



# Federal Labor Relations Authority

*After Arbitration:  
Filing Exceptions with the Authority*

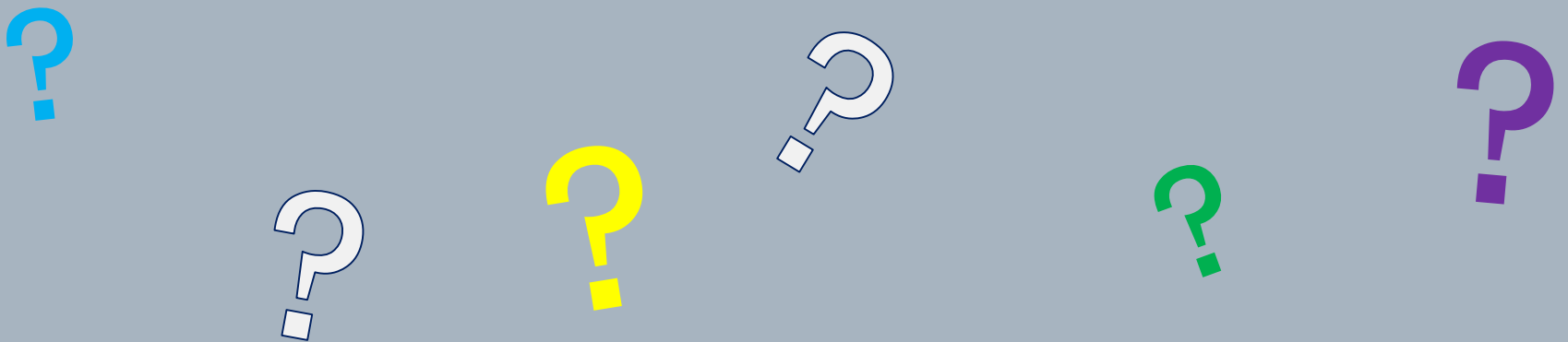
*July 18, 2017*

# Introduction to Federal-Sector Arbitration & The Negotiated Grievance Procedure

# Federal Sector vs. Private Sector



What's the difference?

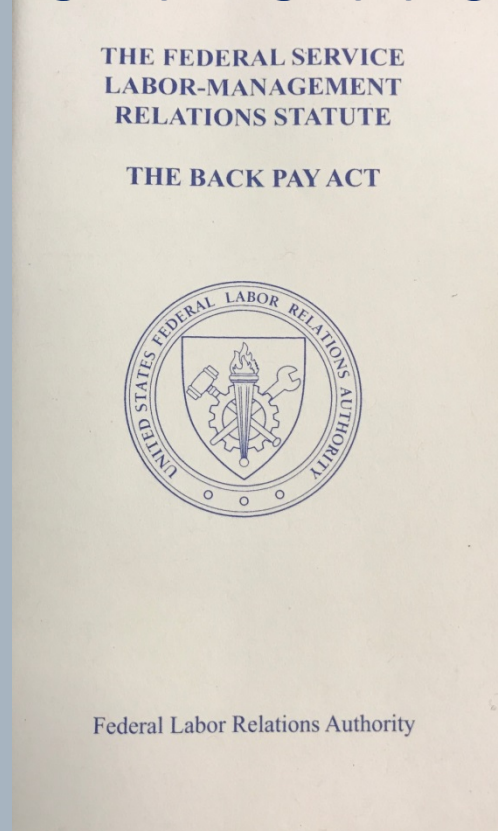


# Private-Sector Arbitration

- Normally confined to the interpretation/application of CBA
- No statutory requirement to arbitrate

# Federal-Sector Arbitration

## The Federal Service Labor- Management Relations Statute



**Every CBA  
MUST  
include  
a negotiated  
grievance procedure (NGP)  
and provide for binding  
arbitration**



# What is a Grievance?

## § 7103(a)(9)

Any complaint by **any employee OR any union** concerning any matter relating to the employment of the employee

**AND**

Any complaint by any **employee, union, OR agency** concerning

- the effect or interpretation, or claim of breach, of a CBA
- any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment

# Exclusions from NGP


- Parties can negotiate matters out of coverage
- Some exclusions come from outside the Statute:
  - OMB Circular A-76
  - 5 C.F.R. § 575.311(g)
- Some exclusions are in the Statute



# What the Statute Excludes

## § 7121(c)

- Prohibited political activities (Hatch Act)
- Retirement, life insurance, or health insurance
- Suspension or removal for national-security reasons
- Examination, certification, or appointment
- Classification of any position that does not result in a reduction in grade or pay



# Classification What it IS

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- ◉ The grade level of the duties permanently assigned to, and performed by, the grievant
- ◉ Classifying currently unclassified duties
- ◉ Accretion of higher-graded duties to an existing position



# Classification

## What it is NOT

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- ⊙ Grievances re: temporary promotion
- ⊙ Promotion within existing career-ladder
- ⊙ Failure to promote under competitive procedure
- ⊙ Accuracy of a PD

# Election of Remedies

- ◉ § 7116(d): grievance or ULP
- ◉ § 7121(d): grievance or EEO complaint
- ◉ § 7121(e): grievance or MSPB appeal
  - adverse actions under § 7512
  - certain performance-based actions under § 4303
- ◉ § 7121(g): prohibited personnel practice
  - (5 U.S.C. § 2302(b)(2)) – grievance or appeal to MSPB, or through OSC

# When is a Grievance Barred by a ULP?

## ⊙ Same issue

- same factual predicate AND
- substantially similar legal theories
  - Statutory claim doesn't bar contractual claim.

