

# TABLE OF CONTENTS

<b>CHAPTER 1: STRUCTURE OF THIS BOOK .....</b>	<b>1</b>
<b>CHAPTER 2: THE NATURE OF ARBITRATION .....</b>	<b>3</b>
I. ARBITRATION IS NOT MEDIATION .....	3
II. RIGHTS AND INTEREST-BASED ARBITRATION .....	4
<b>CHAPTER 3: SOURCES OF GOVERNING LAW FOR ARBITRATORS .....</b>	<b>7</b>
I. DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY .....	7
II. OTHER ARBITRATION AWARDS AS PRECEDENT .....	7
A. PRIOR AWARDS AS <i>STARE DECISIS</i> .....	10
B. PRIOR AWARDS AND <i>RES JUDICATA</i> AND COLLATERAL ESTOPPEL .....	10
<b>CHAPTER 4: THE COLLECTIVE BARGAINING AGREEMENT .....</b>	<b>13</b>
I. FORMATION OF THE AGREEMENT .....	13
II. EFFECT OF THE AGREEMENT .....	14
A. MEMORANDA OR LETTERS OF UNDERSTANDING .....	15
III. ROLE OF EXTERNAL LAW .....	15
A. CONSTITUTIONAL RIGHTS; DUE PROCESS .....	16
<b>CHAPTER 5: ARBITRABILITY .....</b>	<b>19</b>
I. GENERALLY .....	19
II. ARBITRABILITY AS A THRESHOLD ISSUE .....	20
A. TIMELINESS OF ARBITRABILITY, TIMELINESS CHALLENGE .....	22
B. PRESUMPTION OF ARBITRABILITY .....	24
C. BURDEN OF PROOF .....	28
1. Broad Scope Grievance Procedure .....	29
2. Procedural Arbitrability .....	29
D. RAISING ARBITRABILITY ISSUES .....	31
III. ISSUES OF STATUTORY JURISDICTION .....	31
A. ELECTION OF REMEDIES .....	31
1. A General Theory of Contractual Exclusivity .....	33
2. Election Between MSPB, Grievance for Major Adverse Actions, Performance-Based Actions .....	36
3. Election Between Grievance, Unfair Labor Practice Charge .....	36
4. Whistleblowers .....	37
IV. SUBSTANTIVE ARBITRABILITY ISSUES .....	37
A. STATUTORY EXCLUSIONS FROM THE GRIEVANCE PROCESS .....	37
B. CLASSIFICATION DISPUTES .....	38
C. SPECIAL CLASSIFICATIONS OF EMPLOYEES .....	41
1. Probationer .....	41
2. Seasonal Workers .....	42
<b>CHAPTER 6: GRIEVANCES .....</b>	<b>43</b>
I. CONTENT AND PURPOSE .....	43
II. EXCLUSIVE REPRESENTATION .....	44
A. CONTROL OF GRIEVANCE, ARBITRATION PROCESSES .....	44
B. BARGAINING UNITS .....	44
III. GROUP OR CLASS GRIEVANCES .....	45
IV. GRIEVANCE STEPS .....	47
V. SPECIFICITY OF GRIEVANCES .....	48
VI. PRESENTATION OF GRIEVANCES .....	50
VII. PROCEDURAL ERRORS .....	52
VIII. AMENDMENT .....	52
IX. RIPENESS .....	52
X. MOOTNESS .....	53
XI. TIMELINESS OF GRIEVANCES .....	53

A.	PRESUMPTION OF TIMELINESS .....	61
1.	Challenges to Disciplinary Actions .....	62
B.	CONTINUING VIOLATIONS .....	62
1.	Pay Practices.....	66
C.	NOTICE OF CHANGE OR IMPLEMENTATION OF CHANGE .....	68
D.	MATTERS FIRST RAISED AT ARBITRATION.....	68
E.	WAIVER OF TIMELINESS OBJECTIONS .....	70
F.	LACHES.....	71
<b>CHAPTER 7: HEARINGS.....</b>		<b>75</b>
I.	BIFURCATION OF THE HEARING TO CONSIDER PROCEDURAL OR ARBITRABILITY ISSUES .....	75
