To: NAA Board of Governors

From: David Vaughn, Chair, Federal Sector Arbitration Committee

Re: Federal Sector Arbitration Committee Report

Date: April 26, 2021

Dan Nielsen, then NAA President, established a Special Committee on Federal Sector Arbitration and appointed me as Chair. The Committee's purpose is to explain to Academy members the basic structure and operation of federal sector labor relations and arbitration. Its task includes submission of this annual report, containing that explanation and describing significant recent developments in the sector.

The Committee surveyed and described the different elements impacting on arbitration in the federal sector. The Committee has resisted editorializing on both individual cases and larger doctrinal issues. That said, some of the developments cannot be meaningfully described without comparisons between Presidential administrations. To minimize editorializing, to the extent that statements herein include assessments beyond mere factual recitations, they are solely my responsibility and not that of Committee Members.

The Federal Sector employs approximately 2.1 million civilians. Most non-supervisory employees are represented by unions and are covered by collective bargaining agreements ("CBA"s) which include grievance procedures ending in binding arbitration. Federal agencies and unions have an ongoing need for arbitration services.

Basic statutory structure and operations of FSLMRP

Federal Sector labor relations is statute-based. The structure, operation and substantive rules for the federal service labor-management relations program is set out in the Civil Service Reform Act of 1978 ("CSRA"), 5 U. S. C. Section 7101 *et seq*. The formal title of the Law is the Federal Service Labor-Management

Relations Statute ("FSLMRS"). Included in the scope of the FSLMR Program and supplementing the core statute are a number of additional laws and government-wide regulations applicable to federal employees, including those covering EEO and disability matters, the Back Pay Act and the Federal Employees Flexible and Compressed Work Schedules Act. The Statute has been little changed since its enactment. The FSLMRA sets forth the structure and parameters for employee and union rights, recognition, bargaining, contract administration, prohibited practices, the grievance-arbitration process and for administrative review of challenges to arbitration awards.

The Statute provides for a scope of bargaining narrower than the private sector: wages and benefits for federal employees are set by law and are excluded from bargaining. The Statute contains a broad management rights provision which narrows the scope of mandatory bargaining subjects, prohibits bargaining with respect to some issues and establishes permissive subjects, which the parties may, but are not obligated to, bargain.

Negotiated agreements are reduced to written CBAs, which are structured similarly to private sector contracts. Federal Sector CBAs frequently repeat entire sections of the Statute, the more easily to ensure that statutory issues are covered by the negotiated grievance-arbitration procedure and that no different result is intended.

CSRA requires that every Federal Sector CBA include a grievance-arbitration procedure. The statutory presumption is that the procedure will be broad-scope, with grievability and arbitrability coextensive with the statutory parameters. Only by agreement can the parties narrow the scope.

For employees covered by collective bargaining agreements, the enforcement of statutory rights not otherwise excluded is exclusively through the grievance-arbitration process. This means, in short, that arbitrators in federal sector cases may hear and

decide issues not only arising under the applicable CBA, but under the FSLMRA and other statutes, *e.g.*, the Fair Labor Standards Act or the Americans with Disability Act. An arbitrator hearing such cases stands in the shoes of the administrative agency or court which would otherwise decide the dispute and must apply the law as would the statutory tribunal. The standard of deference afforded arbitrators deciding statutory issues is substantially narrower than afforded in interpreting and applying contract language. Moreover, the Statute allows parties to appeal arbitration awards through the Exceptions process. 5 U.S.C. Section 7122. In addition to the usual standards for review of arbitration awards on appeal, an award may be overturned as "contrary to law". *id*.

The Federal Sector Labor-Management Relations program is overseen by the Federal Labor Relations Authority ("FLRA"), a three-member executive branch agency which has responsibility for enforcing representation, negotiability and unfair labor practice disputes. The structure of the FLRA mirrors that of the NLRB. The FLRA General Counsel prosecutes prohibited practices.

The FLRA provides training courses and materials. Of particular interest to arbitrators handling Federal Sector cases is FLRA's Guide to Federal Sector Arbitration ("Guide"), which is available for download through the Agency's Website, (www.FLRA.gov). The Guide is a well-organized and comprehensive explication of principles and authorities in Federal Sector arbitration. It includes case citations. That said, the Guide was last updated as of September 30, 2016 and does not include the numerous doctrinal and procedural changes wrought by the FLRA during the Trump administration; however, it reflects principles to which the FLRA is likely to return during the Biden Administration (see discussion below).

The Statute and Federal Sector labor relations more generally use terminology which is sometimes different from the private sector or from state and local public sector. Statutory definitions

are found at 5 U.S.C. Section 7103. The Guide also contains a definitions section.

Federal Employees are prohibited from striking or taking other economic action. Bargaining is followed by mediation. Bargaining impasses are submitted to te Federal Service Impasses Panel ("FSIP") for binding resolution, generally through mediation and, if mediation is unsuccessful, through the issuance of binding decisions finally resolving bargaining issues submitted to it.

The Merit System Protection Board (MSPB) is an executive branch agency which adjudicates employee discipline. Union-represented employees (as well as non-represented employees) may elect to take their discipline cases to MSPB, rather than through the negotiated grievance-arbitration procedure. Note that Arbitrators are bound to apply MSPB substantive law. *Cornelius v. Nutt*. 472 U.S. 648 (1985).

Trump Administration Changes, Status and Projections

The FSLMR Program has been greatly affected by actions of the Trump Administration, both at policy levels (White House and Office of Personnel Management ("OPM")), at the level of the agencies interpreting the Program (FLRA, FSIP) through the Administration's appointees. Or, in the case of MSPB and the FLRA General Counsel, by lack of appointees: the Trump Administration left the FLRA General Counsel's job vacant, effectively crippling the Agency's enforcement of prohibited practice (unfair labor practices) and allowed the terms of MSPB Members to expire without replacement, leaving that agency without the ability to make decisions above the level of administrative law judges.

Individual executive branch agencies which have been parties to agreements with unions representing their employees have been directed to implement the Trump changes. They responded with varying degrees of speed and enthusiasm, but the Administration

established an Interagency Labor Relations Working Group to monitor and direct implementation of the policies.

Beginning in 2017 and extending through the end of the Trump administration, the Program took a sharp turn in the direction of management and in opposition to unions. Changes in doctrine are a normal part of the changes in personnel and policy that come each time an administration changes. That said, the changes imposed by the Trump Administration, manifest in Executive Orders, FLRA decisions, FSIP rulings, court cases and government-wide regulations from the OP have been particularly abrupt, extreme and far-reaching. Those changes were put in place even though there had been no change in the governing statutes. Many actions overturned long-standing precedent and reflect restrictive approaches to union recognition, union protections, collective bargaining and contract enforcement. Many of those decisions have been issued in review of exceptions from arbitration awards.

Some FLRA decisions have been challenged in court, but the deference afforded by courts to administrative agencies has meant that relatively few decisions have been overturned. See discussion below.

Individual executive branch agencies which are parties to agreements with unions representing their employees were directed to implement the Trump changes. They responded with varying degrees of speed and enthusiasm, but the Administration established an Interagency Labor Relations Working Group to monitor and direct implementation of the policies.

White House, Office of Personnel Management

The Trump Executive Orders

President Trump issued three Executive Orders, dated May 25, 2018, that dramatically changed the federal sector labor relations program and that affected labor arbitration of federal sector

disputes in significant ways. While the Orders have been revoked and replaced, it can be anticipated that they will still appear in some of the cases going forward. Thus the discussion.

The Trump Administration also created a new Schedule F to convert certain categories of career positions into political positions to be filled by the administration is pending and was to go into effect, but has been frozen. The prior Administration also organized the conversion of political appointees into career positions, a practice called "burrowing". In fairness, this is not the first situation where out-going administrations work to do this.

OPM has issued regulations on making it much easier for employees to withdraw Union dues authorizations. The Biden Administration has acted to repeal them.

There were other efforts to weaken merit protection, employee protections and bargaining rights, which the Trump Administration characterized as "making the Federal workforce more responsive" to policy direction. These efforts have been or will be rolled back and will not likely be brought to arbitration.

E.O. Provisions Directly Impacting Arbitration

Trump Executive Order 13836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25329-34 (June 1, 2018), created a structure that centralized decision making on behalf of federal agencies with respect to labor relations matters. EO 13836 created an Interagency Labor Relations Working Group ("Labor Relations Group") with a goal of standardizing contract language in ways favorable to agency managements across the myriad of federal agencies and workforces. Agencies would be obligated "to consider the analysis and advice" of the Labor Relations Group and to "make every effort to secure a collective bargaining agreement that meets those objectives." The Labor Relations Group would include

representatives from every federal agency with at least 1,000 represented employees covered by the Statute and smaller agencies could participate at their option with the concurrence of the OPM Director.

