GUIDE TO ARBITRATION UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE



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Table of Contents

GRIEVANCES AND ARBITRATION	1
Statutory Requirements	1
Coverage of the Negotiated Grievance Procedure	1
Types of Grievances and the Negotiated Grievance Procedure	4
Unacceptable Performance and Serious Adverse Actions	4
Discrimination Cases Under Title VII of the Civil Rights Act of 1964	6
"Mixed Cases" Under 5 U.S.C. § 7702	6
Prohibited Personnel Practice Cases Under 5 U.S.C. § 2302	7
Grieving Unfair Labor Practices	10
General Guidance for Parties During the Arbitration Hearing	11
AUTHORITY REVIEW OF ARBITRATION AWARDS	13
Filing Exceptions and Oppositions	13
Who May File Exceptions	13
Time Limits for Filing Exceptions	13
Additional Requirements for Filing Exceptions	15
Examples of How to Calculate the Due Date for Filing Exceptions	16
Content of Exceptions	21
<u>Oppositions</u>	22
Requests for Expedited, Abbreviated Decisions	22
Collaboration and Alternative Dispute Resolution Program	23

Interlocutory Appeals	23
Grounds for Review	27
Contrary to Law or Regulation	28
Grievance Precluded by Law	28
Category 1 - Matters Excluded Under § 7121(c) of the Statute	28
Category 2 - Certain Negotiability Issues	30
<u>Category 3 - Questions Regarding Bargaining-</u> <u>Unit Status</u>	30
<u>Category 4 - Legal Authorities Outside the</u> <u>Statute</u>	30
Monetary Remedies - Sovereign Immunity	31
The Back Pay Act	31
<u>Backpay</u>	31
Attorney Fees	32
Fees Incurred	33
Fees in the Interest of Justice	34
Amount of Fees is Reasonable	36
Management Rights	38
Status of Regulations	42
Government-Wide Regulations	42
Agency Regulations	43

<u>Private-Sector Grounds</u>	43					
Denial of a Fair Hearing	44					
<u>Arbitrator Bias</u>	44					
Incomplete, Ambiguous, or Contradictory Award	45					
Arbitrator Exceeded Authority	46					
Award Based on Nonfact	47					
Award Fails to Draw Its Essence from Agreement	47					
Public Policy	48					
Challenges to Arbitrability Findings	48					
Awards Based on Separate and Independent Grounds	49					
Authority Practice with Regard to Deficient Awards	49					
COMPLIANCE WITH AWARDS AND JUDICIAL REVIEW						
Compliance with Arbitration Award						
Judicial Review	51					

FOREWORD

This Guide has been prepared by the <u>Federal Labor Relations Authority</u> (the Authority or FLRA). The Authority is an independent agency of the Executive Branch of the Federal Government and administers the labor-relations program under the Federal Service Labor-Management Relations Statute, <u>5 U.S.C. §§ 7701-7135</u> (the Statute), for Federal agencies, Federal employees, and the unions that represent those employees.

A primary responsibility of the Authority under the Statute is to resolve exceptions to arbitration awards that arise out of grievances filed by an employee, union, or agency. This Guide is designed to assist parties and arbitrators to understand the arbitration process and their rights and responsibilities. The Authority believes that an understanding of the statutory scheme will enhance arbitration as an effective and efficient means of dispute resolution. <u>5 U.S.C. § 7101</u>.

This Guide is intended to provide parties and arbitrators with information concerning:

- the key provisions of the Statute that pertain to arbitration;
- the bases upon which arbitral awards may be found deficient;
- the roles of the arbitrator and the parties under the Statute and how those roles may differ from their roles in the private sector; and
- difficult issues that arise in arbitration cases.

The Authority's intention is for this Guide to assist parties in understanding the legal framework for arbitration and to assist arbitrators in rendering awards that are less likely to be found deficient by the Authority. This intention is consistent with Congress's goal that arbitration be final and binding.

This Guide is <u>not</u> an official interpretation of the Statute and/or regulations, or the official policy of the Authority. It should not be considered as legal advice or as a substitute for adequate preparation and research by the party representatives or arbitrators. The case law in this area is constantly evolving. It is crucial that parties and arbitrators research court, Authority, and other administrative-tribunal decisions that may apply to their particular cases. We encourage you to visit the Authority's web site, <u>www.flra.gov</u>, where you can research Authority decisions, read the Statute and the Authority's Regulations, and download forms for filing exceptions and oppositions.

GRIEVANCES AND ARBITRATION

Statutory Requirements

Employment in the Federal Government is subject to numerous statutory and regulatory requirements. As a result, in contrast to private-sector arbitration, arbitration under the Statute is heavily governed by statutory and regulatory provisions.

<u>Section 7121</u> of the Statute sets forth a number of statutory requirements that concern the negotiated grievance procedure (NGP):

- All collective bargaining agreements (CBAs) must provide procedures for the settlement of grievances, including questions of arbitrability, and those procedures must provide for binding arbitration of any grievance not satisfactorily settled. <u>5 U.S.C. § 7121(a)(1)</u>.
- Only an agency or union representative may invoke arbitration. Although the Statute permits an employee to file a grievance and represent himself or herself through the steps of the grievance procedure up to arbitration, the union is permitted to be present during grievance proceedings. Although an employee may personally present a grievance, an aggrieved employee is precluded from being represented in the NGP by an attorney or a representative other than the union or a representative designated by the union. <u>5 U.S.C. § 7121(b)(1)(C)(ii) & (iii)</u>.
- The NGP must be fair and simple and provide for expeditious processing. 5 U.S.C. § 7121(b)(1)(A).

Coverage of the NGP

Sections <u>7121</u> and <u>7103(a)(9)</u> of the Statute establish the coverage and scope of an NGP. Section 7103(a)(9) broadly defines "grievance" as any complaint:

- (A) by any employee concerning any matter relating to the employment of the employee;
- (B) by any labor organization concerning any matter relating to the employment of any employee; or
- (C) by any employee, labor organization, or agency concerning –

- (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
- (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

In contrast with private-sector grievance procedures, where parties must negotiate to <u>include</u> matters in an NGP, in the Federal sector, subjects are covered by the NGP unless parties negotiate to <u>exclude</u> them. These negotiated exclusions are in addition to those matters that are excluded by law from a NGP. In this connection, as <u>discussed in further detail later</u> in this Guide, <u>§ 7121(c)</u> of the Statute excludes the following matters from being covered under an NGP:

- prohibited political activities;
- retirement, life insurance, or health insurance;
- a suspension or removal for national security reasons under <u>5 U.S.C.</u> § 7532;
- any examination, certification, or appointment; and
- the classification of any position that does not result in the reduction in either the grade or the pay of an employee.

5 U.S.C. § 7121(c).

Federal-sector arbitration differs from private-sector arbitration in other significant respects:

- In the private sector, the grievance procedure enforces terms and conditions of the parties' CBA; in the Federal sector, the NGP may enforce and arbitrators therefore may interpret not only CBAs, but also laws, regulations, and agency policies.
- Arbitration awards are subject to appeal (exceptions) to the Authority. <u>5 U.S.C.</u> § 7122. On exceptions, the Authority will consider whether the arbitrator properly considered and applied applicable law or regulation, and will set aside or modify an award where the excepting party has demonstrated that the arbitrator failed to do so. Therefore, party representatives should advise arbitrators of applicable law, regulation, and policy and provide accurate and complete reference materials. Other bases of review are addressed <u>later in this Guide</u>.

As a result of the differences between private- and Federal-sector arbitrations, and to make it more likely that the Authority will uphold their awards if exceptions are filed, arbitrators should ensure that their awards:

- State the issue(s) clearly. If the parties are unable to stipulate to or agree on the submitted issue(s), then the arbitrator should ensure that the award identifies the issue(s) being addressed.
- If a violation of law or contract is found, then:
 - The award should specify clearly which contractual provisions, laws, or regulations were violated.
 - The violation found should be encompassed within or related to the stated issue(s). Although the Authority accords arbitrators substantial deference in the determination of the issues submitted to arbitration, that deference is not unlimited. For example, the Authority has found that an arbitrator exceeded her authority in a situation where the arbitrator: resolved an issue that was not included among stipulated issues; made no finding (and there was no claim) that it was necessary to address the resolved issue in order to resolve the stipulated issue; did not find that the resolved issue necessarily arose from the stipulated issue; and did not interpret the stipulation to include the resolved issue. See U.S. Dep't of Transp., FAA, 64 FLRA 612, 613 (2010) (DOT).
- The remedy should not exceed the scope of the grievance and/or issues before the arbitrator.
 - E.g. If the issue addresses whether one employee should have been promoted, then the remedy must be limited to that employee. *E.g.*, *U.S. EPA*, <u>57 FLRA 648</u>, 651-52 (2001).
 - E.g. If no violation is found, then no remedy may be awarded. E.g., U.S. EPA, Region 2, N.Y.C., N.Y., 63 FLRA 476, 479 (2009); NLRB, Tampa, Fla., 57 FLRA 880, 881 (2002).
- Although it is not necessary for the arbitrator to discuss every piece of evidence presented, it is helpful if the arbitrator includes in his or her award specific references to the record (testimony, transcript, exhibits, CBA provisions) as they relate to material matters and factual findings made by the arbitrator.

Types of Grievances and the NGP

As stated previously, § 7103(a)(9) of the Statute broadly defines the term "grievance." Thus, as a general matter, in the Federal sector, NGPs are broad in scope and permit grievances over violations of not only CBAs but also laws, rules, and regulations affecting conditions of employment. As <u>discussed further below</u>, this includes allegations of unfair labor practices (ULPs). However, parties may agree to exclude any matters, including grievances over ULPs, from the scope of their NGP. *E.g.*, *AFGE*, *Local* 3911, <u>56 FLRA 480</u>, 482 (2000). In addition, as stated previously (and discussed <u>in further detail below</u>), certain matters are excluded by law from coverage of the NGP.

In addressing a grievance, the arbitrator should determine whether either law or the CBA has excluded the grievance from coverage under the NGP. If the grievance is not excluded, and cannot be raised as a ULP, or is not covered by a statutory "election of remedies" provision such as § 7121(d), (e), or (g) of the Statute (discussed further below), then the NGP is the sole and exclusive administrative procedure available to employees in that unit for resolving such grievances. 5 U.S.C. § 7121(a)(1).

If parties are not able to successfully resolve a grievance during the defined steps of the NGP, then either the union or the agency may invoke arbitration. Employees may not invoke arbitration. <u>5 U.S.C. § 7121(b)(1)(C)(iii)</u>.

Following are issues that warrant separate discussion in the context of the coverage of NGPs.

Unacceptable Performance and Serious Adverse Actions

These matters include unacceptable performance matters (<u>5 U.S.C.</u> § <u>4303</u>) and serious adverse actions (<u>5 U.S.C.</u> § <u>7512</u> – suspensions that exceed 14 calendar days, removals from the Federal service, furloughs of 30 days or less, or reductions in grade or pay). Two broad categories of employees are relevant here.

The first group comprises employees who are employed in the ordinary civil-service system. Employees in this group (with the exception of certain employees, such as non-probationary, competitive-service employees) have the right, when faced with an unacceptable performance or serious adverse action, to choose either: (1) an appeal to the Merit Systems Protection Board (MSPB), which is an independent, quasi-judicial agency established by the Civil Service Reform Act to adjudicate appeals by employees of serious adverse actions and performance-based actions; or (2) a grievance under the NGP. 5 U.S.C. § 7121(e) & (f). A grievance involving these types of matters differs from other grievances in several respects:

- The arbitrator must apply the standards that the MSPB would have applied if the matter had been appealed to the MSPB, specifically, the standards set forth in 5 U.S.C. § 7701(c). See 5 U.S.C. § 7121(e)(2). Section 7701(c) provides:
 - (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
 - (A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or
 - (B) in any other case, is supported by a preponderance of the evidence.
 - (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment
 - (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
 - (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
 - (C) shows that the decision was not in accordance with law.
- Review of the arbitration award is available in the same manner and under the same conditions as if the matter had been decided by the MSPB. Specifically, the arbitration award is appealable to the U.S. Court of Appeals for the Federal Circuit – not to the Authority.

The second group comprises Federal employees who are *not* employed in the ordinary civil-service system. In this connection, some Federal employees are employed in other personnel systems – for example, personnel systems that apply to the Federal Aviation Administration, the Securities and Exchange Commission, health-care professionals in the Department of Veterans Affairs covered by <u>Title 38</u> of the U.S. Code, and overseas teachers of the Department of Defense Dependents Schools. These systems provide for actions against covered employees similar to the actions provided for in §§ <u>4303</u> and <u>7512</u>, and these employees have a similar option of either filing a grievance or raising the matter under any procedures available under those systems; those actions are also <u>not</u> appealable to the Authority.

Discrimination Cases Under <u>Title VII of the Civil Rights Act of 1964</u>

This type of case typically is filed with the <u>Equal Employment Opportunity</u> <u>Commission</u> (EEOC). In these cases, an employee alleges, for example, that he or she was not promoted, did not receive training, or received a poor performance appraisal as a result of discrimination on a prohibited basis (such as race or sex). In such cases, the employee has the option of either filing a complaint using his or her employing agency's equal employment opportunity (EEO) process (resulting in an appeal to the EEOC), or filing a grievance under the NGP. <u>5 U.S.C. § 7121(d)</u>.