## ⊙ ULP was filed earlier

- Does NOT matter if ULP wasn't pursued or fully litigated

**AND**

## ⊙ Selection of ULP procedures was at discretion of aggrieved party

- must be same aggrieved party
  - distinguish individual vs. institutional issues

# When is a Grievance Barred by an EEO Complaint?

- ◉ Same subject matter

**AND**

- ◉ Matter was earlier raised by the employee timely initiating an action under the statutory EEO procedure

**Compliance with  
Arbitration Awards,  
Arbitral Retention of  
Jurisdiction,  
& Interlocutory Appeals**

# Compliance with Arbitration Awards

## 5 U.S.C. § 7122(b)

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- ⊙ Failure to comply is a ULP if award is **FINAL AND BINDING**
  - Final award – see slide 21
  
- ⊙ Validity of award **CANNOT** be challenged in ULP proceeding.



# When is an Award Final & Binding?

- ◉ No timely exceptions filed
  - compliance required when period for filing exceptions expires
- ◉ FLRA denies exceptions
  - compliance required upon denial

**BUT**

- Compliance not required while exceptions pending

# Arbitral Retention of Jurisdiction

## ⊙ “Functus Officio”

- After arbitrator renders award regarding an issue, NO authority to take further action on that issue unless:
  - retained jurisdiction OR
  - parties jointly request

# Functus Officio Exceptions

## ⊙ Arbitrator may:

- clarify initial award
- correct clerical or arithmetic error in initial award
- complete an award by resolving a submitted issue that the arbitrator's initial award failed to resolve
- **What about continuing violations?**



# Arbitral Retention of Jurisdiction Requests for Attorney Fees

## Back Pay Act (5 U.S.C. § 5596)

- ◉ At any time during arbitration
- ◉ Within a reasonable period of time after award becomes final and binding
- ◉ CBA may govern timing for requests

# Final Awards & Interlocutory Appeals

- ◉ What is an interlocutory appeal?
- ◉ What is a “final award”?
  - Is this different from final and binding?

# What is an Interlocutory Appeal?

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An exception filed  
before a *final award*  
has been issued

# What is a Final Award?

**An award that completely resolves all submitted issues**

- If everything is decided, award is final
- **EVEN** if jurisdiction is retained to assist with implementation

# Final Awards & Interlocutory Appeals

## What if the Arbitrator . . .

- Amount of backpay/damages/costs? **FINAL**
- Identification of affected individuals? **FINAL**
- An appropriate remedy? **NOT FINAL**
- Whether monetary remedy would be appropriate? **NOT FINAL**



# Final Awards & Interlocutory Appeals

## More What Ifs...

- ◉ What if the Arbitrator says the award is final?
  - DO NOT rely on arbitrator's characterization of award
- ◉ What if the Arbitrator bifurcated the hearing?
  - Just because arbitrator resolved all issues re: 1<sup>st</sup> part of bifurcated hearing, doesn't mean resolved all issues submitted
- ◉ What if the Arbitrator retained jurisdiction to resolve attorney fees?
  - Does NOT render exceptions to merits award interlocutory



# Final Awards & Interlocutory Appeals

## THE EXCEPTION

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### Plausible Jurisdictional Defect

Extraordinary circumstances warrant interlocutory review where there is a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case



# Final Awards & Interlocutory Appeals

## What is a Plausible Jurisdictional Defect?

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Plausible = claim is credible on its face;  
mere assertion not enough

Advancing the “ultimate disposition” of the  
case = resolution of the jurisdictional issue  
must end the dispute

**NOTE: usually statutory**

# Final Awards & Interlocutory Appeals

## Plausible Jurisdictional Defect Examples

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### ○ Exception granted

- Claim arbitrator lacked jurisdiction to resolve a classification matter under 5 U.S.C. § 7121(c)(5)

### ○ Exception dismissed

- Claim arbitrator lacked jurisdiction based only on parties' agreement
- Claim that arbitrator may not be impartial in determining arbitrability because he had "a financial interest in presiding over a prolonged merits hearing"

