

PART 1404 -- ARBITRATION SERVICES

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AUTHORITY: 29 U.S.C. 172 and 29 U.S.C. 173 et seq.

Subpart A -- Arbitration Policy; Administration of Roster

1404.1 Scope and Authority

This chapter is issued by the Federal Mediation and Conciliation Service (FMCS) under Title II of the Labor Management Relations Act of 1947 (Pub L. 80-101) as amended. It applies to all arbitrators listed on the FMCS Roster of Arbitrators, to all applicants for listing on the Roster, and to all persons or parties seeking to obtain from FMCS either

names or panels of names of arbitrators listed on the Roster in connection with disputes which are to be submitted to arbitration or factfinding.

1404.2 Policy

The labor policy of the United States promotes and encourages the use of voluntary arbitration to resolve disputes over the interpretation or application of collective bargaining agreements. Voluntary arbitration and fact-finding are important features of constructive employment relations as alternatives to economic strife.

1404.3 Administrative Responsibilities

- a. *Director*. The Director of FMCS has responsibility for all aspects of FMCS arbitration activities and is the final agency authority on all questions concerning the Roster and FMCS arbitration procedures.
- b. *Office of Arbitration Services*. The Office of Arbitration Services (OAS) maintains a Roster of Arbitrators (the Roster); administers Subpart C of this part (Procedures for Arbitration Services); assists, promotes, and cooperates in the establishment of programs for training and developing new arbitrators; and provides names or panels of names of listed arbitrators to parties requesting them.
- c. *Arbitrator Review Board*. The Arbitrator Review Board shall consist of a chairman and members appointed by the Director who shall serve at the Director's pleasure. The Board shall be composed entirely of full-time officers or employees of the Federal Government and shall establish procedures for carrying out its duties.
 1. *Duties of the Board*. The Board shall:
 - i. Review the qualifications of all applicants for listing on the Roster, interpreting and applying the criteria set forth in Section 1404.5;
 - ii. Review the status of all persons whose continued eligibility for listing on the Roster has been questioned under subsection 1404.5;
 - iii. Recommend to the Director the acceptance or rejection of applicants for listing on the Roster, or the withdrawal of listing on the Roster for any of the reasons set forth in this part;
 - iv. At the request of the Director of FMCS, review arbitration policies and procedures, including all regulations and written guidance regarding the use of the FMCS arbitrators, and make recommendations regarding such policies and procedures to the Director.
 2. [Reserved]

Subpart B -- Roster of Arbitrators; Admission and Retention

1404.4 Roster and Status of Members

- a. *The Roster.* FMCS shall maintain a Roster of labor arbitrators consisting of persons who meet the criteria for listing contained in 1404.5 and who remain in good standing.
- b. *Adherence of Standards and Requirements.* Persons listed on the Roster shall comply with FMCS rules and regulations pertaining to arbitration and with such guidelines and procedures as may be issued by the OAS pursuant to Subpart C of this part. Arbitrators shall conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the American Arbitration Association.
- c. *Status of Arbitrators.* Persons who are listed on the Roster and are selected or appointed to hear arbitration matters or to serve as fact-finders do not become employees of the Federal Government by virtue of their selection or appointment. Following selection or appointment, the arbitrator's relationship is solely with the parties to the dispute, except that arbitrators are subject to certain reporting requirements and to standards of conduct as set forth in this Part.
- d. *Role of FMCS.* FMCS has no power to:
 1. Compel parties to appear before an arbitrator;
 2. Enforce an agreement to arbitrate;
 3. Compel parties to arbitrate any issue;
 4. Influence, alter, or set aside decisions of arbitrators on the Roster;
 5. Compel, deny, or modify payment of compensation to an arbitrator.
- e. *Nominations and Panels.* On request of the parties to an agreement to arbitrate or engage in fact-finding, or where arbitration or fact-finding may be provided for by statute, OAS will provide names or panels of names for a nominal fee. Procedures for obtaining these services are outlined in Subpart C of this part. Neither the submission of a nomination or panel nor the appointment of an arbitrator constitutes a determination by FMCS that an agreement to arbitrate or enter fact-finding proceedings exists; nor does such action constitute a ruling that the matter in controversy is arbitrable under any agreement.
- f. *Rights of Persons Listed on the Roster.* No person shall have any right to be listed or to remain listed on the Roster. FMCS retains its authority and responsibility to assure that the needs of the parties using its services are served. To accomplish this purpose, FMCS may establish procedures for the preparation of panels or the appointment of arbitrators or fact-finders which include consideration of such factors as background and experience, availability, acceptability, geographical location, and the expressed preferences of the parties. FMCS may also establish procedures for the removal from the Roster of those arbitrators who fail to adhere to provisions contained in this part.