If the employee files a grievance under the NGP, then the grievance is processed in much the same manner as any other grievance, except that the employee is not precluded from requesting EEOC review of the arbitrator's award. <u>5 U.S.C. § 7121(d)</u>. The employee also retains the right to file a civil action in an appropriate U.S. District Court. <u>29 C.F.R. part 1614</u>.

In a discrimination case, the employee's choice of either the NGP or the EEO procedure is an election of remedy; the employee cannot pursue his or her claim under both procedures. <u>5 U.S.C. § 7121(d)</u>. The employee shall be deemed to have exercised a "choice" in this regard when he or she either timely initiates an action under the statutory EEO procedure or timely files a grievance in writing, whichever event occurs first. <u>5 U.S.C. § 7121(d)</u>. *See*, *e.g.*, *AFGE*, *Local 2145*, <u>61 FLRA 571</u>, 573-74 (2006) (portion of grievance barred by prior EEO filing). *Cf. NTEU*, *Chapter 145*, <u>65 FLRA 898</u>, 899-900, *recons. denied*, <u>65 FLRA 1015</u> (2011) (untimely EEO complaint did not bar grievance). Arbitration awards that resolve <u>Title VII</u> discrimination issues <u>are</u> appealable to the Authority unless they are outside the Authority's jurisdiction for some other reason.

"Mixed Cases" Under 5 U.S.C. § 7702

This type of case is one in which the agency takes an action against an employee that is appealable to the MSPB (suspensions that exceed 14 calendar days, removals from the Federal service, furloughs of 30 days or less, or reductions in grade or pay) and the employee claims that the action was based on discrimination of the type prohibited by any law administered by the EEOC. One example would be where an agency removes an employee and the employee alleges that the removal is based on racial discrimination. As with §§ 4303 and 7512 matters and pure discrimination cases, the employee has several options available. The scheme for processing these matters is very complex, and a detailed explanation is beyond the scope of this Guide. For more specific details, the applicable statutory and regulatory provisions and cases should be carefully consulted, primarily: 5 U.S.C. § 7702; 5 C.F.R. part 1201, subpart E; and 29 C.F.R. part 1614, subpart C. However, please note that arbitration awards that resolve these matters are not appealable to the Authority.

Prohibited Personnel Practice Cases Under 5 U.S.C. § 2302

This type of case is one in which the agency takes one of the personnel actions listed in 5 U.S.C. § 2302(a)(2) against an employee and the employee claims that the action was for one of the prohibited reasons set forth in § 2302(b) (other than prohibited employment discrimination listed in (b)(1)). One example would be where an agency disciplines an employee based on reprisal for the employee's filing of a grievance, an appeal of an adverse action to the MSPB, or a complaint with the EEOC. Such a disciplinary action would be a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), which prohibits retaliation for the exercise of, among other things, the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. Section 2302(b)(2) states, in pertinent part:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —

. . . .

- (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of
 - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
 - (B) an evaluation of the character, loyalty, or suitability of such individual;
- (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
- (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

- (5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
- (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
- (7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;
- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of
 - (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences
 - (i) a violation of any law, rule, or regulation, or
 - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such

disclosures, of information which the employee or applicant reasonably believes evidences —

- (i) a violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of
 - (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
 - (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
 - (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
 - (D) for refusing to obey an order that would require the individual to violate a law;
- (10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;
- (11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

- (B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or
- (12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

As with other categories of cases, the employee has several options available. He or she may choose to: file an appeal with the MSPB; file a grievance if the matter has not been excluded from the NGP; or seek corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. § 1214(a)(1). See 5 U.S.C. § 7121(g). Once he or she chooses one of these procedures, he or she is precluded from raising the matter under the other procedures. 5 U.S.C. § 7121(g)(4) provides that the employee shall be considered to have exercised the option when he or she timely files a notice of appeal under the applicable appellate procedures, timely files a grievance in writing, or makes an allegation under $\S 1214(a)(1)$ – whichever occurs first. When the grievant elects to file a grievance, § 7121(b)(2)(A) authorizes an arbitrator: (1) to order a stay of the personnel action in a manner similar to the manner described in <u>5 U.S.C.</u> § 1221(c); or (2) to direct the agency to take a disciplinary action identified under § 1215(a)(3), if such an action is otherwise within the agency's authority to take. An arbitration award involving these matters is appealable to the Authority, unless the personnel action at issue is the type of action discussed in the "unacceptable performance and serious adverse actions" section above.

Grieving ULPs

As mentioned previously, an aggrieved party also may raise an alleged ULP under the NGP. However, under § 7116(d) of the Statute, the aggrieved party (which could be an employee, agency, or union) may not raise the issue under both the NGP and as a ULP charge filed with the FLRA's Office of the General Counsel. If the aggrieved party already has filed a ULP charge, then the party cannot subsequently file a grievance over the same issue(s), and an arbitrator is precluded from issuing an award regarding such a grievance. For the grievance to be precluded by an earlier-filed ULP charge, all of the following conditions must be met: (1) the issue that is the subject matter of the grievance must be the same as the issue that was the subject matter of the ULP charge; (2) that issue must have been earlier raised under the ULP procedures; and

(3) the selection of the ULP procedures must have been in the discretion of the aggrieved party. *E.g., U.S. Dep't of Transp., FAA*, 62 FLRA 54, 55 (2007). An issue is "raised" within the meaning of § 7116(d) at the time of the filing of the grievance or the ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits. *E.g., U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1112 (2010).

General Guidance for Parties During the Arbitration Hearing

Parties should consider the following general guidance when they bring a case to arbitration.

Get everything on the record

It is extremely important that you, as a party, ensure that the record you create during the arbitration hearing is as complete as you can make it. As §§ 2429.5 and 2425.4(c) of the Authority's Regulations make clear, the Authority generally will not consider anything a party argues that could have been, but was not, presented to the arbitrator during the hearing. *E.g.*, *U.S. Dep't of the Air Force*, 82nd Training Wing, Sheppard Air Force Base, Tex., 65 FLRA 137, 139 n.4 (2010) (Sheppard AFB). This includes factual assertions, exhibits, legal arguments, requests for a specific remedy, and arguments against remedies that another party requests. 5 C.F.R. § 2429.5.

• Remember, if you could have argued it before the arbitrator, but did not, then generally you may not argue it to the Authority in support of your exceptions or in opposition to another party's exceptions.

Explain your positions thoroughly during the arbitration hearing

It is also very important that you explain your position on all the issues during the arbitration hearing.

Do not stipulate to an issue unless you are certain about it. Once you are on the record as stipulating, you and the arbitrator are bound by the stipulation. The Authority will not find that the arbitrator exceeded his or her authority by addressing any issue that is necessary to decide a stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *See DOT*, 64 FLRA at 613 (citation omitted). However, also be aware that, in the absence of a stipulated issue, an arbitrator's formulation of the issue(s) is accorded substantial deference. *E.g.*, *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

• Remember, if you stipulate to the issue, then the arbitrator is limited to that issue along with any issues that are necessary to decide, or necessarily arise from, the stipulated issue. *E.g.*, *U.S. DHS*, *U.S. Customs* & *Border Prot.*, <u>64 FLRA 916</u>, 919-20 (2010).

Fully explain your position on any possible remedies

Similarly, make sure to articulate all potentially appropriate remedies to the arbitrator during the hearing. Be clear about what you want and what you disagree with. For example, if you believe a proposed remedy exceeds the arbitrator's authority or is contrary to law, then state this on the record. Explain your position clearly and thoroughly. Doing so clarifies your position for the arbitrator. Additionally, if the arbitrator grants a requested remedy, and you wish to challenge it on exceptions to the Authority, then you will have preserved your ability to do so by first raising your challenge before the arbitrator. *E.g.*, *AFGE*, *Local* 3937, 64 FLRA 1113, 1114, recons. *denied*, 65 FLRA 21 (2010).

• Remember, fully explain the remedies you seek during the hearing and fully state your position on any remedies proposed by the other party.

Prepare for the arbitration hearing as thoroughly as you can

Be ready to: state your position to the arbitrator; provide evidence (oral and documentary), legal analysis, and supporting citations; stipulate when appropriate; make objections as necessary; and speak to the types of remedies you want or do not want. Be familiar with the facts of your case and with what your witnesses will say. Anticipate what you think the opposing party will argue so you are prepared to address those issues. If you anticipate that legal issues will arise during the proceedings, then research those issues, including remedial issues such as the requirements for backpay under the Back Pay Act. Get organized – have a checklist of exhibits you want to enter into evidence and important points you want to make. Determine ahead of time the remedies you think are or are not appropriate, and be ready to present your best arguments in support of your position. Being thoroughly prepared helps you present your case in the most organized and convincing manner possible. This maximizes your opportunity to achieve a positive result.

• Remember, the more time you spend preparing for the arbitration hearing beforehand, the better and more convincing a case you will be able to present.

AUTHORITY REVIEW OF ARBITRATION AWARDS

In the Federal sector, review of arbitration awards, in most cases, is accomplished by filing exceptions to the award with the FLRA under § 7122 of the Statute. This is unlike the private sector, where arbitration awards are subject to direct judicial review. This section of the Guide discusses the filing of exceptions and the scope of Authority review of arbitration awards once exceptions are filed.

Filing Exceptions and Oppositions

Who May File Exceptions

Under § 7122(a) of the Statute and § 2425.2(a) of the Authority's Regulations, either "party" to an arbitration may file with the Authority exceptions to an arbitration award. 5 C.F.R. § 2425.2(a). The Authority's Regulations define "party" to include any person who participated as a party in a matter where an arbitration award was issued. 5 C.F.R. § 2421.11(b)(3)(ii). This means that only the agency and the union are entitled to file exceptions because they are the only parties to the arbitration proceeding. Thus, a grievant generally cannot file exceptions to an arbitration award unless authorized by the union to do so. Compare AFGE, Local 3495, 60 FLRA 509, 509 n.1 (2004) (union authorized grievant), with U.S. Dep't of the Treasury, U.S. Customs Serv., 40 FLRA 1254, 1255 (1991) (union did not authorize grievant). In addition, as discussed earlier in this Guide, an award relating to a §§ 4303 and 7512 matter is subject to review by the U.S. Court of Appeals for the Federal Circuit as if the award were a decision of the MSPB, and similar awards under personnel systems other than the ordinary civil service system are reviewable under whatever standards and procedures apply to those personnel systems.

Time Limits for Filing Exceptions

Under § 7122(b) of the Statute and § 2425.2(b) of the Authority's Regulations, parties have 30 days to file exceptions, beginning after the date of service of the award. The 30-day filing period is significant because it is jurisdictional: The Authority may not waive or extend it, and must dismiss untimely filed exceptions. 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b). E.g., U.S. Dep't of Commerce, PTO, Arlington, Va., 60 FLRA 869, 877 (2005) (PTO Arlington).

To determine the date of "service" of the arbitration award for these purposes, it is first necessary to determine whether the parties have reached an agreement as to what is an appropriate method of service of the award. See <u>5 C.F.R. § 2425.2(c)</u>. If the parties have reached such an agreement, then that agreement controls; if they have not reached such an agreement, then the arbitrator may use any commonly used method to serve the award, and the arbitrator's selected method controls. *Id.*

Consider the following principles in determining the date of service of the award:

- If the award is served by regular U.S. mail, then the date of service is the postmark date or, if there is no legible postmark, the date of the award. <u>5 C.F.R.</u> § 2425.2(c)(1).
- If the award is served by commercial delivery such as Federal Express or UPS then the date of service is the date on which the award was deposited with the commercial delivery service, or, if that date is not indicated, the date of the award. <u>5 C.F.R. § 2425.2(c)(2)</u>.
- If the award is served by e-mail or fax, then the date of service is the date of transmission. <u>5 C.F.R. § 2425.2(c)(3)</u>. *See, e.g., NTEU, Chapter 164*, <u>65 FLRA 901</u>, 903 (2011).
- If the award is served by personal delivery, then the date of service is the date on which the award is received. <u>5 C.F.R.</u> § 2425.2(c)(4).
- If the award is served by more than one method, then, generally, the first method is controlling. See <u>5 C.F.R.</u> § 2425.2(c)(<u>5</u>).

Consider the following principles in determining the due date for your exceptions to the award. Once you have determined the date of service based on the principles stated above, then count 30 calendar days (including weekends and holidays) beginning on the day <u>after</u>, not the day of, the date of service. See <u>5 C.F.R. § 2425.2(b)</u>. See also, e.g., NTEU, Chapter 164, <u>65 FLRA at 903</u>. For example, if the award is served on May 1, then May 2 is counted as day 1, and May 31 is day 30. However, if day 30 is a Saturday, Sunday, or Federal legal holiday, then the exceptions are not due until 5 p.m. Eastern Standard Time (E.S.T.) on the next day that is not a Saturday, Sunday, or Federal legal holiday. See <u>5 C.F.R. §§ 2429.21(a)</u> & <u>2429.24(a)</u>. See, e.g., NTEU, Chapter 164, 65 FLRA at 903.