# Filing Exceptions and Oppositions: Procedure





# Exceptions Who Can File

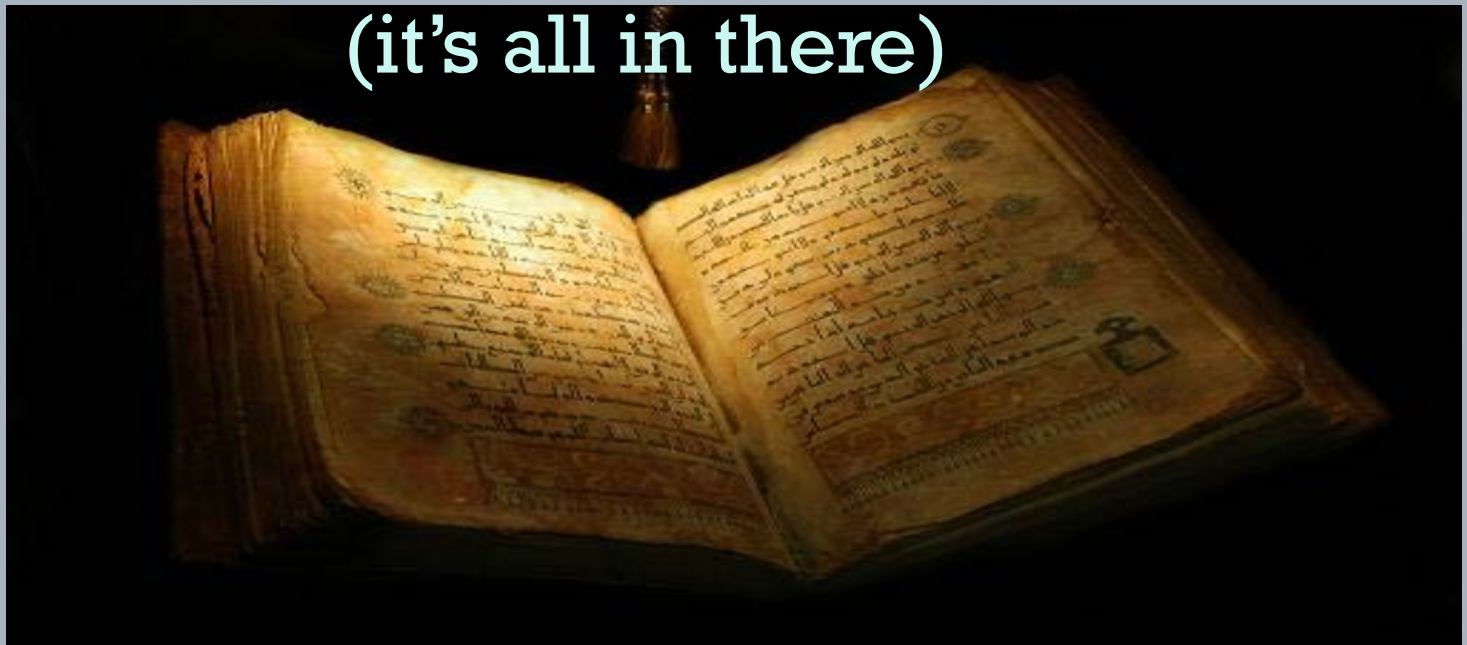
- ◉ **Either PARTY to arbitration**
  - “Party” = any person who participated as a party in a matter where an arbitration award was issued
  - **Only union and agency** are entitled to file exceptions
    - Unless grievant is authorized to file exceptions

# How and Where to File

[www.FLRA.gov](http://www.FLRA.gov)

5 C.F.R. §§ 2425 & 2429

(it's all in there)





Exceptions and oppositions may be filed by registered users through the Authority's eFiling system

Benefits :


- *Free*
- *Convenient*



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# Exceptions When to File

## 5 C.F.R. § 2425.2

- ⦿ Exceptions due 30 calendar days from date of service of award
  - Exclude date of service of the award
  - Method of service is up to arbitrator unless parties' agreement specifies
    - First service method controls
  - Date parties RECEIVE exceptions is irrelevant when calculating due date
- ⦿ **What about weekends and holidays?**

# When to File “What ifs”

- ◉ Arbitrator uses regular mail or FedEx?
  - Calculate from postmark (mail) or date deposited (FedEx)
  - If illegible or missing, use date of the award
  - Add 5 days to the due date
  
- ◉ Arbitrator uses email or fax?
  - Calculate from date of transmission
  - No extra time
  
- ◉ Arbitrator uses personal delivery?
  - Calculate from date of delivery
  - No extra time

# Exceptions: How to Calculate

Sunday	Monday	Tuesday	Wed	Thursday	Friday	Saturday
<u>May</u>	23	24	25	26	27 Date of service of award	28 Start counting
29	30	31	June 1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26 30 days!	27 Due date (BUT add 5 days for mail)	28 Start counting	29	30	July 1	2 Fifth day
3	4 HOLIDAY	<b>5 ACTUAL DUE DATE</b>	6	7	8	9

