

CHAPTER 1

STRUCTURE OF THIS BOOK

Our purpose is to provide practitioners with summaries of awards by arbitrators who address significant federal sector issues. Describing the arbitration process through summaries and commentaries about published awards is a selective exercise. Many awards, also referred to as decisions, are not published at all, either because the parties do not authorize publication, or because the arbitrator does not seek to submit the award for publication. When awards are submitted, depending upon the commercial service that publishes them, it may be some time before the award makes its way through the publication process into print or digital distribution. Of the awards submitted for publication, some show up in one, but not more than one, commercial publication. The awards presented here have been accumulated over a period of years by LRP Publications, in the [Cyberfeds](#) database, in extensive use in the federal sector labor relations community. Awards discussed in the book are taken from and cited to Cyberfeds.

Arbitration awards are not precedential. Unlike appellate court decisions, often followed by or controlling the decisions of other courts, an arbitration award resolves a particular dispute that arose at a particular time, involving a particular set of parties. Similar controversies arising between different parties, at different times, involving different contracts, may well bear different results. Arbitrators may decide not to follow awards of other arbitrators applying the same contract, between the same parties, and involving identical or similar issues.

If arbitration awards are not followed by other arbitrators, why write about them? That is a reasonable question by a reasonable author. The reason for presenting the information that follows is because the reasoning presented in awards of one arbitrator may be considered persuasive by other arbitrators—a common law of arbitration. To the extent the reasoning is cogent and the result is reasonable, past awards may be predictive of the direction that arbitrators will follow in resolving the controversy you now address through arbitration. Early research of arbitration awards may assist in resolution of grievances before they reach arbitration. The awards that follow are representative resolutions by arbitrators of controversies or issues that frequently arise in the federal sector. Only federal sector awards are included. Research of resources covering private sector arbitration may unearth awards useful in a federal sector dispute.

Arbitrators differ in experience, education, and temperament from administrative judges of the Merit Systems Protection Board and the Equal Employment Opportunity Commission. The judges who are employed by the MSPB and EEOC are attorneys, they are civil servants, federal employees, and their thinking and approach to controversies within their jurisdiction is legalistic, guided by procedural rules and precedent. Many arbitrators are not attorneys. They are not federal employees. The MSPB is generally deferential to management disciplinary decisions. The EEOC has the statutory mission to find and eliminate discriminatory employment practices. The arbitrator is a neutral, with no mission other than enforcement of a contract and dispassionate resolution of factual disputes. Many MSPB and EEOC administrative judges have little, sometimes no, professional employment experience before they become government attorneys. Labor arbitrators frequently have decades of experience in private industry, labor unions, and academia before becoming professional neutrals. The difference in background and approach of administrative judges and arbitrators is telling. Arbitrators approach dispute resolution through a practical, not often legalistic, application of a contract or past practice. Administrative judges, by law school training and their experience as attorneys working within government bureaucracies (MSPB and EEOC are government agencies and they have their bureaucratic ways and means), prefer legal analysis. Collective bargaining contracts rarely figure in their deliberations.

The parties to an arbitration jointly select their arbitrator, and that arbitrator is ordinarily jointly paid by those parties. Arbitrators are responsive to the contract between the union and the employer. But arbitrators in the federal sector also must ensure that their awards maintain fidelity to the requirements of federal law. Many types of federal sector awards can be appealed through exceptions filed with the Federal Labor Relations Authority, whose responsibility it is to ensure that awards do not contravene federal statutes and regulations. The exceptions process is described in FLRA publications, available on its website, www.flra.gov, and in *A Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publications, Inc.). The necessity for arbitrators of federal sector disputes to avoid direct conflicts between their awards and federal statutes and regulations creates a level of complexity largely unknown to arbitrators of private sector disputes.