Once you have calculated that date, you must consider the method by which the award was served on you. If the award was appropriately (i.e., consistently with any agreement of the parties) served on you by e-mail, fax, or personal delivery, then your exceptions must be filed by 5 p.m. E.S.T. on the date that you have calculated above. See 5 C.F.R. §§ 2425.2(c)(3)-(4) & 2429.24(a). However, if the award was served on you by regular mail or commercial delivery, then add 5 days to the date that you have calculated above. See 5 C.F.R. § 2429.22. See also 5 C.F.R. § 2425.2(c)(1)-(2). If the resulting date is not a Saturday, Sunday, or Federal legal holiday, then that date is your due date for filing exceptions; by contrast, if the resulting date is a Saturday, Sunday, or Federal legal holiday, then your exceptions are not due until 5 p.m. E.S.T. on the next

day that is not a Saturday, Sunday, or Federal legal holiday. *See* <u>5 C.F.R. §§ 2429.21(a)</u> & 2429.24(a).

Also, there is a special rule that applies if you were served with the award by more than one method in the same day. Specifically, if the award was served by mail or commercial delivery, and on the same day, it was also served by e-mail, fax, or personal delivery, then you will <u>not</u> receive an additional 5 days to file your exceptions – even if the award was postmarked or deposited with the commercial delivery service before the e-mail or fax was transmitted. *See* 5 C.F.R. § 2425.2(c)(5).

Additional Requirements for Filing Exceptions

In addition, exceptions to an arbitration award must comply with, and parties should consult, the requirements set forth in:

- <u>5 C.F.R. § 2429.24</u> (must submit all filings to <u>Authority's Office of Case Intake and Publication</u> by personal delivery, certified mail, first class mail, or commercial delivery);
- <u>5 C.F.R.</u> § <u>2429.25</u> (must submit one signed original plus four copies of anything filed);
- <u>5 C.F.R.</u> § <u>2429.27</u> (must serve all counsel of record and submit signed statement of service); and
- <u>5 C.F.R.</u> § <u>2429.29</u> (must submit table of contents if document exceeds 10 double-spaced pages).

Examples of How to Calculate the Due Date for Exceptions

The following worksheet and examples are intended to provide parties with guidance as to how the Authority determines whether exceptions have been timely filed:

Date of Service of Award: ______ + 30 Days (5 C.F.R. §§ 2425.2, 2429.21 & 2429.22) = $\frac{\text{date (day of week)}}{\text{date (day of week)}}$. But, if weekend or holiday, then advance to next workday = $\frac{\text{date (day of week)}}{\text{days (5 C.F.R. §§ 2429.21(a))}}$. If service by mail or commercial delivery, then + $\frac{5 \text{ days}}{\text{days (5 C.F.R. §§ 2425.2 & 2429.22)}}$ = $\frac{\text{date (day of week)}}{\text{date (day of week)}}$. But, if weekend or holiday, then advance to next workday = $\frac{\text{date (day of week)}}{\text{date (day of week)}}$. (5 C.F.R. § 2429.21(a)).

The Arbitrator serves his award on the parties by an **e-mail** transmitted to the parties on November 1. The Union files exceptions on December 2. As set forth below, the exceptions are due on December 1. Accordingly, the exceptions are untimely filed.

November							December						
Su	Мо	Tu	We	Th	Fr	Sa	Su	Мо	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6				1	2	3	4
7	8	9	10	<u>11</u>	12	13	5	6	7	8	9	10	11
14	15	16	17	18	19	20	12	13	14	15	16	17	18
21	22	23	24	<u>25</u>	26	27	19	20	21	22	23	<u>24</u>	25
28	29	30					26	27	28	29	30	<u>31</u>	

<u>11</u> = holiday

The Arbitrator serves his award on the parties by **U.S. mail** on October 12. The Union files exceptions on November 16. As set forth below, the exceptions are due on November 17. Accordingly, the exceptions are timely filed.

October	November						
Su Mo Tu We Th Fr Sa	Su Mo Tu We Th Fr Sa						
1 2	1 2 3 4 5 6						
3 4 5 6 7 8 9	7 8 9 10 <u>11</u> 12 13						
10 <u>11</u> 12 13 14 15 16	14 15 16 17 18 19 20						
17 18 19 20 21 22 23	21 22 23 24 25 26 27						
24 25 26 27 28 29 30	28 29 30						
31							

11 = holiday

Date of Service of Award: October 12 + 30 Days (5 C.F.R. §§ 2425.2, 2429.21 & 2429.22) =

November 11 (Thursday/Holiday - Veterans' Day). But, if weekend or holiday, then

November 12. (5 C.F.R. § 2429.21(a)). If service by mail or commercial delivery, then + 5 days

(5 C.F.R. §§ 2425.2 & 2429.22) = November 17 (Wednesday). But, if weekend or holiday, then

. (5 C.F.R. §§ 2429.21(a)).

The Arbitrator serves his award by an **e-mail** transmitted to the parties on October 12. The Union files exceptions on November 10. As set forth below, the exceptions are due on November 12. Accordingly, the exceptions are timely filed.

October		November						
Su Mo Tu We Th	Fr Sa Su Mo	Tu We Th Fr Sa						
	1 2 1	2 3 4 5 6						
3 4 5 6 7	8 9 7 8	9 10 <u>11</u> 12 13						
10 <u>11</u> 12 13 14	15 16 14 15	16 17 18 19 20						
17 18 19 20 21	22 23 21 22	23 24 25 26 27						
24 25 26 27 28	29 30 28 29	30						
31								

11 = holiday

Date of Service of Award: October 12 + 30 Days (5 C.F.R. §§ 2425.2, 2429.21 & 2429.22) =

November 11 (Thursday/Holiday – Veterans' Day). But, if weekend or holiday, then

November 12. (5 C.F.R. § 2429.21(a)). If service by mail or commercial delivery, then + 5 days

(5 C.F.R. §§ 2425.2 & 2429.22) = (). But, if weekend or holiday, then ______.

(5 C.F.R. §§ 2429.21(a)).

The Arbitrator serves his award on the parties by **U.S. mail** on November 19. The Union files exceptions on December 28. As set forth below, the exceptions are due on December 27. Accordingly, the exceptions are untimely filed.

November							December						
Su	Мо	Tu	We	Th	Fr	Sa	Su	Мо	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6				1	2	3	4
7	8	9	10	<u>11</u>	12	13	5	6	7	8	9	10	11
14	15	16	17	18	19	20	12	13	14	15	16	17	18
21	22	23	24	<u>25</u>	26	27	19	20	21	22	23	<u>24</u>	25
28	29	30					26	27	28	29	30	<u>31</u>	

11 = holiday

Date of Service of Award: November 19 + 30 Days (5 C.F.R. §§ 2425.2, 2429.21) =

<u>December 19</u> (Sunday). But, if weekend or holiday, then <u>December 20</u>. (5 C.F.R. § 2429.21(a)).

If service by mail or commercial delivery, then + 5 days (5 C.F.R. §§ 2425.2 & 2429.22) =

December 25 (Saturday/Holiday - Christmas). But, if weekend or holiday, then

December 27. (5 C.F.R. § 2429.21(a)).

Content of Exceptions

The Authority provides <u>optional forms</u> for filing exceptions, which can be found at <u>www.flra.gov</u>. In addition to the previously discussed procedural requirements that an excepting party must meet (e.g., providing a statement of service), exceptions must contain certain information and documents. *See generally* <u>5 C.F.R. § 2425.4</u>. Specifically, exceptions must be dated, self-contained documents that set forth in full:

- A statement of the grounds on which review is requested (the grounds are discussed later in this Guide);
- Arguments in support of the stated grounds, including specific references to the record, citations of authorities, and any other relevant documentation;
- Legible copies of any documents referenced in the arguments, with the exception
 of documents that are readily accessible to the Authority (such as Authority
 decisions, decisions of Federal courts, and current provisions of the United States
 Code and the Code of Federal Regulations);
- A statement regarding whether requesting expedited, abbreviated decision under § 2425.7 (which are described further below), and, if so, arguments in support of such request;
- A legible copy of the award; and
- The arbitrator's name, mailing address, and, if available and authorized for use by the arbitrator, the arbitrator's e-mail address or facsimile number.

An excepting party generally may not raise issues before the Authority if the party could have raised those issues before the Arbitrator but failed to do so. *E.g.*, *Sheppard AFB*, 65 FLRA at 139 n.4. This includes any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy if the party reasonably should have known to raise these matters before the arbitrator. *See* 5 C.F.R. §§ 2425.4(c) & 2429.5. In addition, an excepting party's failure to state a recognized ground for finding an arbitration award deficient, or to provide support for a claim that an additional ground should be recognized, may result in dismissal or denial of the exception. *See* 5 C.F.R. § 2425.6(e). *See*, *e.g.*, *U.S. Dep't of Veterans Affairs, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011). (As noted previously, the recognized grounds for review are discussed later in this Guide.)

Oppositions

Any party to arbitration may file an opposition to exceptions within 30 days after the date on which the exceptions are served on the opposing party. For additional rules regarding the filing date, *see*:

- <u>5 C.F.R.</u> § <u>2429.21</u> (if the last day of the filing period is a Saturday, Sunday, or Federal legal holiday, then due date is the next day that is not a Saturday, Sunday, or Federal legal holiday);
- <u>5 C.F.R.</u> § <u>2429.22</u> (five additional days to file if exceptions served by mail or commercial delivery); and
- <u>5 C.F.R. § 2425.8</u> (time limit tolled if parties have agreed to use the Authority's <u>Collaboration and Alternative Dispute Resolution</u> (CADR) Program and time limit for filing opposition has not expired).

In addition to the <u>optional forms</u> for filing exceptions, the Authority provides <u>optional forms</u> for filing oppositions, which also can be found at <u>www.flra.gov</u>. An opposition should address any arguments in the exceptions that the opposing party is disputing. If an excepting party has raised a matter that it could have raised, but did not raise, before the arbitrator, then the opposing party should also address that. In addition, an opposing party should provide copies of any documents on which the opposing party relies, unless those documents were already provided with the exceptions. Further, if the excepting party has requested an expedited, abbreviated decision under § <u>2425.7</u> (which are described further below), then the opposing party should state whether it supports or opposes such a decision and provide supporting arguments. *See generally* <u>5 C.F.R.</u> § <u>2425.5</u>.

Requests for Expedited, Abbreviated Decisions

In arbitration cases that do not involve ULPs, the excepting party may request that the Authority provide an expedited, abbreviated decision. The Authority will consider various factors to determine whether to exercise its discretion to grant such a request, including, but not limited to: whether the opposing party objects to the request and the reasons for its objections; the complexity of the case; the potential for precedential value; and the similarity to other, fully detailed decisions involving the same or similar issue. Even absent a request by the excepting party, the Authority may issue expedited, abbreviated decisions in appropriate cases. *See generally* <u>5 C.F.R.</u> § 2425.7. For an example of an expedited, abbreviated decision, *see U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, N.Y. Dist., N.Y.C., N.Y.*, <u>65 FLRA 623</u> (2011).

The Authority encourages the parties to continue or to consider resolution of the grievance, and parties may voluntarily request assistance from the Authority's CADR. For further details, see <u>5 C.F.R.</u> § <u>2425.8</u>. Finally, in appropriate cases, the Authority may take various measures to clarify a record or a dispute, including directing the parties to provide specific documentary evidence (such as the record); directing the parties to respond to requests for further information; meeting with the parties, either in person or via telephone or other electronic communications systems; or directing the parties to provide oral argument. See <u>5 C.F.R.</u> § <u>2425.9</u>.

Interlocutory Appeals

One area that generates a great deal of confusion among parties is determining whether an award is final, and when exceptions to an award are improperly before the Authority because they are "interlocutory." In this connection, § 2429.11 of the Authority's Regulations states, in pertinent part, that the Authority "ordinarily will not consider interlocutory appeals[,]" which reflects the judicial policy of discouraging fragmentary appeals of the same case. *AFGE, Local 12*, 61 FLRA 355, 357 (2005) (*Local 12*). Consistent with this policy, the Authority generally will not grant interlocutory review of arbitration awards. *See U.S. Dep't of Veterans Affairs, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 175 (2005) (*Veterans*). Instead, with an exception discussed further below, the Authority generally will dismiss an interlocutory appeal (without prejudice to the parties' ability to later file timely exceptions once the award becomes final). *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 568 (2010) (*Carswell*).

An exception is considered an interlocutory appeal when it is filed before the issuance of a final award. *See Cong. Research Emps. Ass'n, IFPTE, Local 75*, <u>64 FLRA 486</u>, 489 (2010) (*CREA*). An award is final, for purposes of filing exceptions, when it completely resolves all of the issues submitted to arbitration. *See U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, <u>64 FLRA 586</u>, 589 (2010) (*IRS*). *Note*: A final award, for purposes of filing exceptions, should not be confused with an award that is final and binding on the parties. As discussed further below, an award becomes final and binding – and thus compliance is required – when: (1) the period for filing exceptions expires; (2) the Authority issues a decision resolving exceptions; or (3) exceptions are withdrawn. *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, <u>48 FLRA 938</u>, 940 (1993) (*Customs*).