# What if You Miss the Deadline?

## 5 C.F.R. § 2425.2

- ◉ Time limit cannot be extended or waived
  - *May* be equitably tolled if:
    - (1) some extraordinary circumstance stood in a party's way to prevent timely filing; and
    - (2) the party was pursuing its rights diligently

Note: The Authority may *waive* an expired time limit in extraordinary circumstances for untimely filed **oppositions**





# Common Procedural Deficiencies

The Authority will send a deficiency order for:

- Failure to provide copy of arbitrator's award
- Failure to provide statement of service
- Failure to provide table of contents
- Incorrect number of copies

# More Common Procedural Deficiencies

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The Authority will send a show-cause order for:

- Failure to Cure Procedural Deficiencies
- Timeliness
- Interlocutory
- Moot/Advisory Opinion
- Lack of Jurisdiction
- Lack of Standing



What if You Don't Respond to a Show-Cause Order?

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**THE AUTHORITY WILL  
DISMISS YOUR EXCEPTIONS  
WITHOUT REGARD TO THE  
NATURE OF THE  
DEFICIENCY**



# Exceptions Required Content

## 5 C.F.R. § 2425.4

- ◉ What you must include
- ◉ What you can leave out

# Requests for Expedited, Abbreviated Decisions

5 C.F.R. § 2425.7

- ⊙ **Excepting party may request**
  - Authority has discretion over whether to grant request
  - Opposing party may respond to request in opposition
- ⊙ **Authority considers:**
  - Complexity
  - Potential for precedential value
  - Similarity to other, fully detailed decisions involving same/similar issues
- ⊙ **Authority may issue even absent request**
- ⊙ **Not in arbitration cases involving a ULP**

# Content that is NOT PERMITTED

Anything you should have known to, but did not, raise below

- Evidence
- Factual assertions
- Arguments (including affirmative defenses)
- Requested remedies
- Potential challenges to a requested remedy

# Failure to Raise Below

5 C.F.R. §§ 2425.4, 2429.5

## ⊙ Not raised below

- Was there an opportunity to raise the issue?
  - Post-hearing brief
  - Other ways?
- Was issue known before award issued?
- What about arbitrator bias?



## ⊙ Raised below in a contrary way

Authority will not consider arguments

# Potential Dismissal or Denial

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- Authority has no jurisdiction
- Exceptions do not raise a recognized ground
- Exceptions do not support a recognized ground



# Potential Dismissal

- ◉ Authority has no jurisdiction over exceptions to awards that concern:
  - Reductions in grade/removals based on unacceptable performance under 5 U.S.C. § 4303
  - Removal, suspension for more than 14 days, reduction in pay, or furlough of 30 or fewer days under 5 U.S.C. § 7512
  - Similar matters arising under other personnel systems
  - Matters “related to” – i.e., “inextricably intertwined with” – those matters

# Potential Dismissal

5 C.F.R. § 2425.6(e)(1): Failure to raise

⊙ Currently recognized grounds



- The arbitrator:
  - exceeded his or her authority
  - was biased
  - denied the excepting party a fair hearing
- The award:
  - is contrary to any law, rule or regulation
  - fails to draw its essence from the parties' agreement
  - is based on a nonfact
  - is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible
  - is contrary to public policy

# Potential Denial

5 C.F.R. § 2425.6(e)(1): Failure to support

- ◉ Must offer sufficient argument or authority to support that ground



## ***Bare Assertion***

*A fallacy in formal logic where a premise in an argument is assumed to be true merely because it says that it is true.*

- ◉ To support a ground not currently recognized, a party must cite the legal authorities relied upon

# Oppositions

## 5 C.F.R. § 2425.3

- ◉ Not required
- ◉ 30 days to file (from service of exceptions)
- ◉ Address:
  - Arguments, including failure to raise/support issues
  - Any request for expedited, abbreviated decision
- ◉ Include:
  - Documents relied on UNLESS provided with exceptions
  - Documents not readily accessible by the Authority

# Other Documents

## 5 C.F.R. § 2429.26

- ◉ Authority *may* consider “other documents,” but filing party must:
  - Request leave to file
    - 5 C.F.R. § 2429.26
  - Argue *why* submission is necessary
    - *E.g.*, Addresses new argument raised by opposing party
  - Serve copies on other parties

# Collaboration and Alternative Dispute Resolution Office (CADRO)



## Clarifying Records or Disputes (5 C.F.R. § 2425.9)

- Direct parties to provide evidence (including arbitration record, see 5 C.F.R. § 2429.3)
- Direct parties to respond to requests for further information
- Meet with parties
- Direct oral argument
- Take any other appropriate action

# Grounds for Reviewing Arbitration Awards Overview & Private-Sector Grounds



# FLRA Review

Exceptions to arbitration awards = majority of Authority's case load

## ◉ Types of exceptions:

- Private-sector grounds
  - Deference to arbitrator
- Contrary to law, rule, or regulation
  - De novo review of legal conclusions
  - Deference to arbitrator's factual findings

