargain in good faith, scope of bargaining, requests for information, and arbitration award exceptions involving management rights would be the exclusive jurisdiction of this internal Labor Relations Board. The FLRA reviews decisions of the internal board under strict time limitations but it must defer to the Homeland Security Labor Relations Board's findings of fact and interpretations of DHS regulations.

Allow me to turn to employee appeals and the role of the MSPB. The regulations virtually eliminate the power of arbitrators and the MSPB to mitigate disciplinary actions. Under these regulations, penalties may be mitigated or lessened only when the penalty is "wholly without justification," otherwise the penalty must be affirmed and the maximum justifiable penalty must be

applied. Additionally, certain adverse actions involving so-called mandatory removal offenses—these are the offenses that upset some managers—are appealable, initially, only to the DHS mandatory removal panel (MRP). Arbitrators are not trusted to handle those cases that DHS deems serious. MSPB reviews the mandatory removal panel's decision under a deferential standard of review. MRP members are selected by the head of the agency. Finally, the regulations modify existing MSPB procedures and regulations and assign the MSPB intermediate appellate review authority. The procedural changes shorten the time for appeal, limit discovery, and authorize a summary judgment procedure when there are no facts in dispute.

In the four principle areas I have outlined, the DHS' regulations substantially eviscerate all collective bargaining and appeal rights of unions and employees in the name of improving employee morale, promoting a better workforce, and making the homeland more secure.

My opinion on this is best conveyed by the words of the robotic bartender in the restaurant at AFGE's headquarters. You may have read about this amazing bartender. The robot was actually created by a secret government agency last year. The *Washington Post* first reported on it. The robot works in the hotel adjacent to our headquarters; three of us decided to test this robot. It was really amazing. The robot is designed to take your order, mix your drink, serve it, and engage you in conversation at an appropriate level of discourse. When you give your order and introduce yourself to the robot, you are to tell the robot your IQ. When the AFGE general counsel, Mark Roth, introduced himself to the robot and ordered his drink, he told the robot that he had an IQ of 140. The robot mixed the drink and started to talk to Mark about Neitzschian philosophy and Einstein's theory of relativity. Joe Goldberg, AFGE's assistant general counsel, ordered his drink and told the robot that he had an IQ of 100. The robot served the drink, and talked to Joe about the Washington Nationals, asking Joe how he thought the Nationals were going to do and whether Frank Robinson was going to make any improvements in the team. I ordered my drink and told the robot that my IQ was 40, which is a little bit high. The robot thought a minute and then said, "What do you think about the new DHS and DOD regulations?"

The regulations were challenged by the unions, seeking to enjoin their implementation. In August 2006, the U.S. District Court in Washington, DC, issued its decision to enjoin much of the

regulations. The court held that the human resource system was flawed because collective bargaining has at least one irreducible minimum and that is missing from DHS' scheme—a binding contract. The court opined that, when good-faith bargaining leads to that contract, one side cannot disregard with impunity the right to engage in collective bargaining as void ab initio, and rejected the agency's right to severely curtail the scope of bargaining and to create an internal review board to resolve bargaining issues. The court held the regulations were invalid.

With respect to mitigation of penalties and disciplinary appeals, the court ruled that the Homeland Security Act permitted modification of the Civil Service Reform Act's (CSRA's) procedures, but only in the interest of furthering the fair, efficient, and expeditious resolution of matters involving DHS employees. The court found that the regulations proposed were not fair and, therefore, were contrary to the Homeland Security Act's admonitions. In sum, the court enjoined implementation of the regulations covering labor relations, mitigation of penalties, and the role of the FLRA.

As for the DOD case, DOD modeled their regulations after DHS. There were some minor differences but, as Judge Sullivan observed, the differences were inconsequential. Judge Sullivan issued his decision on February 27, 2006, and he agreed with Judge Collier in DHS that the regulations of DOD permitted the agency to completely eviscerate and eliminate collective bargaining. He held that the process for appealing adverse actions failed to provide DOD employees with the fair treatment required by the Homeland Security Act. He enjoined the regulations.

As Bill mentioned, appeals and cross-appeals have been filed in each case. Oral argument was held on April 6, 2006, in the DHS case; Judge Edwards was very vocal in his criticism of the government's position. When the government started to talk about 9/11 and all of the reasons that 9/11 required the evisceration of collective bargaining, Judge Edwards responded that he know all about 9/11 so "let's move on, counsel."