EO 13836 was designed to ensue expedited completion for bargaining and the impasse processes, including directives to obtain the assistance of the Federal Services Impasses Panel ("FSIP" or "Panel") on a rapid basis. EO 13836 included provisions designed to reopen existing collective bargaining agreements as soon as possible, to agree or seek the imposition of ground rules that would expedite bargaining and require that bargaining take place on the basis of written exchanges of proposals, and required reporting by the agencies as to their compliance with those goals and expectations.

Agencies were directed not to negotiate any permissive subject matter and to exercise Agency head review to reject any provisions that are non-negotiable including provisions that would violate government-wide requirements contained in any applicable Executive Order or other applicable Presidential directive. EO 13836 did contain language in Section 9(c) stating that "Nothing in this order shall abrogate any CBA in effect on the date of this order."

Executive Order 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, 83 Fed. Reg. 25335-40 (June 1, 2018), placed significant limits on the grant and use of official time set forth in Section 7131 of the Statute, 29 U.S.C. §7131. EO 13837, which refused to reference official time by its name, instead describing it as taxpayer-funded union time, capped official time at one hour or less per bargaining unit member per year, including time spent in negotiations and in FLRA proceedings (which are categories of time specifically provided for without limits in Sections 7131(a) and (c) of the Statute). In the event that an agency were to propose in bargaining or in submissions to FSIP to provide amounts of official time in excess of the caps contained in EO 13837, that action was to be reported

to the President through the Director of the Office of Personnel Management (OPM) with 15 days of such agreement or such proposal to FSIP. The report was to justify why such time would be reasonable, necessary, and in the public interest, including an identification of the total cost of time to the agency and the benefits that the public would receive from those official time grants.

EO 13837 added an additional cap on official time use: All employees were required to spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training. Any time in excess of the of the one-quarter limit was required to count towards the one-quarter limit in subsequent fiscal years. This provision was intended to eliminate full-time and majority-time union representatives, who have been common in many agencies.

Section 4(a)(v) of EO 13837 contained the following additional limitation as it relates to official time for preparing or pursuing grievances, including arbitration:

> (v) (1) Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation.
>
> (2) The prohibition in subparagraph (1) of this subsection does not apply to:
>
> (A) an employee using taxpayer-funded union time to prepare for, confer with an exclusive representative regarding, or present a grievance brought on the employee's own behalf; or to appear as a witness in any grievance proceeding; or
>
> (B) an employee using taxpayer-funded union time to challenge an adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under

> section 2302(b)(8) of title 5, United States Code, under section 78u-6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

EO 13837 also imposed a requirement that no official time be used without advance written authorization from the agency, except where obtaining prior approval is impracticable under regulations or guidance adopted by OPM. Employees who fail to obtain prior written approval would be deemed absent without leave and subject to appropriate disciplinary action.

Agencies were directed to implement EO 13837 within 45 days of its issuance and to ensure compliance "to the extent consistent with applicable law and existing collective bargaining agreements."

Employees who requested official time were to be required to "specify the number of . . . hours to be used and the specific purposes for which such time will be used, providing sufficient detail to identify the tasks the employee will undertake." Agencies were directed to establish systems to monitor the use of official time and ensure that they were not used contrary to law and regulation. Annual reporting to OPM was also required which was to then be incorporated in an annual report that was to be publicly disseminated. Agencies were required to provide notice to unions and to demand bargaining on the earliest date permitted by law to reopen negotiations or negotiate to obtain provisions consistent with EO 13837. Although immediate implementation was required, Section 9(a) of the Executive Order contained language that "[n]othing in this order shall abrogate any collective bargaining agreement in effect on the date of this order."

Executive Order 13839, 83 Fed. Reg. 25343-47 (June 1, 2018), Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles, changed existing law with respect to suspension and removal actions in a number of significant respects. As to removals for unacceptable performance,

EO 13839 restricted the time frames for performance improvement periods. As to adverse actions for misconduct, EO 13839 purported to modify the accepted *Douglas*[1] standards and their application in numerous respects. Sections 2(b) and 2(d) of EO 13839 provided that supervisors and deciding officials should not be required to use progressive discipline. Section 2(c) of the EO purported to limit the concept of disparate treatment by focusing on the time that the adverse action is imposed and limits that concept to employees in the same work units and same chains of supervision. Section 2(e) provided that agencies should have the discretion to take into account all of an employee's prior disciplinary and work record, not merely similar past misconduct, when imposing disciplinary or adverse action. Sections 2(f) and (g) required that, to the extent practicable, agencies issue decisions on proposed removals within 15 business days of the end of an employee reply period and limit the notice period to 30 days. Section 2(h) provided that Chapter 75 removal procedures be used in appropriate cases to address unacceptable performance. Section 2(j) required agencies to prioritize performance over length of service when determining retention rights in the event of a RIF.

Section 3 of EO 13839 directed agencies "whenever reasonable in view of the particular circumstances" to negotiate to exclude from the grievance and arbitration procedures "any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance." If agreement could not be reached with respect to the exclusion, agencies were then directed to the extent permitted by law to request promptly the assistance of the Federal Mediation and Conciliation Service ("FMCS") and FSIP in connection with the dispute and, if a collective bargaining agreement was reached that did not include the exclusion to provide an explanation to the President through the Director of OPM.

[1]*Douglas v. Veterans Administration* (5 MSPB, 313 (1981), which required agencies in taking disciplinary actions to consider a list of mitigating and aggravating factors.

Section 4 of EO 13839 also prohibited agencies, to the extent consistent with law, from submitting to grievance and arbitration procedures disputes concerning performance ratings, any form of incentive pay, quality step increases, and/or recruitment/ retention/relocation payments. That same section also prohibited agencies from making agreements, including collective bargaining agreements, that: 1) limit agency discretion to employ Chapter 75 procedures to address unacceptable performance; 2) require the use of Chapter 43 procedures before removing an employee for unacceptable performance; 3) limit the discretion of an agency to remove an employee without first engaging in progressive discipline; or 4) generally afford a performance improvement period that is greater than 30 days.

Section 5 of EO 13839 did not affect arbitrations directly, but did prevent agencies from agreeing to erase, remove, alter, or withhold from another agency any information in an employee's official personnel records as part of resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. This section made it more difficult to resolve disputes since the settlement terms could not include an expungement from an employee's files.

Like the other Trump Executive Orders referenced herein, Section 8(b) provided that "[n]othing in this order shall abrogate any collective bargaining agreement in effect on the date of this order."

The Litigation over the Trump Executive Order

Seventeen unions representing federal sector employees – lead among them AFGE, NFFE, AFSCME, and NTEU – filed a complaint in federal court against President Trump challenging the Executive Orders as in excess of the President's power to issue. The theories included arguments that the executive orders were unlawful because: 1) the President had no authority to issue executive orders in the field of federal labor relations; 2) the Executive

Orders violated the Constitution, specifically the "Take Care" Clause and the First Amendment right to freedom of association; 3) the Executive Orders and their various provisions violated particular requirements of the Federal Service Labor Management Relations Act; and 4) the cumulative impact of the Executive Orders violates that right to bargain collectively; as expressly provided by the Statute.

On August 25, 2018, District Court Judge Ketanji Brown Jackson issued a lengthy ruling which rejected the government's assertion that she lacked the authority to issue the requested injunction and enjoined the Executive branch from implementing or giving effect to Sections 5(a), 5(3) and 6 of EO 13836; Sections 3(a), 4(a), and 4(b) of EO 13837; and Sections 3, 4(a) and 4(c) of EO 13839. *AFGE, et al.* v. *Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018).

On July 16, 2019, the Court of Appeals for the District of Columbia Circuit reversed the District Court, finding that the court lacked subject matter jurisdiction and that the unions' claims that the Executive Orders were violative of the Statute needed to be addressed to the FLRA in the first instance, rather than to the courts. AFGE v. Trump, 929 F.3d 748, 442 U.S. App. D.C. 232 (D.C. Cir. 2019), rehearing en banc denied, 2019 U.S. App. LEXIS 29030 (D.C. Cir., Sept. 25, 2019).

The Biden Executive Order

On January 22, 2021, immediately following his inauguration, President Biden issued Executive Order 14003, 86 Fed. Reg. 7231-33 (January 27, 2021), which revoked Executive Orders 13836, 13837 and 13839, among others. EO 14003 disbanded the Interagency Labor Relations Working Group. Agencies were directed to review and identify all existing agency actions "related to or arising from" the revoked Executive Orders (including revisions that were codified in collective bargaining agreements) and "as soon as practicable, suspend, revise, or rescind, or publish . . . proposed rules suspending, revising, or rescinding, the actions . . . [in

question] . . . as appropriate and consistent with applicable law." EO 14003 also required all agencies to elect to negotiate over Section 7106(b)(1) permissive bargaining subjects.

Some agencies were eager to implement the Trump Executive Orders; others were slow to do so. And while the Biden EOs seek to unwind the agency-level application of the Trump directives, a similar uneven set of agency responses can be expected, with reluctance most marked in agencies administered by boards and commissions in which Trump appointees continue to be a majority.