Because arbitrators resolving federal sector disputes frequently address, directly or indirectly, nuances of federal sector law, it is important that the parties address the implications of governing statutes and regulations in their submissions to arbitrators. The governing law is extensive. FLRA annually addresses through exceptions to awards, hundreds of points of civil service law. The Merit Systems Protection Board issues hundreds more decisions each year governing disposition of awards that decide adverse actions and performance-based actions that, instead of going through the grievance process, could have been appealed to the Board. Were that not enough, the U.S. Court of Appeals for the Federal Circuit reviews decisions of the MSPB and frequently revises the law established by the Board. And then there is the EEOC, issuing its own federal sector decisions which, along with the Commission's management directives and orders, are supposed to guide arbitrators' awards involving civil rights issues. The purpose of this book is not, however, to catalogue federal statutes and regulations governing employment or to analyze the many MSPB, FLRA, and EEOC decisions addressing issues of statutory and regulatory interpretation. That type of research is better conducted by reviewing decisions of those agencies. The point is that arbitration—a reasonably straightforward process—involves administration of many statutes, regulations, and administrative or judicial decisions limiting an arbitrator's authority under a collective bargaining contract. The effective advocate is one who recognizes the legal complexities of a case, researches the issues, and provides to the arbitrator comprehensive and comprehensible legal analysis through briefs and opening or closing statements.

We generally avoid excerpting discussions from arbitrators' awards that do no more than restate law developed by the Federal Labor Relations Authority or by the courts that review FLRA decisions in negotiability and unfair labor practice cases. The best source of FLRA law is the FLRA, and the FLRA sets aside too many arbitration awards interpreting FLRA law to permit reliance on arbitrators' awards as a source of FLRA law. Similarly, when arbitrators restate MSPB or Federal Circuit decisions, their restatements may or may not be accurate or current; for that reason, summaries from those awards are not emphasized in this book. Reference should be made to *A Guide of Federal Sector Equal Employment Law* by Ernest Hadley

(Dewey Publications, Inc.), or to *A Guide to Merit Systems Protection Board Law and Practice*, by Peter Broida (Dewey Publications, Inc.), and to *A Guide to Federal Labor Relations Authority Law and Practice*, by Peter Broida (Dewey Publications, Inc.).

A word or two may be useful about the quality of analysis in arbitration awards. The parties need a result, not a scholarly dissertation such as might be offered by judges of an appeals court. Yet some arbitrators look beyond a result, and they seek to ensure that the parties understand and even appreciate the reasoning leading to the result of the award. In the federal sector, it is particularly important that an arbitrator explain how an award was derived that grants a monetary benefit. The FLRA will review the award to ensure its compliance with the law. That compliance is best demonstrated by the analysis contained in the award. Because many arbitrators are not familiar with the intricacies of federal sector employment, labor relations, and EEO law, the parties need to educate the arbitrator through their advocacy submissions, that is, through their opening statements and closing briefs. As with other endeavors, you get out of arbitration what you put into it.

This book selects awards providing significant legal analysis. The awards quoted set forth principles related to arbitration. The result of any FLRA review of an award is not provided in this book. That an award was later vacated by the FLRA generally means the arbitrator erred as to a point of law; the analytical concepts in the awards are still useful to know. We avoid awards providing legal analysis clearly contrary to FLRA, MSPB, or Federal Circuit decisions, and we generally avoid extensive recitation of factual background. We trust that the resulting synopsis offers guidance for parties in their ongoing labor relations and provides a resource for research, citation, or quotation when disputes cannot be settled short of arbitration. Readers should do their research, and that will include reading the complete text from any award excerpted here.

CHAPTER 2

THE NATURE OF ARBITRATION

Arbitration is not much more, and no less, than an agreement by the parties to permit an arbitrator, an outsider to a dispute, to resolve the dispute by a decision, known as an award, that both parties agree to follow, although the award may not become final until either party has had the opportunity to file exceptions to the award with the Federal Labor Relations Authority challenging its underlying validity (except in cases could have been taken to the Merit Systems Protections Board, i.e., severe disciplinary or performance-based actions that, when processed through arbitration, result in awards that are not reviewable by the FLRA). Arbitration is the product of grievance/arbitration clauses of collective bargaining agreements between unions and federal-sector employers. Federal sector labor arbitration is not conceptually distinct from its private sector counterpart.