While waiting for these decisions on appeal, the passage of time suggests that the two agencies should rethink the regulations. Is it really necessary to defend against terrorism by eviscerating the protections of the CSRA? Remember, four years have passed since the agencies demanded flexibility in human resources management. During that period of four years, the Reform Act has continued to control collective bargaining and personnel actions. The government cannot point to a single instance where collective bargain-

ing obligations and fair appeal procedures have interfered with the government's ability to combat terrorism or to be flexible to meet other contingencies during the past quarter century.

The CSRA has a provision that directly preserves management's right to act in emergencies notwithstanding the other protections of the Act. That provision has never been invoked. Even if you disagree with the late Justice Hugo Black's statement that "flexibility is mush," what agenda is driving these changes when there has been no problem?

In closing, DHS and DOD could benefit from listening to their employees and their representatives. Federal employees are dedicated and their unions want to help, especially as one disaster after another tests both DOD's and DHS' competency. If the human resources management systems under the CSRA are to be improved, then DHS and DOD must listen to their employees and respond to their concerns rather than shutting them out of the deliberative process by eviscerating collective bargaining and employees' right.

Hockenberry: Dr. Suzanne Butler is next.

Butler: Thank you Arbitrator Hockenberry for inviting me to speak to this august group. I have long admired your sagacity; but I envy your e-mail address. Arbitrator Hockenberry has the coolest e-mail address in the Academy: dochocarbitrator@aol.com.

It got me to thinking, and I have decided to give a try to kickbuttarbitrator@naarb.org and see what happens.

Arbitrators like trilogies. What I propose to do in my 10 minutes is to give you a three-part speech. In a variation of the law school tradition, first, I plan to bore you to death. Second, I plan to scare you to death. And third, I plan to work you to death.

The first part is the boring part. I have titled it: "Federal Sector Tricky-Wickets: Bifurcation, Retaining Jurisdiction Over the Remedy, Interlocutory Appeals, and Finality." Let me tell you how this tricky-wicket came at me suddenly after 25 years of arbitrating and doing quite a number of federal sector cases. I was on a pre-hearing conference call with federal parties on the West Coast. (By the way, I encourage arbitrators and federal parties to hold pre-hearing conference calls because you can work through a lot of things before the hearing.) During this conference call, my first question was whether the parties stipulated to the issue, and they said yes. (Interestingly, missing from the stipulation was any mention of a collective bargaining agreement. The agency involved in the conference call has been subsumed within DHS. Also missing was any

mention of the remedy.) After the issue was articulated, I waited a second or two and then added, "What shall be the remedy?" That resulted in an outburst from both parties. The union was hemming and hawing about how it was not prepared to talk about the remedy that they were seeking, and I could not understand what the agency lawyer was saying. I interrupted them as they were talking over each other and explained that I was not asking what remedy they were seeking but only asking did they want to put the remedy question before me at all. (Sometimes the parties forget that the remedy is a separate issue; it may have been an inadvertent error of omission.) The parties said that they did intend to put the remedy question before me, but agency counsel was very firm: "Madame Arbitrator, if you rule in favor of the union on this case, we are going to the FLRA right away. We want a bifurcated hearing because we do not want you to consider the remedy until we have your answer on the merits." Okay, fair enough. Now I knew what the issue was and that I was being asked to bifurcate the hearing between the merits and the remedy.

For years federal sector cases have been routinely appealed to the FLRA, so the agency response did not surprise me—although I never heard it framed so boldly at the outset. Rather, what I wondered was whether the FLRA would take an appeal of the merits if no remedy had been issued. I consulted my reference book, Peter Broida's tome *Federal Labor Relations Authority Law and Practice* because, in the federal sector, arbitrators need to do extra research. The short answer is that, if the arbitrator bifurcates the hearing between the merits and the remedy (not between arbitrability and the merits), then addresses the merits and frames the remedy while retaining jurisdiction over the *implementation* of the remedy, then that leads to a final award. If, however, the arbitrator issues an award on the merits and remands the remedy to the parties to decide what its nature should be, that is not a final award. The FLRA will consider it an interlocutory appeal and probably will not take it. It took me 10 pages of reading in Broida's book to figure this out, but it does make sense at the end of the day as it revolves around the question of finality.

Audience Member: I thought that was the scare-you-to-death part.

Butler: You have a point. The second part of my speech is called, "The Elephant in the Living Room." You have just heard what it is from previous speakers. Whose living room is this elephant in? Our American living room. This is the federal government, the

scariest elephant of all. Currently, he is a very angry elephant. He is going back and forth on the top deck, and this ship of state can sink if the elephant is too crazy and too big. For the first time in my career as an arbitrator and my life as an American, I am really scared and worried about the future for all of us. Richard Trumka's speech about bankruptcy this morning was absolutely terrifying because what seems to be happening is so frightening. Although I do not think the federal government will go bankrupt, still we have seen many things that we never thought we would see before.