Unions will monitor the roll-backs of the Trump policies. Union grievances and other actions protesting retained policies from the Trump EOs can be expected. The presumptive broad scope grievance arbitration provisions and incorporation of statutory provisions into agreements will bring such grievances to arbitration unless resolved.

Federal Labor Relations Authority

Five U.S.C. § 7104 requires that members of the FLRA be appointed with the advice and consent of the Senate. It further provides that no more than two of its members may be from the same political party and that they can be removed "only for inefficiency, neglect of duty, or malfeasance in office." The statute also prohibits members of the FLRA from engaging in other employment. The powers and duties of the FLRA are set out in 5 U.S.C. § 7105.

As indicated, a change in Presidential Administration brings with it, at some point, changes in the makeup of federal regulatory agencies and boards. The FLRA is no different. The Administration populated the Federal Labor Relations Authority with conservative appointees. While such changes occur with every change of parties controlling the executive branch, the Trump FLRA majority engaged

in overturning much long standing precedent. The percentage of agency losses overturned by the FLRA increased dramatically; if a union files exceptions, they have seldom been upheld.

The current makeup of the FLRA in the Trump Administration consists of Chairman Colleen Duffy Kiko, who was nominated by President Trump on September 5, 2017 and confirmed by the Senate on November 16, 2017; Member James T. Abbott, who was nominated by President Trump on September 2, 2017 and confirmed by the Senate on November 16, 2017; and Member Ernest DuBester, who has served continuously as a Member of the Authority from the Obama Administration in 2009, and was subsequently nominated by President Trump and confirmed by the Senate on December 11, 2017. [2]

The FLRA Website contains a handy version of the Statute, a listing of recent cases (many of which involve exceptions from arbitration awards) and a quarterly digest of significant decisions. The Website also includes the comprehensive FLRA Arbitration Guide. As indicated, the posted Guide indicates a September 30, 2016 update. A scan of the posted Guide against the version originally posted indicates that the Guide has not been updated to reflect post-2016 changes.

Nominating and confirming FLRA Members whose terms have expired or will, including a replacement for Member Abbott, which would shift the Authority's political and ideological balance, may take several months; and even longer, and with less certainty, given the Democrats' tenuous control of the Senate and other Administration priorities. The Biden administration has appointed an acting General Counsel, thereby reactivating the ULP process.

[2]This represented the first time the Authority had its full complement of members since January 3, 2017.

Subject to judicial review, the decisions of the FLRA serve as the guideposts for federal agencies, unions, and arbitrators, and given the five-year terms of its members, those decisions often extend beyond the terms of the President who appointed the them. The Authority expects arbitrators to follow its precedents and will grant exceptions and set aside Awards which do not follow them.

The Biden FLRA will almost certainly roll back the Authority's recent decisions as opportunities arise, restore the earlier, long-standing precedents and make modest expansions of employee and union rights. FLRA Member (now Chair) DuBester, the sole Democrat during the last four years, has been a consistent dissenting vote against the changes. As one of its initial acts, the Biden administration appointed Member DuBester as Chair of the Authority. That appointment enabled Chairman DuBester to exert some control over policy. However, reversal of the Trump decisions must await appropriate cases and will take some time to reverse, certainly months and in some cases even years.

The Authority has redefined the "contrary to law" standard for reviewing arbitration awards to add a new, three-part test: was the contract violated? If so, was the remedy reasonably and proportionally related to the violation? And if parts one and two are answered in the affirmative, did the award "excessively interfere with management's ability to operate" under 5 USC Section 7106. Note that, if the answer to the third part of the test is yes, FLRA vacates the award without remand.

The Authority has found no obligation to bargain based on a new distinction between "working conditions" and "conditions of employment." CBP, El Paso, 70 FLRA 501. The Authority has expanded

the "covered by" doctrine to remove disputes from bargaining obligations.

FLRA has also insisted that arbitrators apply a "plain meaning" standard to contract language: If FLRA determines - after the fact and without history or context - that the language is clear, it invalidates any award based on examination of bargaining history, past practice or intent. FLRA has also been mining awards contrary to its view of propriety based on arbital reliance on "non-facts" to serve as a basis for reversal. The Authority has also been accepting interlocutory appeals from agencies during arbitration, contrary to long-standing practice. The Agency has also been taking a more restrictive view of entitlement to attorneys fees.

There follows a list of FLRA cases overturning awards which are based on one or more of these new or expanded principles. In each instance, there has been a dissent from Member DuBester. Additional cases will have been added since the survey was conducted.

*Claimed failure to draw essence and reliance on past practice when contract language deemed clear. Army & NAIL, 70 FLRA 733. Bureau of Prisons, 70 FLRA 748.

*Improper reliance on past practice -Navy & Metal Trades, 70 FLRA 754.

*Failure to draw essence from contract and exceeds authority- IRS & NTEU, 70 FLRA 783.

*Improper reliance on past practice in a procedural context. SBA & AFGE, 70 FLRA 525.

*FLRA has narrowed bargainable issues based on expansion of the "covered by" doctrine and as being contrary to law. Fed Bur. Prisons 70 FLRA 398

*New standard for management rights exceptions. DOJ & AFGE, 70 FLRA 398. Explicitly overturns precedent Lengthy Dissent contains strong defense of Arbitrator's remedial discretion.

*No obligation to bargain based on the new distinction between "working conditions" and "conditions of employment." CBP, El Paso, 70 FLRA 501. Overturns arbitration toward as well as FLRA & court precedent. Strong Dissent issued.

*Determination of a bargaining obligation as contrary to law. DHS & AFGE, 70 FLRA 628. Strong Dissent contains defense of collective bargaining.

*Award overturned based on accepted request for interlocutory review. IRS & NTEU, 70 FLRA 806.

*Entitlement to attorneys fees narrowed. In case with 21 year history, Authority set aside 8 Awards awarding attorneys fees. DODEA & FEA, 70 FLRA 718.

*Alleged failure of the Award to draw its essence from the CBA, exceeded authority, contrary to law. IRS & NTEU, 70 FLRA 680. See the 2019 Philadelphia Panel chaired by Beber Helburn, NAA Proceedings.

So how is an arbitrator to identify principles meriting precedential effect? The FLRA Guide contains the core, long-term principles and the case citations which established them. The Trump FLRA roll-backs will almost certainly be reversed by the Biden Authority. As indicated, the full undoing must await the establishment of a Democratic majority and then further await appropriate cases to provide a vehicle to articulate the reversals. That may take time, but a reliable indicator of where the principles will be heading will be Chair DuBester's dissents in any case cited to you.

Once issued, the provisions ordered become part of the parties' collective bargaining agreement until superseded.

Federal Service Impasses Panel

The Federal Service Impasses Panel (FSIP or Panel) was established within the Federal Labor Relations Authority (FLRA) in accordance with 5 U.S.C. § 7119. The statute provides the Panel with broad jurisdiction to resolve bargaining disputes between Federal agencies and their unions. Subsection (c)(1) provides that the "function" of the Panel "is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives." Since federal employees and the unions that represent them are prohibited by law from striking or taking other economic action against the government, FSIP is the final arbiter of bargaining impasses, possessed of authority to issue binding decision as to the terms of CBAs.

Five U.S.C. § 7119(c)(2) provides that the Chair and the Members of the Panel shall be appointed by the President. Subsection (c)(2) of § 7119 provides that the Panel "shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor- management relations." Terms are for five years. The positions on the Panel are not full-time. The statute does not require confirmation by the U. S. Senate, and the various Chairs and Members have served without Senate confirmation. Each incoming administration accepts the resignations of FSIP Members, whether offered or not, early into the administration. The Trump Members are no longer in office. [FSIP Members are appointed by the President for five year terms. However, an incoming administration may accept the resignations of FSIP Members, whether offered or not. The Biden Administration exercised that authority; and the

Trump Members are no longer in office. Insofar as the FLRA's website indicates, new Panel Members have not been appointed.

The Panels appointed by different administrations have usually included neutrals, including several members of the NAA. The 10 persons appointed by President Trump to make up the Panel included management representatives and employees of conservative think tanks, but no neutrals and no members with union backgrounds.

In a Memorandum to the Federal Labor Relations Authority dated November 12, 2019, President Trump, citing 3 U.S.C. § 301, delegated to the FLRA the power "to remove the Chairman and any other member" of the Panel.[3] Section 1(b) of that Memorandum provides:

> In exercising the authority delegated by this section, the FLRA shall consider the extent to which decisions of members of the FSIP are consistent with the requirements of Chapter 71 of title 5, United States Code, with particular attention to whether the decisions are consistent with the requirement of an effective and efficient Government, as those terms are used in 5 U.S.C. 7101(b), in addition to any other factors that the FLRA may consider appropriate.

Despite the memorandum, the FLRA does not have jurisdiction to review most decisions of the FSIP.