Arbitration in the federal sector is almost identical to the private sector. *Police Employee Panel v. Tennessee Valley Auth.*, 731 F.2d 325, 115 LRRM 3550 (6th Cir. 1984). Generally, the “law of the shop” developed in the private sector is comparable to the public sector. Substantive and procedural issues may be resolved by the same time-tested principles developed by 50 years of arbitration in both private and public sector labor cases. *Id.* The Civil Service Reform Act of 1978 (CSRA) gave birth to the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). The OPM sets policy for federal government employees. The Federal Labor Relations Authority (FLRA) performs a variety of important functions similar to the National Labor Relations Board (NLRB). The FLRA also has the responsibility of resolving exceptions to arbitration awards.

AFGE, Local 507 and VAMC West Palm Beach, 106 LRP 1976 (2005 Holland)

Grievance arbitration has limitations. One significant limitation upon the substantive and remedial scope of arbitration is the contract itself.

[G]rievance arbitration is not an unlimited forum to address any workplace issue. Instead, this Arbitrator is limited to determining whether certain conduct does or does not violate the collective bargaining agreement between labor and management as well as any applicable law or federal regulation.

SSA and AFGE, Local 3438, 109 LRP 37141 (2009 Feinstein)

Arbitration is supposed to be a relatively informal means of dispute resolution. Whether it is or whether it bears some of the hallmarks of traditional litigation practice depends upon the arbitrator, the parties, and the contract that defines their relationship. Most arbitrators encourage a degree of informality in the process.

First, the arbitrator cannot help but urge the parties to remember that arbitration was and is supposed to be expedited and economical. This relatively limited issue did not necessitate two attorneys on each side, a stenographer, two sessions, voluminous exhibits, and posthearing briefs. Much as the arbitrator appreciated a courtroom-like setting and being addressed as “Your Honor,” he would have welcomed a much more streamlined procedure, where the excess resources that were spent[t] in the preparation and implementation of this case could have been redirected to reducing the perennial office backlog and, perhaps at the same time, providing coverage during the last hour on Friday afternoons. In any event, effective mutual efforts to return closer to the original purpose of arbitration would appear to be of potential benefit to the parties and their constituents.

NLRB Union and NLRB, 101 FLRR 2-1114 (1999 Zirkel)

Arbitrators bring their personal experience to the process.

It goes without saying that a good arbitrator or judge is neutral and fair. However, it is inevitable that every arbitrator or judge brings his or her background, experiences and philosophies to the bench or conference table. Those personal factors embellish or contribute to the efforts of the trier of fact to make the most reasoned and even-handed decision.

Nat'l Border Patrol Council, AFGE Local 2595 and DHS, C&BP, 112 LRP 39475 (2011 Andres)

I. ARBITRATION IS NOT MEDIATION

Arbitration is dispute resolution by a third party neutral appointed by the parties under their contract. Although arbitrators may attempt to fashion a remedy that meets competing interests, the award of the arbitrator—for one party or the other, or split between the two parties—controls the resolution of the dispute. When one places a case before an arbitrator, the parties are paying the arbitrator to make a decision on a dispute. The arbitrator is judge and jury.

Distinguished from arbitration, mediation is a process that seeks a mutual settlement, rather than a unilateral resolution, of a dispute. The mediator, who may be an arbitrator, attempts to aid the parties by exploring with each party, separately and with the parties together, approaches to a dispute that may result in a compromise meeting the parties’ interests. Mediation is a means of voluntary, cooperative settlement. Mediators do not decide cases. They help the parties to resolve their differences. If mediation fails, arbitration may not be far away. Arbitration resolves unsettled differences.