# Exceeded Authority

- (1)** Arbitrator failed to resolve submitted issue
  - arbitrator not required to address every argument raised
- (2)** Resolved an issue not submitted
- (3)** Disregarded specific limitations on authority
  - a claim that the arbitrator added to/altered/modified the CBA generally will not demonstrate exceeded authority
- (4)** Awarded relief to non-grievants
  - remedy too broad



Private-Sector Grounds for Review  
**Exceeded Authority (cont'd)**

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**DEFERENCE**

**Stipulated issue v. Framed issue**

# Private-Sector Grounds for Review

## Bias

- ⦿ Award procured by improper means
- ⦿ Arbitrator was partial or corrupt
- ⦿ Arbitrator engaged in misconduct that prejudiced party's rights

# Private-Sector Grounds for Review

## Fair Hearing

- ⦿ Arbitrator refused to hear or consider pertinent and material evidence
- ⦿ Actions so prejudiced a party as to affect fairness of proceeding as a whole

# Essence

- ⊙ Cannot be rationally derived from parties' agreement;
- ⊙ So unfounded in reason and fact, unconnected w/wording and purpose of agreement as to manifest infidelity to obligation of arbitrator;
- ⊙ Implausible interpretation of agreement;

OR

- ⊙ Evidences manifest disregard of agreement

# Nonfact

- ⦿ Central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result
- ⦿ Cannot challenge factual matters disputed before arbitrator

Private-Sector Grounds for Review  
Incomplete, Ambiguous, or Contradictory as to Make  
Implementation of the Award Impossible

WHOEVER SAID  
NOTHING IS  
IMPOSSIBLE HAS  
OBVIOUSLY  
NEVER TRIED TO  
STAPLE **WATER**  
TO A TREE.





Private-Sector Grounds for Review

# Public Policy

Must be explicit, well-defined,  
and dominant

**AND**

Violation of policy must be  
clearly shown



# Private-Sector Grounds for Review

## Other

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**Must provide citations and explain how they support finding award deficient**

# Additional Grounds for Review

- ◉ Contrary to law, rule, or regulation
  - Absent allegation of nonfact, Authority defers to arbitrator's factual findings
  - U.S. Constitution
  - Statutes
  - Regulations
    - Government-wide
    - *Governing* agency rules or regs

# Separate and Independent Grounds

- ◉ When award based on separate and independent grounds, appealing party must establish that all grounds are deficient
  
- ◉ For example:
  - Award based on interpretation of two CBA provisions and interpretation of either provision provides a sufficient basis for the award
    - Must show interpretation of BOTH provisions is deficient
  
  - Award based on interpretations of CBA *and* Statute
    - Must show interpretation of BOTH CBA *and* Statute are deficient

# Challenges to Arbitrability Findings

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- ⦿ Procedural arbitrability
- ⦿ Substantive arbitrability



## Challenges to Arbitrability Findings

# Procedural Arbitrability

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### ⊙ Determined by:

- Whether procedural conditions to arbitrability have been met or excused
- Examples include:
  - Timeliness of a grievance

# Challenges to Arbitrability Findings

## Procedural Arbitrability

- ◉ What grounds can you use to challenge it?
  - Bias
  - Exceeded authority
  - Fair hearing
  - Law that establishes procedural requirements that apply to NGP

*What about essence?*  
*What about nonfact?*





## Challenges to Arbitrability Findings

# Substantive Arbitrability

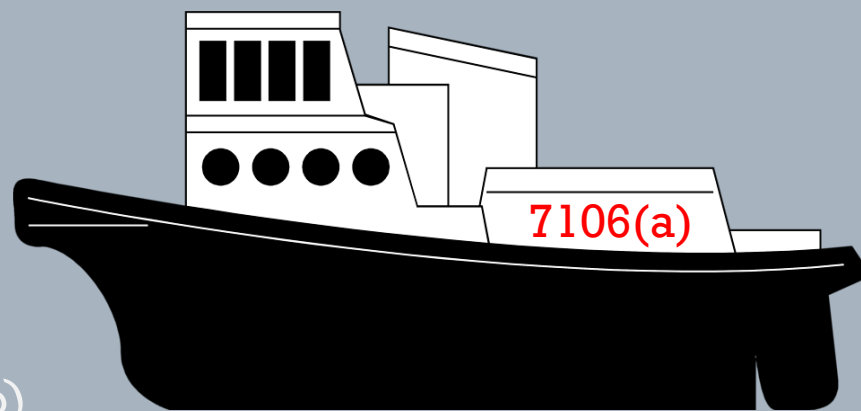
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### ⊙ Determined by:

- Whether subject matter of dispute is arbitrable
  - If determination is based on CBA, then essence standard
  - If determination is based on law, then de novo standard



# Management Rights (5 U.S.C. § 7106)



7106(b)

7106(b)

7106(b)

7106(b)

