66 FLRA No. 144

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL ENGINEERS
ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
JUDICIAL COUNCIL NO. 1
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION REVIEW
NATIONAL HEARING CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4781

_____

DECISION

July 13, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator David Epstein filed by both the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions, and the Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the grievance was substantively arbitrable under the parties' agreement. On the merits, the Arbitrator denied the grievance, finding that a letter of reprimand (reprimand) that the Agency issued to the grievant, an Administrative Law Judge (ALJ) who hears social security claims, was for good cause and was not an intrusion into the grievant's right of judicial independence. For the reasons that follow, we deny the Agency's and the Union's exceptions.

II. Background and Arbitrator's Award

During a hearing, a claimant's representative repeatedly refused to follow the grievant's directions. Award at 4. As a result, the grievant put the representative "on notice that his behavior was improper," *id*., and warned him that he would terminate the hearing if he continued, *id.* at 13. When the representative persisted, the grievant terminated the hearing and "ejected the representative" from the hearing room. *Id.* at 4; *see also id.* at 13 (noting grievant stated "[t]he hearing is terminated" and told both the claimant and his representative that they were "done"). The claimant also left the hearing room. *Id.* at 4, 13-14. The grievant later resumed the hearing and "proceeded to take the testimony" of an expert "in the absence of both the claimant and his representative." *Id.* at 5. The grievant did not advise the claimant either: (1) that he could remain at the hearing or (2) that the grievant was "considering going forward" with the expert's testimony and that such "testimony might be taken in the absence" of the claimant. *Id.* at 4-5.

The Agency reprimanded the grievant for his conduct at the hearing. *Id.* at 3 (noting Agency issued reprimand to grievant for "conduct unbecoming of an ALJ when he improperly . . . took testimony" of an expert "outside of the presence of the claimant and his representative"). The Union presented a grievance challenging the reprimand. *Id.* The grievance was unresolved and was submitted to arbitration. *Id.* at 3-4. The Arbitrator stated that the following issues were before him:

> 1. Is this grievance arbitrable?
>
> 2. If yes, what standard applies?
>
> 3. Did the Agency have good cause to issue [the reprimand] based on [the grievant's] taking ex parte testimony of [an expert]?
>
> 4. Was the action of the Agency in issuing the [reprimand] an intrusion into [the grievant's] qualified judicial independence as an [ALJ]?

Id. at 4 (internal quotation marks omitted).[1]

Before the Arbitrator, the Union also asserted that the reprimand violated the Administrative Procedure

[1] The Arbitrator found the standard of "good cause" applied. Award at 10. Neither party challenges this conclusion. Accordingly, we do not address it further.

Act (APA). *Id.*; *see also id.* at 6. In response, the Agency argued that this claim was not arbitrable. *Id.* at 6. According to the Agency, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) "'has made clear that a "grievance" predicated on a claim of violation of a law that is not directed toward employee working conditions is outside both the arbitrator's and the [Authority's] jurisdiction.'" *Id.* at 8 (quoting *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 689 (D.C. Cir. 1994) (*Customs Serv.*)).

The Arbitrator found that the grievance was arbitrable. *Id.* at 7. The Arbitrator found that the reprimand fell "easily within working conditions" and the parameters established by *Customs Serv*. *Id*. at 8 (internal quotation marks omitted). According to the Arbitrator, the grievant's working conditions were directly impacted because he was issued the reprimand, denied participation in the Agency's "flexi[place]" program, and removed from the Agency's reassignment roster. *Id*. The Arbitrator further found that "[w]hether the APA offer[ed] an independent basis for arbitration" was irrelevant because "the right to arbitrate on the facts presented [wa]s firmly rooted in the [parties'] agreement." *Id.* at 9.

Addressing the merits, the Arbitrator found that the Agency had met its burden of proof and established "good cause" for the reprimand. *Id.* at 15; *see also id.* at 10-14. According to the Arbitrator, the "[g]rievant was on notice that the denial of the right of a complainant to participate in a hearing on the claim is fundamental and may not be set aside, except under stringent conditions" that were not met in this case. *Id.* at 10 (citing *Illinois v. Allen*, 397 U.S. 337, 338 (1970)). Moreover, the Arbitrator noted that the Agency's rules regarding administrative hearings "mandate the right to confront."[2] *Id.* at 11 (citing Hearing, Appeals, and Litigation Law Manual, Social Security Administration, Office of Disability Adjudication and Review (HALLEX) 1-2-6-60(C)). According to the Arbitrator, under these rules, a hearing can continue only when either the claimant or the representative "leaves the hearing and the other remains." *Id.* at 13; *see also id.* at 12, 15. But, the Arbitrator continued, this "may occur only after the ALJ has explained and made certain that the complainant understands what is being waived." *Id.* at 13. The Arbitrator found that the grievant had failed to explain to the complainant his right under the Agency's rules to be present during the entire hearing. *Id.* at 13-15.