Mediation is different from those forms of dispute resolution which operated solely by way of determinations of fact and law. Processes such as arbitration seek truth, even if it is not always found. An arbitrator will, rightly or wrongly, review and weigh the evidence and decide who is telling the truth, what happened when, what arbitral authority should apply and what it means, and who wins and who loses. Arbitrators resolve the dispute, in the truest sense available to fallible and imperfect humans. A mediator can help the parties find a mutually satisfactory way to abandon their quest for that kind of resolution. The issues which define the particular dispute need not be resolved at all. In mediation, the parties get a chance to escape their dispute and get back onto a more productive track....

...Mediation provides the opportunity to search for a nonpunitive, workable solution to a conflict. Agreeing to voluntarily meet sets an immediate tone that both parties are interested in finding a solution to the conflict.

ADR can provide a safe environment for individuals in conflict to express their views of the dispute and their ideas on how to best reach a resolution. Having a venue where disputants are actually listening to each other, instead of contradicting and discounting one another, is a powerful way to bring about an understanding of how each person sees the situation and the conflict. ADR can be very advantageous to the workplace since the mediator does not render a decision but facilitates the parties to reach an agreement on their own.

...Mediation is especially useful in dealing with interpersonal conflict and works best when the parties involved must have a continuing work relationship.

VAMC and AFGE AFL-CIO, Local 446, 103 LRP 2485, 103 FLRR-2 71 (2002 Donald)

The whole reason for requiring mediation is a belief that a mediator can facilitate a resolution of problems in cases where the parties themselves could not do it alone. Even relatively frivolous cases can be resolved. After hearing what the dispute is all about, the mediator can step in and tell a complaining employee that they do not have a very good case. The mediator may also be able to suggest resolutions that are acceptable to both sides, in this case, for example, while it may not have necessarily resolved the case, it would have gone a long way towards satisfying [name]'s and the Union's concerns if the Chief had simply been able to convince them that he did take allegations of violence in the workplace seriously. They could have talked about why [name] felt that the Chief had not taken his complaint seriously and did not investigate it properly. The Chief could have then explained what he did and why he did it. He could have also explained that, if an "incident report" had been filed, or some other form of formal complaint, he would have conducted a more thorough investigation but, without a formal complaint, he did not think that was required. In any event, the point is that meaningful dialogue can lead to resolutions even where no resolution is immediately apparent to the parties at the start of the mediation.

It also needs to be said that, of course, there are many cases that cannot be resolved through mediation. But no one can know for sure which cases those are until a good faith attempt at mediation has been made. If, after some reasonable amount of time, the mediator is out of ideas and feels that there is nothing to be gained from continuing, then he or she will adjourn the mediation. But that point clearly has not been reached when one side has not yet even had a chance to state their position and the mediator also has not had a chance to try to move the parties toward a resolution.

Lindsey and U.S. Mint, Denver, 104 LRP 38267, 105 FLRR-2 19 (2004 Sass)

That arbitration is available to resolve a dispute does not mean it will do so.

Unfortunately, some confluence of factors such as organizational politics, personal intransigence or the principal of sunk costs ultimately thwarted an optimal approach to resolving this dispute. But whatever the reasons, the marginally useful, residual task for this Arbitrator was to declare a winner in a controversy that was very unlikely to be put to rest by his Award. He believes this because it is his opinion that this matter will not really be put behind the Parties until they work through the thorny labor relations issues that lie at the heart of this dispute.

AFGE, Local 2437 and VA, 110 LRP 20515 (2008 Sherman, M.)