On March 27, 2020, the National Veterans Affairs Council, American Federation of Government Employees, filed a complaint for declaratory and injunctive relief against the FSIP; Mark Anthony

[3]Three U.S.C. §301 provides in part: "The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the president by law, or (2) any function which officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President."

Carter, the Panel's then-Chair; and the FLRA.[4] [5] The complaint sets out three counts. The first alleges that the Appointments Clause of the United States Constitution requires that the members of the Panel be appointed with the advice and consent of the Senate. The second alleges that 5 U.S.C. § 7119(c)(2) "was intended to require the appointment of neutral decision-makers skilled in arbitration of labor-management matters"; that "[f]ew if any, of the current Panel members meet these criteria;" that "[o]n information and belief, not a single member of the Panel has a background, training, certification, or credential in arbitration or mediation;" and that "at least four members have blatant conflicts of interest that disqualify them from meeting the statutory fitness requirements for service on the Panel." The third count alleges a violation of the due process clause of the Fifth Amendment. Specifically, it alleges that as currently constituted, the FSIP "does not provide Plaintiff with a neutral tribunal free of bias. Its members not only advocate for and pursue anti-union policies in their current employment not with the Panel, but also continue to derive income by litigating against public sector unions." As of the date of writing this report, the trial court has not issued a decision, and it remains open to see whether the suit will be withdrawn after President Biden appoints a Chair and Members of the Panel.[6]

[4]AFGE had claimed in a suit against the FSIP and others filed in 2019 that the Chair and members of the FSIP had to be confirmed by the Senate; AFGE v FSIP, No. 1:19-cv- 01976 (USDC DDC August 12, 2019). That case was consolidated with AFGE v FSIP, No. 1:19-cv-01934 (USDC DDC June 27, 2019). Both were dismissed as moot on November 16, 2020.

[5]National Veterans Affairs Council v. FSIP, No. 1:20-cv-00837 (USDC DDC March 27, 2020). The Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO, filed a similar suit; see Association of Administrative Law Judges v. FSIP, No. 1:20-cv-01026-ABJ (USDC DDC April 20, 2020). Other unions have alleged similar claims in suits seeking to reverse specific decisions of the FSIP, in addition to other relief; *see, e.g.*, National Labor Relations Board Professional Association v. FSIP, No. 1:20-cv-00888-ABJ (USDC DDC January 10, 2020); National Weather Service Employees Organization v. FSIP, No. 1:20-cv-01563-TJK (USDC DDC June 15, 2020); AFGE, National Council of HUD Locals Council 222 v. FSIP, No. 1:20-cv-02683- RJL (USDC DDC September 21, 2020).

[6]The complaint alleges that the Panel "wields enormous power over federal unions and their employing agencies". The complaint goes on to say that the Panel has imposed management's positions on a union, citing three FSIP decisions, each of which predated President Trump's appointments of the Chair or any Members of

Subsection (c)(5) of § 7119 contains the procedures the Panel may use.[7] Subsection (c)(5)(A) directs the Panel or its designee to investigate any impasse properly brought to it and to either recommend procedures for the resolution of the impasse to the parties or to assist the parties in resolving the impasse through whatever methods and procedures it considers appropriate. Subsection (c)(5)(B) provides that if the parties do not reach a settlement with the Panel's assistance in accordance with Subsection (c)(5)(A), the Panel may conduct hearings and "take whatever action is necessary … to resolve the impasse," provided the action is not inconsistent with 5 U.S.C. Chapter 71. In other words, while the FSIP assists the parties in reaching a settlement, it also has the power to impose one. Five U.S.C. §7119(c)(5)(C) states that any "final action of the Panel … shall be binding on such parties during the term of the agreement, unless the parties agree otherwise." The language mandated by Panel Decisions become part of the CBA.

Five U.S.C. § 6131 relates to impasses regarding flexible or compressed work schedules. In this type of dispute, the Panel's statutory role is essentially adjudicatory. The Statute directs the panel to rule in favor of the agency if the agency's determination not to adopt or to discontinue the flexible or compressed work schedule at issue is supported by evidence that the schedule "is likely to cause" or "has caused an adverse agency impact."

The FSIP's jurisdiction over negotiation impasses is not unlimited. Five U.S.C. § 7119(b) makes clear that the Panel may not accept a request for assistance unless the parties have reached impasse after mediation by either the Federal Mediation and Conciliation Service or a private mediator. The FLRA imposed an additional limitation in *Commander, Carswell AFB, TX and AFGE Local 1364*, 31 FLRA 620 (1988). In that case, the FLRA held that the FSIP lacks the power to determine whether a party has a duty to bargain

---

the Panel.

[7]The FSIP's procedural regulations are found at 5 CFR § 2471.

a particular issue.[8] Thus, when a party to a negotiation impasse presents a good faith claim that an issue is non-negotiable, the FSIP must decline jurisdiction pending a determination by the FLRA regarding that issue.

The Panel has several devices available to it to resolve negotiation impasses. Upon receipt of a request for assistance, the Panel's Executive Director or another member of its professional staff investigates the dispute and makes recommendations regarding whether the Panel should accept jurisdiction and, if so, how it might proceed. The Panel may refer the case (1) to med-arb before the Chair or an individual Member or (2) to a conference before an individual Member with the understanding that if the impasse was not resolved, it would be referred to the entire Panel for resolution. The Panel may resolve an impasse based on written submissions or by use of an order to show cause. The Panel may refer a case to a private mediator/factfinder. Five U.S.C. § 7119(b)(2) authorizes the Panel to approve the parties' request to use the services of a private interest arbitrator.

A comparison of Volume 2019 of FSIP decisions (cases initiated during the second-to-last year of the Trump administration), and Volumes 2013 and 2014 (cases initiated during the third- and second-to-last years of the Obama administration), evidences that the unions' perception of hostility on the part of the Trump Panel has a basis in fact.[9] [10]

[8]Five U.S.C. § 7105(a)(2)(E) provides that the FLRA shall "resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title."

[9]The comparison is between decisions from the Trump Panel for one year and decisions from the Obama Panel for two years because the latter issued fewer formal decisions during the second to last year of the Obama administration.

[10]On a fiscal year basis, the FSIP assigns a number to each case upon receipt of a request for assistance. If a case proceeds to a formal decision, the case number becomes the decision number. For example, the first request for assistance received by the Panel on October 1, 2019 would be assigned case number "2019 – 001". If that case resulted in a formal decision by the Panel, the decision number would be "2019 – 001". One result of the Panel's use of this system is that within a given yearly volume, FSIP decision numbers are not consecutive and do not reflect the relative date of issuance. For example, Volume 2015 consists

When the FSIP issues a negotiation decision, it regularly indicates on an issue-by- issue basis whether it is ordering adoption of (1) the agency's proposal without modification, (2) the Union's proposal without modification, (3) the agency's proposal with modification, or (4) the union's proposal with modification.[11] A comparative review of FSIP Decisions establish that the Panel ordered the adoption of the proposal of one party or the other with modification evenly (2:2) in 2014/2015 but tilted to Management in 2019 (37:12).

In decisions regarding negotiation cases initiated in fiscal years 2014 and 2015, FSIP adopted a modified agency proposal on two occasions and a modified union proposal the same number of times. In decisions arising from negotiation cases initiated in fiscal year 2019, the FSIP adopted a modified proposal of one party or the other with respect to 49 issues. It adopted a modified agency proposal in 76% of those situations and adopted a modified union proposal in 24% of them. In viewing the difference between these percentages, one must bear in mind that the Panel's "modification" of a proposal may be tantamount to adopting the other party's proposal. That is not true when reviewing decisions in which the Panel ordered adoption of a party's proposal without modification, however.

The FSIP ordered adoption of one party's proposal without modification in 2014/2015 (Agency: 11 issues, Union: 8 issues) while in 2019, the division was Agency: 66 issues, Union: 12 Issues.[12]

---

of formal decisions regarding cases initiated between October 1, 2014 and September 30, 2015. Presented order in which they were issued, that volume consists of eight decisions numbered 065, 028, 079, 096, 125, 114, 135, and 121.

[11]The Panel will sometimes indicate that it is ordering adoption of a proposal one party's proposal with a "slight" modification.

[12]In order to base analysis solely on the FSIP's determination that it was adopting the proposal of one party or the other, only those situations are counted only those situations in which the Panel stated that it was directing adoption of the proposal of one party or the other. Not counted are situations wherein the Panel ordered adoption or withdrawal of a proposal to which there was no counterproposal.

In negotiation cases initiated in fiscal years 2014 and 2015, the FSIP ordered adoption of the agency's proposal in 58% of the situations in which it ordered adoption of the proposal of one party or the other without modification and adopted the union's proposal in 42% of those situations. By contrast, in cases initiated in fiscal year 2019, the FSIP ordered adoption of the agency's proposal in 85% of the situations in which it ordered adoption of the proposal of one party or the other without modification and ordered adoption of the union's proposal in 15% of those situations. The difference in the ratios is dramatic. The clear conclusion is that the change in the composition of the Federal Services Impasses Panel under the Trump administration resulted in adoption of Federal agency proposals and rejection of Federal union proposals with significantly higher frequencies than was true during the Obama administration.