The Arbitrator determined that the Agency's issuance of the reprimand did "not constitute interference in the [grievant's] decision-making process." *Id.* at 15. According to the Arbitrator, the reprimand was "not about an ALJ's decision in weighing evidence or issuing an award to provide or deny benefits to a complainant." *Id.* at 17; *see also id.* at 15-16. Rather, it was "an effort to establish a degree of uniformity in the conduct of [the grievant] in dealing with complainants," to apply the Agency's rules regarding the processing and adjudication of claims, and "to assure complainants fundamental due process." *Id.* at 17 (citing *Chocallo*, 1 M.S.P.R. 605, 610-11 (1980), *aff'd*, No. 80-2518 (D.D.C. 1980), *aff'd in part, vacated in part on other grounds and case remanded, Chocallo v. Prokop*, 673 F.2d 551 (D.C. Cir.) (Table), *cert denied*, 459 U.S. 857, 103 S. Ct 128 (1982) (*Chocallo*) (holding ALJ "not immune from review for . . . failings in the performance of his/her duties")).

The Arbitrator denied the grievance.

III. Positions of the Parties

A. Agency's Exceptions

The Agency notes that it is only challenging the Arbitrator's finding that the "[U]nion's claim that the [A]gency violated the [APA] was properly before him." Exceptions at 2; *see also id.* at 2 n.1. The Agency contends that this determination is contrary to law because the Union cannot "claim that the reprimand violated [the grievant's] qualified right of decisional independence in a grievance or an arbitration." *Id.* at 4. According to the Agency, the Union cannot, through the negotiated grievance procedure, "challenge any agency action on [the] ground[] that the [A]gency . . . violated the APA." *Id.*

The Agency asserts that the Arbitrator misunderstood the Agency's argument. *Id.* According to the Agency, it did not argue before the Arbitrator that the Union could not grieve the reprimand under the parties' agreement. Rather, it argued that the Union could not challenge the reprimand, through the parties' negotiated grievance procedure, on the basis that the Agency's action in issuing the reprimand violated the grievant's qualified right of decisional independence. *Id.*

The Agency contends that the definition of grievance in Article 10, Section 2 of the parties' agreement is "virtually identical to the definition of grievance" under the Statute, *id.* at 5 n.2, which defines a grievance as a complaint concerning "'any claimed violation . . . of any law, rule, or regulation affecting conditions of employment.'" *Id.* at 5 (quoting 5 U.S.C. § 7103(a)(9)(C)(ii)). The Agency asserts that, under the Statute, "the only laws a union can claim an agency

[2] The text of the relevant provisions of the parties' agreement, the Agency's hearing manual, and the APA is set forth in the appendix to this decision.

violated through a grievance . . . are laws 'issued for the very purpose of affecting the working conditions of employees.'" *Id.* (quoting *Customs Serv.*, 43 F.3d at 689). According to the Agency, "Congress did not issue the APA for the . . . purpose of affecting employee working conditions." *Id.* at 5-6 (citing *SSA, Office of Hearings & Appeals v. Anyel*, 58 M.S.P.R. 261, 268 (1993) (*Anyel*)). As a result, the Agency claims, the Union may not grieve or arbitrate the claim that the Agency's actions violated the APA. *Id.* at 7.

B. Union's Opposition

The Union contends that the Arbitrator did not err as a matter of law in determining that the matter was arbitrable because his determination was based on the parties' agreement, not on the APA. Union's Opp'n at 5-6. The Union notes that the Arbitrator "collaterally touche[d] on the APA in addressing the Union's claim that [the grievant's] qualified right of decisional independence was violated." *Id.* at 6. But, the Union states, "[e]ven then" he concluded "this right was not violated and thus the APA's protections were not invoked." *Id.* The Union contends that, because the issue of arbitrability "rests . . . on" the Arbitrator's interpretation of the parties' agreement, the correct standard of review is the "high deference" that is given to an arbitrator's contractual interpretations. *Id.* at 7. According to the Union, applying this standard of review, "the Agency's [e]xceptions must be denied[]" because the Arbitrator's award "is clearly derived" from the parties' agreement. *Id.* at 8.