II. RIGHTS AND INTEREST-BASED ARBITRATION

There are two types of arbitration. The more common, traditional, arbitration is rights arbitration: the arbitrator resolves a grievance of an individual, individuals, or the union, under a particular provision of the collective bargaining contract involving a claim to a particular condition or benefit of employment, e.g., overtime entitlement or the requirement that a disciplinary action be imposed only for just cause. Although rights arbitration ordinarily involves claims or complaints of an individual, individuals, or the union, rights arbitration may be pursued by management as a complaint against the union, e.g., abuse of contractual official time privileges for union officials. The other, less common, type of arbitration is interest arbitration: the arbitrator resolves a dispute between the union, as a representative organization, and management, over a broad working condition, e.g., entitlement of the bargaining unit as a whole to overtime or the types of procedural protections available in disciplinary actions. Interest arbitration often sets contract terms; it is used in impasse resolution.

...The difference between traditional negotiations and interest based negotiations is one of process. The parties focus on the interests that underlie their respective positions thereby greatly expanding the possible options that can be included in any agreement that would resolve a dispute. This process is less adversarial than traditional negotiations and more conducive to collegial long term relationships between two parties to a dispute because they have worked together in an attempt to craft an agreement that addresses both of their interests. However, as with traditional negotiations, interest based negotiations may be in good faith (on the part of both parties) but not result in an agreement.

GSA and AFGE, Council 236, 102 LRP 34213, 103 FLRR-2 61 (2002 Goodfriend)

At the outset I will assume the liberty of reminding the parties of an interest arbitrator's function and role in disputes such as this one. In "How Arbitration Works," BNA, 3rd. Ed. by Elkouri & Elkouri it reveals that:

The task is more nearly legislative than judicial. The answers are not to be found within the "four corners" of an existing document which the parties have agreed shall govern their relationship. Lacking guidance of such a document which confines and limits the authority of arbitrators to a determination of what the parties had agreed to when they drew up their basic agreement. Our task here is to search for what would be, in light of all relevant factors and circumstances, a fair and equitable answer to a problem which the parties have not been able to resolve by themselves. (Pg. 53)

Metal Trades Council and Panama Canal Comm'n, 99 FLRR 2-1085 (1999 Anderson, D.)

An arbitrator who resolves a dispute over competing interests attempts to find a resolution that will meet the needs of the parties and avoids providing the palm of victory to one side, unless the interest arbitration takes the form of an arbitrator's choice of either party's last and best offer.

It is recognized that the parties are aware of the above recited principles and acknowledge the basic litigation charter of "interest" third party neutrals to attempt to make practical as well as contractual sense of their dispute and to render an award accordingly. In this instance the parties Agreement and/or, applicable employer policies and procedures forces an award based on their respective "last best offer." This is not unlike major league baseball's player salary arbitration rules. Consequently, there is no personal legislative or judicial wiggle room afforded the neutral to fashion selected issue(s) in ways which he/she may feel would be more appropriate.

Metal Trades Council and Panama Canal Comm'n, 99 FLRR 2-1085 (1999 Anderson, D.)

CHAPTER 3

SOURCES OF GOVERNING LAW FOR ARBITRATORS

The arbitration process is a creation of the collective bargaining agreement, and the arbitrator pledges his or her fidelity to that agreement. Yet, particularly in the federal sector, arbitration awards are constrained by the application of innumerable federal statutes and regulations that indirectly or directly govern the employment relationship and working conditions of bargaining unit members. Arbitrators are also required to consider decisions of the Federal Labor Relations Authority and Merit Systems Protection Board that interpret and apply federal sector law. Arbitrators may rely upon decisions of other arbitrators, involving other parties and other contracts, as they evaluate contract clauses and factual circumstances that are brought to them in the course of grievance proceedings.

I. DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

To be distinguished from the issue of the precedential weight of arbitrators' awards discussed below in "[Other Arbitration Awards as Precedent](#)" is the weight of Federal Labor Relations Authority decisions interpreting federal law. The parties should come to arbitration with a healthy regard for FLRA decisions, as well as for the decisions of federal courts that review FLRA decisions—particularly court decisions evaluating unfair labor practice issues. That level of attention is required, for cases other than those that could have been brought to the MSPB, because arbitrators' awards are reviewable by the FLRA through the exceptions process.