Because the FSIP's function with respect to flexible or compressed work schedule cases is essentially adjudicatory and because the statute itself in effect establishes a pro-agency preference, the author has not included flexible or compressed work schedule decisions.

Bargaining cases come before arbitrators in a variety of contexts, including, on the front end, failures to bargain in good faith and by challenges to submission of cases to the Panel based on the absence of an impasse, which is a pre-condition to Panel jurisdiction. On the back end, unions may challenge improper implementation.

Judicial Review of FLRA and FSIP Decisions

This Section describes decisions of the FLRA during the Trump administration which have been appealed to the federal circuit courts of appeal, and the resultant decisions, as available as of

the date of this writing.[13] To the extent those decisions contain reference to decisions of the Federal Service Impasses Panel, those issues are addressed as well. Although Section 7123(b) of the FSLMRS provides that final orders of the FLRA can be appealed to any U.S. Circuit Court of Appeals in which the party aggrieved resides or does business, in fact, the vast majority of such appeals are filed in the Court of Appeals for the District of Columbia Circuit. Indeed, there are no cases during the relevant period from in any other circuit.

The cases reviewed run the gamut of matters within the jurisdiction of the FLRA – negotiability, representation, unfair labor practices, and most importantly for purposes of his article – exceptions to arbitrators' awards. The review over the relevant period consists of 31 decisions of the Authority which have been appealed to the D.C. Circuit.[14] However, as of this date, the court has only reached a decision on the merits in eight of those appeals, which will be the focus of this analysis.

Decisions

1. American Federation of Government Employees National Council, 118-CE v. Federal Labor Relations Authority, 926 F.3d 814 (D.C. Cir. 2019).

Arbitration Award - Decision of the Authority. In *U.S. Department of Homeland Security ("the Department"), U.S. Immigration and Customs Enforcement ("I.C.E.", "the Agency") and American Federation of Government Employees National Council, 118-CE, ("Union"),* 70 FLRA No. 127 (June 28, 2018), the Agency filed exceptions to an arbitrator's award that found the Agency had committed an unfair labor practice ("ULP") under §7116 of the Federal Service Labor-Management Relations Statute ("the Statute")

[13]The Federal court decisions dealing with challenges to President Trump's Executive Orders regarding the Federal Service Labor-Management Relations Statute are discussed separately, above.

[14]Of those 31, eleven have been consolidated in the D.C. Circuit. Two cases were voluntarily dismissed.

by not bargaining with the Union before implementing a change in the method by which overtime was computed and paid.

The overtime at issue was "administratively uncontrollable overtime" ("AUO"), which is authorized and regulated by the Office of Personnel Management ("OPM"). The Agency had a practice of excluding certain leave (e.g. annual and sick leave), from the total number of hours worked by an employee for the purposes of calculating an overtime rate. Thus, when the number of AUO hours worked was divided by the reduced total hours of work, the average number of AUO hours increased, and an employee was able to meet the threshold-hour requirement for AUO more easily and to receive a higher AUO premium.

In 1997, OPM issued guidance which clarified that under its 1968 regulations, agencies should not subtract hours of unpaid leave in calculating AUO, although I.C.E. had continued its prior practice. A government investigation ensued through the Office of Special Counsel and the Government Accountability Office, which resulted in the Department of Homeland Security advising its units (including I.C.E.) that the practice was to be discontinued. On May 2, 2015, I.C.E. notified its employees and the Union that it was implementing the changes and offered to engage in post-implementation bargaining.

The Union filed a grievance alleging the Agency had violated the Statute and Article 9A of the parties' agreement, which required pre-implementation notice of proposed changes in existing practices and the opportunity for the Union to request bargaining.

The arbitrator rejected the Agency's argument that it could not engage in bargaining prior to the change, as it had been directed by the Department to end the unlawful practice; and in fact that the practice was indeed in violation of OPM regulations and guidance. The arbitrator concluded that the Agency had a long-standing practice of calculating AUO and there was no need to defer to the Agency's interpretations of the OPM regulations.

The Authority set aside the arbitrator's award (Chairman Kiko and Member Abbott; Member DuBester dissenting). The Majority noted that there was no dispute that the OPM regulations were government-wide regulations, and under the plain wording of the regulation and OPM's guidance, the time periods that the Agency's practice excluded were not permissible exclusions. According to the Authority, the arbitrator had cited previous negotiability decisions involving the same parties where the practice was found not to be contrary to OPM regulations – although the Authority stated those decisions had been previously vacated. Accordingly, the Authority held the arbitrator's finding that the Agency violated the Statute was contrary to law and there was no contractual violation.

The D.C. Circuit Court of Appeals. The Court denied the Union's petition for review (before Judges Henderson[15], Pillard[16], and Wilkins[17]). The central issue was whether the Authority correctly determined that I.C.E.'s previous policy conflicted with the OPM regulations as interpreted in the 1997 guidance. The Court held that a plain reading of the regulation and guidance showed on its face that the practice was inconsistent with those provisions. Further, the Court held that the Union's argument that the Agency's practice was well-settled in previous decisions, was not supported by the previous decisions cited by the Union.

2. National Treasury Employees Union v. Federal Labor Relations Authority, 943 F.3d 486 (D.C. Cir. 2019).

Negotiability Dispute - The Authority's Decision. In *National Treasury Employees Union and United States Department of Homeland Security, Customs and Border Protection,* 70 FLRA No. 139 (July 11,

[15]Judge Karen Henderson was appointed to the D.C. Circuit by President George H.W. Bush and confirmed in 1990.

[16]Judge Cornelia Pillard was appointed to the D.C. Circuit by President Obama and confirmed in 2013.

[17]Judge Robert Wilkins was appointed to the D.C. Circuit by President Obama and confirmed in 2014.

2018), the Authority dealt with a question of negotiability. The Union made two proposals, to both of which the Agency filed its negotiability petition with the Authority. Both proposals dealt with performance evaluations. Proposal 1 required the Agency to retain its existing "successful/unsuccessful" rating system, permitted the Agency to add additional rating levels between those two classifications, but prohibited a rating above or below those levels. It was agreed that Proposal 2 had no independent meaning apart from Proposal 1, and would give the Agency the discretion to establish all the criteria for the levels established under Proposal 1.

The Authority denied the Union's petition as to both proposals. (Chairman Kiko, Member DuBester, Member Abbott). As a threshold matter, the Authority determined that Proposal 1 impermissibly affected the Agency's rights to direct employees and assign work under §7106(a)(2)(A) and (B) of the Statute as the performance evaluation system directly affected the degree of precision with which management could establish and communicate job requirements, standards, performance, rewards, and sanctions, all which are essential individual job elements. The Authority did not feel compelled to overrule existing precedent in order to do so, and found the Union's reference to allowing same in incentive-pay situations to be distinguishable.

The Union argued, in the alternative, that even if Proposal 1 affected management's rights to direct employees and assign work, it qualified as an "appropriate arrangement" under §7106(b)(3) of the Statute, and was therefore negotiable. The Authority rejected the argument. In determining whether an arrangement is "appropriate", the Authority noted its function is to weigh the benefits afforded to employees against the proposal's burden on the exercise of management's rights. The Authority was unable to find the claimed benefits to the employees outweighed management's rights.

The D.C. Circuit Court of Appeals. The court denied the Union's petition for review (before Senior Judge Edwards[18], Judges Millett[19] and Rao[20]). The court initially recognized that its role in reviewing the Authority's negotiability determinations is very narrow, and determined to defer to the Authority's reasonable interpretations of the Statute and its negotiability determinations.

Analyzing Authority precedent, the court held the Statute affords agencies a nonnegotiable right to establish performance standards, which allow agencies to effectively exercise their rights to supervise employees and determine what they must do. That precedent allows performance standards to play an important prospective role in assigning and directing employees, and communicating what is required in a job. The court also held that Authority precedent provides agencies with rights to direct employees and assign work based how employees meet those standards. In other words, the Court concluded, the Authority has reasonably connected an agency's ability to control its rating levels to the exercise of its rights to set standards and evaluate performance under those standards. The Court held the Authority had properly determined that this latitude involved the ability to decide how many levels to include in an appraisal system. Further, the Court, like the Authority, was not impressed with the Union's argument that this situation was akin to an earlier decision of the court which reversed a decision of the FLRA which reached a different decision dealing with incentive pay proposals. In sum, the Court held that restricting the number of performance ratings interfered with an agency's ability to measure and evaluate its employees, interfered with an agency's nonnegotiable rights to assign work and direct employees, and the Authority's decision rested on a

[18]Judge Harry Edwards, a former NAA Member, was appointed to the D.C. Circuit by President Carter and confirmed in 1980.