# Burden in Arbitration Context

⊙ Party asserting that arbitration award is contrary to management rights must show both:

- Award affects a management right

AND

- Contract provision arbitrator enforced was not negotiated under § 7106(b)



# Management Rights

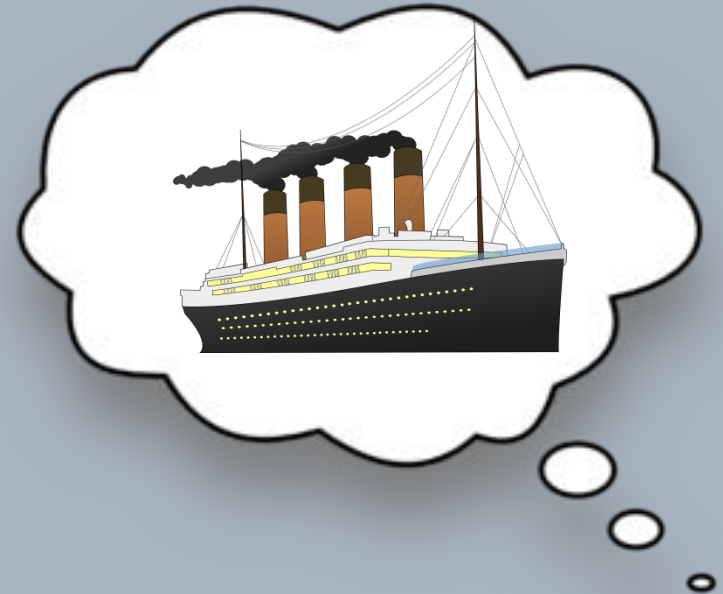
## § 7106 generally

- ◉ Does the award *affect* a management right under § 7106(a)?
- ◉ If so, was arbitrator enforcing:
  - Contract provision negotiated under § 7106(b) (for any management-right claims);
  - or
  - applicable law (for § 7106(a)(2) claims)?

# Management Rights

## § 7106(a)(1)

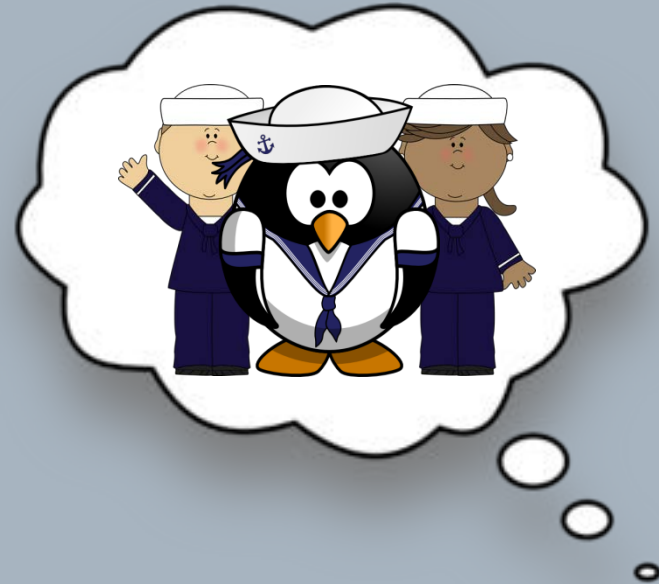
- Mission
- Budget
- Organization
- Number of employees
- Internal-security practices



# Management Rights

## § 7106(a)(2)(A)

- Hire employees
- Assign employees
- Direct employees
- Layoff employees
- Retain employees in the agency



# § 7106(a)(2)(A) cont'd

- ◉ Suspend employees
- ◉ Remove employees
- ◉ Reduce in grade or pay
- ◉ Take other disciplinary action



# Management Rights

## § 7106(a)(2)(B)

- ◉ Assign work
- ◉ Make determinations with respect to contracting out
- ◉ Determine the personnel by which agency operations will be conducted



## § 7106(a)(2)(C) & (D)

### ● § 7106(a)(2)(C):

- With respect to filling positions, make selections for appointments from:
  - (1) among properly ranked and certified candidates for promotion; or
  - (2) any other appropriate source

### ● § 7106(a)(2)(D):

- Take whatever actions may be necessary to carry out the agency mission during emergencies



# Management Rights

## What Affects Management's Rights

- ◉ Look to Authority precedent
- ◉ Parties should brief arbitrators on:
  - How the award will affect management's rights
  - Exceptions to management's rights
- ◉ Arbitrators should be cognizant of possible effects and exceptions



# Management Rights

## What If ...

- ◉ The award does NOT affect a § 7106(a) management right?
  - **Exception denied!**
- ◉ The award **DOES** affect a § 7106(a) management right?
  - Then ...