1404.5 Listing on the Roster; Criteria for Listing and Retention

Persons seeking to be listed on the Roster must complete and submit an application form which may be obtained from OAS. Upon receipt of an executed application, OAS will review the application, assure that it is complete, make such inquiries as are necessary, and submit the application to the Arbitrator Review Board. The Board will review the completed application under the criteria in paragraphs (a), (b), and 8 of this section, and will forward to the FMCS Director its recommendation as to whether or not the applicant meets the criteria for listing on the Roster. The Director shall make all final decisions as to whether an applicant may be listed on the Roster. Each applicant shall be notified in writing of the Director's decision and the reasons therefore.

- a. *General Criteria.* Applicants for the Roster will be listed on the Roster upon a determination that they are experienced, competent, and acceptable in decision-making roles in the resolution of labor relations disputes.
- b. *Proof of Qualification.* Qualifications for listing on the Roster may be demonstrated by submission of five (5) arbitration awards prepared by the applicant while serving as an impartial arbitrator of record chosen by the parties to labor disputes arising under collective bargaining agreements. The Board will consider experience in relevant positions in collective bargaining or as a judge or hearing examiner in labor relations controversies as a substitute for such awards.
- c. *Advocacy.* Any person who at the time of application is an advocate as defined in paragraph (c)(1) of this section, must agree to cease such activity before being recommended for listing on the Roster by the Board. Except in the case of persons listed on the Roster as advocates before November 17, 1976, any person who did not divulge his or her advocacy at the time of listing or who becomes an advocate while listed on the Roster, shall be recommended for removal by the Board after the fact of advocacy is revealed.
 1. *Definition of Advocacy.* An advocate is a person who represents employers, labor organizations, or individuals as an employee, attorney, or consultant, in matters of labor relations, including but not limited to the subjects of union representation and recognition matters, collective bargaining, arbitration, unfair labor practices, equal employment opportunity, and other areas generally recognized as constituting labor relations. The definition includes representatives of employers or employees in individual cases or controversies involving worker's compensation, occupational health or safety, minimum wage, or other labor standards matters. This definition of advocate also includes a person who is directly associated with an advocate in a business or professional relationship as, for example, partners or employees of a law firm. Consultants engaged only in joint education or training or other non-adversarial activities will not be deemed as advocates.
- d. *Duration of Listing, Retention.* Listing on the Roster shall be by decision of the Director of FMCS based upon the recommendations of the Arbitrator Review Board. The Board may recommend, and the Director may remove, any person listed on the Roster, for violation of this part and/or the Code of Professional

Responsibility. Notice of cancellation or suspension shall be given to a person listed on the Roster whenever a Roster member:

1. No longer meets the criteria for admission;
 2. Has become an advocate as defined in paragraph 8 of this section;
 3. Has been repeatedly or flagrantly delinquent in submitting awards;
 4. Has refused to make reasonable and periodic reports in a timely manner to FMCS, as required in Subpart C of this part, concerning activities pertaining to arbitration;
 5. Has been the subject of complaints by parties who use FMCS services, and the Board after appropriate inquiry, concludes that just cause for cancellation has been shown;
 6. Is determined by the Director to be unacceptable to the parties who use FMCS arbitration services; the Director may base a determination of unacceptability on FMCS records which show the number of times the arbitrator's name has been proposed to the parties and the number of times it has been selected. Such cases will be reviewed for extenuating circumstances, such as length of time on the Roster or prior history.
- e. The Board may, at its discretion, conduct an inquiry into the facts of any proposed removal from the Roster. An arbitrator listed on the Roster may only be removed after 60-day notice and an opportunity to submit a response or information showing why the listing should not be canceled. The Board may recommend to the Director whether to remove an arbitrator from the Roster. All determinations to remove an arbitrator from the Roster shall be made by the Director. Removals may be for a period of up to two (2) years, after which the arbitrator may seek reinstatement.
- f. The director of OAS may suspend for a period not to exceed 180 days any person listed on the Roster who has violated any of the criteria in paragraph (d) of this section. Arbitrators shall be promptly notified of a suspension. They may appeal a suspension to the Arbitrator Review Board, which shall make a recommendation to the Director of FMCS. The decision of the Director of FMCS shall constitute the final action of the agency.