[19]Judge Patricia Millett was appointed to the D.C. Circuit by President Obama and confirmed in 2014.

[20]Judge Naomi Rao was appointed to the D.C. Circuit by President Trump and confirmed in 2017.

permissible and reasonable construction of the Statute and existing precedent.

3. National Treasury Employees Union v. Federal Labor Relations Authority, 942 F.3d 1154 (D.C. Cir. 2019)

Negotiability Dispute – The Authority's Decision. In *National Treasury Employees Union and United States Department of Homeland Security, U.S. Customs and Border Protection,* 70 FLRA No. 144 (July 19, 2018), the Union sought to change the way official travel time was compensated. Specifically, the Union sought to have their "official duty station" (i.e. where the employee normally reports for work) extend 50 road miles in every direction. Effectively, the proposal required the Agency to calculate travel compensation by using road miles instead of a straight-line method. The Agency took the position that the proposal was nonnegotiable as the Federal Travel Regulations ("FTR") vested it with the authority to decide the geographical boundaries of the "official duty station" and that the Union's proposal did not include a "definite domain".

The Authority dismissed the Union's petition. (Chairman Kiko and Member Abbott; Member DuBester dissenting). In reaching its decision, the Authority referenced the terms of the FTR, which defined "official duty station" to be where the employee regularly performs his duties, which could be a mileage radius around a particular point, a geographic boundary, or any other "definite domain", provided no part of the area is more than 50 miles from where the employee regularly performs his duties. The Authority concluded that based on the plain wording of the regulation, the Union's proposal of 50 road miles was not a radius around a particular point, a geographic boundary, or another definite domain,; and could therefore extend more than 50 miles beyond where the employee regularly performed his duties. Further, the Authority found the Union's proposal would cause the travel to vary with each employee on every trip.

The D.C. Circuit Court of Appeals. The court reversed the Authority, granted the petition for review, and remanded the case for further proceedings (before Judges Tatel[21], Srinivasan[22], and Senior Judge Ginsburg[23]). The court found the Authority's decision rested on two errors that were arbitrary and capricious. Basically, the court found the Authority's first conclusion was mathematically false, as it would be impossible for an employee to travel beyond a 50-mile radius for reimbursement; and the second conclusion was flawed as the regulations otherwise required employees to travel by the most expeditious route. In either case, the court found the Authority's rationale to be flawed.

4. Federal Education Association v. Federal Labor Relations Authority, 927 F.3d 514 (D.C. Cir. 2019).

Unfair Labor Practice/Arbitration Award – The Authority's Decision. In *United States Department of Defense, Education Activity and Federal Education Association*, 70 FLRA No. 132 (June 28, 2018), the Authority addressed the timeliness of an unfair labor practice charge based upon the Agency's failure to comply with an arbitrator's award. The record reflected the arbitrator issued a decision on November 7, 2003, finding that the Agency had failed to provide its employees sufficient information regarding their compensation and required the Agency to modify its payroll practices to provide more explanation. After several implementation meetings with the arbitrator over the next few years, the arbitrator sent the Agency a letter in March 2010 articulating the specific revisions required, but the Agency's payroll vendor advised the Agency on April 30, 2010 that all the changes were not allowable and would require additional funding. On May 3, 2010, the Agency forwarded the vendor's response to the arbitrator and on

[21]Judge David Tatel was appointed to the D.C. Circuit by President Clinton and confirmed in 1994.

[22]Judge Sri Srinivasan was appointed to the D.C. Circuit by President Obama and confirmed in 2013.

[23]Judge Douglas Ginsburg was appointed to the D.C. Circuit by President Reagan and confirmed in 1986.

August 18, 2010, the Agency and the vendor provided the arbitrator with the available updates to its system. After this presentation, the Union advised that the changes did not comply with the award. Nevertheless, the parties continued with "implementation meetings" with the arbitrator for another five years, then on May 13, 2015, the Agency advised the arbitrator that the extension of jurisdiction had placed it in an untenable position, and that it had advised the arbitrator and the Union in 2010 that all the revisions would not be made. On August 10, 2015, the arbitrator issued an additional award indicating that the Agency had not complied with the earlier award, and on October 6, 2015, the Union filed the ULP charge based on the Agency's failure to comply with the arbitrator's award. An administrative judge for the Agency found the ULP was timely filed based on the Agency's notice on May 13, 2015, and concluded the Agency had committed a ULP for its failure to comply.

The Authority reversed the administrative judge's findings on the issue of timeliness and dismissed the complaint. (Chairman Kiko and Member Abbott; Member DuBester dissenting). The Authority held that in failure-to-comply ULP cases, the six-month period for filing a ULP begins to run when one party expressly notifies the other that it will not comply with the obligations required in the arbitrator's award. In this case, the Authority found the Agency had notified the Union on May 3, 2010 that further changes would not be made by its vendor and that a few months later in August, the Union advised everyone that the payroll system did not satisfy the award.

The D.C. Circuit Court of Appeals. The court reversed the Authority and remanded the case for a determination on the merits. (Judges Pillard, Wilkins, and Chief Judge Garland.[24]) The court held that under *National Treasury Employees Union v. FLRA*, 392 F.3d 498 (D.C. Cir. 2004), the time for filing a ULP cannot begin at least until there has been a failure to comply with the award, and that

[24]Judge Merrick Garland was appointed to the D.C. Circuit by President Clinton and confirmed in 1997.

when an award orders an action to take place in the future, a party may fail to comply either by expressly rejecting its obligation under the award or by simply not taking the steps ordered. In this case, the court held the Authority and the Agency had relied on the express rejection route, relying on the Agency's May 2010 notice and the Union's acknowledgment of same in August 2010. The court held the Authority's conclusion was not supported by substantial evidence. The court held it was not until May 2015 when the Agency advised the arbitrator that further payroll administration changes would not be made and asked him to deem it in compliance with the award. The court further noted that the Agency's May 2010 letter did not expressly reject the Agency's obligations and indicated it would continue to work on meeting the terms of the award. Indeed, the court observed that the record reflected the parties had continued communications on ways to implement the arbitrator's required changes.

5. **American Federation of Government Employees, AFL-CIO, Local 1929 v. Federal Labor Relations Authority, 961 F.3d 452 (D.C. Cir. 2020).**

Arbitration Award – The Authority's Decision. In *United States Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, and American Federation of Government Employees, National Border Patrol Council, Local 1929,* 70 FLRA No. 102 (April 30, 2018), the Agency issued a memorandum ("the inspection memorandum") which dealt with security inspections at border checkpoints. Specifically, border patrol agents conduct two types of inspections at the border – the "primary" inspection which requires general vehicle inspection, examination of license plates and occupants' identifying documents; and if necessary, a "secondary" additional inspection at the discretion of the officer performing the primary inspection, where vehicle and occupant information are run through additional databases. The inspection memorandum required officers to send vehicles with more than one occupant who is a non-U.S. citizen to the secondary inspection area for further document review, and to request a second form of

identification from any non-U.S. citizens. In response to the memorandum, the Union filed a grievance, alleging the Agency had violated §7116(a)(1) and (5) of the Statute, and Article 3A of the parties' agreement, which required the Agency to provide notice and opportunity to bargain over proposed changes to existing practices. At arbitration, the parties disputed whether the memorandum constituted a change in the officers' conditions of employment. The arbitrator ruled in the Union's favor, finding that the memorandum constituted a change by requiring agents to refer more vehicles to the secondary inspection area, thereby reducing primary-area inspections and increasing duties in the secondary inspection area. The Agency filed exceptions to the Award.

The Authority granted the Agency's exceptions and set aside the Award. (Chairman Kiko and Member Abbott; Member DuBester dissenting). From a review of the statute, the Authority noted the Agency must provide notice and an opportunity to bargain before changing "conditions of employment", which are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." The Authority stated through a "convoluted evolution", it had previously reached the erroneous conclusion that there was no substantive difference between the terms "conditions of employment" and "working conditions". The Authority stated that this previous conclusion was not consistent with statutory interpretation and the terms were not synonymous, citing the Supreme Court's conclusion in *Ft. Stewart Sch. v. FLRA*, 495 U.S. 641 (1990). There, the Authority noted, the court stated while the term "conditions of employment" is susceptible to multiple interpretations, the term "working conditions" more naturally refers *only* to the circumstances attendant to one's performance of a job. Under this analysis, the Authority disagreed that the memorandum constituted a change in working conditions. Specifically, the Authority held that a mere increase or decrease in duties did not constitute a change over which the Agency must bargain, that the memorandum did not change the nature or type of work the officers performed - which

management had the right to assign; and the officers continued to perform inspections using the same techniques.