# Management Rights

## What if . . .

- • • ask whether the arbitrator was enforcing:
  - A provision negotiated under § 7106(b)(1), (2), or (3) (for all § 7106(a) rights); and/or
  - An applicable law (for § 7106(a)(2) rights)

# Management Rights – Exceptions

## § 7106(b)(1)

- Numbers, types, and grades
- Of employees or positions
- Assigned to any
  - Organizational subdivision,
  - Work project, or
  - Tour of duty



# PERMISSIVE

# Management Rights – Exceptions

## § 7106(b)(1)

- Technology, methods, & means of performing work

### TECHNOLOGY

technical method used in accomplishing or furthering performance of agency's work

### METHOD

the way agency performs its work (the “how”)

### MEANS

any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work (“with what”)



# Management Rights – Exceptions

## § 7106(b)(2)

- Agency must bargain the “procedures which management . . . will observe in exercising” any § 7106 management right
- Look to the case law


# Management Rights – Exceptions

## § 7106(b)(3)

### APPROPRIATE ARRANGEMENTS

- First ask: Whether the CBA provision, as interpreted and applied by the arbitrator:
  - Is an “arrangement” for employees adversely affected by the exercise of a management right
- If yes, then ask: Does the CBA provision, as interpreted and applied by the arbitrator:
  - Abrogate management’s rights
- Different analysis than in negotiability cases involving proposals





# Management Rights Applicable Laws

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For § 7106(a)(2) rights, ask whether the arbitrator was enforcing an “applicable law”

## APPLICABLE LAW

lawfully enacted statutes, the U.S. Constitution, controlling judicial decisions, executive orders issued pursuant to express statutory authorization, and regulations having the force and effect of law



# What About Regulations?

Regulations have the “force and effect of law” where they:

- (1) Affect individual rights and obligations;
- (2) Were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress;

**AND**

- (3) Were promulgated in accordance with procedural requirements imposed by Congress

# Exceptions – Arbitral Remedies

- Must provide a remedy for a violation of either an “applicable law” within the meaning of § 7106(a)(2)
- OR
- a contract provision that was negotiated pursuant to § 7106(b) of the Statute
- No reconstruction

# Arbitral Enforcement of, & Consistency of Awards with, Regulations



# Contrary to Regulation

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- Award must be consistent with any rule or regulation that governs the matter in dispute
- Government-wide regulations treated differently than agency-specific regulations



# Government-Wide Regulations

## What Are They?

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Rules, regulations, and official declarations of policy that are generally applicable throughout the federal government and are binding on the federal agencies and officials to whom they apply

# Government-Wide Regulations

## What Came First?

- ⊙ Regulation before CBA
  - Reg governs
- ⊙ CBA before regulation
  - CBA governs until it expires
  - **Exception:** gov't-wide regulations that implement 5 U.S.C. § 2302 (prohibited personnel practices)

# Agency Regulations What Are They

Rules, regulations, and official declarations of policy prescribed by an agency to govern matters within that agency





# Agency Regulations

## When Do They Control?

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- ◉ Only when there's no applicable, conflicting CBA provision
  - CBA, not agency regulations, governs matters to which they both apply when there is a conflict
  - Reason: Statute does not prevent agency from agreeing to a CBA that alters or modifies agency regulation
  - Deference to an arbitrator's finding that CBA governs



# Agency Regulations Incorporation

- ◉ An arbitrator may find that agency regulations have been incorporated into CBA
- ◉ And if CBA says matters will be conducted “in accordance with an agency regulation,” that wording “effectively incorporates” the regulation into the CBA – unless the arbitrator indicates otherwise in the award
- ◉ Review of the arbitrator’s interpretation and application of the incorporated agency regulations = essence standard

# Arbitral Remedies & Backpay



# Arbitrator Remedies

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- ◉ Broad remedial discretion
- ◉ Authority denies exceptions that don't support setting aside remedy/attempt to substitute different remedy

# Arbitrator Remedies Limitations

- ◉ Private and federal sectors: Can't dispense “own brand of industrial justice”
- ◉ Additional federal-sector exceptions stem from:
  - Laws and regulations governing employment
  - Expanded scope of grievance procedure (arbitrators substitute for other forums)

# Monetary Remedies

- ◉ Sovereign immunity
  - May be raised at any time, even if not raised before arbitrator
- ◉ Must be explicit statutory waiver
  - Common examples:
    - Back Pay Act, 5 U.S.C. § 5596
    - FLSA, 29 U.S.C. §§ 201-219
- ◉ No sovereign-immunity waiver required for monetary remedies that are “equitable” in nature

# Requirements

- ◉ Unjustified or unwarranted personnel action
  - Violation of applicable law, rule, regulation, or CBA
  - Includes governing agency-wide regs
  
- ◉ Resulting in loss of pay, allowances, or differentials
  - “Pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation ....”