What is the elephant's name? It is Soured Labor Relations. Personal Animosity. Desire for Payback. In some federal agencies, I am told the soured relationships are degenerating into a kind of civil war. We know why we are afraid of civil war, looking at Iraq, because civil war is so incredibly destructive. However, the good news is that even civil wars come to an end—and, in the "post-reconstruction era," we may see good things starting to happen. It is in such post-reconstruction eras, I believe, that people in labor relations and arbitrators can be most constructive.

Here are my three rules of good labor relations. Number one, burn no bridges. Number two, build new bridges. Number three, rebuild burnt bridges. I think labor relationships are very much like a marriage, and a marriage can be saved no matter how bitter people have become and how much there is to forgive, provided that the parties want to work at it. When this particular civil war in federal labor relations ends, I hope there will be enough good will so that we can build and rebuild bridges. It takes only one good bridge to get the elephant off that boat.

Here is the part where I wanted to work you to death, but it will have to happen after Roger Kaplan speaks so that I am not taking his time. I brought three color-coded pieces of paper. My idea was for each person to take a different paper color, depending on who you represent, rip off the bottom and stick it on your lapel. At the end of the session, you would be required to swap colored papers, and introduce yourself to someone who represents the other side—and start building those bridges. It was a nice idea, but now I don't think we will have enough time. Forget it. You get my drift.

One last word: I think it will be critical that labor arbitrators go the extra mile and do the extra research because federal parties are overwhelmed for a variety of reasons. I like to think that those

of us in the Academy will be issuing awards that will be rock solid because we have done our research.

At the end of the day, collective bargaining in the federal sector will survive because it is the best of all alternatives. Winston Churchill spoke this wonderful line (I believe after he was voted out of office): "Democracy," he said, "is the worst form of government in existence—except for all the others." I think that is also true of collective bargaining in the public and the private sector. We just have to hold fast, and wait for the boat to stay afloat, and keep moving it forward.

Hockenberry: Now Roger Kaplan.

Kaplan: My remarks will be brief. I think arbitration in the federal sector is getting better. How do I know that? I do a lot of federal sector arbitration. In the first half of my 25-year tenure as an arbitrator, usually the losing side appealed to the FLRA. The FLRA would mail me a letter informing me of the appeal. Three years later the FLRA would notify me that the appeal was granted or denied. In the last 12 years, the FLRA does the same thing but it now issues a decision within two years. I think the FLRA should be commended for making progress. In my 25-year arbitral career I have been overturned once.

I knew the federal sector was different and this story illustrates my point. When I first started as an attorney for the National Association of Government Employees in 1970, I handled labor relations and arbitration in the federal sector. My roommate was an attorney for the American Federation of Government Employees and eventually we had a case against each other. At that time the Federal Labor Relations Council determined appropriate bargaining units. My roommate's position for AFGE was that the unit should be agencywide and my position was that it should be departmentwide. The hearing was in San Francisco and we flew out to spend a weekend in Las Vegas and then on to San Francisco, where we arrived Sunday night. I called my local president to schedule a meeting on Monday to discuss our position. The president said, "Mr. Kaplan, I don't know how to tell you this, but I've changed my position and I believe we ought to have the unit sought by AFGE." I spent Monday at the race-track and my roommate prepared for the hearing. All I could do was cross-examine his witnesses. As justice would have it, AFGE won the case. Little did I know that 36 years later, arbitration or litigation in the federal sector would not be much different.

I thought it was getting easier to arbitrate in the federal sector. Having arbitrated in the federal sector for 25 years, I am not sure what kind of advantage I have. Unlike the private sector, when you only need to know about the collective bargaining agreement, in the federal sector, there are agency regulations and government-wide regulations and Title VII in the CSRA. If this is a nondisciplinary case, the arbitrator receives reams and reams of FLRA decisions and court cases. If this is a disciplinary case, the arbitrator receives MSPB decisions. On top of all that there are OPM regulations. If that is not enough to give you a headache, I don't know what is.

In the last few years I thought I would see cases getting easier to adjudicate. That is not true. I took a look at the last three cases I had and in one, the agency submitted a 37-page brief and the union a 20-page brief. Next case, same agency, same union, and I receive a 38-page brief from the agency and a 27-page brief from the union. In the third case the union out-briefed the agency by submitting 38 pages and the agency came in at 25 pages. I guess practitioners think that the more paper submitted to the arbitrator, the better chance of winning, a view I do not adopt.