The mistaken belief that a final award is not yet final will not excuse a party's failure to file timely exceptions. *See, e.g., AFGE, Local* 12, <u>61 FLRA 628</u>, 630 (2006) (where award resolved all issues submitted to arbitration, and arbitrator later issued letter that denied reconsideration and did not modify award, time period for filing

exceptions began with service of award, not letter); *U.S. Dep't of Commerce, Patent & Trademark Office*, 24 FLRA 835, 835-36 (1986) (when arbitrator issued final award, and later modified award in a way that did not give rise to the deficiencies alleged in the exceptions, exceptions were untimely because they were not filed within the requisite time period after service of the first award). Additionally, an arbitrator's characterization of an award does not, by itself, demonstrate whether or not the award is final. *See*, *e.g.*, *Local 12*, 61 FLRA at 357 (arbitrator's statements indicating his intention to issue a "final" award regarding certain issues did not indicate that he intended the award to be a complete resolution of all issues presented); *AFGE*, *Local 1760*, 37 FLRA 1193, 1200 (1990) (although arbitrator characterized his award as an "Interim Award," Authority found "it was clearly final").

Where an arbitrator or the parties identify multiple issues underlying a grievance, an arbitrator may bifurcate their resolution. *See, e.g., Carswell,* 64 FLRA at 567; *U.S. Dep't of the Interior, Bureau of Reclamation,* 59 FLRA 686, 687 (2004) (*Reclamation*). The parties' agreement to conduct a separate hearing on a threshold issue does not convert an arbitrator's ruling on that threshold issue into a final award to which exceptions can be filed, unless that threshold issue is the only issue before the arbitrator. *See, e.g., Local* 12, 61 FLRA at 357; *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*); *Dep't of the Army, Oakland Army Base*, 16 FLRA 829, 830 (1984) (*Army*). Thus, the Authority considers exceptions to an interim award to be interlocutory – even where an arbitrator has completely resolved a discrete legal question – if the award does not constitute a complete resolution of all issues submitted to arbitration. *See Carswell*, 64 FLRA at 568; *Local* 12, 61 FLRA at 357; *HHS*, 57 FLRA at 926.

An award that disposes of all submitted issues is final even if the arbitrator did not reach the merits of each issue. *AFGE, Local 1242, Council of Prison Locals 33*, <u>62 FLRA 477</u>, 479 (2008). Thus, an arbitrator's finding that a grievance is not arbitrable may constitute a final award for purposes of filing exceptions. *See id.* Similarly, where the only issue submitted to arbitration is the question of arbitrability, exceptions to such an award are not interlocutory. *See U.S. Dep't of the Navy, Norfolk Naval Shipyard*, <u>63 FLRA 144</u>, 144 n.* (2009); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Tinker Air Force Base, Okla.*, <u>53 FLRA 460</u>, 462 n.1 (1997). However, an arbitrability ruling is not a final award, for purposes of filing exceptions, when a ruling on the merits is still pending before the same arbitrator. *See U.S. Dep't of Transp., FAA*, <u>62 FLRA 344</u>, 347 (2008); *Army*, 16 FLRA at 830.

An award that postpones the determination of a submitted issue does not constitute a final award. *U.S. Dep't of Labor, Bureau of Labor Statistics*, <u>65 FLRA 651</u>, 653-54 (2011). Consequently, where an arbitrator possesses remedial authority but has not made a final disposition as to a remedy, an award is not considered final, and exceptions to such an award are considered interlocutory. *See IRS*, <u>64 FLRA at 589</u>.

Further, where an arbitrator declines to order a remedy, directing instead that the parties attempt to develop an appropriate remedy, the award does not constitute a final decision to which exceptions may be filed. *See, e.g., U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231-32 (2000) (*Wapato*); *U.S. Gov't Printing Office, Wash., D.C.*, 53 FLRA 17, 18 (1997); *Navy Pub. Works Ctr., San Diego, Cal.*, 27 FLRA 407, 408 (1987); *SSA*, 21 FLRA 22, 23 (1986).

For example, where an arbitrator did not make a final disposition as to a monetary remedy, but directed the parties to determine whether a monetary remedy would be appropriate, the award was not final. *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2002). In addition, where an arbitrator found that an agency violated a CBA and, without determining whether any employees were entitled to overtime, directed the parties to review the affected employees' work schedules to make that determination, the award was not final. *Phila. Naval Shipyard*, 33 FLRA 868, 868-69 (1989). Similarly, an award was not final where the arbitrator found the record inadequate or insufficient to determine and effect an appropriate remedy. *IRS*, 64 FLRA at 589-90; *U.S. DOD, Army & Air Force Exch. Serv.*, 38 FLRA 587, 587-88 (1990).

It is not uncommon for an arbitrator to retain jurisdiction for a period of time to resolve questions or problems that might arise concerning the award, and retention for such purposes does not render an award interlocutory or extend the time limit for filing exceptions. Portsmouth Naval Shipyard, 15 FLRA 181, 182 (1984). Similarly, if an arbitrator orders a remedy and retains jurisdiction simply to assist the parties with the details of its implementation, then the award or exceptions are not interlocutory. See, e.g., CREA, 64 FLRA at 489-90; U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M., <u>62 FLRA 121</u>, 123 (2007) (Kirtland) (award is final where arbitrator retained jurisdiction only to assist parties in computing amount of backpay or fringe benefits); OPM, 61 FLRA 358, 361 (2005) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined); SSA, Balt., Md., 60 FLRA 32, 33 (2004) (SSA) (award is final where arbitrator retains jurisdiction solely to assist parties in determining costs owed to the union); U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, 55 FLRA 152, 158 (1999) (award is final where arbitrator retains jurisdiction to assist parties in determining backpay and interest). Such an award is final for purposes of filing exceptions because, while the award may leave room for further disputes about compliance, such an award does not indicate that the arbitrator or parties contemplate the introduction of some new measure of damages. See CREA, 64 FLRA at 489-90; Kirtland, 62 FLRA at 123. In other words, where jurisdiction is retained simply to assist the parties with implementing an awarded remedy, an arbitrator will have resolved all of the issues submitted to arbitration, which indicates that, for purposes of filing exceptions, the award is final. See, e.g., SSA, 60 FLRA at 33.

Nevertheless, where a party seeks clarification of an award from an arbitrator, and, in responding to such a clarification request, the arbitrator modifies the original award, the time limit for filing exceptions to the modified award begins upon service of that modified award on the excepting party. *See, e.g., U.S. Dep't of Labor, Wash., D.C.,* 59 FLRA 131, 132 (2003). However, the post-modification time limit for filing exceptions applies only to modifications of the award that give rise to the deficiencies alleged in the exceptions. *U.S. Customs Serv., Region I, Boston, Mass.,* 15 FLRA 816, 817 (1984).

Finally, retention of jurisdiction by an arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with a party's right to file exceptions to an underlying award. *E.g., USDA, Rural Dev., Wash., D.C.,* 60 FLRA 527, 528 n.2 (2004). In this regard, Congress intended to provide for recovery of attorney fees only after an arbitrator has awarded backpay. *See Phila. Naval Shipyard,* 32 FLRA 417, 420 (1988). Because determinations as to whether backpay is a legally authorized remedy cannot be made until an award becomes final and binding, parties are not required to request, and arbitrators are not required to decide requests for, attorney fees before an award becomes final and binding. *Id.* Although they are not required to do so, nothing in law or regulation precludes arbitrators from resolving attorney-fees requests as a part of an underlying award of backpay. In such circumstances, the Authority will resolve any exceptions to the underlying award before addressing attorney fees. *Customs,* 48 FLRA at 940 n.2.

In sum, in cases where an arbitrator retains jurisdiction, such that there is not yet a final award for purposes of filing exceptions, the arbitrator's award becomes a final one, to which non-interlocutory exceptions may be filed, once the arbitrator has completely resolved all of the issues submitted to arbitration. *See, e.g., U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004); HHS, 57 FLRA at 926; AFGE, Nat'l Council of EEOC Locals No. 216, 47 FLRA 525, 530-31 (1993).

The Authority has recognized an exception to the policy against interlocutory appeals. Specifically, the Authority has found that extraordinary circumstances warrant consideration of an interlocutory appeal where the appeal presents a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of a case. *Carswell*, <u>64 FLRA at 567</u>. Generally, the jurisdictional issues considered on interlocutory appeal are those that arise pursuant to statute. *See Veterans*, <u>61 FLRA at 175</u>. For example, in *United States Department of Labor*, <u>63 FLRA 216</u>, 217-18 (2009), the Authority modified an award after considering an interlocutory appeal that claimed that the arbitrator lacked jurisdiction to resolve a classification matter, pursuant to <u>5 U.S.C. § 7121(c)(5)</u>. By contrast, in *United States Department of the Treasury, Bureau of Engraving & Printing*, *W. Currency Facility, Fort Worth, Tex.*, <u>58 FLRA 745</u>, 746 (2003), the Authority dismissed an interlocutory appeal because the claimed jurisdictional defect arose solely from the parties' agreement.

A claimed jurisdictional defect must be plausible; the "mere assertion" of a controlling jurisdictional issue by a party is not enough to demonstrate that consideration of an interlocutory appeal is warranted. *Wapato*, <u>55 FLRA at 1232</u>. Moreover, where the favorable resolution of an excepting party's interlocutory appeal would not resolve the parties' dispute, interlocutory exceptions have been dismissed without consideration. *See Reclamation*, <u>59 FLRA at 688</u>.

Grounds for Review

Section 7122(a) of the Statute provides, in pertinent part:

If upon review [of exceptions to an arbitration award] the Authority finds that the award is deficient –

- (1) because it is contrary to any law, rule, or regulation; or
- (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

In other words, the Authority will review awards to determine whether they are contrary to law, rule, or regulation or whether they are deficient on other grounds similar to the grounds applied by Federal courts in private sector labor cases.

In addressing the grounds on which an arbitration award can be found deficient, it is important to recognize the context of the Authority's review. Although Congress specifically provided for Authority review of arbitration awards, Congress also made clear that the scope of that review is very limited. *See* H.R. REP. No. 95-1717, at 153 (1978) (conf. rep.), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2887) (Authority is authorized to review awards only "on very narrow grounds"). Thus, the Authority accords substantial deference to arbitrators and will set aside or modify an award only when an excepting party establishes that the award is deficient on one of the specific grounds set forth in § 7122(a) of the Statute. These grounds, which are also listed in 5 C.F.R. § 2425.6, are discussed below.

Under § 2425.6, an exception is "subject to dismissal or denial if: . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award." 5 C.F.R. § 2425.6(e)(1). In accord with § 2425.6, the Authority will not construe parties'

exceptions as raising grounds that the exceptions do not raise. *AFGE, Local 3955, Council of Prison Locals 33, 65* FLRA 887, 889 (2011) (Member Beck dissenting in part).

The recognized grounds for review are discussed below.

Contrary to Law or Regulation

Under § 7122(a)(1) of the Statute, the Authority will find an award deficient if the excepting party demonstrates that the award is contrary to law or regulation. See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Fla., 65 FLRA 908, 909-10 (2011). In reviewing questions of law raised by an excepting party, the Authority reviews the legal issue presented de novo – without deference to the arbitrator's legal findings regarding the law – but with deference to the arbitrator's underlying factual findings (unless those findings are shown to be "nonfacts," as discussed further below). E.g., AFGE, Local 1164, 66 FLRA 74, 77-78 (2011). As discussed earlier, an arbitrator in the Federal sector generally cannot ignore the application of law and regulation. In order to avoid having their awards found deficient, Federal-sector arbitrators frequently must consider provisions of law and regulation that govern the matter in dispute and ensure that their awards are consistent with those provisions. See, e.g., U.S. Dep't of the Treasury, IRS, 65 FLRA 369, 371-72 (2010) (Treasury, IRS) (award contrary to grade- and pay-retention regulations). Several bases for finding an award contrary to law or regulation are discussed below.

Grievance Precluded by Law

As <u>discussed earlier</u>, all matters covered by the broad statutory definition of "grievance" are within the coverage of a NGP, except for matters that are excluded by the parties' agreement or by law. Four different categories of legal exclusions from the NGP are discussed here.

Category 1 Ì Matters Excluded Under § 7121(c) of the Statute

<u>Section 7121(c)</u> of the Statute lists several types of matters that may not be raised under the NGP.

First, § 7121(c)(1) provides that grievances concerning claimed violations of 5 U.S.C. §§ 7321-7326 – commonly referred to as the "Hatch Act" – are barred from the NGP.

Second, § 7121(c)(2) provides that grievances concerning retirement, life insurance, or health insurance are barred from the NGP. *See, e.g., MSPB Prof'l Ass'n,* 61 FLRA 650, 652 (2006) (*MSPBPA*). For example, the Authority has found barred grievances involving sick leave "buy back" available to employees only upon

retirement, see U.S. Dep't of Transp., FAA, 59 FLRA 579, 581 (2004) (then-Member Pope dissenting), and involving creditable hours and retirement eligibility, see NATCA, MEBA, AFL-CIO, 51 FLRA 204, 208 (1995). However, the Authority has found grievable a grievance involving voluntary separation incentive pay, see MSPBPA, 61 FLRA at 652, and a grievance regarding an employee's status as an intermittent, rather than a part-time, employee, see Prof'l Airways Sys. Specialists, 57 FLRA 415, 416-17 (2001).

Third, § 7121(c)(3) provides that grievances concerning suspensions or removals relating to national-security matters under 5 U.S.C. § 7532 are barred from the NGP. *See AFGE, Local* 1013, 60 FLRA 712, 714 n.3 (2005).