1404. 6 Inactive Status

A member of the Roster who continues to meet the criteria for listing on the Roster may request that he or she be put in an inactive status on a temporary basis because of ill health, vacation, schedule, or other reasons.

1404.7 Listing Fee

All arbitrators will be required to pay an annual fee for listing on the Roster as set forth in the Appendix to this part.

Subpart C -- Procedures for Arbitration Services

1404.8 Freedom of Choice

Nothing contained in this part should be construed to limit the rights of parties who use FMCS arbitration services to jointly select any arbitrator or arbitration procedure acceptable to them. Once a request is made to OAS, all parties are subject to the procedures contained in this part.

1404.9 Procedures for Requesting Arbitration Lists and Panels

- a. The Office of Arbitration Services (OAS) has been delegated the responsibility for administering all requests for arbitration services. Requests should be addressed to the Federal Mediation and Conciliation Service, Office of Arbitration Services, Washington, DC 20427.
- b. The OAS will refer a panel of arbitrators to the parties upon request. The parties are encouraged to make joint requests. In the event, however, that the request is made by only one party, the OAS will submit a panel of arbitrators. However, the issuance of a panel -- pursuant to either joint or unilateral request -- is nothing more than a response to a request. It does not signify the adoption of any position by the FMCS regarding the arbitrability of any dispute or the terms of the parties' contract.
- c. As an alternative to a request for a panel of names, OAS will, upon written request, submit a list of all arbitrators and their biographical sketches from a designated geographical area. The parties may then select and deal directly with an arbitrator of their choice, with no further involvement of FMCS with the parties or the arbitrator. The parties may also request FMCS to make a direct appointment of their selection. In such a situation, a case number will be assigned.
- d. The OAS reserves the right to decline to submit a panel or make appointments of arbitrators, if the request submitted is overly burdensome or otherwise impracticable. The OAS, in such circumstances, may refer the parties to an FMCS mediator to help in the design of an alternative solution. The OAS may also decline to service any requests from parties with a demonstrated history of non-payment of arbitrator fees or other behavior which constrains the spirit or operation of the arbitration process.
- e. The parties are required to use the Request for Arbitration Panel (Form R-43), which has been prepared by the OAS and is available in quantity upon request to the Federal Mediation and Conciliation Service, Office of Arbitration Services, Washington, DC 20427, or by calling (202) 606-5111 or at www.fmcs.gov. Requests that do not contain all required information requested on the R-43 in typewritten form may be rejected.
- f. Requests made by only one party, for a service other than the furnishing of a standard list or panel of seven (7) arbitrators, will not be honored unless authorized by the applicable collective bargaining agreement. This includes unilateral requests for a second or third panel or for a direct appointment of an arbitrator.

- g. The OAS will charge a nominal fee for all requests for lists, panels, and other major services. Payments for these services must be received with the request for services before the service is delivered and may be paid by either labor or management or both. A schedule of fees is listed in the Appendix to this part.

1404.10 Arbitrability

The OAS will not decide the merits of a claim by either party that a dispute is not subject to arbitration.

1404.11 Nominations of Arbitrators

- a. The parties may also request a randomly selected panel containing the names of seven (7) arbitrators accompanied by a biographical sketch for each member of the panel. This sketch states the background, qualifications, experience, and all fees as furnished to the OAS by the arbitrator. Requests for a panel of seven (7) arbitrators, whether joint or unilateral, will be honored. Requests for a panel of other than seven (7) names, for a direct appointment of an arbitrator, for special qualifications or other service will not be honored unless jointly submitted or authorized by the applicable collective bargaining agreement. Alternatively, the parties may request a list and biographical sketches of some or all arbitrators in one or more designated geographical areas. If the parties can agree on the selection of an arbitrator, they may appoint their own arbitrator directly without any further case tracking by FMCS. No case number will be assigned.
- b. All panels submitted to the parties by the OAS, and all letters issued by the OAS making a direct appointment, will have an assigned FMCS case number. All future communications between the parties and the OAS should refer to this case number.
- c. The OAS will provide a randomly selected panel of arbitrators located in state (s) in proximity of the hearing site. The parties may request special qualifications of arbitrators experienced in certain issues or industries or that possess certain backgrounds. The OAS has no obligation to put an individual on any given panel, or on a minimum number of panels in any fixed period. In general:
 - 1. The geographic location of arbitrators placed on panels is governed by the site of the dispute as stated on the request received by the OAS.
 - 2. If at any time both parties request that a name or names be included, or omitted, from a panel, such name or names will be included, or omitted, unless the number of names is excessive. These inclusions/exclusions may not discriminate against anyone because of age, race, gender, ethnicity or religious beliefs.
- d. If the parties do not agree on an arbitrator from the first panel, the OAS will furnish a second and third panel to the parties upon joint request and payment of an additional fee. Requests for a second or third panel should be accompanied by a brief explanation as to why the previous panel(s) was

inadequate. If parties are unable to agree on a selection after having received three panels, the OAS will make a direct appointment upon joint request.