II.	SUMMARY JUDGMENT.....	75
III.	DEFINING THE ISSUE .....	76
IV.	DISCOVERY.....	76
V.	BURDENS OF PROOF.....	77
A.	CONTRACT VIOLATIONS: PREPONDERANT EVIDENCE; OTHER STANDARDS .....	79
1.	Presumptions.....	80
B.	PRIMA FACIE CASE.....	81
VI.	FORMAT OF HEARING.....	81
A.	SEQUESTRATION OF WITNESSES; REPRESENTATIVE AS WITNESS.....	81
VII.	EVALUATION OF EVIDENCE .....	81
A.	ALLEGATIONS.....	82
B.	CIRCUMSTANTIAL EVIDENCE .....	82
C.	DOCUMENTS; NEW EVIDENCE .....	82
D.	HEARSAY.....	83
E.	CREDIBILITY DETERMINATIONS.....	85
F.	ADVERSE INFERENCE .....	89
G.	EXPERT TESTIMONY .....	91
H.	ATTORNEY-CLIENT PRIVILEGE .....	91
I.	FIFTH AMENDMENT, SIMILAR PRIVILEGES .....	91
VIII.	BENCH DECISIONS .....	92
<b>CHAPTER 8: ARBITRATOR'S ROLE .....</b>		<b>93</b>
I.	NEUTRALITY .....	93
II.	PRIMACY OF THE LABOR CONTRACT.....	94
<b>CHAPTER 9: MANAGEMENT RIGHTS.....</b>		<b>95</b>
I.	FISCAL LIMITATIONS .....	98
<b>CHAPTER 10: CONTRACT INTERPRETATION .....</b>		<b>99</b>
I.	APPLICATION OF STATUTES AND REGULATIONS.....	100
II.	NEGOTIABILITY ISSUES .....	101
III.	PRINCIPLES OF CONTRACT INTERPRETATION.....	101
A.	BURDEN OF PROOF.....	106
B.	GOOD FAITH AND FAIR DEALING.....	107
C.	EFFECTUATE THE PARTIES' INTENT .....	107
D.	AVOID NONSENSICAL RESULT.....	108
E.	ALL TERMS ARE GIVEN MEANING .....	108
F.	LANGUAGE IS GIVEN ITS ORDINARY MEANING .....	109
G.	SPECIFIC OVER GENERAL PROVISIONS.....	110
H.	CLEAR AND PLAIN LANGUAGE CONTROLS .....	110
I.	AMBIGUOUS LANGUAGE.....	112
1.	Construction of Ambiguous Language Against the Drafter .....	115
J.	CONTEXTUAL MEANING .....	115
K.	AVOIDANCE OF FORFEITURE .....	116
L.	BARGAINING HISTORY; PAROLE EVIDENCE.....	116
M.	PAST PRACTICE .....	117
1.	Past Practice as an Aid to Contract Interpretation .....	123
2.	Past Practice at Variance or Conflicting With Contract .....	123
N.	AVOIDANCE OF UNILATERAL CHANGES IN CONTRACT TERMS.....	124

O.	MUTUAL MISTAKE.....	125
P.	ESTOPPEL .....	125
Q.	IMPOSSIBILITY OF PERFORMANCE.....	126
R.	AGENCY REGULATIONS CONFLICT WITH CONTRACT LANGUAGE.....	127
S.	STATUTORY INTERPRETATION .....	127
T.	SPECIFIC TERMS.....	127
1.	“May” .....	127
2.	“Good Faith”.....	127
<b>CHAPTER 11: SUBSTANTIVE TOPICS COMMONLY ENCOUNTERED IN ARBITRATION .....</b>		<b>129</b>
I.	COMPENSATION ISSUES.....	129
A.	ENVIRONMENTAL DIFFERENTIAL PAY; HAZARD PAY.....	129
1.	Asbestos Exposure.....	130
B.	STANDBY PAY.....	132
II.	PERFORMANCE ASSESSMENT AND PERFORMANCE-BASED ACTIONS.....	133
A.	PERFORMANCE STANDARDS .....	134
B.	PERFORMANCE APPRAISAL.....	136
C.	PERFORMANCE AWARDS.....	140
D.	DISCIPLINE UNDER CHAPTER 43 OR CHAPTER 75 .....	141
III.	PROMOTION.....	144
A.	CAREER LADDER PROMOTIONS .....	144