Fourth, § 7121(c)(4) provides that grievances concerning any examination, certification, or appointment are barred from the NGP. The Authority has defined: (1) "examination" as the process by which an applicant's qualification for employment is determined before the applicant is considered as a candidate for appointment, see NFFE, Local 1636, 48 FLRA 511, 514 (1993); (2) "certification" as the process by which the Office of Personnel Management submits certificates of a list of eligibles from a register to appointing officials so that the eligibles may be considered for appointment, id.; and (3) "appointment" as referring to the action which takes place at the time an individual is initially hired into federal service, see NFFE, Local 2010, 55 FLRA 533, 534 (1999). Thus, these three terms apply to matters regarding an individual's initial entry into Federal service – not matters regarding an agency's hiring (or not hiring) of an individual who already is a federal employee. E.g., USDA, Rural Dev. Centralized Servicing Ctr., St. Louis, Mo., 57 FLRA 166, 168-69 (2001).

Finally, § 7121(c)(5) provides that grievances concerning the classification of any position which does not result in the reduction in grade or pay of an employee are barred from the NGP. The Authority has held that where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by a grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of § 7121(c)(5). E.g., U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C., 65 FLRA 1017, 1020 (2011). In addition, a grievance concerns classification within the meaning of § 7121(c)(5) if it contends that the grievant's permanent position warrants a change in its journeyman level or promotion potential. <u>Id.</u> In contrast, a grievance that alleges a right to be placed in a previously classified position does not concern classification. *Id.* Similarly, a grievance alleging that an agency failed to promote a grievant under a competitive procedure does not concern classification matters. *Id.* In addition, the Authority has held that where an arbitrator determines that a grievant is entitled to a career-ladder, temporary, or other noncompetitive promotion based on previously classified duties, the award does not concern classification. Id. Further, a grievance concerning a delay in receiving a careerladder promotion does not concern classification. *Id.* Please note, however, that even if a grievance does not involve classification, an award will be found contrary to

§ 7121(c)(5) if an arbitrator awards reclassification as a remedy. *See U.S. Dep't of HUD*, 65 FLRA 433, 435-36 (2011).

Category 2 Ì Certain Negotiability Issues

Negotiability issues under § 7117 of the Statute that have not previously been ruled on by the Authority may not be resolved under the NGP; § 7105(a)(2)(E) of the Statute requires that they be resolved exclusively by the Authority. A negotiability issue under § 7117 raises the question of whether a matter is nonnegotiable because it conflicts with any Federal law, government-wide regulation, or agency regulation for which there is a compelling need. Unless the negotiability issue raised before the arbitrator has already been ruled on by the Authority, the negotiability issue may not be resolved by the arbitrator, either in the guise of a grievance or in the resolution of a bargaining impasse. *E.g.*, *AFGE*, *AFL-CIO*, *Dep't of Educ*. *Council of AFGE Locals*, 42 FLRA 1351, 1353-55 (1991). However, when an arbitrator is presented with a grievance alleging a ULP, and resolution of that ULP necessitates a negotiability determination, the arbitrator is authorized to make that determination. *E.g.*, *NTEU*, 61 FLRA 729, 732-33 (2006).

Category 3 Ì Questions Regarding Bargaining-Unit Status

Arbitrators may not resolve questions concerning whether employees are included in a bargaining unit. *E.g., U.S. Small Bus. Admin.*, 32 FLRA 847, 852 (1988) (*SBA*), recons. granted as to other matters, 36 FLRA 155, 161 (1990). See also U.S. Dep't of Veterans Affairs, Med. Ctr., Coatesville, Pa., 56 FLRA 966, 969 (2000). As a consequence, an arbitrator may not address the merits of a grievance whenever a question has been raised regarding the grievant's bargaining-unit status. When the parties to a grievance are faced with such a question, they can place the grievance in abeyance pending the resolution of the employee's unit status. *Id.* However, the Authority has advised that there is no unit-status question when the Authority has already determined that the grievant or the grievant's position is in the unit and when, in making that determination, the Authority rejected the basis on which the agency contests the grievability of the grievance. *SBA*, 32 FLRA at 854. In these circumstances, an arbitrator would not be precluded from resolving the grievance.

Category 4 Ì Legal Authorities Outside the Statute

Legal authorities outside the Statute sometimes preclude grievances from being covered by the NGP. *See, e.g., AFGE, Local 1513,* <u>52 FLRA 717</u>, 721 (1996) (collective bargaining agreements may not contain provisions that would subject disputes over compliance with <u>Office of Management and Budget Circular A-76</u> to the negotiated grievance procedure); *AFGE, Local 2250,* <u>51 FLRA 52</u>, 54 (1995) (pursuant to <u>5 U.S.C.</u> <u>§ 5366</u>, termination of employee's grade and pay retention benefits is not grievable

under NGP). Moreover, pursuant to the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518, 526-34 (1988) (*Egan*), arbitrators may not review the merits of an agency's security-clearance determination, although the Authority has held that *Egan* does not prohibit grievances that raise issues that do necessitate a review of the security-clearance determination. *U.S. Info. Agency*, 32 FLRA 739, 744-46 (1988).

In addition to cases involving whether a grievance is precluded by law, the Authority resolves exceptions alleging that an arbitrator's resolution of a grievance on the merits is contrary to law. Some examples of the legal issues that the Authority addresses are discussed below.

Monetary Remedies - Sovereign Immunity

Arbitrators in the Federal sector are more constrained than arbitrators in the private sector with regard to their ability to award monetary remedies. In this connection, the doctrine of "sovereign immunity" provides that the United States is immune from suit except as it consents to be sued. *E.g., U.S. Dep't of Transp., FAA, Detroit, Mich.,* 64 FLRA 325, 328 (2009) (*FAA Detroit*). Thus, there is no right to damages against a U.S. government agency unless there is a statutory waiver of sovereign immunity. *Id.*

The Statute is not a waiver of sovereign immunity for money damages. <u>Id.</u> at 329. Thus, in order for an arbitrator to award money damages, he or she must have some basis in law for doing so. The most frequently used basis is the Back Pay Act. *See* <u>5 U.S.C.</u> § 7122(b) (citing <u>5 U.S.C.</u> § 5596).

The **Back Pay Act**

The Back Pay Act (BPA), <u>5 U.S.C.</u> § <u>5596</u>, provides for the recovery of both backpay and attorney fees. These two types of remedies are discussed separately below.

Backpay

Under the BPA, an arbitrator may award backpay when he or she finds: (1) an unjustified or unwarranted personnel action; and (2) that action directly resulted in the withdrawal of "pay, allowances, or differentials." *E.g., FAA Detroit*, <u>64 FLRA at 329</u>.

A violation of an applicable law, rule, regulation, or CBA provision is an unjustified or unwarranted personnel action. *E.g.*, *AFGE*, *Local* 1592, <u>64 FLRA 861</u>, 861-62 (2010). This includes governing agency regulations. *E.g.*, *U.S. Dep't of Transp.*, *FAA*, 64 FLRA 513, 515 (2010) (*FAA*).

As for whether the unjustified and unwarranted personnel action directly resulted in the withdrawal of "pay, allowances, or differentials," <u>5 U.S.C. § 5596</u>, the quoted term is defined as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation[.]" <u>5 C.F.R. § 550.803</u>. Any loss that does not meet this definition may not provide the basis for an award of backpay. *E.g., FAA Detroit*, <u>64 FLRA at 329</u>.

In addition, the arbitrator must find that the unjustified or unwarranted personnel action "directly resulted" in the reduction or withdrawal of those pay, allowances, or differentials – i.e., that but for the unjustified or unwarranted personnel action, the affected employee would not have suffered a reduction or withdrawal of pay, allowances, or differentials. *E.g.*, *U.S. Dep't of Transp.*, *FAA*, <u>64 FLRA 922</u>, 923 (2010).

Attorney Fees

Although various statutes – such as the Fair Labor Standards Act, <u>29 U.S.C.</u> § <u>216(b)</u>, and the Privacy Act, <u>5 U.S.C.</u> § <u>552a(g)(4)</u> – allow arbitrators to award such fees, most fee requests in Federal-sector arbitration are based on the BPA. The BPA independently authorizes arbitrators to award such fees under certain conditions (as discussed below). As such, the parties' CBA need not independently authorize an arbitrator to award fees, and the Authority has set aside awards requiring such CBA authorization. *E.g.*, *NAGE*, *Local R14-52*, <u>45 FLRA 830</u>, 833 (1992).

In order to award attorney fees, the arbitrator must award backpay under the BPA requirements discussed above. Also, the fee award must be reasonable and related to the personnel action, and the arbitrator must resolve the request for fees in accordance with the standards established under 5 U.S.C. § 7701(g), which pertains to MSPB awards of attorney fees. In resolving whether an award is consistent with those standards, the Authority considers decisions of the MSPB and the Federal courts, particularly the U.S. Court of Appeals for the Federal Circuit. *E.g.*, *U.S. Dep't of Veterans Affairs*, *Med. Ctr.*, *Detroit*, *Mich.*, 64 FLRA 794, 796 (2010).

In resolving a request for fees, arbitrators must set forth specific findings supporting their determination on each pertinent statutory requirement. *E.g.*, *U.S. Dep't of the Navy, Commander, Navy Region Haw.*, *Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, <u>64 FLRA 925</u>, 928 (2010) (*Navy Region Haw.*).

When exceptions are filed with the Authority and the arbitrator has not sufficiently explained the determinations, the Authority will examine the record to determine whether it permits the Authority to resolve whether the award is deficient. *See* <u>id.</u> If so, then the Authority will modify the award or deny the exception, as

appropriate. <u>Id.</u> If not, then the Authority will remand the award for further proceedings. <u>Id.</u>

Section 7701(g) prescribes that, for an employee to be eligible for an award of attorney fees, the employee must be the "prevailing party," which means, generally, that the grievant must have obtained an enforceable judgment that benefited him or her at the time of the judgment. *See, e.g., AFGE, Local 1592*, 65 FLRA 921, 922 (2011). This determination does not entail assessing the degree of the grievant's success in arbitration. *See AFGE, Local 987*, 64 FLRA 884, 887 (2010) ("[A]n employee who receives a mitigated penalty is considered to have received significant relief and is, therefore, a prevailing party.").

Section 7701(g)(2) governs the award of attorney fees in employment-discrimination cases and provides for the award of fees in accordance with 42 U.S.C. § 2000e-5(k). Section 7701(g)(2) applies to cases of discrimination on the basis of race, color, religion, sex, national origin, age, or handicapping condition, as well as in cases of reprisal for the exercise of rights under Title VII of the Civil Rights Act of 1964. *E.g., FDIC, Chi. Region*, 45 FLRA 437, 453-55 (1992). Where a grievant prevails in a grievance involving one of these grounds, the grievant is normally entitled to an award of attorney fees; thus, an arbitrator merely needs to find a violation on one of these grounds, and further discussion of fees is necessary only when the arbitrator determines that "special circumstances" within the meaning of § 2000e-5(k) would render an award of fees unjust. *Id.* at 455-56.

In non-employment-discrimination cases, requests for an award of fees are governed by $\S 7701(g)(1)$, which requires that: (1) the fees were incurred by the employee; (2) an award of fees is warranted in the interest of justice; and (3) the amount of fees awarded is reasonable. These requirements are discussed separately below.

Fees Incurred

Attorney fees are incurred when an attorney-client relationship exists and the attorney has rendered legal services on behalf of the grievant. *See, e.g., Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 233 (2000) (Chairman Wasserman dissenting as to other matters). In many arbitration proceedings, the union provides the attorney who represents the grievant. Such an arrangement satisfies the necessary attorney-client relationship and the requirement that the fees be incurred by the grievant, even though the union actually incurs the fees and the attorney represents the grievant on behalf of the union. *See <u>id.</u>*

Fees in the Interest of Justice

In addressing the requirement that fees be warranted in the interest of justice, parties and arbitrators should consider *Allen v. United States Postal Service*, <u>2 M.S.P.R.</u> <u>420</u> (1980) (*Allen*), and decisions applying the criteria set forth in *Allen*, which are discussed further below. In addition to the five *Allen* criteria, the Authority has stated that an award of attorney fees is warranted in the interest of justice when there is either a service rendered to the Federal workforce or there is a benefit to the public derived from maintaining the action. *AFGE*, *Local 1148*, <u>65 FLRA 402</u>, 404 n.* (2010) (*Local 1148*) (citing *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, <u>39 FLRA 1215</u>, 1223 (1991)).

Most requests for attorney fees in arbitration involve the *Allen* factors. In *Allen*, the MSPB identified five broad categories of cases in which an award of fees would be in the interest of justice. These categories are not exhaustive, but merely illustrative. *Allen*, <u>2 M.S.P.R. at 435</u>.

Allen category 1 pertains to cases where the agency engaged in a prohibited personnel practice under <u>5 U.S.C. § 2302</u>. See <u>id.</u> As discussed previously, such prohibited practices include, for example, disciplinary action based on retaliation for an employee's previous filing of a grievance, an appeal of an adverse action to the MSPB, or a complaint with the EEOC. See <u>5 U.S.C. § 2302(b)(9)</u>.

Allen category 2 pertains to cases where the agency engaged in action that was clearly without merit or was wholly unfounded, or the employee was substantially innocent of the charges brought by the agency. See Allen, 2 M.S.P.R. at 434. This category actually involves two distinct issues that are assessed independently: (1) whether the agency's action was clearly without merit or wholly unfounded; and (2) whether the employee is substantially innocent of the charges brought by the agency. E.g., Navy Region Haw., 64 FLRA at 929.