# The Back Pay Act “Resulted in”

- ⊙ Causal connection necessary
  - Essential because backpay is make-whole remedy
- ⊙ FLRA reviews for evidence of connection
  - Does not require particular words or phrases (such as “but for”)
- ⊙ No requirement to identify specific employees when award sufficiently identifies specific circumstances warranting backpay



# The Back Pay Act Recovery Period

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- ⦿ Cannot exceed “a period beginning more than 6 years before the date of the filing of a timely appeal” (e.g., a grievance)
- ⦿ Does not establish when period can end/total duration of recovery period



# Interest on Backpay

## STATUTORY ENTITLEMENT

- ◉ Begins: Date of Loss
- ◉ Ends: Date not more than 30 days before date on which paid

# Attorney Fees

# Sources of Authority to Award

◉ Primary: Back Pay Act, 5 U.S.C. § 5596


◉ Others:

- FLSA

- Privacy Act

- Rehabilitation Act





# Attorney Fees Prerequisites I

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- ◉ The Back Pay Act requires that an award of fees be:
  - Awarded in conjunction with backpay award;
  - Reasonable and related to personnel action;
  - Awarded in accordance with standards established under 5 U.S.C. § 7701(g)

# Attorney Fees

## Prerequisites II

- Standards established under 5 U.S.C. § 7701(g)
  - Prevailing party
  - Incurred by the employee
  - Warranted in the interest of justice
  - Reasonable amount

**Note:** Arbitrator must make specific findings supporting each pertinent statutory requirement

# Attorney Fees Standard of 7701(g)

## Prevailing Party

- Enforceable judgment on the merits
- Degree of success not a consideration



# Attorney Fees Fees Incurred

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- ⦿ Attorney-client relationship
- ⦿ Legal services rendered
- ⦿ Under certain circumstances, attorney fees may be awarded for the services of non-attorney representatives

# Attorney Fees Interest of Justice

**How can you meet § 7701(g)(1)'s standard?**

**ALLEN  
CRITERIA**



**THE  
STATUTE**





# Attorney Fees

## *Allen* criteria

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- (1) Prohibited personnel practice
- (2) Clearly without merit/wholly unfounded or employee substantially innocent
- (3) Bad faith
- (4) Gross procedural error; OR
- (5) Agency knew or should have known would not prevail

## Prohibited personnel practice

- 5 U.S.C. § 2302
- Distinct from “unjustified or unwarranted personnel action”

- ◉ **Clearly without merit/wholly unfounded**
  - Examine competing interests of fault of employee and reasonableness of agency action
  
- ◉ **Employee substantially innocent**
  - Employee prevails on substantive rather than technical grounds on major charges
  
- ◉ **Focal point is result of merits award**

## Bad faith

- Action brought to “harass” the employee
- Action brought to exert improper pressure on the employee to act in certain ways

## Gross procedural error

- Prolonged proceeding or severely prejudiced employees
- More than simple harmful error warranting reversal of agency action

# Attorney Fees

## *Allen 5*

- Agency knew or should have known would not prevail
  - Analysis of agency evidence and agency conduct of investigation
- Focal point = reasonableness of agency actions in view of information available at the time of the action
- Penalty an aspect of merits; if penalty mitigated on evidence available to agency, and no new info presented at hearing, then agency knew or should have known



# Attorney Fees

## Reasonable Amount

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- ◉ Billing rate
- ◉ Reasonable number of hours
- ◉ No explicit provision for interest on attorney fees

**NOTE:** Degree of success IS a consideration



# Attorney Fees

## Procedural Notes

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- ◉ Petition for fees and opportunity to respond
- ◉ May resolve in merits award, but ...
- ◉ Back Pay Act jurisdiction
  - Doctrine of *functus officio* does not permit refusal to consider timely request
  - Arbitrator may resolve fee issue at any time during arbitration, or within reasonable period after award becomes “final and binding,” or if the parties agree to a different period
- ◉ Requests for fees determined by “appropriate authority” as defined by 5 C.F.R § 550.807



# Judicial Review of Authority Decisions

# Judicial Review

- ◉ § 7123(a): FLRA decisions in arbitration cases reviewable only if the order involves a ULP
- ◉ Look at order - not award, not grievance
  - More than acknowledge ULP
  - Must necessarily implicate a statutory ULP even if no explicit discussion
- ◉ Conduct must actually have been characterized as a ULP

# Judicial Review

- ◉ No jurisdiction where CBA was basis for arb's award and FLRA's review
- ◉ No automatic grant of jurisdiction when an agency claims order violates sovereign immunity
  - “Routine statutory and regulatory questions—in this case, the meaning of the ‘shall not exceed’ clause in the Back Pay Act and ‘administrative error’ in [the agency’s] assignment policy—are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity.”

# Judicial Review

- ◉ **Furtheres Congressional interest in:**
  - providing arbitration awards substantial finality
  - ensuring a single, uniform body of case law concerning ULPs
- ◉ **Standard of review:**
  - Arbitrary/capricious
  - Court will uphold remedial order for a ULP ““unless it can be shown that the order is a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’”

**THE END**

**Questions, Feedback,  
&  
Thank You For  
Participating**