Moreover, the Union asserts that, contrary to the Agency's argument, the APA has a considerable impact on the working conditions of ALJs. *Id.* at 9-11. The Union also contends that *Customs Serv.* is "inapposite." *Id.* at 9; *see also id.* at 10-11. According to the Union, unlike the statute involved in that case, "the APA explicitly delineates the relationship between ALJs and their employing agencies." *Id.* at 10; *see also id.* at 11. In this regard, the Union notes that, under the APA, ALJs are "exempt from 'performance appraisals'" and "are not subject to the usual probationary period applicable to other" employees. *Id.* at 10-11 (citing various provisions of 5 U.S.C. § 4301 (1982)).

C. Union's Exceptions

The Union asserts that the award is contrary to law. Union's Exceptions at 2. Specifically, the Union contends that the award is contrary to 5 U.S.C.§ 554(d)(2), which the Union asserts, "is the foundation of the APA's judicial independence doctrine." *Id.* at 5. The Union contends that the Agency violated this doctrine when it reprimanded the grievant for his conduct during the hearing. *Id.* at 2. According to the Union, the Arbitrator found that the reprimand did not interfere with the grievant's judicial independence because the reprimand "was 'not about an ALJ's decision in weighing evidence or issuing an award to provide or deny benefits to a complainant.'" *Id.* at 5, 6 (quoting Award at 17). The Union asserts that this finding "ignores that the APA's prohibition against interference with judicial independence is not limited to an ALJ's decision," but, rather, "includes the process and procedures involved in gathering information during a hearing." *Id.* at 6. The Union contends that its assertion – that an ALJ's qualified right of judicial independence extends to an ALJ's conduct during a hearing – is supported by the Supreme Court's decision in *Butz v. Economou*, 438 U.S. 478 (1978) (*Butz*), as well as the Agency's position description for ALJs. *Id.* at 6-8.

The Union further contends that the United States Court of Appeals for the Federal Circuit has held that a charge cannot constitute good cause if it is based on reasons that "constitute an improper interference with the ALJ's performance of his quasi-judicial functions." *Id.* at 8-9 (citing *Brennan v. Dep't of Health & Human Servs.*, 787 F.2d 1559 (Fed. Cir. 1986) (*Brennan*)). The Union contends that, because the Agency's actions concern the manner in which the grievant implemented Agency policies pertaining to how to conduct a hearing, the reprimand was not for good cause. *Id.* at 8-10

The Union also argues that the reprimand was not for good cause because the Arbitrator "erred in concluding that [the grievant] violated the claimant's due process rights by proceeding ex parte." *Id.* at 8. In this regard, the Union contends that the grievant "conduct[ed] the hearing . . . consistent" with Agency policies. *Id.* at 9. According to the Union, nothing in the Agency's policies "explicitly prohibited [the grievant] from proceeding ex parte and taking the testimony of the . . . expert, and later proffering this testimony to the claimant's representative for comment." *Id.* (citing HALLEX 1-2-6-60, 1-2-6-60(C) ("Testimony of Claimants and Witnesses"); 1-2-6-30 ("Additional Evidence Received At or After the Hearing"); 1-2-6-78 ("Closing the Hearing")).

The Union further contends that, even assuming the grievant violated the claimant's due process rights, the proper forum for addressing this issue was the Agency's administrative appeals process. Union's Exceptions at 10-11. According to the Union, the Agency improperly "circumvented" this process "by disciplining [the grievant] for a judicial decision that he made." *Id.* at 10. As a result, the Union claims, the Agency's actions "violate[] the APA's protections of judicial independence by permitting the Agency to supervise the judicial process." *Id.*

D. Agency's Opposition

The Agency reiterates its contention that the Union's claim that the Agency violated the APA in issuing the reprimand is not within the jurisdiction of the arbitrator or the Authority. Agency's Opp'n at 2-3.

The Agency further asserts that, assuming the Arbitrator could review the Union's APA claim, the Arbitrator "correctly determined" that the Agency "did not violate [the grievant's] qualified right of decisional independence" and that the Merit Systems Protection Board's (MSPB's) case law regarding an ALJ's qualified independence supports his determination. *Id.* at 3-4 (citing *Anyel*, 58 M.S.P.R. at 269; *Chocallo*, 1 M.S.P.R. at 610). According to the Agency, agencies have the authority to take disciplinary actions against ALJs to ensure that these individuals properly apply agency regulations and policy. *Id.* at 4.