1404.12 Selection by Parties and Appointments of Arbitrators

- a. After receiving a panel of names, the parties must notify the OAS of their selection of an arbitrator or of the decision not to proceed with arbitration. Upon notification of the selection of an arbitrator, the OAS will make a formal appointment of the arbitrator. The arbitrator, upon notification of appointment, is expected to communicate with the parties within 14 days to arrange for preliminary matters, such as the date and place of hearing. Should an arbitrator be notified directly by the parties that he or she has been selected, the Arbitrator must promptly notify the OAS of the selection and his or her willingness to serve. If the parties settle a case prior to the hearing, the parties must inform the arbitrator as well as the OAS. Consistent failure to follow these procedures may lead to a denial of future OAS service.
- b. If the parties request a list of names and biographical sketches rather than a panel, they may choose to appoint and contact an arbitrator directly. In this situation, neither the parties nor the arbitrator is required to furnish any additional information to FMCS and no case number will be assigned.
- c. Where the parties' collective bargaining agreement is silent on the manner of selecting arbitrators, the parties may wish to consider any jointly determined method or one of the following methods for selection of an arbitrator from a panel:
 1. Each party alternately strikes a name from the submitted panel until one remains, or
 2. Each party advises the OAS of its order of preference by numbering each name on the panel and submitting the numbered lists in writing to the OAS. The name that has the lowest combined number will be appointed.
 3. In those situations where the parties separately notify the OAS of their preferred selections, once the OAS receives the preferred selection from one party, it will notify the other party that it has fourteen (14) days in which to submit its selections. If that party fails to respond within the deadline, the first party's choice will be honored. If, within 14 days, a second panel is requested and is allowed by the collective bargaining agreement, the requesting party must pay a fee for the second panel.
- d. The OAS will make a direct appointment of an arbitrator only upon joint request unless authorized by the applicable collective bargaining agreement.
- e. The issuance of a panel of names or a direct appointment in no way signifies a determination on arbitrability or an interpretation of the terms and conditions of the collective bargaining agreement. The resolution of such disputes rests solely with the parties.

1404.13 Conduct of Hearings

All proceedings conducted by the arbitrators shall be in conformity with the contractual obligations of the parties. The arbitrator shall comply with 1404.4(b). The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control, and the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding. The arbitrator may, unless prohibited by law, proceed in the absence of any party who, after due notice, fails to be present or to obtain a postponement. An award rendered in an ex parte proceeding of this nature must be based upon evidence presented to the arbitrator.

1404.14 Decision and Award

- a. Arbitrators shall make awards no later than 60 days from the date of the closing of the record as determined by the arbitrator, unless otherwise agreed upon by the parties or specified by the collective bargaining agreement or law. However, failure to meet the 60 day deadline will not invalidate the process or award. A failure to render timely awards reflects upon the performance of an arbitrator and may lead to removal from the FMCS Roster.
- b. The parties should inform the OAS whenever a decision is unduly delayed. The arbitrator shall notify the OAS if and when the arbitrator (1) cannot schedule, hear, and render decisions promptly, or (2) learns a dispute has been settled by the parties prior to the decision.
- c. Within 15 days after an award has been submitted to the parties, the arbitrator shall submit an Arbitrator's Report and Fee Statement (Form R-19) to OAS showing a breakdown of the fee and expense charges so that the OAS may review conformance with stated charges under Section 1404.11(a). The Form R-19 is not to be used to invoice the parties.
- d. While FMCS encourages the publication of arbitration awards, arbitrators should not publicize awards if objected to by one of the parties.

1404.15 Fees and Charges of Arbitrators

- a. FMCS will charge all arbitrators an annual fee to be listed on the Roster. All arbitrators listed on the Roster may charge a per diem and other predetermined fees for services, if the amount of such fees have been provided in advance to FMCS. Each arbitrator's maximum per diem and other fees are set forth on a biographical sketch which is sent to the parties when panels are submitted. The arbitrator shall not change any fee or add charges without giving at least 30 days advance written notice to FMCS. Arbitrators with dual business addresses must bill the parties for expenses from the least expensive business address to the hearing site.
- b. In cases involving unusual amounts of time and expenses relative to the pre-hearing and post-hearing administration of a particular case, an administrative charge may be made by the arbitrator.
- c. Arbitrators shall divulge all charges to the parties and obtain agreement thereto immediately after appointment.