Let me read one of the arguments made in the hearing. In this case, management decided to suspend or terminate the joint awards committee and the union filed a grievance. The agency argued before me and in its post-hearing brief as follows:

> Considering the agency's primary anti-terrorist mission, the agency cannot afford to have employees' attention focused on these pay inequities instead of keeping terrorist and terrorist weapons of mass destruction from crossing our Nation's border. One second of inattention could have catastrophic results should a terrorist be allowed entry into our country because of inattention stemming from the agency's focus on awards.
>
> Ladies and gentlemen, thank you very much.

Hockenberry: I think it is very clear from the discussions of several speakers that the words "mission" and "security" are both appearing in congressional legislation and have been used as arguments by different agencies. That is not to say that under managements' right at 5 U.S.C. 7106(a) the agency does not have the right to do a whole bunch of things. That right is frequently in contracts and quoted to us, but those words are more prevalent now. Roger used a humorous way to approach it. Judge Collier and Judge Sullivan did not challenge the statutes but they challenged the implementation of the agencies' regulations dealing

with those statutes. Chuck gave you a very nice thumbnail sketch of what each one of them held in relation to those statutes and to those regulations.

It's time for questions.

Audience Member: I had one of my awards overturned by the FLRA. The information relied upon by the FLRA did not resemble the information I had at the hearing. My question to George Birch is how does the FLRA decide whether it is based upon what takes place at the hearing or what should have taken place at the hearing?

Birch: Let me respond by making a couple points in response to many complaints of arbitrators about so-called sandbagging. The FLRA members took another look at a provision in our regulations. The provision states that an issue that could have been raised to the arbitrator but was not raised cannot be raised in exceptions to that arbitrator's award. I think a look at how the FLRA's early decisions dealt with that regulation show it was not fully enforced, but in the last few years, the FLRA has been enforcing it strictly. The FLRA also looks at the issue, sua sponte. The opposing party does not have to raise the issue of the regulation. In practically every case, the FLRA members look at the issue raised in the exception and ask themselves whether that issue was raised to the arbitrator. If that issue was not raised to the arbitrator, then the members ask, *could* that issue have been raised to the arbitrator? If the answer to that question is affirmative, then the appeal is dismissed without addressing the merits of that exception. This shows some sensitivity by the FLRA in response to sandbagging that we heard from arbitrators for years and years.

Also, the *Steelworkers* trilogy cases[3] talk about rules of the shop and practices of the parties as terms and conditions of employment contained in the collective bargaining agreement or part of the collective bargaining agreement. What that means in the private sector and for the federal sector as well is that arbitrators are deferred to when interpreting and applying the contractual rules of the shop whether a practice exists or not.

In the federal sector, many of the terms and conditions of federal employees' rules of the shop are contained in laws and governmentwide regulations and because they are contained in laws

[3] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

and governmentwide regulations and not in collective bargaining agreements, arbitrators are not deferred to when interpreting those rules and regulations. If an arbitrator issues an award that is contrary to one of those terms and conditions of employment contained in law or governmentwide regulation, the FLRA will examine de novo the award versus the standard set forth in those regulations and laws to determine whether the arbitrator properly applied law and regulation.

The FLRA has moved significantly to avoid the sandbagging problem but it cannot do anything with the rules of the shop in the federal sector that are contained in governmentwide regulations and the wide variety of laws that affect the terms and conditions of federal employees. The arbitrator must observe those laws and those regulations when issuing an award that implicates them. This frequently surfaces when a grievance is sustained and a remedy issued.

Dan Winograd: I'm from Colorado Springs. How does the FLRA define the term "issue"? My case had one issue: did so-and-so get removed in accordance with law, with regulation, and/or the contract. There were 16 arguments on either side about why it was or was not a problem. Are 16 of those issues or is it one issue?

Birch: Let me give an example. Management rights set forth at 5 U.S.C. §7106(a) are frequently the bases for agency exceptions to arbitration awards. One of those rights is the right to discipline employees. Let's say the grievance is sustained and the discipline rescinded. The FLRA will not allow an agency exception that your award violates management's right because that was an issue raised in the exceptions to the award that could have been raised before you. Therefore, that exception is barred by the regulation that precludes it being raised as part of the exception.

Hockenberry: That helps us get to the appointed hour. Thank you.