The D.C. Circuit Court of Appeals. The court granted the Union's petition for review and remanded the case to the Authority. (Judge Henderson, Chief Judge Srinivasan, Senior Judge Randolph[25]). Initially, the court observed that Authority had taken the opportunity to alter its existing precedent, but in doing so, failed to explain its departure and also misread the Supreme Court authority it relied upon to do so. Specifically, the court stated the Authority had misread the Supreme Court's reference to "working conditions" as *only* applying to the circumstances attendant to one's job performance, when the court had actually stated that to be the case when the term "working conditions" is used in isolation. Further, the court stated the Authority failed to provide any explanation as to what would constitute a difference between the two terms.

Turning to the Authority's analysis of the memorandum, the court noted that the Authority had erroneously concluded that an Agency is not required to bargain over mere increases in normal duties, when the precedent relied upon restricted that conclusion to increases *not* attributable to changes in the agency's policies or procedures. The memorandum, the court held, indeed changed procedures and increased the workload of secondary area agents. As to the Authority's conclusion that the memorandum did not change the nature or type of the agents' work which supervisors had the authority to direct, the court held the memorandum went beyond merely assigning work to changing procedures. Finally, on the Authority's finding that the memorandum did not change the agents' job, the court held the memorandum indeed did at least change how and where certain inspections were conducted. The court concluded the Authority's decision did not represent reasoned decision-making.

[25]Judge Arthur Randolph was appointed to the D.C. Circuit by President George H.W. Bush and confirmed in 1990.

6. Independent Union of Pension Employees for Democracy and Justice v. Federal Labor Relations Authority, 961 F.3d 490 (D.C. Cir. 2020).

Unfair Labor Practice – The Authority's Decision. *Independent Union of Pension Employees for Democracy and Justice and Pension Benefit Guaranty Corporation,* 70 FLRA No. 164 (September 24, 2018) and 71 FLRA No. 14 (March 7, 2019) represents a somewhat unusual set of facts. A predecessor union, Union of Pension Employees ("UPE") negotiated a collective bargaining agreement with the Agency, which went into effect on May 3, 2011. A week after the CBA went into effect, the Authority conducted a representation election and the successor Independent Union of Pension Employees for Democracy and Justice won. On September 20, 2011, the predecessor UPE and the Agency signed a Memorandum of Agreement selecting five arbitrators. On November 16, 2011 the Authority certified the successor Union as the exclusive representative of the Agency bargaining unit employees, thereby displacing the UPE. Essentially, the new Union interfered with, in a number of ways, the selection and appointment of arbitrators under the MOU with the predecessor union, effectively attempting to dismantle the pool of arbitrators, resulting in the Agency filing a ULP with the Authority. An administrative judge found in favor of the Agency and the Authority affirmed. (Chairman Kiko and Member Abbott; Member DuBester concurring).

The D.C. Circuit Court of Appeals. The court held the Union had not demonstrated the Authority's order was arbitrary, capricious, or otherwise contrary to law, and denied the petition for review. (Judges Rogers[26], Tatel, and Senior Judge Ginsburg). Effectively, the court held the Authority's decision was consistent with precedent, as the Union's actions constituted an unfair labor practice by repudiating an existing agreement, which interfered with the employees' rights to access the grievance procedure. The court further found the Authority did not act contrary to law when it determined that the Union acted outside of the statutory

[26]Judge Judith Rogers was appointed to the D.C. Circuit by President Clinton and confirmed in 1994.

protection for the expression of personal views and similarly that the Union had not demonstrated that its First Amendment rights were violated as it failed to identify a public concern implicated by its speech. The court noted the Authority's nontraditional remedy of offering the arbitrators the opportunity to return to the panel did not exceed its statutory authority because it was an appropriate exercise of its power to carry out the purposes of the Civil Service Reform Act by restoring the status quo.

7. National Weather Service Employees Organization v. Federal Labor Relations Authority, 966 F.3d 875 (D.C. Cir. 2020).

Arbitration Award – The Authority's Decision. In *National Weather Service Employees Organization and United States Department of Commerce National Oceanic and Atmospheric Administration National Weather Service,* 71 FLRA No. 47 (August 8, 2019), the issue concerned whether the Agency had prematurely repudiated negotiations for a successor agreement. The facts go back to 1986, when the Federal Service Impasses Panel ("FSIP" or "Panel") required the parties to adopt a provision in their agreement which provided that the agreement would remain in effect for 90 calendar days "from the start of formal renegotiation or amendment of said Agreement, exclusive of any time necessary for FMCS or FSIP proceedings". If, at the end of that period, an agreement had not been reached, "and the services of neither FMCS [n]or FSIP have not been invoked", either party could terminate the agreement upon notice to the other party.

In the summer of 2015, the Agency notified the Union of its intent to renegotiate the CBA. From that summer until October 2015, the parties were unable agree on ground rules, but ultimately with the intervention of the FSIP, the parties agreed to ground rules and a MOU regarding same was signed on December 7, 2016. Written proposals were exchanged between January and March 2017, during which time the Union's chief negotiator requested assistance from the FMCS. However, on July 25, 2017, the FMCS advised it could not

assist the parties without it being a joint request. The first face-to-face negotiations began on April 4, 2017, but the parties were unable to reach an agreement within 90 days and on July 21, 2017, the Agency terminated the Agreement. The issue before the arbitrator was whether the Agency violated the Agreement and/or committed a ULP by terminating the Agreement.

The arbitrator noted the issue depended upon when "formal renegotiation" of the CBA began. Initially, the arbitrator concluded that the negotiations for the ground rules arose in the fall of 2016, which contained the indicia of formal negotiations. Alternatively, he concluded that even if "formal negotiations" applied only to substantive negotiations, those had commenced with the exchange of proposals in January 2017. Nevertheless, he determined that the Union's contact with the FMCS effectively blocked the Agency from terminating the contract, in violation of the contract, although he did not find the Agency had committed a ULP. The Union filed an exception to the award.

The Authority held the award failed to draw its essence from the CBA and vacated the award. (Chairman Kiko and Member Abbott; Member DuBester dissenting). The Authority did agree with the arbitrator that negotiation over ground rules was not substantive, and emphasized the language of the contractual provision indicated that the time limit for negotiations applied to negotiations for a "successor agreement". As such, the Panel concluded that while ground rules bargaining marked the start of negotiations, it did not trigger the 90-day period for "formal renegotiations" for a successor agreement.[27] The Authority further took issue with the arbitrator's ultimate rationale that the Union's unilateral request to the FMCS operated to block the time requirement. The Authority found this interpretation to be inconsistent with the contract, and taken to its logical conclusion, could forestall the 90-day period

[27]Although it is not clear when the Authority considered formal renegotiations to have commenced, it could have been either the first exchange of proposals in January or the first face-to-face meeting in early April. In either case, those occurred outside the 90-day window.

from ever becoming operative upon request to one of those agencies. While granting the Agency's exception as the contractual violation, the Authority denied the Union's exception that the Agency's repudiation violated the Statute. The Union petitioned for review.

The D.C. Circuit Court of Appeals. The court granted the Union's petition for review and overturned the Authority's decision as to the contractual violation, but affirmed the Authority's decision on the alleged ULP. (Judges Rogers, Griffith[28], and Katsas[29]). The first issue addressed by the court pertained to the Authority's argument that the court lacked jurisdiction to hear the case, as that jurisdiction only arose if the Authority's order on an arbitration award "involves an unfair labor practice." The court held the Authority's argument was without merit, as precedent authorized the court's jurisdiction in review of arbitrators' awards, if an unfair labor practice was raised and addressed by the Authority, which it was in this case.

On the merits, the court first addressed whether the Authority properly exercised review of the arbitrator's award. The court noted that the Authority's role should be highly deferential and should only consider whether the arbitrator was arguably construing or applying the CBA. Under this standard, the court found the Authority had exceeded that standard and engaged in a much more searching review of the award than was permitted. The court held that when the arbitrator analyzed the determination of when the parties commenced formal negotiations, he was construing and applying the CBA, yet the Authority exercised its own analysis and failed to explain how the arbitrator's analysis was incorrect. Accordingly, the court concluded the Authority had acted contrary to law.

[28]Judge Thomas Griffith was appointed to the D.C. Circuit by President George Bush and confirmed in 2005.

[29]Judge Gregory Katsas was appointed to the D.C. Circuit by President Trump and confirmed in 2017.

Finally, the court addressed the Union's contention that the Authority's decision as to the Agency's statutory repudiation did not constitute a ULP. The Authority had ruled that there was no statutory repudiation, as there was no contractual violation. However, the court pointed out that its ruling had found such a violation, as just outlined above. Thus, the court then addressed the arguments of the parties as to whether there can be no repudiation if the party relies upon a reasonable interpretation of a contract term (as argued by the Agency), or that any express rejection of a CBA always amounts to a repudiation (as argued by the Union). In reconciling these arguments, the court held the Agency's precedent more persuasive, to the effect that while the Agency terminated the agreement, it properly did so in reasonable reliance with the terms of the CBA. The case was therefore remanded to the Authority.

8. <u>Antilles Consolidated Education Association v. Federal Labor Relations Authority</u>, 2020 WL 6038922 (D.C. Cir., October 13, 2020), --- F.3d --- (D.C. Cir. 2020).