The inquiry into whether the agency's action is clearly without merit or wholly unfounded under *Allen* category 2 involves an assessment of competing interests, specifically the degree of fault on the employee's part and the existence of any reasonable basis for the agency's actions. *Id.* Thus, an arbitrator must evaluate the extent to which he or she found, in the merits award, that: (1) the employee prevailed; or (2) the agency's action was without merit. In this regard, the Authority has found this factor satisfied when an agency presents little or no evidence to support its actions, or where the agency charge is based on incredible or unspecific evidence that was fully countered by the grievant/appellant. *Id.*

The "substantial innocence" standard under *Allen* category 2 is satisfied when the employee is without fault and was needlessly subjected to attorney fees to vindicate

himself or herself. *E.g.*, *AFGE*, *Local* 1061, 63 FLRA 317, 319 (2009) (*Local* 1061). Even where the employee is not fully exonerated, the employee is "substantially innocent" when the arbitrator concludes that the employee is innocent of the primary or major charges or of the more important and greater part of the charges. *Id.* In this regard, the arbitrator must objectively assess the success of the employee's challenge to the agency's disciplinary action. *Id.* When the employee prevails on substantive rather than technical grounds on the major charges, he or she is substantially innocent as a matter of law unless the employee deliberately withheld exculpating information during the investigation. *E.g.*, *AFGE*, *Local* 3105, 63 FLRA 128, 130-31 (2009).

Allen category 3 pertains to cases where the agency initiated the action against the employee in bad faith (including situations where the agency's action was brought to harass the employee or to exert improper pressure on the employee to act in certain ways). See, e.g., Fraternal Order of Police, Pentagon Police Labor Comm., 65 FLRA 781, 782 (2011).

Allen category 4 pertains to cases where the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee. See Allen, 2 M.S.P.R. at 435. The Authority has noted that the MSPB has found a gross procedural error when an agency, while conducting a reduction-in-force (RIF), failed to give an employee the required specific RIF notice, did not establish required competitive areas, competitive levels, and retention lists, did not consider or honor the employee's bump and retreat rights, and did not accord him priority placement required for preference-eligible employees. AFGE, Council 220, 61 FLRA 582, 586 (2006) (citing Thomas v. U.S. Postal Serv., 77 M.S.P.R. 502 (1998)).

Allen category 5 pertains to cases where the agency knew or should have known that it would not prevail on the merits when it brought the action. See, e.g., U.S. Dep't of the Army, Med. Activity (MEDDAC), Fort Drum, N.Y., 65 FLRA 575, 578 (2011). Making the determination requires the arbitrator to evaluate the reasonableness of the agency's actions and positions in light of the information available to it at the time of the disputed action. See <u>id.</u> An arbitrator's assessment of whether the agency knew or should have known that it would not prevail is primarily factual. See <u>id.</u> at 222. When an arbitrator's factual findings support the arbitrator's legal conclusion, the Authority denies exceptions to the arbitrator's determination. <u>Id.</u>

In disciplinary actions, the penalty imposed by the agency is an aspect of the merits of an agency's case, and fees are warranted in the interest of justice when the agency knew or should have known that it would not prevail on the merits when it disciplined the employee. *E.g. AFGE, Local 1923*, 66 FLRA 22, 24 (2011) (Member Beck dissenting). When the penalty is mitigated based on evidence before, or readily available to, the agency at the time of the disciplinary action, and no new information was presented at the merits hearing that was not available to the agency at the time of

the discipline, such mitigation establishes that the agency knew or should have known that its choice of penalty would not be sustained. <u>Id.</u> In that situation, *Allen* criterion 5 is satisfied as a matter of law. <u>Id.</u>

Amount of Fees is Reasonable

Both § 7701(g)(1) and the BPA require that the amount of attorney fees awarded be reasonable. *U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement,* 64 FLRA 1003, 1006 (2010). The computation of a reasonable attorney fee award begins with an analysis of the attorney's customary billing rate and the number of hours reasonably devoted to the case. *Id.* at 1007. For attorneys in private practice, there is a presumption that an agreed-upon fee between client and counsel is the maximum reasonable fee which may be awarded absent clear evidence to the contrary. *E.g., id.* However, the presumption is rebuttable by convincing evidence that the counsel's customary rate for similar work is higher and either that the agreed-upon rate was not based on marketplace considerations or was provided only because of the client's inability to pay. *Id.* In addition, the Authority has upheld the application of fee agreements that set forth a higher rate for favorable decisions, where the higher rate is consistent with prevailing market rates. *See U.S. Dep't of the Army, U.S. Army Dental Activity, Fort Bragg, N.C.*, 65 FLRA 54, 57-58 (2010) (*Fort Bragg*).

The standard of review as to the reasonableness of the number of hours awarded is deferential. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, <u>65 FLRA 603</u>, 606 (2011). The Authority has indicated that the arbitrator is in the best position to determine whether the number of hours expended was reasonable. *See <u>id.</u>* The Authority will not second-guess the arbitrator's evaluation absent a specific showing that his or her evaluation was incorrect. *See <u>id.</u>*

In the fee request, the attorney should provide any fee agreement and evidence that the charged or requested rate is the customary rate that the attorney charges for performing similar work. In addition, the attorney should show, and the arbitrator should confirm, that this rate falls within the range of rates charged by other attorneys of similar experience for similar work in the same community.

In the case of union-employed attorneys who do not have a customary billing rate, those attorneys must submit evidence that the requested hourly rate is comparable to the prevailing billing rate in the community for similar services by private attorneys of reasonably comparable skill, experience, and reputation. *E.g.*, *U.S. DOD*, *Def. Distrib. Region E., New Cumberland, Pa.*, <u>51 FLRA 155</u>, 162-63 (1995). The relevant community is the community in which the attorney ordinarily practices, <u>not</u> the community in which the arbitration was held. *E.g.*, *U.S. Dep't of the Navy, U.S. Naval Acad.*, *Nonappropriated Fund Program Div.*, <u>63 FLRA 100</u>, 103 (2009). For attorneys based in the Washington, D.C. area, the Authority has applied the *Laffey* matrix, which sets forth the method for

determining the rate based on qualifications and years of experience. <u>Id. at 101 n.3, 103</u>. In addition, the Authority has approved arbitrators' applications of an "adjusted" <u>Laffey</u> matrix. *E.g.*, Fort Bragg, 65 FLRA at 58. The normal <u>Laffey</u> matrix calculates the matrix rate for each year by adding the change in the overall cost of living as reflected in the United States consumer price index (CPI) for the Washington, D.C. area for the prior year and rounding that rate to the nearest multiple of \$5; the adjusted <u>Laffey</u> matrix calculates the matrix rates for each year using the legal-services component of the CPI, rather than the general CPI. <u>Id. at 55 n.4</u>.

In determining the reasonableness of fees under § 7701(g)(1), it is necessary to consider whether the fee award should be reduced because the relief ordered was significantly less than what was sought. *E.g.*, *NFFE*, *Forest Serv*. *Council*, *Local 1771*, 56 FLRA 737, 742 (2000). In addition, when there is more than one claim for relief and those claims involve a common core of facts or are based on related legal theories, the determination of a reasonable amount should reflect the significance of the overall relief obtained in relation to the number of hours reasonably expended. *Id.*

In addition, an award of attorney fees may include reimbursement of incidental and necessary expenses incurred in furnishing effective and competent representation. *See USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, <u>53 FLRA</u> <u>1688</u>, 1693 (1998). Reimbursement is appropriate for reasonable and necessary out-of-pocket expenses that are routinely paid by counsel and billed to the client for services rendered, and that are not: (1) covered by the hourly rate; (2) taxable costs; (3) prohibited by statute or authorized regulation; or (4) incurred for the mere convenience of counsel. *Bennett v. Dep't of the Navy*, <u>699 F.2d 1140</u>, 1143-46 (Fed. Cir. 1983). Examples of reimbursable items are: travel expenses, postage, and telephone tolls. <u>Id.</u> Examples of <u>non</u>-reimbursable items are: stenographic fees for depositions and witness fees. <u>Id.</u>

Arbitrators and practitioners should be aware that, in employment-discrimination cases where fees are governed by the broader standards of § 7701(g)(2) (as discussed above), different standards apply to the award of costs. In this connection, arbitrators and practitioners should consult precedent interpreting § 7701(g)(2) and § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)).

With regard to the timing of attorney-fee requests before arbitrators, it is important to note that the BPA confers statutory jurisdiction on an arbitrator to resolve a request for attorney fees after the issuance of a decision awarding backpay. *E.g., Navy Region Haw.*, <u>64 FLRA at 927</u>. Thus, the doctrine of *functus officio* – which generally provides that an arbitrator is without authority to proceed further in a case after completion and delivery of an award – does not apply to attorney-fee requests or permit an arbitrator to deny such requests. *See Ala. Ass'n of Civilian Technicians*, <u>52 FLRA 1386</u>, 1388 (1997). In addition, if parties have agreed to establish a time period

during which the grievant must file with the arbitrator an attorney-fee request, then that period governs. *E.g.*, *U.S. Dep't of Veterans Affairs*, *Med. Ctr.*, *Ann Arbor*, *Mich.*, <u>56 FLRA 216</u>, 224-25 (2000). Absent such an agreement, if an appropriate fee request has not been filed before the issuance of the backpay award, then the fee request must be filed within a reasonable period of time after the backpay award issues or becomes final and binding. *E.g.*, *Local 1148*, <u>65 FLRA at 403</u>. Arbitrators should be aware that, if exceptions are filed to their awards on the merits, then their awards will not become final and binding until the Authority issues its decision resolving the exceptions or the exceptions are withdrawn. *E.g.*, *Customs*, <u>48 FLRA at 940</u>. Arbitrators should consider this in determining how long they should retain their records of the case on the merits.

Management Rights

<u>Section 7106</u> of the Statute provides broad rights to management. <u>Section 7106</u> provides, in pertinent part:

- (a) Subject to subsection (b) . . . , nothing in [the Statute] shall affect the authority of any management official of any agency
 - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
 - (2) in accordance with applicable laws
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections for appointment from
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and
 - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating
 - (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
 - (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
 - (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

As the rights set forth in § 7106(a) are "[s]ubject to" § 7106(b), all of the rights set forth in both § 7106(a)(1) and (2) must be exercised in accordance with CBA provisions that are negotiated under § 7106(b). In addition, all of the management rights set out in § 7106(a)(2) must be exercised in accordance with "applicable laws." (By contrast, the Statute does <u>not</u> require that the rights set out in § 7106(a)(1) be exercised in accordance with applicable laws.)

The scope of the rights set forth in § 7106(a) are broad and potentially apply to a wide range of workplace disputes. In addition, as discussed further below, they constrain what an arbitrator can do, unless he or she is enforcing a contract provision negotiated under <u>subsection (b)</u> or, for the rights set out in <u>subsection (a)(2)</u>, he or she is enforcing an applicable law.

To determine what the management rights in § 7106(a) encompass, parties and arbitrators should consider Authority decisions, including not only decisions that review arbitration awards, but other decisions (such as in negotiability and ULP cases) where the interpretation of § 7106(a) is at issue.

If an arbitrator's award affects a right under § 7106(a)(1), then it will be upheld only if the arbitrator is enforcing a contract provision that was negotiated pursuant to § 7106(b). See U.S. EPA, 65 FLRA 113, 115 (2010) (Member Beck concurring as to result) (EPA). If an arbitrator's award affects a right under (a)(2), then the award will be upheld only if the arbitrator is enforcing: (1) a contract provision that was negotiated pursuant to § 7106(b); or (2) an applicable law. <u>Id. at 115 n.7</u>.

When an agency files an exception contending that an arbitration award is deficient as contrary to § 7106, the Authority first assesses whether the award affects the exercise of any management right cited by the excepting party. <u>Id. at 115</u>. When there

is no such effect, the Authority denies the exception. *E.g., U.S. Dep't of Energy, Rocky Flat Field Office, Golden, Colo.*, 59 FLRA 159, 163 (2003) (Chairman Cabaniss concurring). When the award affects the exercise of a cited management right(s) under § 7106(a)(1), and is not based on a violation of a contract provision negotiated under § 7106(b), the Authority will set aside the award. *See EPA*, 65 FLRA at 115. If the award affects the exercise of a cited management right under § 7106(a)(2) and is not based on a violation of either a contract provision negotiated under § 7106(b) or an applicable law, then the Authority will set aside the award. *Id.*

Section 7106(b) sets forth three types of contract provisions that are enforceable in arbitration. First, § 7106(b)(1) provisions involve: the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods and means of performing work. Although the agency may elect not to bargain over these matters, once the parties agree to a contract provision concerning these matters, an arbitrator may enforce the contract provision. *E.g.*, *U.S. Dep't of Transp.*, *FAA*, *Alaskan Region*, 62 FLRA 90, 92 (2007).

Second, § 7106(b)(2) provisions involve procedures that management will observe in exercising its rights. These matters are within an agency's duty to bargain and are fully enforceable in arbitration. *E.g., SSA, Office of Hearings & Appeals*, 54 FLRA 1365, 1373 (1998).