Further, the Agency contends that the Authority should reject the Union's claim that the Agency's action in disciplining the grievant "infringe[d] on his qualified right of decisional independence because his actions regarding the ex parte testimony resulted from his interpretation" of HALLEX. *Id.* at 6. According to the Agency, the Union's interpretation is contrary to the plain language of the Agency's rules. *Id.*

Moreover, the Agency contends that, contrary to the Union's argument, "[t]he MSPB has made clear" that an agency need not wait for appellate review of an ALJ's failure to properly apply agency policy before an agency can discipline the ALJ. *Id.* at 7. The Agency also asserts that the Union's reliance on *Butz* is misplaced. *Id.* According to the Agency, *Butz* addressed whether ALJs could be sued for damages by parties appearing before them, not whether agencies may discipline ALJs for conduct violating an agency's regulations and policies. *Id.* at 7, 8.

Finally, the Agency claims that the record supports the Arbitrator's finding that the Agency established good cause for its reprimand of the grievant. *Id.* 8-10 (citing Tr. at 30, 36-37, 162, 184, 230, 235; Award at 10-11).

IV. Analysis and Conclusions

In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *Customs Serv.*, 43 F.3d at 686-87). In applying the standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator did not err in finding the grievance was substantively arbitrable.

The Agency argues that the award is contrary to law because the Arbitrator erred in finding the Union's claim – that the reprimand violated the grievant's qualified right of decisional independence – was grievable or arbitrable. Agency's Exceptions at 4, 7. The Agency contends that, because "Congress did not issue the APA for the . . . purpose of affecting employee working conditions," the grievance does not satisfy the definition of grievance under § 7103(a)(9)(C)(ii) of the Statute, and, therefore, the Union cannot challenge the reprimand on the basis that it violated the APA. *Id.* at 5 (citing *Customs Serv.*, 43 F.3d at 689); *see also id.* at 7.

Section 7103(a)(9)(ii) of the Statute defines "grievance" to include any complaint "by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(ii). The D.C. Circuit has held that a grievance is not arbitrable under § 7103(a)(9) if it is "predicated on the violation of a law that is not directed toward employee working conditions." *Customs Serv.*, 43 F.3d at 689. In *United States Department of the Treasury, U.S. Customs Service, Pacific Region*, 50 FLRA 656, 659 n.5 (1995) (*Customs Serv., P.R.*), the Authority noted the court's holding, but "express[ed] no view" on it. The Authority continues to "express no view" on the court's holding. *See, e.g., AFGE, Local 987*, 57 FLRA 551, 554 (2001) (quoting *Customs Serv., P.R.*, 50 FLRA at 659 n.5).

However, assuming, without deciding, that the holding in *Customs Serv.* applies in this case, we find that the APA is a "law . . . affecting conditions of employment" within the meaning of § 7103(a)(9)(C)(ii). In this regard, contrary to the Agency's contention, provisions of the APA are directed toward the working conditions of ALJs. *See, e.g., Brennan*, 787 F.2d at 1562 n.2 (citing provisions of the APA that affect an ALJ's working conditions). For example, the APA exempts ALJs from performance appraisals. 5 U.S.C. § 4301. In addition, once appointed, an ALJ is not subject to the usual probationary periods for agency employees. *Id.* § 3321(c). ALJs also may not perform duties that are inconsistent with their duties as judges. *Id.* § 3105. Furthermore, periodic step pay increases are given without certification by the employing agency that the ALJ is performing at an acceptable level of competence. *Id.* § 5335. Moreover, the specific provision of the APA upon which the Union relies, § 554(d)(2), provides that

an ALJ may not be supervised or directed by an employee "engaged in" an agency's "investigative or prosecuting functions." *Id.* § 554(d)(2). As a result, the Union may grieve and arbitrate whether the reprimand violated the grievant's "decisional independence" under the APA. *See, e.g., AFGE, Local 1045*, 64 FLRA 520, 522 (2010) (finding grievance arbitrable under § 7103(a)(9) of the Statute because provision of the Americans with Disabilities Act affected conditions of employment).

Accordingly, we deny the Agency's exception.

B. The Arbitrator did not err in finding that the Agency's action in issuing the reprimand did not violate the APA.

The Union asserts that the Arbitrator erred by finding that the reprimand of the grievant "was not an impermissible intrusion into the qualified right of decisional independence." Union's Exceptions at 1-2. The Union asserts that conducting hearings falls within the purview of an ALJ's judicial functions pursuant to 5 U.S.C. § 554(d)(2) of the APA and that, as a result, the grievant's actions here could not be the subject of disciplinary action. *Id.* at 2, 5-6.