An arbitrator in the federal sector must take a ruling of the FLRA as gospel, even if it may not yet be the final word on the issues involved.

DHS, C&BP and NTEU Chapter 137, 104 LRP 23356, n.6 (2004 Abrams)

Decisions of the Federal Labor Relations Act (which by the way, concur with the parties' longstanding past practice) "are entitled to special deference when they reflect policy choices." (*U.S. I.N.S. v. Federal Labor Relations Authority*, C.A.4 1993, 4 F.3d 268) "FLRA interpretations are given significant deference if reasonable and coherent and constitute reasonable interpretations of Federal service labor/management statute." (*National Treasury Employees Union v. Federal Labor Relations Authority*, D.A.D.C. 1983, 721 F.2d 1402, 232 U.S. App. D.C. 241) "FLRA conclusions as to the negotiability of employment issues will be upheld when the conclusions are 'reasonable and defensible.'" (*U.S. Dept. of Air Force v. Federal Labor Relations Authority*, C.A.D.C. 1991, 949 F.2d 475, 292 U.S. App. D.C. 300.)

AFGE, Local 3028 and VA Anchorage, 104 LRP 57673, 105 FLRR-2 32 (2004 Swanson)

An arbitrator declined to follow a dissent arguing for grievability of a pay dispute when the FLRA majority determined that the agency's pay-setting discretion was unreviewable.

I have been given no compelling reason by the Union to set aside long-established precedent and adopt Member Pope's analysis and reasoning in NIMA. Accordingly, for the reasons given above, I find the Union's grievance to be neither grievable nor arbitrable.

NTEU, Chapter 302 and Office of the Comptroller of the Currency, 111 LRP 7408, 111 FLRR-2 49 (2010 Ross)

II. OTHER ARBITRATION AWARDS AS PRECEDENT

The MSPB, EEOC, and FLRA view their final administrative decisions as precedential, except when a decision of one of these agencies is specifically denominated as nonprecedential (a situation often occurring with the MSPB). Law developed by the adjudicative agencies, and by the courts, is viewed as dispositive for a set of similar circumstances and issues until the agencies or reviewing courts depart from or overrule precedent, usually by a decision that recognizes the existence of precedent and then explains the reasons for departure from the rule previously established.

Arbitrators generally tend not to follow awards of other arbitrators. They will more likely consider their selection as an appointment requiring *de novo* review of the interrelationship of the grievance, the contract, and the facts. That said, arbitrators often examine, and then adopt or depart from, reasoning of other, respected arbitrators whose awards involve similar issues or circumstances. Arbitrators will more likely—but not always—follow awards of other arbitrators involving the same parties before them, applying the same contract, and presenting similar disputes.

Creating a common law of arbitration, awards frequently quote or refer to awards by other arbitrators. An arbitrator's reference or the quotation to another arbitrator's award is generally by way of illustration or explanation, but it is not a determination to reach a particular result because another arbitrator reached that result. Some arbitrators ignore other awards, or they do not know of them and do not cite them because the parties did reference them.

Arbitrator Roger Abrams commented upon the precedential value of awards:

Everything else being equal, there is a value in having issues settled once and for all. In general, arbitrators have not adopted the view that prior arbitration decisions are binding precedent, even between the same parties to the same contract. Of course, it is good practice for an arbitrator to follow a carefully reasoned prior decision, but the parties seek correct decisions, not simply consistent ones.

DHS, C&BP and NTEU Chapter 137, 104 LRP 23356 (2004 Abrams)

A tad more directly:

With all due respect to the parties, this is an *ad hoc* arbitration; what people have written in other cases is not particularly important to me. The collective bargaining agreement is the source of my authority, and the record of this hearing is the source of my wisdom.

SSA and AFGE, 111 LRP 76954 (2011 Sherman, Jeffery)