- d. The OAS requests that it be notified of any arbitrator's deviation from the policies expressed in this part. While the OAS does not resolve individual fee disputes, repeated complaints concerning the fees charged by an arbitrator will be brought to the attention of the Arbitrator Review Board for consideration. Similarly, repeated complaints by arbitrators concerning non-payment of fees by the parties may lead to the denial of services or other actions by the OAS.

1404.16 Reports and Biographical Sketches

- a. Arbitrators listed on the Roster shall execute and return all documents, forms and reports required by the OAS. They shall also keep the OAS informed of changes of address, telephone number, availability, and of any business or other connection or relationship which involves labor-management relations or which creates or gives the appearance of advocacy as defined in Section 1404.5 (c) (1).
- b. The OAS will provide biographical sketches on each person admitted to the Roster from information supplied by applicants. Arbitrators may request revision of biographical information at later dates to reflect changes in fees, the existence of additional charges, or other relevant data. The OAS reserves the right to decide and approve the format and content of biographical sketches.

Subpart D - Expedited Arbitration

1404.17 Policy.

In an effort to reduce the time and expense of some grievance arbitrations, FMCS is offering expedited procedures that may be appropriate in certain non-precedential cases or those that do not involve complex or unique issues. Expedited Arbitration is intended to be a mutually agreed upon process whereby arbitrator appointments, hearings and awards are acted upon quickly by the parties, FMCS, and the arbitrators. The process is streamlined by mandating short deadlines and eliminating requirements for transcripts, briefs and lengthy opinions.

1404.18 Procedures for Requesting Expedited Panels.

- a. With the exception of the specific changes noted in this Subpart, all FMCS rules and regulations governing its arbitration services shall apply to Expedited Arbitration.
- b. Upon receipt of a joint Request for Arbitration Panel (Form R-43) indicating that expedited services are desired by both parties, the OAS will refer a panel of arbitrators.
- c. A panel of arbitrators submitted by the OAS in expedited cases shall be valid for up to 30 days. Only one panel will be submitted per case. If the parties are

unable to mutually agree upon an arbitrator or if prioritized selections are not received from both parties within 30 days, the OAS will make a direct appointment of an arbitrator not on the original panel.

- d. If the parties mutually select an arbitrator, but the arbitrator is not available, the parties may select a second name from the same panel or the OAS will make a direct appointment of another arbitrator not listed on the original panel.

1404.19 Arbitration Process.

- a. Once notified of the expedited case appointment by the OAS, the arbitrator must contact the parties within seven (7) calendar days.
- b. The parties and the arbitrator must attempt to schedule a hearing within 30 days of the appointment date.
- c. Absent mutual agreement, all hearings will be concluded within one day. No transcripts of the proceedings will be made and the filing of post-hearing briefs will not be allowed.
- d. All awards must be completed within seven (7) working days after the hearing. These awards are expected to be brief, concise, and not require extensive written opinion or research time.

1404.20 Arbitrator Eligibility.

In an effort to increase exposure for new arbitrators, those arbitrators who have been listed on the Roster of Arbitrators for a period of five (5) years or less will be automatically placed on expedited panels submitted to the parties. However, all panels will also contain the names of at least two more senior arbitrators. In addition, the parties may jointly request a larger pool of arbitrators or a direct appointment of any arbitrator of their choice who is listed on the Roster.

1404.21 Proper Use of Expedited Arbitration.

- a. FMCS reserves the right to cease honoring requests for Expedited Arbitration if a pattern of misuse of this process becomes apparent. Misuse may be indicated by the parties' frequent delaying of the process or referral of inappropriate cases.
- b. Arbitrators who exhibit a pattern of unavailability for appointments or who are repeatedly unable to schedule hearings or render awards within established deadlines will, after written warning, be considered ineligible for appointment for this service.

Appendix Schedule of Fees

Annual listing fee for all arbitrators: \$100 for the first address; \$50 for second address

Request for panel of arbitrators: \$30 for each panel request (includes subsequent appointment)

Direct appointment of arbitrator \$20 per appointment when a panel is not used

List and biographical sketches of \$10 per request plus \$.10 per page arbitrators in a specific area