B.	MERIT PROMOTION.....	145
1.	Crediting Plans .....	146
C.	FILLING OF VACANCIES .....	147
D.	SUPERVISORY POSITIONS .....	147
E.	TEMPORARY PROMOTIONS.....	149
F.	PROMOTION THROUGH ACCRETION OF DUTIES.....	151
G.	PRIORITY CONSIDERATION .....	151
H.	CAREER INTERN PROGRAM .....	152
IV.	ASSIGNMENT OF WORK.....	152
A.	ASSIGNMENT OF DUTIES.....	152
1.	Position Descriptions.....	155
B.	TEMPORARY DUTY ASSIGNMENTS .....	156
C.	INVOLUNTARY REASSIGNMENTS .....	156
D.	STAFFING ISSUES .....	157
V.	WORK SCHEDULES.....	157
A.	OVERTIME .....	157
1.	Compensatory Time.....	161
2.	Pre-Shift and Post-Shift Activity.....	162
3.	FLSA: Suffer or Permit; FEPA: Overtime Ordered or Approved .....	168
4.	Calculation; Recordkeeping; <i>De Minimis</i> ; Work Week.....	169
5.	When Overtime Entitlement Occurs .....	171
6.	FLSA Recovery Period.....	172
7.	FLSA Exemptions; Job Classification; Position Descriptions.....	174
B.	ALTERNATIVE WORK SCHEDULES .....	174
C.	FLEXIPLACE .....	175
D.	OFFICIAL TIME.....	175
VI.	LEAVE .....	177
A.	SICK LEAVE.....	177
B.	ABSENCE WITHOUT LEAVE.....	177
C.	ADMINISTRATIVE LEAVE; ENFORCED LEAVE.....	178
D.	FAMILY AND MEDICAL LEAVE ACT .....	180
E.	LEAVE PROCEDURES.....	180
VII.	REDUCTION IN FORCE.....	181
A.	CONTRACTING OUT .....	182
VIII.	DEBT COLLECTION.....	183
IX.	DISCIPLINE .....	184
A.	INSUBORDINATION.....	186
1.	Exercise of <i>Weingarten</i> Rights.....	189
B.	VIOLATION OF RULES .....	189

C.	ABSENTEEISM.....	191
D.	DISHONESTY.....	191
	1. Falsification; Lack of Candor.....	192
	2. Failure to Pay Debt.....	194
	3. Theft 195	
E.	DISCOURTESY.....	195
F.	OFFENSIVE LANGUAGE.....	196
G.	MISUSE OF GOVERNMENT VEHICLE.....	196
H.	MISUSE OF GOVERNMENT COMPUTER EQUIPMENT.....	196
I.	THREATS.....	196
J.	ALCOHOL AND DRUG OFFENSES.....	197
K.	LOSS OF LICENSE.....	198
L.	PHYSICAL OR MENTAL INABILITY TO PERFORM POSITION.....	198
M.	NEXUS; OFF DUTY CONDUCT.....	198
N.	THE CONCEPT OF JUST CAUSE.....	201
	1. Daugherty's Seven Tests.....	208
	2. Efficiency of the Service, Just Cause, <i>Douglas</i> Factors and Daugherty's Tests.....	211
O.	BURDEN OF PROOF.....	213
P.	CONSTRUCTIVE ADVERSE ACTIONS.....	214
Q.	PARTICULAR TYPES OF EMPLOYEES.....	215
	1. Union Officials.....	215
	2. Law Enforcement Officers.....	216
	3. Administrative Law Judges.....	217
X.	DUE PROCESS IN THE ADMINISTRATION OF DISCIPLINE.....	218
A.	TIMELINESS OF DISCIPLINE.....	219
B.	PROGRESSIVE AND PRIOR DISCIPLINE.....	221
C.	ADEQUACY, TIMELINESS OF INVESTIGATIONS.....	225
D.	NOTICE OF CHARGES.....	226
E.	SEARCHES.....	226
F.	DOUBLE JEOPARDY.....	229
G.	REPLY RIGHT.....	229
H.	POST-TERMINATION CONDUCT.....	229
I.	HARMFUL ERROR.....	230
XI.	PENALTY ASSESSMENT.....	230