Contrary to the Union's claims, the APA does not support its contention that conduct within the course of a hearing may not be considered as a basis for disciplinary action. *See Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989). "'[T]hat an [ALJ] carries out his/her duties in a hearing room rather than an office does not provide an impenetrable shield from appraisal of [his/her] performance.'" *Anyel*, 58 M.S.P.R. at 268-69 n.8 (quoting *Chocallo*, 1 M.S.P.R. at 610-11). Furthermore, "[a]n ALJ is a creature of statute and, as such, is subordinate to the [agency head] in matters of policy and interpretation of law." *Nash*, 869 F.2d at 680. As a result, the MSPB has found that ALJs "are required to follow agency policies." *Anyel*, 58 M.S.P.R. at 269 n.13; *see also* C*hocallo*, 1 M.S.P.R. at 611. Thus, the Arbitrator did not err in finding that the Agency's reprimand of the grievant did not interfere with the grievant's "decisional independence."

The Union's reliance on *Butz* as support for its contention is misplaced. The Supreme Court in *Butz* did not address whether agencies may discipline ALJs for conduct violating an agency's regulations and policies, but, rather, considered whether ALJs may be sued for damages by parties appearing before them. *See id.*, 438 U.S. at 480-85, 513-14. Accordingly, *Butz* is inapposite and provides no support for the Union's argument.

Further, to the extent that the Union claims that the Arbitrator "erred in concluding that [the grievant] violated the claimant's due process rights by proceeding ex parte," such claim also provides no basis for finding the award deficient. Union's Exceptions at 8. This claim is based on the same argument discussed above – i.e., that the reprimand was impermissibly based on the grievant's performance of his judicial duties. Because we have rejected that claim, it provides no basis for finding that the award is contrary to the APA.

The Union further contends that, even assuming the grievant violated the claimant's due process rights, the proper forum for addressing this issue is the Agency's administrative appeals process because the issue involves the "APA's protections of judicial independence." *Id.* at 10-11 (citing *Butz*, 438 U.S. at 514). The Union's argument again is predicated upon its claim that the reprimand violated the grievant's decisional independence under the APA. As a result, this claim also provides no basis for finding that the award is contrary to the APA.

Accordingly, we deny the Union's exception.

C. The Arbitrator did not err in finding that the reprimand was for good cause.

The Union argues that the reprimand was not for good cause because the Arbitrator "erred in concluding that [the grievant] violated the claimant's due process rights by proceeding ex parte." Union's Exceptions at 8. In this regard, the Union contends that the grievant "conduct[ed] the hearing . . . consistent" with Agency policies. *Id.* at 9. According to the Union, nothing in the Agency's policies "explicitly prohibited [the grievant] from proceeding ex parte and taking the testimony of the . . . expert, and later proffering this testimony to the claimant's representative for comment." *Id.*

In the resolution of grievances under the Statute, arbitrators are empowered to interpret and apply agency rules and regulations. *See U.S. Dep't of Justice, Immigration & Naturalization Serv., Wash., D.C.*, 48 FLRA 1269, 1275 (1993). The Authority treats agency policies as agency rules. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 340 (2011) (agency policy concerning inspection assignments was an agency rule); *SSA, Region IX*, 65 FLRA 860, 863 (2011) (*SSA*) (Member Beck dissenting) (treating agency's travel card policy as an agency rule). The Authority applies a de novo standard of review when it reviews an arbitrator's interpretation of a law, rule, or regulation. *See, e.g., AFGE, Local 3615*, 66 FLRA 565, 565 (2012); *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). Also, when evaluating exceptions asserting that an award is contrary to a governing agency

rule or regulation, the Authority will determine whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation. *See SSA*, 65 FLRA at 863 (citing *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 42 FLRA 1034, 1056-57 (1991)).

Section 1-2-6-60 of HALLEX concerns the testimony of claimants and witnesses at hearings. Section 1-2-6-60(C) of that provision states that "[t]he claimant and the representative have a right to be present during the entire hearing." Union's Exceptions, Attach. C. The Arbitrator found that this provision did "not either explicitly or implicitly permit a hearing to proceed in the absence of *both* the complainant and the representative." Award at 15. Rather, the Arbitrator found the provision "compelled [the] conclusion [that] either the complainant *or* the representative must attend a hearing for it to proceed." *Id.* The Arbitrator found that, because the grievant had conducted the hearing ex parte, the Agency had established good cause for the reprimand.