Third, § 7106(b)(3) provisions are "appropriate arrangements" for employees who are adversely affected by the exercise of a management right. In the arbitration context, to constitute an "arrangement," the contract provision must ameliorate or mitigate the adverse effects that an employee(s) experienced as a result of the exercise of a management right. See EPA, 65 FLRA at 116. Also in the arbitration context, to be "appropriate," the provision, as interpreted and enforced by the arbitrator, cannot abrogate – i.e., waive – the affected management right. Id. at 116-18. An award abrogates the exercise of a management right if it precludes the agency from exercising that right. E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Kan. City, Mo., 65 FLRA 809, 814 (2011).

We note that this test for determining whether an agreed-upon provision is an appropriate arrangement is different in the arbitration context than the tests applied in the negotiability context. In the negotiability context, in assessing whether *either* a bargaining proposal *or* an agreed-upon provision that has been disapproved on agencyhead review is an appropriate arrangement, the Authority also applies a "tailoring" test. *E.g.*, *NTEU*, <u>65 FLRA 509</u>, 511 (2011) (Member Beck dissenting in part), *pet. for review filed*, No. 11-1102 (D.C. Cir. Apr. 8, 2011). A tailoring test does not apply in the arbitration context. *See EPA*, <u>65 FLRA at 116-18</u>. In addition, in the negotiability context, if the Authority is assessing whether a *bargaining proposal* is within the duty to bargain, then the Authority assesses whether the proposal "excessively interferes" with

– not whether it "abrogates" – the affected management right. *E.g., AFGE, Local 1367*, 64 FLRA 869, 870-71 (2010) (Member Beck dissenting in part). However, like in the arbitration context, the Authority applies an "abrogation" (not excessive-interference) standard in negotiability cases that involve agency-head disapprovals of *agreed-upon contract provisions* (as distinct from bargaining proposals). *See NTEU*, 65 FLRA at 511-15.

With regard to arbitration awards that affect management rights under § 7106(a)(2) (but not rights under § 7106(a)(1)), an arbitration award also may be upheld if the arbitrator is enforcing an "applicable law." See U.S. Dep't of Justice, Exec. Office for Immigration Review, Bd. of Immigration Appeals, 65 FLRA 657, 662-63 (2011) (Member Beck concurring). Applicable laws include not only statutes, but also the United States Constitution, judicial decisions, executive orders, and regulations having the force and effect of law. See, e.g., Fed. Prof'l Nurses Ass'n, Local 2707, 43 FLRA 385, 390 (1991). 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. E.g., AFGE, Local 1441, 61 FLRA 201, 206 (2005) (Chairman Cabaniss concurring). However, the Supreme Court has held that the Statute itself is not an "applicable law" within the meaning of § 7106(a)(2). IRS v. FLRA, 494 U.S. 922, 930 (1990).

With regard to arbitral remedies that affect management rights, in *Federal Deposit Insurance Corp.*, *Division of Supervision & Consumer Protection*, *S.F. Region*, <u>65 FLRA 102</u>, 106 (2010) (Chairman Pope concurring in part) (*FDIC*), the Authority stated that an arbitrator's award that affects management rights under § <u>7106(a)</u> of the Statute must provide a remedy for a violation of either an applicable law, within the meaning of § <u>7106(a)(2)</u> of the Statute, or a contract provision that was negotiated pursuant to § <u>7106(b)</u> of the Statute. In *FDIC*, the Authority stated that although, generally, an arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under § <u>7106(a)</u>, such remedial authority is not unfettered; rather, the remedy must be reasonably related to the negotiated provisions at issue and the harm being remedied. *See <u>id. at 106-07</u>*.

Thus, in processing a grievance and participating in arbitration proceedings, both union and agency representatives should consider whether the dispute could involve the exercise of a management right and, if so, whether the contract provision(s) or legal provisions relied on are enforceable provisions despite any possible effects on management rights. *Cf. U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009) (Authority dismissed exception claiming that contract provision was unenforceable as contrary to management rights because excepting party failed to raise that argument before arbitrator). Together the representatives should provide information to their arbitrator on management rights

and the exceptions to those rights. If the arbitrator finds merit to the grievance and believes that sustaining the grievance would affect a management right, then the arbitrator should consider whether he or she is enforcing either a contract provision negotiated under § 7106(b) or an "applicable law." Finally, in filing exceptions and oppositions with the Authority in cases involving management rights, agency and union representatives should address these elements.

Status of Regulations

In addition to laws, there is a regulatory framework that applies to many aspects of the employment relationship between Federal employees and their employing agencies. Specifically, both government-wide rules and regulations and agency rules and regulations may apply. These two types of regulations are discussed separately below.

Government-Wide Regulations

Government-wide rules or regulations are rules, regulations, or official declarations of policy that are generally applicable throughout the Federal government and are binding on the Federal agencies and Federal officials to which they apply.

If a government-wide regulation was in effect before a CBA took effect, then the government-wide regulation governs over related CBA provisions. See 5 U.S.C. § 7116(a)(7). However, with one exception, if a CBA was in effect before the effective date of a government-wide regulation, then the CBA governs over the government-wide regulation. See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, 65 FLRA 817, 819 (2011) (PTO). The one exception involves government-wide regulations that implement 5 U.S.C. § 2302, which, as set forth previously in this Guide, lists certain prohibited personnel practices. If the regulation implements § 2302, then the regulation governs over the CBA, regardless of when the regulation or the CBA took effect. See Nat'l Air Traffic Controllers Ass'n, 60 FLRA 398, 399 n.6 (2004). Accordingly, most newly prescribed government-wide regulations will not control in relation to a preexisting, conflicting CBA provision until the preexisting CBA expires. However, if a government-wide regulation implements 5 U.S.C. § 2302, then that regulation governs immediately, without regard to the terms of a preexisting, contrary CBA provision. See, e.g., PTO, 65 FLRA at 819.

To avoid deficient awards, arbitrators must ensure that their awards are consistent with government-wide rules and regulations that govern the matter in dispute – most typically, the regulations set forth in title 5 of the Code of Federal Regulations. *See, e.g., Treasury, IRS,* 65 FLRA at 371-72. In addition, arbitrators must ensure that any government-wide rules or regulations apply to the particular employee(s) at issue, as some government-wide regulations do not apply to particular

groups of employees – e.g., civilian technicians of the National Guard, or health-care professionals of the Department of Veterans Affairs.

Agency Regulations

In addition to government-wide rules and regulations, each Federal agency may prescribe rules, regulations, and official declarations of policy to govern the resolution of matters within the agency. Arbitrators are empowered to interpret and apply agency rules and regulations. An arbitration award that conflicts with a governing agency regulation is deficient under § 7122(a)(1) of the Statute. *E.g.*, *U.S. Dep't of Transp.*, *FAA*, 64 FLRA 680, 683 (2010).

Where a CBA provision concerns the same matter as an agency regulation, the CBA provision governs over the agency regulation. *See U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.,* <u>37 FLRA 186</u>, 190-96 (1990). Thus, if an arbitrator is enforcing a CBA provision that concerns a matter, then the arbitrator's award will not be found deficient as contrary to an agency regulation that concerns the same matter. Agency regulations are different from government-wide regulations in this regard.

An agency's interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the language of the regulation. *E.g., FAA*, <u>64 FLRA</u> <u>at 514</u>. However, consistent with the approach of the courts, the Authority declines to defer to an agency's litigative position. <u>Id.</u> In this regard, the Authority has explained that such positions may not reflect the views of the agency head and may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views. <u>Id.</u> Accordingly, for an agency's interpretation to be entitled to deference, the interpretation asserted in exceptions must have been publicly articulated prior to litigation. <u>Id.</u> In circumstances where an agency fails to establish that deference is due its alleged interpretation of an agency regulation, the Authority independently assesses, de novo, whether the arbitrator's interpretation of the regulation is consistent with its provisions. <u>Id.</u>

Private-Sector Grounds

Section 7122(a)(2) of the Statute states that an arbitration award may be found deficient on "grounds similar to those applied by Federal courts in private sector labor-management relations" cases. The private-sector grounds are narrow, and it is difficult for parties to establish that an award is deficient on these grounds. The Authority currently recognizes seven private-sector grounds for review, which are discussed separately below. *See* 5 C.F.R. § 2425.6.

Denial of a Fair Hearing

The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when a party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. E.g., Pension Benefit Guar. Corp., 64 FLRA 692, 697 (2010) (PBGC). Federal courts have held that arbitrators are required only to grant parties a fundamentally fair hearing that provides adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. E.g., AFGE, Local 3979, Council of Prisons Locals, <u>61 FLRA 810</u>, 813-14 (2006) (Council of Prisons). As such, an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. E.g., Antilles Consol. Educ. Corp., 64 FLRA 675, 677 (2010) (Antilles). In this connection, the liberal admission by arbitrators of testimony and evidence is a permissible practice. *Id.* See also AFGE, Local 376, 62 FLRA 138, 142 (2007) (Chairman Cabaniss concurring) (consideration of hearsay evidence did not demonstrate denial of fair hearing); MSPBPA, 61 FLRA at 653 (reliance on extrinsic and parol evidence in interpreting CBA did not demonstrate denial of fair hearing). Further, an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing. E.g., PTO Arlington, 60 FLRA at 879. Disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient on this ground. *E.g., Antilles,* 64 FLRA at 678. But the Authority has found that an arbitrator denied a party a fair hearing where, for example, the arbitrator relied on evidence, from a different case, that the party was unable to contest. See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y., 62 FLRA 360, 362-63 (2008).

It is important to note that, if a party disagrees with an arbitrator's conduct during the hearing, then the party should object to that conduct during the hearing. In this regard, the Authority has held that issues involving an arbitrator's conduct at a hearing that could have been, but were not, raised before the arbitrator will not be considered by the Authority, absent extraordinary circumstances. *AFGE*, *Nat'l Council of Field Labor Locals*, <u>60 FLRA 241</u>, 245 (2004).

Arbitrator Bias

To establish that an award is deficient because of bias on the part of the arbitrator, a party must show that an award was procured by improper means, that the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the parties' rights. *E.g.*, *AFGE*, *Local 3354*, <u>64 FLRA 330</u>, 332 (2009) (*Local 3354*).

When assessing whether an award is deficient on this ground, the Authority applies the approach of federal courts, which requires the appealing party to prove specific facts establishing improper motives; the courts ascertain whether the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness. *E.g., Council of Prisons*, 61 FLRA at 813. Federal courts will find bias when: (1) a reasonable person would conclude that the arbitrator was partial; (2) the circumstances are powerfully suggestive of bias; or (3) the evidence of impropriety is direct, definite, and capable of demonstration. *E.g., id.*

A party's assertions that all of the arbitrator's findings were adverse to that party, without more, does not demonstrate that the arbitrator was biased. *E.g.*, *Local* 3354, 64 FLRA at 332. Similarly, the fact that an arbitrator's award contains language that is critical of a party does not demonstrate that the arbitrator was biased against that party. *E.g.*, *Local* 1061, 63 FLRA at 320. In addition, an arbitrator's decision to credit one party's evidence over another party's evidence is not sufficient to demonstrate bias. *E.g.*, *U.S. Dep't of the Army, Norfolk Dist.*, *Army Corps of Eng'rs*, *Norfolk*, *Va.*, 59 FLRA 906, 910 (2004).

As with allegations that an arbitrator is not conducting a fair hearing, a party that believes that an arbitrator is exhibiting bias should, during the hearing, object to the arbitrator's conduct. In this regard, when allegations of arbitral bias could have been, but were not, raised before the arbitrator, the Authority will not consider such allegations for the first time on exceptions, absent extraordinary circumstances. *E.g.*, *Local* 3354, 64 FLRA at 332.

Incomplete, Ambiguous, or Contradictory Award

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *E.g., Local 1395*, 64 FLRA at 624. In order for an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *Id.* The Authority has found that an award that granted remedies to five unnamed grievants was deficient in this regard because the identities of the grievants could not be determined from the record. *See U.S. EEOC, Balt. Field Office, Balt., Md.*, 59 FLRA 688, 692 (2004). In that situation, the Authority remanded the matter to the parties, absent settlement, for resubmission to the arbitrator for clarification. *Id.*

Please note, however, that the mere allegation that an award is confusing or inconsistent does not demonstrate that an award is impossible to implement. *E.g.*, *AFGE*, *Local* 2923, 61 FLRA 725, 728 (2006). *See also U.S. DOD*, *Def. Contract Mgmt*. *Agency*, 59 FLRA 396, 404 (2003) (then-Member Pope dissenting in part) (even if arbitrator made inconsistent findings, that would not, by itself, render award deficient).

Further, an arbitrator's failure to set forth specific findings, or to specify and discuss all of the allegations before him or her, does not provide a basis for finding an award deficient on this ground. *E.g.*, *NFFE*, *Local* 1904, <u>56 FLRA 196</u>, 200-01 (2000).

Arbitrator Exceeded Authority

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *U.S. DOD, Army & Air Force Exch. Serv.*, <u>51 FLRA 1371</u>, 1378 (1996). The Authority, like the federal courts, accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *E.g.*, *DOT*, 64 FLRA at 613.

Arbitrators are not required to address every argument raised by the parties. *E.g., AFGE, Local 3911,* 64 FLRA 686, 687-88 (2010); *U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va.,* 63 FLRA 553, 557 (2009). In addition, in the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *E.g., AFGE, Local 3627,* 64 FLRA 547, 549 (2010). Further, where the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *E.g., DOT,* 64 FLRA at 613. In examining an arbitrator's interpretation of a stipulation of issues, the Authority grants an arbitrator the same substantial deference that the Authority grants an arbitrator's interpretation of a CBA (which is discussed in the "essence" section below). *Id.* Further, where a party fails to identify a specific limitation on the arbitrator's authority, the Authority will deny an exception alleging that the arbitrator disregarded such a specific limitation. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., W. Palm Beach, Fla.,* 63 FLRA 544, 548 (2009).