A.	MSPB <i>DOUGLAS</i> STANDARDS.....	237
B.	TABLE OF PENALTIES.....	241
C.	REASSIGNMENTS AS DISCIPLINE.....	241
D.	ANALYSIS OF CHARGES.....	242
E.	INDEFINITE SUSPENSIONS.....	242
F.	CONSISTENCY OF PENALTIES; COMPARATORS.....	244
XII.	DISCRIMINATION.....	245
A.	ELECTION OF FORUMS.....	245
B.	BURDEN OF PROOF.....	246
C.	DISPARATE IMPACT; DISPARATE TREATMENT.....	248
D.	HARASSMENT AND HOSTILE WORK ENVIRONMENT.....	251
E.	EQUAL PAY CLAIMS.....	251
F.	DISABILITY AND ACCOMMODATION REQUIREMENTS.....	252
XIII.	REPRISAL AND RETALIATION.....	255
A.	UNION ACTIVITIES.....	256
B.	EEO ACTIVITIES.....	258
C.	FREE SPEECH.....	260
D.	WHISTLEBLOWERS.....	261
E.	PRIOR APPEALS.....	261
F.	REMEDIES FOR REPRISAL.....	261
XIV.	BARGAINING.....	262
A.	REMEDIES FOR BARGAINING FAILURES.....	262
XV.	PRIVACY ACT VIOLATIONS.....	263
XVI.	UNFAIR LABOR PRACTICES.....	264
XVII.	UNION RIGHTS AND OBLIGATIONS.....	266
A.	UNION REPRESENTATION.....	266

B.	TELECOMMUTING FOR UNION REPRESENTATIVES.....	268
C.	INFORMATION REQUESTS .....	269
XVIII.	UNION DUES DEDUCTIONS .....	270
XIX.	COST OF ARBITRATION .....	270
<b>CHAPTER 12:</b>	<b>SETTLEMENTS.....</b>	<b>271</b>
I.	LAST CHANCE AGREEMENTS.....	271
II.	GENERAL CONTRACT PRINCIPLES APPLIED TO SETTLEMENT AGREEMENTS .....	272
III.	SETTLEMENTS AS EVIDENCE .....	272
<b>CHAPTER 13:</b>	<b>CORRECTION, CLARIFICATION OF ARBITRATION AWARDS; RETENTION</b>	
	<b>OF JURISDICTION; ENFORCEMENT .....</b>	<b>273</b>
I.	RETENTION OF JURISDICTION .....	273
II.	ENFORCEMENT OF AWARDS .....	274
<b>CHAPTER 14:</b>	<b>REMEDIES, COUNSEL FEES &amp; DAMAGES .....</b>	<b>275</b>
I.	BACK PAY.....	275
A.	PERIOD OF RECOVERY .....	277
II.	ACCOUNTINGS AND INTEREST .....	278
III.	LIQUIDATED DAMAGES .....	279
IV.	COMPENSATORY DAMAGES .....	284
V.	FAILURE TO NEGOTIATE; UNILATERAL CHANGES IN EMPLOYMENT CONDITIONS.....	286
A.	UNLAWFUL PROVISIONS .....	287
VI.	NON-TRADITIONAL REMEDIES .....	287
VII.	COUNSEL FEE AWARDS; COSTS .....	289
A.	STATUTORY ENTITLEMENT STANDARDS.....	290
1.	Prevailing Party .....	293
2.	Representation by Counsel .....	294
3.	Reasonableness of Fees .....	295
4.	<i>Laffey</i> Rate.....	300
5.	Timing of Fee Petition.....	303
6.	Mitigation; Partial Success .....	303
7.	Travel Time.....	305
8.	Time for Preparation of Fee Petition.....	305
9.	Itemization of Time.....	306
B.	INTEREST OF JUSTICE.....	306
1.	“Knew or Should Have Known” Standard .....	307
2.	Prohibited Personnel Practice .....	307
3.	Costs .....	307
4.	Expert Witness Fees.....	307
<b>CHAPTER 15:</b>	<b>LEGAL RESEARCH IN FEDERAL SECTOR ARBITRATION.....</b>	<b>309</b>
<b>TABLE OF CASES.....</b>		<b>311</b>
<b>INDEX OF ARBITRATORS .....</b>		<b>323</b>