The Arbitrator's interpretation of Section 1-2-6-60(C) is not inconsistent with the plain wording of, or otherwise impermissible under, this provision. As the Arbitrator noted in his award, although Section 1-2-6-60(C) permits the hearing to go forward in certain circumstances when either the claimant or his or her representative is not present, it does not permit such action when both individuals are not present. Therefore, based on the wording of Section 1-2-6-60(C) and the Arbitrator's factual findings, to which the Authority defers, the Union has not established that the Arbitrator's interpretation and application of the HALLEX is contrary to law.

Accordingly, we deny the Union's exception.

V. Decision

The Agency's and the Union's exceptions are denied.

APPENDIX

Article 10 of the parties' agreement provides, in pertinent part, as follows:

> GRIEVANCE PROCEDURE
>
> The grievance procedure is pursuant to the Federal Service Labor-Management Relations Statute (FLMRS), subchapter III, 5 U.S.C. § 7121 et. seq.
>
> . . . .
>
> Section 2
>
> A. A grievance is defined as any complaint:
>
> 1. by any judge concerning any matter relating to the employment of the judge;
>
> 2. by the AALJ concerning any matter relating to the employment of any judge; or,
>
> 3. by any judge, the AALJ, or the Agency concerning:
>
> a. the effect or interpretation, or a claim of a breach, of this agreement; or,
>
> b. any claimed violation, misinterpretation, misapplication of any law, rule, or regulation affecting conditions of employment.
>
> . . . .

Union's Opp'n, Ex. E at 3; Agency's Exceptions, Attach. 4 at 63.

The Administrative Procedure Act, 5 U.S.C. § 554(d)(2), provides, in pertinent part, as follows:

> (d) The employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . . Except to the extent required for the disposition of ex parte

> matters as authorized by law, such an employee may not--
>
> . . . .
>
> > (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply --
>
> . . . .
>
> > (C) to the agency or a member or members of the body comprising the agency.
>
> . . . .

The Hearing, Appeals, and Litigation Law Manual provides, in relevant part, as follows:

> Chapter 1-2-6. Conduct of Hearings
>
> . . . .
>
> Section 1-2-6-30. Additional Evidence Received At or After the Hearing
>
> > If additional evidence is received at or after the hearing, mark the items(s) with the next exhibit number(s). Add the exhibit(s) to the exhibit list under the heading "RECEIVED DURING HEARING" or "RECEIVED SUBSEQUENT TO HEARING," as appropriate. . . .
>
> Section 1-2-6-60. Testimony of Claimants and Witnesses
>
> . . . .
>
> > B. Right to Question and Cross-examine Witnesses
> >
> > The claimant and the representative have the right to question witnesses. A claimant or representative is entitled to conduct such questioning as may be needed to inquire fully into the matters at issue. The ALJ should provide the claimant or representative broad latitude in questioning witnesses. However, this latitude does not require the ALJ to permit testimony that is repetitive and cumulative or questioning that is designed to intimidate, harass or embarrass the witness.
> >
> > The ALJ determines when they may exercise this right. The ALJ usually allows the claimant and the representative the opportunity to question a witness when the ALJ completes his or her initial questioning of the witness. If necessary, the ALJ may recall a witness for further questioning. Subpoenaed witnesses are subject to such cross-examination as may be required for full and true disclosure of the facts.
> >
> > C. Right to be Present During Entire Hearing
> >
> > The claimant and the representative have a right to be present during the entire hearing. However, there may be instances in which the claimant may be excused from the hearing. Such instances include, but are not limited to:
> >
> > - When the claimant requests that the ALJ proceed without his or her attendance and only after the claimant is advised by the ALJ of their right to be present and participate in the hearing and the claimant understands that right and what will happen if he or she is not present.
> > - The representative asks the claimant to be excused from the hearing, the claimant agrees, and the representative remains in the hearing room for the rest of the hearing to protect the claimant's interest.
> > - The claimant or the representative is being disruptive during the hearing and continues this pattern of behavior after being fully

> advised that the conduct is disruptive of the proceedings.

. . . .

1-2-6-78. Closing the Hearing

> Before closing the hearing, the ALJ must ask the claimant and the representative if they have any additional evidence to submit.
>
> . . . .

Union's Exceptions, Ex. C at 1-5; Agency Opp'n, Ex. 2 at 1-2.