Unfair Labor Practice/Federal Service Impasses Panel – The Authority's Decision. In *Department of Defense, Domestic Dependent Elementary and Secondary Schools, Fort Buchanan, Puerto Rico and Antilles Consolidated Education Association*, 71 FLRA No. 24 (May 22, 2019), the underlying dispute centered upon workday provisions in the parties' agreement. Article 19 of the parties' 2011 agreement provided: "The workday for full-time bargaining unit members shall consist of eight (8) hours. Unit members must be physically present at the work site for a seven and one-half (7 ½) hour duty day which includes a 30-minute non-paid duty-free lunch period." Article 19 of the agreement also provided that "bargaining unit members will perform one (1) hour per workday of preparation and professional tasks for completion of their assigned eight (8) hour workday". During the 2015 negotiations, the Union sought to carry forward the workday provisions from the 2011 agreement. The Agency sought to eliminate the dedicated hour for preparatory and professional tasks and to require teachers to be at school for that

hour. The Agency took the position that these terms implicated its right to assign work and were nonnegotiable.

The Union sought help from the FSIP, which referred the matter to a factfinder. The factfinder concluded that the workday provisions from the 2011 agreement were negotiable and recommended that the successor agreement maintain them and further recommended that the successor agreement incorporate all provisions on which the parties had already tentatively agreed. The FSIP adopted these recommendations and ordered the parties to adopt an entire successor agreement, as recommended by the factfinder, including the disputed workday provisions and the provisions on which the parties had tentatively agreed. After the Agency refused to implement the successor agreement as ordered, the Union filed an unfair labor practice charge with the FLRA. An administrative law judge recommended ruling for the Union.

The Authority rejected the ALJ's recommendation and ruled substantially for the Agency. (Chairman Kiko and Member Abbott; Member DuBester dissenting). The FLRA reached four conclusions to which the Union objected. First, that the FSIP lacked authority to decide whether the disputed workday provisions infringed the agency's right to assign work. Second, that those provisions did infringe the Agency's right to assign work. Third, that as a result, the parties should resume bargaining over workday and compensation issues. Fourth, that the FSIP lacked authority to order the parties to adopt the provisions on which the parties had tentatively agreed before the Union sought the Panel's help.

The D.C. Circuit Court of Appeals. The court denied the Union’s petition in part, set aside the decision in part, and remanded the case to the Authority. (Judges Katsas, Pillard, and Senior Judge Randolph). On the first two arguments, the court held that the workday provision in Article 19 was non-negotiable and arguably limited the Agency’s ability to assign specific tasks at specific times during one of the hours of a normal workday. The court thus concluded the FSIP had exceeded its authority and set

aside its decision as arbitrary and capricious. On the third issue, the court found the Panel's decision to order resumption of both the workday and compensation issues to be proper as they were inherently linked together. On the fourth issue, the court deferred to the Authority's decision that the Panel lacked authority to order compliance with previously reached agreements. The court pointed out that the authorizing statute allowed the Panel to resolve an "impasse" where the parties are "unable to reach agreement" and the Panel should decline jurisdiction in the event no impasse exists. In this case, the court noted that the only "impasse" related to the provision in question, and agreed with the Authority's decision that the Panel therefore lacked jurisdiction to address previously agreed-upon provisions.

Pending Cases

As indicated above, these eight cases are the only decisions reached by the District of Columbia Circuit Court of Appeals from the Federal Labor Relations Authority during the relevant period of analysis. The above analysis does not include any actions of the Authority after a remand from the court. As of the date of this writing, there are twenty-four more "in the pipeline" at the D.C. Circuit, which deal with many of these same issues. For labor arbitrators, of particular attention would be those dealing with review of arbitration awards, of which there are two: *American Federation of Government Employees, Local 3690 v. Federal Labor Relations Authority,* No. 20-1183 (filed June 1, 2020)[30] and *NLRB Professional Association v. Federal Labor Relations Authority*, No. 20-1233 (filed July 2, 2020)[31]. In the former, the Authority vacated the arbitrator's award in favor of the Union, and in the latter, the Authority affirmed the arbitrator's award. However, due to the recent filing of both these cases, a final decision from the court is not likely for some time.

[30]71 FLRA No. 125 (April 2, 2020).

[31]71 FLRA No. 141 (May 7, 2020).

Administrative Aspects of Federal Sector Arbitration

Federal Sector arbitration processes vary considerably. Larger agencies and bargaining units tend to select and use standing panels of arbitrators on a rotating basis. Less frequent users generally request panels from Federal Mediation and Conciliation Service. Notice of appointment tends to come first from FMCS, although the parties may contact arbitrators directly to notify them of selection.

The scheduling and administrative aspects of federal sector arbitration are not all that different from private sector proceedings, although they tend to be more formalistic and procedure-intensive, including dispositive Motions and disputes regarding requests for information (*see* 5 U.S.C. 7114).

There is one notable exception which create traps for the unwary: most federal sector cases involve agencies which use congressionally-appropriated funds. There are exceptions, such as the Smithsonian Institution or the Federal Reserve, but most agencies using arbitration are executive branch agencies which get their budget authority from Congress.

The use of appropriated funds for any purpose must be authorized. Providing services, including arbitration services, without the agency - and you - having obtained authorization to do so invites not getting paid or, at the least, not getting paid without lots delay and complications.

Procurement procedures were uniform across the government, but have become more decentralized and diverse. The most common vehicle to authorize your services is a purchase order, which is a statement which authorizes you to work and sets the terms (and generally the amount) of your compensation. Not all agencies use purchase orders. The key is to ascertain what authorization is required and how to get it.

When an arbitrator receives a notice of appointment to arbitrate a federal sector case, the arbitrator's first communication to the parties should include a notice that, if advance authorization is required, the arbitrator cannot and will not perform work without it. Not all agencies require advance authorization for arbitration services; but if they do not have such a requirement (that is, the arbitrator simply performs the services, submits the award and sends a bill) the arbitrator needs to obtain a statement to that effect in writing.

The federal government procurement processes are not geared to compensate arbitrators, so arbitrators must be prepared to educate the procurement people to what they do and to review whatever advance authorization (if any) is proposed to ensure that the PO provides a sufficient total amount, that it provides a reasonable period of performance, that it provides not only for funds for a hearing but for pre-hearing work, study and drafting and for time to address petitions for attorneys fees.

Specific provision for cancellation fees must be made, both as to entitlement and allocation. Some CBAs provide for fee shifting depending on the outcome of the case (e.g., loser pay or if union prevails, agency owes 75%). Arbitrators also need to ensure that the authorization is amendable, rather than being a fixed price contract, to deal with such situations as second days of hearing. Arbitrators may be asked for an advance estimate of costs, including a breakdown. Remember in such situations, you can always go down, but it may be difficult to increase the amount beyond the amount of the PO.

The procurement document will likely have both contact information for the contracting officer or equivalent and specific information as to where the invoice is to be sent. There may be other administrative requirements, such as limiting expense reimbursements to government travel rates and including receipts. Copy the advocates and labor relations representatives in addition to the procurement people. In submitting invoices, always include

on the invoice the PO Number and other identifying marks for the contract. Send the documents in ways that include a paper trail and confirmation of receipt.

In recent years, the government has set up contractor registries, a data base of people and companies who register to be eligible for work. The government-wide registry is System for Award Management ("SAM") www.sam.gov. There is a Department of Defense counterpart [Procurement Integrated Enterprise Environment ("PIEE") piee.eb.mil]. If you are not already registered, work closely and quickly to meet the agency's requirements. An arbitrator's failure to be registered with the appropriate systems may result in disqualification from serving. There is no charge to register. However, there are at least a couple of businesses with official sounding titles who will charge you to register and submit your update.

Conclusion

The Statute provides the FLRA with specified bases to review and overturn arbitration awards. The deference shown such awards has varied over time. That deference increased under the Clinton and Obama Authorities, and took a plunge under the Trump Administration. As indicated, the Authority expects arbitrators to follow its precedents and will grant exceptions and overturn the awards of arbitrators who fail to do so.

Under well-established precedent, courts are to defer to the determinations of administrative agencies on the basis of their presumed expertise and to affirm their determinations if supported by substantial evidence. Where the courts reviewing FLRA determinations have upheld the Authority, it generally did so on the basis of its limited scope of review. When the court overturned the Authority's decisions, it was critical of the Authority's inadequate or erroneous analysis.

FLRA review of arbitration awards is written unto the statute (5 U.S.C. §7122). Arbitrators who seek to ensure that their awards are not set aside must conduct their analysis in such a way as to withstand scrutiny on review, applying, in particular, applicable law and precedent. That said, the FLRA going forward is unlikely to continue to apply the doctrines of the Trump Authority. The principles enunciated and cases cited in the Guide are the best guidance; the dissents of the past several years will likely be the new majority.

- o -