However, arbitrators must confine their awards to those issues that have been submitted by the parties. *E.g., DOT*, <u>64 FLRA at 613-14</u>. Arbitrators may not decide matters that are not before them. <u>Id. at 614</u>. Thus, if a grievance is limited to a particular grievant, then the remedy must be similarly limited. *E.g., U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, <u>64 FLRA 535</u>, 538 (2010) (*Oak Ridge*). In addition, an arbitrator exceeds his or her authority by providing a remedy where he or she has found no violation of law or contract. *E.g., SSA, Balt., Md.*, <u>64 FLRA 516</u>, 518 (2010).

Award Based on Nonfact (Challenges to Factual Findings)

When a party wishes to challenge an arbitrator's factual findings, the party's arguments should address the "nonfact" standard. To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *E.g., PBGC*, 64 FLRA at 696. For an example of a decision where the Authority found the award based on a nonfact, *see U.S. Dep't of Def., Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (arbitrator's finding that agency admitted that it had engaged in favoritism was a nonfact).

Claims that an arbitrator's factual findings are not sufficiently supported do not demonstrate that an award is deficient. *PBGC*, <u>64 FLRA at 696</u>. In addition, exceptions to an arbitrator's evaluation of evidence and the weight to be accorded such evidence do not provide a basis for finding that an award is based on a nonfact. *E.g.*, *AFGE*, *Local 1395*, <u>64 FLRA 622</u>, 625 (2010) (*Local 1395*); *NAGE*, *SEIU*, *Local R4-45*, <u>64 FLRA 245</u>, 246 (2009). This includes exceptions to an arbitrator's determinations regarding the credibility of witnesses. *E.g.*, *U.S. Dep't of the Treasury*, *IRS*, *Wage & Inv. Div.*, *Austin*, *Tex.*, <u>64 FLRA 39</u>, 58 (2009). Even if an arbitrator relies on an erroneous fact, the award will not be found deficient on this ground if the excepting party fails to show that, but for the arbitrator's reliance on the erroneous fact, the arbitrator would have reached a different conclusion. *E.g.*, *Local 1395*, <u>64 FLRA at 625-26</u>.

An arbitrator's conclusion that is based on an interpretation of the parties' CBA does not constitute a "fact" that can be challenged as a nonfact. *See NLRB*, <u>50 FLRA 88</u>, 92 (1995). In addition, an exception that challenges an arbitrator's legal conclusions does not demonstrate that the award is based on a nonfact. *E.g.*, *PBGC*, <u>64 FLRA at 696</u>.

Award Fails to Draw Its Essence from CBA (Challenges to Contract Interpretation)

When a party wishes to challenge an arbitrator's interpretation of a CBA, the appropriate argument to make is that the award fails to draw its "essence" from the CBA. However, this is another situation in which the Authority defers to the Arbitrator. In this connection, the Authority will find that an arbitration award is deficient as failing to draw its essence from the CBA only when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not

represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep't of Labor (OSHA)*, <u>34 FLRA 573</u>, 575 (1990) (*OSHA*).

Generally, the Authority has found that an award failed to draw its essence from the CBA when the award was expressly contrary to the CBA. For example, in *United States Small Business Administration*, <u>55 FLRA 179</u>, 182 (1999), the Authority found that an award directing the agency to pay the union's costs and expenses failed to draw its essence from the CBA because the CBA expressly required that the agency and union bear costs and expenses equally.

The Authority and the courts defer to an arbitrator's interpretation of a CBA "because it is the arbitrator's construction of the agreement for which the parties have bargained." *OSHA*, <u>34 FLRA at 576</u>. Consistent with this deferential standard, the Authority has denied essence exceptions where the excepting party has failed to identify a provision of the agreement that the arbitration award directly and expressly contradicts. *E.g.*, *AFGE*, *Local* 2505, <u>64 FLRA 689</u>, 691 (2010).

In addition, a party's exceptions to an arbitrator's factual findings in the course of applying an agreement at arbitration do not demonstrate that an award fails to draw its essence from the agreement. *E.g., Local 3354*, <u>64 FLRA at 333</u>. (Challenges to an arbitrator's factual findings are more appropriately raised under the "nonfact" standard, <u>discussed above</u>.)

Public Policy

In the private sector, courts will find an arbitration award deficient when the award is contrary to public policy. The Authority has held that this ground is "extremely narrow." *NTEU*, <u>64 FLRA 504</u>, 507 (2010). For an award to be deficient on this basis, the public policy asserted must be "explicit," "well-defined," and "dominant[.]" <u>Id.</u> The appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *NTEU*, <u>63 FLRA 198</u>, 201 (2009). In addition, the alleged violation of that public policy "must be clearly shown." *NTEU*, <u>64 FLRA at 507</u>.

Challenges to Arbitrability Findings

Parties often challenge arbitrators' determinations concerning the "arbitrability" of a grievance. There are two categories of arbitrability: procedural and substantive.

Procedural-arbitrability issues pertain to the procedural conditions to resolving a dispute on the merits. *E.g. U.S. Dep't of Transp., FAA, Portland, Me.,* <u>64 FLRA 772</u>, 773 (2010). Timeliness is a common procedural-arbitrability issue. *See, e.g., AFGE, Local*

3438, 65 FLRA 2, 3 (2010). The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *E.g.*, *U.S. Dep't of Veterans Affairs*, *Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011). However, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *Id.* Additionally, a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law. *E.g.*, *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1006 (2011). In order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' NGP. *Id.* at 1006-07.

Substantive arbitrability involves questions as to whether the subject matter of the dispute is arbitrable. *E.g., AFGE, Local 1815*, 65 FLRA 430, 431 (2011). When an arbitrator's substantive-arbitrability determination is based on law or governing regulations, the Authority reviews that determination de novo. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010). When an arbitrator's substantive-arbitrability determination is based on an interpretation of the parties' CBA, the Authority reviews that determination under the deferential essence standard discussed previously. *Id.*

Awards Based on Separate and Independent Grounds

When an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *E.g., Soc. Sec. Admin., Fredericksburg Dist. Office*, 65 FLRA 946, 949 (2011). For example, if an arbitrator bases an award on his or her interpretation of two CBA provisions, and the interpretation of either provision provides a sufficient basis for the award, then the Authority will not set aside the award unless the excepting party demonstrates that the arbitrator's interpretation of both provisions is deficient. *See id.* Similarly, if an arbitrator bases an award on interpretations of both the CBA and the Statute, then the Authority will not set aside the award unless the excepting party demonstrates that the arbitrator's interpretations of both the CBA and the Statute are deficient. *See, e.g., U.S. Dep't of the Treasury, IRS*, 66 FLRA 325, 332 (2011) (Member Beck concurring).

Authority Practice with Regard to Deficient Awards

Once the Authority has found an arbitration award to be deficient, the Authority generally will set it aside or modify it to remove its deficiency. *See, e.g., AFGE, Council of Prison Locals, Local 4052*, 65 FLRA 734, 737 (2011); *Oak Ridge*, 64 FLRA at 538. In

matters where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g., U.S. Dep't of Transp., FAA, Salt Lake City, Utah,* 63 FLRA 673, 676 (2009). In addition, when the Authority is unable to determine whether the award is deficient, the Authority generally will remand the award to the parties for resubmission to the arbitrator for clarification, absent settlement. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.,* 65 FLRA 157, 159 (2010).

COMPLIANCE WITH AWARDS & JUDICIAL REVIEW

Compliance with Arbitration Award

Parties are required to comply with a final and binding arbitration award. See <u>5 U.S.C.</u> § 7122(b). A party's failure to do so constitutes a ULP under § 7116(a)(8) (for agencies) and § 7116(b)(8) (for unions) of the Statute. As stated previously, an award becomes final and binding when: (1) the period for filing exceptions expires; (2) the Authority issues a decision resolving exceptions; or (3) exceptions are withdrawn. *Customs*, <u>48 FLRA at 940</u>. The issue of compliance with an arbitration award arises in various types of cases.

One type of case involves a situation where timely exceptions have been filed and are pending before the Authority. An award is not final and binding, and compliance is not required, while those exceptions are pending before the Authority.

A second type of case is where no (timely) exceptions have been filed or where exceptions have been filed but later are withdrawn. In this type of case, the award becomes final – and compliance with the award is required – when the 30-day period for filing exceptions has expired (or, if exceptions are withdrawn after the 30-day period, when the exceptions are withdrawn). Once the award becomes final, the parties may not challenge the validity of the award in any ULP proceedings involving a refusal to implement the award. *E.g., U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 15 FLRA 151, 153 (1984), *aff'd sub nom., Dep't of the Air Force v. FLRA,* 775 F.2d 727 (6th Cir. 1985). Thus, it is important for parties who wish to challenge an award to file timely exceptions; otherwise, they are precluded from later raising these claims to the Authority or the courts, even if their arguments otherwise might have merit. For example, subsequent ULP proceedings will focus solely on whether there has been compliance with a final award of an arbitrator, as required by § 7122(b), and not on the validity of the award.

A third type of case is where timely exceptions to the award have been filed with, but denied by, the Authority. In this type of case, once the exceptions are denied, the award becomes final and compliance is required. In these cases, parties may not relitigate the merits of their exceptions in a ULP proceeding before either the Authority or the courts. *E.g.*, *Dep't of HHS*, *SSA v. FLRA*, 976 F.2d 1409, 1413 (D.C. Cir. 1992). *See also Bureau of Prisons v. FLRA*, 792 F.2d 25, 28-29 (2d Cir. 1986); *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432, 1436-37 (9th Cir. 1985).

Judicial Review

Under § 7123(a)(1) of the Statute, there is no judicial review of Authority decisions that resolve exceptions to arbitration awards, "unless the [Authority's] Order

involves an unfair labor practice[.]" <u>5 U.S.C. § 7123(a)(1)</u>. The pertinent legislative history of the Statute provides: "In light of the limited nature of the Authority's review, the conferees determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters." H.R. REP. No. 95-1717, at 153 (1978) (conf. rep.), reprinted in 1978 U.S.C.C.A.N. 2860, 2887.

The U.S. Court of Appeals for the District of Columbia Circuit has interpreted § 7123 to mean that judicial review is available only when the "substance of the [ULP]" is "discussed in some way in, or [is] some part of, the Authority's order." Ass'n of Civilian Technicians, N.Y. State Council v. FLRA, 507 F.3d 697, 699 (D.C. Cir. 2007) (citation omitted). A mere passing reference to a ULP will not suffice, nor will the fact that the underlying conduct *could* be characterized as a statutory ULP. Instead, the conduct must *actually* be characterized as a ULP and the claim pursued, as a statutory ULP, not as something else. *Id.* The Authority decision need not address a ULP on the merits to "involve" a ULP, but it does need to include some sort of substantive evaluation of a statutory ULP. <u>Id.</u> Compare Overseas Educ. Ass'n v. FLRA, <u>824 F.2d 61</u>, 71 (D.C. Cir. 1987) (although Authority did not decide ULP claim on the merits because it was precluded by previously filed claim, Authority decision "involved" a ULP because it included a detailed substantive analysis and comparison of the two ULP claims such that its discussion of ULPs "was no mere citation in passing") with U.S. Dep't of Interior v. FLRA, 26 F.3d 179, 184 (D.C. Cir. 1994) (Authority decision did not involve ULP where arbitrator's decision clearly framed the issue as one arising solely under the parties' CBAs and Authority decision repeated arbitrator's statement of the issue as involving only contract). See also AFGE, Local 2510 v. FLRA, 453 F.3d 500, 504-05 (D.C. Cir. 2006) (Authority decision did not involve ULP where Authority review of arbitration fee award neither mentioned § 7116 nor discussed arbitrator's finding of a ULP, other than passing references to the issues in the underlying dispute).

Other Courts of Appeals also have addressed this wording and provided further elaboration on the circumstances under which court review is precluded. *See, e.g., Begay v. Dep't of Interior*, 145 F.3d 1313, 1316 (Fed. Cir. 1998) (ULP was not "an explicit or a necessary ground" addressed in the Authority decision, as grievance did not allege ULP, grievant did not otherwise file ULP charge with Authority, and no ULPs were addressed by Authority in its decision); *AFGE, Local 916 v. FLRA*, 951 F.2d 276, 278-79 (10th Cir. 1991) (to support judicial review, a ULP "must be an actual part, not just a foregone alternative characterization or a potential consequence, of the underlying controversy[,]" and review was not appropriate where the arbitrator and Authority did not consider, "explicitly or impliedly," whether a statutory ULP had been committed); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985) (ULP was not "a necessary ground" for Authority decision where there was no assertion that agency violated § 7116, and the Authority's decision made no reference to any such violation).

AFTERWORD

We hope that this Guide has proved helpful. Though it is not an official interpretation of the Statute and/or regulations, and is not official policy of the Authority, we believe that the Guide can be helpful to litigants, neutrals, and others. As stated previously, we encourage you to visit the Authority's web site, at www.flra.gov, to access even more information and guidance, including the wording of the Statute and the Authority's Regulations, as well as the Authority's published decisions.